

IN THE LABOUR COURT OF SOUTH AFRICA

REPORTABLE / REVISED

DURBAN

CASE NO **D975/2000**

DATE OF HEARING: 28/03/01

DATE OF JUDGMENT: 30/03/01

DATE EDITED: 19/04/01

In the matter between

KWAZULU TRANSPORT (PTY) LTD Applicant

and

PETER SIMON MNGUNI 1ST Respondent

BHEKI KHUMALO N.O. 2ND Respondent

**COMMISSION FORR CONCILIATION,
MEDIATION & ARBITRATION (CCMA)** 3RD Respondent

BEFORE THE HONOURABLE MS JUSTICE PILLAY

ON BEHALF OF APPLICANT: MR M R KYLE

ON BEHALF OF RESPONDENTS: MR MATHENJWA

ON RESUMPTION ON 30 MARCH 2001
MR M R KYLE APPEARS FOR APPLICANT

JUDGMENT 30 MARCH 2001

PILLAY J This is an application to review and set aside the ruling and ensuing award of the second respondent Commissioner, for refusing to recuse himself.

It was argued *in limine* that the application should have been brought in terms of section 145, and not section 158(1)(g) of the Labour Relations Act No 66 of 1995 ('the LRA').

Section 145 deals with the review of awards. Section 158(1)(g) empowers the Court to review the performance of any other function or act of the Commission for Conciliation, Mediation and Arbitration ('the CCMA').

An award is a decision which is issued at the conclusion of arbitration proceedings. It must be accompanied by brief reasons. It must also be signed by the commissioner who issues it [section 138(7)(a)]. A ruling is a decision on a limited issue, usually made at the conclusion of interlocutory proceedings. It could, in some instances, have the effect of concluding the entire proceedings. A ruling may be made before arbitration commences or during the course of it.

In this case, the applicant wrote as soon as it received notice of the arbitration to the Convening Senior Commissioner, requesting that another commissioner be appointed to hear the matter. The Convening Senior Commissioner could have acted on the request. His action would then have been reviewable in terms of section 158(1)(g). However, section 145(2)(a) provides:

"A defect referred to in sub-section (1) means,

- (a) that the commissioner,
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - iii) exceeded the commissioner's powers; or..."

(my underlining)

Furthermore, in *Ruijgrok v Foschini (Pty) Limited and Another* 1999 (2) ILJ 635 (LC), BASSON J held that a review of the condonation application was a review of an award, as a commissioner exercised a judicial discretion under section 191(2) of the LRA. The learned Judge also relied on the fact that the commissioner in that case was "conducting arbitration proceedings". As the LAC had held in *Carephone (Pty) Limited v Marcus NO & Others* 1998 (19) ILJ 1425 (LAC) that arbitrations must be reviewed in terms 145 and not 158(1)(g), the learned Judge proceeded in terms of section 145.

SONI AJ, on the other, hand found that an application for rescission should have been

brought under section 158(1)(g). (*Day and Night Investigators CC v Ngoasheng and Others* 2000 (21) ILJ 1084 (LC), *Byrne v Day and Investigators CC.*) Applications to review the refusal of condonation or rescission are usually heard in terms of section 158(1)(g).

Whether section 145 or section 158(1)(g) applies cannot depend on whether a ruling is made during the conduct of arbitration proceedings or outside of them. If it were accepted that section 145(2)(a)(ii) applies to rulings made during arbitration proceedings, then the ruling would be reviewable only on the limited basis of a gross irregularity. It would not be reviewable on the grounds of misconduct or a commissioner exceeding his powers. To limit the grounds of review of a ruling in such a way would be absurd.

Furthermore, merely because a ruling was made within or outside arbitration proceedings cannot be the basis on which the grounds and the test for review should be determined. It must be the nature of the administrative act that determines whether section 145 or 158(1)(g) is to apply. If the act is a ruling then, irrespective of whether it is made in the conduct of arbitration proceedings or outside of it, section 158(1)(g) applies.

I may be wrong in concluding as aforesaid. I will therefore approach the review on the more limited grounds of section 145 and, if necessary thereafter, on the wider grounds of section 158(1)(g).

I turn to the law and practice pertaining to applications for recusal. The test for recusal, which is well-established, is summarised thus:

"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 South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1999 (4) SA 147, 1999 (7) BCLR 725 (CC) at paragraph 48; *South African Commercial Catering and Allied Workers Union v Irving & Johnson* page 2021 ILJ 1583 (CC); *S v Roberts* 1999 (4) SA 915 (SEA) and *BTR Industries (SA) (Pty) Limited and Others v Metal and Allied Workers Union and Another* 1992 (3) SA 673.)

The test accordingly sets a high threshold for an applicant in a recusal application to meet. Where that threshold is pitched may vary depending on the circumstances of each case and the forum where the application is made. Thus it will be pitched much higher for an appellate bench where the personal attributes, traits and dispositions of each judge is reduced by the collegial nature of the forum. Appellate judges are also entrusted with a higher level of judicial office and are also generally more experienced in the craft of judging. (*SACCAWU v Irving & Johnson* above). For this reason it would be more difficult to have an appellate judge recused than a trial judge.

Similarly, adjudicators who are more experienced in labour dispute adjudication would be able to resist an application for recusal more easily than those who are not. The probability of a reasonable apprehension of bias is greater if the adjudicator is less experienced or is imposed on the parties than when the adjudicator is more experienced or chosen by the parties. The timing of the application may also indicate whether it is made *bona fide* or in order to delay the proceedings. Far from being a comprehensive list of considerations in an application of recusal, the foregoing are probably pertinent to CCMA proceedings more frequently than to other proceedings.

Even though the test may be pitched at different levels in the hierarchy of the dispute resolution system it remains the same in the sense that an applicant will always have to show, in essence, a reasonable apprehension of bias on the part of a party to the proceedings.

Another consideration is the practice that prevails in the industrial relations community where practitioners service employers, employees and their respective organizations, and also preside as independent dispute-resolvers. Those involved in dispute resolution services have largely accepted such a culture, incestuous as this may seem to the purists.

In *Appel v Leo and Another* 1947 (4) SA 766, the court held that:

“though there was no probability or possibility that the arbitrator in the case would be biased in fact nevertheless the Court, in applying this test and approaching the question not from the point of view of a lawyer but from that of a reasonable lay litigant, granted an application for the recusation of an arbitrator, where the chosen arbitrator had appeared as Senior Counsel for the respondent in two interlocutory applications on the same facts as those involved in the applicant’s present claim for damages against the respondent for defamation. The Court considered that the fact that Counsel had once been briefed by one of the parties could not

indicate any possibility of bias, but it was not the possibility of prejudice in fact, but whether a reasonable person in the position of the applicant might think that he would not get a fair trial, which was the test to be adopted.”

This case was cited with approval more recently in *Orange Free State Provincial Administration v Ahier and Another Parys Municipality v Ahier and Another* 1991(2) SA 608.

A person who renders services not only as a commissioner but also as a representative of one of the parties before the CCMA should recuse himself or herself without hesitation if the apprehension of bias is based on the dual role played by the commissioner. A commissioner who has litigated against a party who is scheduled to appear before him or her should disclose that fact immediately she or he receives notice of the hearing and offer to recuse herself or himself. An early and timeous response by the commissioner would avoid delay and the costs of an aborted process. Even if the parties wish the commissioner to remain seized with the matter, it is still within the commissioner's discretion to recuse herself or himself. Commissioners must recuse themselves if they believe that they may not bring an impartial mind to bear on the matter.

The applicant had applied for the recusal of the Commissioner in this case on the grounds that it had a reasonable apprehension of bias based on the following:

- a) The Commissioner had represented employees in labour litigation against the applicant on at least three occasions - in July 1996, January 1998 and June 2000. In 1996 and 2000 he styled himself as "Tugela Labour Consultants". In 1998 he communicated under the letterhead of "Mbube Security and Labour Consultants"
- b) The first respondent, Mr Mnguni, had been a shop steward of DELATUSA, the trade union. He had in that capacity referred the three disputes above to the Commissioner in his capacity as a labour consultant.
- c) Because the employees in the three disputes were members of DELATUSA the applicant alleged that the Commissioner had a relationship with DELATUSA.

The Commissioner reacted to the application for recusal as follows:

"I considered and rejected the application. In terms of CCMA Code of Conduct I am bound to disclose any relationship with either of the parties, and recuse myself if necessary. But in this case I have no relationship with either DELATUSA or the applicant employee.

The two of the mentioned cases where I allegedly represented employees are far-fetched, in that one was at the former Industrial Court and one is at the Labour Court where I have no right of appearance. I assisted employees who approached me individually either by completing the necessary documents or referring them to where they could be assisted. I therefore rejected that the reasons advanced would obscure my judgment in favour of the employee."

In these proceedings the applicant filed supporting documents, from which it would appear that the Commissioner, acting against the applicant as consultant, had made demands and referred a dispute for conciliation. He had also applied for condonation. The Industrial Court matter was a substantial interim reinstatement application. This matter was hardly "far-fetched". Furthermore, the litigation spanned over a period of about four years, and persisted as recently as June 2000. The arbitration award under consideration is dated 1 June 2000. The Commissioner clearly attempted to down play his role as a representative of employees in litigation against the applicant.

He categorically denied in the award that he had any relationship with DELATUSA or Mr Mnguni. His denial was couched in the present tense. Strictly, it meant that at the time of the award the Commissioner had no relationship with DELATUSA and Mr Mnguni. Mr Kyle, for the applicant, submitted that this was a deliberate misrepresentation, and not a mere failure to disclose.

The Commissioner was aware of the Code of Conduct for Commissioners and had considered it when making his ruling. The Code prescribes at length the obligations of a commissioner when faced with a conflict of interest and the duty of disclosure. The spirit of the Code is that there must be maximum disclosure of any facts that could reasonably lead to a perception of bias by a party.

The concerns relating to DELATUSA were pertinently raised. The Commissioner's omission to disclose his relationship in the past with DELATUSA was, at best, negligent and, at worst, a deliberate misrepresentation. Such misrepresentation on any basis amounts to misconduct. The Commissioner's failure to tender his recusal and his refusal to do so on application, is also gross misconduct in relation to his duties as a commissioner and arbitrator. It creates doubt about the Commissioner's suitability to serve as such. Serious allegations are made in the applicant's founding affidavit supported by annexures. The Commissioner

ought to have filed an affidavit explaining his involvement in the various matters. Of particular note is an affidavit filed as an annexure to the replying affidavit, namely Annexure RA1, in which the Commissioner deposed to the following statement,

"I was until December 1999 an official of
DELATUSA, the trade union that represented
Zithulele Mbhele in the arbitration proceedings
before the Commission for Conciliation
and Arbitration."

The applicant also alleged in its founding affidavit at paragraph 25 as follows,

"I respectfully submit that it is quite clear that the second respondent has always had a relationship with DELATUSA up until the recent deregistration of DELATUSA (of which the first respondent was a member)." (my underlining)

These allegations, amongst others, cry out for a response from the Commissioner which he failed to provide in these proceedings.

Accordingly, the Court directs the Registrar of the Labour Court to bring this judgment to the attention of the Director and the Convening Senior Commissioner, KwaZulu-Natal, of the CCMA so that they could enquire into the suitability of the Commissioner to remain on the CCMA panel of Commissioners.

The Court grants an order in the following terms:

- i. The Commissioner's ruling regarding his refusal to recuse himself is hereby reviewed and set aside.
- ii. The arbitration award under case No KN40275 is hereby reviewed and set aside.
- iii. The costs of the application are to be borne by the first respondent and the Commissioner, jointly and severally, the one paying, the other to be absolved.

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that so far as it is audible, the foregoing is a true and correct transcription of the proceedings recorded by means of a mechanical recorder in the matter of:

KZN TRANSPORT v MNGUNI & ANOTHER

CASE NO : D975/00

COURT OF ORIGIN : LABOUR COURT, DURBAN

TRANSCRIBER : N BINEDELL

DATE COMPLETED : 17 APRIL 2001

No of Tapes : 1

Number of Pages : 11

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EXTRACT:
Judgment Only