REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C682/03

In the matter between:

THE MAGIC COMPANY	Applicant
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	First Respondent
MAZWI V (Commissioner)	Second Respondent
PHETE E	Third Respondent

JUDGMENT

MURPHY AJ,

1. The applicant seeks to review and set aside an arbitration award made by the second respondent in his capacity as a commissioner of the CCMA on 24 May 2002 in terms of which he directed the applicant to pay the third respondent R21900 as compensation for her dismissal, which he found to have been procedurally and substantively unfair.

2. The third respondent was employed as a customer attendant at a children's entertainment centre operated by the applicant at Grandwest Casino in Cape Town. On 2 July 2001, a customer Dr William Langenhoven, addressed a letter of complaint to Ms Belinda van der Hoven, a public relations officer at the Casino, complaining that the third respondent had been unhelpful, rude, cheeky, disrespectful and had attended to customers with a mouth full of chewing gum. The complaint arose out of an interaction between Dr Langenhoven, his wife and the third respondent in which he had sought her assistance regarding a defective machine which would not accept tickets to operate one of the games.

3. On the strength of this letter the third respondent was charged with rudeness to a client, poor customer service and damaging the image of the company and was dismissed on 13 July 2001 following a disciplinary hearing on 12 July 2001. No documentation or minutes pertaining to the disciplinary enquiry have been filed in these proceedings.

4. The third respondent referred a dispute regarding her dismissal to the CCMA on the 26 July 2001. The applicant failed to participate in the conciliation process and a certificate of outcome declaring the dispute to remain unresolved was issued on 18 February 2002, whereupon the third respondent requested the dispute to be resolved through arbitration. The arbitration hearing took place at the offices of the

CCMA in Cape Town on 13 May 2002. The applicant failed to attend the hearing and accordingly the award was handed down on a default basis. For reasons that have not been explained, the applicant chose not to seek rescission of the arbitration award but instead brought this application for review.

5. In reaching his decision the second respondent considered the testimony of the third respondent given under oath. She claimed that the customers had been in a bad mood after standing in a long queue but wanted to "outjump" other customers for preferential service and had become verbally rude towards her while she attempted to attend to their query. The finding that the dismissal was substantively unfair was based on this uncontested evidence. The commissioner further found the dismissal to be procedurally unfair because the third respondent's accusers had not been called to appear at the hearing and she had been denied the opportunity to challenge them. In this regard he held that the *audi alterim partem* rule required the employee to be given the opportunity to face her accusers. It seems that on the evidence before him the commissioner concluded that the applicant had based its decision to dismiss the third respondent exclusively on Dr Langenhoven's letter.

6. The applicant's founding affidavit, deposed to by its human resources manager, is short on detail in relation to the events leading to the dismissal and the conduct of the disciplinary hearing. The applicant essentially limits itself to three grounds of

review.

7. The first ground is in effect a point *in limine* that the CCMA lacked jurisdiction to hear the matter on the ground that the dispute should have been referred to the Bargaining Council for the Entertainment Industry of South Africa. According to Ms Pauw, the applicant's human resources manager, when the applicant received notification that the matter had been referred to the CCMA she sent "a standard letter" to the CCMA informing it that it had no jurisdiction to hear disputes between the applicant and its employees. No copy of such letter has been annexed to the founding papers. She also claims to have contacted the Gauteng Branch of the Bargaining Council and requested it to inform the CCMA in Cape Town that it lacked jurisdiction to hear the matter. She does not identify the person to whom she spoke, nor the time the call was made. She averred further that the Bargaining Council duly telephoned the CCMA and informed it that it lacked jurisdiction. Again, beyond her say so, there is no corroboration of this or any supporting affidavit from the council. Still, it remained the applicant's view that the arbitration was conducted irregularly by the CCMA even though it was aware that it lacked jurisdiction. Neither the first nor the second respondent has put in an appearance to defend. Nor have they filed any supplementary reasons for the award.

8. At the hearing of the review the applicant handed in two documents, which ought

rightly to have been annexed to its founding papers. The first was a Certificate of Registration certifying that the applicant is registered by the Bargaining Council as an employer in the entertainment industry. The second was a Certificate of Accreditation of Council issued by the CCMA in terms of section 127 of the LRA accrediting the Bargaining Council to perform dispute resolution functions including the authority to resolve disputes about unfair dismissals through conciliation and arbitration.

9. On the face of it, therefore, it would seem that the Bargaining Council did indeed enjoy jurisdiction in respect of the dismissal dispute. Section 191 of the LRA provides that where there is a dispute about the fairness of a dismissal the dismissed employee may refer the dispute in writing to a Council if the parties to the dispute fall within the registered scope of that council, or to the CCMA, if no council has jurisdiction. Although no argument was presented on the point, the use of the word “may” in section 191 could be interpreted to mean that a dismissed employee has an election to refer the dispute either to a council with jurisdiction or to the CCMA. More likely though, keeping in mind the voluntarist scheme of the Act, the election contemplated is the employee’s right to decide whether to refer a dispute to the relevant body at all. For reasons which will appear presently, it is unnecessary to decide this question.

10. Initially, in his heads of argument, Mr van der Schyff, who appeared for the

third respondent, argued that the applicant had failed to provide any substantiating evidence of the alleged absence of jurisdiction or any details of the applicant's affiliation to the council and contended that it was estopped from raising the issue. When presented with the two certificates, however, he wisely chose not to press the point, but instead opted to rely on section 147(3)(a) of the LRA. The section provides:

> "If at any stage after a dispute has been referred to the commission, it becomes apparent that the parties to the dispute fall within the registered scope of a council and that one or more parties to the dispute are not parties to the council, the commission may-
>
> (i) refer the dispute to the council for resolution; or
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> (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act".

10. Mr van der Schyff submitted that when one has regard to the applicant's version, in particular its claim that it wrote to the CCMA advising it that it lacked jurisdiction and that the council had subsequently telephoned the CCMA to inform it similarly, it is probable that the CCMA elected to assume jurisdiction in terms of section 147(3)(a) and thus was entitled to make the award despite the assumption of jurisdiction in terms of this particular section not being reflected or recorded in the award. Mr Stylianou, counsel for the applicant, on the other hand, in support of his contention that there had been no conscious assumption of jurisdiction by the

commissioner under section 147(3)(a), referred to the opening paragraph of the award in which the commissioner recorded that he had “decided to proceed with the matter in terms of section 138(5)(b)(i)” of the LRA.

11. On the limited evidence available, and relying particularly on the applicant’s evidence that the CCMA was twice informed that the council had jurisdiction to determine the dispute, I am persuaded on the probabilities that the Commission opted to assume jurisdiction and appointed the commissioner to resolve the dispute. Since the third respondent, unlike the applicant, was not a party to the council, the assumption of jurisdiction was proper and in accordance with the pre-conditions stipulated in the sub-section. The fact that the appointed commissioner, without the benefit of any argument on the point, did not record the basis of his jurisdiction, is neither here nor there. The authority to appoint the commissioner vested in the Commission, acting through the Director or any other official to which the power might have been lawfully delegated. Once the CCMA was informed of the council’s jurisdiction it seems likely in the circumstances that it elected to proceed, as it was entitled to do, under section 147(3)(a). Such a finding is in keeping with the spirit of the general canon of construction: *verba ita sunt intellegenda ut res magis valeat quam pereat* and the evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta,* both of which are fortified in this instance by the legislative injunction in section 1 calling on functionaries, including judges, when applying the LRA to

promote the effective resolution of labour disputes. In the premises the applicant's challenge to jurisdiction must be dismissed.

12. The applicant's other grounds of review relate to the justifiability of the award. On the matter of substantive fairness, the applicant seizes on the following comment made by the second respondent in the award:

> "The onus was then on the absent employee to prove the dismissal was for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements ---the respondent could not prove these facts because it was not in attendance and dismissal should, on this basis alone, be found to have been substantively unfair".

14. The applicant legitimately maintained that the mere fact that it was not present at the hearing did not justify a finding of substantive unfairness. This may be so, but it is apparent from both the record and other paragraphs of the award that the commissioner did consider and weigh the uncontested evidence of the third respondent. In particular, he noted the nature of the allegations against the third respondent, that she disputed them and that there was no evidence to contradict her direct evidence that Dr Langenhoven's wife had been impatient, had tried to jump the queue and was in a very bad mood. It is also apparent from his questioning of the third respondent that the commissioner implicitly accepted that the third respondent had called her supervisor to attempt fix the faulty machine, but that before he could do so Langenhoven had become rude and had

shouted at her. Nowhere in its papers filed in the review proceedings does the applicant contest the third respondent's version, nor was any other version available to the commissioner when making his decision. Hence, on the basis of the third respondent's denial of having been rude to the customer and her explanation of what had transpired, the commissioner was justified in reaching the conclusion that there was no fair reason for the dismissal.

15. I am similarly persuaded that the commissioner's finding that the third respondent did not enjoy the benefit of the *audi alteram partem* principle was not beyond the bounds of rationality or justifiability. The applicant has failed to file a replying affidavit contesting the third respondent's averment that it relied exclusively on the letter of complaint. While it is correct that employers should be granted same leeway in applying the *audi* principle flexibly to their peculiar circumstances, mere reliance on a letter of complaint from an agitated customer, who may have had an axe to grind, will of itself usually not be enough to justify a summary dismissal of an employee with a clean disciplinary record. Ideally, before a dismissal can follow, the employee should be given an opportunity to hear the complaint against her and be afforded the right to challenge the complainant's version in the presence of the complainant. Alternatively, and at the very least, the employer should have adduced evidence tending to corroborate the allegations made in the letter of complaint. Accordingly, the commissioner's finding that reliance on the letter led to a dismissal, which was

both substantively and procedurally unfair, cannot be faulted as irrational or unjustifiable.

16. There is therefore no basis to set aside the award and there is no reason why costs should not follow the result. In the premises I make the following orders:

1. The application is dismissed.

2. The applicant is ordered to pay the third respondent R21900, together with interest at the rate prescribed in the Prescribed Rate of Interest Act from 24 May 2002 until the date of payment.
3. The applicant is to pay the third respondent's costs.

MURPHY AJ

DATE OF HEARING: 2 DECEMBER 2004

DATE OF JUDGMENT: 19 JANUARY 2005

APPLICANT'S REPRESENTATIVE: Adv Stylianou instructed by KOKKORIS ATTORNEYS.

RESPONDENT'S REPRESENTATIVE: Adv J. van der Schyff instructed by N. ALLEN ATTORNEYS.