IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C1214/2001

In the matter between:

DAIRYBELLE (PTY) LTD	Applicant
And	
NGCOLA HEMPE N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (EASTERN CAPE)	Second Respondent
FOOD AND ALLIED WORKERS' UNION on behalf of 10 members	Third Respondent

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JUDGMENT

WAGLAY J:

[1] The Applicant seeks to have reviewed and set aside an arbitration award handed down by the first respondent, under the auspices of the second respondent, in which he found the dismissals of the members of the third respondent (hereinafter "the employees") were substantively unfair. First respondent ordered that the employees be reinstated with back pay.

[2] The employees, who were employed as store workers in the Applicant's cheese

factory, were dismissed pursuant to a disciplinary hearing in which they were charged with various acts of misconduct allegedly occurring on 16, 19 and 29 May 2000. The specific offences with which the employees were charged were as follows:

(i) they left their work stations without authorization of their superior;

(ii) they left the Applicant's premises before the completion of their normal working hours;

(iii) they neglected to report that their work was complete ;

(iv) they blatantly refused to comply with a lawful and reasonable instruction of their superior; and

(v) they acted in a cheeky manner both verbally and through their attitudes towards their superior.

[3] The outcome of the disciplinary hearing was that the employees were found guilty of all charges of misconduct. The chairperson at the disciplinary hearing, one De Vos who also represented the applicant at the CCMA arbitration, concluded that the appropriate sanction was dismissal, although the employees were offered, and refused, the choice of accepting an "Alternative to Dismissal" (ATD). Nothing came of the subsequent appeal and they were accordingly dismissed by the applicant.

[4] The employees referred their dispute to the second respondent, the CCMA, alleging that their dismissals had been unfair. After conciliation failed to resolve the dispute, the matter was referred to arbitration. At the arbitration the applicant led the evidence of the following witnesses:

(i) Hilton Cross ("Cross"), the stores control officer;

(ii) Attie Els ("Els"), a company supervisor; and

(iii) Johannes De Vos ("De Vos"), the Applicants' factory manager.

[5] The third respondent's only witness was Bojile Aubrey Ndlela ("Ndlela") one of the dismissed employees.

[6] De Vos's evidence was limited to reading a statement prepared by him into the record, regarding the conduct of the disciplinary proceedings against the employees. He, as stated earlier, had chaired that hearing. Cross and Els were the main witnesses for the applicant. They were the employees direct supervisors and gave evidence in respect of the misconduct with which the employees were charged.

[7] As has been recorded above, the allegations of misconduct arose from three separate occasions, the relevant details of which, as appear from the testimony of Cross and Els are:

(i) On 16 May 2000, the employees:

- left work early (at 14h00, when the usual knocking off time was 15h30) without first reporting to their supervisor;
- left work without permission of their supervisor;
- failed to obey their supervisor's lawful instruction to return to work at 14h10 (after a twenty minute smoke break) to "throw out" eight vats of cheese;
- acted in a cheeky and disobedient manner when ordered to return to work.

(ii) On 19 May 2000, the employees:

- left work (at the usual time) without reporting to, or obtaining permission from, their supervisors, when their scheduled tasks were not yet completed;
- acted in a cheeky manner when confronted regarding their incomplete work.

(iii) On 29 May 2000, the employees left work at 15h30 without reporting to, or obtaining permission from, their supervisor, when their scheduled tasks were not yet completed.

[8] Ndlela's testimony confirms that it was customary for the employees to report to their supervisors before leaving work for the day, however Ndlela's evidence is in direct conflict with that of Cross and Els in the following material aspects:

Ndlela testified that:

(i) RE: 16 May 2000

- the employees did report to their supervisors before they went home;
- by the time the instruction was communicated to the employees to empty the eight vats of cheese, all but two employees had already left for home;

- he was neither cheeky nor disrespectful to his superiors.

(ii) RE: 19 May 2000

- at the end of the working day, the employees reported to Els, who closed the shop and switched off the scale that they used;
- the employees reported to Els that they were going home before leaving;
- none of the employees were cheeky or disrespectful to their supervisors.

(iii) RE: 29 May 2000

- the employees had been instructed to wax five vats of cheese that day. However, when they came to the fifth vat, they discovered that it was wet, and therefore it was impossible to wax it. They accordingly called their supervisor, who suggested that it be left for the following day.
- none of the employees were cheeky or disrespectful to their superiors.
- the employees did what was required of them on that day.

[9] Therefore while, it was common cause that the employees were obliged to report to their supervisors before knocking off for the day, the real dispute before the Commissioner (the first respondent) was whether or not the employees had complied with the rules on the dates in question and whether or not their conduct was “cheeky and disrespectful of their superiors”.

[10] Faced with two mutually destructive version of events, as put forward by the applicant and the employees respectively, Commissioner was obliged to make a credibility finding, and in doing so found that the evidence of Ndlela was to be preferred over that of the applicant's witnesses.

[11] The main thrust of the Applicant's case is aimed at reviewing this credibility finding of the first respondent.

[12] When it comes to testing the credibility finding in Van der Riet v Leisurenet t/a Health and Racquet Club [1998] 5 BLLR 471 (LAC) at 474, the Labour Appeal Court cited with approval the dictum in Amalgamated Beverages Industries (Pty) Ltd v Jonker (1993) 14 ILJ 1232 (LAC) at 1209, which stated that:

" The present appeal is one in the ordinary strict sense, i.e. a rehearing on the merits, but limited to a consideration of the evidential material on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong. In that determination this Court is free, and indeed, bound to embark on a fresh assessment of the merits based on the evidential material before the court *a quo*, and to exercise its own discretion as to what is fair and reasonable in the circumstances, at the same time having proper regard to the findings of the court *a quo* as to the credibility of the witnesses who testified before it. *Food and General Workers Union & Others v Design Contract Cleaners (Pty) Ltd* (1996) 17 ILJ 1157 (LAC) at 1165 A-D and the other cases

there cited.

It is therefore necessary for this Court to accord proper weight to the credibility findings made by Roth AM, without overstating the effect of same."

[13] Furthermore the principles enunciated in Rex v Dhlumayo 1948 (2) SA 677 (AD) were adopted by the Labour Appeal Court in CWIU v Lennon Ltd [1994] BLLR LAC in the following terms:

"…Those principles [set out in Dhlumayo] are based on propositions of logic and common sense. While this court enjoys greater flexibility than an ordinary court of appeal, even perhaps with regard to findings of fact and credibility, there must be proper grounds for disregarding the advantage of the trial court in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial …".

[14] The above matter relate to appeals in a review context however, the reviewing court is even less likely to interfere with findings on credibility made by an inferior body. Thus in the context of a review of a CCMA arbitration award it was held, in the City of Johannesburg (Midrand Administration) v Bean NO & Others [2002] 5 BLLR 416 (LC) at 421 C-E, that:

"With regard to her [the commissioner's] assessment of the probative value or otherwise of the evidence presented to her and her evaluation of the credibility or lack of it of certain witnesses who testified in the hearing, the challenge mounted by the applicant would appear to be more the stuff of appeal than review. The first

respondent, as is always the case where issues of credibility arise, had the benefit of direct visual and aural evaluation of the witnesses in question – the manner of the presentation of their testimony, their demeanour in the witness chair, their reaction to cross-examination, and so forth. Her evaluation of the substance of their evidence was necessarily subjective and any differences of perception in that regard do not constitute grounds for review."

[15] The commissioner in the matter before me gave the following reasons for finding that Ndlela's evidence was preferable to that of the Applicant's witnesses:

"… The evidence of Aubrey Ndlela on this matter was clear, coherent and more probable in the circumstances. Hilton Cross and Attie Els, who despite being clearly coached on what to say often did not answer questions as if fearing trick questions. The employer representative Johannes de Vos in frustration had to coach them and implore them to answer questions repeatedly. They were uncertain and did not answer the questions asked…"

…

Attie Els and Hilton Cross were evasive and contradictory as witnesses. They were coached with a prepared text of questions and answers. They individually corroborated Aubrey Ndlela's evidence. They are unreliable and their evidence lacks credibility.

…

Aubrey Ndlela's evidence was corroborated by Attie Els and Hilton Cross. He was

coherent witness. I accept his evidence in preference to that of Attie Els and Hilton Cross."

[16] The applicant argued that the commissioner's conclusion on the credibility of the applicant's witnesses is reviewable as the various findings on which it is based are "irregular and unjustifiable based upon an analysis of what actually transpired at the arbitration proceedings". The Applicant then goes on to analyze each of the Commissioner's stated reasons for his credibility finding in light of the prepared transcript of the proceedings before the CCMA.

[17] The applicant conceded that its witnesses were coached in preparation for the arbitration hearing and admitted that the evidence in chief of its witnesses was led by way of prepared questions and answers. This element of the Commissioner's finding is thus justifiable on the basis of what transpired at the arbitration proceedings.

[18] The applicant further suggested that the Commissioner's failure to warn the applicant's representative, regarding the fact that the witnesses' evidence was being read would detract from the probative weight thereof, amounted to a gross irregularity in itself. The applicant cited various authorities in support of its contention that the Commissioner was under a duty to warn the representative of the applicant because he was a lay person.

[19] The principle to be derived from the cases cited, as argued by Counsel for the applicant, is that where in arbitration proceedings an unrepresented participant or lay person presents a case, the commissioner has a strict obligation to ensure "fair play" by assisting the party in question to understand the rules of evidence and procedure which may have a bearing in the determination of the dispute.

[20] The Commissioner states in his award that he did in fact warn Cross of the consequences of reading his evidence from a prepared text:

"The Employer's first witness was Hilton Cross, the stores control officer. He read his evidence from a prepared question and answer text. I informed him that if he reads his response throughout the hearing I might not attach much weight to his evidence. He then gave his oral evidence but making constant reference to the prepared text in answering questions."

[21] In his supplementary affidavit in terms of Rule 7A (8), the Applicant's De Vos denied that a warning was issued by the Commissioner to the effect that the use of prepared notes by Cross and Els would affect the probative value of their evidence.

[22] This is confirmed by the fact that it does not appear from the transcript of proceedings that the Commissioner issued the warning prior to or during the

evidence of Cross and Els. Under the circumstances, it must be accepted that the Commissioner failed to warn the applicant's representative regarding the diminished probative value he could attribute to Cross's evidence should he read from the prepared text. (see Natal Shoes Components CC V Ndawonde (1998) 19 ILJ 1527 (LC) at 1529 D-H)

[23] The applicant further attacked the remainder of the Commissioner's findings relating to credibility. In particular, the applicant argued that the remainder of the reasons given by the Commissioner for his credibility finding are irrational and unjustifiable.

[24] A reading of the record reveals that the Commissioner's further reasons for the credibility finding he made were well founded and rationally connected to the facts before him. The transcript of the arbitration proceedings show that De Vos repeatedly interjected throughout the cross-examination of the Applicant's witnesses. The record further indicates that De Vos did attempt to coach the Applicant's witnesses while they were under cross-examination. The Applicant's witnesses gave contradictory evidence regarding whether or not the employees were allowed to go home early after their tasks for the day had been completed. This aspect of Applicant's evidence was crucial to its case. The Applicant's witnesses, Els in particular, were also argumentative and evasive under cross-examination. In contrast, the testimony of Ndlela was clear, coherent and

unmarred by the discrepancies that characterized the evidence of the Applicant's witnesses.

[25] Aside from the fact that the Commissioner's reasons are justified on the basis of the record, it must be accepted that the Commissioner was in the best position to determine the credibility of the witnesses concerned. The commissioner would have been aware of aspects of the evidence such as the demeanour of the witnesses which will not appear from the record.

[26] Under the circumstances, the Commissioners further reasons for his credibility finding are not susceptible to review. Accordingly the only irregularity in the proceedings was the failure of the Commissioner to warn the Applicant that diminished probative value would be attached to evidence based on a prepared written text. Does this failure however constitute a reviewable irregularity within the meaning of s145 of the Labour Relations Act?

[27] The applicant contends that the Commissioner's failure to warn the Applicant regarding the nature of its witnesses testimony amounted to a gross irregularity. Since not all irregularities are gross, the question of when an irregularity will qualify as "gross" was considered in Toyota SA Motors (Pty) Ltd v Radebe (2000) 21 ILJ 340 (LAC). After concluding that the Commissioner in the matter under review in that case had been wrong with respect to the issue of fair sanction, the

Court went on to consider whether a reviewable irregularity had taken place. It said:

"… The question which remains, however, is whether the third respondent [the Commissioner] misconceived the whole nature of the question of a fair sanction and his duties in connection therewith to such a degree that interference on review was warranted."

[28] The Labour Appeal Court there considered whether, despite the irregularity the parties had been afforded a fair trial. If the answer was in the affirmative, the irregularity could not be said to be gross. The Court thus concluded that, although it was impossible to give precise definition of the meaning "gross irregularity".

"… The use of the word 'gross' indicates that the irregularity has to be so egrerious that a court can conclude that the function of assessing a fair sanction has been misconceived. It is always difficult to define the extent to which the commissioner has to deviate from the normal sanction for such to constitute a 'gross irregularity'… The fact that precise definition is not possible of the degree of error before a gross irregularity is committed, does not mean that the court should not interfere where it is convinced such a gross irregularity has taken place.

[29] Therefore before an irregularity can be considered "gross" it must be such as to prevent a fair trial of the issues. In the present matter, the Commissioner did not

base his credibility finding solely on the fact that the evidence of the applicant's witnesses had been read from a prepared text (It is clear that he did take this into account as a factor). However, even if this aspect of the Commissioner's award is ignored, there is no doubt that the same credibility finding would have been reached on the basis of the other, independent reasons stated in the award, namely:

- Ndlela's evidence was clear and coherent;
- The probabilities were in favour of Ndlela's version of events;
- The applicant's witnesses were evasive and contradictory;
- The applicant's representative, De Vos, coached and cajoled the applicant's witnesses throughout their testimony.

[30] I am thus satisfied that the Commissioner would have made the credibility finding he did regardless of his finding on the prepared text. In addition, applicant's legal representative was present, albeit as an observer, for at least the relevant part of the proceedings. Although this point should not be emphasized, it is relevant insofar as the applicant's representative cannot be seen as a helpless lay person entirely without access to legal advise during the arbitration hearing.

[31] It is further noteworthy that De Vos, who read his own affidavit into the record, was warned by the Commissioner that diminished probative value would be attached to evidence given in this manner. De Vos however responded by insisting that because of the time frames involved, it was not possible to recall all the

relevant facts. He accordingly read his evidence into the record. This further lends weight to the conclusion that the failure of the Commissioner to warn the applicant earlier in the proceedings did not prevent a fair trial of the issues.

[32] In the premises for all the reasons set out above, the irregularity in question was not "gross" within the meaning of section 145(2)(ii) of the LRA and as the proceedings essentially turned on the credibility findings, it follows that the Commissioner's conclusion regarding the incidents on 16,19 and 29 May 2000, as well as his finding on the unfairness of the dismissals are not open to interference from this Court.

[33] With regard to costs I see no reason why costs should not follow the result. The matter was opposed by the third respondent who travelled from Port Elizabeth to attend Court. The arbitration award sought to be reviewed was handed down by the CCMA in Port Elizabeth and all the parties to this suit are from Port Elizabeth. This notwithstanding Applicant launched this application in Cape Town. Without making any comment on the appropriateness of the matter being referred to Cape Town I believe that it is equitable that third respondent's costs include its reasonable traveling and accommodation costs.

[34] In the result the Applicant having failed to make out a case for review, the application is dismissed with costs, which costs shall include the reasonable

travelling and accommodation costs incurred by the third respondent in opposing this matter.

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Waglay J

For the Applicant: Adv M.W. Janisch instructed by Cliffe Dekker Inc.

For the Third Respondent: M. Poyo, Union representative

Date of Judgment: 15 November 2002.