IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

REPORTABLE

CASE NO: C260/2003

OCELLI FRANCKE AUBOUINN KLAASEN Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

COMMISSIONER CJ WESSELLS N.O. Second Respondent

ALEXKOR LIMITED Third Respondent

JUDGMENT

MURPHY AJ,

1. The applicant has made application in terms of section 145 of the Labour Relations Act (LRA) for an order setting aside the arbitration award made by the second respondent ("the commissioner") on 8 April 2003.

2. The applicant sets out various grounds of review in his founding affidavit and in his supplementary affidavit filed in terms of rule 7A(8)(a). However, when the

matter came before me the applicant elected to limit his challenge to the award to two review grounds, namely that:

2.1 the commissioner committed an irregularity by failing to properly caution the applicant about the implications of him not giving viva voce evidence; and

2.2 the commissioner misdirected himself by finding unreasonably that the applicant was dismissed on 20 September 2002 rather than on 11 September 2002.

3. The applicant was employed by the third respondent ("Alexkor") as a geologist for approximately 7 years. On or about 9 September 2002 a dispute arose between him and the CEO of Alexkor regarding his failure to furnish the CEO with a report into certain mining activities, which the CEO had requested. The report in question had been completed some time before, but the CEO needed extracts of it for use in a report he was compiling in relation to certain equity transfers. Between 9 and 11 September 2002 some unpleasantness arose around the provision of the information, which led to the applicant being summoned to the office of the CEO on 11 September 2002. What transpired during this meeting remains in dispute.

4. Alexkor's version is that after some display on the part of the applicant of

recalcitrance in furnishing the report, amounting to insubordination and the refusal to obey a lawful instruction of the CEO, the applicant was suspended pending a disciplinary hearing scheduled for 19 September 2002, chaired by the Company Secretary, and in which the applicant failed to participate fully. At the end of the disciplinary hearing, according to Alexkor, the applicant was dismissed.

5. The applicant on the other hand contends that he was summarily dismissed at the meeting of 11 September 2002, when the CEO allegedly told him to pack his things and go. Although, he attended the earlier part of the disciplinary enquiry where he successfully raised objections to the partiality of the original chairperson and participated up to a point, he withdrew from the enquiry claiming that he had been dismissed on 11 September 2002 and that the hearing was likely to be a sham or a foregone conclusion.

6. Following the unsuccessful conciliation of the matter, the dispute was referred to arbitration before the commissioner. The arbitration commenced on 7 February 2003 and concluded on 18 March 2003 after hearing the evidence of 13 witnesses, 5 on behalf of the respondent and 8 on behalf of the applicant. The applicant did not give evidence under oath.

7. The commissioner handed down his award on 8 April 2003 in which he found

that the applicant had been dismissed on 20 September 2002 and that the dismissal was both substantively and procedurally unfair.

8. Because of the view I take in relation to the first ground of review, I do not consider it necessary to make any finding in relation to the date of the dismissal, except to the extent that the commissioner's reasoning in that regard has relevance to the first ground. The first ground, as mentioned, alleges that the commissioner committed an irregularity by failing to properly caution the applicant about the implications of him not giving evidence under oath.

9. At the arbitration hearing the applicant did not have the benefit of representation and conducted his own case to the best of his abilities. During his opening address he made various submissions regarding his dismissal. Firstly, he suggested that the CEO had been motivated by ulterior motives on account of his refusal to withdraw a case he had filed with the Labour Court alleging unfair discrimination. Secondly, he indicated that he interpreted the events of the meeting of 11 September 2002 as tantamount to a dismissal. Thirdly, he presented an exculpatory version of the circumstances surrounding his failure to furnish the report, contending in effect that he had not perpetrated the acts of alleged misconduct. And finally, he gave an account of his reasons for not participating in the disciplinary hearing, saying in effect that because the CEO, during the meeting of 11 September 2002, had taken a strong prior view

that he deserved to be dismissed, it would be fairer to refer the matter to arbitration (by which he perhaps meant a disciplinary enquiry conducted by an independent chairperson).

10. Alexkor called five witnesses to give evidence. They included the chairperson of the disciplinary enquiry, the CEO, the applicant's immediate superior, and two security officers who had been present at the meeting of 11 September 2002. Collectively they made out a case that the applicant was guilty of insubordination, had merely been suspended on 11 September 2002 and had by his own conduct failed to avail himself of a fair disciplinary procedure on 19 September 2002. At the end of the examination in chief of Alexkor's first witness, the commissioner duly apprised the applicant of his right to cross-examination and the aim and purpose of the exercise. Thus, he said:

> "Goed, dit is nou u geleentheid vir kruisverhoor. Die doel van kruisverhoor is nou maar net in kort om, sou u verskil met die getuienis wat die getuie, mnr Williams, gelewer het, om dan nou met hom te stry. Dit is u geleentheid om sy getuienis, die getuienis waar u nou verskil daarmee in dispuut te plaas…….
>
> As hy iets uitgelaat het…… wat u saak kan bevorder, kan u dit by hom ontlok. As hy nie die waarheid praat nie, moet u vir hom se luister, hier en hier jok jy, en om hierdie redes jok jy. U moet ook stellings aan hom maak wat u weergawe van die saak is. Met ander woorde as jy nou getuig het u wou nie deelgeneem het nie en u wou egter deelgeneem

het, kan u vir hom se man ek stel dit aan jou, ek wou deelgeneem het, ek het gese ek wil deelneem en jy het my nie toegelaat om byvoorbeeld in argument, dat hy daarrop kan reageer. Enigiets wat u nie met die getuie wil stry nie, kan ek aanvaar hy praat die waarheid en kan ek sy getuienis dan nou as sodanig aanvaar. U moet een vraag op 'n slag vra en hom kans gee om te antwoord voordat u die volgende vraag vra. U verstaan dit ne?

11. On the strength of this full explication of his rights in cross-examination, the applicant proceeded to cross-examine all the witnesses called by Alexkor during which he endeavoured to put his version of the events to them, and in effect indicated clearly that his version differed materially from Alexkor's, particularly in that it offered some justification for his conduct; and indeed that he had not refused to obey instructions.

12. At the conclusion of Alexkor's case the commissioner again gave directions to the applicant on how to proceed. But this time he was somewhat less conscientious. The interchange between them proceeded as follows:

Commissioner: Mnr Klaasen, die respondent, of die werkgewer het dan nou sy saak gesluit. Ek het nou een kant van die saak gehoor.

Applicant: Ja.

Commissioner: Dit is nou u geleentheid om u kant van die saak aan my te stel. Dit kan u doen deur self te getuig en getuies te

roep, of u hoef nie self getuies te roep nie, u kan net getuies roep, maar u kry nou geleentheid om u saak voor my te stel. U is met my?

The applicant at that point indicated that he understood, but asked the commissioner to re-call the chairperson of the disciplinary enquiry. The commissioner refused this request and the interchange continued as follows:

Commissioner: Goed, u kan nou aangaan met u saak. Hoe wil u maak, wil u getuies roep, wil u self getuig?

Applicant: Nee ek wil getuies roep.

Commissioner: U wil getuies roep. U is reg om daarmee aan te gaan ne?

Applicant: Ek is.

13. The commissioner then proposed an adjournment, before which Mr. Duckitt, the employer's representative, intervened with a request that the applicant be instructed to testify first. He explained his concern that if the applicant testified after his witnesses he might tailor his version to suit the testimony of his witnesses. The commissioner commented twice on the request. First, before the adjournment, he said:

"Ja, obviously we can't tell the applicant, or nobody can, not me as Commissioner can instruct the applicant what evidence he must present. If he doesn't want to testify

himself, it's his good right. If he wants to call whoever first, he can do that".

Later after the adjournment when Mr. Duckitt queried the matter again, the commissioner stated:

> " Yes, I follow exactly what you've saying, but I don't even know if the applicant wants to testify. He can decide not to testify……. I just don't, I'm convinced, I don't have the power to tell the applicant listen Mr. Klaasen, you will testify, so go and testify. I don't even know if he wants to testify. So I hear what you say Mr. Duckitt, but there's no way I can inform the applicant and I want him to testify first, or that I want him to testify at all. There is a possibility that the applicant might not testify, but obviously I think if your concern materializes you can argue that".

It is not entirely clear from these extracts whether the commissioner was aware that the applicant's failure to testify might result in him eventually having to accept an uncontradicted version or drawing an adverse inference. His focus was upon the order in which the witnesses would testify, but he noted correctly that the applicant was not obliged to testify nor could he be compelled to do so. He was at the time addressing his comments to Duckitt and in the process omitted to caution the applicant about the dangers of not testifying.

14. Having so ruled, the commissioner invited the applicant to present his case. As stated, the applicant called 8 witnesses. Much of the testimony presented by

the applicant went to the probabilities of him not having been suspended (but rather dismissed) on 11 September 2002. Some of it related to the events between 9 and 11 September 2002 and the issues surrounding the disciplinary enquiry on 19 September 2002. But very little of it touched upon the critical issues of whether the applicant had indeed disobeyed any instruction regarding the provision of information to the CEO, the CEO's alleged ulterior motives or what in fact had transpired during the meeting in the CEO's office on 11 September 2002. For obvious reasons, the applicant was the only person in a position to present his version on these material issues. He failed to do so under oath, preferring not to testify personally. How so deleterious an event came to pass can also be gleaned from the record.

15. At the conclusion of the testimony of the applicant's last witness, the commissioner was quick to bring matters to a close. This brief interchange went as follows:

> **Commissioner**: Dankie mnr Klaasen, u volgende getuie.
>
> **Applicant**: Daar is nie meer nie, klaar.
>
> **Commissione**r: Gaan uself getuig, of sluit u u saak?
>
> **Applicant**: Ek sluit my saak.
>
> **Commissioner**: U gaan nie self getuig nie.
>
> Baie dankie, die applikant het sy saak gesluit.

16. With that the commissioner adjourned the proceedings after the parties

agreed to file written argument.

17. On 24 March 2003 the applicant addressed 16 pages of written argument to the commissioner. It is evident from this document that the applicant relied on evidence falling directly within his personal knowledge, which had not been adduced at the arbitration hearing. The factual submissions thus made addressed not only the events of 11 September 2002, but also his substantive justification and denials in respect of the charge of insubordination.

18. As mentioned earlier, the commissioner found that the applicant had been fairly dismissed on 26 September 2002. From his award it is obvious that the commissioner felt constrained not to give any weight to the applicant's version, which had not been given under oath. He also felt, correctly I might add, that the applicant's witnesses shed little light on the critical issues in dispute.

19. After his summation of the evidence, the commissioner recorded that the applicant had indicated that he did not wish to testify under oath. And then, in his analysis of the evidence, dealing with the critical issue of what transpired in the CEO's office he observed:

> The practical effect of the applicant not testifying is that the respondent led the evidence of 5 witnesses whom I've already indicated made a good impression,

> testifying about what was said and what happened concerning the incidents in dispute, while on the other hand although the applicant led the evidence of 8 witnesses I have no evidence from the applicant under oath contradicting what the respondent's witnesses testified to. What was put to the respondent's witnesses by the applicant during cross-examination is not evidence that I can take into account in his favour.

20. More specifically in relation to the disputed date of dismissal, he said:

> On the other hand the applicant presented no evidence under oath concerning the incident in Mr. Zihlangu's office on 11 September 2002. Not one of his witnesses was present at that stage and I therefore have the situation that the only evidence under oath concerning whether the applicant was dismissed on 11 September 2002 or not, comes from the respondent.

Later in the award, when dealing explicitly with the question of substantive fairness and the question of whether the applicant had indeed disobeyed a lawful instruction, the commissioner accepted Alexkor's version, more or less on the basis that it was the only sworn version before him. Hence, he concluded:

> As already indicated, despite this evidence by the respondent, the applicant did not testify under oath and I therefore as far as the critical issues in dispute are concerned, just have the evidence of the respondent before me.

21. It is clear, therefore, that the applicant's failure to testify under oath played a

significant role in the commissioner reaching the conclusion he did.

22. The applicant essentially submits that the failure of the commissioner to alert him to the consequences of failing to testify under oath has had the effect of denying him a fair trial of the issues and that such amounted to misconduct in relation to his duties as an arbitrator or a gross irregularity in the conduct of the arbitration proceedings, making the award reviewable under section 145(1) read with section 145(2)(a)(i) and (ii) of the LRA.

23. The applicant first raised this ground of review after receiving the transcribed record of the arbitration proceedings in his supplementary affidavit filed in terms of rule 7A(8)(a). In it he points out that he has never had any legal training and that such was obvious to the commissioner. He complains that the commissioner failed to warn him that his failure to testify on crucial events would be held against him and that the commissioner should have realized that he was ignorant of the rules of evidence and warned him accordingly. As a lay person, he claims to have been under the impression that he did not need to present evidence because he had placed his version before the commissioner in his opening statement and during cross-examination of the respondent's witnesses. He avers that he would have testified under oath had he known that his presentation of his version was insufficient. That he believed his version was before the commissioner is to a degree borne out by the manner in which

he dealt with it in his written closing argument.

24. The respondent, Alexkor, contends that the material facts relating to the charges brought against the applicant and the events that led to charges being brought against the applicant were not placed in dispute during the arbitration either in the version of the applicant put to the witnesses or by the applicant's submissions. Moreover, it submits, the version contained in the closing argument was not properly before the commissioner. It maintains the commissioner gave the applicant a fair opportunity to give evidence himself and despite those opportunities, the applicant declined to give evidence. It also argued that the applicant suffered no prejudice as a result of the commissioner not giving the applicant an explicit warning because the version so put would not, had it been admitted, have led to a different result. Finally, it is suggested, had the commissioner instructed the applicant as proposed, he may have opened himself to the charge of descending into arena and thereby compromised his impartiality.

25. Before considering the arguments, it must be said that the task of investigative arbitration bestowed on CCMA commissioners by the LRA is an unenviable one. This court has understanding for how difficult it must at times be to play the dual role of umpire and counsel to unrepresented parties in an arbitration involving 13 witnesses enduring over a period of a number of days. In this case,

the commissioner approached the task considerately with conscientious regard for the rights of both parties. His explication of the requirements of cross-examination was clear, to the point and no doubt helpful. Unfortunately, perhaps by then slightly more fatigued, he appears not to have followed through when required to instruct the applicant on giving testimony.

26. In the employment law context, where there is evidence directly implicating an employee in misconduct, or which is adverse to his or her version, such employee cannot afford to leave that evidence unanswered. Although the commissioner would not be obliged to accept that evidence solely on the ground that it is uncontradicted, provided it is credible, it is unlikely to be rejected if the employee has chosen not to deny or contradict it. An employee's failure to testify will always strengthen the case for the employer - see Hoffmann and Zeffertt: *The South African Law of Evidence* @ 598-599. Nevertheless, it is clearly not an invariable rule that an adverse inference be drawn or that the uncontradicted version should stand. In the final analysis the decision must depend upon the circumstances of the litigation. And, accordingly, in instances such as the present, a commissioner would be justified in drawing an adverse inference or accepting an uncontradicted version only if he has cautioned the unrepresented litigant that his failure to testify might lead to that result.

27. Commissioners acting under the auspices of the CCMA in terms of the LRA are expected to act inquisitorially or investigatively. Section 138(1) of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities. This includes stepping momentarily and cautiously into the arena to direct the proceedings in the interests of justice. In *Consolidated Wire Industries (Pty) Ltd v CCMA* [1999] 10 BLLR 1025 (LC) the Labour Court stated:

> The parties were laymen unrepresented by legal practitioners and without the benefit of pleadings to tie the parties to a version. When a version is charged or a new version is suddenly presented the arbitrator must take charge of proceedings. He cannot rely on the parties to realize what it expected of them unaided.

28. By the same token, and perhaps even more so, one might expect the commissioner to take charge by instructing a party to put a version (of which he is aware) under oath or risk the consequence of an adverse inference or his acceptance of the uncontradicted testimony. The failure to give that warning, in the light of a commissioner's inquisitorial function and duties, in my assessment, constitutes a reviewable irregularity.

29. I find support for this proposition in the judgment of Gamble AJ in *Scholtz v*

Maseko NO and Others [2000] 9 BLLR 1111(LC) @ 1119-1120 where in relation to similar but not identical facts he held:

> It seems to me more probable that the applicant did not give *viva voce* evidence before the first respondent because she did not comprehend that she was obliged to do so. Certainly, the first respondent took no steps to inform the applicant that the only way in which she could place her evidence before him was by giving *viva voce* evidence. Nor did the first respondent warn the applicant of the possible consequences of her failure to testify.
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> As pointed out above, the first respondent has in fact drawn an adverse inference from the applicant's failure to testify. In my opinion the applicant was prejudiced by the first respondent's failure to inform her of the rules of evidence and his intention to rely thereon, to the extent that she failed to present a proper case at the arbitration. The applicant has not had the benefit of the "fair play" approach in CCMA proceedings and the first respondent's admitted assessment of the evidence before him and his failure to properly advise the applicant constitutes a further irregularity in the proceedings.

30. On a similar line of reasoning I am persuaded by Mr. Whyte, who appeared on behalf of the applicant, that the commissioner misconducted himself by neglecting to inform the applicant that the only way in which he could place evidence before him was by giving *viva voce* evidence under oath and by not warning him of the possible consequences of his failure to testify. The *laissez*

faire approach adopted by the commissioner was inappropriate in the circumstances. He was under a duty to inform the applicant of the rules of evidence and his intention to rely upon them to accept an uncontradicted version or to draw an adverse inference.

31. Mr. Sibeko, who appeared for Alexkor, prevailed upon me to ponder the dangers of allowing commissioners to become overly involved in directing arbitration proceedings. Commissioners are required to be independent and must conduct themselves in such a way that any inference of bias is avoided. To this end, he submitted, commissioners should avoid being perceived as entering the arena or as lending assistance to the one party in proving its case. A commissioner's duty should be restricted to outlining the format of proceedings and the procedural rights of the respective parties.

32. Mr. Sibeko's admonition is a salutory one, worthy of being kept in mind as a point of departure. But to my mind the point suffers from overstatement. A requirement that commissioners inform parties of the rules of evidence and the potential consequences of not abiding them will not occasion illegitimate forays into the arena. It is well within the ambit of fair umpiring to spell out the rules and the consequences of falling foul of them. Such an intervention would normally not involve the forming of a fixed view on the cogency of the existing evidence. It consists merely of an elucidation of the principle that unchallenged

evidence has contingent results. There is no duty on the commissioner to insist upon the applicant testifying, nor may he compel such testimony - and to that extent the commissioner in this case stated the principle accurately. Where he failed was in not issuing the caution.

33. Finally, I also agree with Mr. Whyte that at the very least the commissioner ought to have re-opened the arbitration proceedings when alerted by the written argument that the applicant was clearly of the view that his version had been properly put, when it in fact had not.

34. In the premises, I am persuaded that the applicant was denied a fair trail of the issues and the award falls to be set aside on this ground alone.

35. This brings me to the question of relief. For evident reasons, I am in no position to determine whether the dismissal of the applicant was fair, and hence am unable to substitute my decision for that of the commissioner. The matter should therefore be remitted back to the first respondent, the CCMA. During argument I expressed my unease about the expense and delays of fresh arbitration proceedings involving 14 witnesses. I put it to counsel that there may be wisdom in referring the matter back to the same commissioner for the limited purpose of taking the evidence of the applicant and the issuing of a second award. Both counsel raised no objection in principle. However, on reflection, I

hesitate to make such an order. Although the commissioner has demonstrated himself to be conscientious and an insightful professional without any particular bias, it would be unfair to the applicant to expect him to proceed before a commissioner who has already made an adverse award against him. Besides, it strikes me that much of the evidence adduced in the arbitration was strictly speaking not relevant or necessary. Now that able counsel represent both parties it may be possible to narrow the issues somewhat and to mould the evidence accordingly. Regrettable as it may be, the dispute must be determined afresh.

36. The applicant has asked for an order of costs. I am disinclined to make one. Firstly, the respondent, Alexkor, has not conducted itself unreasonably, vexatiously or frivolously. The award is reviewable because the commissioner erred in his duties towards the applicant in the conduct of a fair process. I am also mindful that the applicant was given an opportunity at both the disciplinary hearing and the arbitration to account for his conduct and refused on debatable grounds to do so. Had he complied and testified as he should have, this application might have proved unnecessary. He has prevailed in the review on the narrowest of margins, namely because he was not properly apprised of the consequence of his failure to play open cards. In such circumstances fairness mandates that there should be no award of costs.

37. In the premises I make the following orders:

38.1 The award of the second respondent dated 08 April 2003 under CCMA case number NC 1229/02 is hereby reviewed and set aside.

38.2 The dispute between the parties is remitted to the first respondent, to be arbitrated *de novo* by a Senior Commissioner other than the second respondent within 4 weeks of this order or such other time period as the parties may agree.

38.3 There is no order as to costs.

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Murphy AJ,

Date of hearing: 17 June 2005.

Date of judgment: 27 June 2005

Applicants' Representative: Mr. J. Whyte of Cheadle, Thompson and Haysom.

Respondents' Representative: Mr. T. Sibeko instructed by Nalane Manaka Incorporated.