REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE N0. D890/98

In the matter between:

RAJAN NARAINDATH APPLICANT

and

THE COMMISSION TOR CONCILIATION MEDIATION AND ARBITRATION FIRST RESPONDENT

AUBREY NGCOBO N O SECOND RESPONDENT

DEPARTMENT OF CORRECTIONAL SERVICES THIRD RESPONDENT

JUDGMENT

WALLIS AJ

[1] The Applicant was formerly employed by the Third Respondent, the Department of Correctional Services (the Department), as a prison warder. On the 28th February 1998 he was dismissed on one month's notice after a disciplinary enquiry had found that he was in possession of prohibited drugs on the premises of the New Prison in Pietermaritzburg. The drug in question was dagga and the quantity involved some 3.7 kilograms.

[2] The Applicant was aggrieved by his dismissal and referred a dispute in this regard to the CCMA. Conciliation was unsuccessful and Mr. A. Ngcobo was appointed as the commissioner to arbitrate the dispute. The arbitration took place on the 11th August 1998 and on the 8th September 1998 an award was handed down in which it was held

that the Department had a fair reason for dismissing the Applicant but had not followed a fair procedure. In the result an order for compensation was made. The Applicant seeks to review and set aside this award as he wishes to be reinstated in his employment.

[3] The review proceedings have been bedeviled by procedural irregularity and incompetence. Firstly the application for review was not fled timeously. The award was received by the Applicant on the 1Sth September I998 and in terms of section 145(I)(a) of the Labour Relations Act, 66 of 1995 (the LRA) he had to institute proceedings for review within six weeks, that is, by the 27th October 1998. In fact the application was lodged on the 2nd November 1998.This was compounded by the absence of any prayer for condonation. Secondly, the application was brought in terms of rule 7 and not in accordance with rule 7A. Thirdly the founding affidavit made little if any attempt to set out in a coherent way the basis upon which the award was said to be reviewable and to identify the alleged shortcomings of the arbitrator. Lastly there is nothing in the court file to indicate that any endeavour was ever made to serve the application upon the party most likely to be affected thereby, namely the Department.

[4] When the matter came on for hearing as an unopposed application before Van Niekerk AJ the deficiencies in regard to the form of the proceedings and the absence of service were apparent. Accordingly the application was adjourned in order that an amended notice of motion could be delivered in accordance with rule 7A and that the papers could be served.

[5] At this stage the Applicant abandoned his attorneys and turned to the Public Servants Association of South Africa, a registered trade union, to assist him as they had done before Mr. Ngcobo. Their approach was to launch the application de novo by way of a fresh notice of motion and supporting affidavits. Only the case number was retained from the original application. Even the relief sought is different. Whilst dated the 1stJuly 1999 the new notice of motion was apparently only filed on the 3rd August 1999.

[6] This is not a satisfactory state of affairs. It leaves the original application in limbo. More to the point it created an utterly confusing situation for the Department which had no prior knowledge of the earlier papers. Not surprisingly in its opposing affidavit the Department contended strongly that the application was not a mere five or six days out of time but over nine months late. It drew attention to the fact that (yet again) there was a complete absence of any application for condonation and contended that on this ground alone the application should be dismissed.

[7] To add to this litany of error the revised notice of motion once again made no

attempt to comply with rule 7A and is clearly couched in terms of rule 7. What is more, annexed to the Applicant's affidavit are a number of documents, running to over one hundred pages, which are not properly identified in the affidavit and not properly proved in evidence. There are simply references to particular pages of these documents, for example "see annexure "C", page 47", or "see annexure "D", page 91" without any endeavour by the witness to identify the document in question and indicate on what basis it is being placed before the court.

[8] On the basis of these difficulties Mr. Govender, who represented the Department, submitted that the application should be dismissed without going into the merits. He said that condonation of the non-compliance with section 145 should be refused particularly as no application for condonation had ever been made. Indeed Mr. Deysel, the legal officer of the trade union who represented the Applicant, only made such an application informally from the Bar in the course of his reply. Quite rightly, Mr. Govender said that this was not the right way to go about things and that such an application should ordinarily be made formally on notice of motion with a proper explanation of the default and why it should be condoned.

[9] If what I have called the application de novo had stood alone I would unhesitatingly have upheld Mr. Govender's submissions. It seems to me, however, that I cannot overlook the fact that proceedings were launched, albeit in a defective form, within five days of the expiry of the statutory six week period for reviewing an arbitration award by a commissioner. If nothing else the Applicant demonstrated thereby that he intended to challenge the award by way of review. Mr. Govender accepted that it would have been proper for me to condone a delay of a mere five days. On reflection whilst in form the fresh notice of motion and affidavits constitute a fresh application I think it is proper to treat what I have described as the application de *novo* as an endeavour to put the existing application in procedural order in accordance with the order of Van Niekerk AJ. I think the additional affidavits should be treated as supplementing the case being put forward on behalf of the Applicant. On that basis the, application must be treated as merely five or six days late and it was conceded that I should condone a delay of that short duration. I accordingly condone the Applicant's non-compliance with section 145(I)(a) of the LRA.

[10] The second point made by Mr. Govender has weighed heavily with me, particularly as the Applicant's representatives have had two bites at the cherry in an endeavour to comply with this court's rules and have failed on each occasion. I have recently said in another matter that it behoves legal practitioners who and organizations, such as trade unions and employer organizations, which prepare , documents and appear in this court to ensure that they are familiar with the LRA and the rules of this court and that the documents they prepare and file comply with both. There has been a dismal failure to do that in this case.

[11] Three things however cause me to hold back from dismissing the application on this ground. Firstly the errors are not those of the Applicant but of his various representatives. whi1st a litigant cannot always escape the consequences of the incompetence of his or her representatives in the conduct of litigation (Saloojee and another v Minisler of Community Development 1965 (2) SA I35 (A) at 14IC) a court is loath to penalise a blameless litigant for the negligence of his or her representative in that litigation. (Reinecke v Incorporated General Insurances Limited 1974 (2) SA 84 (A) at 92F). Secondly it is not contended that the Department has been prejudiced by these departures from prescribed procedure. Thirdly in regard to the corresponding provisions relating to reviews in the High Court (High Court rule 53 which equates to rule 7A) it has been held that the purpose of the rule is to facilitate the task of the litigant who wishes to bring proceedings under review and that there can be no objection to the litigant pursuing such a review by way of ordinary application proceedings if he or she so chooses. If the litigant chooses to forego the advantages conferred by the special rules governing review proceedings that is ordinarily the litigant's prerogative. Indeed in many cases it may be cheaper, more expeditious and more appropriate to bring a review by way of a conventional application. (Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 659A-663D.) This should not be construed as an encouragement to litigants in this court not to comply with rule 7A. In reviews under section 145 of the LRA it will always be necessary to have the record of the proceedings before *the* commissioner available to the court and litigants must not adopt a procedure which fails to bring that about simply and expeditiously. In all the circumstances, however, I reject Mr. Govender's second point in limine.

[12] That brings me to the merits of the review. Mr. Deysel and Mr. Govenderwereat onc that the application is one under section 145 of the LRA. They also a Dreed that the approach to such a review is that laid down by the Labotlr Appeal Court in Carephone (Pty) Limited v Marcus NO. and others (l998) 19 ILJ 1425 (LAC).

[l3] The judgment in Carephone has occasioned a number of difficulties in particular because in paragraph 53 there of Froneman DJP said, in summarising the legal position governing reviews of arbitration awards made by commissioner in unfair dismissal cases, that:

"Accordingly, the only bases for review are (1) that the facts amount to misconduct or gross irregularity or impropriety under s145(2)(a)(i)-(ii) and s145(2)(b) of the LRA, or (2) that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under s145(2)(a)(iii) of the Act".

[14] The problem to which the judgment and particularly this statement of the legal position has given rise is that it conveys that the scope for judicial review of arbitration

awards made by commissioners in unfair dismissal cases may be broader than would be the case in accordance with the traditional understanding of the language used in section 145 which, as will be apparent to anyone familiar with the law of arbitration, is taken directly from the language of section 33 of the arbitration Act, No. 42 of 1965. The confusion has been compounded by the fact that in Carephone the learned Deputy Judge President criticised the approach to the interpretation of section 145 based on cases relating to the equivalent provisions of the Arbitration Act. The end result has been a perception that the grounds for review have been considerably widened by the judgment in Carephone. Indeed *the* "wider" around for review has effectively come to be regarded as being the sole ground. Thus in Nel v Ndaba & others I999 20 ILJ 2666 (LC), para. 10 at 2669 Marcus AJ said :

"The test for review in terms of s 145 of the Act has been authoritative settled by the Labour Appeal Court in Carephone. The question that must be asked is whether there is "a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conc1Lision he or she eventually arrived at"." (At 1453E).

To similar effect is the judgment in Solomon v Commission for Conciliation, Mediation and Arbitration and others (1999) 20 ILJ 2960 (LC), para. 16, p2965.

[15] A question mark has now been placed over the correctness of Carephone by the as yet unreported judgment of the Labour Appeal Court in Toyota South Africa Motors (Pty) Limited v Radebe and others, Case No. DA2/99 where Nicholson JA expresses "certain misgivings" about whether the approach of justifiability espoused by Froneman DJP in Carephone can constitute an independent ground upon which an award can be attacked. Unfortunately, the learned judge of Appeal, having set out his misgivings, came to the conclusion that it was not necessary for the purposes of his judgment to decide the issue, which leaves the matter in a state of uncertainty.

[16] An initial reading of the application papers suggested that the unenviable task of, addressing this uncertainty might arise in this case in view of the following paragraphs in the Applicant's second founding affidavit:

"15.

I contend, with respect, that the Arbitration Award of the Second Respondent is not justifiable. This appears to fall outside the parameters of the powers of review of the Honourable Labour Court as stipulated in Section 145 of the Labour Relations Act (Act 66 of I995). I am advised that justifiability of an Award is a around for review...

16.

The Second Respondent erred as he failed to comply with the procedural requirement for just administrative action as envisaged in Section 33 of the Constitution. It is evident

from the Arbitration Award that he did not apply his mind, consider all relevant facts, avoid errors of law, avoid errors of fact and ensure that facts are substantiated. He furthermore failed to avoid presumptions and speculations."

[17] In argument before me, however, Mr. Deysel narrowed the scope of the contentions on behalf of the Applicant. He expressly confined his grounds for review to those specifically set forth in section 145 and he summarised his contentions in the following three paragraphs from his heads of argument:

"4. The Second Respondent committed misconduct in relation to the duties of the commissioner as an arbitrator as he failed to apply the rules of natural justice and only heard direct evidence from one party.

5. The Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings by making a finding based on hearsay evidence.

6. The Second Respondent exceeded the commissioner's powers as he made an unreasonable and unjustifiable finding after failing to subpoena relevant witnesses who would have helped to resolve the dispute".

[18] The first two of these grounds were based essentially on the same fact. That fact was that only two witnesses testified on behalf of the Department at the arbitration before the Third Respondent. Of these one gave evidence on a procedural matter which is no longer relevant. The other was Ms Nkosi who presided at the disciplinary enquiry held in respect of the Applicant. Her evidence was largely limited to handing in to the commissioner the record of the proceedings at the disciplinary enquiry and confirming that it was an accurate record of those proceedings.

[19] On this basis Mr. Deysel makes two points. The first is that there was no direct evidence before the arbitrator that the Applicant had committed the disciplinary offence which had led to his dismissal. He contrasted this with the fact that the Applicant had himself given evidence during the arbitration and had dealt with the merits of the case. The second point was that in rejecting the evidence of the 'Applicant and relying on the evidence given at the disciplinary enquiry, the Third Respondent based his finding that the Applicant had indeed been guilty of the misconduct complained of by the Department solely upon hearsay evidence. That evidence, so the complaint went, had not been tested by way of cross-examination.

[20] Before dealing with the merits of these contentions it is necessary for me to say something about the general conduct of arbitration proceedings by arbitrators appointed

for that purpose by the CCMA. That is dealt with in section 138 of the LRA and more particularly sub-sections (l) and (2) there of which read as follows:

"(l) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of and other party, and address concluding arguments to the commissioner."

[21] These provisions must be seen in the light of the overall purpose of the LRt1 in providing for compulsory arbitration in respect of unfair dismissal cases arising from misconduct and incapacity. under the previous labour law regime established by the Labour Relations Act, 28 of 1956, disputes concerning these matters were referred to the Industrial Court to be dealt with in terms of its unfair labour practice jurisdiction. Approximately two-thirds of the disputes handled by the Industrial Court concerned individual dismissals. (Benjamin, "Legal Representation in Labour Courts" (1994)15 ILJ 250 at 254). Virtually all of these were dismissals arising from alleged misconduct or incapacity.

[22] When the first draft of the current LRA was prepared and published in January 1995 it was accompanied by an explanatory memorandum which was published in (l995) 16 ILJ 268-336. It is helpful to look at what that memorandum said concerning the existing system for dealing with unfair dismissal disputes. The following seems to me pertinent (at p3 16):

"The system of dispute resolution is complex and inefficient. Where the fairness of a dismissal is disputed, cases are heard in the first instance in the Industrial Court, with appeals to the LAC and from there to the Appellate Division. The Industrial Court does not have the necessary resources to deal effectively with the several thousand dismissal cases referred to it annually. In Gauteng there is a backlog of five months in the Industrial Court. Further lengthy delays arise after the hearing and before the reasons for judgment are handed down. If a matter is taken on appeal, as is increasingly the case (the LAC's work load doubled from 1991 to 1993), it can take anything up to three years before an unfair dismissal case is fnally determined by the Appellate Division. [I interpolate that in the well known SARMCOL case dismissals which took place on the 3rd May 1985 were eventually ruled to have been unfair on the 6th March I 998 when the matter was remitted to *thc* Industrial Court to determine the remedy.] This has serious consequences for the employees concerned and creates problems for a management wishing to resume and continue production...

Our system of adjudicating unfair dismissal disputes is, contrary to original intentions, highly legalistic and expensive. The Industrial Court conducts its proceedings in a formal manner, alone the lines of a court of law, and adopts a strictly adversarial approach to the hearing of cases. Judgments are lengthy, fairness is determined by reference to established legal principles and, within an essentially adversarial system, the lawyer's presentation of a case has inevitably emphasized legal precedent. Legalism undermines thc goals of the system, namely cheapness, speed, accessibility and informality. Common law perceptions of natural justice, rather than industrial relations-based equity, have become the standard by which fairness is assessed. The existence of an appeal requires keeping a record of the proceedings, confines the court to operating out of fixed premises and increases costs enormously. These problems are particularly acute for small businesses." (My emphasis).

[23] The next portion of the memorandum (at p3l7) deals with the draft Bill's proposed solution to this problem. The old system is starkly contrasted with the new in the following passage:

"In cases concerning the alleged misconduct of workers, the courts have generally required an employer to follow an elaborate predismissal procedure and have thereafter conducted a fresh, full hearing into the merits of the case. Apart from its duplication and lengthiness, this approach has obvious cost implications for the parties and the State. The draft Bill requires a fair, but brief, predismissal procedure, and quick arbitration on the merits of the case.

[24) The memorandum goes on (at p318) to say the following:

"By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal.....In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies. The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings."

[25] After the original draft Bill had been published for comment it was revised and

submitted to Parliament. Notwithstanding pleas for a more formal process before the arbitrators including a right to legal representation (Buirski (1995) I 6 ILJ 529) the Task Team which drafted the Bill as submitted to Parliament remained firm in its stance that the existing system was utterly unsatisfactory and should be replaced. It expressed this in paragraph 14 of the explanatory memorandum which accompanied the Bill submitted to Parliament. (Thompson and Benjamin, South African Law, Vol. 1, AA2-163-I 74). In dealing with this issue the Task Team said (at p172):

"Our system of adjudicating unfair dismissals is one of the most lengthy and expensive in the world. Despite this, it fails to deliver meaningful results and does not enjoy the confidence of its users. Not surprisingly, dismissals trigger a significant number of strikes.

Contrary to initial intentions the adjudication of unfair dismissal disputes has become highly legalistic and inaccessible. It can take up to three years before an unfair dismissal case is finally determined by *the* Appellate Division. Reinstatement is no longer regarded as the primary remedy for workers who were unfairly dismissed and there is no capping of compensation awards. Consequently the system lacks legitimacy and fails as a credible alternative to resolving dismissal disputes through power.

In the absence of private agreements, a system of compulsory arbitration is introduced for the determination of disputes concerning dismissal for misconduct and incapacity. By providing for the determination of dismissal disputes by final and binding arbitration, the Bill adopts a simple, quick, cheap and non legalistic approach to the adjudication of unfair dismissal. The benefits of arbitration over court adjudication have been shown in a number of international studies.... ... .

The Bill does not permit an appeal from the arbitrator's award. This is designed to speed up the process and free it from the legalism that accompanies appeal proceedings."

[26] It would stultify the entire purpose of the legislation if this court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those proceedings in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts: Such an approach is also in my view contrary to the express provisions of the LRA. Section 138(1) is the decisive provision in this regard. It empowers the commissioner to conduct the arbitration in such manner that the commissioner considers appropriate in order to determine the dispute both fairly and quickly. Lest the commissioner is under any is apprehension as to what is required the section goes on to direct that he or she discharge his or her functions "with the minimum of legal formalities".

[27] In my view it is perfectly clear in these circumstances that a complaint that a

commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in *the* conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA ; McKenzie, The Law of building and Engineering Contracts and Arbitration, 5th Ed. pp l88-189).

[28] This is of course entirely in accordance with the traditional under standing of arbitration. In this regard the expression "misconduct" in relation to an arbitrator is one which we have adopted from the English law. It is helpful therefore to have regard to English authority on the meaning of this expression particularly when it is borne in mind that London is the world's pre-eminent centre for international arbitration. The expression "misconduct" is dealt with in Halsbury (4th Ed. Re-Issue) Vol. 2, para. 694 in the following way:

"Misconduct has been described as "such a mishandling of the arbitration as is likely to amount to some substantial miscarriage ' of justice."... .....An arbitrator will misconduct himself if he acts in a way that is contrary to public policy. In particular, it would be misconduct to act in a way which is, or appears to be, unfair".

As Diplock J (as he then was) said in London *Export* Corporation Limited v Jubilee Coffee Roasting Company Limited [1958) 1 All ER 494 (QBD) at 498:

"I apprehend that an award obtained in violation of the rules of natural justice even where there was no breach of the agreed procedure would be set aside on grounds of public policy."

[29] It is against that background that the provisions of section 138(2) must be viewed. The rights conferred upon a party in terms of that section are always conferred subject to the overriding discretion of the commissioner as to the appropriate form of the proceedings. In any case where any of those rights are denied to a party that will not of itself give rise to grounds for review. It is only where the denial of those rights gives rise to unfairness that the commissioner will perpetrate a review able error.

[30] What I have said above is I think an amplification of what was said by Mlambo J in PPWAWU & another v Commissioner *:* CCMA *(Port Elizabeth)* and *another* [1998) 5 BLLR 499 (LC), paras. 7-9, pp500-501. I agree entirely with the following passages from his judgment:

"It is the commissioner who determines the procedure at arbitration proceedings. Of importance, however, is that he sets a procedure that must be appropriate and capable of determining the dispute fairly and quickly. The section does not require strict adherence to legal formalities."

and:

"My view is that arbitration proceedings should not be taxed with - .. strict formalities as applied to courts of law."

Where the learned Judge goes on from there to incorporate into his judgment the various rights referred to in section 138(2) of the Act that must be understood as always being subject to the overriding discretion of the commissioner.

[31] I also agree with the warning which Jali ,AJ (as he then was) sounded in Mirtual & Federal Insurance Company Limited v The Commission for Conciliation, Mediation and Arbitration and others [1997) 12 BLLR 1610 (LC) about the need for an arbitrator, who adopts a more inquisitorial and participate role in the proceedings than is customarily the case in an adversarial hearing, to be vigilant to ensure not only that the proceedings are fair to both parties but that the appearance of fairness is always maintained. However, with respect, insofar as certain passages in his judgment might be taken to indicate that it is only a traditional adversarial process as we known it from our courts that conforms to the well established rules of natural justice so that the commissioner's role is to mimic that of a trial judge and be a "silent umpire" I, with respect, cannot agree with him. There is no warrant for that approach in section 138 and its general adoption , in arbitration proceedings before commissioners would stultify the clear purpose of this legislation. Similarly I do not believe that the judgement of Tip AJ in B & D Mines *(*Pty*)* Ltd v Sebofha N 0 and another [1998] 6 BLLR 564 (LC) paras 12 - 14 should be read as obliging commissioners to permit the parties to examine and cross-examine every possible witness as if the matter was a trial. All that the learned judge was there concerned with was a case where that was the appropriate procedure and where the conduct of the commissioner in restricting the questioning of a vital witness

precluded a proper ventilation of the central issue in the case.

[32] It is obviously not possible to lay down specific guidelines for commissioners as to the manner in which they should conduct arbitration's. There may well be cases where the adoption of a traditional adversarial approach is justified, for example, because the true issue depends upon the resolution of a clear dispute of fact which can only be determined by listening to evidence and determining the credibility of the witnesses. In that case a conventional trial format with evidence and cross examination may be the most expeditious way of resolving the dispute. Such cases should in my view, however, be relatively rare. In general a commissioner will start with the brief statements required by the rules setting out the stances of the respective parties. The task of commissioner may be eased by having available a record of what relevant witnesses said at a disciplinary enquiry. There may well be documents which are relevant and the consideration of which will dispose of peripheral matters. Ordinarily there will be no legal representation. In those circumstances it is wholly appropriate for the commissioner to conduct the proceedings in the same manner in which commissioners of the Small Claims Court have for many years conducted proceedings with conspicuous success. The proceedings before that tribunal are informal in nature and conducted in a manner determined by the commissioner subject to the overriding need to comply with *the* principles of natural justice. (Smit v Seleka en andere 1989 (4) SA 157 (0) at 164D-G.) As regards the success of following that approach in the Small Claims Court it is noteworthy that so far as I have been able to find there are only three reported cases since Small Claims Courts were established by the Small Claims Court Act, 61 of 1984 where the decision of a commissioner has been successfully brought under review and only one of those arose from the manner in ¡which the commissioner conducted the proceedings. I point out that the grounds of review established by section 46 of the Small Claims Court Act 61 of 1984 are very similar to those provided for by section 145 of the LRA.

[33] The Applicant's complaints must be assessed against that background. The complaint that the commissioner relied upon hearsay evidence seems to me to be without foundation. The rule against the admission of hearsay evidence is one which was imported into South African law from the English law of evidence. It has always been a controversial rule the justification for which is unclear. (Hoffmann and Zefferett, The South .African Law of Evidence, 4th Edition, ppl24-125). In South Africa at least the rule is no longer absolute in its effect in consequence of the provisions of section 3 of the Law of Evidence Amendment Act 1955. In the field of admiralty law the rule is wholly inapplicable by virtue of section 6(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 which provides that:

"A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit."

Section 6(4) provides that the weight to be attached to such evidence shall be in the

discretion of the court. From extensive experience in the field ofproceeding5under that Act I am not aware that the effect of abolition of the hearsay rule in admiralty courts has occasioned any difficulty.

[34] If that is the approach in our courts of law then it follows fortiori in my view that reliance by an arbitrator upon hearsay evidence which he or she is satisfied on proper grounds is reliable does not constitute a revisable irregularity. That is well illustrated by the facts of the present case. I have the advantage of having the record of the evidence at the disciplinary enquiry. The first witness was a Mr. Gordon. His evidence was as follows:

"On the 3rd of September 1997 about 11h00 a member came through the gate - Naraindath (the Applicant), and he went into the parking lot where a maroon Jetta was parked. He then reversed his car up to the Jetta. The gentleman from the Jetta got out of his car and took a parcel from his car and put it into Naraindath's car and then the maroon Jetta drove off. Then Naraindath closed his door and came to me on the veranda and said to me : "Wally man, I got a puncture, what should I do?" I said: "Well you own a car, you know you've got to take it to a garage". So I was quite eager to know what was inside his car so I said to him : " Show me the tyre then." So then he took me to his car and he opened his boot and only to find there was nothing wrong with the tyre. So when I looked at the back seat of the driver on the floor I saw a parcel inside the car. I didn't know what was inside the parcel... ..so I walked away. When I walked away from him going back to my post, Mntungwa and other members ran down to him and said to him : "hey why are you smuggling? "He said no, he's not. So Mntungwa opened his back door and there was a parcel there a 18 brown paper bag. I then turned and walked back to the car. Mntungwa took the paper bag, put (it) on the back seat and (on) top was (a) couple (of) packets of flour and then we saw a little cooked chicken and some raw boerewors. Now on the bottom of the packet there were two parcels in a blue plastic packet so Chris Mntungwa opened one and inside he found dagga and then Lucky Zondi also opened the other one, and also found a parcel of dagga." (In quoting this passage I have slightly amended the punctuation and spelling and made the insertions in brackets in order to make it more readable).

There was similar evidence at the enquiry by Mr. Mntungwa and Mr Zondi which was to the same effect.

[35] This evidence had been given at the disciplinary enquiry without challenge as the Applicant and his representative had with drawn from the hearing at thc commencement of proceedings. There can be no doubt, however, that the ' Applicant knew what the

charge against him was particularly as his alleged possession of the dagga had also formed the basis for criminal charges which were made against him. It is significant therefore that in his letter of appeal dated the 3rd February 1998 the Applicant chose not to deal at all with the question of possession of dagga. The arbitrator was award of this as the letter formed part of the material placed before him.

[36] In those circumstances I do not regard it as having been in the least inappropriate for the arbitrator to have continued the arbitration proceedings, once the record of ' this evidence had been placed before him, by looking to the Applicant for an explanation of his stance regarding these charges. Depending upon that explanation *the* arbitrator would then be able to decide whether or not it was necessary for the persons who had given evidence before the disciplinary enquiry to attend at the arbitration. It seems apparent that this was the approach of the arbitrator. Unfortunately due to the procedural errors referred to earlier in this judgment and the passage of time I do not have the arbitrator's notes or anything other than his arbitration award before me but there is nothing in the papers to gainsay that inference.

[37] The heads of argument which Mr. Deysel tendered to the arbitrator are in the application papers. Those contain the following illuminating passage:

"The evidence tendered was that a packet which contained dagga, wvas found in the Second Applicant's vehicle. It is interesting to note that the witnesses contradicted one another as to where the parcel was found. Evidence also showed that a person other than the Second Applicant had placed the said parcel in the Second Applicant's vehicle. There was no evidence that the Second Applicant had handled the parcel, knew what *the* contents of the parcel was, or could reasonably be expected to know what the contents of *the* parcel was. The Respondent could at no stage establish a causal link between the incident and the actions of the Second Applicant."

[38] I do not find it surprising in the circumstances that the heads of argument given to Mr. Ngcobo on behalf of the Department contained the following statement'

"It is common cause that on or about 3 November 1997 the Applicant was found in possession of dependence producing drugs, to wit, dagga." (Obviously this referred to physical possession of the packet containing the dagga because it was in his car.)

It is against that background that the contentions on behalf of the Applicant in regard to the arbitrator's award must be viewed. Thus the arbitrator records in regard to Ms Nkosi's evidence the following:

"She wvas cross-examined on an apparent discrepancy in the evidence of witnesses, where one witness said the dagga in question had been found on the back seat while another witness said it was found on the floor. Her response was that the significant point was that dagga was found in the car."

Not only is Ms Nkosi's response the sensible and obvious response to such cross-examination it hardly justifies the contention made on behalf of the Applicant namely that:

"This evidence, on which the Second Respondent based his finding, amounted to hearsay evidence and could thus not be tested. In spite of the Applicant being unable to test the veracity of the evidence adduced at the disciplinary hearing, Ms Nkosi conceded that there were discrepancies in the evidence tendered."

Nor does it justify the contention that there were contradictions in the evidence lead at the disciplinary enquiry. Manifestly the discrepancies were not relevant and the arbitrator properly regarded them as such.

[39] In dealing with the Applicant's evidence at the arbitration the arbitrator records that:

"His main defense was that he had no known ledge of and even less handled the package of dagga. He also expressed total ignorance of the maroon Jetta alluded to. Strangely enough, at one stage in his evidence-in-chief he referred to a bag found outside his car."

The arbitrator records that the Applicant explained his presence at the prison garage at the time by claiming that his car had a tyre problem.

[40] The arbitrator regarded this story as incredible and unconvincing. I share his view. It is clear in the first instance that the Applicant did not seek to challenge in any real way the evidence which had been given to the disciplinary enquiry by Messrs. Gordon, Mutungwa and Zondi. They placed a packet containing not only dagga but flour, cooked chicken and boerewors in his car. The latter were on *top* of the dagga and served to conceal it. Then !here was the presence of the maroon Jetta and the conduct described by Mr. Gordon in the passage quoted above. before it was incumbent upon the arbitrator to secure the attendance of Messrs. Gordon, Mntungwa and Zondi and to have them cross-examined it needed to appear that there was some serious challenge to their veracity. Instead there was none. Effectively the Applicant accepted that the dagga was there and had come from the maroon Jetta but simply disclaimed any knowledge of it. That was utterly far-fetched and the arbitrator was wholly justified in rejecting that explanation.

[41] That examination of the facts disposes of the second contention advanced on behalf of the Applicant namely that he was deprived of the opportunity of cross-examining Messrs. Gordon, Mntungwa and Zondi. On the face of the documents before me there was no real challenge to their evidence and accordingly no need for them to be cross-examined. It is not even suggested in the affidavits which have been put up that Mr. Deysel, on behalf of the Applicant, asked that their attendance be secured so that he could cross-examine them. Nor in the circumstances was it incumbent on the commissioner mero motu to secure their attendance for that purpose.

[42] In the circumstances it seems to me that insofar as these complaints are concerned they are unjustifiable and do not show that there was misconduct on the part of the commissioner or cross irregularity in the conduct of the arbitration proceedings. Instead the commissioner appears to have approached the matter in a sensible and practical fashion, which expedited proceedings and brought them to finality sooner than would have been the case if he had insisted on emulating a conventional trial. (I should mention that I regard expedition as important bearing in mind that in cases where an award of compensation is made the amount of such award in terms of section 194(1) of the LRA depends on the period of time which has elapsed between the date of dismissal and the last day of the arbitration hearing. This is relevant here in that the arbitrator found that there was a measure of procedural unfairness in the disciplinary enquiry.)

[43] The last complaint by the Applicant is that the commissioner failed to subpoena relevant witnesses who would have helped to resolve the dispute. Nowhere in the affidavits were any such witnesses identified nor did Mr. Deysel identify them in the course of his argument. I rather suspect that the witnesses being referred to in this paragraph of the heads of argument are Messrs. Gordon, Mntungwa and Zondi. I have already dealt with the fact that they were not called to give evidence before the arbitrator and held that this was proper.

[44] In the circumstances the Applicant has failed to make a case for the review and setting aside of the arbitration award. Accordingly the application must fail. In regard to the costs of the application I can see no reason why those should not follow the result.

[45] In the circumstances the application is dismissed with costs.

M.J.D. WALLIS A.J.

16-03-2000

FOR THE APPLICANT : Mr. M. Deysel of thc Public Servants Association of South Africa.

FOR THE RESPONDENT: Advocate S M Govender, instructed by the State Attorney (Natal).