

# IN THE LABOUR COURT OF SOUTH AFRICA

Held in Johannesburg

**Case No :J 1433/97**

In the matter between :

Applicant

and

1<sup>st</sup> Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND**

2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent

## **JUDGMENT**

**LYSTER, AJ**

1.This is an application in terms of s 145 of the LRA for the review of an award issued by 3<sup>rd</sup> Respondent (the CCMA commissioner) in which he ordered compensation to be paid to the 1<sup>st</sup> Respondent (the employee) arising out of procedural unfairness.

2.The common cause facts are as follows :

- 2.1 The Applicant/Employer is a contract cleaning company supplying cleaners and cleaning services to various customers;
- 2.2 The Respondent/Employee was a cleaner in the employ of the Applicant from 26 November 1996 until her dismissal for theft on 23 May 1997;
- 2.3 On 20 May 1997, and in writing, the Respondent/Employee admitted having taken two toilet rolls from the Applicant/Employer's customer without permission;
- 2.4 Consequent upon such admission, a disciplinary hearing was held on 22 May 1997 at which hearing the Respondent/Employee again admitted stealing the toilet rolls in writing and further that she knew why she was at the hearing.
- 3.1 The matter was referred to conciliation and arbitration. Applicant called two witnesses, who led evidence and were cross examined.
- 3.2 Applicant's version is that the employee's case was given by her trade union representative, that the employee tendered no evidence whatsoever and that this irregularity was specifically drawn to the arbitrator's attention during the course of the arbitration.
- 3.3 In his award, the 3<sup>rd</sup> Respondent i.e. the arbitrator, implies that the First Respondent did give evidence, in that he uses words in his award such as "the employee testified" and "the employee argued that .."
- 3.4 However, the 3<sup>rd</sup> Respondent's hand written notes, which were available as part of the CCMA record, with a typed transcription reveal that the proceedings unfolded as follows:
- 3.4.1 The issues in dispute were recorded by the 3<sup>rd</sup> Respondent
- 3.4.2 The common cause issues were recorded i.e. that the First Respondent was a cleaner, that she was dismissed for taking two toilet rolls, and that a disciplinary hearing was held.
- 3.4.3 Applicant's witnesses (i.e Respondents at the CCMA) evidence was then recorded, as well as their cross examination by the trade union representative. It is clear from his notes that two witnesses testified for Applicant, Thys Johannes Niewenhuyzen and Susy Mahlangu, and that re-examination took place

thereafter.

3.4.4 The next subheading recorded by the 3<sup>rd</sup> Respondent in his notes is “closing argument” i.e it is clear *ex-facie* these notes that the First Respondent employee did not testify at all.

3.4.5 Applicant’s (Respondent at the CCMA) closing argument is then summarized by the second in his notes. He records the following :

“Elsie has not contradicted any of the evidence given by witnesses. Respondent’s evidence must stand - given under oath. Arbitrator (must) ignore anything given by trade union because not under oath. Respondent not given the opportunity, evidence by trade union not true”

The Remainder of the closing argument is then recorded.

3.5.1 The matter is taken further by Applicant’s chairman in his founding affidavit. He attended the CCMA hearing and was present during this proceedings. He states as follows in his affidavit :

“A discussion arose whether the employee should testify. The Respondent’s representative, whose name I cannot recall, stated that he had testified on behalf of the employ and there was nothing, under the circumstances, for the employee to come and say. The commissioner said there was no duty upon the employee to testify at all and he thereupon called upon the parties to address him with their final argument.”

3.5.2 The founding affidavit continues as follows;

“It is my respectful submission that:

3.The Applicant was denied an opportunity to cross-examine the employee regarding the dismissal procedure.

4.Various aspects of the testimony of the Applicant’s witnesses were challenged but could not be clarified by cross-examination of the employee.

5.The Respondent’s representative did not testify.

6.The Respondent’s representative did not give any evidence under oath.

7.Had he testified, the Respondent’s representative’s evidence would, nevertheless, have been hearsay.

8.The Applicant was denied the opportunity of cross-examining the Respondent’s representative.”

3.6 In reply, First Respondent (the employee) says she did give evidence under oath.

4.The 3<sup>rd</sup> Respondent, in his award, found that her dismissal was fair on substantive grounds, but on procedural grounds found that it was unfair. In his analysis of evidence, he deals with the issue of procedural unfairness in two sentences, as follows :

“As regards procedural unfairness, code of Good practice Item 4 states that the employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. I was not persuaded by the form the employer used, more especially because the employers evidence contradicted with that of his witness”.

5. Applicant attacks the 3<sup>rd</sup> Respondent’s award on various grounds, the gist of which was that 3<sup>rd</sup> Respondent had committed a gross irregularity by making findings of law and fact based on the “evidence” of the employee when, on Applicant’s version, there was no such evidence, and that he held that the First Respondent need not testify, and did not in fact permit her to testify or be cross examined.

6. With regard to the dispute of fact which arises as to whether First Respondent did testify or not, I must have regard to :

- 6.1 The detailed notes of 3<sup>rd</sup> Respondent from which it appears that First Respondent did not testify
- 6.2 The detailed notes of 3<sup>rd</sup> Respondent in which he records the employer’s argument and objection and the failure of First Respondent to give evidence.
- 6.3 The founding affidavit of Applicant chairman, who was present at the CCMA hearing, and who states that no evidence was given by the First Respondent
- 6.4 The award of the Third Respondent in which he implies that First Respondent testified.
- 6.5 The replying affidavit of First Respondent in which she states that she did testify.

7. Insofar as there is a dispute of fact, it is appropriate to refer to the principle laid down in **Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd 1984 (3) SA (AD) 620** where the Court held as follows:

“In certain cases the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5) (g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. There may be

exceptions to this general rule, eg where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

7.2 By application of these principles, there is no doubt whatever in my mind as to whose version this Court should accept, and I accordingly accept the version of the Applicant that there was no evidence under oath by First Respondent, and there was no opportunity to cross examine her.

8.1 I deal now with First Respondent’s failure to call for evidence from Third Respondent. The common cause facts did not include any concessions by the Applicant employer as to whether or not the notice of disciplinary enquiry was understood by the First Respondent. In the sense that 3<sup>rd</sup> Respondent’s award was based entirely on this aspect, his failure to cause First Respondent to give evidence under oath in regard thereto, particularly where there was evidence from the employer that the notice had been understood, would be regarded as a gross irregularity.

8.2 The fact that the Act permits a party at the CCMA to be represented by an authorized representative cannot mean that the representative may put the case on behalf of the party (see du Toit et al The Labour Relations of 1995 Butterworths, 2<sup>nd</sup> Edition 1998 at 323). Where all the facts are common cause, and all that is required is argument, then it is appropriate to permit the parties’ representative to conduct those arguments. However where a representative purports to place disputed evidence before a tribunal and the other party is denied an opportunity to cross examine the party in order to test that evidence, a commissioner who permits such a state of affairs, and then goes onto base his award on such disputed evidence as if it were proved, commits a gross irregularity.

8. On this basis alone, the award is reviewable, and is set aside. The Application is therefore granted, with costs. The matter is remitted back to the CCMA for hearing by a commissioner other than the 3<sup>rd</sup> Respondent.

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R. Lyster

Acting Judge - Labour Court of S. A.

17 May 2000

25 May 2000