IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JR 1270/03

In the matter between:

Ross Poultry Breeders

(Proprietary) Limited

Applicant

and

Jan van Dijk **First**

Respondent

Commission for Conciliation,

Mediation and Arbitration **Second Respondent**

Kobus Louw N.O **Third**

Respondent

JUDGMENT

CELE AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("The Act") to review and set aside an arbitration award dated 13 June 2003 issued by the third respondent while he was acting under the auspices of the second respondent. The first respondent in whose favour the award was issued opposed the application.

Background facts

[2] The first respondent commenced employment with the applicant some time in 1991 as a Technical Advisor. The applicant conducted business as a breeder of poultry parent stock for the broiler industry.

[3] On 26 November 2001 the applicant dismissed one Mr Schultz, its Hatchery Manager on various grounds of misconduct. The first respondent had represented Mr Schultz in that disciplinary hearing. On the same day, Mr Schultz was granted access to the company premises at the hatchery in order to download personal information which he had stored in a computer which had been allocated to him. The first respondent accompanied Mr Schultz and was present when Mr Schultz downloaded information from the computer which had been placed for him at the reception area. He was not allowed in the Hatchery. He downloaded the information into 5 stiffy-discs which he was given by the staff which worked there. Mr Schultz then procured a written statement from one Mr Mayisa, an employee of the applicant, who was present at the reception area. The first respondent and Mr Schultz then left with Mr Schultz taking 5 stiffies and a statement.

[4] The applicant had suspicion that the information downloaded by Mr Schultz was not personal but that it contained sensitive company information. This was later verified and the stiffies were returned whereafter Mr Schultz was charged with a criminal offence of theft. This incident also led to the first respondent being charged by the applicant with gross and deliberate acts of misconduct, summarised as:

> "1) Intimidation of a subordinate to make a statement.
> 2) Abuse of his position in the company.
> 3) Dishonesty relating to his true reason why he accompanied Doug Schultz to the Hatchery.
> 4) His refusal and / or failure to ensure the confidentiality or safety of company information.
> 5) His participation in a fraudulent scheme to remove company property without authority.
> 6) His attempt to discredit and undermine the authority of the Company Management.
> 7) His failure and or refusal to act and conduct himself in a manner expected and required of a reasonable and professional Manager.
> 8) The irrevocable breach of the trust and good faith relationship.
> 9) Conflict of interest between the Company and the applicant."

[5] The disciplinary enquiry continued against him on 24 December 2001 after which he was found guilty of all the charges. A sanction of dismissal was imposed but an alternative sanction was offered to him. The alternative, *inter alia*, entailed:

- Loss of leave equivalent to the number of days of the employee's suspension, which commenced on 29 November 2001.
- Demotion with 6% loss of pay and benefits and to be placed in a Trainee Technical Advisor position for 6 months.
- A 12 months' final written warning
- A written apology.

[6] The first respondent accepted, in writing, the alternative sanction. He however lodged an appeal against the finding of the hearing. The applicant felt that the first respondent was reneging on the agreement which had been reached and it gave the first respondent an ultimatum within which to withdraw the appeal or run the risk of a dismissal being confirmed at the appeal. The first respondent stood by the appeal which he had lodged. He was not successful and was dismissed. The decision to dismiss him aggrieved him and a dispute then arose between him and the applicant.

[7] The first respondent referred the dismissal dispute to the second respondent for conciliation. The dispute was not capable of resolution and a certificate of outcome was issued on 13 March 2002. He then referred the dispute to arbitration, the hearing of which was before the third respondent.

[8] The applicant proceeded with its case by calling its two witnesses. The applicant's representative then addressed the third respondent by submitting that the real dispute they were supposed to be dealing with was one of constructive dismissal. The first

respondent's representative opposed the submission. A *point in limine* was thus being raised by the applicant calling upon the third respondent to determine whether it was the applicant or the first respondent who terminated the services of the first respondent. The applicant was however not alleging that the third respondent had no jurisdiction to arbitrate the dispute. The third respondent found that the applicant, through the first respondents' non-acceptance of the alternative offered, terminated the first respondent's services and that it was upheld in an appeal hearing on 14 January 2002. He found further that the second respondent had jurisdiction to hear the matter and he ruled that the arbitration hearing was to continue. After the ruling had been communicated to the parties, the arbitration hearing was rescheduled and it finally proceeded before him. On 13 June 2003 he issued an award in which he found the dismissal of the first respondent to have been substantively and procedurally unfair and he ordered the applicant to compensate the first respondent. It is that finding which the applicant seeks to have reviewed and set aside.

Arbitration hearing

[9] Mr Redpath was the first witness to be called by the applicant. His evidence was that:

- He was appointed by the Managing Director of the applicant to chair the internal disciplinary hearing, at that time he was the Operations Manager of the applicant but had then become the Managing Director.
- The hearing was scheduled for 29 November 2001 but it was postponed to 4 December 2001 whereafter it was postponed

to 20 December 2001 and to 24 December 2001.

- In all of these dates a chance was being given to the first respondent to get representation.
- It was company rules that an employee be represented by a colleague in a disciplinary enquiry. Representation by a person from outside was not allowed.
- He agreed that the third respondent tried in vein to get representation from three colleagues.
- He admitted a letter which was shown to him, dated 12 December 2001 stating that the hearing of 20 December 2001 was to proceed since the first respondent had been accommodated in finding a replacement to represent him.
- Mr Redpath further recognised another letter dated 14 December 2001, written by the first respondent who was asking the company to provide him with representation. In the alternative he asked to be allowed to appoint a representation from outside, in the special circumstances of his case as three colleagues had already turned him down for fear of being victimised by the company.
- He contacted a consultant Mr Van der Berg, usually used by the company who, at his request, drew a letter as a response to that of the first respondent, to decline representation suggested by the first respondent.
- He found it to have been quite normal to have discussed with Mr Van der Berg even as he well knew that Mr Van der Berg had formulated the charges against the first respondent.
- The initiator had told Mr Van der Berg everything allegedly done by the first respondent whereafter Mr Van der Berg was to put all of it in to legal terms, in formulating the

charge, to make sure that they cover every thing.

- He confirmed that the hearing of 20 December 2001 was postponed at his instance as he could not attend it. He agreed that when the hearing started on 24 December 2001, the first respondent was not granted another postponement after he had asked for it in order to get a representative.
- The hearing was commenced by him reading the company code to explain the rights of the first respondent. Mr Mariott, a Breeding Manager, would then have explained the charges in detail for the first respondent, as the initiator.

[10] Mr Redpath then stated the evidence which had been given to him during the disciplinary hearing. That is the evidence that has been outlined as background facts hereto and need not be repeated. He continued to testify that:

- After the dismissal of Mr Schultz, Mr Bopape was appointed as the Acting Manager of the Hatchery. While Mr Bopape was present in the hatchery, during the downloading of information, his evidence given to Mr Redpath was that he was unable to see what was downloaded but his concern was satisfied by the presence of the first respondent, as senior personnel.
- Mr Schultz had requested Mr Bopape to take a statement from one Mr Mayisa, but Mr Bopape refused, stating that the permission was granted to download information.
- Mr Schultz was then said to have given a note book to the first respondent to use in taking the statement from Mr Mayisa. Mr Schultz and the first respondent then left.
- The downloading incident was reported to the Managing

Director who in turn discussed it with the first respondent.

- The first respondent went to Mr Schultz to get the stiffy discs back.
- The disks contained all information relating to the company pedigree lines, the performance of various pedigree lines in terms of hatchability and fertility.
- There were test results relating to certain disease situation.

[11] Mr Redpath continued to testify as follows:

- The company business was increasingly becoming competitive.
- Information like one in the disks could be used out of context and be shown to potential customers of the competition with the perception created of pending poor performance.
- The outcome of the hearing was a finding of guilt to all the charges whereafter the first respondent was dismissed but was given an alternative sanction.
- He admitted taking part in a discussion of the alternative sanction with Mr Gericke who was the immediate superior of the first respondent.
- The first respondent initially accepted the alternative sanction and handed in a letter of apology as required of him.
- The company then received a notice of appeal from the first respondent, against the decision of the disciplinary hearing.
- The company, in response, issued a letter wherein the first respondent was given an option of either being dismissed and to proceed with the appeal or to withdraw the appeal.

The appeal was not withdrawn and the first respondent proceeded with the appeal which he lost and was dismissed.

- Mr Mauldenhauver, a Financial Manger, presided in the appeal. He had been initially approached by the first respondent and agreed to represent him but later declined.

[12] Mr Mariott was the next to testify with his evidence being to the following effect:

- He was aware that Mr Schultz had been granted permission to go to and download information from a computer he had used before his dismissal.
- He had a discussion with the first respondent who had come to his office and learnt that the first respondent would accompany Mr Schultz.
- He advised the first respondent that Mr Schultz was not to get into the hatchery.
- He then telephoned Mr Bopape to inform him that Mr Schultz was coming to download information and had been granted permission. He told Mr Bopape to put the computer at the reception area for Mr Schultz.
- He did not deem it necessary to accompany Mr Schultz as the first respondent, being senior personnel, said he would.
- Later on that day, Mr Mayisa called him and reported that he had been asked by Schultz to sign a statement relating to chick boxes that were transported.
- He investigated the matter and established that 4 or 5 stiffy discs had been used to download which to him was unusual for the downloading of personal information.
- The matter was then reported to the Managing Director who

in turn, discussed it with the first respondent.

- Most of the information contained in the discs was confidential company information and would have been put on 26 November 2001 as that was the date showing on them. He conceded that the date might relate to the last day on which a stiffy was opened.
- He did not know whether there was information on the discs at the time they were handed over to Mr Schultz. He admitted that the discs belonged to the company and therefore that it was possible that they had company information when they were given to Mr Schultz.
- He discussed the case further with the Managing Director and a decision was taken to charge the first respondent.
- He had a discussion with Mr van der berg and asked him to draw up the charges. He also discussed the charges with Mr Redpath before the hearing.
- He is the one who served the first respondent with a notice for a disciplinary hearing.
- After the disciplinary hearing, but before the outcome, he did attend a meeting to discuss an alternative sanction. Also present in that meeting were Mr Gericke and Mr Redpath. The first respondent was not present.

[13] The first respondent also testified and his version was that:

- He asked some colleagues to represent him at the hearing but they later declined and these included Ms Henderson and Mr Ahmed. Mr Ahmed worked under Mr Mariott.
- He asked for more information from the company to explain the charges but that was not given to him. When the hearing

commenced, he had not been given enough time to prepare.

- He did accompany Mr Schultz to the hatchery to retrieve some information from the computer. No one had instructed him what information Mr Schultz was to obtain.
- He did not work at the hatchery with Mr Schultz but had an idea of the kind of work they did.
- Once they were at the reception area, Mr Bopape put the computer on the window to make it accessible to Mr Schultz and gave used stiffies to Mr Schultz. He did not know what information was in those stiffies.
- He went to sit on a chair on the right side near the door as Mr Schultz downloaded information. He trusted that only personal information would be taken. In any event, no instructions were given to him to watch what information was being retrieved.
- Mr Schultz did ask Mr Mayisa some questions and a statement was drawn which Mr Mayisa signed freely. It seemed that Mr Schultz wanted to reopen his case against the company and needed that statement from Mr Mayisa.
- The first time he came to know there was something wrong, was when the Managing Director called him. When the nature of the concern had been explained to him, out of his own volition, he went to Mr Schultz, retrieved the stiffies and he handed them back to the company. He was being honest to the company.
- He knew that Mr Schultz had a computer in his house and would down load information from work to it. He also knew that the company opened a criminal case against Mr Schultz but prosecution was declined.

- He felt that he was honest as no instructions has been given to him to watch the type of information retrieved by Mr Schultz and it was never his intention to act dishonestly against the company.

[14] That, in brief, concluded the evidence led at the arbitration hearing.

The arbitration award

Procedural fairness

[15] The third respondent found that the first respondent was not afforded the right to be represented by a non-employee such as a union official. He also found that the chairman was not impartial, having colluded with the initiator. He concluded that dismissal was procedurally unfair.

Substantive fairness

[16] The third respondent noted that nobody had told the first respondent what information Mr Schultz was allowed to download. He noted further that Mr Schultz had been allowed to take company information home. He noted further that no password had been installed on the computer. He said that he was not convinced that the information on the stiffies had become confidential.

[17] The third respondent said that, according to the company code, none of the offences charged was a dismissal offence. He found that there was not enough evidence on which he could find the first respondent guilty. He further found that the first application had not contravened any rule in the workplace. He concluded that dismissal was substantively unfair.

[18] He awarded 6 months compensation for procedural unfairness and 6 months compensation for substantive unfairness.

Grounds for review

[19] There are three grounds on which the award is assailed, namely;

i) it is not legally justifiable,

ii) the commission exceeded his powers and

iii) the commissioner committed a gross irregularity.

Analysis

[20] Section 145 (1) and (12) of the Act reads:

"145 Review of arbitration awards

(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a) within six weeks of the date that the applicant discovers such offence.

(2) A defect referred to in section (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the ,duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

b) that an award has been improperly obtained".

[21] When dealing with the standard of review the decision in **Carephone (Pty) Ltd v Marcus N.O and others (1998) 19 ILJ 1425 (LAC)** provides an appropriate guidance and a test to be followed. I need to refer to paragraph 31 of the judgment which reads:

> "[31] The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (s 33 and 23 (b) of schedule 6 to the constitution). The provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety. But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal."

[22] In determining whether the award is justifiable, the test set was couched in the following terms:

> "… is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at"

[23] When, on the other hand, an award is attacked on gross irregularity, the decision in the case of **Goldfields Investment (Pty) Ltd and another v City Council of Johannesburg and another 1938 (TPD)** at 560 has, over years, provided an informative approach. Part of the often cited paragraph reads:

> "The law, as stated in Ellis Morgan (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows 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 a gross irregularity."

[24] With that in mind, I now approach the submissions made by the parties in the consideration of this application. There are five instances by means of which the applicant attacks the award.

1. **Procedural fairness**

[25] The applicant attacked the finding that the first respondent was not accorded his right to be represented by a union, in accordance with the Act ("the Code of Good Practice"). The applicant submitted that the first respondent at no stage requested to be represented by a union official. The first respondent's submission was that he did ask, in writing, to be allowed outside representation as three of his colleagues had suddenly declined to represent him. Outside representation was, in my view, inclusive of representation by a union official. The company was well aware of the predicament in which the first respondent found himself. It was common cause that each of the three employees who initially agreed to represent him, declined out of fear that the company might dismiss them as well. The first respondent had just represented Mr Schultz who had just been dismissed. The applicant, in these circumstances should have used the company code only as a guide and should consequently have preferred the procedure provided by the Act. Legal representation is a very essential right to procedure which finds authority from the Act. To decline an employee the exercise of such right merely because of the company code and because the employee might be possessed of the necessary skills to represent

himself, is in these circumstances unjust. The first respondent had the right to representation by a person who was not involved in the issues or dispute, to bring in objectivity, when it was required. The third respondent was able to see the issues for what they were and, in my view, his decision, in this respect is quite justifiable.

2. **Bias of the chairperson of the disciplinary enquiry**

[26] The third respondent found that Mr Redpath was not an impartial chairman. In his own evidence, Mr Redpath admitted that he spoke to Mr Mariott about the charge. As correctly cited by the third respondent, in discussing with Mr van der Berg, Mr Redpath did say that they wanted to make sure that they covered everything. The third respondent therefore reflected the evidence which was adduced before him and the record supports him. In identifying this aspect of evidence, he therefore did not commit any gross irregularity as alleged by the applicant. For the chairperson of the enquiry to make sure that they covered everything of the charges against the first respondent, who was to appear before him, suggests that he was not treating the parties before him even handedly. As correctly submitted by the first respondent, the chairperson should, at the very least, be impartial and disinterested in the outcome of the hearing. I would have no quarrel with the chairperson seeking legal advice for his role as a chairperson and nothing more. The question of how the charges were to be drafted should have been left only to Mr Mariott, as the initiator. Mr Redpath allowed himself to be part of a meeting with Mr Mariott

and Mr Gericke to decide the fate of the first respondent, in his absence. That was not a hall mark of the impartial chairperson, the result thereof notwithstanding. I find the decision of the third respondent in this respect, justifiable.

3. <u>Sufficiency of evidence.</u>

[27] The applicant submitted that there was a duty to exercise reasonable care towards the employer, more so as a senior employee. The difficulty with the submission made by the applicant is that, it is the applicant which chose to charge the first respondent with "gross and deliberate" acts of misconduct. It excluded any negligent acts of misconduct. The evidence of the first respondent was never disputed namely that he was never instructed to watch the information collected by Mr Schultz and that he sat next to the door such that he could not see, like Mr Bopape, what information was being downloaded. I would however not agree that Mr Schultz could still be entitled to take the company information away as his status had then changed. He had been dismissed and was accordingly not entitled to such information. The first problem with the case of the applicant is that it failed to prove that Mr Schultz did download company information. Mr Mariott conceded that the information could very well have been in the stiffies when Mr Bopape gave them to Mr Schultz. The second problem lay in the absence of the instruction, as a safety valve, to control that which Mr Schultz could retrieve. The third was the failure of the company, as already indicated, to charge the first respondent with acts of negligence, in the absence of gross and deliberate acts on his part. The third respondent was quite alive to these shortcomings. In my view, his award is

unassailable due to being sound and justifiable.

4. <u>Exceeding powers in awarding compensation</u>

[28] The applicant contends that the third respondent exceeded his powers by awarding a separate compensatory amount for procedural and substantive unfairness. The submission by the first respondent is that section 194 of the Act, as amended, has created a discretion which allows the arbitrator to award compensation that is just and equitable in all circumstances where the dismissal is substantively or procedurally unfair or both. He submitted that the arbitrator in no way exceeded his powers and that nothing prevented him from setting out separate amounts as he did. The applicant has failed to show in what manner the separate quanta of compensation for procedural and substantive unfairness amounts to exceeding the powers of an arbitrator. As correctly pointed out, in my view, by the first respondent, the third respondent has such discretion. He did not exceed the limitation imposed by section 194 of the Act. Exceeding simply means that the award is one which the commissioner did not have the power to make – see **Le Roux v CCMA & others (2000) 6 BLLR 680 (LC) at para 15.**

[29] There was not a shred of evidence against the first respondent, yet the applicant wanted to make sure it covered everything in this matter. The applicant declined to give the first respondent a listen ear when he called out for help, just so as to have a fair hearing. The first respondent lost what was, at that time, to him, a valuable job. The compensation awarded to him was therefore in no way excessive or unwarranted.

5. <u>Recognition on the alternative sanction.</u>

[30] The applicant submitted that the first respondent reneged on the agreement to accept an alternative dismissal. That conduct, it was submitted, ought to have been taken into account by the third respondent in determining the appropriate compensation to be awarded. This approach fails to take into account the fact that the first respondent protested his innocence through the hearing. Even in the letter he wrote to tender in his apology, he still pleaded his innocence and an absence of any intention to act dishonestly against the company. For the same reasons as stated in the previous circumstance, I find the award justifiable and devoid of any defect as envisaged in section 145 of the Act.

[31] I accordingly make the following order:

The application is dismissed with costs.

CELE AJ

DATE OF HEARING : 22 NOVEMBER 2005

DATE OF JUDGMENT : 31 MAY 2006

<u>Appearances</u>

<u>For the Applicant</u> : **MR M VON AS (ADVOCATE)**

Instructed by : **WEBBER WENZEL BOWENS**

For the Respondent: Mr W SAIIMAN (ADVOCATE)

Instructed by : **BOUWE WIERSMA ATTORNEYS**