# REFLECTIONS ON BIAS AT INTERNAL DISCIPLINARY HEARINGS AND AT ARBITRATION

BY

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**DECLARATION BY SUPERVISOR**

I HEREBY RECOMMEND THAT THIS DISSERTATION BY CANDIDATE NO. 9219750, KOBORO JEFFREY SELALA, ENTITLED REFLECTIONS ON BIAS AT INTERNAL DISCIPLINARY HEARINGS AND AT ARBITRATION, FOR THE DEGREE MASTER OF LAWS IN THE DEPARTMENT OF LABOUR LAW, BE ACCEPTED FOR EXAMINATION.

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I DECLARE THAT THIS DISSERTATION FOR THE DEGREE MASTER OF LAWS HEREBY SUBMITTED, HAS NOT PREVIOUSLY BEEN SUBMITTED BY ME FOR A DEGREE AT THIS OR ANY OTHER UNIVERSITY, THAT IT IS MY WORK IN DESIGN AND EXECUTION AND THAT ALL MATERIAL CONTAINED HAS BEEN DULY ACKNOWLEDGED.

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**KOBORO JEFFREY SELALA**

# TABLE OF CONTENTS

*Page*

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**TABLE OF CASES**

## TABLE OF STATUTES

Constitution of the Republic of South Africa Act, no 108 of 1996

Industrial Conciliation Amendment Act, no 94 of 1979

Labour Relations Act no. 28 of 1956

Labour Relations Act no. 66 of 1995

Promotion of Administrative Justice Act, no 3 of 2000

# CHAPTER 1

## INTRODUCTION

One of the fundamental requirements for a fair procedure in any judicial or quasi-judicial proceedings is that the presiding officer must be impartial.[1] This requirement is usually a dominant subject of debate in disciplinary inquiries in both administrative and labour tribunals. The driving force behind this debate is usually precipitated by an accused party's desire to be exonerated from the charges preferred against him at all possible costs.

A disciplinary inquiry is by its very nature semi-judicial and it emanates from a relationship between two parties of unequal standing in the relationship. There is always a "master", (for example an employer) and the "servant", (an employee); or a member of a statutory board (as a servant), and the board (as the master). Thus in a master-servant relationship, it is the master's power to ensure and maintain discipline that characterises the relationship. In this kind of relationship the mere mention of the word discipline by the master would often raise scary thoughts to the servant.

In an employment relationship, it is usually the thought of how such discipline should be carried out that concerns most employees. It is the nature of the disciplinary hearing itself that worries most employees because although some kind of basic principles of procedure may be in place, impartiality of the presiding officer cannot be perfectly guaranteed. The significance of this problem is primarily because the decision to discipline and the ultimate fate of the employee is taken by somebody who has some kind of association with the employer, and usually influenced by employer's policies. This is equally applicable to all other entities entrusted with administrative justice.

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[1] *President of the Republic of South Africa v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) at 170 I-J; Slade v Pretoria Rent Board 1943 TPD 246 at 252 ; Marlin v Durban Turf Club & Others 1942 AD 112 at 126; Turner v Jockey Club of SA 1974 (3) SA 633(A) at 646E; S v Rall 1982 (1) SA 828(A) at 831H; Jacob v Tugela and Mapumulo Rural Licensing Board 1964 (1) SA 45 (D) at 47B; NAAWU v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378F.*

As stated above, the requirement that no one may be a judge in his own cause is fundamental to procedural fairness in our law.[2] This requirement is derived from common law principles of natural justice and is usually expressed in the maxim *"nemo iudex in sua causa"*.[3] This rule requires that a person who is tasked with deciding an issue involving the rights of others may do so without any partiality or bias. This was correctly observed by Solomon J in *Liebenberg v Brakpan Liquor Licensing Board*[4] as follows:

> "Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial..."[5]

The rule against bias in judicial and quasi-judicial tribunals is not new. Being a package of rules of natural justice, its origin predates history.[6] In Roman law, particularly during the era of the Roman Republic, this principle was strictly applied to judicial officers including those who performed wide administrative functions as well. According to Baxter,[7] the Law of the Twelve Tables even prescribed a death penalty for any judge who allowed his judgment to be influenced by accepting bribes.

The right to fair labour practices is entrenched in the Constitution.[8] Fair labour practices include fair procedures in disciplinary processes. The Labour Relations Act[9] also gives every employee a right not to be unfairly dismissed[10]

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2 Ibid
3 The other principle is that of "audi alteram partem" which means "hear the other side".
4 1944 WLD 52
5 At 54
6 See Baxter L *Administrative Law* 1984 536; Also Wiechers M *Administrative Law translated from Afrikaans to Engish by G Carpenter* 1985, 208.
7 *Ibid*
8 See section 23 of the Constitution of the Republic of South Africa Act, no 108 of 1996.
9 Act 66 of 1995
10 Section 185

and requires of all employers to dismiss employees for fair reasons and in accordance with a fair procedure.[11]

The Promotion of Administrative Justice Act[12] is one important legislation that deals with the issue of procedural fairness. The Act, among others, provides for remedies against unfair administrative action. Section 6(2)(a) provides that a court or tribunal has the power to review an administrative action if the administrator who took it *(i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias.*[13]

In labour law the concept of bias as a package of procedural fairness is virtually more recent and still undergoing development. Procedural fairness was introduced by the Industrial Court in the law of dismissal since 1979.[14] As noted by Cameron,[15] the development by the Industrial Court of this concept since its creation was not a smooth one. Its application by members of the Industrial Court was seldom consistent that many employees sought intervention of the courts because their rights to procedural fairness were ignored or insufficiently respected.

The origin and development of the concept of procedural fairness in labour law are discussed in Chapter 2 of this study. The chapter reflects briefly on the application of rule against bias in administrative law and how this concept eventually found its place in modern labour law.

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[11] Section 188

[12] Act 3 of 2000

[13] The whole concept of bias is discussed in Chapter 3 of this study.

[14] In terms of the Industrial Conciliation Amendment Act, no. 94 of 1979. Before the establishment of the Industrial Court, the law relating to dismissals in employment was regulated by common law. The law thus recognised the so-called employer's prerogative to hire and fire at will without any need to call for a hearing, neither to give reasons for his decision to dismiss an employee. Since its establishment, the Industrial Court introduced two main requirements for a fair dismissal, namely substantive fairness and procedural fairness. See also Grogan J *Workplace Law* 9th edition 2007 at 188; Du Plessis, Fouche & Van Wyk *A Practical Guide to Labour Law* 3rd edition, 1998 at 291

[15] Edwin Cameron *"The Right to a Hearing before Dismissal – Part 1"* (1986) ILJ 183.

In Chapter 3 the whole concept of bias is discussed. The chapter preludes with the discussion on the definition of bias including its application in administrative tribunals and labour disputes; and the test for bias in procedural fairness law in general.

The conduct of disciplinary hearings in employment law will be reflected upon in chapter 4. This will include the rules that govern the conduct of proceedings in internal disciplinary hearings and also at arbitration both at private and public sectors.

In chapter 5 I will deal with the issue of recusal and judicial review against the conduct of bias. This chapter will mainly focus on remedies available to a party affected by conduct of bias.

Chapter 6 concludes this study with a brief reflection on the law on bias at workplace disciplinary processes in the light of the provisions of the Promotion of Administrative Justice Act, the Constitution and case law. In this chapter the opinion of the writer hereof will be expressed on the subject and also the recommendation which, hopefully, will be of assistance to law practitioners and academics on this aspect of the law. The chapter will then be concluded with the list of bibliography.

# CHAPTER 2

## The origin and development of procedural fairness in South African Labour Law.

### 2.1 Introduction

At common law an employer could dismiss an employee for any reason or for no reason except that the employer might be called upon to pay employee damages if he or she exercises his or her so-called "prerogative" to hire and fire than in accordance with the principles of the common law applicable to employment.[16] This is because, at common law, employment is recognised as a contract and the freedom to contract forms the basis of employment relationship. In this regard the concept of fairness was unknown in employment relationship and what is most important is whether each party is capable of carrying out its obligations in terms of the employment contract. The employer could thus not lawfully terminate an employee's job without following a certain agreed procedure.

With the establishment of the Industrial Court[17] the law of procedural fairness was introduced in labour law to regulate matters of dismissals. In terms of sections 43 and 46(9) of the 1956 Labour Relations Act[18] the Industrial Court was empowered to "reinstate" dismissed employees and to make "determinations" in unfair labour practice disputes. In 1995 the new Labour Relations Act[19] was promulgated. This Act, among others, established the Commission for Conciliation, Mediation and Arbitration (the CCMA).[20] With the powers vested upon it by the Act, the CCMA has continued to assist with

[16] Okpaluba C, *"The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom" (1999) 11 RADIC 392, at 392.*

[17] by the Industrial Conciliation Amendment Act, no 94 of 1979

[18] no. 28 of 1956

[19] no. 66 of 1995

[20] Section 112.

dispute resolution functions in the workplace and to ensure that fair procedures are applied by employers in matters of discipline against employees.

## 2.2 Development of the rule against bias

The rule against bias emanates from administrative law.[21] This rule requires that a person who presides over a disciplinary hearing should not only be impartial in fact but should also not display any conduct which would reasonably create a suspicion that his or her decision will be shaped by extraneous factors.[22]

The requirements of procedural fairness were developed from the rules of natural justice of the common law by the labour courts.[23] However, in employment practice the rules of natural justice as applied in administrative law are not applied strictly in employment law because they were "adapted to suit the employment arena".[24]

In the earlier cases that dealt with procedural fairness in employment law (under the 1956 Labour Relation Act), the courts have consistently emphasised that the right to procedural fairness is fundamental.[25] However, the courts cautioned that the rules relating to the holding of disciplinary enquiries should not be applied mechanically to every situation.[26]

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21 Baxter op cit, at 558

22 *S v Rall 1982 (1) SA 828 (A) at 831H; Slade v The Pretoria Rent Board 1943 TPD 246 at 252; CommercialCatering & Allied Workers Union of South Africa and others v Rondalia Vakansie-Oorde Bpk t/a Buffelspoort Vakansie Oord (1988) 9 ILJ 871 (IC);Townsend v Roche Products (Pty) Ltd (1994) 15 ILJ 886 (IC)*

23 See Grogan J *Employment Law 9th edition, 2007 at 188.*

24 Ibid.

25 *Leboto v Western Areas Gold Mining Co Ltd (1985) 6 ILJ 299 (IC) at 303; Dlamini v Cargo Carriers (Natal) (Pty)Ltd (1985) 6 ILJ 42 (IC) at 48E; Van Zyl v O'Okiep Copper Co Ltd (1983) 4 ILJ 125 (IC) at 135G; National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378F; Twala v ABC Shoe Stores (1987) 8 ILJ 714 (IC) at 716J; Matshoba & Others v Fry's Metals (Pty)Ltd (1983) 4 ILJ 107 (IC) at 116-118; NUM and another v Unisel Gold Mines Ltd (1986) 7 ILJ 389 (IC) at 403C-D .*

26 *Bosch v THUMB Trading (Pty) Ltd (1986) 7 ILJ 341 (IC) at 344E-F ; Robbertze v Matthew RustenburgRefineries (Wadeville) (Edms) Bpk (1986) 7 ILJ 64 (IC) at 66-68 ; NAAWU v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378H.*

Notwithstanding, the emphasis has remained that where a presiding officer in a disciplinary hearing displays some conduct of bias (actual bias), the outcome of that hearing will be tainted. *In Metal and Allied Workers Union & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd*[27] the chairman of a disciplinary hearing was found to have "*viewed the applicant through jaundiced eyes*"[28] and put words in the mouths of witnesses. This conduct led the court to hold that the chairman was biased.

Labour law is characterised by flexibility. In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[29] the chairperson of a disciplinary hearing had occasionally discussed the matter with her superiors and had been involved in the "investigation" of the matter that gave rise to the disciplinary charges. Despite this discovery the court found that this did not render the hearing procedurally unfair. Also when an appeal was heard it was presided over by a manager who had taken part in the decision to institute the disciplinary charges.

Importantly, the requirement that a presiding officer in a disciplinary hearing may not be biased was emphasised albeit with qualification.[30]

As will be seen below, cases that were decided under the 1995 Labour Relations Act marked a considerable shift towards more flexibility than it was under the 1956 Act.

The 1995 Labour Relations Act contains a Code of Good Practice:Dismissal.[31] The Code was included in the Act to serve as a

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[27] (1988) 9 ILJ 129 (IC)

[28] At 136.

[29] (1992) 13 ILJ 573 (LAC)

[30] The qualification was that a disciplinary hearing should be treated as a "tribunal with institutional bias" whose decisions may be interfered with by the courts only if it appears that there is or is feared to be, a real likelihood, of bias on the part of the decision-maker or adjudicator.

[31] Schedule 8 to the Act.

guideline on matters of dismissals. Relevant to this study is *item* 4 of the Code which states that *"whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188".*[32] Unfortunately the Code does not seem to provide any definition of a fair procedure, neither does it expressly or impliedly suggest that the rules of natural justice may be dispensed with under any circumstances.

In *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd*[33] the Labour Court stressed that the requirements for procedural fairness under the current Labour Relations Act demand less stringent and formalised compliance than it was under the unfair labour practice jurisprudence of the Industrial Court.

A more radical position was taken in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others.*[34] In this case the employee was dismissed following the employee's conversation with a colleague while the colleague was allegedly busy stealing some goods belonging to the home. The dismissed employee among others claimed that her disciplinary hearing was unfair because the chairperson of the hearing was junior in rank to the initiator (employer's representative), and this created in her a reasonable apprehension that the chairperson would be biased against her. At arbitration the CCMA commissioner found that the situation indeed created a reasonable perception of bias and ruled that the dismissal was procedurally unfair. On review the Labour Court overturned the commissioner's award and held that there was no basis in law for the approach the commissioner had adopted, and ruled that the "criminal justice model" applied by the erstwhile Industrial Court was no longer applicable.

The Labour Court clearly distinguished the current position to that which prevailed before the coming into effect of the 1995 Labour Relations Act and was concerned that, also, *"the primary authorities relied on by the third and*

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[32] Section 188(1)(b) of the Labour Relations Act requires that dismissal must have been effected in accordance with a fair procedure.
[33] (1998) 19 ILJ 635 (LC)
[34] (2006) 27 ILJ 1644 (LC)

*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*".[35]

It is interesting to note that this judgment represents a departure from the ordinary rules of procedural fairness as developed and applied in administrative law.[36] Having regard to the Code of Good Practice: Dismissal, the court elaborated its reasoning with this observation:

> "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 a notice of that decision".[37]

Moving from this premise, it can be safely argued that the application of the rules of natural justice in employment law is generally confined to the *audi alteram partem* principle. As Grogan puts it, in the employment context "of the so-called rules of natural justice, the most important is enshrined in the *maxim audi alteram partem*, and therefore unless the commissioner finds that the basic requirements of the *audi alteram partem* rule have been violated, there is no basis for a finding that the dismissal is procedurally unfair".[38]

The Labour Court's position on this aspect of procedural fairness has clearly shaped the law on employment to what it is today. The emphasis is more on fairness rather than on lawfulness.[39]

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35 At 1651B-C

36 At 1651H.The court noted that the model that was developed by the Industrial Court under the 1956 Labour Relations Act 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.

37 At 1651G

38 *Workplace Law 9th edition* 2007 at 191. Also by the same author in *Dismissal, Discrimination & Unfair Labour Practice* 2005 at 274.

39 See *Highveld District Council v CCMA & Others (2003) 24 ILJ 517 (LAC); Jonker v Okhahlamba Municipality & Others (2005) 26 ILJ (LC); Avril Elizabeth Home for the Mentally Handicapped v CCMA & othes (2006) 27 ILJ 1644 (LC); Khula Enterprise v*

In this regard the Labour Court's position is in obvious contradistinction to the approach of the superior courts on procedural fairness.

In the jurisprudence of the superior courts, the importance of the requirement of lawfulness in any transaction is not compromised under any circumstances. This is illustrated by at least the following two decisions of the Supreme Court of Appeal. In *Denel (Pty) Ltd v Vorster,*[40] the case dealing with the employer's non-observance of a term of a disciplinary code, the Supreme Court of Appeal was called upon to determine whether the employer's failure to observe the disciplinary procedure contained in the employment contract rendered the employee's dismissal lawful. Having observed that the disciplinary procedure formed part of the contract, the Supreme Court of Appeal did not hesitate to find that the procedure could not be departed from because it constituted a term of the contract.

The court rejected the appellant's argument that the relationship between employer and employee is governed by only a reciprocal duty upon the parties to act fairly towards one another. On this the court said:

> "If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect… It is no answer to say that the alternative procedure adopted by the appellant was just as good".[41]

In *Fedlife Assurance Ltd v Woolfaardt*[42] the respondent had claimed damages against the appellant for breach of a fixed employment contract. The court thus had to determine whether an action for contractual damages

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*Madinane & Others (2004) 25 ILJ 535 (LC);* See also Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* 1994 at 168-169

[40] (2004) 25 ILJ 659 (SCA)

[41] At 665C-E

[42] 2002 (1) SA 49 (SCA)

arising from the repudiation of the contract of employment was a matter falling within the excusive jurisdiction of the Labour Court as provided for in section 157(1) of the Labour Relations Act and therefore not legally cognisable under the jurisdiction of the High Court. In its finding that the High Court retained its jurisdiction in the matter, the court noted that the Labour Relations Act did not abrogate an employee's common law entitlement to enforce contractual rights and held that " the High court would have no jurisdiction only if the subject of the employee's complaint is the fairness of the dismissal. If not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about, and the High Court would retain its jurisdiction".[43]

Strangely, the *Denel* decision was somewhat gently criticized by the Labour Court in *Jonker v Okhahlamba Municipality & others*[44] where the court "*expressed regret that the Supreme Court of Appeal had not taken the opportunity to guide the lower courts*".[45]

The abovementioned conflict illustrates the radical position which the Labour Court has adopted on procedural fairness and the measure of flexibility which overwhelms its jurisprudence.[46]

[43] At 61F-G
[44] (2005) 26 ILJ 782 (LC)
[45] At 789
[46] See also *Highveld District Council v CCMA & Others (2003) 24 ILJ 517(LAC)*

# CHAPTER 3

## The Concept of Bias

### 3.1 Definition

It is generally not easy to find an appropriate definition of the concept of bias. This is, among others, due to the fact that the whole concept was developed as a two-pronged inquiry; that is, whether there exists any form of actual bias, and/or secondly whether there are factors which indicate a real likelihood of reasonable perception of bias.

The Oxford Thesaurus of English defines bias as "partial'; "one-sidedness"; "bigotry"; "partisanship"; "favouritism"; and "unfairness". It further describes a person who is biased as someone who is irrationally opinionated in favour of or against another, typically because of some emotional commitments rather than because of rational considerations.[47]

For this purpose, it is perhaps convenient at this stage to define the various forms of bias recognised in our law. Yvonne Burns[48] distinguishes between the following types of bias:

**(a) Actual bias**

The basis for the rule against actual bias is the principle that justice must not only be done but must also be seen to be done. This form of bias therefore includes reasonable perception of bias.[49]

[47] Oxford Thesaurus of English, 2nd edition, 2004
[48] *Administrative Law under the 1996 Constitution* 1999 at 172-174
[49] See the discussion on the test for bias below.

**(b) Apparent bias**

This relates to an administrator's personal attributes such as prior learning or professional qualifications. Where a person has been appointed to preside over a matter which requires certain minimum professional qualifications, his or her involvement in those proceedings will generally not amount to bias unless there is a real prejudice resulting from his or her involvement. This is usually referred to as "authorised bias".

**(b) Personal interest**

Personal interest can take different forms. The interest may be of pecuniary nature, familial relationship, personal relationship, social or business relationship. Suspicion of bias may well arise from any form of personal relationships. The courts have always accepted that whenever a decision-maker has pecuniary interest in the outcome of the decision, there is a real likelihood of bias.[50]

The above types of bias are clearly elucidated in the cases discussed below.

In order to find a clear definitive description of what constitutes bias in law, older court cases that dealt with the subject provide some guidance. In *Jacob v Tugela and Mapumulo Rural Licensing Board*[51] the court described the existence of bias as in a situation where a person has an interest in the subject matter to be determined, and emphasised the importance of the rule that justice must not only be done but must also be seen to be done.[52]

In *Rose v Johannesburg Local Road Transportation Board*[53] the chairperson of the board refused to recuse himself from the hearing even when it was shown that he had a pecuniary interest in the taxi company which was

[50] See the cases discussed here below on this subject.
[51] 1964 (1) SA 45 (D)
[52] See also *Slade v The Pretoria Rent Board 1943 TPD 246 at 252; Marlin v Durban Turfclub 1942 AD 112 at 126; S v Rall 1982 (1) SA 828 (A) at 831H.*
[53] 1947 (4) SA 272 (W)

opposing an application by another company for the granting of an exemption certificate for self-drive hired cars. On review the court held that a reasonable man would perceive that the chairperson was biased because he had pecuniary interest in the taxi company.

Similarly, in *Liebenberg v Brakpan Liquor Licensing Board*[54] the town mayor refused to recuse himself from the proceedings of the liquor board and insisted on being present when liquor applications were heard despite the fact that his brother was one of the applicants. When the brother was granted the licence, despite the liquor board members' sworn affidavits that the mayor's presence did not in any way influence their decision, the court found that the mayor's presence in the proceedings created a reasonable perception of bias and set the decision aside.

*In Metal and Allied Workers Union & others v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd*[55] the chairman of a disciplinary hearing was found to have "*viewed the applicant through jaundiced eyes*" and put words in the mouths of witnesses. The court was then constrained to find that the chairman was biased.

*In Feinberg v African Bank Ltd and Another*[56] the court was concerned about the high handed manner in which the proceedings were conducted by the chairperson. It was noted that the chairperson had expressed before the commencement of the hearing that he considered the applicant to be obnoxious. This, the court held could not be reconciled with open mindedness and an unbiased state of mind.[57]

However, caution should be sounded about the application of procedural fairness requirement in our law. In *Van Huysteen v Minister of Environmental Affairs and Tourism*[58] the court held that constitutional right to procedural

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[54] 1944 WLD 52
[55] (1988) 9 ILJ 129 (IC)
[56] (2004) 25 ILJ 217 (T)
[57] At 219I-J
[58] 1996 (1) SA 283 (A)

fairness should not be regarded as a codification of pre-constitution law. The court noted that the right in terms of the Constitution must be a generous one in order to give the individual the full measure of fundamental rights referred to in the Bill of Rights. A similar approach was adopted in *Maharaj v Chairman, Liquor Board*.[59] In this case the court held that a procedurally fair administrative action is more than just the application of the *audi alteram partem and nemo iudex in sua causa* rules and that it involves the principles and procedures which are right, just and fair in the particular situation or set of circumstances.

In the tone of these decisions, it is possible to depart from the rules of procedural fairness as long as the administrator can show that such departure is justified by circumstances which are just and fair.[60]

The concept of bias in labour law has taken a somewhat different dimension. As shown above, several cases that dealt with the application of the rule against bias prior to the Constitution have always emphasised the importance of the principles of natural justice.[61] However, this picture changed in *Avril Elizabeth Home for the Metally Handicapped v CCMA & Others*.[62] Of significance in this decision was the court's observation that the "criminal justice model" applied by the erstwhile Industrial Court was no longer applicable.[63] In this regard the court held that the rules and procedures as developed by the Industrial Court, which likened a workplace disciplinary

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[59] 1997 (1) SA 273 (N)

[60] See Burns Y *Administrative Law under the 1996 Constitution 1999* at 165; See also section 3(4) of the Promotion of Administrative Justice Act which provides that an administrator may depart from the requirements if it is reasonable and justifiable in the circumstances to do so.

[61] *Leboto v Western Areas Gold Mining Co Ltd (1985) 6 ILJ 299 (IC) at 303; Dlamini v Cargo Carriers(Natal) (Pty)Ltd (1985) 6 ILJ 42 (IC) at 48E; Van Zyl v O'Okiep Copper Co Ltd (1983) 4 ILJ 125 (IC) at 135E-G; National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC) at 378F; Twala v ABC Shoe Stores (1987) 8 ILJ 714 (IC) at 716J; Matshoba & Others v Fry's Metals (Pty)Ltd (1983) 4 ILJ 107 (IC) at 116-117*

[62] (2006) 27 ILJ 1644 (LC)

[63] At 1651I-J

enquiry to a criminal trial, no longer applied.[64] This position, however, does not suggest that the rule against bias in labour law is not recognised.[65]

The Constitutional Court has had an advantage of defining this concept in *President of the Republic of South Africa v South African Rugby Football Union and others*.[66] In this matter the court held that,

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes".[67]

This ruling by the Constitutional Court confirms the approach which the then Appellate Division of the Supreme Court adopted in *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers Union and others*.[68] In this matter the court emphasised the right of the public to have their cases decided by persons who are free not only from fear but also from favour. It held then that to insist upon appearance of a real likelihood of bias would cut at the very root of the principle, which is deeply embedded in our law, that justice must be seen to be done.[69]

## 3.2 The test for bias

### 3.2.1 Administrative law

While it has not been difficult for our courts to identify circumstances under which bias may arise, a number of decisions of the courts have continued to

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[64] At 1651H
[65] Chapter 6 below
[66] 1999 (4) SA 147 (CC)
[67] At 170-171
[68] 1992 (3) SA 673 (A).
[69] At 694G-H

reflect a difference of opinion as to what the correct test for bias in our law is. A few of such decisions are examined below.

In *Danisa v British and Overseas Co Ltd*[70] the so called "likelihood of bias" test was found to be the correct test. Thus the court said:

> "It seems to me that the test that is to be applied is whether the applicant can show a reasonable fear that the trial will not be impartial. The matter must be looked at from the point of view of a reasonable lay litigant; but the test is an objective one: the likelihood of bias".[71]

In *Monnig and Others v Council of Review* and others [72] the court confirmed the real likelihood test but sounded caution where it has to deal with administrative bodies which are known and expected to have institutional bias. In this regard the court said:

> " There is however, in my view, no reason to jettison the real likelihood of bias test. I suggest that it retains its utility where a court is called upon to consider the impartiality of tribunals in the nature of administrative bodies which are known and expected by the reasonable layman to have an institutional bias. In these situations the courts will not interfere with the exercise of administrative, and even quasi-judicial functions, unless it appears that there is, or is feared to be, a real likelihood, that is to say, a probability, of (actual) bias on the part of the decision maker or adjudicator". [73]

In *S v Malindi and others*[74] the court emphasised the importance of impartial adjudication of matters before courts and proceeded further to propose the test that need to be followed to determine bias. After careful examination of previous cases dealing with issues of recusal, the court then said:

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[70] 1960 (1) SA 800 (D)
[71] At 801B-C
[72] 1989 (4) SA 866 (CPD)
[73] At 879 G-H
[74] 1990 (1) SA 962 (AD)

> "Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there are some reasonable grounds for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important". [75]

The difference of opinion of the courts in this matter was eventually settled in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers Union and Others.*[76] In this matter the court diverted from the real likelihood test and introduced a new approach of a reasonable suspicion test. Rejecting the real likelihood test the court had this to say:

> "For the reasons which follow I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test: and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias".[77]

This test was eventually endorsed by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union and others.*[78]

### 3.2.2 Labour Law

Whereas administrative law cases offer considerable guidance in procedural matters of labour law, the test for bias in workplace disciplinary inquiries still remains, strictly speaking, difficult to formulate. Various factors contribute to this problem. Firstly, dispute resolution in labour law is determined by rules which are naturally flexible in terms of application. Secondly, in the employment relationship the employer has a duty (and in fact a right) to

[75] At 969G-H
[76] 1992 (3) SA 673 (A)
[77] At 693I-J
[78] 1999 (4) SA 147 (CC)

maintain discipline among the employees. In this regard senior personnel in the workforce are usually the ones clothed with the power to discipline other employees and more often than not are the ones who witness incidences that give rise to disciplinary inquiries against the employees.

This problem is further complicated by the situation where an employer is a small scale entity which inevitably results in the employer being the prosecutor, witness and the judge at the same time. Thirdly, most employers are tempted not to follow procedures if those procedures would have the effect of defeating their economic goals. For example, the employer who catches his or her employee red-handed stealing from him or her is likely to dismiss the employee on the spot. In the circumstances, it may sometimes be difficult for the employer to call for an impartial tribunal if such employer is the owner of the employment itself. [79]

The fourth reason may be attributed to the Labour Relations Act itself. It does not prescribe what procedure must be followed in disciplinary inquiries. The best it does is to spell out the rights of employees who are accused of misconduct. [80]

The proper test for bias in labour law can be found in the celebrated comment made by Cameron in his article: "*The Right to a Hearing before Dismissal-Part 1*",[81] where the learned author wrote:

> "While allowance will be made for the unavoidable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgment to bear on the issues involved – such as bias or presumed bias stemming from a closed or prejudiced mind or from a family or other relationship – will render the procedure unfair. The importance of appearance in this area must not be left out of account and it is submitted that where an employee has a reasonable basis for believing that something more

[79] This practice is commonly encountered in the private sector and it is regrettable that many employees have been victims of bias and unfair procedures at the hands of their employers before dismissal.

[80] See item 4 of Schedule 8 [the Code]

[81] (1986) 7 ILJ 183

> than merely the traces unavoidably left by prior contact in the employment relationship is present and that this precludes a fair hearing, a complaint on the grounds of bias should be upheld".[82]

The above comment by Cameron has clearly set the tone for the approach which the courts and other tribunals should embrace in their determination of matters on procedural fairness in the course of employment dispute resolution. In principle, Cameron's view does not materially depart from the established test for bias in administrative law and it is submitted that the test for bias in labour law should not be construed to be different both in principle and in practice.[83]

In *Afrox Ltd v Laka*[84] the Labour Court re-emphasised the test adopted in the *BTR Industries* case as follows:

> " As stated in the cases referred to above, the test for bias is the existence of a reasonable suspicion of bias. The question therefore is whether, on the facts on which the applicant's representatives at the arbitration proceedings developed a reasonable suspicion of bias on the part of the first respondent. The suspicion of impartiality must be one which might reasonably have been entertained by a lay litigant in the circumstances of the applicant. If such a suspicion could be reasonably apprehended, the test for disqualifying bias is satisfied. It is not necessary to show that the apprehension is that of a real likelihood that the first respondent would be biased or was biased".[85]

This test is undoubtedly well-established and should be consistently applied in all judicial and quasi-judicial inquiries including labour proceedings.

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82 At 213
83 *See Afrox Ltd v Laka and others (1999) 20 ILJ 1732 (LC)*
84 Ibid
85 At 1742F-H

# CHAPTER 4

## Conducting disciplinary hearings at the Workplace

### 4.1 Introduction

A disciplinary hearing is some kind of a semi-judicial trial where the accused is charged by his employer for some specified form of misconduct or breach of a rule. In this chapter a pattern of procedure which is widely accepted as fair and in line with the requirements of the provisions of the Labour Relations Act in the employment arena is examined.

For this purpose it is imperative to refer to the Code of Good Practice: Dismissal.[86] Item 3.3 of the Code provides as follows:

> "(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violation. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconducts may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct".

In essence, item 3.3 applies to situations where a formal disciplinary hearing is not envisaged. Whenever the employer decides to discipline an employee with the possibility of a dismissal, there must be a formal hearing.

The procedure which must be followed in the disciplinary hearing is outlined in Item 4(1) of the Code which provides as follows:

[86] Schedule 8 to the Labour Relations Act, 66 of 1995

(1) Normally the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that 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".

As will be noted from Item 4, the requirement that the presiding officer should not be biased in the proceedings is not included as a package of the procedure.

What follows is a step by step process of discipline in the workplace.

## 4.2 **Formal Disciplinary Process**

### **4.2.1 Investigation**

The employer must first conduct an investigation to determine if there are grounds upon which an employee may be dismissed.

### **4.2.2 Notification of charges**

The employee may be notified of the alleged misconduct and the date of hearing once the employer has completed the investigations.

### **4.2.3 The hearing**

During the hearing the employee must be afforded an opportunity to state his or her case and also cross-examine any witness called by the employer. Of particular importance, the chairperson of the hearing must be impartial. The test for bias has been dealt with in chapter 3 above.

*Gina Babieri*[87] has suggested some few guidelines which chairpersons of disciplinary hearings should follow to ensure procedural fairness in conducting the hearing. These include introduction of the parties; dealing with preliminary issues; getting an employee to plead to charges; call for evidence from both parties; keep an open mind throughout the proceedings and pronounce the verdict and the sanction, if necessary.

A number of employers today have adopted disciplinary rules which regulate the conduct of proceedings in disciplinary matters in the workplace. These rules are contained in disciplinary codes and employers often refer to these codes to check if an employment rule has been breached.

In the public service the procedure for conducting disciplinary inquiries is contained in Resolution 1 of 2003 (the Disciplinary Code). The disciplinary code requires that the disciplinary hearing be conducted within 10 working days after the employee has been notified of the hearing. After the conclusion of the hearing of evidence, the code further stipulates that the presiding officer must pronounce the verdict within 5 working days.

It would generally be a gross procedural irregularity and grave injustice to the accused employee if the employer takes a decision to dismiss the employee before the hearing is commenced or concluded.

However, the Labour Appeal Court has recently ruled that where an employee was dismissed without a hearing, such defect may be cured by the employer's offer to hold the hearing before an impartial tribunal.[88] It is, however, unimaginable that the dismissed employee would really believe in the impartiality of the "impartial" tribunal offered by the employer in the light of the employer's conduct.

[87] *Handbook on Discipline in the Workplace 2006 at 17*
[88] Semenya SC and Others v CCMA & Others (2006) 16 ILJ 1627 (LAC)

### 4.3 Procedure at Arbitration

Section 138 of the Labour Relations Act sets out a general provision for the conducting of proceedings at arbitration. Of significance to this study is the provision in subsection 1 of section 138 which provides as follows:

> "(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".

The wider discretion given to the arbitrators by this section may sometimes result in abuse of power on the part of the arbitrators. However, what is important is that the arbitrator conducts the proceedings with an open mind free of bias.

# CHAPTER 5

## Remedies for biased conduct

### 5.1 Recusal

Recusal is one of the first instruments that an employee may use to ensure that his or her trial is conducted fairly. Employees who have reason to believe that the chairperson of the disciplinary hearing may not adjudicate the case impartially may request that the chairperson recuse himself or herself from the case. The test for bias, (as discussed above), applies pertinently to cases of recusals.

Applications for recusal are often rejected by the presiding officer against whom the recusal is sought. In *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[89] the court held that a refusal against an application for recusal is appealable.[90] This case was concerned with an application for recusal of a presiding officer in a judicial matter. It is unclear whether the same approach may be adopted in cases involving recusals in disciplinary inquiries given that a disciplinary inquiry is not a judicial inquiry, neither is it expected to imitate court proceedings.

However, in the context of a disciplinary hearing, it appears that there may not be any reason why a review application should not be brought by the disgruntled employee since the presence of bias in a disciplinary inquiry has the effect of vitiating the whole process and amounts to bare denial to the employee of a fair hearing.

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[89] 1996 (3) SA 1 (A)
[90] At 10B-C

### 5.2 Judicial review

An employee adversely affected by a decision of a presiding officer in recusal application may approach the High Court for relief.

A proper route to challenge the outcome of disciplinary hearing on the basis of the presiding officer's refusal to recuse himself is to approach the High Court with a review application. This was the ruling in *Mantzaris v University of Durban Westville and others*[91] where the Labour Court held that it did not have the power to review the conduct of a disciplinary inquiry. The court thus reasoned that the acts of disciplinary inquiry did not constitute acts or omissions of a body constituted in terms of the Labour Relations Act and therefore did not fall within its review jurisdiction.

This view was confirmed by the Transvaal Provincial Division of the High Court in *Feinberg v African Bank Ltd*[92] where the court said that nothing prevents the High Court from exercising its inherent jurisdiction to review internal disciplinary proceedings.

The Promotion of Administrative Justice Act provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative organ on the basis, among others, that the administrator who took it was biased or reasonably suspected of bias.[93]

One should however not confuse the review proceedings instituted in the Labour Court against a conduct of a biased arbitrator and that of chairperson of a disciplinary hearing. Reviews in the Labour Court emanate from section 145 of the Labour Relations Act. Where a recusal application against an arbitrator is denied, the aggrieved employee has in terms of section 145 a right to bring review application against that decision in the Labour Court. This

[91] (2000) 21 ILJ 1818 (LC)
[92] (2004) 21 ILJ 217 (T)
[93] Act no.3 of 2000, See Section 6.

is because, unlike a disciplinary hearing, arbitration is a process constituted under the auspices of a statutory body created under the Labour Relations Act.

Section 145 provides as follows:

> (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;
>
> (2) A defect referred to in subsection (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
> (iv) that an award was properly obtained

The conduct of bias has been held to amount to gross irregularity. [94]

**5.3 Interdict**

An employee whose application for recusal of the presiding officer has been rejected by that presiding officer may refuse to participate in that disciplinary hearing without waiving his rights to a fair hearing.[95] In that event the disciplinary hearing would undoubtedly be proceeded with in his absence and an adverse decision may be delivered against him. In order to avoid such situation taking place, the employee may approach the High Court for an interdict restraining the employer from proceeding with the disciplinary hearing. Such kind of an order was granted by the High Court in *Van As v*

[94] *Afrox Ltd v Laka and Others (1999) 20 ILJ 1732 (LC), at 1746A-B.*
[95] Grogan J *Employment Law 9th edition, 2007 at 198.*

*African Bank Ltd.*[96] In this matter, the applicant sought an interdict to prevent the employer from proceeding with the disciplinary hearing in the light of the fact that the employee had accepted a retrenchment package that was offered by the employer. The court found that by acceding to the retrenchment agreement, the employer expressly contracted out of the normal disciplinary procedure which could have culminated in the dismissal of the applicant and therefore not entitled to proceed with the disciplinary hearing.[97] However, the facts in *Van As* were particular and should be read in that context.

[96] (2005) 26 ILJ 227 (W)

[97] At 234

# Chapter 6

## Conclusion

In the foregoing study, I have placed at focus the application of the rule against bias in workplace disciplinary processes. The study examined, firstly, the legal meaning of the concept of bias and, secondly, its comparative application in administrative law and in labour law. It has been observed throughout this study that the description of the concept of bias in administrative processes is similar to employment disciplinary processes but differs materially in application.[98]

The application of the rule against bias in disciplinary inquiries has become more technical than it is required to be. This is partly due to the Labour Court's overemphasis on flexibility and fairness on labour matters. In turn, this has created a lot of uncertainties about the law.

For example, in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[99] the court could not find anything sinister in the employer's choice of appointing a presiding officer who was a witness in the alleged incident giving rise to the disciplinary hearing. Further, the fact that the presiding officer constantly discussed the matter with her superior who later turned to be the presiding officer in the appeal did not impress the court to find that both the disciplinary hearing and the appeal were unfair. This approach is in stark contrast to the one followed in *Commercial Catering & Allied Workers Union of South Africa and others v Rondalia Vakansie-Oorde Bpk t/a Buffelspoort Vakansie-Oord*.[100] In this matter the Industrial Court was not hesitant to find that where the manager who chaired the disciplinary hearing was intimately involved in the events which gave rise to the disciplinary hearing, the chairperson was disqualified from presiding over the matter.

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[98] See the comparative analysis in 3.2.1 and 3.2.2 above
[99] (1992) 13 ILJ 573 (LAC)
[100] (1988) 9 ILJ 871 (IC)

The rule against bias cuts across in both labour and administrative disciplinary processes. In a workplace disciplinary hearing, in particular, it is unacceptable for the presiding officer to display any form of partiality. However, the so-called institutional bias is often used to justify biased conduct of a presiding officer in internal disciplinary hearings and, more often than not, foreshadows the conclusion that the disciplinary hearing was procedurally fair.[101] As some writers argue, the nature of the relationship between the parties in the employment context makes it difficult to strictly implement the rule against bias.[102] It is submitted that this should not be the excuse. The law should not be borrowed and bent when it suits the circumstances.

Recent decisions of the Labour Court on procedural fairness as a whole have introduced into the law some new developments. *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*[103] *is* exemplary to this development. In this matter the court was not impressed enough to hold that the presiding officer's junior position to the accused could reasonably have created a perception of bias against the accused employee. In its reasoning the court noted also that the authorities referred to by the respondents all preceded the 1995 Labour Relations Act.[104]

In the workplace disciplinary processes the remedy of recusal of a presiding officer is more often than not a theoretical concept. In practice, applications for recusal are seldom granted by the presiding officer against whom the application is made. This position is complicated further by the fact that an accused employee may not approach the Labour Court to interdict nor review the processes of the disciplinary hearing. In terms of the Labour Court decision in *Mantzaris v University of Durban Westville and others*,[105] a decision of a chairperson of a disciplinary hearing is not subject to the review powers of the Labour Court because, unlike the CCMA, a disciplinary tribunal

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101 Cameron "*The Right to a Hearing before Dismissal- Part 1*"at 183

102 Grogan *Workplace Law 9th edition* 2007 at 191; Cameron op cit at 183.

103 (2006) 27 ILJ 1644 (LC)

104 See also *Highveld District Council v CCMA and others (2003) 24 ILJ 517 (LAC); Jonker v Okhahlamba Municipality and others (2005) 26 ILJ 782 (LC)*

105 *(2000) 21 ILJ 1818 (LC)*

is not a body constituted in terms of the Labour Relations Act. The only avenue to challenge the conduct of a biased chairperson of a disciplinary hearing is then the High Court.[106]

The application of the concept of bias in arbitration proceedings is not unique. Of particular importance is the provision of section 138 (1) of the Labour Relations Act[107] which requires the commissioners to conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly. Added to the requirement of fairness, section 145 of the Labour Relations Act provides for review by the Labour Court any decision of an arbitrator which was arrived at by improper means, including misconduct by the arbitrator.[108]

The apparent conflict between the Labour Court and the High Court on the interpretation of the right to procedural fairness in our law adds to this problem.

As observed from a few cases of the Supreme Court of Appeal, fairness cannot be stressed over lawfulness.[109] In this regard the Supreme Court of Appeal holds to the view that it is only after the enquiry on lawfulness has been undertaken that it can be determined whether the result is fair (if that is relevant at all). It is no answer to say that the alternative procedure is just as good.

The Supreme Court of Appeal's view seems to be attractive. The strength of this view is the acknowledgement also by the Constitutional Court that the test for bias held in *BTR Industries* case[110] is the correct one in our law.

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106 See *Feinberg v African Bank Ltd*(2004) 21 ILJ 217 (T) where the court said that nothing prevents the High Court from exercising its inherent jurisdiction to review internal disciplinary proceedings.

107 No.66 of 1995

108 See section 145(2) of the Act

109 *Denel (Pty) Ltd v Voster (2004) ILJ 659 (SCA) at 665 I-J; Fedlife Assurance Ltd v Woolfaardt (2002) 1 SA 49(SCA); Feinberg v African Bank Ltd (2004) 21 ILJ 217 (T)*

110 See fn76 above

This view is undoubtedly correct and should be followed.

In order to fully comply with the above view, employers should adopt in their disciplinary codes a clause which makes it mandatory for the parties to use the provisions of section 188A of the Labour Relations Act. [111]

It is submitted that this approach will change and shape our employment law on procedural fairness to a degree of certainty.

[111] Section 188A provides for a procedure where internal disciplinary hearings may be conducted by independent commissioners provided by the CCMA or other accredited agencies.

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