IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR1453/06

In the matter between:

DOORNPOORT KWIK SPAR CC **Applicant**

and

FRANCISKA ODENDAAL **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER ENOCH NEPHALELA **Third Respondent**

EX TEMPORE JUDGEMENT

1] In this review application, the Applicant (Doornpoort Kwik Spar CC) applied for an order reviewing, correcting and setting aside the award made by the Third Respondent (hereinafter referred to as "the

Commissioner") under case number GAPT2179/06 in terms of which the Commissioner found that the First Respondent (Ms Franciska Odendaal – hereinafter referred to as "Odendaal") had been constructively dismissed. The Commissioner ordered the Applicant to pay Odendaal compensation in the amount of six months' salary amounting to R 27 000.00. The Commissioner stated in his award that the question before him was whether the resignation by Odendaal constituted a *constructive dismissal* as contemplated in terms of section 186(1)(e) of the Labour Relations Act 66 of 1995. He goes on to state that *"[s]hould the finding be that the applicant [Odendaal] was indeed constructively dismissed; the appropriate relief should be granted, envisaged by the Labour Relations Act, 2995.*" I will return to the question whether or not the Commissioner had misconstrued his duties in formulating the question in the manner he did and whether his assumption that once a (constructive) dismissal has been established that relief should follow.

2] The first point of attack in this review application was that, because the Commissioner had failed to keep a proper record of the proceedings, he committed an irregularity which irregularity falls to be reviewed. The Second Respondent (hereinafter referred to as "the CCMA") in

compliance with its obligations in terms of Rule 7A(3) of the Rules of this Court, only filed the short and abridged handwritten notes of the Commissioner as the Commissioner did not record the arbitration proceedings mechanically. At the outset it should be pointed out that these handwritten notes are of a very poor quality; very abridged and to a large extent illegible. If the handwritten notes of the Commissioner in the present matter are perused, insofar as it is possible, it appears furthermore that the Commissioner purported to record only the following portions of the evidence and sworn testimony delivered by some of the witnesses at the arbitration hearing: the opening statement made by the Applicant and by Odendaal; the evidence under cross-examination by Odendaal's witness; the evidence under cross-examination by one of the Employer's witnesses; the closing arguments on behalf of the Odendaal and the Applicant. The Commissioner failed to record the sworn testimony of Odendaal herself (the Applicant before the arbitration) and also failed to record the evidence in chief of all the witnesses who testified at the hearing. The handwritten record before this Court is thus seriously deficient both in form and content.

LAW IN RESPECT OF ARBITRATION PROCEEDINGS

3] In terms of Rule 36(1) of the Rules for the Conduct of the proceedings before the CCMA, the Commissioner must keep record of: (a) any evidence given in an arbitration hearing; (b) any sworn testimony given in any proceedings before the Commissioner; and (c) any arbitration award or ruling made by a commissioner. In terms of Rule 36(2) of the Rules, the record may be kept by "legible" handwritten notes or by means of an electronic recording. The wording of Rule 36 appears to be couched in peremptory terms.

4] An applicant has a right to a reasoned award in respect of the dispute that was adjudicated before the CCMA. When an award is the subject of a review application, the record of the proceedings before the statutory body will also become important.[1] In fact, once a party had filed its Notice of Motion and founding affidavit, he or she has the right to the record of the proceedings in so far as it may be necessary for

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1 See *Uee-Dantex Expolisives (Pty) Ltd v Maseko & Others* (2000) 3 ELLR 86 (LC) at paragraph [21]: "*That it is not eminently reasonable and practical to keep such records, but also necessary, is self-evident. Keeping a record of the arbitration proceedings provides objective material upon which this court exercises its review powers. It eliminates, or keeps to a minimum, disputes of fact about what transpired at the arbitration proceedings. Such disputes would bedevil the work of this court when exercising its review powers. It is also self-evident that keeping a record of the arbitration proceedings assists the court in the proper exercise of its review powers.*

the purposes of the review.[2] In this regard Rule 7A(8)[3] of the Rules specifically provides that an applicant in review proceedings may amend, vary or add to the terms of the notice of motion and may supplement the supporting affidavit filed in the review application in light of the record of the proceedings. An applicant who is not afforded this opportunity by virtue of an incomplete or non-existent record may well be prejudiced. The CCMA is a creature of statute and as such it derives its powers and obligations from the LRA. It is therefore obliged to adhere to these statutorily imposed duties – most notable for purposes of this judgment – to keep a proper record of the

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2 "*[10] Rule 7A of the Labour Court reads as follows insofar as it is relevant: '7A Reviews (1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties. (2)The notice of motion must - ...(c) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done;...(3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.... (5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct. (6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body. (7) The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause. (8) The applicant must within 10 days after the registrar has made the record available either - (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or (b) deliver a notice that the applicant stands by its notice of motion. (9) Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant. (10)The applicant may file a replying affidavit within 5 days after receipt of an answering affidavit.'*

3 *Ibid.*

proceedings conducted before it.[4]

5] There is, however, clear authority to the effect that the mere fact that there is not a record, does not necessarily imply that the matter should as a matter of course be remitted back to the CCMA. Even where parties have endeavoured to reconstruct the record and it is not possible, the Court will likewise not as a matter of course remit the dispute back to the CCMA. See *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd & Others* (2004) 25 ILJ 1286 (LC) where the Court declined to remit the matter back to the CCMA but decided to proceed

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4 This is not a new principle and has, in fact, been endorsed more than a 100 years ago when Innes CJ stated as follows in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115: *"Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the state, or is guilty of gross irregularity or … illegality in the performance of the duty, the Court may be asked to review the proceedings complained of and set aside or correct them ….. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of this Court." There are also good reasons why public authorities are treated differently by the law as opposed to private individuals: Laws J analysed the position as follows in R v Somerset County Council, ex parte Fewings & Others [1995] 1 ALL ER 513 (QB) at 524e-g: "Public bodies are private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit, It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books… But for public bodies the rule is opposite, and so of another character altogether. It is that any action be taken must be justified by positive law. A public body has not heritage of legal rights which it enjoys for its own sake; at every run, al of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose."*

to determine the case on all the available evidential material before it.[5] See also *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO & Others* (2005) 26 ILJ 876 (LC). In the latter case the Court followed the decision in the *Kya*-case. However, in two cases the Court was willing to refer the matter back to the CCMA: See *Uee-Dantex Explosives (Pty) Ltd v Maseko & Others* (2001) 22 ILJ 1905 (LC)[6] and *Shoprite Checkers Ltd v CCMA & Others* (2002) 23 ILJ 943

5" [16] I agree with Mr Barrie that it is not legally permissible in the circumstances of the present case to remit the matter to the CCMA for a rehearing due to the defective record. The applicant cannot contend that the award of the commissioner is not rationally justifiable merely because the evidence which was adduced before him (and which presumably influenced him in his decision) cannot be placed before this court. In the present circumstances, then, the court must look at the award of the commissioner together with all the documentary and other evidence before him (including a clandestine tape recording of certain important discussions between the employee and employer's representatives) as well as the available transcript of proceedings, and then decide whether the award passes muster in accordance with the jurisprudence set out in para 9 above."

6 "*[18] The dispute of fact in this application could easily have been resolved if a record of the arbitration proceedings was filed. The very reason the commission should keep a record of the arbitration proceedings is precisely to overcome potential disputes of fact. The records of arbitration proceedings present an objective account of what transpired at the arbitration proceedings and this court is entitled to rely on such records for the purpose, inter alia, of resolving potential disputes of fact. The absence of a record provides an almost insurmountable problem. It is untenable to expect disputes of this nature, which are easily determined by reference simply to the record, to be resolved by cross-examination in a referral to oral evidence.*
[19] Section 138 of the Labour Relations Act 66 of 1995 (the Act) provides generally for the conduct of arbitration proceedings held under the auspice of the commission. Rule 7A casts a duty upon the commission to provide the registrar of this court with the record of the arbitration proceeding. The absence of the record places me in a dilemma. I am unable properly to discharge my statutory function of review. In my view where the commission fails to provide the registrar with the record of the arbitration proceedings and if it fails to explain its failure to provide the record, a court may make a cost order against it.
[20] Although the Act does not expressly oblige the commission or the arbitrator to keep a record of the arbitration proceedings, there is an implied duty on the arbitrator or commission to keep and provide this court with a record of the arbitration proceedings. It will always be necessary to have the record of the arbitration proceedings available to this court when arbitration awards are reviewed under s 145 of the Act.

(LAC). In these two cases it was taken into account that *no record* was made available. It was concluded that the commissioner's failure to produce the record constituted a reviewable irregularity.

6] Where the record can be reconstructed the parties will, however, be expected to reconstruct the record even it may be time consuming or frustrating to do so. See *Lifecare Special health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others* (2003) 24 ILJ 931 (LC)[7] and *JDG Trading (Pty) Ltd t/a Russels v Whitcher NO & Others* (2001)

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[21] *That it is not eminently reasonable and practical to keep such records, but also necessary, is self-evident. Keeping a record of the arbitration proceedings provides objective material upon which this court exercises its review powers. It eliminates, or keeps to a minimum, disputes of fact about what transpired at the arbitration proceedings. Such disputes would bedevil the work of this court when exercising its review powers. It is also self-evident that keeping a record of the arbitration proceedings assists the court in the proper exercise of its review powers.*

[7] *In this case the record was incomplete because certain of the tapes were losts. The Court postponed the matter in order to grant the parties an opportunity to reconstruct the record: "[16] Ngcamu AJ recorded in his judgment that: 'There is no application before me to have this matter postponed in order to have the handwritten notes transcribed.' The learned judge had earlier said that: 'the applicant is obliged to have transcribed the handwritten notes if the record is not complete'. Transcribing the commissioner's notes, as though they possibly constituted an alternative record, was not of itself the solution. In my view the court should have suggested to the parties that the matter be postponed in order: (a) to make the enquiries referred to in the previous paragraph; and (b) insofar as might prove necessary, to attempt a reconstruction. The latter would at least have been required for the part of tape 9 which was over-recorded, and may be required in respect of other tapes. It is not possible to speculate how Lifecare's legal representative in the court a quo would have reacted to such a suggestion had it been proffered from the bench.*

[17] A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness."

22 ILJ 648 (LAC).[8]

7] Where there has been no mechanical transcribing of the proceedings, the Applicant is still obliged to reconstruct the record as far as possible.[9] Parties who seek relief on the basis of an incomplete record run the risk of being unsuccessful purely on this basis:[10] Where an applicant in review proceedings fails to provide a transcription of the handwritten records and or the cassette tapes, the Court will be unable to adjudicate the review application and may find that it is not entitled to interfere with the award. The Court will not, as already stated, as a matter or course set aside an award and remit the matter back to the CCMA for rehearing merely on the basis that the record is incomplete[11] especially in circumstances where the Applicant has

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8 "*[8] It seems to me that the attack on the judgment of the court a quo overlooks an insuperable hurdle for the appellant. In my view the first and fundamental question which arises is whether the court a quo was entitled at all on the information before it to review and vary the order made by the first respondent. ……..[11] In compliance with Rule 7A(3) the second respondent filed with the Registrar of the Labour Court the first respondent's handwritten 'notes of the proceedings' and '6 recorded cassette tapes of the arbitration proceedings' as well as a '[b]undle of documents submitted at arbitration hearing (exhibits)'. [12] In terms of rule 7A(5), (6) and (7) the appellant was obliged to have transcribed the handwritten record and also the contents of the cassette tapes. Arguably, if the latter proved to be complete, it may have proved unnecessary to transcribe the handwritten notes. The appellant failed to have either the handwritten record or the tapes transcribed. [13] In the absence of the transcribed record of the proceedings before the first respondent, the court a quo was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it."*

9 See *Ndlovu v Mullins NO & Another* (1999) 20 *ILJ* 177 (LC).

10 See *Metalogic Engineering & Manufacturing CC v Fernandez and Others* (2002) 23 *ILJ* 1592 (LC).

11 See the authority quoted above.

taken no steps to reconstruct the record. In such circumstances the Court will decide whether or not the award is reviewable by looking at all the evidence available, the documentary evidence and the record as incomplete as it may be.[12]

8] I am in agreement with the principles expressed in the aforementioned authority. In the present case the record consists of (apart from the award) only of the mostly illegible handwritten scribbles of the Commissioner. Apart from the fact that it is illegible, it is also seriously flawed in respect of content in that it appears *ex facie* that the Commissioner had very selectively and very cryptically recorded the evidence presented to him. Although mindful of the principles expressed in the case law, I am of the view that this is one of those cases where it would be unfair to merely dismiss the review on the basis that no record of the proceedings exists especially where it is patently clear that the Commissioner has committed serious irregularities in respect of the record. Under these circumstances I am of the view that it would be fair to remit the dispute back to the CCMA for a rehearing.

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12 See *Fidelity Cash (supra..*

9] However, apart from the fact that the dispute ought to be remitted back to the CCMA in light of the absence of a proper record, there is in my view, a further ground upon which this award falls to be reviewed without the necessity of even having regard to a record. It is appears from the conclusion reached by the Commissioner that he was of the view that Odendaal was entitled to compensation in light of the fact that her dismissal "*was a constructive dismissal*". It was argued on behalf of the Applicant that, in coming to this conclusion, the Commissioner had completely misconstrued the applicable law in so far as it relates to the establishing of an "*unfair constructive dismissal*". There is no indication from a reading of the award that the Commissioner had applied his mind to what is referred to as the "*second stage*" of the inquiry as to whether or not an employee has established an "*unfair*" constructive dismissal. The Commissioner merely found that "*there was a constructive dismissal*" which is but the first stage in the enquiry as to whether an employee has been unfairly constructively dismissed. Once a "dismissal" as contemplated by section 186 of the Labour Relations Act 66 of 1995 has been established, the Commissioner must proceed to the second stage namely to consider whether or not the "*dismissal*" was also "*unfair*". It is clear that section 186(e) of LRA envisages such a two-stage

approach: Firstly, the employee who resigns or leaves bears the onus to prove that continued employment was made "*intolerable*" by employer's conduct. In terms of this (first) enquiry the *employee* merely has to prove the jurisdictional requirement namely that there was a "*dismissal*" as contemplated by section 186 of the LRA. Secondly, in terms of the next leg of the enquiry, the onus is on *employer* to show that dismissal was not unfair. The Commissioner in this case merely confined himself to the first enquiry and as such completely misconstrued his powers. See in this regard the often quoted case on this point *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 *ILJ* 1240 (LC) where the Court explains this two-stage approach in detail:

> "[30] The Act states that every employee has the right not to be unfairly dismissed. See s 185. If the employee is dismissed in the sense referred to in s 186 and that dismissal is not automatically unfair as described in s 187, then the dismissal will be unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity and that the dismissal was effected in accordance with a fair procedure. See s 188(1) of the Act.

[31] The distinction between dismissal and the unfairness of the dismissal is further underlined by s 192 of the Act which regulates the onus in dismissal

disputes. It provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. However if the existence of the dismissal is established, the employer must prove that the dismissal is fair.

> *[32] What we have here is a two-stage approach. Similar, but not entirely identical, to the two-stage approach to constructive dismissal which was followed in the Industrial Court.*
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> *[33] As far as case law is concerned, I have not been able to find any case in which s 186(e) has been dealt with by this court. However, reference may be made to the CCMA arbitration of Aldendorff v Outspan International Ltd (1997) 18 ILJ 810 (CCMA); [1997] 6 BLR 771 (CCMA).*

[34] The new concept is discussed in Basson et al Essential Labour Law vol 1 (1998) at 111, where it is said

> *'The definition of a constructive dismissal in s 186(e) does not define the limits of what may be "intolerable' behaviour on the part of the employer, and in the end this will probably be a value judgment made according to the facts of each case. What the case does seem to suggest, however, is that the inquiry by the court is twofold:*

A Firstly, the employer must establish that there was no voluntary intention by the employee to resign. (The employer must have caused the resignation.) Secondly, the court must "look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it'.
(See Pretoria Society for the Care of the Retarded v Loots [(1997) 18 ILJ 981 (LAC)] for further explanation in this regard.)'

[35] The quote referred to above deals, as I have pointed out, with the

> Labour Relations Act 1956 and the Labour Appeal Court was not considering s 186(e) of the new Act. In my opinion, having regard to the scheme of the new Act, the two-stage approach is to be followed.

[36] First of all an employee who resigns or leaves her place of employment (or may be said to have deserted) must prove that this was not the case and that the employer dismissed her by making the continued employment intolerable. The onus on this leg is upon the employee. If this is established then the second stage is arrived at.

[37] The second stage concerns an evaluation of whether or not the dismissal was unfair. This is certainly true of substance but clearly the provisions relating to procedure are not relevant.

[38] The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is so is however a matter of fact and no general principle can or should be laid down.

> *…….*
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> *[46] There is no indication in the award that the commissioner properly considered these facts in regard to the second stage. At most there is a passing reference to the entire case but I am convinced that the commissioner did not apply his mind past the mere fact that constructive dismissal had been proven, in the sense of a jurisdictional fact, ie a dismissal. That was conclusive as far as the commissioner was concerned. It was not conclusive. He should have gone on to consider all the facts to determine whether the dismissal was unfair and then, of course, even if he*

did find it to be unfair, in evaluating compensation, he was obliged to ask what was Sister Gregory's contribution.

[47] In my opinion therefore, this is a case where it is appropriate to refer the matter back to the CCMA in order to deal with this issue. However, I am immediately faced with a difficulty. I found that there has been a dismissal but I have found that the commissioner did not consider whether or not it was unfair. The two cannot be separated. Therefore it seems to me that the best that can be done is to refer this matter back for ab initio arbitration before a commissioner other than the first respondent. "

See also *Capwest Mouldings* & Components CC v Ely & Others (1999) 20 *ILJ* 2859 (LC).[13]

10] I am therefore of the view that the award falls to be reviewed and set aside on this basis alone and that the dispute should be remitted to

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13 "*[12] This court has endorsed the so-called two-stage approach to dealing with a dispute involving an alleged constructive dismissal. The approach, with specific regard to the scheme of the 1995 Labour Relations Act, is set out in detail by Landman J in Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others (1998) 19 ILJ 1240 (LC) and in particular at 1250C-F.*
....
[13] In the Sappi Kraft case, further, the court found that the enquiry into the second stage commences when dismissal has been proved. At that stage the onus switches to the employer to show that the dismissal was fair for reasons related to the employee's conduct G or capacity. On the facts of the Sappi Kraft case the court found no indication in the award that the commissioner had properly considered the relevant facts in regard to the second stage. The court was convinced that the commissioner did not apply his mind past the mere fact that constructive dismissal has been proven, in the sense of a jurisdictional H fact, that being a dismissal. It found that that aspect was conclusive as far as the commissioner was concerned, whereas it ought not to have been. He ought to have gone on to consider all the facts to determine whether or not the dismissal was unfair. His failure to do so rendered the award reviewable. I
[14] ***That is exactly what appears to have happened in the case before me. There is no indication whatsoever that the third respondent applied his mind to the second stage. He simply concluded on the evidence before him that second respondent had discharged the onus of showing a constructive dismissal in the sense that it was the conduct of Meyer which had caused him to terminate his employment with applicant.*** *"* (My emphasis.)

the CCMA for a rehearing.

11] In the result the following order is made:

1. The award by the First Respondent in the arbitration held under the auspices of the Second Respondent under case number GAPT2179/06 is reviewed and set aside.

2. The matter is referred back to the Second Respondent to conduct an arbitration *ab initio* before a commissioner other than the First Respondent. In conducting the arbitration the Commissioner shall have regard to both the *dismissal* (if any) and the *unfairness* of such dismissal (if established).

3. There is no order as to costs.

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BASSON, J

DATE OF HEARING: 11 SEPTEMBER 2007

DATE OF JUDGEMENT: 11 SEPTEMBER 2007
FOR THE APPLICANT:

ADV K IOULIANOU

INSTRUCTED BY: STEVE IOUILIANOU ATTORNEYS

FOR THE RESPONDENT:

ADV MM MOJAPELO

INSTRUCTED BY: MOKHOFALA & VERSTER