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19 March 2011

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## **Munnik Basson Dagama Attorneys v Commission for Conciliation, Mediation and Arbitration and Others [2010] ZALC 183**

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JUDGEMENT: FRANCIS J

### INTRODUCTION

The third respondent was employed by the applicant. After she was dismissed, she referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration. The second respondent (the commissioner) found that her dismissal was substantively fair but procedurally unfair and awarded her three months' compensation.

The applicant brought an application to review the commissioner's finding that the dismissal was procedurally unfair.

Analysis of the evidence and arguments raised

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The main issue to be decided on review is whether the commissioner's finding that the change of the charge sheet rendered the dismissal procedurally unfair, is reviewable. The third respondent contended that the commissioner did not commit any reviewable irregularity and did not exceed his powers as alleged by the applicant. Further that the chairperson of the disciplinary hearing was impartial.

It is trite that in civil proceedings, amendments to pleadings and documents can be sought at any stage of the proceedings. In this regard see *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 408; *David Hersch Organisation v Absa Insurance Brokers* 1998 (4) SA 783 (T) at 787 and *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77-78. The granting or refusal of an application for an amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. An amendment will be allowed where this can be done without prejudice to the other party. In this regard see *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D and *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 598I-J.



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The principles referred to above applies equally in labour matters. Nothing prevents an employer to amend the charge sheet before a finding is made.

It is clear from the evidence led at the arbitration proceedings that the applicant had on the second day of the disciplinary proceedings brought an application to amend the charge sheet. The applicant's representative explained how the error came about. It centred around a categorisation of the charge sheet to read 'gross negligence'. The third respondent had objected and after arguments were heard, the amendment was allowed.

The labelling of particular charges of misconduct as gross negligence did not in any way add to the complexity or substance of the charges. The focus must always be in the factual allegations in the charge sheet, and not their categorisation. The chairperson of the disciplinary hearing afforded both parties an opportunity to address him on the proposed amendment. He allowed them to adjourn to consider their position and to present any further evidence should they wish to do so, following the amendment to the charge sheet. The position would have been different if the chairperson did not allow the parties to make representation or to lead further evidence.



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It is clear that the finding by the commissioner that the amendment to the charge sheet caused procedural unfairness, suggests that he misunderstood the test for procedural fairness in the disciplinary hearing and amounts to a material error of law which constitutes a reviewable irregularity and has exceeded his power.

