SA COMMERCIAL CATERING AND ALLIED WORKERS UNION AND OTHERS V IRVIN AND JOHNSON LTD

CCT 2/00

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicants, a trade union and a number of its members, asked for leave to appeal to the Constitutional Court against the refusal by two judges of the Labour Appeal Court to recuse themselves from the hearing of an appeal. The case relates to the dismissal of certain of the applicants from the employ of the respondent for events that occurred on 21 June 1995 at the respondent's factory. The judges had made certain observations in a previous judgment which concerned the dismissal of other employees belonging to the trade union following events in August 1995 at the same factory. The applicants contended that such observations had a bearing on the decision that had to be made in the present matter. It was argued that there was a reasonable apprehension of bias on the part of the applicants that they would not be afforded a fair hearing, in breach of the fair trial provisions of section 34 of the Constitution.

Cameron AJ, on behalf of the majority of the Court, applied the test for recusal laid down by the Constitutional Court last year in *The President of the Republic of South Africa and others v SARFU and others*. That test is whether a reasonable and informed person would, on the correct facts, reasonably apprehend that a judge is biased. Two considerations were discussed. First, there is a presumption that judicial officers are impartial. The party alleging bias bears the burden of rebutting this presumption and must do so with cogent and convincing evidence. Second, absolute neutrality on the part of judges is not possible; but they are required to be impartial, a quality of open-minded readiness to persuasion, without adherence to any party, or to the judge's own predilections, preconceptions and personal views.

Applying these principles to the present matter, Cameron AJ considered two important questions: a) were the issues on which pronouncements were made in the earlier *case* the same as those in the present matter; b) could the findings already made by the Labour Appeal Court on the credibility of certain witnesses in the earlier matter have an effect on the assessment of the evidence of witnesses in the present matter?

The majority held that the issue previously before the Labour Appeal Court was whether or not dismissals that occurred pursuant to events in August 1995 were justified in accordance with the relevant legal provisions. The present matter, on the other hand, concerned the culpability of individual applicants in relation to the June events and the fairness of their consequent dismissals. The events of June were recounted in the earlier judgment as uncontroverted background information only and a reasonable litigant, properly informed, would recognise that such recital did not suggest that findings had been made in connection with the June events. Furthermore no credibility findings had been made regarding witnesses whose testimony was relevant to the events of 21 June 1995.

Cameron AJ also found that the presumption of judicial impartiality applies with particular force to an appellate court where the issues of fact and law have already been crystallised, where there is the benefit of a written record and where the personal attributes and dispositions of individual judges have less effect on the proceedings.

The majority concluded that the applicants had not displaced the presumption of judicial impartiality and dismissed the appeal.

Judges Mokgoro and Sachs jointly dissented in this case. In their view, more weight should be given to the lay litigant's perception of a judge's impartiality. The judges stated that it was reasonable in the circumstances of the case for the applicants to have an apprehension that they would not get a fair hearing. The events and findings made in the earlier appeal overlapped so closely with those at issue in this appeal that the applicants' apprehension in this context was reasonable. The judges concerned had already made pronouncements on matters which were central to this appeal. The judges noted, however, that they were satisfied that Conradie and Nicholson JJA would have considered the appeal before them with appropriate professionalism and impartiality. Nevertheless, justice must not only be done, but it must be seen to be done. Judges Sachs and Mokgoro concluded that they would have upheld the appeal.

09 June 2000