REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO **D491/2001**

DATE:2002/05/03

In the matter between:

STANDARD BANK OF SA LTD	Applicant
and	
JEFFREY FOBB	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
SOUTH AFRICAN SOCIETY FOR BANK OFFICIALS	Third Respondent
MATTHEW GOVENDER	Fourth Respondent

JUDGMENT

PILLAY D, J

[1] The first point raised *in limine* in this application for a review is that the first respondent Commissioner's award is a nullity. It was issued on or about 14 March 2001, some eight and a half months after the arbitration was

heard.

[2] Advocate *Nel*, for the applicant, relying on case law, submitted that the *ratio* for declaring an award issued outside the time limit a nullity is to prevent an injustice. As a nullity there would be no valid award to be substituted or corrected and the proceedings must start *de novo*. The injustice referred to in this case was that the Commissioner awarded reinstatement with full retrospective effect to the date of dismissal. I will return to this later.

[3] Advocate *Rautenbach*, for the fourth respondent, asked the Court to have regard to the primary objects of the Labour Relations Act No 66 of 1995 (the LRA), to adopt a purposive approach to the interpretation of Section 138(7)(a) and to find, as LANDMAN J did in *Free State Buying Association Ltd (t/a Alfa Farm) v S A Commercial Catering and Allied Workers Union and Another* [1998] 19 ILJ 1481 LC, that the time limit stipulated in the section is intended to be a guideline.

[4] Section 138 provides:

"(7) Within 14 days of the conclusion of the arbitration:

(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;

(b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and

(c) the Commission must file the original of that award with the registrar of the Labour Court.

(8) On good cause shown, the director may extend the period within which the arbitration award and the reasons are to be served and filed."

[5] In *Maharaj and Others v Rampersad 1964(4) 638 at 643D-E* VON WINSEN AJA said:

"It is a recognised principle of statutory construction that a Court, when determining which of these two alternative constructions is to be placed upon a statutory enactment, must seek to ascertain the real intention of the Legislature and in so doing must have regard to the scope and object of the enactment as a whole."

[6] The word "must" is peremptory in relation to the issuing of an award. For as long as a Commissioner is alive and well she is enjoined to issue an award in a matter in which she has arbitrated and where the parties to the arbitration have not released her from that obligation.

[7] The time limits in this context are a guideline and not peremptory. I say so, firstly, because peremptory treatment can lead to absurdity. Secondly, it is not in the interests of litigants, the public and the national interest to re-hear arbitrations for no reason but the fact that the award is issued outside the time limit. Thirdly, it would conflict with the object of the LRA to resolve labour disputes effectively. In the nature of arbitration awards are issued late. If they are a nullity and no effect can be given to them, then the referral for a fresh arbitration would not be an effective, expeditious solution.

[8] I accordingly agree with my brother LANDMAN J in the *Free State* case where

he states at paragraph 16:

"Section 138 of the Labour Relations Act 66 of 1995 does not make provision for an extension of the time within which to issue an arbitration award. In my opinion s 138(7)(a), in so far as it relates to the signature and the issuing of the award, is intended to be more of a guideline. It is not intended to be peremptory. It is quite clear that, having regard to human nature, a commissioner may not always be able to sign and issue an award within the 14-day period. If a commissioner were to sign or to issue the award after that period, it would not be in accordance with the aims of this Act to visit such omission with invalidity. If that were to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place de novo. This could not have been intended."

[9] The Court, therefore, has a discretion in each case to decide whether the award should be allowed to stand. In exercising such a discretion the Court may consider, amongst other things, the following:

- the reasons for the delay,
- the period of delay,
- the effect of the award,
- the prejudice to the respective parties if the award were allowed to stand or to be struck down,
- the availability of evidence if the matter were to be reheard,
- alternative means of promoting the effective resolution of the dispute, such as the rehearing of the matter on the same record of the evidence,
- what the other grounds of review are.

[10] In this case the effect of the award is retrospective reinstatement. Whatever the Commissioner's reasons might have been for the delay it cannot outweigh the prejudice to the applicant who is saddled with paying eight and a half months' salary without receiving any value in return.

[11] Neither party indicated that the witnesses would not be available if the matter were to be reheard. What the most effective way of finalising the dispute, which is about the unfair dismissal of the fourth respondent, should be, is canvassed more fully after considering the further grounds of review.

[12] The second ground of review is that the Commissioner ordered reinstatement when the fourth respondent had only sought a compensatory award. This ground is well-founded. The Commissioner ought to have been aware, having read the transcript of a previous hearing on a point *in limine*, that reinstatement was not sought. If he, in his discretion, considered reinstatement appropriate, he ought to have engaged the parties on the issue before making his award.

[13] The third ground of review is that the Commissioner did not consider the applicant's replying argument. This was common cause. Advocate *Rautenbach* countered that as there was no misconduct with which the fourth respondent ought to have been charged and dismissed, the failure to consider the replying argument made no difference to the outcome.

[14] Whether the failure to consider the replying argument is a reviewable irregularity depends on whether the omission is material. It is material if it could have influenced the discretion of the Commissioner. The

Commissioner made credibility findings against certain of the applicant's witnesses. The applicant, in the replying argument, addresses this issue. This alone amounts to a material defect. Although there were other instances where the replying affidavit was material to the deliberations of the Commissioner, it is not necessary to traverse them all. What the merits or demerits of the submissions were in the reply is not the test. The fact that they related to material actually considered by the Commissioner, as manifest from his award, is sufficient to class them as material to the decision. If the Commissioner had considered the replying affidavit he might have found that the fourth respondent had misconducted himself or come to some other conclusion. The failure or omission to consider the replying argument before making his award is a reviewable irregularity.

[15] The fourth ground of review is that the Commissioner is alleged to have taken judicial notice of preferential treatment by employees of commercial banks of certain attorneys purportedly in the allocation of conveyancing work. I was referred to the relevant portions of the transcript where the Commissioner intervened to inquire how conveyancing work was allocated to attorneys. An example of that appears at page 519 of the record:

"COMMISSIONER: Mr Brodie, just one question in regard to impartiality. You spoke earlier on about it's absolutely imperative that a person in a managerial position is seen to be absolutely impartial when it comes to services and suppliers and so forth. But it's common practice for a bank to restrict the work that it gives out to particular suppliers of a service, and I say that because I am an attorney."

And at page 519, line 25:

"COMMISSIONER: Okay, and attorneys, it is common knowledge, vie for

the ability to do work for a certain bank. Some guys make it and some guys don't. How do you make it on to that panel? I am asking you this because I have my own personal theories about how you make it on to a panel, but you tell me what you say."

At page 800:

"COMMISSIONER: Mr Alexander, I understand this line of cross-examination but, can you show me anywhere within the rules that indicates to me, will assist me, what he did was wrong? And I give you an analogy, all of the firms of attorneys in Durban, as you know, vie for bank work when it comes to conveyancing and the bank is entitled to say well, 'We are going to take three firms of attorneys and we are going to give them all our conveyancing.' Much as that we may think, for example, in my practice, that we're the best conveyancers in town, we don't get the nod. Now, that is really the prerogative of the bank manager. It may be because he plays golf with the Conveyancing Department manager of Shepstone and Wylie, I don't know. But unless there is a rule in that bank, and that is the question I am asking you, what is wrong with what he did? I understand what you are saying but it is a judgment call."

[16] At first blush the intervention appears to be an attempt by the Commissioner to establish whether there was an objective standard or rule relating to the distribution of work. However, in his award the Commissioner states:

"Evidence was lead, which was not challenged that the Applicant's senior Mr Bolstridge spent time with partners of Goodrickes Attorneys who enjoy the lion's share of the conveyancing work from Mr Bolstridge's department. Mr Bolstridge insisted on allocating work to Dales Bros. Auctioneers in a situation where he intended purchasing a Porche motor vehicle from them.

The principle of impartiality and objectivity does not appear to be consistently applied by the Respondent's management."

[17] The conclusion that Goodricke's gets the lion's share of conveyancing is not supported by the evidence. Furthermore, this was evidence on a new matter which was elicited in re-examination of the fourth respondent. It was also a peripheral issue. If the Commissioner intended to place any weight on it, he should have given the applicant an opportunity to deal with the evidence. By his silence the applicant was entitled to assume that the rules of procedure would be followed in the normal course, namely that the Commissioner would disregard the new material. The fact that the applicant did not interject when such material was being elicited cannot be held against it as it was the Commissioner who disregarded the rules of procedure.

[18] The Commissioner's personal and private perception of the unfairness of the allocation system is evident from this extract from his award. His lack of adjudicative discipline in failing to keep his personal unhappiness with banks in check, renders his award reviewable on this ground.

[19] Moreover, his intervention could have influenced the evidence that was led at the arbitration. This is a relevant consideration for determining whether the record of the evidence can be relied upon if the matter were to be determined without leading evidence afresh.

[20] Fourthly, it was submitted that the Commissioner took into account the evidence of a witness at the disciplinary inquiry despite having agreed with

the parties that such evidence would not be admissible. Furthermore, he did not inform the parties that he intended to rely on such evidence as corroboration of a material issue.

[21] The facts which found this ground are also not in dispute. The Commissioner set the ground rules in terms of which the arbitration was to proceed. He ought not to have changed them midstream without consulting the parties. This ground, therefore, is sustained.

[22] I do not intend to deal with those grounds of review that impact on the substantive finding of the Commissioner that the dismissal was unfair for the reasons that will become apparent. According to Advocate *Rautenbach*, the fourth respondent should not have been charged at all. The allegations do not amount to misconduct, he said. The applicant submits that the fourth respondent was dishonest.

[23] The evidence is nuanced and a trier of fact may be disadvantaged if she is confined to considering the transcript of the evidence without the benefit of observing the demeanour of witnesses. Furthermore, findings of credibility will have to be made. This can be done better by observing witnesses. For these reasons I find that the rehearing of the matter should not be on the basis of the record of the evidence of the arbitration.

[24] With regard to costs, I take into account that the fourth respondent would have felt compelled to defend the award and his defence was conducted in good faith and in a reasonable manner.

[25] The order I make is as follows:

1. The award is reviewed and set aside.
2. The matter is remitted to the CCMA to be heard afresh by another Commissioner.
3. There is no order as to costs.

D PILLAY
JUDGE OF THE LABOUR COURT

DATE OF HEARING: 30 APRIL 2002

DATE OF JUDGMENT: 3 MAY 2002

DATE OF REVISION: 4 JUNE 2002

HALF OF APPLICANT: ADV C NEL

OF FOURTH RESPONDENT: ADV J G RAUTENBACH