

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

Case no: CA5/2002

In the matter between:-

PUBLIC SERVANTS ASSOCIATION

APPELLANT

and

DEPARTMENT OF JUSTICE 1ST RESPONDENT

**WW MARITZ NO 2ND RESPONDENT
COMMISSION FOR CONCILIATION,**

MEDIATION AND ARBITRATION 3RD RESPONDENT

H.S NORTIER 4TH RESPONDENT

AA DUMINY 5TH RESPONDENT

JUDGEMENT

ZONDO JP

Introduction

- [1] This is an appeal from a judgement of the Labour Court in a review application. The review application was brought by the Department of Justice, the first respondent herein, in order to have an arbitration award that had been issued by the second respondent in a certain dispute reviewed and set aside. The second respondent is a commissioner of the Commission for Conciliation, Mediation and

Arbitration, (“**the CCMA**”), the third respondent herein. He had issued the award under the auspices of the CCMA. The dispute was about the decision of the Minister of Justice and Constitutional Development not to appoint Messrs H.S. Nortier and A.A. Duminy to certain posts for which they had applied and to appoint instead two other candidates. Although I refer to a decision not to appoint them and not to a decision not to promote them, I do so for convenience. I accept that, had they been appointed, such appointment would have been a promotion for them. For reasons that should become apparent later on in this judgement I propose not to disclose the full identity of the successful candidates but to refer to them as Mr A and Ms B. Mr A is an African man whereas Ms B is an Indian female. The two posts in issue were those of senior assistant state attorney in the office of the State Attorney, Cape Town.

Factual background

[2] During 1998 the professional staff of the office of the State Attorney, Cape Town, consisted of almost only whites. Out of a professional staff complement of 19, there was not a single African man or woman, not a single Indian – man or woman. There were five Coloureds – 3 men and 2 women. There were 13 white men and one white woman.

[3] On the 25th September 1998 the Department of Justice advertised two posts of senior assistant attorney in the office of the State Attorney, Cape Town internally. Only a few applications for these posts were received. Among the

persons who submitted their applications were Mr A, Ms B, Mr Castello, Mr Duminy and Mr Nortier. The latter three were employed in the office of the State Attorney, Cape Town as assistant state attorneys. Mr A was employed in the office of the state attorney in Bisho as an assistant State Attorney. Ms B was employed as a public prosecutor in the magistrate's court, Wynberg but was an attorney who had practised as such at some stage before.

[4] A committee was established which was to interview the candidates. It consisted of Mr D Mias, the State Attorney, Cape Town, Mr H. Mohamed, the Regional Head of the Department of Justice, Western Cape, Mr P. Riedeman, a Deputy State Attorney, Cape Town and Ms A. Abrahams who is described as Director: Personnel, Regional Office. After interviewing the candidates, the committee recommended that Messrs Nortier and Duminy be appointed to the posts. The basis for this decision was largely that the two had more experience than the other candidates and that that is what the office of the State Attorney, Cape Town, needed.

[5] The committee's report and recommendation were then sent to the Head Office of the Department of Justice, Pretoria. The power to make the appointment lay with the Minister of Justice. The Acting Chief Director: Human Resources Management of the Department of Justice, Mr M.N. Hendricks, studied the report and documentation. He had to make a recommendation on who should be appointed. He did not agree with the recommendation of the selection committee. His view was that the need for representivity in the office of the State Attorney, Cape Town, was so strong that the two candidates, namely Mr A and Ms B, whose appointment would advance representivity should be appointed and not the ones recommended by the selection committee whose appointment would not advance representivity.

[6] The Acting Deputy-Director-General: Human Resource Management also endorsed the view that the candidates who would advance representivity be appointed. The matter then

went to the then Acting Director – General who also endorsed Mr Hendricks’ recommendation. The matter then went to the then Minister of Justice, Dr Omar, for his consideration. He decided not to approve the recommendation of the selection committee but to approve the recommendation that Mr A and Ms B be appointed to the posts and, accordingly, appointed Mr A and Ms B to the two posts.

[7] Messrs Duminy and Nortier were aggrieved by the fact that they were not appointed to the posts. In due course the appellant - their trade union - referred a dispute in this regard to the CCMA. It categorised the dispute as one concerning an unfair labour practice as defined in item 2(1)(b) of Schedule 7 to the Labour Relations Act, 1995 (**“Act 66 of 1995”(“the Act”)**). In the CCMA the Department of Justice contended that the CCMA did not have jurisdiction to arbitrate the dispute. It is not necessary to go into the grounds on which this contention was based. It suffices, for present purposes, to state that the CCMA ruled that it had jurisdiction to arbitrate the dispute. The CCMA issued an arbitration award in which it found that the Department of Justice had committed an unfair labour practice by not appointing or promoting Messrs Duminy and Nortier and ordered it to accord Messrs Duminy and Nortier what is called **“protective promotion”**. The CCMA also ordered the first respondent to pay the respondents’ costs of the arbitration.

The review application

[8] The Department of Justice was aggrieved by the CCMA’s award. It, accordingly, brought an application before the Labour Court for an order reviewing and setting aside the

award. The appellant and Messrs Duminy and Nortier opposed that application. The Labour Court, through Waglay J, granted the application and set the award aside. It ordered the appellant to pay costs. It subsequently granted the appellant leave to appeal to this Court; hence this appeal.

The appeal

[9] Quite strangely Messrs Duminy and Nortier were cited in this appeal as the fourth and fifth respondents respectively while their union, the Public Servants Association, appears as the appellant. In this judgement I shall refer to them and their union collectively as the appellants. I shall refer to the two of them as the individual appellants or by their surnames.

[10] During argument in this appeal I raised with Counsel the question whether the commissioner should not have had the successful candidates joined in the arbitration proceedings or at least whether he should not have afforded them an opportunity to be heard before he could issue the award that he issued and, if he should have, whether the award should not, for that reason, be set aside. I raised these questions because it appeared that the commissioner may have presided in proceedings in which the successful candidates might well have had a direct and substantial interest or in which findings could be made that had the potential to affect their rights or interests adversely.

[11] In the founding affidavit in support of its review application the first respondent raised the issue of the non – joinder of the successful candidates in the arbitration proceedings. It said: **“Once it became the case of the [individual appellants] that the appointees were not**

suitable, it was incumbent upon them to join Mr [A] and Ms [B]. The problem with which one is now faced is that a finding has been made that they are not suitable. The [Department of Justice and Constitutional Development] is now obliged to take the matter further. This suggests that the [commissioner] has not properly applied his mind to the issues involved in this case. It was his duty to ensure that there was a proper joinder of [Ms B] and [Mr A]. He failed to fulfil that duty.”

[12] The other slightly different question of whether, even if the appointees were not joined in the arbitration proceedings, the commissioner should, nevertheless, have afforded them an opportunity to be heard before he could issue the award that he issued was not covered by the founding affidavit. I pause to observe that a court is, of course, entitled to raise such issues even mero motu. This is so because there is a duty on it not to pronounce on matters that may adversely affect the rights or interests of a party who is not before it or whom it has not afforded an opportunity to be heard. The same rule would, in my view, apply to a statutory body exercising public power such as the CCMA.

[13] The appellant’s response in its answering affidavit to the first respondent’s point of non-joinder raised in the founding affidavit was that the first respondent’s **“belated plea of non-joinder ... does not assist the [first respondent]”**. The appellant took the attitude that the point of non-joinder should have been taken **“as a point in limine up front.”** At this stage I pause to make one observation. That is that when, during the arbitration proceedings, Counsel for the first respondent complained to the commissioner that the first respondent did not know

what the appellant's case was and this was an unsatisfactory state of affairs. Counsel for the appellant responded that the first respondent would learn their case as the case proceeded.

- [14] There were no pleadings exchanged between the parties in the arbitration. When the arbitration proceedings commenced, it was not clear what the appellant's bases were for its contention that the Minister's failure to appoint them to the two posts constituted an unfair labour practice. However, it would seem that their case in the arbitration proceedings ended up including that the two candidates that the Minister had appointed were not suitable for appointment to those positions. In the commissioner's arbitration award the commissioner says something that supports this. He says, among other things, that **"(t)he applicants relied on the recommendation of the selection committee as supported by the evidence of Mr Mias and Mr Riedeman to show that the appointees of the Department were, in fact, not suitable for appointment in the posts."** (my underlining). It is also clear from that page of the award that Counsel for the first respondent presented argument designed to show that the selection committee had not said that the two appointees were not suitable but the commissioner stated that he did not agree with the interpretation of the committee's report advanced by Counsel for the first respondent on this issue.

[15] During the course of his award the commissioner stated that he was rejecting Mr Mahomed's evidence that all the five candidates (including the appointees) were suitable. The commissioner had this to say at some stage in his award : **“With my interpretation of what Mr Mohamed said I am satisfied that on the evidence neither Mr [A] nor Ms [B] could cope with the job at the time of their appointment.”** He then found **“as an objective fact that they were not suitable for appointment.”** He went on to say that **“that is the interpretation to be given to the unanimous recommendation of the committee.”** He went on to find that **“they did not have the experience and, accordingly, the minimum proficiency to be able to perform the tasks that would have been expected of them as Senior Assistant [State] Attorneys.”**

Later he said:

“It follows that when it is found as an objective fact that the appointments were not in accordance with the policy of the [first] respondent what happened at a later stage is for practical purposes irrelevant. It also has as a necessary implication that the condition precedent to the proper application of the affirmative action policy was not met and that justification for the ultimate appointments by the [first] respondent must fail.”

[16] The commissioner then said: **“For the above reasons I have come to the conclusion that the failure to appoint the applicants to the positions was unfair and amounted to an unfair labour practice.”**

[17] The question which arises is whether, where a tribunal that exercises public power such as the CCMA, is called upon to arbitrate a dispute such as this one where it may or will have to make a finding that someone who has been appointed to a position is unsuitable for such a position, it is proper or competent for it to proceed and arbitrate such a dispute without such person being joined in the arbitration proceedings or at least being afforded an opportunity to be heard first.

[18] Counsel presented their argument on the issues I raised as well as on other issues. Leave was also granted to both Counsel to submit written argument after the hearing to cover these issues. Counsel on both sides subsequently delivered written argument. I now turn to deal with these issues.

[19] In dealing with the issues it is necessary to make a few observations about the CCMA since, in arbitrating the dispute, the commissioner was acting under the auspices, and, as a commissioner, of the CCMA. The CCMA is established by sec 112 of the Act as a juristic person. In terms of sec 113 it is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations. It is governed by a governing body. The governing body consists of a chairperson and nine other members each of whom is nominated by

NEDLAC and appointed by the Minister of Labour and a director who is an ex-officio member of the governing body but has no voting rights.

[20] The chairperson is an independent person. Those members of Nedlac who represent organised labour, those who represent organised business and those who represent the State each nominate three members of the governing body to make the nine members in addition to the chairperson. The director is appointed by the governing body (sec 118). At the commencement of the Act the CCMA was financed and provided with working capital from moneys that the Minister of Labour, with the agreement of the Minister of Finance, had to allocate to the CCMA from public funds (sec 122). It is otherwise financed and provided with working capital from, among others, the moneys that Parliament may appropriate to it from time to time (sec 122).

[21] The functions of the CCMA include the arbitration of certain disputes between employers and employees. In terms of sec 136(1) of the Act, if the Act requires a dispute to be resolved through arbitration, the CCMA must appoint a commissioner to arbitrate it if certain events have occurred or if certain time periods have expired. Sec 138 of the Act contains general provisions relating to arbitration proceedings. Sec 138(1) provides that **“(t)he 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 dispute with the minimum of legal formalities.”** Sec 138(2) provides that **“(s)ubject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question**

the witnesses of any other party, and address concluding arguments to the commissioner.” In terms of sec 143 an arbitration award issued by a commissioner of the CCMA is final and binding and may be enforced as if it were an order of the Labour Court.

[22] By sec 22(a) of Act 12 of 2002 sec 115 has been amended by the insertion of sec 115(2A). Sec 115(2A) empowers the CCMA to make rules regulating, among other things, **“the joinder of any person having an interest in the dispute in any conciliation and arbitration proceedings.”** This amendment came into operation only in 2002 and did not exist at the time of the arbitration proceedings with which we are concerned. This, in my view, does not mean that the CCMA had no power to order the joinder of third parties. Such power is incidental to the performance of its main functions and it had power to order a joinder of a third party if the latter had a direct and substantial interest.

[23] It is also necessary to refer to the statutory provisions in terms of which the dispute in this case was referred to the CCMA for arbitration. The dispute was referred in terms of item 2(1)(b) of Schedule 7 to the Act. Item 2 dealt at the time – it is no longer in the Seventh Schedule now- with unfair labour practice disputes. Item 2(1)(b) read thus at the time:.

“2. Residual unfair labour practices.

1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving -

(a) -----

(b) **the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;"**

[24] In terms of item 3 disputes falling within the ambit of item 2(1)(b) were required to be referred to conciliation and, if conciliation failed, to arbitration. The arbitration would be conducted by a bargaining council if there was one with jurisdiction or by the CCMA if there was none with jurisdiction. In terms of item 4(2) the arbitrator would have power to determine such dispute **"on reasonable terms."**

[25] With regard to the issue of non- joinder it is trite that a third party should be joined in proceedings if he is shown to have a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgement that may be given in the matter. It is not necessary to refer to many authorities in this regard. It is sufficient to refer to the case of **Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A).**

[26] In that case a dispute existed between a trade union and the employer of some of its members concerning their working conditions. At the request of the union the Minister of Labour appointed an arbitrator to conduct a compulsory arbitration to resolve that dispute. The employer made

representations to the Minister as a result of which the Minister withdrew or “**nullified**” the appointment of the arbitrator. The union then brought an application before a Provincial Division of the then Supreme Court against the Minister - without joining the employer - for an order declaring that the appointment of the arbitrator was valid and that the withdrawal of that appointment was of no force and effect or, alternatively, for an order requiring the Minister to appoint an arbitrator to arbitrate the dispute. When that matter went on appeal, the Appellate Division raised the issue of the non-joinder of the employer *mero motu*. On those facts the Appellate Division held that the employer had a direct and substantial interest in the proceedings and should have been joined.

- [27] Fagan AJA took the opportunity in the **Amalgamated Engineering Union** to review various authorities on the issue of joinder of parties. I draw attention to the two principles that Fagan AJA refers to at 651, namely “**(1) that a judgement cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties not before it.**” At 661 Fagan AJA said the following among other things:-

“Can it be said that the City Council [which was the employer] is not ‘directly and substantially interested’ in the appointment on which we are asked to give a decision? To my mind the answer is clear; the council can have no less an interest in it than the Union itself. In the prayer which we are asked to make an order of Court, both in its first and in its alternative form, the dispute is referred to as one ‘between the Amalgamated Engineering Union and the Durban City Council’. It is solely because of its participation in the dispute

that the Union has *locus standi* to make the application. Then surely the Council has an equal *locus standi* to be heard on it.”

[28] In the following paragraph Fagan AJA went on to apply another test. He said:-

“Let me apply another test. If we make the order prayed for, it will - subject to what I say below as to the effect of the Council’s non-intervention after notice – not be binding on the Council as *res judicata* inasmuch as the Council is not a party to the proceedings. When the arbitrator was originally appointed, the Council objected and threatened recourse to law. It clearly had *locus standi* to come to Court – no less than the Union has to make this application. If it is not bound by the order we make, it can again take up exactly the same attitude: object to the arbitrator, and come to Court to have his appointment set aside. It may put additional facts before the Court. Broome, J., said in the Court below, ‘I am not satisfied that all relevant information is before me’. Its counsel may put forward argument which will persuade the Court to put a different interpretation on the law. The effect would then be that there would be two perfectly valid, though totally irreconcilable, orders against the Minister; one enforceable by the union, ordering him to appoint an arbitrator, another enforceable by the Council, interdicting him from appointing an arbitrator.”

[29] Where a third party who has a direct and substantial interest in a matter is not joined in proceedings, it is not a

defence to a point of non-joinder to say that such party had knowledge of the proceedings but did not intervene. His mere non-intervention, despite having knowledge of the proceedings, does not make the judgement emanating from those proceedings binding on such party. (see **Amalgamated Engineering Union** at 660). Even in the **Amalgamated Engineering Union** case where the third party had been given a copy of the court papers with a notice that they related to a matter that had been set down in court, the Appellate Division held that that was not good enough to dispense with the need for the third party to be joined in the proceedings. (see **Amalgamated Engineering Union** at 661-663). In fact Fagan AJA even decried the use of informal notifications. He said at 662:

“This case is a good example of the uncertainties to which we would open the door if we were to start allowing informal notifications to take the place of due and proper joinder of a party.”

Later, on the same page he said that:

“(m)ere non-intervention or even an intimation of non intervention, with nothing more to it, after receipt of a notice of legal proceedings short of citation, cannot therefore, to my mind, be treated as if it were a representation, express or tacit, that the party concerned will submit to, and be bound by, any judgement that may be given.”

[30] It seems to me that the facts in the **Amalgamated Engineering Union** case are comparable to the facts of the present matter. In that case the Minister had made a decision in favour of one of the parties who had conflicting interests. The one party, that is the union, wanted an arbitrator to be appointed. The other party, the City Council, wanted the Minister not to appoint an arbitrator. The Minister, having earlier appointed an arbitrator, withdrew that appointment in accordance with the representations of the City Council. The union perceived that decision as detrimental to its interests. The City Council had sought to advance its interests in the matter when it made representations to the Minister to withdraw the appointment of the arbitrator. The union, in seeking an order that the earlier appointment of the arbitrator be declared valid also sought to advance its own interests in the matter as well.

[31] In the present matter the successful candidates and Messrs Duminy and Nortier were competitors in the race for appointment to the two posts. The Minister appointed the two candidates. Messrs Duminy and Nortier maintained that the Minister's decision not to appoint them but to appoint the two candidates was wrong and should not have happened. They said it constituted an unfair labour practice against them. Obviously the two successful candidates would most probably maintain that they were the right persons to have been appointed.

[32] This created a state of affairs in which it could be said that the employer was faced with contradictory claims as to who should have been appointed. The unsuccessful candidates, Messrs Duminy and Nortier, then took their grievance or complaint to arbitration. That arbitration was, to say the least, about who should have been appointed to the two posts and who should not have been appointed. To my mind this demonstrates quite clearly that the successful candidates had a direct and substantial interest in the arbitration proceedings. It seems to me, therefore, that the commissioner could not and should not have sat in judgement on Messrs Duminy's and Nortier's claim in the absence of the other two affected parties. As the two successful candidates had a direct and substantial interest in the arbitration proceedings, they should have been joined. The commissioner's failure to have them joined in the arbitration proceedings

led to the issuing of an award adversely affecting their rights and interests without their having been joined and without their having been afforded an opportunity to be heard.

[33] The result is a situation where the Minister and the Department of Justice and Constitutional Development have in the Department's employ two employees that a statutory body has declared "**as an objective fact**" to be unsuitable for the positions that they occupy. The deponent to the founding affidavit in support of the review application brought by the Department indicated that this created some difficulty for the Minister and the Department. The difficulty, of course, is what the Minister and the Department should do with the appointees. If the appointees had been party to the arbitration proceedings, they would have been bound by the commissioner's award as long as it stood. In that case it might not have been difficult for the Minister and the Department to remove them from those positions following the finding that they were not suitable for them. However, since they were not party to the arbitration proceedings, they are not bound by the arbitration award. Accordingly, if the Minister and the Department sought to remove them from such positions on the basis of the commissioner's finding, the appointees could bring proceedings in a court or tribunal of competent jurisdiction for an order declaring that they are suitable for the positions and have been properly and validly appointed. If they were successful, this would result in two contradictory findings or judgements by different tribunals on their suitability for the positions. This would be wholly untenable and is one reason why they should have been joined.

[34] The **Amalgamated Engineering Union** case dealt specifically with the issue of non-joinder. I now propose to refer to another decision of the

Appellate Division which did not deal with the question of non-joinder, but dealt with the duty which a statutory body or a tribunal has even at common law to afford a person an opportunity to be heard before it can make a finding that may adversely affect his or her rights or interests. I refer to this in order to deal with the question whether, even if there was no obligation to have the successful candidates joined, they should at least have been afforded an opportunity to be heard. In **Du Preez & Another v Truth and Reconciliation Commission 1997(3) SA 204 (A)** the respondent (“**the TRC**”) was a statutory body. One of its committees was called the Committee on Human Rights Violations the functions of which included investigating and hearing alleged violations of human rights.

- [35] When that committee was to hear evidence that was going to implicate the appellants in that matter in cases of poisoning and murder and they had not been afforded a reasonable opportunity to submit representations or to give evidence, they successfully brought an application to court to interdict the Commission (and, therefore, the Committee) from hearing such evidence until such time that a reasonable and timeous notice had been given to them of the Commission’s intention to hear or receive such evidence, and facts and information had been given to them, that would enable them to identify the events and persons concerning which or whom evidence would be presented that could detrimentally affect them. At 230I-231A of the judgement Corbett CJ said in part: **“In my view, the solution to the problems raised by the issues in the case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain**

instances to observe the rules of natural justice by acting in a fair manner. In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the maxim *audi alteram partem* (which for the sake of brevity I will call the “audi principle”).

- [36] At 231F of the judgement the Chief Justice went on to say that “(t)he audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly”. In seeking to answer the question of what the duty to act fairly demands of a public official or body concerned, the Chief Justice referred with approval to a passage in a speech by Lord Denning MR in the case of *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA). In that case inspectors were conducting an investigative inquiry in the public interest. It was argued in that case that, because the inquiry was not a court of law, and there was to be no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply. Lord Denning MR said in this regard:

“It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... They are not even quasi-judicial for they decide nothing. They only investigate and report. They sit in private...

But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact

which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions... Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly.”

[37] Corbett CJ then went on to express the view at 233B-C that **“likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings.”** At 233D-E he said about the Committee of the TRC: **“The Committee’s findings in this regard and its report to the Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly.”** The Appellate Division proceeded to substantially approve of the decision of the High Court granting the appellants in that matter the interdict they had sought.

[38] In the present case there can by no doubt that the commissioner could, and the CCMA can in an arbitration of a dispute such as this one, make findings that could be very damaging to third parties. To make it worse some of the arbitration awards issued by the CCMA are published in the Industrial Law Journal which is read widely within legal circles. As it

turned out in this case the commissioner made a finding that is very detrimental to the two appointees, namely, that **“as an objective fact”** they are not suitable for the positions to which the Minister appointed them. It goes without saying that the commissioner was saying that they should not have been appointed to those positions. In conducting the arbitration proceedings to finality and making such a damaging finding against the appointees without affording them any opportunity to be heard or joined in the arbitration proceedings, the commissioner committed a gross irregularity which vitiates the entire arbitration proceedings over which he presided. The parties before him must also bear some blame for not drawing his attention to the need to join or hear the appointees.

- [39] The appellant’s Counsel submitted that since the appellant did not seek any relief against the two appointees such as the setting aside of their appointment, there was no basis for them to be joined. I assume that the same argument would be advanced against the proposition that the commissioner should at least have afforded them an opportunity to be heard. I do not agree. In my view whether or not the appointees should have been joined or should have been afforded an opportunity to be heard is not dependent solely on the question of the relief sought. Even if no relief were sought against the appointees, they should have been joined or at least should have been given an opportunity to be heard before the commissioner could make the finding that **“as an objective fact”** they are not suitable for the posts to which they were appointed. This is so because such a finding would, with or without any relief being sought against the appointees, affect their rights and interests adversely. I agree entirely with Goldstone J who, in **Traube & others v Administrator Transvaal & others 1989(1)SA 397 (W)** at 400 I-J, said: **“A decision that a professional person is unsuitable for a post is**

potentially of the utmost importance and will, if it remains, be a permanent blot on his good name.” At 401 C-D Goldstone J went on to say that **“(w)here the suitability of a person is the issue, and an adverse decision has serious consequences for that person in relation to his application and in relation to his career, then I have no doubt that in the absence of a clear provision to the contrary in the statute he must be entitled to be heard before he is made to suffer an adverse decision.”**

- [40] In a subsequent appeal to the Appellate Division, Corbett CJ said that he was not persuaded that the decision not to appoint the doctors who were applicants before Goldstone J to certain posts could be said to have prejudicially affected them in their existing rights (**Administrator, Transvaal and others v Traub and others 1989(4) SA 731 (A) at 754D-E**). However, he did not, with respect, say that a decision that they were not suitable for appointment to such posts would not affect their professional careers adversely. Indeed, in that case the doctors had no rights to be appointed to such positions. They only had a right to have their applications for appointment to such posts considered in a bona fide manner and without prejudice. In the present case the appointees had already been appointed to the posts and had commenced their duties in those posts when the arbitration proceedings commenced before the commissioner. In such a case a finding that they were unsuitable for appointment to such positions could no doubt detrimentally affect their existing rights and interests. The duty to act fairly obliged the commissioner not to make such a finding without complying with the audi alteram partem rule or without

having them joined in the proceedings first.

[41] A party cannot avoid the need to join another party to proceedings by the simple device of formulating its relief in a certain manner. If the question whether or not a party should be joined in proceedings or should be afforded an opportunity to be heard depended simply on the order or relief sought, then in this case the commissioner could have been entitled not to have given the appointees an opportunity to be heard or not to have joined them in the arbitration proceedings even if he were being called upon to find that they were not only unsuitable for the positions but that they were unsuitable because they had forged their academic or professional certificates on the basis of which they were appointed. Of course, quite clearly that cannot be the position. That would be a wholly untenable situation. A tribunal exercising public power can make no such finding against a party without such party being joined in the proceedings or at least being afforded an opportunity to be heard.

[42] The appellants' complaint is about the fact that the Minister decided not to appoint the individual appellants to the posts when they were the ones who were suitable for such appointments and deserved to be appointed and instead he appointed the appointees. They now seek protective promotion. That means that they will not be appointed to any posts of senior assistant state attorney because there would be no posts but they would be paid

or remunerated at a rate applicable to such posts.

[43] The Department of Justice wanted to appoint two persons into the vacant positions of senior assistant state attorney. It would have budgeted for such appointments. It did not seek to pay two persons who filled those positions and pay two others (under the guise of protective promotion) for whose additional expenses it might not have budgeted and who did not fill them. The Minister and the Department of Justice are entitled to say: if we should not have appointed the appointees because they are not suitable and we should have appointed the appellants, then we cannot keep the appointees in those positions; they must move out of those positions and those who are suitable must be appointed to fill them. Indeed, the Minister and the Department of Justice may find it intolerable to keep the appointees in those positions when a statutory body has declared them unsuitable for the positions if its award continues to stand.

[44] The commissioner's finding that the appointees are unsuitable for the positions to which they were appointed is as good as the commissioner granting the appellants the relief of a declaratory order that the appointees are unsuitable for their positions. For a tribunal exercising public power to effectively make such a declaratory order against a third party who is not before it or who has not been afforded an opportunity to be heard goes against so fundamental a principle of our law that such a tribunal's decision cannot be allowed to stand and must be reviewed and set aside. It would then be up to the appellants to commence the proceedings afresh and have all interested parties joined if they still wish to pursue the matter.

[45] The Court a quo set the award aside for reasons that I need not deal with in the light of the conclusion I have reached on the issue of non-joinder. The result is that the non-joinder point is enough to justify the Court a quo's decision to set the award aside. In these circumstances the appeal must fail. With regard to costs, the matter was argued on the basis that costs should follow the result.

[46] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Mlambo AJA

Appearances:

For the Appellant: Adv. Stelzner
Instructed by: De Klerk and Van Gend Attorneys
For the Respondent: Adv. Soni
Instructed by: State Attorneys
Date of Judgement: 18 December 2003

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

Case No: 5/2002

In the matter between:

**THE PUBLIC SERVANTS ASSOCIATION
Appellant**

and

**THE DEPARTMENT OF JUSTICE First Respondent
WW MARITZ N.O. Second Respondent
THE COMMISSION FOR CONCILIATION Third Respondent
MEDIATION AND ARBITRATION

HS NORTIER Fourth Respondent
AA DUMINY Fifth Respondent**

J U D G M E N T

GOLDSTEIN AJA:

I agree respectfully with the judgment of **Zondo** JP except that I would (i) prefer the word “taints” to the word “vitiates” in para [39], (ii) find it unnecessary to express the views in para [44] and (iii) not dismiss the appeal as he has done. I accept that the matter ought, in fairness, not to be referred back to the commissioner who heard it for a further hearing after joinder of the appointees. Cf **Livestock and Meat industries Control Board v Garda** 1961 (1) SA 342 (A) at 349G. The trial was a lengthy one and the commissioner delivered a long and full award in which he expressed a firm view, which the appointees would no doubt want him to reverse, on their unsuitability. Indeed, he went so far as to make a costs order against the Department of Justice finding that it “never had any prospect of success ...” and that its defence of the matter was “frivolous and/or vexatious”. Nevertheless the appointees may not wish to be involved in fresh proceedings which the appellant and Messrs Nortier and Duminy may decide to launch, and this eventuality ought to be catered for.

In **Amalgamated Engineering Union**, to which the learned Judge President refers, **Fagan** AJA (as he then was) said the following at 663, after having found that the City Council of Durban should have been joined in the proceedings:

“The difficulty is to know what to do now that the matter has reached

the appeal stage. One wishes to avoid, as far as it may be at all possible, the necessity of causing the parties unnecessary trouble, expense and delay. The furthest, however, that I think we are able to go to to meet the parties is to let the final judgment in this matter stand over so as to give them an opportunity of ascertaining from the Council whether it is prepared to file with this Court, through its own attorneys, a consent to be bound by our judgment notwithstanding the fact that it has not been cited as a party. If such consent is filed, we shall give final judgment without hearing further argument, as the merits of the matter have been fully argued before us by counsel for the two parties who are appearing. If, however, no such consent is filed within two months of the delivery of this interim judgment, or if at any time before the expiry of the two months the appellant's attorneys intimate to the Registrar of the Court that no such consent can be obtained, we shall give directions as to the course the proceedings will then have to take."

I believe we should follow the same route and make the following order:

I. The appellant is ordered to serve a copy of the papers including the Judgments of this Court on each of the two appointees to the posts of Senior Assistant State Attorney, and to file the returns of service with the Registrar of this Court.

1. Such appointees are given 2 months from date of service to file with the Registrar of this Court a consent to be bound by its judgment herein.

2. If no such consents are filed within the period of 2 months aforesaid, or if either of the appointees indicate that he or she is not prepared to file such consent this Court will give directions as to the course the proceedings will then take.

E L GOLDSTEIN

ACTING JUDGE OF THE LABOUR COURT OF APPEAL

Date of judgment: 7 January 2004