

**C/K Alliance (Pty) Ltd t/a Greenland v Mosala NO & others  
[2009] 1 BLLR 52 (LC)**

**Division:** Labour Court, Johannesburg  
**Date:** 15/08/2008  
**Case No:** JR3 134/06  
**Before:** E Molahlehi Judge

***Application in terms of section 145 of the LRA***

*Bargaining council – Arbitration proceedings – Review – Commissioner allowing witness to remain in hearing, then barring her from testifying because she had done so – Award set aside.*

**Editor's Summary**

The respondent employee, a cook, was dismissed after being found guilty of disobedience, rudeness and aggression, leaving work without permission and endangering the safety of a colleague. During the arbitration hearing, the employee objected to the fact that the employer's two representatives, one of whom was to testify later, were leading witnesses. The representative who was to testify asked the commissioner whether she should leave the proceedings. The commissioner ruled that she need not do so, but that only one of the representatives should lead the witnesses. Later, however, the commissioner ruled that the second representative could not testify because she had heard the other witnesses. The commissioner subsequently reinstated the employee. The applicant contended that the commissioner had committed a gross irregularity by barring the representative from testifying.

The Court noted that, as a general rule, witnesses are required to wait outside court until they have testified. However, for good reason, this rule is often not applied in arbitration proceedings. It was accordingly incumbent on commissioners to warn parties if they intend to apply the rule. In any event, witnesses are not precluded from testifying merely because they have heard earlier evidence, especially if they are called to testify on aspects not dealt with earlier. In other cases, a court may assess the witness's evidence to ensure that his or her testimony was not influenced by the versions of earlier witnesses. The commissioner had accordingly perpetrated gross irregularities by not warning the witness of the consequences of remaining in the hearing, then barring her from testifying.

The award was set aside.

**Judgment**

**Molahlehi J:**

**Introduction**

- [1] This is an application to review and set aside the award issued by the first respondent ("the commissioner") under case DSPARB06/04/08, dated 25 October 2006. In terms of this award, the commissioner ordered the

**Page 53 – [2009] 1 BLLR 52 (LC)**

reinstatement of the third respondent retrospectively without loss of benefits. Some time back, I issued an order on the following terms:

- "1. The late filing of the opposing papers is condoned.
2. The arbitration award is reviewed and set aside."

The reasons for this order are set out below.

**Background facts**

- [2] The third respondent ("the employee"), who was employed by the applicant as a cook, was charged with failure to carry out an instruction; displaying a rude and aggressive response; leaving work without permission and threatening the safety of a co-worker.
- [3] Following his dismissal, the employee referred an unfair dismissal dispute to the second respondent.

The dispute was then, subsequent to failure of conciliation, referred to arbitration and at the conclusion of which as stated earlier the commissioner ordered the reinstatement of the employee.

- [4] At the arbitration hearing, the applicant sought to have as its representative and a witness, Mr Donna Vance ("Vance"). Vance was also to assist Ms King Robinson in the conduct of the applicant's case.
- [5] The third respondent raised an objection at the beginning of the testimony of the first witness. The third respondent objected to both Robinson and Vance leading first applicant's the witness. At that stage, Vance enquired from the commissioner whether she was required to leave the proceedings. The commissioner ruled that Vance was not required to leave and could sit in during the proceedings and that either Vance or Robinson could lead the evidence of the applicant's witness.
- [6] At a later stage after the completion of the evidence of the first witness of the applicant, the commissioner ruled that Vance was not permitted to give evidence on behalf of the applicant for two reasons. The first reason is that Vance sat in during the proceedings and, secondly, because she made an opening statement on behalf of the applicant.

#### **Ground for review**

- [7] The applicant contended that the commissioner committed a gross irregularity in refusing Vance to testify simply because she made an opening statement and sat in through the evidence of the first witness of the applicant. The applicant further contended that the commissioner did not warn Vance that she could be precluded from testifying on behalf of the applicant if she sat in through the proceedings.
- [8] In opposing the review application, the respondent conceded that the commissioner did not inform or warn the applicant representative that if Vance stayed to observe the proceedings and heard the testimony of the first witness, she would not later be permitted to give evidence on behalf of the applicant. The respondent argued in this regard that the applicant's representatives had confirmed that they were familiar with the arbitration proceedings and therefore it was not necessary for the commissioner to have cautioned them about Vance sitting in through the testimony of the

#### **Page 54 – [2009] 1 BLLR 52 (LC)**

first witness. The respondent further argued that the applicant was not prejudiced or denied the opportunity of properly presenting its case because the applicant's representative had firstly placed on the record that they were familiar with the arbitration process and also advised that they would lead only one witness.

#### **Evaluation**

- [9] As a general rule, witnesses are normally required to wait outside the court until such time when they would have presented their evidence. The reason for this is to guard against the version of a witness being influenced by what they may have heard whilst sitting in during the testimony of other witnesses. This rule is generally not as firmly enforced in arbitration proceedings, and correctly so, as is the case in the courts. This being the case, it seems to me that the appropriate approach is that commissioners are duty bound to warn potential witnesses or those that may have already been identified as such of the possible consequences of their presence during the testimony of other witnesses. But where, for any reason, it turns out later that a witness sat in during the testimony of other witnesses, that should not disqualify such a person from testifying. At best, what the commissioner should do in such a situation is to allow the witness to testify and then evaluate at the end of the proceedings when assessing his or her testimony as to whether his or her version may have been influenced by the version of the other witnesses who testified while present in the hearing. The other party would have the right during cross-examination to test the extent to which the version of such a witness, who had been sitting during the proceedings, may have been influenced by his or her presence during testimony of other witnesses.
- [10] The danger of excluding a witness simply because he or she sat in during the testimony of others is that such an approach prejudices the testimony of such a witness. It may well turn out that such a witness would have testified on an issue which those before him or her have not testified on. It may also be that the witness is so honest that he or she is willing to go against those who are suppose to be on his or her side.

- [11] The probative value, which the commissioner accords to such evidence, would depend on the extent to which the witness may have sought to tailor make his or her evidence with those who testified before him or her. This would, however, not apply where the witness, who sat in during the testimony of others, testifies on a totally different issue to the one that the others may have testified on.
- [12] In my view, the commissioner failed in her duty by, firstly, not warning the applicant of the consequences of Vance sitting in the hearing during the testimony of the first witness. The consequences which the commissioner should have warned both Robinson and Vance of is not that Vance would be disqualified from testifying but that the applicant ran the risk that her evidence may carry little or no weight for the simple reason that she was present during the testimony of the first witness.
- [13] I know of no rule in our law that a person who makes an opening statement on behalf of a party in litigation proceedings would be disqualified

**Page 55 - [2009] 1 BLLR 52 (LC)**

for that reason to testify at later stage. There is also no rule that a representative of any party in the arbitration proceedings is disqualified to testify for that reason. Thus the commissioner, in my view, committed a gross irregularity, and arrived at a conclusion which a reasonable decision-maker could not reach.

- [14] It was on the basis of the above reasons that I reviewed and set aside the commissioner's award.

*For the applicant:*

Bronwyn Murray (attorney) instructed by Bell Dewar & Hall Inc

*For the respondents:*

Eunice Mahlaule (union official) instructed by SAFATU

*No cases were referred to in the above judgment.*