

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICAHELD AT JOHANNESBURGDATE: 16 March 2000CASE NO. J1038/99

In the matter between:

CHAR TECHNOLOGY (PTY) LTD

Applicant

and

PETER MNISI AND OTHERS

Respondents

J U D G M E N T

PILLAY, AJ:

- [1] Commissioners of the CCMA are instructed during their training to conduct arbitration proceedings. They are aware, therefore, that after they introduce themselves to the parties at an arbitration they should outline the process to them. The detail of the outline will depend on the level of experience of the parties. The commissioner should, therefore, ascertain the experience of the parties at the outset. In their training arbitrators are briefed to ensure that the parties are aware inter alia of the format of the proceedings and of their rights to call and cross-examine witnesses. The commissioners should also be make the parties aware of the consequences of their failure to do and ensure thatthey are aware of how documentary evidence should be dealt with. Lay people often assume that documents are automatically admissible as evidence of the truth of their contents. By making these introductory remarks, the commissioner absolves himself or herself from intervening or failing to intervene in the course of the arbitration to remind the parties of their obligations. If such intervention is made when the proceedings are under way it could lead

to the commissioner being perceived as favouring one or other party.

[2] If commissioners approach arbitrations by complying with these instructions of their training they cannot be faulted if, thereafter, a party fails to present its case properly. It is a matter of great concern to this court that some commissioners continue to disregard the instructions they receive during their training. Whilst it is acknowledged that many commissioners carry a heavy workload, the cost of not abiding by basic rules of arbitration are far greater to all concerned, including the CCMA, than the cost of taking sufficient care to do the job properly the first time round.

[3] In this arbitration under review the commissioner failed to observe these instructions of his training. As a result the applicant has been prejudiced in that it was not warned of the consequences of its failure to call witnesses at the arbitration. It was also not warned that the documentary evidence would not be admissible as evidence of the truth of their contents if they were not proved at the arbitration or if there was no agreement about them with the respondent.

[4] This is the primary basis for concluding that the commissioner committed an irregularity in this case. As a result of this irregularity the applicant failed to present a proper case at the arbitration.

[5] From the record it would appear that Mr Steyn and Mr Mashegana, the representative for the third respondent, were knowledgeable about the disciplinary proceedings. It is not evident that they were au fait with the rules of evidence in arbitration proceedings. As a general rule the Act does not permit legal representation in misconduct and incapacity dismissal arbitrations. The commissioners must anticipate that the parties appearing before them would not all be competent to the same degree to present their cases. It does not necessarily follow that because a company has a large turnover or that a union has a large membership that their representatives would be capable of presenting their cases without guidance from the commissioner.

[6] The transcript of the proceedings is quite incoherent in many parts and the court is left to speculate as to what was said and meant. The award is also not helpful in that the commissioner has not set out clearly whether he took into account certain facts such as those that were common cause between the parties. It is also not clear what facts were considered in concluding that the dismissal was procedurally unfair,

assuming that he came to such a conclusion. It is difficult to say therefore whether the mistake of fact about Mr Mokoena not being called at the enquiry was material or not. If it went to proving the procedural fairness it would have been an irregularity. However it would not on its own have rendered the award reviewable if there were other grounds on which the commissioner found procedural unfairness.

[7] But, as I have stated above, the court is faced with the difficulty of not knowing whether there was in fact a finding of procedural unfairness. The mere fact that the evidence is poor or inadequate would not necessarily render an award reviewable. The parties remain responsible for the quality and content of the evidence at the arbitration. The commissioner has no onus to call witnesses unless the proceedings are inquisitorial, which most arbitrations of the CCMA are not. It is true that the commissioner had only one version on which to base his reasons. However, that was a consequence of the commissioner's own conduct in failing to warn the Applicant of the failure to call witnesses and to prove and agree documents.

[8] I mention in passing that the commissioner failed to quantify the award. If this matter had come before this court for an order in terms of section 158(1)(c) of the Act, it would have had to be referred back to the CCMA for quantification.

[9] The commissioner committed therefore a gross irregularity in not alerting the parties to the procedure for leading evidence at the outset. The award is therefore reviewable and is set aside. The matter is referred back to the CCMA to be heard afresh by another commissioner. There is no order as to costs.

PILLAY, AJ

LABOUR COURT OF SOUTH AFRICA

: MR PIETER PAUW

: Sampson Okes Higgins

: ADV Z CAMROODIEN

: Cheadle Thompson & Haysom

: 16 MARCH 2000