IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR 782/05

In the matter between:

AVRIL ELIZABETH HOME FOR THE MENTALLY HANDICAPPED Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

BUTI ZWANE N.O. Second Respondent

NEHAWU Third Respondent

JULIA MVUMVU Fourth Respondent

JUDGMENT

A VAN NIEKERK AJ

This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") to review and set aside an arbitration award made

by the Second Respondent ("the commissioner"). The commissioner found that the Applicant had unfairly dismissed the Fourth Respondent and ordered her reinstatement.

The Applicant seeks to review and set aside the award on the basis that:

1 the commissioner failed to apply his mind to the evidence before him;

2 the commissioner applied the incorrect test in weighing the evidence and assessing the probabilities;

3 the commissioner failed and/or refused to consider the Applicant's evidence and submissions on what an appropriate remedy would be if the Fourth Respondent's dismissal was found to be unfair; and

4 the commissioner reached an irrational and unjustifiable conclusion in relation to procedural fairness, and committed a gross irregularity in failing to allow the Applicant's witness to testify in relation to this issue.

Prior to considering the merits of the Applicant's submissions, some background to the case is appropriate. The Applicant offers a facility to care for approximately 150 intellectually and physically disabled residents as well as a number of day visitors. The Fourth Respondent ('Mvumvu') was employed in 1998 as a supervisor. In that capacity, Mvumvu was responsible for taking

charge of and properly organising the daily operation of a section assigned to her, and for the supervision, training and discipline of care workers assigned to her. Mvumvu's duties also included the offloading and stacking of donated jumble after office working hours and at weekends. It was in respect of this latter duty that she was found guilty of misconduct and dismissed. The charges of misconduct brought against Mvumvu related to an incident that occurred in the administration office on 18 April 2004. Mvumvu was alleged to have been an accomplice to a theft that occurred in the office late that afternoon in that she watched Ms Patience Letselebe, the main home supervisor, wilfully removing donated jumble from the administration office.

A disciplinary hearing was held on 20 May 2004. On 21 May 2004, the chairperson found Mvumvu guilty of the charge against her and imposed a sanction of summary dismissal. An appeal hearing took place on 4 June 2004. The chairperson of that hearing upheld the finding and sanction imposed at the disciplinary hearing.

Mvumvu referred a dispute concerning her dismissal to the CCMA. An arbitration hearing was convened on 8 February 2005 at the CCMA, Johannesburg, before the commissioner. After hearing the evidence of both parties, the commissioner issued an award in which he found that Mvumvu's dismissal was substantively and procedurally unfair, and ordered her reinstatement.

The evidence before the commissioner

At the arbitration hearing, the Applicant produced as evidence a video tape recording that clearly shows another employee, Ms Patience Letselebe, stealing a plastic bag, which contained a pair of boots. This recording is the primary source of evidence on which the Applicant relied to sustain Mvumvu's dismissal. The submission before the commissioner was to the effect that the inference could be drawn from the video footage was that Mvumvu was also involved in the theft. This inference was sought to be drawn on the basis that Mvumvu could be seen speaking to Letselebe, that she was facing Letselebe when the theft took place, and that Mvumvu's body language during the course of the incident gave credence to her involvement in the theft.

Mvumvu denied any involvement in the theft. She testified that she had not seen Letselebe remove the boots, since she had had her back to Letselebe at the time the theft occurred.

The commissioner's award

The commissioner made the following material findings on the evidence adduced at the arbitration hearing:

1 the video footage was not conclusive in supporting the Applicant's

version because Mvumvu's face could not be seen on the video recording and her movements were not conclusive;

2 in regard to the footage showing Letselebe and Mvumvu speaking to each other before Letselebe stole the boots, the inference that the two were speaking about stealing the plastic bag in which the boots were contained was not the "only inference" to be drawn. The commissioner states at one point in the award "*There is no evidence that the two were prohibited in talking to each other, and that since they did, the only inference to be drawn is that they were planning to steal the plastic bag.* (sic)*".* In a later passage, the commissioner states "*I find no reason why I should find talking to each other between the Applicant and Patience irregular or constituting a plan to steal. It may be that that was the case if an adverse inference is drawn, however the fact that they could have been talking about stealing the plastic bag is not the only inference that could be drawn* (sic)".

3 Mvumvu later found and returned a bag containing the stolen shoes. This demonstrates that she could not have intended to steal them.

The commissioner then concluded that not only was Mvumvu's version the more probable, but that she could not have been an accomplice to theft because no theft had occurred. He states -

"*In the circumstances I find the Applicant's version more probable than that of the Respondent, in that she did not see Patience kicking the plastic bag. Thereby could not have been accomplice to the alleged theft. There is no evidence that indeed the theft in question occurred, consequently in absence of theft, there is no justification for the allegation of accomplice against the Applicant* (sic)*."*

This is a remarkable conclusion, given that the existence of an act of theft perpetrated by Letselebe and clearly visible on the video recording was never in dispute.

Evidence was also led during the arbitration relating to the procedure adopted prior to Mvumvu's dismissal. It was submitted on Mvumvu's behalf that her dismissal was procedurally unfair in that the chairperson of the disciplinary hearing, Ms Kathleen Jooste, was a subordinate of the initiator of the hearing, Ms Sylvia Haywood. In these circumstances, it was submitted further that a reasonable apprehension of bias existed and that the proceedings were consequently unfair.

The commissioner upheld this argument. He concluded that "*Ms Haywood's participation at the disciplinary hearing as an initiator being a senior to the chair is some what irregular. The chairperson of the disciplinary hearing may have been intimidated in such that she was biased in favour of the respondent. It is*

*therefore my view that the perception of bias has been established, and therefore the dismissal is also procedurally unfair (*sic)".

On the basis of his findings that Mvumvu's dismissal was both procedurally and substantively unfair, the commissioner ordered the Applicant to reinstate Mvumvu.

> I deal first with the commissioner's conclusions relating to substantive fairness. It is trite that the test to be employed to determine whether or not an employee is guilty of the misconduct alleged by the employer is a balance of probability, on the evidence presented at the arbitration. Although the commissioner makes reference in his conclusions to a single aspect of Mvumvu's version (that she did not see Letselebe kick the bag) being the more probable, this is not his conclusion in respect of her version generally, nor is it the basis of his reasoning for rejecting the version proffered by the Applicant's witnesses.

While he purported to apply the balance of probabilities test, the commissioner in fact applied a different test, namely as to whether any doubt existed as to the employee's guilt, or whether the only reasonable inference to be drawn was that proffered by the Applicant. This is apparent from the award read as a whole, and particularly from the passages quoted above.

This Court has previously held that when a commissioner errs by applying a standard stricter than proof on a balance of probabilities, the award is reviewable. (See *Potgietersrus Platinum Ltd v CCMA & others* (1999) 20 *ILJ* 2679 (LC), *Markhams (a division of Foschini Retail Group (Pty) Ltd v Matji NO & others* [2003] 11 BLLR 1145 (LC)).

Mr Baloyi, who appeared for the Third and Fourth Respondents, agreed that the correct test to be applied was that of a balance of probability, but submitted that the commissioner nevertheless came to the correct conclusion on the evidence presented to him. In this regard, he referred *to Rustenburg Platinum Mines Ltd v CCMA and others* [2003] 7 BLLR 676 (LAC).

I do not consider that it necessarily follows from any agreement between counsel to the effect that the commissioner's approach was or may have been fatally flawed that I should without further consideration apply the proper test to the evidence that was presented to the commissioner and substitute his decision for my own. The *Rustenburg Platinum* decision was concerned with the severity of the sanction imposed by an employer and a finding by the Court that the facts on which the commissioner relied to sustain his conclusion that dismissal was too severe a penalty had not been established by the evidence. It did not concern, as the present matter does, a fundamental failure by a

commissioner to determine, on the evidence before him or her, the preponderance of probabilities given the conflicting versions presented by the parties during the arbitration proceedings.

I am not persuaded that it is appropriate in this instance for me to ignore the flawed approach adopted by the commissioner and simply substitute my own finding on the merits after having applied the test that he should have applied. While the Court obviously has a discretion when reviewing and setting aside an award to substitute that award, this is not one of those matters where the exercise of that discretion is appropriate.

In these circumstances, it is not necessary for me to consider the further grounds for review on which the Applicant relies in relation to the commissioner’s finding of substantive unfairness.

I turn now to the commissioner's conclusions regarding procedural unfairness. In essence, he finds that Mvumvu's dismissal was procedurally unfair because the chair of the enquiry was in a position junior to that of the complainant, and that it necessarily followed on account of that relationship that there was at least a valid perception of bias.

The Third and Fourth Respondents concede that the mere fact that a

subordinate of Ms Haywood chaired the hearing does not necessarily give rise to an inference of bias. It was submitted though that the Third and Fourth Respondents had demonstrated a reasonable apprehension of bias, and that the commissioner's findings in this regard should therefore be upheld.

The primary authorities relied on by the Third and Fourth Respondents to the effect that valid perceptions of bias in the context of a workplace disciplinary enquiry should be addressed, all precede the enactment of the 1995 Labour Relations Act.

To some extent, Chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in Schedule 8 to the LRA.

Item 4 of the Code provides:

> *"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal.* ***This does***

not need to be a formal enquiry. (My emphasis) *The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."*

It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the industrial court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and

procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal

disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

> "*The draft Bill requires a fair, but brief, pre-dismissal procedure …(It) opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."*

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the

leading of witnesses, technical and complex ‘charge sheets’, requests for particulars, the application of the rules of evidence, legal arguments, and the like.

The nature and extent of the fair procedure requirements established by the Labour Relations Act and the Code is supported by international labour standards. International Labour Organisation Convention 158 requires procedures to promote compliance with the obligation to ensure that dismissals are based on valid reasons. Although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the LRA. (see *NUMSA and others v Bader Bop (Pty) Ltd and another* [2003] 2 BLLR 103 (CC)). The observations and surveys by the ILO's Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of Chapter VIII of the LRA and the Code since they give content to the standards that the Convention establishes. This is particularly so in the present instance because both Chapter VIII and the Code draw heavily on the wording of Convention 158.

International labour standards are also significant in that they give content to the constitutional right to fair labour practices (*see NEHAWU v University of Cape Town & others* (2003) 24 *ILJ* 94 (CC) at 113 – 114). The right to fair

labour practices contained in section 23 of the Constitution, to the extent that it provides the foundation on which section 185 of the LRA (the right not to be unfairly dismissed) is based, itself requires a recognition of the tension between the interests of workers on the one hand and the interest of employers on the other. The Constitutional Court has stated that care must therefore be taken to accommodate, where possible, these conflicting interests so as to arrive at the balance required by the constitutional conception of fair labour practices. It is in this context that the LRA, and in this instance, Chapter VIII and the Code, must be construed (see the *University of Cape Town* case at 113B-C).

Article 4 of Convention 158 provides that "*the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity*."

In its interpretation of this Article, the ILO's Committee of Experts has observed that the Convention does not state explicitly what form the opportunity to present a defence should take, or the form in which the allegations should be presented. In its last General Survey on the application of the Convention, the Committee of Experts observed that -

"[147] *It is clear from the preparatory work that the opportunity for a worker to defend himself is related to the possibility of his being afforded an opportunity to be heard by the employer, without there being a need for an adversarial proceeding. In reply to the proposed text submitted to the Conference by the Office and after the first discussion, which provided that the employment of a worker should not be terminated for reasons related to his conduct or performance before being afforded a hearing by the employer and given the opportunity to defend himself against the allegations made, three governments proposed to delete the reference in this paragraph to the word "hearing", which they believed implied a quasi-judicial procedure, with a view to greater flexibility. The Office pointed out that inasmuch as the word "hearing" might have such a connotation it felt that this reference could well be deleted without affecting the substance of this provision, according to which a worker should not have his or her employment terminated for reasons of conduct or performance before being given an opportunity to defend him- or herself against the allegations made.*

[148] Over and above the terms of Article 7 and its meaning, which is to allow workers to be heard by the employer, the

purpose of this Article is to ensure that any decision to terminate employment is preceded by dialogue and reflection between the parties."[1]

This conception of the right to a hearing prior to dismissal (what the Committee of Experts refers to as a preceding opportunity for 'dialogue and reflection') is reflected in the Code. When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by Item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee, the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction, or any procedure established in terms of a collective agreement (see Item 4 (1) and (3)).

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1 Protection Against Unjustified Dismissal' General Survey, International Labour Conference 82nd Session of the International Labour Conference 1995

The Convention goes on to require what it terms a right of appeal. This is not the right of appeal to a higher level of management that the criminal justice model requires, it is a right of recourse to an independent tribunal when the substantive merits of a decision to dismiss are challenged. This requirement is of course met by these provisions of the LRA that require the arbitration or adjudication of disputed dismissals. Neither the Act nor the Code obliges an employer to provide any workplace right of appeal against the decision to dismiss.

The standard of procedural fairness that I have described above is the standard that the Act establishes and which must be applied by commissioners. Section 203 of the Act obliges them to do so. That section requires, in peremptory terms, that any person who interprets or applies the Act must take into account any relevant code of good practice.

This is not to say that employers and unions cannot agree to retain the criminal justice model if they are so inclined, whether by way of a collective agreement (as was the case in *MEC: Dept of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* [2005] 2 BLLR 173 (SCA)) or by way of a contract of employment or employment policies and practices. In this instance, employers are obviously bound to apply the standards to which they have agreed or that they have established. It is also possible that the

application of administrative law to employment issues may rqeuire a greater degree of formality. There are conflicting judgments dealing with this issue, but because this matter arises in the private sector, I need not consider them.

In the present matter, there was no legal basis for the application of the rule against bias that the commissioner applied. In the formulation and application of a rule against bias, the commissioner clearly applied the criminal justice model of procedural fairness, and the standards associated with it.

> It is now well established in this Court that arbitration proceedings conducted under the auspices of the CCMA may be reviewed on the grounds that the commissioner committed a material error of law. (See *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at p.93, *Mlaba v Masonite (Africa) Ltd and Others* [1998] 3 BLLR 291 (LC) at 301C-302E, *National Commissioner of SA Police Service v Potterill NO and Others* (2003) 24 *ILJ* 1984 (LC) at para 25, *OK Bazaars (A division of Shoprite Checkers) v Commissioner for Conciliation, Mediation and Arbitration & others* (2000) 21 *ILJ* 1188 (LC) at para 10, and *Foschini Group (Pty) Ltd v CCMA and others* (2002) 23 *ILJ* 1048 (LC) at para 25.)
>
> The reviewability of an arbitration award on the basis of an error of law on the requirements set out in *Hira v Booysen* was recently approved by the

Labour Appeal Court. In *Mlaba's* case, this Court held that the review of CCMA awards on the basis of an error of law is essentially one of materiality (at page 301).

The test of materiality may be described as follows -

> "*If, in the exercise of this discretion, a commissioner makes an error of law, this does not render the decision of the commissioner reviewable unless it is a material error in the sense that it results in the commissioner asking the wrong question or basing his or her decision on a matter not prescribed by the statute."*

(See *Moolman Brothers v Gaylard NO & others* (1998) 19 *ILJ* 150 (LC) at 150 at 156).

In summary, the commissioner failed to apply the test of a balance of probabilities in determining the existence of misconduct, and failed to apply the provisions of the Act read with the Code by requiring a standard of procedural fairness that is not contemplated by either the Act or the Code and that cannot otherwise be justified. These shortcomings disclose material errors of law, and the commissioner's award stands to be reviewed and set aside on that basis.

I accordingly make the following order:

1. The Second Respondent's arbitration award is reviewed and set aside.

2. The matter is referred back to the CCMA for re-hearing before another commissioner.

3. The Third and Fourth Respondents are to pay the costs of these proceedings.

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ANDRE VAN NIEKERK,
Acting Judge of the Labour Court

Date of hearing	:	22 November 2005
Date of judgment:	:	14 March 2006
Attorneys for Applicant	:	Mr Chris Todd Attorneys Bowman Gilfillan Inc.
Counsel for 3rd & 4th Respondents:		Advocate S Baloyi
Attorneys for Respondent:		Kathrada Norval Rice Patel