IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J3304/98

In the matter between

Applicant

and

Respondent

JUDGMENT

PILLAY AJ

1.Arbitration proceedings before the CCMA are expected to be conducted 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."* [section 138 (1) of the Labour Relations Act of 1995 ("the Act")]

2.Section 138(1) anticipates that the commissioner would balance robustness with fairness in order to deal with the dispute substantively.

3.In an application in terms of section 145 of the Act the award must be considered as a whole and in the context of section 138(1) before it can be set aside. Nitpicking through every shrapnel of evidence that was considered or not considered by the commissioner is not the correct approach. Commissioners have to merely provide "brief reasons" [section 138(7)(a)] for their awards. And for so long as such brief reasons connect rationally to justify the results of the arbitration, an award should not be set aside.

4.It is the Applicant's responsibility to ensure that Rule 7A(8) is complied with. If the arbitration was not properly recorded, the Applicant cannot be faulted. However, it also means that in the absence of agreement between the parties as to the correctness of the whole or parts of the record, the Court cannot have regard to it if it is not clear. [**Director-General Department of Labour v Claasen and Another (1998) 19 ILJ 1142 LC**.]

5.The parties in this case could not agree on the record of the arbitration. Accordingly, the Court has not had regard to it, except insofar as matters are common cause between the parties or the record is clear.

6.The primary complaint of the Applicant is that the commissioner attached weight to evidence of the Fourth Respondent and his witness when such evidence was not put to the Applicant's witness under cross-examination. Furthermore it was submitted that the commissioner's failure to intervene by calling or advising the Applicant to recall its witnesses also vitiated the award.

7.Although the Applicant has not specified which sub-section of section 145 was being relied upon, it would appear from the submissions that the complaint was in terms of Section 145(2)(ii).

8.The Applicant relied on **President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)** which is summarised in the head-note at page 5F to 6A:

"... that the institution of cross-examination not only constituted a right, it also imposed certain obligations. As a general rule, it was essential, when it was intended to suggest that a witness was not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation was intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending her or his character. If a point in dispute was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the unchallenged witness's testimony was accepted as correct. The precise nature of the imputation should be made clear to the witness so that it could be met and destroyed, particularly where the imputation relied upon inferences to be drawn from other evidence in the proceedings. It should be made clear that not only that the evidence was *to be challenged but also* how *it was to be challenged. This was so because the witness had to be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance was to be placed. The rule was, of course, not an inflexible one. Where it was quite clear that prior notice had been given to the witness that his or her honesty was being impeached or such in intention was otherwise manifest or where a story being told by a witness may have been of so incredible and romancing a nature*

that the most effective cross-examination would be to ask her or him to leave the box, it was not necessary to cross-examine on the point. These rules relating to the duty to cross-examine obviously had not to be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But sight of their object could not be lost. Its proper observance was owed to pauper and prince alike."

9.In arbitration proceedings at the CCMA, the commissioner should, at the outset, when advising the parties on how arbitration works, inform them of the rights and obligations relating to cross-examination and the consequences of failing to put a version to the witness. If this is done, then the parties cannot complain that they were not aware of the rules of cross-examination, or that the commissioner did not intervene to give direction to the process. Putting a version under cross-examination in arbitration proceedings, where there are no detailed pleadings to speak of, can be a critical step which, if not followed, may result in an irregularity if the commissioner's decision is based on the evidence as if it is uncontested.

10.However, the omission by the commissioner to alert the parties at the outset of the rules of cross-examination does not amount to an irregularity in the circumstances of this case. While the evidence was material, it was not the only reason for preferring the Fourth Respondent's version over that of the Applicant's. Firstly, the commissioner found that the Applicant's witness had contradicted themselves. Perhaps the commissioner put it too highly by concluding that witness Snyman's evidence about insubordination and gross insubordination amounted to a changing of the evidence. However, this does not render the award reviewable.

11.Secondly, the commissioner found that Fourth Respondent's version was corroborated.

12.Thirdly, he correctly concluded that the onus rested on the Applicant to prove the fairness of the dismissal.

13.Fourthly, the commissioner was alive to the contradiction in the Fourth Respondent's case.

14.Faced with two opposing versions, the commissioner adopted the correct approach by turning to the provisions of section 192(2) of the Act.

15.The award of compensation when the misconduct was not proved is, on the face of it, disingenuous. However, the fact of the matter is that the Applicant has made serious allegations of misconduct which go to the root of the relationship. Irrespective of whether such allegations are true or not, they have been made. Although the commissioner does not spell out the reasons for awarding compensation instead of reinstatement, it is not inconsistent with the overall tenor of his reasons on finding that the dismissal was unfair.

16.The application is dismissed with costs.

D PILLAY A J

Acting Judge of the Labour Court

: 24 March 2000

NT: 24 March 2000

G van der Westhuizen

MacRobert de Villiers Lunnon & Tindall Inc

Advocate A Bava

Tayod Kamdar & Associates