REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

REPORTABLE

OF INTEREST TO OTHER JUDGES

Case no: JR3392/10

In the matter between:

LAND BANK	**Applicant**
And	
L. NOWOSENETZ N.O.	**1st Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**2nd Respondent**
MZ MULANGAPHUMA	**3rd Respondent**

Heard: **9 January 2013**
Delivered: **27 February 2013**

JUDGMENT

HARDIE AJ

[1] This is an application for review brought in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") on 30 November 2010, in which the Applicant seeks to review and set aside an arbitration award made by the 1st Respondent ("the Commissioner") under the auspices of the 2nd Respondent on 2 November 2010 under CCMA case number GATW 6657- 10 in which the Commissioner found that the 3rd Respondent was dismissed by the Applicant as contemplated by section 186 (1) (e) of the Act and that such dismissal was unfair, and ordered the Applicant to pay the 3rd Respondent six months compensation in the sum of R325 000, 00 within 14 days of receipt of the award. This award which is annexed as "A" of the Applicant's review application, I shall refer to as "the award".

[2] The Applicant's grounds of review are essentially that the Commissioner so misconstrued the evidence before him that he committed a gross irregularity and came to a decision that no reasonable decision maker could have reached.

[3] Briefly, the essential facts are that the 3rd Respondent commenced employment with the Applicant on 1 May 2009 in the position of Trading Risk Manager, earning R650 000, 00 per annum. Arising from her resignation on 12 April 2010, which she thereafter attempted to retract, the 3rd Respondent referred an alleged constructive dismissal case to the 1st Respondent on 10 June 2010. At the arbitration before the 1st Respondent on 20 October 2010, neither the Applicant nor the 3rd Respondent was legally represented. The 3rd Respondent, who bore the onus of proving a dismissal, presented her evidence first. She was then cross- examined by the Applicant's representative, Mr S Macgregor ("Macgregor") after which she closed her case. After an adjournment of 15- 20 minutes, Macgregor commenced Applicant's closing argument after which the 3rd Respondent was given an opportunity to present hers. At paragraph [8] of the award, the Commissioner states under the heading "The Respondent's (the Applicant in these proceedings) case" that "No witnesses were called by the Respondent. It closed its case". At paragraph [10], the Commissioner states "In assessing the evidence only the version of the Applicant (3rd Respondent in these proceedings) is

before me. The Respondent (Applicant in these proceedings) did not call any witnesses.

[4] Prior to legal argument being advanced before me, and because the review record contained irrelevant as well as duplicated documents, the matter stood down for the parties' legal representatives to reach agreement on the relevant parts of the review record that the Court should have regard to in considering the review application. Thus, in referring to the transcript of the arbitration ("transcript"), I will use the typed and not the handwritten numbering in the top right hand corner in this judgment.

[5] Ex *mero motu*, I asked the parties' legal representatives to address me on the fact that it appeared from the transcript that the Commissioner had adjourned the arbitration at the conclusion of the 3rd Respondent's case for 15- 20 minutes for the Applicant to present its evidence, but that after the adjournment, this had not occurred. Instead, Macgregor launched straight into his closing argument on behalf of the Applicant without any intervention or clarification on the part of the Commissioner. This appears from pages 53 and 54 of the transcript.

[6] Mr Moshoana on behalf of the 3rd Respondent submitted that it is clear from the transcript that the Commissioner indicated on two occasions to Macgregor what the process was. The first appears at pages 43 and 44 of the transcript at lines 11- 21 and 1- 25 respectively and then again at page 53 at lines 1- 15 which is a synopsis of what was said at pages 43 and 44 and reads as follows:-

"Commissioner: Very well. I just want to make it clear again that you have to deal with the entire case, the entire dispute that is before me at this stage and not just rebutting whether there was dismissal or not. I hope you are very clear about it. I do not want any misunderstandings later on in the day that you did not understand. There will not be another process to investigate whether if there was a dismissal it was fair or not a fair dismissal. You will not get another opportunity as far as the Applicant (3rd Respondent in these proceedings) is concerned. You will get an opportunity as far as the Company is concerned to place any facts you with (*sic)* to place but you will not get a further opportunity with the

Applicant (3rd Respondent in these proceedings). She closes her case now.

Mr Macgregor: I understand.

Commissioner: And now the Company presents its case in its entirety, just as her case in its entirety is now closed.

Mr Macgregor: I understand. Thank you."

The arbitration was then adjourned for tea and upon resumption, the Commissioner says "Alright, the Applicant (3rd Respondent in these proceedings) is finished with her case and you can now proceed." Macgregor then proceeded to make his closing statement based upon the documentary evidence and the 3rd Respondent's evidence without any intervention on the part of the Commissioner.

[7] Mr Mer on behalf of the Applicant submitted that it was not necessary for the Applicant to lead evidence at the arbitration as the 3rd Respondent on her own version, had not proved a dismissal.

[8] In raising this issue *mero motu* with the parties, I was guided by what has now been articulated in paragraph 21 of the Guidelines on Misconduct Arbitrations published by the 1st Respondent in terms of section 115(2)(g) of the Act and which became effective on 1 January 2011 ("the Guidelines"), namely that where it is evident that during the arbitration either representative does not understand the nature of proceedings and that this is prejudicing the presentation of either of their cases, the Commissioner is to alert the party to this. Whilst the Guidelines were not in effect when the Commissioner made his award, it is clear from them that they were developed by the 1st Respondent in accordance with judgments that are binding on it such as the Klaasen judgement referred to below. Paragraph 21.1. makes it clear that one such instance where the Commissioner should draw this to the attention of a party, is where that party fails to lead evidence of its version under oath or affirmation.

[9] Paragraph 21 mirrors paragraph 12.1. of the Guidelines in that a Commissioner must conduct an arbitration in a manner that the

Commissioner considers appropriate to deal with the substantial merits of the dispute with the minimum of legal formalities and in doing so should not allow technicalities to prevent the full picture of relevant events being placed before the Commissioner. Paragraph 33 indicates that where one or both parties are unrepresented or where a representative is not experienced, an inquisitorial approach will often be appropriate. Paragraph 40 states that the Commissioner may suggest that the parties lead evidence on a particular issue relevant to the dismissal in order to gain a full understanding of the issues in dispute or call a witness for that purpose.

[10] It is clear the purpose of the interventions of the Commissioner referred to in paragraph 6 above was to explain to Macgregor that constructive dismissal arbitrations were not conducted in two stages, but in one sitting. Pursuant thereto and prior to the adjournment, the Commissioner indicated that upon resumption the Applicant would present its case in its entirety. When Macgregor then launched straight into his closing argument after the resumption of the arbitration, there is nothing on record which indicates that the Commissioner sought to warn Macgregor of the consequences of not leading evidence to rebut what the Commissioner must have considered to be a *prima facie* case of constructive dismissal that had been established by the 3rd Respondent.

[11] In Klaasen v CCMA & others (2005) 14 LC 1.25.9 at paragraphs [26]- [28], Murphy AJ, in the context of an employee not testifying in a misconduct case, held as follows:-

"[26] In the employment law context, where there is evidence directly implicating an employee in misconduct, or which is adverse to his or her version, such employee cannot afford to leave that evidence unanswered. Although the commissioner would not be obliged to accept that evidence solely on the grounds that it was uncontradicted, provided it is credible, it is unlikely to be rejected if the employee has chosen not to deny or contradict it. An employee's failure to testify will always strengthen the case of the employer (see Hoffmann & Zeffertt The South African Law of

Evidence at 598- 599. Nevertheless, it is clearly not an invariable rule that an adverse inference be drawn or that the uncontradicted version should stand. In the final analysis the decision must depend upon the circumstances of the litigation. And, accordingly, in instances such as the present, a commissioner would be justified in drawing an adverse inference or accepting an uncontradicted version ***only if he has cautioned the unrepresented litigant that his failure to testify might lead to that result.*** (this portion is highlighted for the purposes of this judgement).

[27] Commissioners acting under the auspices of the CCMA in terms of the LRA are expected to act inquisitorially or investigatively. Section 138(1) of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities. ***This includes stepping into the arena to direct the proceedings in the interests of justice.*** (this portion is highlighted for the purposes of this judgement). *In Consolidated Wire Industries (Pty) Ltd v CCMA [1999] 10 BLLR 1025 (LC) the Labour Court stated:*

> *"The parties were laymen unrepresented by legal practitioners and without the benefit of pleadings to tie the parties to a version.*
>
> *When a version is charged [sic:changed] or a new version is suddenly presented the arbitrator must take charge of proceedings. He cannot rely on the parties to realise what it expected of them unaided."*

[28] By the same token, and perhaps even more so, one might expect the commissioner to take charge by instructing a party to put a version(of which he is aware) under oath or risk the consequence of an adverse inference or his acceptance of the uncontradicted testimony. ***The failure to give that warning, in the light of a commissioner's inquisitorial***

function and duties, in my assessment, constitutes a reviewable irregularity. (this portion is highlighted for the purposes of this judgement)."

[12] I find no reason why this dictum should also not apply to employers in constructive dismissal cases. The Commissioner should have warned Macgregor that his failure to lead evidence under oath meant that the Applicant risked the consequence of an adverse inference being drawn or the Commissioner accepting the uncontradicted testimony of the 3rd Respondent.

[13] Indeed, the Commissioner should have gone one step further. Given that the parties were unrepresented, he should have insisted on hearing evidence from the Applicant relating for instance, to the steps taken to address the grievances that had been lodged by the 3rd Respondent. The Commissioner made a finding that there was a history of unresolved grievances and a paper trail to support the 3rd Respondent, without having all the substantial merits of the dispute before him. It was incumbent upon him, in the interests of justice, to require the Applicant to lead evidence on what it had done to address the grievances, if anything, before making a finding that there was a history of them being unresolved.

[14] I am persuaded therefore that the Commissioner committed a reviewable irregularity on the grounds articulated in paragraphs [12] and [13] above and that his award stands to be set aside.

[15] That brings me to what relief is appropriate in these circumstances. Whilst I am mindful that substantial time has elapsed since the 3rd Respondent resigned and claimed constructive dismissal, given that all the substantial merits of the dispute were not canvassed at the arbitration, I am in no position to substitute my decision for that of the Commissioner.

[16] The Applicant has asked for an order of costs. I am not inclined to grant it as the Applicant never raised the review grounds upon which the arbitration award is being set aside, in its review application. Besides, the award is reviewable because the Commissioner erred in the conduct of the arbitration in not adopting a fair process.

I therefore make the following order:

1. The 1st Respondent's arbitration award made under the auspices of the 2nd Respondent on 2 November 2010 under CCMA case number GATW 6657- 10 in which he found that the 3rd Respondent was dismissed by the Applicant as contemplated by section 186 (1) (e) of the Act and that such dismissal was unfair, and ordered the Applicant to pay the 3rd Respondent six months compensation in the sum of R325 000, 00 within 14 days of receipt of the award, is hereby reviewed and set aside.
2. The dispute between the parties is remitted to the 2nd Respondent to be arbitrated *de novo* by a commissioner other than the 1st Respondent within four weeks of this order or such other time period as the parties may agree.
3. There is no order as to costs.

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S B Hardie

Acting Judge

APPEARANCES

APPLICANT:	Mr D Mer of Fluxmans Incorporated, Rosebank
THIRD RESPONDENT:	Mr G Moshoana of Mohlaba and Moshoana Inc, Johannesburg