



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case no: JR 2282 /2016

In the matter between:

PLASTICS CONVERTORS ASSOCIATION OF

SOUTH AFRICA (PCASA)

First Applicant

NATIONAL EMPLOYERS' ASSOCIATION OF

SOUTH AFRICA (NEASA)

Second Applicant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL (MEIBC)

First Respondent

GENERAL SECRETARY OF THE

MIBCO N.O

Second Respondent

THE MINISTER OF LABOUR

Third Respondent

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (NUMSA)

**Thirty fourth
Respondent**

Heard: 10 February 2017

Delivered: 21 February 2017

JUDGMENT

PRINSLOO J

Introduction

- [1] The Registration and Administration Expenses Collective Agreement ('the Agreement') was concluded under the auspices of the First Respondent (MEIBC). The MEIBC requested the Third Respondent (the Minister) to extend the Agreement in terms of section 32 of the Labour Relations Act¹ (LRA). The decision by the MEIBC to request the Minister to extend the agreement is the subject of a pending review application, filed under case number JR 2282/16.
- [2] On 6 January 2017 the Applicants filed an urgent application wherein they sought an order directing that the review application be argued forthwith on 9 January 2017, and that the Minister be interdicted from acceding to the MEIBC's request to extend the Agreement pending judgment in the review application. In the alternative, the Applicants sought a preferential date for the hearing of the review application and an order interdicting the Minister from extending the agreement pending judgment in that application. The urgent application was postponed to 24 January 2017.
- [3] On 24 January 2017 I made the following order in the urgent application:
1. The review application under case number JR 2282/16 is enrolled for hearing on 10 February 2017;
 2. The Respondents are directed to file opposing affidavits or supplementary affidavits by close of business on 31 January 2017;
 3. The Applicants are to file a replying affidavit, if any, by no later than close of business on 3 February 2017;
 4. All parties are directed to file heads of argument by close of business on 3 February 2017;

¹ Act 66 of 1995.

5. The Third Respondent is not to take any decision on the request for extension pending the finalization of the review application.
- [4] On 25 January 2017 the thirty-fourth respondent's (NUMSA) attorneys of record requested reasons for the above order and the reasons were made available to the parties on 3 February 2017.
- [5] On 31 January 2017 NUMSA filed a recusal application indicating that it would apply, on 10 February 2017, for my recusal from hearing the review application.
- [6] The Applicants opposed the recusal application.

The recusal application

- [7] In its founding affidavit, NUMSA has set out the background to the urgent application that was postponed to 24 January 2017 in order to give the parties an opportunity to serve and file answering and replying papers. The postponement was agreed to in the context that the Department undertook not to make its recommendation to the Minister regarding the extension of the Agreement until 25 January 2017.
- [8] NUMSA's case as set out in the founding affidavit in support of the recusal application is that:
- 8.1. It did not agree to an expedited hearing of the review application and the Court order wherein the matter was enrolled for hearing on an expedited basis, was not made with the agreement of the parties.
 - 8.2. The matter was not heard in open Court and NUMSA's officials were excluded from observing the hearing of the application, thus justice was not seen to be done and the 'lack of transparency was most upsetting'.
 - 8.3. NUMSA's counsel was not afforded an opportunity to take instructions regarding the proposal to expedite the review application.
 - 8.4. NUMSA's counsel requested to make submissions in open Court about the Minister being prevented from considering the extension request pending the review application's expedited hearing and this request was not entertained, wherefore NUMSA's right to be heard was denied.

8.5. Advocate Maenetje SC offered to make submissions on the matter notwithstanding the Minister's intention to abide by the Court's decision and this was not taken up.

8.6. The Court order of 24 January 2017 in essence granted the Applicants the relief they sought and NUMSA has a reasonable apprehension of bias because the order was made without hearing NUMSA's submissions and justice was not seen to be done.

8.7. NUMSA has a reasonable apprehension of bias due to the lack of transparency, the denial of NUMSA's legal representative to take instructions, the denial of NUMSA's right to be heard in open Court and my failure to consider or properly consider NUMSA's submissions about matters of substantial legal complexity.

[9] In opposing the application for recusal the Applicants submitted that NUMSA has not pleaded any facts, if proven, capable to illustrate a reasonable apprehension that I would not be impartial when the review application, set down for 10 February 2017, was to be argued. The Applicants stated that the Court does not require NUMSA's consent to issue directives or to make orders. NUMSA was not prejudiced in any way as it was granted an opportunity to file an answering affidavit in the review, which affidavit was already due in November 2016, but had not been filed as at 24 January 2017.

[10] The Applicants also submitted that the primary relief in the urgent application was sought against the Minister who agreed to an expedited review and showed deference to the Court and abided by the decision. Urgent proceedings of this nature, where directions are sought for the continuance of court proceedings, are habitually dispensed with in chambers and there is nothing sinister with the practice, particularly under circumstances where the parties were represented by counsel in attendance.

[11] The Applicants argued that the recusal application is misconceived and that no reasonable person could apprehend that my decision was indicative of bias in any shape or form.

[12] NUMSA filed a replying affidavit in answer to the averments made by the Applicants. NUMSA repeated that it has a reasonable suspicion of bias because the Court order of 24 January 2017 was made without NUMSA's submissions being heard in open Court.

[13] When the matter was argued on 10 February 2017, Mr van der Riet SC on behalf of NUMSA and Mr Redding SC on behalf of the Applicants made submissions and both referred to *President of the Republic of South Africa and others v South African Rugby Football Union and others (SARFU)*² wherein the Constitutional Court formulated the proper approach to recusal applications.

The legal principles

[14] The test for recusal of a judicial officer was first decided in *SARFU* and the Constitutional Court formulated the proper approach as follows:

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[15] In *SACCAWU and others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)*³ the *SARFU* test for recusal was elaborated on in detail and the Constitutional Court, with reference to *SARFU*, held that:

² 1999(4) SA 147 (CC).

³ 2000(3) SA 705 (CC), (2000) 21 ILJ 1583 (CC), 2000 (8) BCLR 886 (CC) at paras 12 – 17.

"Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted."

- [16] The Court in *SARFU* alluded to the double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*⁴, decided shortly after *SARFU*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.
- [17] The two-fold emphasis underscores the weight of the burden resting on a person alleging judicial bias. The Constitutional Court held that the threshold for a finding of real or perceived bias is high since it calls into question an element of judicial integrity.
- [18] The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties.

Analysis

- [19] NUMSA's case is essentially that it has a reasonable suspicion of bias because the Court order of 24 January 2017 was made without NUMSA's agreement, without NUMSA's submissions being heard in open Court,

⁴ 1994 (4) SA 915 (SCA)

NUMSA's counsel was not afforded an opportunity to take instructions regarding the proposal to expedite the review application and to make submissions on matters of substantial legal complexity.

[20] As already mentioned, I have provided reasons for the Court order that was issued on 24 January 2017 and I do not intend to repeat those. However, it is necessary to give context to the order that was issued in dealing with this application for recusal.

[21] The Court order was issued in the following circumstances: the Applicants filed a review application, wherein the lawfulness of the MEIBC's request to the Minister to extend the Agreement is challenged, and in the urgent application they effectively sought for the Minister not take a decision on the request for extension until the pending review application is decided, as the outcome of the review application will determine the way forward. If the Minister takes a decision pending the review, the review application may become moot and another review application is likely to be filed.

[22] It became apparent to me that the pending review application should be expedited as that would dispose of the challenge to the lawfulness or not of the request for extension of the Agreement and it was evident to me that the most effective way to deal with the matter was to have the review application heard on an expedited basis. Judgment in the review application would dispose of the matter in its entirety, as the parties would then know whether the request for extension was lawful or not. If the review is expedited, the Minister has to wait for a short while to know the outcome and in the event that the review application fails, she can proceed to take her decision on the request for extension.

[23] If the urgent application proceeded, the Court would be faced with the real likelihood of a duplication of proceedings, and the consequent unnecessary waste of costs and resources. An order that the hearing of the pending review application be expedited would obviously avoid a duplication of proceedings and would ensure an expeditious resolution of the pending dispute concerning the lawfulness of the request by the MEIBC to the Minister to extend the Agreement.

- [24] Without any consideration of the merits of the pending review application and in view of the relief sought by the Applicants in the urgent application, and having regard further to the submissions made by the Respondents in their heads of argument, I considered that hearing the urgent application in isolation of the review application (which was not ripe for hearing on 24 January 2017) would amount to dealing with the matter on a piecemeal basis and would not dispose of the matter finally. I considered that a preferable approach would be to expedite the hearing of the main matter (i.e. the review application) and dispose of it.
- [25] The enrollment of the review application on an expedited basis accommodated the interests of all parties in certainty and finality. The Minister as the party against whom the Applicants primarily sought relief, did not object to the order granted by this Court. No relief was sought against NUMSA in the urgent application and I failed to see how NUMSA can object to an order where the primary party against whom relief was sought, agreed to the terms of the order. In view of the Minister's position and the arrangement for an expedited hearing date that was acceptable to the Minister, I did not consider it necessary for the urgent application to be argued and for NUMSA to make submissions in the urgent application as to why the Minister should not be restrained, when the Minister did not object thereto.
- [26] Furthermore, I have made it clear to the parties that I will deal with the review in an expedited manner and undertook to expedite the delivery of a judgment in the matter. The Minister is restrained from taking a decision pending the finalization of the review application, which application will be finalized when judgment in the review application is handed down. The intention was to hear the review application on 10 February 2017 and to hand down judgment soon thereafter, thus the restraint will be of a very limited and brief duration.
- [27] It was further made clear and is clear from the Court order that the parties were directed to file opposing affidavits and heads of argument to ensure that all the facts are placed before Court and that all the parties have the opportunity to state their case in the main application. NUMSA, as any other party in the review application, would be afforded a full opportunity to

argue its case and to make submissions in open Court when the main application is heard.

[28] This is the context within which the order was granted and within which the main application is to be dealt with.

[29] I have to consider the application for recusal and the grounds for recusal against the test set out in *SARFU*.

[30] NUMSA failed to place any cogent or convincing evidence before me to show that a reasonable, objective and informed person would on the correct facts, as I have set out the circumstances in which the order was granted and why arguments by NUMSA were not heard in open Court, reasonably apprehend that I have not or will not bring an impartial mind to bear on the adjudication of the case.

[31] The context within which the order was granted must be considered and that does not indicate that I would not bring a mind open to persuasion by the evidence and the submissions in deciding the main application. The order was granted without any consideration of the merits of the pending review application and the review application will be decided on its own merits, based on the papers filed and the submissions to be made by the parties.

[32] In the absence of cogent and convincing evidence that NUMSA's anxiety amounts to a reasonable apprehension about my partiality based on my conduct, I am not satisfied that NUMSA has made out a case for my recusal. NUMSA has not met the standard for rebutting the presumption of judicial impartiality. I am fortified in this conclusion by the fact that if I were to grant the application on the basis advanced by NUMSA, more particularly that the matter was enrolled on an expedited basis without NUMSA's consent, then on any occasion where a matter is enrolled without the consent of a party or without hearing submissions in an open Court, the prospect of a recusal application would arise. This would no doubt lead to regular disruption and unnecessary prolongation of proceedings.

[33] In the light of the aforesaid considerations, the recusal application should fail.

[34] In the premises I make the following order:

Order

1. The recusal application is dismissed;
2. There is no order as to costs;
3. The Registrar is directed to enrol the review application for hearing on an expedited basis.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Advocate A Redding SC

Instructed by: Anton Bakker Attorneys

For the Thirty fourth

Respondent: Advocate H van der Riet SC

with Advocate M Maenetje SC

Instructed by: Haffegée Roskam Savage Attorneys