IN THE COURT OF APPEAL FOR THE KINGDOM OF SWAZILAND

HELP AT MBABANE

In the matter between:

STANDARD CHARTERED BANK SWAZILAND LIMITED ..... Appellant
And

ISRAEL MAHLALELA ..... Respondent

P.E. Flynn for the Appellant P Kennedy for the Respondent

Coram: Melamet JP,

Schreiner JA,

Dunn, AJA

JUDGMENT

SCHREINER JA: This matter has been the subject of legal proceedings for a long time. Twice it has been before the Industrial Court and twice before the High Court. The cause ofthe dispute

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the dispute was the summary dismissal of the present Respondent whom I will call "Mahlalela" by the Appellant which I will call "the Bank". This will avoid any confusion about the relative position of the parties at various stages of the litigation.

Though at one stage the officials of the Bank were not prepared to accept the facts upon which Mahlalela sought to justify or mitigate his conduct, the relevant facts as related by him have now been accepted as common cause. Mahlalela, at the time of his dismissal was a teller. He had been a Bank employee since December 1978 and his record of service/ which I will deal with later, had not been wholly satisfactory.

In December 1990 he bought an electric stove from a concern called Jumbo Discounters which proved to be defective during the period of guarantee. Jumbo took the stove back for repair or replacement. There appears to have been considerable delay in repairing or replacing it due to a strike of employees of the manufacturer. The proposal was then made that Jumbo would supply Mahlalela with a full container of gas for the small gas stove which he/

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which he had. For this Mahlalela gave a post dated cheque drawn on his account at the Bank for an amount of E147,00. E100 was to be security for the container and E47 payment for the gas itself. It was not intended that the cheque should be presented immediately for collection as it was only to be paid in the event of a default by Mahlalela.

However, the post-dated cheque was by mistake sent for collection by Jumbo and this placed Mahlalela in a dilemma when it was drawn to his attention. He got into touch with Mr Anderson of Jumbo who was prepared to help and, to avoid an overdraft on Mahlalela's account, gave him a cash cheque to place to the credit of his account at the Bank.

Meanwhile Barclays, Jumbo's Bank, had discovered that the post- dated cheque had been

sent for collection to the Bank and asked that it be returned to them. Mr Mdluli, the batch supervisor of the Bank, could not find the cheque but found in its place a cash cheque signed by A Anderson for almost the same amount. Mahlalela admits that he took out the post-dated cheque and caused the cash cheque to be deposited. The deposit slip showed his wife as being the depositor of the cheque but this was not correct.

Mahlalela was

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Mhlalela was not permitted by the terms of his appointment to give post-dated cheques or to have an overdraft. The purpose of the removal of the post-dated cheque and the substitution of the cash cheque from Anderson was to conceal from his superiors that he had made out a post-dated cheque which, when it was prematurely sent for collection, resulted in an overdraft. But the manoeuvre was discovered and he was summarily dismissed.

The procedure which was followed for his dismissal was described by Mrs G Dlamini, the accountant at the Manzini branch of the Bank. She was in control of matters affecting staff and also controlled the balancing and scrutiny of the bank books and records. After being apprised of the irregularities in the account of Mahlalela she took her findings to the Manager and then, with him and the Area Manager, called Mahlalela in and asked him about it. He was shown the relevant documents and given an opportunity of providing an oral explanation. After the meeting he recorded his explanation in a letter. When the letter of explanation had been received by the informal investigating committee, all the documents were sent to the Head Office. The informal investigators did not accept the explanation given by Mahlalela and also took note of his record of employment with the Bank which they considered unsatisfactory. He had received a number of

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number of warnings and, in the view of the committee, there were no mitigating factors. The shortcomings of Mahlalela were set out in the report of the committee to the Head Office.

The dismissal was contained in a letter from the Managing Director of Standard Chartered Bank Swaziland Limited dated 26th August 1991. It was clear and unambiguous. It alleged that Mhlalela acted in a dishonest manner by removing from the vouchers of the relevant day a post-dated cheque drawn on his account and by replacing it with a current cheque for the same amount. The statement of dismissal records that, because of this act, the Bank had "no option" but to terminate his services with immediate effect. It declared that the dismissal was "in terms of Article 4.2.1.2 of the Collective Agreement and Section 36 (b) of the Employment Act 1980". The article referred to is in the Disciplinary Code and Procedures which is Annexure A to the Collective Agreement entered into between the Swaziland Bank Employers Association and the Swaziland Union of Financial Institutions and Allied Workers. Collective Agreements of this kind are recognised in Part V1 of the Industrial Relations Act.

Article 4.2 sets out examples of offenses "which may lead to disciplinary action such as summary dismissal, written warning or verbal warning noted" and the relevant offence is described as follows:-

"Altering or

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"Altering or falsifying any certificates or documents (e.g. medical certificates, education documents and/or attendance register)". This provision may not be wholly apposite to what occurred in the present case but, as the Article does not purport to set out all the various kinds of misconduct which may justify summary dismissal or other forms of disciplinary measures mentioned it is adequate to draw the attention of the employee to the kind of

misconduct relied upon.

Section 36(b) of the Employment Act 1980 confers upon an employer the right to terminate the services of an employee, inter alia, because the employee is "guilty of a dishonest act" vis-a-vis his employer.

The correctness of the dismissal was contested and the matter was referred to the Commissioner of Labour who eventually certified that it was an unresolved dispute.

The Industrial Court took a narrow view of the matter to be decided and concluded, probably correctly, that Article 4.2.1.2 did not apply to the facts in the present case. It considered further that the conduct of Mahlalela did not constitute a "dishonest act" and held therefore that the Bank had not discharged the onus of proving that there were grounds for summary dismissal

summary dismissal. It recommended that Mahlalela be reinstated failing which he should be paid 6 months salary in lieu of reinstatement in addition to the terminal benefits to which he was entitled.

The Bank appealed to the High Court against the decision of the Industrial Court relying upon a matter of law, namely, the question of the proper interpretation of the words "dishonest act" in section 36(b) of the Employment Act.

The learned Chief Justice upheld the appeal finding that, in the context of the relationship between Mahlalela and the Bank, the act complained of was in law of a dishonest nature vis-a-vis the employer. After making this finding the learned Chief Justice said:-

"The gravity of the misdemeanour is of course a separate matter as is the question of any extenuating circumstances. Both notions are, I think, as relevant to this kind of situation as they are to a criminal case. Before his summary dismissal could be justified, the appellant also had to show that taking into account the circumstances - but because of that dishonest act -it was reasonable to terminate his employment.

What is

What is reasonable in any particular case is a question of fact. The integrity of its records, and its banking procedures, and the trustworthiness and reliability of its employees (especially those who are concerned with such things) are plainly important and relevant considerations in the present context, for a banker. On the other hand, the gravity of the complaint and the question of extenuating circumstances are also matters also to be considered."

The learned Chief Justice then rejected a contention by Counsel for the Bank that the Industrial Court had by clear implication itself found on the facts that it was unreasonable to dismiss Mahlalela. He allowed the appeal, set aside the judgment of the Industrial Court and remitted it "to determine after such submissions on the question as counsel may wish to make whether or not the dismissal of the respondent is shown by the applicant to be reasonable and, if not, what award should be made."

The Industrial Court then heard argument and came to the conclusion that the dismissal of Mahlalela was unreasonable taking into account all the surrounding circumstances. This part of the judgment concluded:-

"It is our finding that the respondent acted unreasonably in deciding to

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deciding to dismiss the Applicant from employment summarily." The reasons given for this conclusion will be dealt with later because it was upon a criticism of this reasoning that the Bank based its High Court application for the review which followed the judgment.

The review application was in the form of a notice of motion for an order reviewing and correcting and/or setting aside the order of the First Respondent, [the President of the Industrial Court] in his capacity as such, in respect of the Application to determine the unresolved dispute. The supporting affidavit by the Managing Director of the Bank contends, inter alia that the Industrial Court "failed to take into account relevant considerations as to the reasonableness of the Applicant's [the Bank's] decision to dismiss the 2nd Respondent [Mahlalela] "and "took irrelevant considerations into account in the process of determining that Applicant acted unreasonably" and that "the decision of the Industrial Court was unreasonable in the light of all the evidence that was led". It is said, in particular, that the Industrial Court failed to take into account the dishonest nature of the act of Mahlalela and the integrity of the Bank's records and trustworthiness of its employees as a major consideration. The fact that

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The fact that the Bank rejected the explanation given by Mahlalela was alleged to be an irrelevant consideration or one to which undue weight had been accorded. The mitigating factors which were taken into account as deposed to by Mrs Dlamini and the various factors considered by the committee of enquiry were also said to have been overlooked by the Industrial Court.

No answering affidavit was filed on behalf of the Industrial Court. Mahlalela, however, filed an affidavit denying the allegations in the relevant paragraphs of the affidavit of the Managing Director of the Bank. His denial must inevitably have been based upon what appeared in the judgment of the President of the Industrial Court because he had no knowledge of the matters which had been discussed and dealt with by the members of the committee. The result is that the High Court was not given any picture of what in fact was discussed and considered in the deliberations of the Industrial Court. The decision of the High Court must therefore be judged by the inferences which are to be drawn from the evidence and the judgment of the Industrial Court. This aspect of the matter will be dealt with

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be dealt with later in this judgment.

The learned Chief Justice criticised the judgment of the Industrial Court in failing specifically to deal with the importance to the Bank of having a staff upon which it could rely to maintain the integrity of its records. He concluded his judgment as follows:-

"Another tribunal might very well have concluded that a bank, in the circumstances, had proved that it had acted reasonably in dismissing summarily a teller. But that decision was a matter for the Industrial Court. It decided that the bank in this case had not shown that it acted reasonably. Although I consider that its failure to demonstrate its reasons, that it had already weighed the bank's need to insure the integrity of its staff and of its financial records, is open to serious criticism, I am not satisfied that the grounds for review have been made out. There was in my view a basis for the Industrial Court, as the arbiter of fact, to have decided as it did that the second respondent's action was not so serious as to justify dismissal. It is not, as my predecessor Hannah CJ said in Dlamini, the function of this court simply to substitute its own judgment for that of the

Industrial Court. The test of gross unreasonableness is a high one. I am not persuaded, as he was not, that it can probably be said that the Industrial Court's decision was grossly unreasonable. I am not persuaded, either, that the fact that its judgment does not demonstrate overtly that it did consider the importance to the bank of the integrity of its staff and of its records is sufficient to justify this court in intervening in a review."

The application was therefore dismissed with costs in favour of Mahlalela. It is the correctness of the above findings by the learned Chief Justice which is the issue in the present appeal. Appeals from the Industrial Court

Section 4(1) of the Industrial Relations Act provides for the establishment for an Industrial Court with all the powers and rights set out in the Act or any other law for the furtherance, securing and maintenance of good industrial relations in Swaziland. It consists of a person qualified to be a Judge of the High Court who is the President and two nominated members appointed by the President in consultation with the Labour Commissioner,

Commissioner, one from a panel of six names nominated by the Federation of Swaziland Employers and one from a panel of six names nominated by the industry unions or staff associations (sub-section(3) and (4). The jurisdiction of the Court is exclusive and includes the hearing and determination of trade disputes and grievances, the registration of collective agreements and the hearing and determination of matters relating to the registration of such agreements and in enjoining any organization or employee or employer from taking or continuing strike action or lockout (section 5)(I). Section 5(2) declares that any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the President. Upon all issues other than matters of law, the decision of the majority of the Court is the decision of the Court, but where the nominated members are not in agreement on any issue, the decision of the President is the decision of the Court (section 5) (3)

Sub-Section (4) of section 5 provides:-

"(4) Save that the President's decision made in terms of subsection (2) shall be appealable to the High Court and from there to the Court of Appeal no decision or order of the Court shall be subject

be subject to appeal to any other Court, but the High Court shall, at the request of any interested party be entitled to review the proceedings of the Court on grounds permissible at common law."

The proceedings presently before this Court are an appeal against a decision by the High Court on a review application seeking to set aside the finding of the Industrial Court. The High Court dismissed the review application, i.e. it refused to set aside the decision of the Industrial Court. The original decision giving rise to the review proceedings in the High Court was not a decision by the President in terms of sub-section (2) of Section 5, i.e. a matter of law arising for decision at a sitting of the court on a question as to whether a matter was one of law or fact. If it had been, an appeal would clearly have lain to this Court. The question for decision is whether the words "no decision or order of the court shall be subject to the appeal to any other court" have the effect of prohibiting an appeal from the decision of the High Court refusing to make any order upon a review application.

I do not think

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I do not think that we are here primarily concerned with a a decision or order of the Industrial court. What we have been asked to do is to consider the correctness of the decision of the High Court in the review application. It is true that, if the decision on the High Court is reversed by this Court, the order of the Industrial Court may have to be altered, but this does not mean that "a decision or order of the [Industrial] Court" has been the subject of an appeal to this Court. The merits of the decision of the Industrial Court are not before us save to the extent that they affect the decision of the High Court which is, indeed, before us.

The right of appeal to this Court depends ultimately upon the provisions of the Court of Appeal Act No. 74 of 1954 which defines the jurisdiction of the Court of Appeal in Criminal and Civil matters. Section 14 of the Act provides:-

"14 (1) An appeal shall lie to the Court of Appeal –

1. From all final judgments of the High Court; and
2. by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.

(2) The right

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(2) The right of appeal given by sub-section (1) shall apply only to judgments given in the excercise of the original jurisdiction of the High Court."

The order made by the High Court was a final order. The application by the Bank was for an order "reviewing and correcting and/or setting aside the order of the first respondent [the President of the Industrial Court] made on the 23rd March 1993 in respect of the application number 192/91". The order made by the Industrial Court was consequent upon a finding that the Bank acted unreasonably in deciding to dismiss Mahlalela summarily and was in the form of a direction that the Bank pay to Mahlalela an amount representing one month's notice pay and "additional" notice pay for a further five months. The effect of the decision of the High Court on review was thus, subject to any right of appeal, to dispose finally of the lis between the Bank and Mahlalela.

The next question is whether the judgment of the High Court was "given in the exercise of the original jurisdiction of the High Court" in terms of sub-section (2) of section 14 of the Appeal Court Act. The jurisdiction of the High Court of Swaziland is dealt with in sections 2, 4 and 5 of the High Court Act number 20 of 1954. Section 2 declares that the Court may, within the limits

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within the limits of and subject to the High Court Act or any other law "possess and exercise jurisdiction, power and authority vested in the Supreme Court of South Africa." Section 4 confers upon the High Court the power, jurisdiction and authority to review proceedings of all subordinate courts of justice within Swaziland and if necessary to set aside and correct the same. Section 5 provides that the High Court shall be a court of appeal from all magistrates courts in Swaziland with full power to reverse and vary all judgments, decisions and orders and to order a new trial or send a matter back with instructions as to further proceedings or, in criminal matters, impose a punishment which in its view should have been imposed at the

trial.

In the light of the above provisions of the High Court Act it would appear that the phrase "original jurisdiction" was intended to refer to all matters which are not appeals in terms of section 5 of the Act, i.e. matters falling within section 2 and reviews of decisions of subordinate courts of justice in terms of section 4. It is true that the word "appeal" has sometimes been held

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been held to include a review but the distinction drawn in sections 14 (2) and section 15 of the Appeal Court Act is between the "original jurisdiction of the High Court" and the civil "appellate jurisdiction" of that court. The High Court is the appropriate place to look for the distinction between those terms and it would seem clear that, if regard is had to sections 2, 4 and 5 of the High Court Act, the term "original jurisdiction" is appropriate to describe matters falling under sections 2 and 4 and "appellate jurisdiction" matters in terms of section 5.

It is not necessary for the purposes of the present case to discuss the question whether the Industrial Court is a "subordinate court of justice" within the meaning of that term in section 4 of the High Court Act or whether it falls within section 2 which would cover common law reviews. (of. South African Technical Officials Association v President of the Industrial Court and Others 1985 (1) SA 597 (A); Paper, Printing, Wood and Allied Workers Union v Pienaar and Others 1993 (4) SA 621 (A)). Provided it is not part of the appellate jurisdiction of the High Court i.e. does not fall within section 5, it seems to

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5, it seems to me that it forms a part of the "original jurisdiction" of the High Court and sub-section (2) of section 14 of the Court of Appeal Act does not apply. Section 15 of that Act need not be considered and no leave to appeal is necessary.

The analysis of the jurisdictional provisions of the Industrial Relations Act, the High Court and the Court of Appeal Act must take place against the background of the reluctance of a court to accept statutory exclusion or limitation upon its jurisdiction unless this is effected unambiguously by express words or by necessary implication (Welkom Village Management Board v Leteno) 1958 (1) SA 490 (A) at 502; SA Technical Officials Association v President of the Industrial Court (supra) at 613). Though the failure specifically to mention the Appeal Court in that part of sub-section (4) of section 5 of the Labour Relations Act dealing with reviews and the express mention of it in the portion of the sub-section dealing with appeals from the President's decisions under sub-section (2) is curious, it does not require by "necessary implication" the exclusion of the jurisdiction of the Appeal Court in the case of review proceedings. I am therefore of the view that the Appeal Court has jurisdiction in the present case to entertain an appeal from the decision of Industrial Court.

The merits of the Appeal

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The merits of the Appeal

Mr Flynn who appeared for the Bank took a simple approach. He said that there had been evidence that the Bank was in a position in which it could not afford to employ persons whose reliability was open to question. The matter may be stated in a number of ways but that is the essence of it. He then submitted that, in deciding on the reasonableness of the dismissal, this was a most important consideration and one which, if not considered at all, would give rise to an irregularity of sufficient magnitude to have required the exercise of review jurisdiction by the High Court. That the Industrial Court did not consider the question of the reasonableness of the dismissal from the point of view of the Bank and its unique position is proved, so he

contended, by the absence of any express mention of the matter in the second judgment of the Industrial Court which was the subject of the High Court review. I think it is also clear that the judgment of the Industrial Court does not contain any positive statement which tends to show that the position of the Bank vis-a-vis its employees was ignored.

The onus of

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The onus of proving, on a balance of probabilities, the facts upon which the application for review is based lies upon the Bank. The central issue upon which the review depends is whether or not the Industrial Court had regard to the necessity for the Bank to safeguard the integrity of its records and thus be entitled summarily to dismiss a person whose reliability sofar as bank records are concerned had been shown to be unsatisfactory. The extent to which a bank is in a different position to that of any other concern where the integrity of the books and records are of importance was debated in argument. I am prepared to assume that this is the case because the reputation of a bank depends very much upon the accuracy of its books and records, perhaps more so than most other business enterprises.

The learned Chief Justice criticized, and in my view correctly, the failure to mention in the judgment of the Industrial Court the peculiar position of a bank and its records and the right of the Bank to protect that situation. However, this does not mean that the Industrial Court was not at all times conscious of this fact. After all, this matter had been mentioned more than once in the evidence which had been led before it and had formed a part of the argument on behalf of the Bank at

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Bank at all stages of proceedings. In his judgment on the appeal the Chief Justice had stated:-

"The integrity of its [the Bank's] records and its banking procedures and the trustworthiness and reliability of its employees (especially those who are concerned with such things) are plainly important and relevant considerations in the present context, for a banker."

It seems to be common cause that, before the Industrial Court, after evidence had been led, this formed an important part of the submissions on behalf of the Bank. It would therefore seem very unlikely that the Industrial Court failed to take into consideration the position of the Bank and employees responsible for maintaining the records and laid-down procedures.

The Industrial Court when hearing the evidence and making up its mind as to the reasonableness or otherwise of the summary dismissal was carrying out a judicial function and remarks by courts concerning the necessity for a reasoned judgment are relevant. In Botes and Another v Nedbank Limited 1983 (3) SA 27(A) Corbett JA dealt with two features of the appeal before the Appellate Division in that matter. He said:-

The first

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"The first is that the Judge who heard the exception and application to strike out made the orders dismissing the exception and allowing, in part, the motion to strike out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues had been argued, litigants are entitled to be informed of the reasons for the Judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order

which he did."

Though the point raised by Corbett JA in the above passage regarding appeals has but limited application in the present case, the remarks concerning the interest of litigants in knowing the reasons for the final decision apply and it is important for the proper functioning of the Industrial Court that reasons should be given in cases where opposing arguments have been put forward. As far as the reasons for the conclusion of the court is concerned the following remarks of Davis AJA in RV Dhlumayo and Another 1948 (2) SA 677(A) at 702 are apposite:-

Indeed

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"Indeed, even in a written judgement it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in a judgment - more especially, of course, if that judgment be an oral and extempore one - they have not been taken into account by the trial Judge in arriving at his decision. No judgement can ever be perfect and all-embracing. It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked." In Dhlumayo's case Davis AJA refers with some diffidence to his judgment in Maitland and Kensington Bus Co. (Pty) Limited v Jennings 1940 CPD 489 where at page 496, dealing with the possibility that a magistrate had overlooked certain factors, he said:-

"I must say further that as to none of them is it at all likely that he did really overlook them. On the contrary, I think it highly improbable that he was allowed to do so, for I have no doubt that they were all brought to his attention by the very experienced attorney who appeared for the defendant and that in the manner of their presentation they lacked nothing either in force or

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in force or in perseverance."

The statement in Dhlumayo quoted above was relied upon in Federated Timbers Limited v Bosman and Others 1990 (3) SA 149 (W) at 153 which was a review matter.

I do not think that on the probabilities the Industrial Court failed to take account of the position of the Bank as the custodian of monies of the people and a body which had to ensure that its books and records were properly kept and its procedures which were laid down had been followed. As I have said, this was emphasized by witnesses for the Bank and not disputed by witnesses for Mahlalela and was brought to the attention to the Industrial Court by Counsel and emphasized by the learned Chief Justice in his judgment on the appeal. It can hardly have been overlooked by the members of the Industrial Court when the matter was remitted to them by the High Court.

There remains the consideration that the members of the Industrial Court did not file any affidavits stating positively that they did take into account relevant considerations to the issue of the reasonableness of Mahlalela's dismissal.

Rule 53(5)

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Rule 53(5) provides for the filing of affidavits by or on behalf of a party affected by the order

sought. In the present case that the Industrial Court did not oppose the application, but left it to Mahlalela to do so. Mahlalela denied the factual basis of the review application. While he himself had no direct evidence to contradict what had been said by the Managing Director of the Bank, he was as entitled to contend that the probabilities did not support the factual allegations made on behalf of the Bank. These were based also on inferences from facts which were common cause. I do not think that any inference in favour of the Bank can be drawn from the absence of affidavits from members of the Industrial Court. I can understand reluctance on the part of a body exercising a specialised jurisdiction to do anything which might assist or prejudice one of the parties before it. There may be cases where in review proceedings an affidavit from the deciding body is called for (of Pretoria North Town Council v A.I. Electric Ice Cream Factory (Pty) Ltd 1953(3) SA1A) but, in the present case I do not think that the members of the Industrial Court could be expected to make have made affidavits concerning their thought processes in coming to the decision which they did. After all there was judgment which, though perhaps not comprehensive did give reasons for their decision.
I am therefore

I am therefore of the view that the Bank has not established the facts upon which it relies in order to establish irregularities sufficient to justify setting aside the decision of the High Court. I would therefore dismiss the appeal with costs.

WHR SCHREINER

MELAMET JP

I agree and it is so ordered..

DUNN AJA

I agree

Delivered on the . . 1st..... day of .. July.....1994.