IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no JR 485/07

In the matter between:

ROWMOOR INVESTMENT (PTY) LTD **APPLICANT**

And

RANA ANN WILSON **1ST RESPONDENT**

GCINA MAFANI **2ND RESPONDENT**

CCMA **3RD RESPONDENT**

JUDGEMENT

Molahlehi J

Introduction

[1] The Applicant seeks an order to have the arbitration award issued by Second Respondent (the Commissioner) under case number GAJB 8048-06 dated 9 February 2007 reviewed and set aside.

[2] In terms of the arbitration award the Commissioner found the dismissal of the First Respondent, Ms Wilson to be both substantively and procedurally unfair and ordered compensation in the amount of R401 400.00.

[3] The Applicant has subsequent to filing its heads of argument raised a further

ground of review which concerns the jurisdiction the CCMA to arbitrate the dispute.

[4] The Applicant has also applied for condonation for the late filing of its replying affidavit. The affidavit was about 10 (ten) days late. The respondent did not oppose the condonation application. The explanation for the lateness was reasonable and acceptable. Accordingly the late filing of the replying affidavit is condoned.

Background facts

[5] During August 2005, Snip (Pty) Ltd (Snip) was placed under provisional liquidation by the High Court. Subsequent to the provisional liquidation the ABSA bank perfected its rights in terms of a notorial bond.

[6] Thereafter the Applicant made an offer to purchase Snip which offer was accepted by ABSA bank. In terms of the sale agreement the Applicant purchased all the assets, intellectual property and trading name of Snip from ABSA.

[7] Although this was not a purchase as a going concern, at the commencement of trading the Applicant offered employment to the employees of Snip including Ms Wilson. And at the time of appointment by the Applicant, Ms Wilson had been with Snip for over 17 (seventeen) years as buyer of house wares.

[8] At the arbitration hearing the Applicant called only one witness, Ms Pretorius, the HR officer. Her testimony centred mainly on the appointment of employees following the purchase of Snip by the Applicant. She testified that Snip's employees were offered new employment contracts by the Applicant.

[9] Ms Wilson testified that she commenced her employment with Snip in 1990, and was promoted during 1997, to the position of a senior buyer. This position did not change when her employment contract was taken over by

the Applicant. She further testified that she was during 2005, informally offered the position of marketing manager by the Applicant but this was never implemented.

[10] On the 6th March 2006, Mr Swart, the human resources manager convened a meeting with Ms Wilson and issued her with a letter, the heading of which reads as follows "*Re: DISMISSAL DUE TO OPERATIONAL REASONS."* In addition to informing Ms Wilson that her position "as marketing manager has been identified as redundant," the letter further states that:

> "*Rowmoor Investment 543 (PTY) Ltd. as an employer is committed to the principles of procedural and substantive fairness as regulated by the Labour Relations Act and as a result, conformance to s189 requires meaningful consultation with the affected employee/s with specific reference to the following:*
>
> 1. *Appropriate measures in an attempt to avoid dismissal.*
> 2. *Timing of the proposed process.*
> 3. *Severance pay.*
> 4. *Opportunity for the employee to make appropriate submission.*
> 5. *Prospects for future employment.*
>
> *Termination of employment for whatever reason is always considered as very traumatic and therefore management wishes to engage in meaningful consultation in an attempt to reduce the*

traumatic effect of the process.

Should you however have any concerns or queries following the discussion of the above proposed process, please do not hesitate to contact me."

[11] On 6th March 2006, Ms Wilson was called to a meeting where she was informed that her position as a marketing manager was declared redundant. The purpose of the meeting on the 6th March 2006 was, according to Mr Swart to consult with the Ms Wilson. This was according to the Applicant a consultation in terms of section 189 of the Labour Relations Act 66 of 1995 (the LRA)

[12] In his open remark at the beginning of the arbitration hearing Mr Swart submitted that once he had explained the purpose of the meeting and the contents of the letter, Ms Wilson made it clear that she was no longer interested in the employ of the Applicant. He further submitted that he had no doubt that Ms Wilson was not interested in consulting further with the Applicant.

[13] The discussion during the meeting according to Mr Swart focused on other issues like notice pay, severance pay, the use of the company vehicle and use of the cell phone. At the end of the discussion both Mr Swart and Ms Wilson signed an agreement regarding issues like severance pay, the continued use of the vehicle and the cell phone.

[14] Ms Wilson in her testimony disputed the allegation made by Mr Swart that when the Applicant took over from Snip she was appointed to the position of marketing manager. The offer to the position of marketing manager was according to her made during November 2005. This offer never materialised as she continued as a buyer until the day of her dismissal.

[15] As concerning the meeting of 6th March 2005, Ms Wilson testified that there was no consultation but was simply informed at that meeting that the

executive had taken a decision to declare her position redundant. She further testified that the letter was handed to her as she entered the office.

[16] After being told about the decision of the executive to declare her position redundant, Ms Wilson enquired about the buying position as she was aware that the Applicant required more buyers and that interviews were infact underway at that stage. The record further reveals her having stated during her testimony:

> *"At that point, I realised that, the decision was final. They do not want me in the Company [pause] and I was given no options (sic) [silence] Must I carry on?"*

[17] Later on in her testimony Ms Wilson testifying about what transpired at the meeting between her and Mr Swart said:

> *"He then proceeded to explain the payment option, where he said, they would pay me the 2 months [pause] …that I could use the company car for that 2 months…I then asked if I could leave immediately…,"*

[18] Mr Wilson further enquired about the possibility of appointing her a buyer in the light of her position having become redundant. In response to this inquiry, according to her, Mr Swart informed her that the Applicant would not be appointing buyers at that stage. However 21(twenty one) days thereafter the Applicant appointed three buyers.

Grounds of review and award

[19] The Applicant contended that contrary to the discussions that the employee had with Mr Swart the Commissioner found that there was no invitation to consult with Ms Wilson prior to the 6th March 2006.

[20] The Applicant further contended that the Commissioner completely ignored the evidence of Ms Wilson that she no longer wished to be employed

by the Applicant and as result of this the consultation would have been a futile exercise.

[21] As indicated earlier, the Applicant filed an additional ground for review after the heads of argument were filed. In this regard the Applicant relied on the provisions of section 191 (12) of the Labour Relations Act 66 of 1995 (the LRA). The Applicant contended that the Commissioner did not have jurisdiction to entertain this dispute because Ms Wilson attacked procedural fairness of a dispute concerning a retrenchment of an individual. The essence of this argument is that where in a dismissal for operational reasons the employee attacks both the procedure and the reason for the retrenchment, the CCMA does not have jurisdiction.

Ms Riki Anderson, attorney for the employee, correctly conceded that a jurisdictional point may be raised at any time during the proceedings. It should however be pointed out that the stage in the proceedings at which the point is raised may have costs implications for the party raising such a point.

[22] The provisions of section 191 (12) of the LRA were considered in the case of **Rand Water v/s Adv. R. Bracks NO & Others (unreported case no. JR 1965/05)**. In that case the court held that:

"…the legislature intended that it is only in matters where only substantive fairness of a dismissal by the employer by reason of its operational requirements involving a single employee is to be determined that the CCMA has jurisdiction to hear the matter. As soon as the procedural fairness of the dismissal is put in issue by a single employee, …section 191(12) of the LRA must be interpreted as meaning that such case must still be referred to the Labour Court and that the CCMA will not have jurisdiction to hear them."

[23] The facts in Rand Water case are distinguishable from those of the present case. In that case the dismissal was following the consultation process between the affected employee and her employer. There was also frequent exchange of correspondence between the parties as part of the consultation

process before the dismissal.

[24] In my view, the CCMA's jurisdiction is ousted in an individual dismissal for operational reasons where the facts reveal that the dismissal was *"following a consultation procedure in terms of section 189"* of the LRA. The three jurisdictional facts to be satisfied before the election could be made by an employee who was dismissed for operational reasons was correctly pointed out by Mr Boda SC in Rand Water case. His submissions in the Rand Water case are:

1. *The dismissal had to be by reason of the employer's operational requirements.*
2. *The retrenchment had to be in respect of a single employee.*
3. *The retrenchment which was due to operational reasons was effected after "following a consultation procedure in terms of section 189" of the LRA."*

[25] The employee in the present case formulated her dispute in the CCMA LRA Form 7.13 as follows:

"(1) No fair procedure followed (sic) prior to retrenchment.

(2) No fair reason existed for retrenchment."

[26] In my view the jurisdictional point raised by the Applicant would be sustainable on the authority of Rand Water, had the employee formulated her dispute as concerning the fairness of the procedure followed prior to her dismissal. Her case is that, there was no procedure followed by the Applicant prior to her dismissal.

[27] Although this point was not pertinently raised before the Commissioner, she does seem to have been aware of it in that, in her analysis of the evidence and argument she states:

"Section 189(1) requires consultation prior to retrenchment and not

when the decision is already made."

[28] In my view, the essence of the Commissioner's conclusion is that the dismissal of the employee was not *"following procedure in terms of section 189"* of the LRA. My view on this point is that if the Rand Water decision was to be regarded as authority then, the CCMA would lack jurisdiction in a case where the facts reveals that the dismissal was after the employer had followed the procedure as required by section 189 of the LRA.

[29] For the above reasons, the jurisdictional point raised by the Applicant is dismissed.

[30] I now proceed to deal with the grounds of review as raised by the Applicant in its founding affidavit. In its first ground of review the Applicant contended that the Commissioner failed to apply her mind to what transpired on the 6th March 2006, during the meeting between the employee and Mr Swart. The Applicant contended that this meeting constituted consultation as contemplated by section 189 of the LRA.

[31] After dealing with the provisions of section 189(1) (2) of the LRA, the Commissioner concluded that Ms Wilson never received a letter inviting her to consult. The Commissioner also found that the letter which was given to her on the 6th March 2006 was given after she was told that the executive had taken a decision to declare her post to be redundant.

[32] In my view the conclusion reached by the Commissioner cannot be said to be unreasonable. She arrived at this conclusion on the basis of the uncontested evidence of the employee. The only evidence presented by the Applicant was that of Ms Pretorius which as indicated dealt only with what transpired after the purchase of Snip and not what transpired at the meeting of 6th March 2006. In any case she would not have testified about what transpired at the meeting as she was not there. The person who was at the

meeting was Mr Swart. Mr Swart never testified but during his opening remarks indicated that he may testify or call witnesses if necessary. He did not testify nor call any witness to deal with the critical aspects of the Applicant's case.

[33] The Applicant contended that the letter of the 6th March 2006 was not intended to terminate the employment of the employee but to commence with consultation. This the Commissioner dealt with in her award and therefore it is incorrect to say she failed to apply her mind to the issue.

[34] The second ground of review relates to the substantive fairness of the dismissal. The Applicant conceded that it appointed new buyers approximately three weeks after the termination of the employee's employment. The Applicant however contended that there was no evidence in the record that the buyers were interviewed on the 6th March 2006. The Applicant further contended that although the employee performed certain buyer functions, she was employed as a marketing manager.

[35] I have already indicated that the evidence before the Commissioner in as far as the critical aspects of this case were concerned was not challenged. The employee's evidence that she was offered the position of a marketing manager but never occupied the position was never challenged. In fact to some extent her version was supported by the service certificate which was issued by Mr Swart. The certificate states:

> "*This is to certify that Ms R.A. Wilson was employed by Rowmoor Investment 543 (Pty) Ltd in the capacity of Senior Buyer/ Marketing Manager at Head Office."*

Ms Pretorius could not confirm under cross-examination whether the employee was ever given a contract as a marketing manager.

[36] The Commissioner reasoned that the dismissal was substantively unfair

because the Applicant had vacant buying posts which the employee could have filled and that the retrenchment was not the only option available.

[37] The Commissioner rejected the submission of Mr Swart that the employee resigned.

[38] The third ground of review relates to the contention that the Commissioner committed gross irregularity in failing to provide reasons for the amount of compensation she awarded to the employee.

[39] Section 194(1) of the LRA provides:

> *"The compensation awarded to the employee whose dismissal is found to be unfair, either because the employer did not prove that the reason for dismissal was fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow the fair procedure, or both, must be just and equitable in all circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employer's rate of remuneration on the date of dismissal."*

[40] In **Arashumy v Tee and other (1999) JOL 5068 (LC),** the Court held the arbitration award was reviewable because the Commissioner failed to provide reasons for awarding compensation to the employee to the amount of R18 000.00. The Court further held that it could not find from the record the basis of the amount of compensation. It is clear from the reading of this judgement that had there been a basis in the record for arriving at the R18000.00 compensation. The Court would not have interfered with the award even if the award did not expressly state the reasons for arriving at the amount

[41] The issue whether a Commissioner should give reasons for the relief granted received attention in the **Bezuidenhout v Johnston NO & Others (2006) 27 ILJ 2337(LC) at para [57]**, where the Court in agreeing with the decision in **Amstrong v Tee &others (1999) 20 ILJ 2568(LC)**, held that as a

general proposition the Commissioners should give reasons for their awards. However, the fact that a Commissioner does not provide clear and express reasons for each and every conclusion he or she arrives at, does not in itself render the award reviewable.

[42] In **Amalgamated Pharmaceuticals Ltd v Grobler NO & Others (2004) 25 *ILJ 523*(LC) at page 525,** the Court held that:

> *"The failure or omission by the Commissioner to provide reasons for her award does not per se render the award irrational and therefore reviewable on the grounds of gross irregularity."*

[43] In considering whether failure to provide reasons for the relief provided, the Court is required to determine from the Commissioner's finding whether he or she anticipated the remedy or the basis for the remedy is apparent from the record.

[44] Turning to the facts of the present case, the Applicant contended the Commissioner awarded the employee a car allowance in the amount of .00 despite the evidence indicating that the car allowance was estimated at R4000.00.

[45] Whilst the Commissioner did not expressly state the reason for the award issued it is apparent he was influenced in arriving in his conclusion by the severity of the unfairness of the dismissal.

[46] The severity of the unfairness of the dismissal outweighs other factors that may have favoured a lesser compensation in as far as the interest of the employer was concerned. These factors are the fact that Ms Wilson secured employment 4 (four) months after her dismissal. Her salary in the new employment is much lower than the one she earned prior to her dismissal.

[47] In as far as the car allowance is concerned there is no indication as to on what basis the Commissioner arrived at R5000.00 when the estimation by

Ms Wilson was R4000.00. I agree with Applicant that the period of 17 (seventeen) years relates to the general experience which Ms Wilson had but not to the period of employment with the Applicant. The period of employment is significantly less than 17 (seventeen) years. This factual error does not have a material bearing on the decision of the Commissioner.

[48] In my view the only criticism to be levelled against the Commissioner is the calculation of the car allowance. There is no evidence on the record showing how the Commissioner arrived at the amount of R5000.00 The estimated costs for the car allowance which was not challenged by the Applicant was R4000.00. In this regard the Commissioner committed a gross irregularity and therefore the award stand to be reviewed and corrected.

[49] In my view fairness and justice require that the award should be corrected in as far as compensation is concerned. Eventually the Commissioner incorrectly calculated the car allowance, the reading of the award, the record and the circumstances of this case, the conclusion of awarding the maximum compensation by the Commissioner cannot be faulted.

[50] In as far as substantive fairness is concerned; I am of the view that the Commissioner's conclusion cannot be faulted, as if it is a conclusion that a reasonable decision maker could have reached.

[51] The other issue raised by the Applicant concerns the complaint that the Commissioner failed to administer an oath or affirmation before taking evidence from the witness of the employee.

[52] ***In Morningside Farm v Van Standen NO & Another (1998) 19 ILJ 1204 (LC),*** the Court disagreed with the employee's contention that the failure to swear in a witness did not amount to an irregularity. In arriving at this

conclusion the Court relied on the provisions of s31(1) of the Supreme Court Act 59 of 1959, which provides for committal to prison for a person who refuses to take an oath in or who refuses to make an affirmation as a witness. The Court also relied on the provisions of s142(1)(e) of the Labour Relations Act 66 of 1995 (LRA), which provides that a Commissioner who has been appointed to resolve a dispute may administer an oath or accept an affirmation from any person called to give evidence. To this extent the Court held that:

> "*It therefore must follow that a commissioner who fails to administer the oath or fails to ensure that affirmation is made by a witness, commits a gross-irregularity."*

[53] In criminal cases it has been held that the testimony of a witness which had not been properly placed under oath or properly affirmed or properly admonished to speak the truth as provided for in section 162 read with section 163 and section 164 of the Criminal Procedure Act of 1997, lacks the status and character of evidence and can therefore not support a conviction in a criminal trial.

[54] It is clear, that in criminal matters there is a statutory duty imposed on the presiding officer to administer an oath or admit an affirmation. In the context of the LRA the Commissioner has a discretion in terms of section 142(1) (e) whether or not to administer an oath or require an affirmation. However, refusal to take an oath or make an affirmation when required to do so by the Commissioner, constitutes contempt of the CCMA in terms of Section 42(8) (e) of the LRA.

[54] The issue of oaths and affirmation in private arbitrations is governed by section 14(1) (b) (ii) of the Arbitration Act 42 of 1965.

[55] ***In Portnet, A Division of Transnet Ltd v Finnemore & Others (1999)***

20 ILJ 1104 (LC), the Court after noting the decision in Morningside Farm, that failure to administer an oath is an irregularity which justify the intervention of the Court, held that in private arbitration proceedings evidence need not be led under oath where there is an agreement between the parties or where no objection is taken at any stage, a party cannot subsequently approach the Court and cry foul. The Court went further to say:

> "*Accordingly, I do not think that the arbitration award is reviewable because of failure to administer the oath."*

[55] It is interesting to note that rule 24 of the American Arbitration Association provides:

> "*Oaths- **...** the Arbitrator may, in his discretion, require witnesses to testify under the oath administered by any duly qualified person, and if required by law to or requested by either party, shall do so."*

See Frank Elkour; et al How arbitration works Fifth Edition Page 263

[56] In my view the correct approach is the one adopted in Portnet and should apply to both private and compulsory arbitration proceedings. Because of the adversarial nature of the arbitration proceedings, there can be no doubt that taking an oath or making an affirmation by witnesses will always be preferred. However failure to have a witness take an oath or affirmation before testifying, does not in my view, automatically amount to a gross-irregularity. In such cases the issues turns around the weight and the manner in which the Commissioner approaches the evidence tendered without taking an oath or making an affirmation.

[57] Turning to the facts of the present case, the evidence of the witness who

did not take an oath had no bearing on the decision of the Commissioner. It can also not be said that failure to administer an oath on the witness denied the Applicant a fair hearing.

[58] The contentions that the Commissioner allowed leading questions during examination-in-chief have no merit and should be dismissed for that reason.

[59] In the premises I make the following order:

a. The part of the review application seeking to review and set aside the arbitration award in relation to the issue of substantive fairness is dismissed.

b. The part of the review application seeking to review and set aside the arbitration award in relation to the compensation awarded to the third respondent, is reviewed and corrected to read as follows:

"*The respondent, Rowmoore Investment (PTY) is ordered to pay the Applicant, Ms Rana Ann Wilson as follows:*

i) Basic salary x 12 months *R26000.00*

ii) Car allowance *R4000.00*

iv) Cell phone allowance *R500, 00*

v) Pension *R1950.00*

R32450X12=R389400.00

TOTAL PACKAGE *R389400.00"*

MOLAHLEHI J

Date of Hearing: 28 November 2007

Date of Judgement: 07 March 2008

APPEARANCES:

For the Applicant: Mr GL van der Westhuizen

Instructed by: MacRobert Inc.

For the Respondent: Ms Riki Anderson

Instructed by: Du Toit Attorneys