

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: **DA 23/99**

IN THE APPEAL OF:

AUTOMOBILE ASSOCIATION OF S.A. Appellant

AND

COMMISSIONER: S.M. GOVENDER N.O.

First Respondent

NUMSA Second Respondent

VINO NAIDOO Third Respondent

JUDGMENT

JOFFE AJA:

1. After an internal disciplinary inquiry the third respondent was dismissed from the appellant's employ. This resulted in arbitration proceedings. At the conclusion thereof, first respondent found that the third respondent should be reinstated and that he be furnished with a final warning on certain terms. This resulted in proceedings being launched by appellant in terms of s 145(2) and s 158(1)(g) of the Labour Relations Act, 66 of 1995 ("the act"). In those proceedings appellant sought an order reviewing and setting aside the first respondent's award.
2. In its founding affidavit, appellant pointed out that it had not been able to obtain a copy of the record of the arbitration proceedings. The appellant relied upon three grounds for the review of the first respondent's award. They

were:

the first respondent's failure to make a full and proper record of the proceedings;

the first respondent's alleged misconduct during the arbitration;

the absence of a legal nexus between the evidence led at the arbitration and the first respondent's finding.

The review application came before Landman J on 15 June 1999. On 17 June 1999 he handed down the following order: "*It is hereby ordered:*

1. *That judgment will continue to be reserved until at least, the notes of the commissioner relating to the evidence of Mr Naidoo and Mr Lala have been transcribed.*

2. *The applicant is to file the transcription with the Registrar by 20 July 1999.*

3.1 *The commissioner is directed to render assistance with the transcription of the notes.*

3.2 *The commissioner is to file a report regarding any mechanical recording of the arbitration proceedings.*

4. *The parties are at liberty to file further heads of argument by the 31 July 1999, if they so wish."*

3. Pursuant hereto relevant portions of Mr. Naidoo's and Mr. Lala's evidence were transcribed and the first respondent filed a report on the absence of the mechanical recording.

4. It is apparent from the first respondent's report that he does not have an independent recollection of the method of recording the proceedings during the arbitration. He states that he caused an investigation to be made and that no recording of the proceedings was found. He concludes by making the inference that "*there was no mechanical recordings of this Arbitration*"

5. Thereafter Landman J delivered a judgment. In the course thereof he referred to the absence of a transcript of the evidence and the appellant's averment that the proceedings had been mechanically recorded. He noted the first respondent's report. He then went on to hold that he had decided to deal with the matter on the available evidence. Landman J then proceeded to find that the first respondent's finding, that third respondent lacked the necessary mental intention to commit the misconduct complained of, was justifiable. He had however, difficulty with the sanction imposed by the first respondent. In view hereof he made the following order:

6. *"Paragraphs 2,3 and 4 of the award of the commissioner is reviewed and set aside. The matter is remitted to the first respondent to consider, after hearing such evidence as the parties may tender, whether the applicant (AA) should be ordered to re-instate Mr Naidoo retrospectively to the date of the arbitration award if there is satisfactory expert evidence that the circumstances giving rise to the conduct are unlikely to re-occur; or; if the evidence is to the contrary whether the applicant (AA) should be ordered to re-employ Mr Naidoo in a position where he does not interact with the public and does not drive an AA vehicle if this be reasonable feasible; or were the compensation should be ordered.*
7. *The application to make the award an order of court is postponed sine die.*
8. *In the event of a dispute arising regarding the sanction which the first respondent may impose, the parties may re-enroll this application, suitably amplified, for decision by this court.*
9. *The applicant (AA) shall pay the applicants costs incurred in this matter since 17 June 1999".*

6. The appellant now appeals against the judgment and order of Landman J.

7. As already alluded to, the review was based on three grounds. On a reading of the judgment, it appears that the learned Judge dealt with two of them, namely the first and the third ground set out in paragraph 2 above. He does not appear to have considered the second ground, namely the alleged misconduct of first respondent.

8. The misconduct by the first respondent of which the appellant complains is set out in para 11 of the appellant's founding affidavit in the following terms:

"11.1 it is at the outset accepted that Section 138 (General Provisions for the Arbitration Proceedings), clothes the presiding commissioner with a wide discretion as to how the presiding commissioner disposes of matters that become before him/her.

11.2 Notwithstanding this concession, it is submitted that the presiding commissioner misconducted himself and acted in a grossly irregular fashion and for the following reasons:

11.2.1 He failed to remain impartial

11.2.2 More particularly the First Respondent, notwithstanding the Third Respondent's representation by a senior Numsa official, took complete control of the Third Respondent's evidence in chief and closing argument.

11.2.3 This extended to the asking of leading questions concerning the issue of the Third Respondent's mental state at the time of the various incidents.

11.3 The First Respondent continuously stated to the Third Respondent's legal representatives the questions that he (the commissioner) required to be asked of the Third Respondent.

11.4 During closing argument the First Respondent interrupted the Third Respondent's representative and again began asking the Third Respondent leading questions.

11.5 The First Respondent by way of example asked the Third Respondent:

11.5.1 You did not really intend to damage the image of the AA, did you?

11.5.2 You did not know the effect that the pills would have on you, did you?

11.5.3 You did not intend to do any of the things that you did, did you?

11.6 I objected to the First Respondent's line of questioning and conduct to no avail.

11.7 The First Respondent severely curtailed and cut short my attempts to fully cross-examine inter alia the Third Respondent

11.8 The First Respondent adopted a one-sided inquisitorial role that was blatantly biased towards the Third Respondent.

11.9 It was clearly evident from the leading questions put to the Third Respondent as also the "questions" put to the Third Respondent's representative that he had at this early stage already decided on the judgment that he intended giving as also the reasoning thereof.

11.10 The commissioner's "leading" of the Third Respondent as also his representative was clearly aimed at providing a factual basis for a preconceived legal finding.

11.11 The Commissioner at the time did not only obstruct my attempts to fully canvas issues but was also dismissive. At times I was told by the Commissioner that he had no intention of hearing me on aspects that I would submit were of pertinence and importance: "This is of no relevance". In essence I was told in as many words to "sit down and be quiet".

11.12 These issues related inter alia pertinently to the following issues"

11.12.1 A full examination of Dr. Lala's supposed expertise in the

field of psychiatry and the prescription and effect of drugs that may or may not have been prescribed and may or may not have been taken by the Third Respondent.

11.12.2 It should also be mentioned that notwithstanding the curtailment of my cross-examination Dr Lala conceded that he was not qualified to give the evidence tendered and in terms of which the Commissioner reached a finding.

11.12.3 I was refused the chance to address these aspects fully in argument. On this and other aspects was asked/told by way of example: "What's this got to do with it" and "Carry on with the next thing" and "This is not relevant".

11.13 In addition the Commissioner insisted upon the expert evidence of Dr Hoosen on one occasion and said he could not make a decision without this critical evidence. The matter was postponed to accommodate this directive from the Commissioner yet when the matter proceeded he reneged on this directive and made a decision on the medical evidence without Dr Hoosen's evidence which resulted as an unfair finding in view of this."

9. The appellant's founding affidavit is deposed to by its general manager, human resources and development. The deponent to the affidavit represented appellant in the arbitration proceedings and obviously has personal knowledge of what occurred there.

10. The first respondent did not depose to an affidavit dealing with the allegations contained in applicant's founding affidavit. The closest he comes to dealing with the serious allegations contained therein is in the final paragraph of his report. He there states the following:

"The Applicant makes much of the fact that it's allegations regarding the recording of the proceedings is not challenged by me or the CCMA. In this regard, I take this opportunity to make mention of the fact that it is not the policy of CCMA or Commissioners to engage in time consuming and expensive litigation. In opposing what often seems to the spurious Review proceedings, but rather to leave matters in the capable hands of this Honourable Court and are prepared to abide the decision thereto."(sic).

11. The second respondent filed an opposing affidavit on it's behalf and on behalf

of the third respondent. The affidavit is deposed to by the second respondent's regional legal officer one Ms E Chinnsamy. She states in the affidavit that she has no personal knowledge of the facts giving rise to the arbitration proceedings nor was she a participant at the arbitration hearing. Accordingly the factual averments made by the appellant as set out above were uncontroverted before the court a quo.

12. In the absence of an answer from the first respondent or, at least, by the second and third respondent, the court a quo was obliged to accept the facts set out by the appellant in its founding affidavit. These facts reflect adversely upon the first respondent. They create the impression that first respondent was biased against appellant in favour of the third respondent.

13. S138(1) of the act provides as follows:

"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the disputes with the minimum of legal formalities"

The section confers a discretion upon the commissioner to determine the procedure to be adopted at the arbitration. He may determine upon an adversarial process or an inquisitorial process.

14. He may even determine upon a hybrid of the two processes. His discretion is only limited by the objective of the section, that is, to determine the dispute "fairly and quickly" and "with the minimum of legal formalities." (See Brassey, Commentary on The Labour Relations Act, A7:49. Whatever procedure the commissioner determines upon, it must be of such a nature and, the conduct of the commissioner in applying that procedure must be of such nature, that it does not create a suspicion of bias in the minds of the parties. See Mutual and Federal Insurance Co Ltd. v CCMA and Others (1997)12 BLLR 1610 (LC) at 1619 -1620. As was held in President of the Republic of South Africa and

Others v South African Rugby Football Union and Others 1999(7) BCLR 725(CC) at 747D:

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.”

15. It is not clear what procedure first respondent adopted at the arbitration. Clearly if the adversarial procedure was adopted his conduct was such as to create the reasonable apprehension of bias alluded to. If the inquisitorial process was adopted by him, he did not sufficiently guard against creating the reasonable apprehension of bias in the mind of the appellant.
16. In the circumstances the first respondent committed misconduct in relation to his duties as an arbitrator and committed a gross irregularity in the conduct of the arbitration proceedings and the award ought to have been set aside. See *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175 - 6, *Hyperchemicals International (Pty) Ltd. and Another v Maybaker Agrichem (Pty) Ltd. and Another* 1992 (1) SA 89 WLD at 99F - 100B.
17. The learned judge in the court a quo failed to consider this ground of review in his judgment. He erred in this regard. He should have considered it and upheld it. It is not necessary to consider the appellant's further grounds of review.
18. The arbitration proceedings are to be commenced de novo, before a different commissioner.

19. In the result the following order is made:

1. The appeal is upheld with costs
2. The judgment and the order of the court a quo is set aside and substituted with the following:

The arbitration proceedings are set aside. The arbitration is to commence de novo before a different commissioner.

M M JOFFE
ACTING JUDGE OF APPEAL

I agree

R M M ZONDO
JUDGE PRESIDENT

I agree

M T R MOGOENG
JUDGE OF APPEAL

Counsel for Appellant: Adv. G D Doubell
Attorneys for Appellant: Wright Rose-Innes Inc
Representative for 2nd and 3rd Respondents: Mr Brett Purdon

Attorneys for 2nd and 3rd Respondents: Chennells Albertyn & Tanner

Date of hearing: 24 August, 2000
Date of judgment: 20 September 2000