IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE

Case No. JR328/01

In the matter between:

GROUP 6 SECURITY SERVICES (PTY) LTD	**1ST APPLICANT**
ANDREW MASTERS	**2ND APPLICANT**

and

MOLETSANE, R.N.O	**1ST RESPONDENT**
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**2ND RESPONDENT**
WELLER DEAN	**3RD RESPONDENT**

JUDGMENT DELIVERED BY

THE HONOURABLE ACTING JUSTICE NGCAMU

Ngcamu AJ,

Introduction

1. This is a review application brought by the two applicants against an arbitration award issued by the first respondent. The application is opposed by the third respondent.

2. This matter was initially heard by my brother Ndlovu AJ. After the argument had been presented before Ndlovu AJ, it was postponed for further

argument. It became difficult for Ndlovu AJ to become available to finalise the matter. It was then agreed that the matter start *de novo* before me.

3. During the argument, counsel for the respondent Adv van der Westhuisen submitted that the applicant's submissions and the approach to the case took him by surprise and asked for a postponement. His submissions were based on the fact that on the previous occasion when the matter was heard before Ndlovu AJ the argument submitted on behalf of the applicants was different. He had prepared his argument on the lines of the submissions previously made by Mr Higgins who previously appeared for the applicants. Adv Barrie who represented the applicants before me took a different stance in his submissions.

4. Mr Barrie made concessions on certain findings made by the first respondent. He correctly conceded that the commissioner's findings as to the date of dismissal and on the finding that the dismissal was procedurally and substantively unfair is not reviewable on the evidence. This is the approach not taken previously by Mr Higgins.

5. I refused to grant the postponement because I held the view that the postponement was not in the interest of the parties. The respondent's counsel should have been prepared for the case despite the change of focus. The application for a postponement was made on behalf of the respondent when Mr van der Westhuisen had already commenced his argument. A further postponement was likely to cause a further delay and the matter was likely to be presented to a third judge. This matter was postponed *sine die* in May 2003. The matter had to reach finality.

Background

6. The first applicant is a security company registered under the company laws of the Republic of South Africa. The sole shareholder is the second applicant. The second applicant is also the chairperson of the Board of

Directors. Its managing director is Mr Briscoe. The director of operations is the third respondent. These three formed the Board of directors. They had been involved with the company since 1990.

7. On 26 August 1999 a robbery occurred at Rosebank Mall. The third respondent did not take steps to inform the centre manager of the robbery. He assumed that the Senior Security officer would inform the centre manager Mr Adamson. The centre manager complained to the second applicant on 27 August 1999. The second applicant wanted to know from the third respondent why Mr Adamson was not informed. The second applicant was of the view that it was the third respondent's responsibility to inform Mr Adamson of the robbery. The third respondent did not want to accept responsibility. As a result of this a heated argument started between the second applicant and the third respondent. The parties went for each other.

8. The second applicant demanded an apology from Mr Weller and Weller refused to apologise. Mr Masters told Mr Weller he was suspended and when Mr Weller wanted something in writing indicating why he was suspended, Mr Masters told him he was fired.

9. Mr Weller went out and telephoned Mr Briscoe and advised him of the position. He collected his belongings. He returned his keys and petrol card. Mr Masters refused to pay him.

10. On 28 August 1999 in the evening Mr Weller went to Mr Master's home to get his money, the R3100-00 due to him. He pushed the gate and damaged the intercom system. The gate was damaged as it fell over. Mr Masters came out and fired a shot in the air. Mr Masters approached the High Court for an interdict against Mr Weller. On 30 August 1999 the first applicant sent Mr Weller a letter of dismissal. Mr Weller referred a dispute

of unfair dismissal to the CCMA. At the end of the arbitration hearing, the Commissioner found that

(a) Mr Weller was dismissed on 27 August 1999 and not on 30 August 1999.

(b) The dismissal was procedurally and substantively unfair.

(c) The first and second applicants pay to the third respondent compensation in the amount of R273 239-04 being the amount equivalent of 12 months' remuneration.

(d) The compensation to be paid jointly and severally by the applicants.

(e) The applicants pay the third respondent's costs on the attorney and own client scale, including costs of counsel on the High Court scale.

(f) The applicants pay the CCMA costs of R6000-00.

Grounds for Review

11. The applicants grounds for the review as gleamed from the founding affidavit are that the award is unjustifiable and grossly unreasonable on:-

(a) The findings that the dismissal occurred on 27 August 1999.

(b) Whether the dismissal was procedurally and substantively unfair.

(c) Whether the company should pay compensation.

(d) Whether the applicants should pay attorney and client costs.

(e) Whether the applicants should pay the CCMA fees.

(f) Joint and several liability of Masters (the second applicant)

12. The applicant's have conceded that the finding that the dismissal occurred on 27 August 1999 and that such dismissal was procedurally and substantively unfair cannot be said to be irrational and therefore not reviewable. In the light of this concession I need not deal with these issues it being accepted that such findings were rational and justifiable.

Is the order for compensation Reviewable?

13. The award was issued on 9 February 2001 before the amendment of Section 194 of the Labour Relations Act 1995. Section 194 before it was amended provided that:

> "(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must equal the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or the adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.
>
> (2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason related to the employee's conduct, capacity or based on the employer's operational requirements must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal."

14. In *Johnson and Johnson (Pty) LTD v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)* p99 at para 40 Froneman DJP stated:

> "If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not, if compensation is awarded it must be in accordance with the formula set out in Section 194 (1); nothing more, nothing less. The discretion not to award compensation in the particular circumstances of a case must, of course, also be exercised judicially."

15. The commissioner is required to exercise his discretion on whether or not to award compensation. In *Johnson and Johnson* (supra) paragraph 41 the

court went further to state that:

> "The nature of an employee's right to compensation under S 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of S 194(1), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

16. In *Johnson and Johnson's* case the court found that compensation should not have been awarded because the employer offered to make good its failure properly to discuss selection criteria was made barely four days after communicating its final decision to retrench the employees to the union. The union was also obstinate in discussing with the employer.

17. In *Le Roux v Commission for Conciliation, Mediation and Artbitration and Others (2000) 21 ILJ 1366 (LC)* at p1369 para 111 Wallis AJ came to the conclusion that "it is open to the Labour Court or an arbitrator to decide not to make any order of compensation at all in the case of a dismissal which has been found to be substantively unfair."

18. Although the discretion applies both in circumstances where the dismissal is substantively unfair and procedurally unfair, it must be borne in mind that in Section 194(1) the court or the arbitrator is dealing with an employee who is not supposed to be in the employ of the employer because a fair reason to dismiss exists. In Section 194(2), the employer got the procedure correct but has no good reason to dismiss. In the case where the employer got the procedure wrong as well as have no good reason to dismiss, it is difficult to exercise the discretion against awarding compensation to the employee.

19. In an obiter Zondo JP in *H.M Liebowitz (Pty) LTD t/a The Auto Industrial*

Centre Group of Companies v Fernandes (2002) 23 ILJ 278 (LAC) at p283 para 11 stated:

> This matter was argued on the basis that the court a quo had a discretion to refuse to award compensation. I am prepared to deal with the matter on that basis, too. In passing I mention that it seems to me that it will be very difficult to find a case where, after finding a dismissal to have been unfair both because there was no fair reason to dismiss the employee and because the employer failed to follow a fair procedure, the Court or an arbitrator would nevertheless consider it appropriate to exercise its discretion against awarding the employee compensation or reinstatement."

20. In the minority judgment in *H.M Liebowitz* case Page AJA at p295 para 19 stated:

> "It is abundantly clear in terms of the Johnson & Johnson case that the learned judge a quo had no discretion to award compensation in a lesser amount than that prescribed by the statute. Once he found that the dismissal of the respondent was unfair within the ambit of S194(2) he was obliged by law to award the full amount or to refuse any compensation whatsoever in the exercise of his discretion. Counsel for the appellant was accordingly constrained to argue on appeal that the learned judge a quo should have refused to award any compensation at all."

21. The learned judge accepted that the following factors may be taken into account in determining whether to award compensation or not. That is:
    (a) Whether the employer has already provided the employee with substantially the same kind of redress.
    (b) Whether the employer's ability and willingness to make that redress is frustrated by the conduct of the employee.
    (c) The degree that the employer deviated from the requirements of a fair procedure.
    (d) Whether the employer secured alternative employment for the

employee.

These factors are not meant to be exhaustive as it is not possible to list all possible factors.

22. Mr Barrie argued that Mr Briscoe told Mr Weller that he would sort out the situation. He further submitted that the problem could have been sorted out the same day or on Monday. Mr Weller's conduct frustrated the resolution of the problem.

23. Mr Briscoe's testimony was that on receipt of the telephone call from Mr Weller, he advised Weller not to do anything until he arrived at the office. He found Mr Weller sitting in his motorcar outside the premises. He advised Mr Weller to come inside. Mr Weller was emotional and he was crying. He advised him to go home and that he would resolve the matter when tempers had cooled down.
24. Mr Briscoe proceeded to Mr Masters and got his version but did nothing except telephoning Ms Gordon who advised him they would deal with the matter on Monday. The position is that Mr Weller remained dismissed. He was not advised how the matter was going to be resolved. He was not told to return to work on Monday.

25. At p112 lines 7 to 10 of the record, Mr Briscoe was asked the following:

> "Ms Gordon – In your mind at that time, had Dean's services been terminated?… I do not believe that I would have offered Dean the opportunity to come back and try and sort it out and I do not believe that his services had been terminated, under no circumstances."

Mr Briscoe does not explain his belief. He stated that the matter could have been resolved while saying that he did not believe he could have offered Weller the opportunity to come back and try to resolve the issue. It is hard to understand what resolution he was looking at if he could not ask Mr Weller to return to work. In my view, this suggests that Mr Weller

had been fired by Mr Masters and Briscoe could not get him back. It therefore cannot be said that Mr Weller frustrated attempts to resolve the problem.

26. Mr Briscoe believed that Mr Weller's services were not terminated because the company procedures relating to the notification of hearing, the presentation of charges as well as the hearing did not take place. This in my view misses the point as the dismissal can take place without a hearing. Section 186(a) define a dismissal as meaning that an employer has terminated a contract of employment with or without notice. However, for the dismissal to be fair there has to be a fair procedure and a reason for the termination of services. It does not mean that because there is lack of proper procedure, there is no termination of service.

27. Mr Briscoe based his belief that it was not going to be possible to hold a disciplinary hearing on the events that occurred on the evening of 28 August 1999. That is after the dismissal. There is no evidence how Mr Weller frustrated the holding of a disciplinary hearing. In my view as at the evening of 28 August, Mr Weller was no longer an employee and owed no allegiance to Mr Masters.

28. Mr Masters position is that all the problems could have been resolved on Monday 30 August. Mr Masters accused Mr Weller without getting the facts correct as to who was responsible for advising Mr Adamson. He was angry because the contract was in serious jeopardy. Both Mr Weller and Masters exchanged dirty words unbecoming of directors. Mr Masters suspended Mr Weller and when Weller wanted to know the reason, he was advised they were going to think about it. He was then told he was fired and had to leave the keys and cell phone. Mr Masters instructed that the cell phone service be suspended. He also refused to pay Weller's money. In the light of this, I cannot find any substance in the submission that Mr Weller was the author

of his own misfortune. There is also no merit in the submission that Mr Weller made it impossible for the applicant to resolve the issues.

29. I hold the view that in the case where the dismissal is both procedurally and substantively unfair, the court and the arbitrator is not entitled to exercise his discretion against the awarding of compensation. It seems to me it would be unfair to reinstate an employee who wishes to be reinstated but refuse to award compensation to the employee who wants to be compensated under the same circumstances.

30. In the light of this, I find that the award of compensation is not reviewable in the circumstances.

Payment of attorney and client costs

31. The commissioner found that the arbitration hearing lasted four (4) days and that the bulk of this time was taken by the applicant leading evidence to establish that the dismissal took place on 30 August 1999 with the result that the arbitration trial lasted for an unnecessary long time. It was for that reason that punitive costs were awarded against the applicant.
32. The applicant's submission is that this finding was not rational as the company wanted to prove its case. I agree with Mr Barrie on this. It is unfair to punish a litigant for taking time in leading evidence to prove his or her case. The onus was on the applicant to prove its case. The date of the dismissal was in dispute.

33. Mr van der Westhuizen submitted that the defence was based on misleading information in that the dismissal had taken place on Friday, 27 August. It was therefore submitted that the arbitration would have been short if it was only the right to compensation that was contested.

34. Section 138(10) of the Labour Relations Act provides that:

"The commissioner may not include an order for cost in the arbitration award unless a party, or the person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner –

(a) by proceeding with or defending the dispute in the arbitration proceedings; or

(b) In its conduct during the arbitration proceedings"

The section does not permit the arbitrator to make an order for costs unless it is shown that the party, acted in a frivolous or vexatious manner. The Commissioner did not make a finding that the evidence led by the applicant in an attempt to prove its case was not relevant or that the defence was vexatious.

35. The applicant's based their defence on the letter sent to Mr Weller on 30 August 1999 stating that his services had been terminated. That is the date on which, according to the applicants, Mr Weller was dismissed. I accept that that version was rejected by the commissioner on the basis that Mr Weller was told on 27 August that he was fired. Taking the evidence as a whole and in particular, the fact that there had been some problems in the past, the applicant had believed that the dismissal only took place when the written notification was served on the employee.

36. The applicant was entitled to lead evidence to prove its defence. The fact that, that prolonged the hearing cannot be a reason for saying that the defence was frivolous and vexatious.

37. I agree with Mr Barrie that the award of punitive costs was irrational in the circumstances and stands to be reviewed and set aside.

Costs of the Commission

38. Section140 (2) of the LRA provides that

"If in terms of Section 194 (1) the commissioner finds that the dismissal is procedurally unfair, the commissioner may charge the employer an arbitration

fee."

39. The reason for awarding the arbitration fees was that the CCMA had incurred unnecessary expenses for what could have been an ordinary dismissal. It was submitted on behalf of the applicants that the award of costs was against the tenor of the Act. It was further submitted that the Commissioner was wrong in holding that this was an ordinary case.

40. I agree with Mr Barrie that this was not an ordinary case. The facts of the matter demonstrate that it was not that easy. Having said that, I do not agree that the order for costs is reviewable and that it was against the tenor of the Act.

41. The arbitrator has a discretion in terms of Section 140(2) to charge the arbitration fees if the dismissal is procedurally unfair. The Commissioner found that the dismissal was procedurally unfair. It does not matter that the commissioner justified the charging of the arbitration fees on the grounds of delay. It is my view that as the charge is justifiable on the grounds of procedural unfairness of the dismissal in terms of Section 140(2), the award should stand.

Piercing the Corporate Veil

42. The arbitrator found Mr Masters jointly, liable with the company on the basis of the allegation that Masters told Weller that Group 6 was nothing but a shell. The Commissioner found that there was a real possibility that Masters has transferred most of the assets and business contracts held by the first respondent to Isilulu another company operated by Mr Masters.

43. Mr Barrie submitted that the commissioner had no jurisdiction over Masters because he was not an employer. It was never suggested that Mr Masters was the real employer. Mr van der Westhuizen submitted,

Rule 26 of the CCMA Rules provides:

(1) The Commission or a Commissioner may join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

(2) A Commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

(3) A Commissioner may make an order in terms of subrule (2)

(a) of its own accord;

(b) on application by a party; or

(c) if a person entitled to join the proceedings applies at anytime during the proceedings to intervene as a party.

Rule 26 subrule (8) provides that a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

44. The Rules of the Labour Court contain similar but not identical provisions relating to the joinder of parties. Rule 22 provides the following:

"(1)The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.

(1) (a) The Court may, of its own motion or on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the

proceedings."

Subrule (7) provides that no joinder or substitution in terms of this rule will affect any prior step taken in the proceedings. Rule 22(7) of the Rules of the Labour Court is similar to Rule 26 (8) of the CCMA Rules.

45. Both Rule 22 and Rule 26 of the CCMA rules allow the court and the commissioner to join a party on its own motion. The only difference between Rule 22(1) of the Rules of this Court and Rule 26(1) of the CCMA Rules is that the court can join the parties jointly, jointly and severally, separately or in the alternative. This is not the power given to the CCMA in Rule 26(1).

46. Rule 10 of the High Court Rules puts the position of joinder in a clear manner and sets out what the court could do at the end of the trial with regard to the judgment and costs.

47. Rule 10(3) and 10(4) provide that:

"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action. (4) In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief or grant absolution from the instance, and shall make such order as to costs as shall to it seem to be just, provided that without limiting the discretion of the court in any way."

48. The test is whether or not a party has a "direct and substantial interest" in

the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. *(See Henri Viljoen (Pty) LTD v Awerbuch Brothers 1953 (2) SA 151 (O) at p168 – 170).*

49. A party may be joined because he is a necessary party or because of convenience, equity, the savings of costs and the avoidance of multiplicity of actions. (See *Rabinowitz and Another NNO v Ned Equity Insurance* 1980 (3) SA 515 (W) at 419 E). The Rules permit the joinder of parties in the same proceedings but do not direct the hearing of evidence as between all defendants; so that the extent of liability is determined between all parties. (See *K & S Dry Cleaning Equipment v South African Eagle Insurance* 1998 (4) SA 456 at 462 B-C.)

50. The Rules provide no time limits within which an application for joinder can be made. Implicit in the Rules is that an application for the joinder of a party can be made at any time. Such joinder does not affect the proceedings.

51. The Rules referred to demonstrate that the commissioner can join any party in the proceedings without a formal application. Mr van der Westhuisen referred me to the matter of *Serfontein v Balmoral Central Contractors (Pty) LTD (2000) 5 LLD 266 (CCMA).* That case dealt with the identification of the true employer. That was the position also in the matter of *Airlink Pilots Association SA v SA airlines (Pty) LTD and another (2001) 22 ILJ 1359 (LC).* These cases are not relevant for the reason that it was never an issue as to who was the true employer.

52. Mr Masters was not joined at conciliation. The Commissioner did not make an order joining him as a co-employer with the first applicant at the arbitration hearing. He was only made jointly liable for the purposes of paying the compensation.

53. In *Veress v Granard CC t/a G2 Clothing & another (2004) 3 BLLR 283 (LC)*, Pillay J dealt with the piercing of the corporate veil. At p 285 para 24 of the judgment, the learned Judge stated:

> "Thirdly, the case pleaded against Chidoni is not that he grossly abused the juristic personality of the first respondent. This is a requirement of Section 65 of the Close Corporations Act if Veress were to succeed in piercing the corporate veil."

I agree with Pillay J, that there has to be evidence of the abuse of the juristic personality before a party can be held jointly liable with a company.

54. In *Shipping Corporation of India LTD v Evdomon Corporation & The President of India 1994 (1)SA 550 (A)* at 566 C-G, the court held that the only permissible deviation from the rule was in those rare cases where circumstances justified "piercing of lifting the corporate veil". It was held further that those circumstances would include an element of fraud or other improper conduct in the establishment or use of the company or in the conduct of its affairs.

55. In *Cape Pacific LTD v Lubner Controlling Investments (Pty) LTD & Others 1995 (4) SA 790 (A)*, the court held that each case involves a process of enquiring into the facts which, once determined, may be of decisive importance.

56. It was further held that the Court has no general discretion simply to disregard a company's separate legal personality whenever it regards it as just to do so. The court proceeded to mention that the grounds that may be taken into account for piercing the corporate veil may be, fraud, dishonesty and improper conduct.

57. There is no evidence of fraud except the allegation that Masters told Weller that the Company was a shell. That is not sufficient for the purposes of lifting the corporate veil. There is no evidence of dishonesty in the operation of the business or any improper conduct. There is no evidence on the award that the Commissioner ever considered the grounds to be considered before lifting the corporate veil.

58. Mr Masters was never made a party before the arbitrator. He was present as a witness for the company and not in his personal capacity. The award cannot be made against a person simply because it is just to do so. There has to be some fault on the part of the directors or shareholders to make them jointly liable with the company. No such evidence of fault was led.

59. In the circumstances it was improper to make an award in which Mr Masters is jointly liable. In the circumstances, this part of the award can not stand.

60. I have been asked to make an order for the costs on the basis that the costs follow the results. In the light of my findings on the review applications, I have come to the conclusion that I make no order for costs for the reason that the review only succeeded in part and failed in part.

61. The appropriate order is that of reviewing and correcting the award. The order I make is the following:
(1)The award is reviewed and corrected to read:

(a) The dismissal of the applicant on 27 August 1999 was procedurally and substantively unfair.

(b) The respondent (Group Security (Proprietary) Limited) is ordered to pay to the applicant compensation equivalent to twelve (12) months

remuneration in the amount of R273 239-04, calculated at the employee's rate of remuneration on the date of dismissal.

(c) Such compensation shall be paid to the applicant on or before 31 July 2005.

(d) The respondent is ordered to pay to the CCMA Gauteng Office four days' Commissioner's fees as a reimbursement to the Commission, which fees shall be calculated at
R1500-00 x 4 = R6000-00 on or before 31 July 2005.

(e) There is no order for costs.

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Ngcamu AJ

Date of Hearing:	25 May 2005
Date of Judgment:	21 July 2005
For the Applicant:	Adv F.G Barrie
For the Respondent:	Adv D.W. Van der Westhuizen