NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN CASE NO. JR 531/01

In the matter between :

RAINBOW DRIVERS & CREWS (PTY) LTD Applicant

and

THE COMMISSION OF CONCILIATION MEDIATION AND ARBITRATION First Respondent

PROFESSOR MZUNGULU MTHOMBENI

Second Respondent

QWAKA VELILE ORCHARD Third

Respondent

JUDGMENT

PILLEMER, AJ:

[1] The Applicant dismissed the Third Respondent from its employment. He challenged that dismissal as being unfair utilising the procedures available to him in the Labour Relations Act, 1995. The matter proceeded as an arbitration under the auspices of the First Respondent. The Second Respondent, a Commissioner employed by Second Respondent was appointed arbitrator. He heard the evidence of two witnesses, one called by the Applicant and the Third Respondent testified in support of his case.

[2] The transcript of the record of the hearing contains numerous portions where what was said was indistinct and the transcriber captures this by the use of the word “indistinct” in brackets. There are also times when the transcriber cannot hear what is being said because two people are speaking at the same time and a note is made on the transcript to record this difficulty.

In spite of these problems with the transcript it nonetheless presents a reasonably full picture of what occurred at the arbitration and of the evidence that was given at the hearing.

[3] The managing director of the Applicant, a Mr Nkosi, conducted the case on behalf of the Applicant. He did not do a particularly good job. He was inept and failed to lead evidence central to his case. In fact he was probably the most important witness for the

Respondent, if evidence was to be lead to contradict the version of the Third Respondent, yet he elected not to testify. The witness he did call did not take the matter particularly far and did not deal at all with the allegations of procedural unfairness. It was an aspect that ought to have been dealt with fully because the Third Respondent contended that the disciplinary process was a sham. He testified that a person who was described as a partner of Mr Nkosi, a Mr Skinner, had only nominally presided. In fact according to him Mr Nkosi took control of the proceedings and in effect dismissed him. He was the witness, prosecutor and judge notwithstanding Mr Skinner's presence. Without any evidence to gainsay this version, which on the performance of Nkosi at the arbitration was not improbable, the arbitrator could make no other finding on the evidence before him than that the dismissal was unfair. He also decided that the deterioration in the employment relationship was such that it was inappropriate to order reinstatement and awarded compensation.

[4] Although there are challenges to the reasoning of the arbitrator on the basis that some of the factual conclusions to which he came cannot properly be deduced from evidence on the record, I am of the opinion that this feature is of little moment. I take that view because the record, as I indicated, is not 100% complete with the result that there may well have been evidence in the portions that

were indistinct to justify the factual findings in respect of which the complaint has been made. These complaints were not set out in the founding papers and were simply argued on the basis of the record. More importantly however I am satisfied that on the evidence that was given the finding to which the arbitrator came was the correct one and, in those circumstances, even if legitimate criticisms of his reasoning or factual findings can be made they are of no relevance in the final outcome. On the evidence before him he came to the correct legal conclusion, so even if his reasoning is faulty, the award ought not to be set aside on that ground alone.

[5] In the main argument advanced by the Applicant's counsel he relied upon the constitutional right to fair labour practices and upon section 138 of the Labour Relations Act which 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 and must deal with the substantial merits of the dispute with the minimum of legal formalities. It was argued that the commissioner was too preoccupied with dealing with the matter quickly with the result that this impacted upon his duty to do so fairly. There are two passages in the transcript which reveal that the commissioner was at times impatient with Mr Nkosi's questioning and pointed out to him that he had another arbitration later in the day and would like to complete the present one expeditiously. In my opinion those comments

> are of little moment and do not amount to a reviewable irregularity. What was pressed in argument was that in his zeal to ensure that the matter moved quickly the arbitrator fell short of his duty to advise unrepresented parties of the consequence of the failure to lead evidence on matters where there was direct evidence which they may be able to contradict. This it was argued rendered the proceedings unfair and constituted misconduct in the conduct of the proceedings making the award reviewable.

[6] The point in general terms is a good one. There obviously is a duty upon commissioners to assist laymen in the conduct of their arbitrations. The court has on a number of occasions set aside awards where this has not occurred. The following examples are illustrative. In *Dimbaza Foundries Limited v CCMA and Others* (1999) 20 ILJ 1763(LC), it was held that a commissioner is obliged to guide the process and to be alert to a layman representative's lack of legal training. The commissioner's failure to postpone the matter *mero moto* so as to enable the employer to produce the necessary witnesses and his consequent findings on the limited evidence presented to him was found to constitute a reviewable defect. In *Consolidated Wire Industries Proprietary Limited the CCMA and Others* [1999] 10 BLLR 1025 (LC), it was held that where laymen are involved the commissioner must take charge of the proceedings when a version is changed or a new one suddenly presented and cannot simply rely on

the parties to realise what is expected of them unaided. In *Char Technology Proprietary Limited v Nnisi and Others* (2000) 7 BLLR778 (LC) a commissioner was found to be obliged to explain proceedings, rules of evidence and the manner of dealing with documents to the parties at the outset. In *East Cape Agricultural Co-operative v Du Plessis and Others* (2000) 9 BLLR1027 (LC) it was held that a commissioner cannot find against a party on a point not canvassed during the hearing, that he is obliged to call for documentation when it appears material, explain the procedure he intends to follow and narrow and explain the issues at the outset of proceedings. In *DB Thermal Proprietary Limited v CCMA and Others* (2000) 10 BLLR1163 (LC) it was held that the commissioner is obliged to advise lay clients on the evidence that should be led. In *Scholtz v Commissioner Masekono and Others* (2000) 21 ILJ1854 (LC) it was held that a commissioner is obliged to inform parties about his discretion to allow legal representation about the status of a written statement and about the influence that he could draw from the failure to give oral testimony.

[7] The Applicant relies upon misconduct by the commissioner and it bears the *onus* of establishing that misconduct. While the record may in an appropriate case be all that is required because it speaks for itself, generally, the averments should be made expressly and clearly in the founding papers. In that way the commissioner is afforded

an opportunity of dealing with the criticism of his conduct and is afforded a proper opportunity to set out factual matters which may well be relevant. In this case for instance if the complaints that were made in argument had also been clearly set out in the affidavits the arbitrator would have been able to explain what it is that he did if anything, in advising the parties of the process and the need to give evidence or that he satisfied himself that that had access to such advice and assistance. It may well be that there were matters which were canvassed before the matter was formally recorded, which as I understand it, often occurs before the matter proceeds formally and on record. If the allegations of misconduct by the arbitrator are not made in the founding affidavit then it is generally not open to a party to rely on acts of misconduct which do not emerge plainly from the record itself. In this case the founding affidavit only makes the complaint in the following terms:-

"Mr Skinner did not give evidence because I did not realise that his evidence was necessary. It should have become apparent to the Second Respondent that the evidence of this witness was relevant. In order to support the Applicant's defence it became apparent to me during the proceedings that I required the attendance of Mr Skinner. I applied for a postponement during the proceedings but the Second Respondent refused this. I submit the Applicant was severely prejudiced in its defence of the allegations because of the failure of the Second Respondent to permit the Applicant to properly

present its case".

There is nothing on the record which indicates that a postponement was sought. It is most improbable on a reading of the record as a whole, even taking into account that there are portions that are indistinct that such an application was in fact made. So while it is true that the record contains passages that are indistinct, the complaint as set out in the founding affidavit contradicts the approach adopted in argument. In argument it was submitted that the commissioner had a duty to explain to the Applicant that it was essential for the Applicant to call Mr Skinner as a witness and for Mr Nkosi himself to testify. On the affidavit it is alleged that the misconduct arose as a result of a so-called refusal to postpone the matter in order to enable Mr Nkosi to call further witnesses. The contradiction is obvious - if Nkosi had indeed applied for leave to call further witnesses he would have appreciated that it was necessary to do so and needed no explanation. I assume that the contention that a postponement was refused was not persisted in during argument because that is not supported by the record at all which, if anything, suggests that Nkosi was unsure of whether or not he should call further witnesses, but not that he was refused a postponement.

[8] An Applicant who alleges relatively serious misconduct

against a commissioner should do so expressly and clearly so that the commissioner is in a position to deal with those criticisms. In my view this was not done in the present case. I am not satisfied that the Applicant has established that the commissioner was guilty of an irregularity in the conduct of the proceedings and, as I indicated above, the conclusion to which he came on the evidence before him was in my view the correct one.

[9] In those circumstances I take the view that the review should fail. The application is dismissed with costs.

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PILLEMER, AJ

Date of hearing: 23 January 2003

Date of Judgment: 31 January 2003.

For Applicant: Allardice and Partners.

For Respondent: Mashego Attorneys