IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO. P745/99

DATE 18.8.2000

In the matter between:

CHEMICAL ENERGY PAPER PRINTING	
WOOD AND ALLIED WORKERS' UNION	First applicant
WELCOME JOBELA	Second applicant
and	
AFROX (PTY) LTD	First respondent
COMMISSION FOR CONCILIATION, MEDIATION	
AND ARBITRATION	Second respondent
MARION FOUCHE, N O	Third respondent

JUDGMENT DELIVERED ON 19 AUGUST 2000

REVELAS, J:

s is an application in terms of Sec 145 of the Labour Relations Act No. 66 of 1995 ("the Act"), to review and set aside the award of the third respondent, made in favour of the second applicant. The third respondent ("the arbitrator") is the commissioner who conducted the arbitration hearing arising from the second applicant"s dismissal.

e second applicant was dismissed by the first respondent having been charged with misconduct during a strike conducted by the first applicant and which commenced on 3 August 1998. The second applicant was charged with:

authorised access to company premises and using an unauthorised access control disc;

The unauthorised use of company equipment and property for private use.

The second applicant had made photocopies, (using the photocopier in the offices of the first respondent), of a certain pamphlet he wished to disseminate to the striking workforce. A disciplinary hearing was held. The second applicant was found guilty of the charges above and he was dismissed. He referred his dispute to the second respondent.

[3] At the arbitration hearing the second applicant's defence was that the picketing agreement reached during the strike entitled him to reasonable access to the first respondent's premises. He further contended that a co-employee had given him a disc and therefore he had the necessary authorisation to enter the premises and make copies at the photocopying machine. The third respondent rejected the second applicant's defence, found that he was indeed guilty as charged but that dismissal was an inappropriate sanction.

[4] The first and second applicants specifically applied for the reinstatement of the second applicant before the third respondent. Nonetheless, the third respondent, after being told that a restructuring process at the first respondent during the argument, decided not to reinstate the second applicant but to award him compensation.

[5] In calculating the compensation she disregarded the period 15 December 1998 until March 1999 when the conciliation proceedings were postponed by the applicant. She awarded compensation for the period 15 October to 15 December 1998 and 1 April to 2 September 1999.

[6] The applicant seeks to review the award on the basis that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings within the meaning of Sec 145(2)(a)(ii) of the Act. The conduct of the arbitrator sought to be characterised as a gross irregularity is that she awarded compensation instead of reinstatement, notwithstanding that no evidence was led to the effect that reinstatement, the primary remedy provided for an unfair dismissal in the Act ,was not "practicable".

[7] The record of the arbitration proceedings reflects that at no stage prior to the arguments presented by the parties, did the first respondent tender any evidence pertaining to the question of whether or not

reinstatement was appropriate or practicable.

[8] During his address to the arbitrator, the first respondent's representative requested the arbitrator to not make an award for reinstatement but rather to compensate him, should she find the dismissal to be unfair as "all positions in his (the second applicant's) department have been made redundant".

[9] In response thereto, the applicant's representative argued that no evidence was led as to redundancies and that the first applicant wished to be reinstated. The arbitrator then enquired whether a position similar to the one held by the applicant was available in "other sections" of the first respondent. The first respondent's representative?s response was that in terms of a recent project, several positions within the first respondent had been made redundant. One Mr Vena of the union advised the arbitrator that he was aware of the restructuring process, but was not convinced of the need therefor. The arbitrator expressed some unwillingness to "opening up a new dispute" and made the point that all she needed to have clarity on was whether or not there was "some restructuring going on".

[10] The Labour Appeal Court and Labour Court have dealt with the concept of gross irregularity in the context of reviewing arbitration awards in the same way as the Supreme Court has. In GOLDFIELDS INVESTMENT LTD AND ANOTHER v THE CITY COUNCIL OF JOHANNESBURG AND ANOTHER 1938 (TPD) 551 it was held that: **?? It is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to gross irregularity.?** (See also PUREFRESH FOODS (PTY) LTD v DAYAL AND ANOTHER 1999 (20) ILJ at 1590 (LAC); TOYOTA SOUTH AFRICA MOTORS (PTY) LTD v RADEBE THE CCMA AND OTHERS; THE LEGAL AID BOARD v JOHN, N O AND ANOTHER 1998 (4) BLLR 400 (LC) at 404H-I.)

[11] Sec 193(2) of the Act provides that the Labour Court (or an arbitrator) must, once an unfair dismissal has been established, require the employer to reinstate or re-employ the employee unless:

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would

be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee (my emphasis); and

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

[12] The Appeal Court (as it then was) held that it is incumbent on a court (and therefore also a statutory arbitrator), when deciding what remedy is appropriate, to consider whether in the light of all the proven circumstances, there is a reason to refuse reinstatement. (See NUMSA v HENRED FREUHAUF TRAILERS 1994 (15) ILJ 1257 (A) at 1263C-D).

[13] The imperative language of Sec 193(2) of the Act reflects an intention to uphold reinstatement as the primary remedy for an unfair dismissal and to curtail any arbitrary decision-making when determining the appropriate relief once an unfair dismissal has been established.

[14] The employer bears the onus or at least an evidentiary burden, to establish the application of Sec 193(2)(c) of the Act in any given context. The wording of the section suggests it and in addition, the employer bears the overall onus in dismissal disputes.

[15] The first respondent did not discharge the onus of establishing that compensation as opposed to reinstatement was the appropriate remedy. The first respondent led no evidence to support this contention which was advanced during argument only. The arbitrator commented that she wished to avoid starting a new dispute when the issue of redundancies was raised before her, but then proceeded to make her most crucial finding in respect of the remedy applicable, based on information, (not even evidence), which she wanted to avoid. She came to her conclusion on facts that were not ventilated before her and therefore failed to adhere to the basic tenets of the audi alteram partem rule. She also ignored to follow the provisions of Sec 138(2) of the Act which require an arbitrator to allow a party to a dispute before him or her to give evidence; call witnesses; question the witnesses of any other party; and address concluding arguments on this very important issue.

[16] Insofar as inadequate or inadmissible evidence is regarded by an arbitrator, the following was said in THE STANDARD BANK OF BOPHUTHATSWANA LTD v REYNOLDS N O AND OTHERS 1995(3) BCLR at 305B at 318G-H:

"Our courts have held that where a decision maker takes a decision unsupported by any evidence or by some evidence which is in sufficient to reasonably justify the decision arrived at or where the decision-maker ignores uncontroverted evidence which he was obliged to reflect on, the decisions arrived at will be null and void."

[17] The applicant had a right to present evidence and cross-examine witnesses on the aspect of redundancy. The fact that there was a restructuring process in progress within the first respondent, does not mean that the second applicant would necessarily be affected thereby, in terms of Sec 189 of the Act the second applicant was entitled to be consulted about any restructuring and how it would affect him. There may have been alternatives to retrenchment and the second applicant would have been entitled to be consult about such aspects. In fact, the first respondent had an obligation and still has an obligation, towards the second applicant to consult with him if it intends terminating his services for operational requirements.

[18] The arbitrator's award has, the effect of retrenching the applicant without any recognition of his rights provided for in Sec 189 of the Act. The arbitrator was not required to arbitrate a dispute about a dismissal for operational requirements, but was obliged to arbitrate a dispute about a dismissal for alleged misconduct. In my opinion the arbitrator committed a gross irregularity and her award falls to be set aside.

[19] Had she not disregarded the question of the restructuring process alleged to have been in progress, I have no doubt that she would have reinstated the second applicant. No purpose would be served in remitting the matter to the second respondent for a re-hearing. This is a matter where I should substitute the arbitrator's award with an order to the effect that the second applicant be reinstated.

[20] The matter was unopposed, in the sense that no representative appeared on behalf of the first respondent. However, a cross review was filed, and answering affidavits were filed. As early as two

days before the matter was argued, after receipt of the applicant's heads of argument, the first respondent annexed to its withdrawal of opposition, further submissions. For all practical intents and purposes this matter was an opposed matter. The fact that there was no representative physically present, is irrelevant as far as costs are concerned. The withdrawal of the opposition came too late. The applicants had to prepare for the matter as if it were opposed. Consequently I award costs against the first respondent.

[21] I make the following ORDER:

The award of the third respondent is SET ASIDE.

1. The second applicant is REINSTATED in the employ of the first respondent on terms and conditions no less favourable to him than those which applied to him prior to his dismissal.
2. The reinstatement is to have retrospective effect, save for the period 15 December 1998 to 1 April 1999.
3. The first respondent is to pay the COSTS of the applicants in this matter.

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E REVELAS