REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C1123/01

DATE OF HEARING: 09-09-02

DATE OF JUDGMENT: 13-09-02

In the matter between:

SERENITE WELLNESS CENTRE (PTY) LTD Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

VICKY SMITH Second Respondent

SUSAN GALE Third Respondent

J U D G M E N T

PILLAY D, J:

The background to this review in terms of section 145 of the Labour Relations Act No. 66 1995 (the "LRA") is as follows: In November 1999 the applicant offered the third respondent employment as a senior therapist. The third respondent declined the offer. The applicant improved the offer by inviting the third respondent to serve as manager and at a higher salary. The third respondent accepted this offer. It is common cause that as the third respondent was experienced in the hospitality, tourism and therapy industries and not as a spa manager, the contract of employment provided as follows at paragraph 1:

"*1. Taking over full responsibility after three months and training in case of absence of the assistant manager/manageress and/or the spa owners or*

general manager.

...

3. You will be required to serve an initial three month period of probation. During this probationary period there will be a mutual assessment on an ongoing basis to evaluate your performance, skill, conduct, compatibility, knowledge and suitability. Subject to the successful completion of the probationary period your permanent employment to this position will be confirmed."

The third respondent commenced employment on probation as a manager of the therapy centre on 2 May 2000. It is common cause that on 20 July 2000 the applicant issued the third respondent with a warning for poor performance, insufficient management and organisational skills. The warning begins as follows:

"*It has been 10 weeks that we have been watching your performance*

an trying verbally to guide you and to give you the proper input that you need to manage the spa. All our talking, guiding, directing, training and communication didn't help not to write this letter of disappointment today. You have a very small amount of people to manage and even with five therapists you have an assistant manager who is perfectly skilled and professional and prepared to help you at any time. There are many things that we are not happy about, I would just mention a few of them."

The warning concludes thus:

"*We are willing to give you two weeks more to improve your service to the company and to demonstrate your management skills. We expect you to organise the spa on your own and (not) to phone reception constantly as they have their own load of responsibilities. You have to be able to work self-sufficiently and be responsible for the guests and their management. If that does not improve within the next two weeks we will have no other option as to follow further the prescribed procedures by labour law. I would just like to point out your unacceptable behaviour when I was not yet ready to talk to you and you wanted to enforce a meeting with me. Furthermore, accusing me of verbal abuse is absolutely unacceptable and I will not tolerate it anymore. I, as your superior, have rights to talk to you and make an appointment at a time which suits me and rights to present everything to you in*

writing as I do not want to talk to staff in such matters without witnesses."

There is no evidence of any prior written warning being issued or any notes of counselling having been kept or given to the third respondent. On the same day, the applicant issued the third respondent with a final warning and summoned her to a disciplinary hearing to be held on 24 July 2000 at 09h00.

On 24 July 2000 the third respondent lodged a grievance against the Brands, the owners and representatives of the applicant, on several grounds, including Mrs Brand's lack of professional courtesy and decorum, her failure to provide training relevant to the third respondent's position after stating in the first six to seven weeks of the latter's employment that she was "*the perfect person for the job*". This resulted in the disciplinary enquiry being postponed and eventually heard on 7 August 2000.

The charges were:

a. not acting in good faith;
b. not showing the necessary respect for superiors, a reference to an incident on 20 July 2000; and
c. the most serious conduct in breach of contract.

The enquiry was chaired by the applicant's labour consultant, who found that the respondent had been given the necessary training and guidance, that she was not performing to the standard and

recommended, as the alternative to terminating the contract of employment, that she be offered the position of health therapist consultant. A final written warning was issued on 8 August 2000.

On 17 August 2000, the applicant informed the third respondent that it could no longer employ her as a manageress of the spa. Her contract was terminated with effect from 10 August 2000. She was then offered the position of a senior therapist from 20 August 2000 at a lower salary.

Through her attorney, third respondent declined the offer of alternative employment. On 22 August 2000 the applicant gave her further notice of the termination of her contract as spa manageress with effect from 22 September 2000. Purportedly this notice was on the grounds of the third respondent's alleged “insufficient” performance as a manageress and “serious cases of misconduct” against her. The applicant also accused the third respondent of entering Mrs Brand's office and throwing away a fax addressed to the applicant. This, it was alleged, was "*another case of serious misconduct and disrespect of a superior unheard of in more than three decades of professional career*".

On 6 September 2000, the applicant informed the third respondent that the management and administration of the spa was transferred to another employee, Anra Lubbe. The applicant reserved its right to take legal action for damages if the applicant

received "*any negative feedback from guests or staff members about bad-talking or actions*".

On 15 September 2000 the third respondent queried certain deductions that had been made from her commission. Anra Lubbe, who had since left the applicant, testified for the third respondent as follows about this incident at the arbitration:

"*Mrs Brand just absolutely lost self-control and I immediately remembered of the day she slammed my hand on the door but she totally, totally lost it. She called Susie over and over again what a stupid bastard she was and she said to Susie that she is so materialistic and that she has got everything in life - she's got a husband, she's got children, she's got business and what has Susie have, she's got nothing. And she kept screaming and screaming at Susie what a stupid stupid bastard she was and she phoned her husband and he came down and he asked Susie to leave the premises and Susie said she would only do that if they give it to her in writing. Susie was absolutely traumatised. I mean Elizabeth actually looked like she was physically going to hit Susie, attack her. She was coming up to her face close and I personally think she called Dr Brand whenever she lost her temper because he always calms her down.*

<u>MS GALE:</u> Were there any witnesses there besides you? --- Ja my friend Simone was doing a treatment at Steenberg Estate, the golf estate. Vanessa, the manager there, she was actually receiving her treatment at that stage from Simone and she was sitting upright and she said to Simone 'who's screaming that way?' and

they could hear that 'stupid bastard, stupid bastard, stupid bastard' being yelled over and over again."

On 26 September 2000 the second respondent met with the manager, Truter Hellman, to collect her salary. She was presented with a prepared document which stated, *inter alia*, that she did not have any further claims against the applicant or its owners. The third respondent handed the letter to the applicant stating that she will accept payment of all monies due to her under her contract of employment without prejudice to her rights to refer the dismissal dispute to the CCMA. She was then paid by cheque.

That night at about 23h03 she received an e-mail from the Brands stating that they would cancel the cheques first thing the next morning if they did not receive a fax stating that she would not go ahead with arbitration. Payment of the cheques was stopped. Tthe third respondent was eventually paid at the end of October 2000, after the intervention of her attorneys. The dispute was then conciliated and arbitrated over two days on 13 July and 12 September 2001.

Against this factual background the Commissioner reasoned as follows:

"*It is relevant that the employee did not warrant she had previous experience of managing a spa. Where the owner knowingly appoints an employee lacking the required skills it has a more onerous duty to offer the necessary assistance. (See Buthelezi v*

Amalgamated Beverages Industry [1999] 9 BLLR 907 LC). The responsibility lies with the employer to provide the employee with the necessary support and engender a workplace climate in which to perform. The Courts have said in the case of a trainee the employer is obliged to give specific training (see Gostelow v Datakor Holdings [1993] 14 ILJ 171 IC). It is not simply up to the employee to perform correctly, but the employer has a key role in developing this eventuality.

The Code of Good Practice: Dismissals states at item 8 that an employer should give probationary employees appropriate evaluation and instruction, training, guidance and/or counselling. In Gostelow, supra, the Court held that the employer should involve itself appropriately in assisting with under performance and cannot simply adopt an armchair approach to the underperformance. In addressing performance problems the employer should have counselled much earlier than 20 July and issued progressive warnings. Counselling implies a two-way communication process where the employer spells out the standard expected of the employee, points out the shortcomings relative to the standard, allows the employee to respond to the allegations; if necessary, engages in a joint problem-solving discussion, gives assistance and then gives the employee a reasonable opportunity to improve. This process is intended to be motivational and pro-active. It is only after the counselling has been done, preferably face-to-face, and when no improvement occurs, that formal warnings should be issued. Mrs Brand relied upon memoranda addressed chiefly to the therapists' minutes of

management meetings and Lubbe showing the employee the ropes. This, in my view, did not constitute an appropriate evaluation, instruction training or guidance. Although Mrs Brand claimed she had spoken hundreds of times to the employee, no instances of these discussions were led in evidence. There is therefore no evidence of counselling before 20 July.

It is important to distinguish between warnings for poor performance and warnings for misconduct. The incident where Mrs Brand believed the employee to have accused her of lying is an incident of misconduct and not a performance. Warnings are usually progressive and are intended to correct the employee's performance or conduct. It is clear that in issuing the final warning on 20 July and simultaneously notifying the employee of a disciplinary enquiry this is inconsistent and contrary to the purpose of warnings - as no opportunity was given to change or improve her conduct. Two allegations against the employees at the disciplinary enquiry were for misconduct, the third being for under-performance. A finding should have been made by the chairman, Dr Brandt. Instead the second final warning dated 8 August is issued for misconduct. No mention is made of the allegation of under-performance. No evidence was led by Mrs Brandt that after the warning for poor performance and receipt of the employee's grievances in response thereto, that any meetings or discussion between the parties took place in order to address these specific issues. Neither was any evidence led that the issues of poor performance had deteriorated after 20 July. It is therefore unfair and unacceptable that the same allegations were raised by the

employers at the incapacity hearing. The period between 20 July and 5 August, the date on which the notification for the incapacity hearing was given, was two weeks and insufficient,

I determine, for the employee to acquire the management and organisation skills.

In the case of poor performance it is preferable to consider alternatives to dismissal. This had been proposed by the employer and recommended by the chairman. When the employee did not respond to the offer of demotion, for whatever reason, it was appropriate to dismiss. Dr Brandt gave one month's notice in terms of the contract, giving the reason as underperformance. There then was the incident on 15 September where the employee questioned deductions from her commission, Mrs Brandt used abusive language and Dr Brandt ordered the employee off the premises, thus prematurely curtailing the notice period. This second dismissal is unprocedural, however, I exercise my judicial discretion not to award compensation for this as it was clear that the employee knew and accepted she already was on notice. It was clear the relationship between the parties had soured, the parties were more sensitive and neither, I deduce, were inclined to make the relationship work for the duration of the notice period.

I am satisfied that the notice period was paid in full.

In summarising, I determine that the procedure to dismiss for incapacity had been unfair in that the inappropriate evaluation, guidance, instruction had been given and insufficient and inappropriate training had been given. The only attempt to

'counsel' the employee was done in writing on 20 July, two weeks before the end of the probation period, and when the employee responded, no meeting was held to discuss the issues. Instead a disciplinary enquiry followed immediately by an incapacity hearing.

In considering Schedule 8 Item 9 which sets out the guidelines determining whether the dismissal was for a fair reason, I am not persuaded that the employer made it clear what the performance standards were. There is a difference between duties expected of an employee and required performance standards. Mrs Brandt attempted to set the standards in her letter of 20 July. It was clear from the employee's evidence that she was aware of her duties but not aware of the required performance standards prior to that date. Where the employee was not aware of the employment standards and then was given two weeks to attain those standards without training, this cannot be regarded as a fair opportunity.

I find on a balance of probabilities, that the reason for the dismissal was unfair."

The principal ground of this review is that the second respondent allegedly committed gross irregularities in the conduct of the proceedings within the meaning of section 145(2) of the LRA, alternatively that the award was not justifiable. More specifically, the applicant pleaded that:

1. The Commissioner accepted as evidence a 74 page statement, allegedly prepared by the third respondent's attorneys.

2. The Commissioner allegedly denied the applicant an opportunity to address her in closing after she specifically requested an opportunity to do so.
3. The applicant's representatives were not informed that if they left the arbitration without cross-examining then the third respondent's version would be accepted.
4. The Commissioner had a duty to explain to the Brands the consequences of leaving without cross-examining because they were foreigners, not familiar with the adversarial proceedings.
5. The Commissioner failed to consider that the third respondent was dismissed, not only for poor performance, but also for misconduct.
6. The Commissioner failed to consider the applicant's attempts to counsel the third respondent for poor performance.
7. The Commissioner ignored documents which set out the third respondent's remuneration and consequently miscalculated the award of compensation by an extra R26 000,00.
8. The Commissioner failed to have regard to the fact that the third respondent had received her final wages in full and final settlement of any dispute against the applicant.
9. The Commissioner should not have disregarded the applicant's offer of alternative employment to third respondent.
10. The Commissioner failed in her duty to determine the exact origin of the third respondent's statement.
11. The Commissioner refused to accept written closing argument from the applicant.
12. The Commissioner awarded compensation that was objectively unjustifiable.

13. The proceedings were so confused and disjointed that it would have been impossible for the Commissioner to make an objectively justifiable award based on the evidence properly before her.

Notwithstanding the last ground, the applicant persisted in its prayer that the Court should determine the matter in favour of the applicant. This prayer was, however, abandoned in the applicant's heads of argument and substituted with a request that it be referred back to another commissioner for a rehearing.

It is common cause that gross irregularity is one that results in prejudice (Bester v Easi Gas (Pty) Ltd & Another 1993(1) SA 30 CPD 42-43; Moloi v Euijen & Others [1997] 8 BLLR 1022 LC).

12. It is also common cause that the third respondent and the Brands, more particularly Mrs Brand, misbehaved at the arbitration proceedings which were frequently interrupted by vitriolic exchanges. Despite her five years experience, the Commissioner had great difficulty in subduing the parties, especially Mrs Brand, in order to manage the process. Mrs Brand's sense of self-importance and arrogance is manifest from the following utterances she made shortly before the Brands walked out of the arbitration:

"*I am the chairman of four charity organisations; business woman in association with Pam Golding. I couldn't go to her birthday today, I sent her flowers, because of that case. I am the chairman,*

have been the chairman of Women International Club, who has brought... I am in the Nelson Mandela Trust, I am in all kinds of organisations trying, to bring to South Africa, now she's accusing me."

Parties who are disruptive at arbitration cannot thereby earn themselves a review later on the ground that the commissioner failed to control the process. They are the authors of their own misfortune insofar as they deny themselves the opportunity of a fair hearing. However, this general approach is qualified by the fact that it remains the duty of the Commissioner to ensure that the process is fair and the award justifiable.

It is all very well for Mr Steltzner to submit for the applicant, as he now does, that the Commissioner should have adopted an inquisitorial approach to prevent the process from becoming chaotic. That is speculative. I also doubt that an inquisitorial procedure would have subdued the irrepressible Mrs Brand. If the Commissioner was deprived of the opportunity of calm and dispassionate observation, it was as a result of the bad manners of the parties and not her own doing.

The applicant's main complaint was about the admission of the third respondent's statement and related not only to its content, which was an emotive mixture of evidence and argument liberally sprinkled with vitriol, but also the manner in which it was presented. The third respondent was allowed to read this

statement. In doing so she did not follow the sequence of the script but read from different parts of it, thereby confusing the Brands. As she was reading fast, they, as foreigners, had difficulty in understanding her. This triggered their subsequent walk-out from the process, so it was submitted for the applicant.

The reading of a statement in trial proceedings is not allowed as a rule. Witnesses are required to give their evidence *viva voce* by recollecting from memory. The reading of evidence from a prepared statement creates scope for the coaching of witnesses. However, as Mr Kahanovitz for the third respondent pointed out, it may be permitted in certain situations, for example the presentation of evidence of expert witnesses and formal evidence such as at an inquest and the reading of contemporaneous statements (S v Heller & Another 1964(1) 520 (W) at 521H-522C). It is, therefore, not a *per se* irregularity such as that contemplated by Mahomed, CJ in S v Shikunga & Another 2000(1) SA 616 NM SC.

If the Brands had difficulty in following the third respondent's "evidence" they were neither shy nor fearful of the Commissioner to ask for help. The Commissioner did assist them whenever they were unable to follow the narrative by pointing out the parts of the text being read. However, the Brands did not remain in the process until the end to see whether the Commissioner would address their concerns. The Commissioner was mindful that great weight could not be placed on the statement.

Although she qualified in another jurisdiction, Mrs Brand was an attorney. No person, least of all an attorney, can reasonably assume that she can walk out of a statutory tribunal without running the risk of prejudicing herself.

The Brands first indicated their desire to leave the process when the third respondent started to make reference to the transcript of the proceedings of the previous hearing. They were offered an opportunity to study the transcript, which they declined. They remained in the process for a substantial part of the presentation of the third respondent's case. Their parting statements were, *inter alia*:

"*ARBITRATOR: I'm really saying please do not walk out. MRS BRANDT: Yes I will I have proven all the documents, please if you can record that I have proven all the warning incapacity, I have (done) everything I could do. I have been advised by the Labour Law Act, I have been advised by the lady which is the CCMA, South Africa, the black lady which has stayed with us which you can see her comments here I have been advised by her what to do. She is the director of CCMA, South Africa.*

ARBITRATOR: Alright Madam, I really - the same lady... [intervention]

MRS BRANDT: No I told you...[intervention]

ARBITRATOR: That same lady would advise you not to leave right now...[intervention]

MRS BRANDT: Yes but fine I am just...[intervention]

ARBITRATOR: and we've had this discussion before, I really don't

believe it's in your interest.

MR BRANDT: No, but I don't want -, but you see that case has been prepared by an attorney...[intervention] You will award whatever you want to do Ms Smith.

ARBITRATOR: ...is quite (indistinct), you know, quite (indistinct) part of the process...[intervention]

MRS BRANDT: It's in your hands. Exactly. It's in your hands You can award whatever you want to award.

ARBITRATOR: Do you understand...[intervention]

MRS BRANDT: I have got rights to go further...[intervention]

ARBITRATOR: You have.

MRS BRANDT: ...to go to Labour Court, to advise my attorney.... I have been working in a professional she's going to tell you now how I must run my own business, which I have invested millions and millions and millions and I've given employment to so many people in South Africa and now she's going to tell me how I must run my business Mrs Brandt. I want to reserve my rights today, here, I want to be recorded I want to reserve my rights that... [intervention]

ARBITRATOR: That's what you said at the beginning.

MRS BRANDT: That's it, I will consult tomorrow with top attorney which I know them in Cape Town. I pay them R1500 or I will go my way. That's what I'm going to do, because I don't need... [intervention]

ARBITRATOR: Okay, but you do understand that I have to proceed?

MRS BRANDT: Yes, you can proceed.

ARBITRATOR: *Okay.*

MRS BRANDT: *You can proceed you are welcome to proceed.*"

The appeal to this Court to find that the Brands were helpless and overwhelmed by the process is unconvincing. The complaint that the Commissioner did not warn them of the consequences rings hollow. The Commissioner appealed to the Brands to remain in the process on several occasions. They were also in contact with their legal advisers.

The Brands' principle objection to the reading of the statement was because they believed that it had been prepared by the third respondent's legal representatives. Besides the direct and undisputed evidence of one Paul Cole, who delivered an affidavit in the review application confirming that he had assisted the third respondent in preparing the statement, the applicant persisted that the content of the statement evidenced the assistance of an attorney. This submission is entirely speculative.

I am not persuaded that the Brands did not understand the third respondent's narration. They periodically dismissed it as "*an abuse*". In the circumstances, even if the Brands could not follow the proceedings when the applicant was reading her statement and did not have the opportunity to cross-examine, they have no one but themselves to blame. (Gimini Indent Agencies CC t/a S & A Marketing v CCMA & Others [1999] 20 ILJ 2872 LC at paragraphs 8-11)

The Commissioner had also repeatedly reminded the parties of their right to be cross-examined.

The Commissioner had indicated that the applicant would have an opportunity to address her in closing. By a letter dated 16 September 2001 the Brands explained that they left the arbitration because they considered the third respondent's alleged attacks on them personally for more than three hours were not in line with the purpose of giving evidence about proper work performance and the dismissal. The third respondent's evidence, they said, was simply an ongoing violation, victimisation and "*dismantling*" of their personalities. They then stated that the final closing statements would be delivered within 14 days.

This they said without first having obtained leave of the Commissioner. On leaving the process, Mrs Brand had said that the Commissioner could go ahead and make the award. There was therefore no need for the Commissioner to anticipate further submissions. Whether the closing argument ever came to the attention of the Commissioner is not evident. There is also no evidence that the Commissioner refused to consider the closing argument. This ground of review is not sustainable on the evidence before me.

From the extract of the Commissioner's reasoning quoted above, it is clear that the Commissioner did consider the charges of

misconduct against the third respondent. By focusing on incapacity as being the reason for dismissal the Commissioner de-emphasised the significance of the alleged misconduct. This was to the advantage of the applicant, as it would appear from the award that the Commissioner was not convinced of the fairness of the dismissal for misconduct. In any event she was not prepared to award any compensation to the third respondent on that ground.

On the facts before her the Commissioner's finding that there was no evidence of any discussions after the warnings for poor performance was issued on 20 July 2000 was entirely justifiable. She also found that the applicant should have counselled the third respondent earlier than 20 July 2000 and issued progressive warnings. The only attempt to counsel the third respondent, she concluded, was done in writing on 20 July 2000, that is two weeks before the end of the probation. This ground of review must also fail.

The contention that the Commissioner should have had regard to the third respondent having received her wages in full and final settlement of any disputes between the parties, can also not succeed as the applicant did not raise at the arbitration or as an *in limine* ground of review in these proceedings that the dispute had been settled. The evidence of the alleged settlement was more disadvantageous to the applicant as it appeared to be aimed at depriving the third respondent of her right to refer the dispute to arbitration.

Whether the third respondent was offered alternative employment is irrelevant as the applicant has failed to prove that the third respondent had performed poorly, despite being trained and counselled.

A further ground of review raised in argument was that Ms Lubbe was assisted by the third respondent who provided her with notes to prime her. Ms Lubbe stated at the arbitration that the note was not even about the question that was being asked and offered the note to Mrs Brand to see. Apparently satisfied with what she saw, the arbitration continued. To raise this as a ground of review now is spurious.

With regard to the calculation of the applicant's remuneration, the third respondent’s evidence was contradicted by the documentary evidence. The Commissioner ought to have reconciled these contradictions. In terms of the contract of employment the applicant's gross remuneration at the time of the dismissal was R7 974 per month and not R9 394, as stated by the Commissioner.

But for the computation of the compensation, the award is manifestly rational and justifiable on the basis of the material properly before the Commissioner. Even if the third respondent's “evidence” in the form of the statement is ignored altogether, the award is sustainable purely on the evidence of the applicant and the common cause facts. Furthermore, the disruption of the

process by the parties did not prevent the Commission from applying an objective and judicious mind to the dispute.

In view of these findings, I have not dealt with the other grounds of review which were, in any event, not in themselves sufficient to overturn the Commissioner's decision.

With regard to costs I take into account that the applicant was partially successful. The award must, therefore, be corrected. I grant an order in the following terms:

1. The award of the Commissioner dated 4 October 2001 under CCMA case number WE37589 is reviewed and corrected by the substitution of the following:

"*The employer shall pay the employee compensation of 12 months' remuneration at the rate of R7 974 per month payable in 12 equal instalments of R7 974 subject to normal tax, the first payment being made on 1 November 2001 and on the first of each subsequent month thereafter, failing which the outstanding balance will become due within seven days of any payment not being made and interest at the rate of 15.5% shall become applicable.*"

2. The applicant shall pay 60% of the third respondent's costs.

_____

JUDGE D PILLAY

FOR THE APPLICANT	:	ADVOCATE STELTZNER
INSTRUCTED BY	:	ATTORNEY IRISH ASHMAN
FOR THE RESPONDENT	:	ADVOCATE KAHANOVITZ
INSTRUCTED BY	:	BERNADT VUKIC POTASH & GETZ