

**IN THE LABOUR COURT OF SOUTH AFRICA**

**CASE NUMBER J 239/99**

**In the matter between :**

**KAROS LEISURE (PTY) LIMITED t/a  
MÖVENPICK**

**Applicant**

**and**

**THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**RICHARD BYRNE  
Respondent**

**Second**

**ANNAH NGOMANE**

**Third Respondent**

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**J U D G E M E N T**

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**KENNEDY A J**

[1] The Applicant seeks to review an arbitration award of the Second Respondent, a Commissioner of the Commission for Conciliation, Mediation and Arbitration ("***the Arbitrator***"). The arbitration proceedings arose from a decision taken on 28th August 1998 by the Applicant at the conclusion of a disciplinary enquiry, in which the Third Respondent was found guilty of dishonesty and the removal of company property, and she was dismissed.

[2] The only issue before the Arbitrator was whether or not the dismissal was substantively fair. Procedural fairness was not in dispute. The Arbitrator concluded, in his award delivered on the 18th December 1998, that the dismissal of the Third Respondent was substantively unfair in that "**her dismissal was not appropriate**". He ordered the Applicant to reinstate her with effect from 20th November 1998.

[3] The review application, brought in terms of section 145 of the Labour Relations Act, No 64 of 1995, is not opposed by any of the Respondents. The grounds on which the Applicant seeks to review and set aside the award of the Arbitrator are, in the main, concerned with the manner in which the Arbitrator conducted the proceedings. In effect, the main grounds advanced are to the effect that the Arbitrator irregularly and unfairly restricted the evidence and argument.

[4] Section 138(1) of the Labour Relations Act provides that:

***"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."***

That section gives a considerable measure of discretion to Commissioners conducting arbitrations under the Labour Relations Act. For sound practical reasons, it eschews formalism and seeks to achieve the speedy resolution of labour disputes. However, as the section indicates, such disputes are to be resolved not only "**quickly**" but also "**fairly**". Fairness is of course an overriding and fundamental objective of the Act. When the approach of a Commissioner is such that, in an effort to dispose of the proceedings speedily, the requirements of fair procedure are overlooked or ignored, and this prevents the parties one of them from being heard fully and properly, this may constitute unreasonable and unfair action, and indeed gross irregularity, of such a nature which may render the entire proceedings, and the award which is delivered, liable to be set aside on review.

[5] In the present matter, the uncontradicted evidence contained in the founding affidavit of the Applicant is to the effect that the Arbitrator stated that he was in a hurry to return to Johannesburg and that he might have to leave the proceedings before they were concluded. Accordingly, another Commissioner sat with him during the proceedings, on the stated basis that if the Arbitrator who had been appointed to preside over the arbitration, had to leave early, the second Commissioner would then conclude the matter, after hearing all the evidence. The proceedings were however concluded speedily

and the Arbitrator did not leave before the end of the hearing of evidence. At the end of the arbitration proceedings, the Arbitrator indicated that he intended to deliver his findings immediately after a brief adjournment of a few minutes, when he left the room together with the other Commissioner, apparently conferred with him, and then returned a few minutes later to deliver the award. This approach is in my view highly questionable. The Second Respondent alone had been appointed as the Arbitrator to preside over the arbitration proceedings and to decide the matter and to deliver his award. The other Commissioner had not been so appointed. It appears to me to be clearly inappropriate that the sole Arbitrator appointed to preside over the proceedings should confer with anyone else in such a manner.

[6] There are a number of features which are of particular concern in relation to how the proceedings were conducted. In the first place, it is apparent from the founding affidavit, and it has not been disputed either by the Arbitrator or any of the other Respondents, that during the arbitration proceedings, the Third Respondent, being the employee dismissed by the present Applicant, and who contended before the Arbitrator that her dismissal was unfair, was not called to give any evidence. The Arbitrator appears to have relied first on statements made on the Third Respondent's behalf by her union representative, Mr Rakolle, and second on the evidence

which she had given previously before the disciplinary enquiry prior to her dismissal. The statements by Mr Rakolle during the arbitration proceeding, were only hearsay statements and not evidence given under oath. The Third Respondent did not give any such evidence of her own under oath, not did the Applicant's representative have the opportunity to cross-examine her. In my view, there is considerable merit in the submission of Ms Fulton, the Applicant's attorney who appeared at the hearing of this application, that the Third Respondent's testimony and her account of relevant events was crucial to a fair hearing and that it was a gross irregularity for the Arbitrator to allow the Third Respondent to advance her case through her representative and to deny the Applicant's representative the opportunity to cross-examine her.

See in this regard **B & D Mines (Pty) Limited v Sebotha N.O and Another [1998] 6 BLLR 573 (LC) at 574 I to 575 H**

[7] This problem was exacerbated by the fact that the Arbitrator relied selectively on what had previously been advanced on the Third Respondent's behalf during the disciplinary enquiry. In particular he referred to and apparently accepted without more the statement made by the Third Respondent during that disciplinary enquiry that she had been instructed by her supervisor, Ms Julia

Ngomane, that she had to throw away the dish towels which were subsequently found in her possession and which she was found guilty of stealing. During the disciplinary enquiry, the Third Respondent had called Ms Ngomane as a witness to corroborate her evidence in that regard. However, Ms Ngomane had contradicted her evidence and denied having told the Third Respondent to throw away the dish cloths. The Arbitrator appears to have ignored this evidence or at least did not properly apply his mind to it. Furthermore, the Applicant's representative at the arbitration proceedings had intended to call Ms Ngomane to testify to the effect that she had in fact instructed the Third Respondent to use the dish towels for cleaning. It appears from the uncontradicted and detailed description by the deponent to the Applicant's founding and supplementary affidavits that the Arbitrator conducted the proceedings with inappropriate haste, and he failed to afford the Applicant's representative an opportunity to call Ms Ngomane. By precluding the Applicant's representative from leading evidence which was clearly relevant, the Arbitrator again acted in an irregular and unfair manner.

**Afrox Limited v Laka and Others [1999] 5 BLLR 467 (LC) at 489**

**D - G;**

**Legal Aid Board v John N.O and Another [1998] 4 BLLR 400 (LC)**  
**at 404 G - I**

[8] It is also apparent from the evidence before me that the Arbitrator failed to allow or to call for closing argument after the conclusion of the evidence. The affidavits of the Applicant's deponent state that at the conclusion of evidence, and without calling for closing argument, the Arbitrator stated that he was ready to make a finding, he left the room and returned approximately two minutes later, and stated that the sanction in respect of the Third Respondent was too severe and that a written warning would have been more appropriate. The only evidence before me that might call into question this averment is a reference in the handwritten notes of the Arbitrator which, under the heading of closing argument, sets out only three lines of cryptic notes. Two lines of those appear to relate to argument on behalf of the Applicant reading:

***"Contention that forgot, is unlikely. Discussed daily. Rejects kept for cleaning purposes."***

This relates to one small aspect of the entire enquiry before the Arbitrator. It is highly unlikely that there was any detailed argument canvassing the other relevant issues if there was no note of this.

Furthermore, the Arbitrator has not filed any explanatory affidavit or other statement which places in question the clear evidence of the Applicant's deponent, Mr Norris, who was its representative at the arbitration proceedings. It is supported also by the version of Mr Norris that after the Arbitrator had handed down his findings, Mr Norris attempted to refer the Arbitrator to legal principles concerning dishonesty in cases such as **Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC)** and **Standard Bank of South Africa v CCMA and Others [1998] 6 BLLR 622 (LC) at 632 D**. Significantly the notes of the Arbitrator contain a reference to those two cases, but that note appears after the passage in the Arbitrator's notes setting out, again in cryptic form, the findings and reasons of the Arbitrator in upholding the claim of the Third Respondent. It would therefore appear clearly that the Arbitrator did not allow or invite closing argument at the crucial stage, *viz* before a decision was made. This in my view, constitutes a gross irregularity.

**Mutual and Federal Insurance Company Limited v CCMA [1997] 12 BLLR 1610 (LC) at 1616 A - H**

[9] I am accordingly satisfied that the defects in the proceedings constitute gross irregularities and proper grounds for reviewing and setting aside the decision of the Arbitrator. It

accordingly is unnecessary for me to deal with the other grounds raised by Ms Fulton in challenging the Arbitrator's award.

[10] Ms Fulton submitted that in the event that the award is set aside, the matter should not be remitted to the CCMA for arbitration by another Commissioner, but that based on the evidence before me as presented to the arbitration, this Court should substitute its own decision for that of the Arbitrator. I am not persuaded by this submission. It appears that there are a number of factual questions which require to be properly ventilated by means of oral evidence and cross-examination to deal with the various issues, such as the harshness of the penalty. In my view, it would be inappropriate for this Court to reach such conclusions merely on the basis of the evidence presented to the Arbitrator, particularly where that evidence was unnecessarily limited by the Arbitrator.

[11] In the result I grant the following order:

(a) The arbitration award of Commissioner R Byrne dated 18 December 1998 in CCMA case number MP 8226 is hereby reviewed and set aside.

(b) The matter is to be remitted to the Commission for

Conciliation, Mediation and Arbitration for a fresh hearing of the matter before a Commissioner other than the Second Respondent.

(c) There is no order as to costs.

**PAUL KENNEDY  
ACTING JUDGE OF THE  
LABOUR COURT  
20 AUGUST 1999**

**Date of hearing : 17th August 1999  
Date of judgment: 20th August 1999**

**Applicant represented by: Ms K Fulton  
Applicant's Attorneys: Bowman Gilfillan Hayman Godfrey  
Inc**

**No appearance for the Respondents**