

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**HELD AT JOHANNESBURG**

Case Number:
JA 88/97

In the matter between

PETRO MAGDA GEERDTS

Appellant

and

MULTICHOICE AFRICA (PTY) LIMITED

Respondent

JUDGMENT

Nicholson JA

[1] The appellant was employed by the respondent as a public relations manager. She reported to her manager Mr Cobus Scholtz from January 1995. During the course of her employment Ms Robyn de Villiers of Arcay Corporate Communications, an outside consultant, was engaged to do an assessment of appellant's department, whilst the appellant dealt with certain special projects.

[2] On 23 May 1996 the appellant was given notice to attend a disciplinary enquiry which proceeded on 27 and 28 May 1996. The appellant was charged with unlawfully recording a private business meeting held by Scholtz and two other persons. The

appellant disputed making the recording. She was found guilty at the enquiry and dismissed on 28 May 1996.

- [3] On 31 May 1996 the appellant lodged an appeal against the decision of the disciplinary enquiry. She also brought proceedings in terms of sections 17(11), 43 and 46(9) of the Labour Relations Act, No. 28 of 1956, (“the Act”). In the last mentioned proceedings she sought a declaration that her dismissal was an unfair labour practice and that pursuant to such a declaration she be reinstated in her former position. Urgent relief sought in terms of section 17(11) was refused. The application in terms of section 43 resulted in a reinstatement order which was not put into effect.
- [4] Initially only appellant testified in the industrial court on her own behalf. After Scholtz, De Villiers and Ms Kumarie Naranjee had testified for respondent, appellant successfully applied to reopen her case and called Ms Kezanne Riley. After a 13 day trial in the industrial court her section 46(9) application was refused and the court made an order that she pay the costs of the respondent on the High Court scale. The decision by the industrial court was handed down on 6 August 1997 and reasons were furnished on 5 September 1997. No findings were made on credibility and the court a quo found that on a conspectus of all the relevant facts and probabilities appellant’s version fell to be rejected. This is an appeal from that decision.

Procedural unfairness

[5] Mr Bruwer, who appeared in this court as well as the industrial court for the appellant, submitted that it was procedurally unfair that the respondent did not lead the evidence at the disciplinary enquiry and in the industrial court of Dr Jansen, an expert who examined the tape used to record the meeting to see if anyone had tampered with it. Although appellant was not allowed the services of a legal practitioner at the disciplinary enquiry as the disciplinary code made no allowance for that, it was common cause that appellant was receiving advice from counsel during that period. As the evidence of Dr Jansen was never led it was not clear what his findings encompassed and that his examination had been conducted at the time of the enquiry. Assuming that it had been, I am not convinced that appellant was prejudiced by the failure by company to call such evidence. Appellant could always have called Dr Jansen at both proceedings and declined to do so despite being advised at the time by counsel. Scholtz identified the original tape and it was handed in as an exhibit. He categorically denied that anyone had tampered with it. There was no evidence to contradict this. In any event, given the issues that emerged in the industrial court, namely whether appellant recorded the meeting accidentally or whether Scholtz taped it to frame appellant, it does not seem to me to matter whether the tape was tampered with or not.

[6] The second instance of procedural unfairness relied on by Mr Bruwer related to the alleged failure of respondent to afford appellant the right of appeal guaranteed her in the disciplinary code. That such a right existed admits of no dispute. Appellant could have utilised such a right. The respondent made an offer of such an appeal to be held

during the week of 15 July 1996 in a letter dated 3 July 1996. The offer of the appeal was made subject to the appellant withdrawing her section 43 application. This letter records Mr Bruwer as having addressed the industrial court on the section 43 application on the basis that the appeal had been abandoned. Appellant declined the offer of the appeal subject to the withdrawal in a letter dated 5 July 1996. The appellant was entitled to exhaust her domestic remedies first and then utilise the machinery of the Act. There was no question that she would have lost any right to use section 43 after her internal appeal hearing. She chose rather to embark on an application in terms of section 43. By invoking this section she waived reliance on her domestic right of appeal.

Substantive unfairness

- [7] Mr Bruwer has criticised the finding of the industrial court that the dismissal of appellant involved no unfair labour practice on a number of grounds. It is necessary to look at the version of the appellant and the other evidence in the case to determine whether these criticisms are justified. In the industrial court the appellant testified as follows with regard to the events of 21 May 1996. She arrived at work at 6am and took her husband's son to school. On her return she worked at Naranjee's desk until the phone rang. The call was from Scholtz who advised the appellant that he would be late for a meeting and that she should advise De Villiers of this fact. Naranjee arrived and unlocked Scholtz's office. The appellant followed her into the office explaining that she had arranged with Scholtz the previous day that she would fetch a bottle of

wine for Mr Marius Steyn. The appellant was shown where the wine was kept and she took a bottle and left. She had a sling bag with her which she left there accidentally.

[8] The first bottle of wine was to replace one taken from the managing director Mr Koos Bekker and she went into Scholtz's office a second time to fetch another bottle which would be from Scholtz to the colleague. At the time of this second visit Scholtz had two people with him and the appellant took the wine, with Scholtz's permission, and left immediately. Appellant's reason for fetching the second bottle of wine in the disciplinary enquiry changed once it became clear that Steyn had already received a bottle of wine the previous day.

[9] The appellant then proceeded with her work. She had used a dictaphone in the car to dictate notes to herself and this was in her sling bag. As she could not find her sling bag, she asked Naranjee if she had seen it. She had not and the two then looked through the window, which separated Naranjee's office from that of Scholtz, and saw the bag against the cupboard that housed the wine. The appellant asked Naranjee to fetch the bag when she took tea into the meeting. Naranjee explained that she had already made tea. The appellant then said that she would fetch it after the meeting.

[10] When the meeting was over she went in and Scholtz asked her why she was recording his meeting. She enquired as to why she would want to record the meeting and suggested that Scholtz might have turned the dictaphone on accidentally, when

removing it from the bag. On playing back the tape it became clear that parts of the meeting had been recorded. Two members of the human resources department and the head of security were called and appellant was subsequently suspended.

- [11] From the above account it is clear that appellant was relying on accidentally recording the meeting and at the disciplinary hearing, the section 17(11) and 43 proceedings, she persisted in such a defence, including suggesting a number of ways in which the dictaphone could have been switched on. An example of her evidence at the disciplinary enquiry reads as follows

“It’s been on my mind since Tuesday and the only thing I could’ve done was when I rewinded it, okay, I must’ve stopped it, either by that method - I normally do it by the stop button off - rewind it and then put it into my bag like that. All I can think that is that I would’ve pressed the top button ‘record’ which automatically takes the play button with it. Some dictaphones you’ve got to physically press both, at the same time. But, all I can think is that the record button, as I put it into my pocket here, it went down like that. Okay, that’s all I can think of. I cannot offer any other explanation, at this stage of the game and believe me, I’ve tried to rack my brains.”

- [12] In the replying affidavit filed by the appellant in section 43 application appellant deals with the allegation by Scholtz that she deliberately taped the meeting. She points out that the meeting lasted an hour and that only seven minutes thereof were recorded. This she concludes “reflects that the tape recording was not intentionally put on the record made by myself.”

- [13] In the pleadings filed in terms of section 46(9) of the Act she abandoned the defence of accident and suggested that Scholtz had set off the tape in a deliberate attempt to

frame her and secure her dismissal. She alleges the following:

- “29.1.1 On 21 May 1996, Mr Scholtz, motivated by an ulterior motive, searched the Applicant’s sling bag, which was accidentally left in Mr Scholtz’s office, in her absence.
- 29.1.2 Mr Scholtz then took the Applicant’s dictaphone, activated it by switching it on to the voice activating mode.
- 29.1.3 Mr Scholtz then put the dictaphone into the Applicant’s bag again.
- 29.1.4 Mr Scholtz then commenced a meeting with Mesdames Robyn de Villiers and Chirstine Bailey with the dictaphone in the voice activated mode in the Applicant’s bag.
- 29.1.5 After the meeting had terminated and after Mesdames de Villiers and Bailey had left, Mr Scholtz presented and pretended to his secretary that he had been unaware of the presence of the applicant’s bag in his office, requested her to bring the bag to him, made reference to the dictaphone and took the dictaphone out from the bag, whereafter Mr Scholtz gave out and pretended to the secretary that the Applicant had recorded his private meeting.”

[14] The section 46(9) pleadings go on to allege that Scholtz put into motion a false charge and fabricated evidence against the appellant. There was not a jot or tittle of evidence to substantiate these wild and scurrilous allegations and the appellant gave no evidence to show why Scholtz had the alleged ulterior motive. The industrial court found that appellant’s placing of the bag was not accidental or done to frame appellant but deliberate : in order to record the proceedings at the meeting. The industrial court relied on circumstantial evidence and the probabilities in arriving at the conclusion that appellant deliberately recorded the meeting. The test remains whether the appellant’s version is the more plausible amongst several conceivable ones. Ocean Accident Guarantee Corporation v Koch 1963 (4) SA 147 (AD) at 159C.

- [15] Mr Bruwer submitted that the evidence never revealed that the meeting was actually taped. Although the taping process was not done very professionally the evidence established clearly that the seven minutes could only have related to the meeting in question. Scholtz identified incidents which were mentioned by the participants at the meeting which were recorded on that occasion. De Villiers also recognised her voice on the tape telling the persons present about being locked out of her office. It is clear that the seven minutes on the tape constituted parts of the conversation at the meeting.
- [16] Mr Bruwer criticised the industrial court's finding that the appellant had attempted to record the meeting. He submitted that she was charged at the disciplinary hearing with actually recording the meeting. This submission is without substance. The industrial court was not suggesting that appellant was merely involved in acts of preparation. The industrial court was implying that there was an actual recording but that it was so poor it constituted an unsuccessful attempt to comprehensively tape the proceedings. That appellant taped the meeting badly does not alter the fact that she taped it.
- [17] Mr Bruwer submitted that the industrial court ought to have found that it was Scholtz that activated the recorder and not the appellant. He placed emphasis on the fact that initially appellant recognised the voice of Scholtz and that this was an indication of her innocence. It seems to me that appellant was alert to the dilemma in which she found herself and devised a strategem to extricate herself.
- [18] Mr Bruwer also criticised the fact that Scholtz did not cry out with anguish when he

discovered the dictaphone. His reaction was consistent with a calculated move and not shock and dismay at having his privacy invaded, so the argument ran. It is difficult to predict how people react to different situations. Stunned silence is a frequent response to shocking revelations. The fact that Scholtz immediately summoned Mardia van der Walt, the General Manager Human Resources, and Kallie Jacobs from security does not necessarily imply that he planned the entire exercise. In themselves these factors are neutral and it is necessary to look at the whole conspectus of the evidence including the probabilities to evaluate whether Scholtz is the ogre he has been made out to be.

[19] Mr Bruwer suggested that Scholtz contradicted himself with regard to the discovery of the dictaphone. These relate to whether Scholtz immediately recognised the dictaphone, or saw a 'black instrument' and then asked Naranjee to put down the bag or saw the machine after the bag was put down. The final version, so the argument ran, was that Scholtz only observed the object once the bag was put down by Naranjee. Similar criticisms were levelled at the fact that Scholtz could not have seen the dictaphone from the position where he was sitting. These criticisms and others led Mr Bruwer to stigmatise Scholtz as an arrogant psychopathic liar.

[20] This accusation is as breathtaking as it is unfounded. Myburgh JP deals with the costs aspect in this matter and the manner of cross-examination of Scholtz by Mr Bruwer. I share his views completely. That minor discrepancies creep into the testimony of every honest witness needs little authority. In fact exactness of recitation often

bespeaks rehearsal and contrivance. The important point in relation to Scholtz and any other witness is to test the evidence against the proved facts and the probabilities.

[21] It is common cause that the dictaphone was found in voice activation mode. The question which arises is whether Scholtz would have had an adequate opportunity to arrange his nefarious plan. Scholtz would have had to have foreseen that the appellant would accidentally leave her bag where she did and utilise the twenty odd seconds he was alone to activate the machine. He would also have to foresee that the appellant would not remove the bag on her second visit to fetch the second bottle of wine. I must say that I find it most improbable that, given the dimensions of the office, appellant would not have noticed her bag the second time she visited the office. Appellant conceded that there was no reason to take the bag into the office and the probabilities favour her doing so deliberately to facilitate the taping. It is also improbable that she would have left it in Scholtz's office given that, on her version, it had the dictaphone in it with the notes she would be typing out.

[22] Scholtz's evidence was that the red light on the dictaphone, which illuminates when recording, was covered in prestik. The appellant was not able to explain this with any degree of conviction and belatedly suggested that the prestik was on the volume button. In the disciplinary enquiry Scholtz dealt with the prestik and said

“... The fact is what I want to say it [was] on one spot - on one particular spot over the red light.”

The appellant responded by saying that she was not denying that. The presence of the prestik very strongly suggests that the person wished to record the meeting clandestinely. The red light would warn any person at the meeting of the presence of the dictaphone. That prestik might inadvertently attach itself to that precise part of the dictaphone seems to me to be improbable in the extreme.

- [23] The evidence revealed that the appellant was on very good terms with De Villiers . According to the latter, the appellant had told her after the incident that Scholtz had caught her out on something that she did not think she was going to get away with. De Villiers did not tell the chairman of the disciplinary enquiry about this conversation and her explanation was that she was not asked any specific questions about it. She did not volunteer it at the time as she regarded it as a private conversation and she was on friendly terms with appellant. The first time she made mention of it was when she was precognised by counsel, Mr Franklin, who appeared for the respondent in both the industrial court and this court, in preparation for her evidence before the industrial court. At the time she was in her husband's office. The cross-examination of De Villiers by Mr Bruwer suggested that the words 'caught out' in the context meant that she had been arrested. This, of course, posited the notion that she admitted saying the words - which was never her version - and was implying a different construction. Mr Franklin, very properly, objected to this line of cross-examination and it was disallowed. What appellant told De Villiers during the same conversation is also of importance. She urged De Villiers to not reveal to anyone that appellant was aware of

the meeting that morning. This evidence was given by De Villiers at the disciplinary hearing. Despite rigorous cross-examination De Villiers was not shaken on this and other points and I have no reason not to believe her. Her evidence reads well and she was most most candid in her admission of a reluctance to divulge the confidence imparted to her by appellant. Her reluctance to reveal the telling confession made by the appellant arose out of her respect for a confidence, not any mendacity on her part.

- [24] The admonition to keep silent about appellant's knowledge of the meeting is a serious matter and illustrates very clearly that appellant realised that if that fact were known her interest in taping the meeting would be revealed. That appellant did have an interest in taping the meeting admits of no doubt whatsoever. The three participants in the meeting discussed the future of the two persons in appellant's department. The functions, management and physical location were considered and a procedure was agreed in terms of which De Villiers would take over that responsibility on a permanent basis. I must say that appellant's evidence on whether she knew that a meeting was to take place was most evasive and unsatisfactory. Cross-examined by Mr Franklin she said the following:

“And Robin de Villiers told you on the 20th of May that she had been called to a meeting with Mr Scholtz the following day, not so? --- She had told me that Mr Scholtz had requested lunch. She could not make lunch and we left her desk together with her saying, ‘let me to to Kumarie and see when I can get into his diary’”.

In the disciplinary enquiry she admitted knowing about the fact that a meeting was to be held.

- [25] The gravamen of appellant's version at the disciplinary enquiry was that it was beneath her dignity to sink to the level of taping the meeting or private conversation of another. She described such conduct as "unpalatable" and "disgraceful" and strongly suggested that she would be insane to jeopardise her job by indulging in such conduct. Under cross-examination she was constrained to concede that on a previous occasion she had secretly recorded the conversation of another, her husband.
- [26] The evidence of Naranjee reveals that she reminded appellant to remove her bag when she left it there on the first occasion that she fetched a bottle of wine. There is no reason why Naranjee should not tell the truth on this point. On this point the appellant initially volunteered the same evidence herself in the disciplinary enquiry when she said "But Cobus you know that Kumarie said to me "don't forget your bag" and you said to Kumarie "get me some breakfast"." Appellant sought later to try and distance herself from this statement by saying that she did not remember Naranjee ever reminding her. It seems to me that she had belatedly tumbled to the fact that given this reminder it was somewhat surprising - indeed sinister - that she did not remove the bag. The probabilities favour that if Naranjee did remind appellant to remove her bag and she left it there, she must have done so to record the meeting.
- [27] The industrial court, rightly in my view, rejected the evidence of Riley that appellant had not telephoned her and then handed the call over to De Villiers that morning. Riley was employed by the appellant as a secretary. Any calls during the day for De

Villiers would come through Riley. Riley conceded that appellant did phone De Villiers on numerous occasions previously when she was not in the office. Riley's evidence in connection to whether De Villiers ever spoke to people in the general office was unimpressive and I got the impression she was doing all in her power to save the appellant. She conceded a friendship with the appellant - indeed her boyfriend defended appellant in the disciplinary enquiry - and she evidenced a partiality which makes it difficult to give her the same credence as De Villiers on this point.

[28] I am therefore of the view that the industrial court was quite justified in rejecting the version of appellant and Riley and in accepting without qualification the evidence of Scholtz, Naranjee and De Villiers. The finding by the industrial court that appellant did intentionally record the meeting cannot, therefore, be disturbed.

[29] Mr Franklin has submitted that electronic surveillance is a serious invasion of the privacy of an individual. He points out that it is a criminal offence in terms of section 2 of the Interception and Monitoring Prohibition Act, No 127 of 1992 and constitutes the commission of a delict and a serious impairment of the *dignitas* of a person. See Mc Quoid-Mason The Law of Privacy in South Africa 1978 page 147, S v A 1971(2) SA 293 at 297. Section 13 of the Constitution of the Republic of South Africa, Act 200 of 1993, dealt with the protection of privacy and provided that

“Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or

property, the seizure of private possessions or the violation of private communications.”

The current Constitution, Act 108 of 1996 protects ‘the privacy of ..communications’.

See section 14(d).

- [30] The managerial prerogative requires that senior employees and managers should be entitled to evaluate the work of their subordinates in circumstances of confidentiality. Any invasion of this privileged occasion has to be viewed in a very serious light. Not only does it reveal a breach of the trust that the manager will objectively evaluate such work it also destroys the relationship as such. Clandestine electronic surveillance undermines good faith and fidelity and betrays a less than honest disposition. It is difficult to see how the employer can be fairly expected to continue the employment relationship having regard to such misconduct. See Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers’ Union (1994) 15 ILJ 778 (LAC) at 781 A-B. The reading of this record leaves a sour taste in the mouth. It may well be that appellant became desperate after losing her job and embarked on the unfounded attack on Scholtz and the other witnesses. Whatever the reasons may have been, the manner appellant conducted the case was unconscionable. I agree, for the reasons set out by Myburgh JP, that the appeal should be dismissed with costs, such costs to be on the attorney and client scale.

NICHOLSON JA

I agree

MYBURGH JP

I agree

FRONEMAN DJP

Myburgh J P

[31] In this judgment costs are dealt with in two respects:

- (a) the costs order of the industrial court - that the appellant pay the respondent's costs on the High Court scale – which is appealed against by the appellant; and
- (b) the request by the respondent that the appeal should be dismissed with costs on an attorney and client scale.

[32] The normal practice in the industrial court in s 46(9) proceedings is to make no order as to costs. By ordering the appellant to pay costs on the High Court scale, the industrial court deviated from the norm. The court motivated its award by referring to the reprehensible conduct of the appellant in attempting to record the meeting; the turnabout in the appellant's defence from an averment that the tape was switched on accidentally to a new defence that it was Scholtz who did so; the appellant's conduct in allowing Mr Brüwer to launch a cross-examination which was 'a vicious and venomous, and, more importantly, an unwarranted and baseless attack on the integrity

of Mr Scholtz'; the fact that Scholtz had to endure 'an excessively and unnecessarily lengthy cross-examination over six days, to indulge [appellant's] counsel, to which the [appellant] was a consenting party'; and the case should never have come to court.

[33] In an appeal against costs, the question is whether there was an improper exercise of judicial discretion, i.e., whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view: Ward v Sulzer 1973 (3) SA 701 (A) at 707A; Minister of Prisons a.o. v Jongilanga 1985 (3) SA 106 (A) at 124B-C.

[34] In my view there was no improper exercise of a discretion. On the contrary, the award was justified on at least three grounds: the merits of the case, which are dealt with in the judgment of Nicholson J A, the baseless and vicious attack on Scholtz, and the cross-examination of Scholtz.

[35] Having stated initially that the tape could have been switched on accidentally by herself or by Scholtz when he removed the dictaphone from the sling-bag the appellant averred in her statement of claim, filed five months after her dismissal, that Scholtz, acting with an ulterior motive, fabricated a case against her. In essence the averment was that Scholtz framed the appellant. The attack on Scholtz did not rest there. It was pleaded that in the disciplinary enquiry he 'manipulated the said witnesses, either tacitly through his very senior position with the respondent and/or by blatantly intimidating them and/or by misleading them and/or enticing them to

commit perjury' in certain respects.

[36] The appellant did not call a single witness in support of those allegations nor did she give evidence to substantiate those allegations. In cross-examination she wavered between testifying that the frame-up was a possibility, which should be investigated, to saying that she was '95% sure' that Scholtz had framed her. It emerged during the cross-examination of Scholtz that the allegation that he had forced witnesses to change their evidence was based on a reading of the record of the disciplinary enquiry and that the allegation of a frame-up had no factual basis at all. Mr Brüwer commenced the cross-examination with the intention to show, on the basis of Scholtz's own evidence, that he framed the appellant.

[37] Not only was no evidence led by appellant of Scholtz's motive to frame her: the appellant expressly stated that she knew of no motive.

[38] At best for the appellant the attack on Scholtz was speculative. But the indictment of the appellant is far more serious. She knew that the truth was that she had deliberately planted the sling-bag in Scholtz's office with the dictaphone switched on in order to tape record the meeting. Yet she instructed her legal representatives to accuse Scholtz of having framed her. At no stage during the trial did she withdraw that instruction. She allowed Mr Brüwer to cross-examine Scholtz in the manner and for the length of time he did so in the knowledge that Scholtz was entirely innocent of the scurrilous allegations made against him.

- [39] The cross-examination of Scholtz was an abuse, a travesty in its duration and in the manner in which it was conducted.
- [40] The evidence in chief of Scholtz was recorded on 43 pages. The cross-examination was recorded on about 480 pages. Scholtz was in the witness box under cross-examination over a period of six days: most of the first day, four full days, and part of the sixth day. A conservative estimate of the number of questions Mr Brüwer put to Scholtz is between 2500 and 3000. The mere duration of the cross-examination was an abuse. The cross-examination endured despite repeated objections by Mr Franklin and the intervention of the industrial court. A court is entitled to disallow tedious cross-examination the only purpose of which would seem to be to wear down the witness and to induce him to ultimately make replies favourable to the cross-examiner as a result of fatigue: 525 (T) at 526 R v De Bruyn a. o. 1957 (4) SA 408 (C) at 412H; S v Mngogula 1979 (1) SA H; S v Mogqaza 1984 (3) SA 377 (C) at 385G-H. The industrial court tried in different ways to curtail the abuse. The presiding officer gave numerous ad hoc rulings, called Mr Brüwer into his office on one occasion to admonish him, and on the fifth day of the cross-examination, the court commenced the proceedings by warning Mr Brüwer that he would not allow the trial ‘to deteriorate into a circus’. It was to little or no avail.
- [41] The remarks of the Master of the Rolls, quoted with approval by the House of Lords in Mechanical and General Inventions Company Ltd a.o. v Austin and the Austin Motor Company Ltd 1935 AC 346 at 359 are apposite: ‘Cross-examination is a

powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed on the witness.’ At page 360 of his speech, Viscount Sankey L C said: ‘It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the court are taking part in the great task of doing justice between man and man.’ The weapon of cross-examination was not used in this case ‘with discretion’, rather the cross-examination was without restraint and, as I will demonstrate later, without the courtesy and consideration which Scholtz was entitled to expect in the industrial court. What was entirely lacking in the cross-examination was ‘pertinent, properly focussed and accurate cross-examination’: S v Tswai 1988 (1) SA 851 (C) at 858H.

- [42] A witness is entitled to ordinary courtesy. No cross-examiner is entitled to insult a witness. Witnesses must be treated with courtesy and respect. Before a witness is attacked, the cross-examiner must lay a foundation to the satisfaction of the court that

he has grounds for attacking the witness: c.f. S v Asov 1974 (1) SA 808 (T) at 810G-811A. It was said of the attorney in that case at 811D that he was ‘unduly rude, sarcastic and insulting to the witnesses’. A witness should not be harassed or badgered in cross-examination: c.f. S v Booie a.o 1964 (1) SA 224 (ECD) at 227H-228A. A proper cross-examination does not permit the gratuitous intimidation of a witness. A cross-examiner should not bully a witness by insulting him, browbeating him or adopting an overbearing attitude which admits of no contradiction by the witness of what is put to him. A cross-examiner should not unnecessarily ridicule a witness or taunt the witness or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering question to the best of his ability: c.f. S v Gidi a.o. 1984 (4) SA 537 (C) at 539I-540A.

- [43] Mr Brüwer had hardly commenced the cross-examination of Scholtz when he insulted him. Despite the objection of Mr Franklin, that set the tone for the rest of the proceedings. In addition to accusing Scholtz of being untruthful, Mr Brüwer referred to Scholtz as arrogant and insolent. He accused Scholtz of using the ‘experience that [he] acquired as a journalist to twist facts and to suppress the truth’ - thereby gratuitously insulting the profession of journalists. At one point Mr Franklin objected to Mr Brüwer shouting at Scholtz. Mr Brüwer denied that he was shouting but admitted that he had ‘raised his voice’. And this, unjustified, treatment of Scholtz went on day after day.

[44] An illustration of the abuse Scholtz was subjected to is his cross-examination on the basis of a supplementary affidavit made by him in the s 43 proceedings. The affidavit dealt with information that had come to light after the appellant's dismissal. The information was only peripherally relevant in the s 46(9) proceedings and was not referred to at all by either counsel in this appeal. The cross-examination began with Mr Brüwer questioning Scholtz on this paragraph in the affidavit:

“In so far as this affidavit contains facts and allegations which are not within my personal knowledge or belief, such facts and allegations are supported by confirmatory affidavits”.

This is an extract from the cross-examination:

‘Q: You did not attach a confirmatory affidavit as far as the car rental aspect is concerned, is that correct?

A: I don't understand the question.

Q: What don't you understand?

A: Exactly what you ask me.

Q: What don't you understand, Sir?

A: Exactly your question, Sir.

Q: I am asking you, did you attach a confirmatory affidavit concerning the motor car rental aspect?

A: I don't understand the question.

Q: What don't you understand?

A: Your question.

Q: Don't you understand English?

A: Your question, Sir.

Q: You don't want to understand it.

A: No, if I understood your question, I would answer it.

Q: Do you know what a confirmatory affidavit is, Mr Scholtz

A: Perhaps I don't. Could I ask what that would mean?

Q: Did you make an affidavit and you didn't know what you said in your affidavit?

A: I know what I said in my affidavit.

Q: What did you say in your affidavit about confirmatory affidavits? Come now, Mr Scholtz.....Point 3.

A: What?

Q: Point 3. It says: 'Such facts and allegations are supported by confirmatory affidavits.'

A: Yes.

Q: Now, what is a confirmatory affidavit?

A: I am uncertain what you are asking otherwise I would answer you.

Q: I am asking you what a confirmatory affidavit is, Sir.

A: Could I please understand the question?

Q: If you - you will not understand the question if you don't understand the word. Do you want to speak English or do you want to speak Afrikaans?

A: I am happy to speak any language.

Q: But you don't understand English.'

[45] The cross-examination on that point continued from time to time for at least another

60 pages, some questions being repeated over and over again.

[46] Scholtz was tested under cross-examination about his conduct during the disciplinary proceedings. An example of what occurred is that Naranjee said that Scholtz was sitting behind his desk at a certain stage whereas on Scholtz's version, he was standing. Scholtz put his version to her in the disciplinary enquiry and she then agreed with Scholtz. This happened with other witnesses, too. Scholtz admitted that it had been unwise of him to represent the respondent and to be a witness and that he had intervened unnecessarily when other witnesses were testifying at the enquiry. Scholtz said he was inexperienced - this was the first disciplinary enquiry he had attended - and had confused his two roles. He denied that there was anything sinister in his conduct. Despite the failure by Mr Brüwer to call a single witness to say that she had been intimidated by Scholtz to change her evidence, Scholtz was cross-examined at length for about 60 pages on the basis that the record of the disciplinary enquiry showed that he had forced witnesses to change their version of events and so commit perjury. A case in those terms was not made out by Mr Brüwer. The case pleaded, that Scholtz had intimidated witnesses to commit perjury, was entirely without foundation.

[47] The appeal against the costs order of the industrial court is dismissed.

[48] In awarding costs on the attorney and client scale, the Court has a discretion, to be exercised judicially upon a consideration of all the facts. As between the parties, it is a matter of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious

conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs: Nel v Waterberg Landbouwers Ko-operatiewe Vereniging 1946 AD 597 at 607; Ward v Sulzer at 706G-H. A court of appeal must guard against inhibiting a legitimate right of appeal, and it requires the existence of very special circumstances before awarding costs of appeal on an attorney and client scale: Herold v Sinclair a.o 1954 (2) SA 531 (A) at 537C-F; Ward v Sulzer at 707B-D.

- [49] Special circumstances exist in this appeal to award attorney and client costs against the appellant. Firstly, her appeal is entirely without merit. Secondly, the argument on appeal was presented as if the respondent had made out no case against the appellant. Neither the evidence she gave in the industrial court nor the probabilities in favour of the respondent's case were referred to in Mr Brüwer's heads of argument. His heads of argument consisted of another attack on Scholtz, the submission being that it had been shown in cross-examination of Scholtz that it was Scholtz who had deliberately switched on the tape recorder in order to frame the appellant. Thirdly, the unrestrained, gratuitous and defamatory nature of the attack of Scholtz was repeated on appeal. Mr Brüwer did not limit himself to accusing Scholtz of being a liar, he spoke of Scholtz in these terms: ' 'n arrogante psigopatiese leuenaar'; 'a koel berekende psigopatiese leuenaar...gewetenloos in sy optrede en gedrag'. Scholtz was said to have had sufficient opportunity '...om sy bose plan uit te voer'; and to be 'meer as arrogant oor sy slimheid'. There was no justification for describing Scholtz in any of those terms. Fifthly, Mr Brüwer made personal remarks about the industrial

court. One passage in the judgment was said to demonstrate a possible bias against the appellant. Another criticism was that ‘die geleerde lid emosionele oomblikke beleef het gedurende die verhoor’. The criticism, in those respects, of the industrial court was unwarranted. The reference to the industrial court becoming emotional during the trial is presumably one to the industrial court’s attempts to limit the unfair cross-examination of Scholtz. The industrial court’s frustration is entirely understandable.

[50] Lest there be any ambiguity in this judgment, I want to make it clear that the judgment is a complete vindication of Scholtz. As far as he, and his employer, the respondent, is concerned this Court accepts that he was an honest, if fallible, witness. The suggestion that he framed the appellant and intimidated witnesses in order to induce them to perjure themselves was without foundation.

[51] I have already found that the personal attacks on the industrial court were unwarranted. I would add that the industrial court conducted itself with commendable patience throughout the 13 days of hearing and the judgment was to the point, and in the result, correct.

[52] The appeal is dismissed, with costs, such costs to be paid on the attorney and client scale.

MYBURGH J P

I agree

FRONEMAN D J P

I agree

NICHOLSON J A

Date of Hearing: 22 June 1998

Date of Judgment: 29 June 1998

Counsel for Appellant: Adv Brüwer instructed by Wentzel Viljoen & Swart

Counsel for Respondent: Adv Franklin instructed by Deneys Reitz

This judgment is available on the Internet at: <http://www.law.wits.ac.za/labourcert>.