

REPORTABLE

DATE _____ DELIVERED _____

PILLAY D, J

[1] Mr Pitman referred me to the three cases discussed hereunder in support of his submission that the applicant had satisfied the requirement of proving that Mnyandu, the manager of Labour Relations who deposed to the founding affidavit, was properly authorised to launch this review.

[2] The remarks of FLEMING DJP in *Eskom v Soweto City Council* 1992 (2) SA 702 (W) that the regularity of argument about the authority of the deponent was unnecessary and wasteful must be echoed in this application. The learned Judge observed that in the past proof of authority to bring legal proceedings appeared to have been inspired by the fear that a person might deny that it was a party to the litigation carried on in its name. The later view, he said, is that if the attorney concerned is authorised to bring an application, the application necessarily is that of the applicant. There is no need for any other person, whether (s)he is a witness or someone who becomes involved, especially in the context of authority, to be additionally authorised.

[3] In *Tattersall & Another v Nedcor Bank Limited* 1995 (3) SA 222 (A) the Court found that a branch manager fell within

the class of officials having authority to bring legal proceedings on behalf of the bank. In that case a copy of the resolution authorising the bringing of an application was found to be unnecessary as there was sufficient *aliunde* evidence of authority. The Court further pointed out that the appellant's denial of the deponent's authority was "ambiguous, spare and probably tactical", and adopted the approach in *Mall Cape (Pty) Limited v Merino Koöperasie Beperk* 1957 (2) SA 347 (C), namely that when the challenge to authority was a weak one, minimum evidence will suffice. The use of the word, "duly" in the expression "duly authorised" was an indication that the authority was properly conferred, so the Court held.

[4] Similarly in *Poolquip Industries (Pty) Limited v Griffin & Another* 1978 (4) SA 353 (W), COHEN AJ held that,

"It is usual and desirable for the resolution of the board of directors of a company, authorising the litigation, to be annexed to and proved by the founding affidavits. When it is not, but the probabilities indicated by allegations in those affidavits justify the conclusion that the company has

authorised the application, in the absence of evidence to the contrary, the failure to annex the resolution need not result in the dismissal of the application."

- [5] In this case the applicant is represented by attorneys. They would hardly do so if they were not properly authorised. The first respondent's objection is based on no more than a bare and tactical denial. He had nothing to gainsay Mnyandu's contractual obligations. (See also my judgment in *Mould v Rooper* 2002 (23) ILJ 2076 (LC), at paragraph 24, and the cases cited therein.) The objection *in limine* is dismissed.
- [6] The first and principal ground of review is that the second respondent Commissioner committed a gross irregularity which vitiated the entire arbitration. The facts on which this ground was based are the following:
- [7] The first respondent applied to be legally represented at the arbitration. After considering the jurisdictional facts prescribed in section 140 of the Labour Relations Act No 66 of 1995 (the "LRA"), the Commissioner ruled against the first respondent. In doing so, however, he added that the first

respondent's attorney could remain in the proceedings but was precluded from "representing" the first respondent, who was,

"entitled in the circumstances to consult from time to time with the legal representative."

He continued,

"There is no prohibition against that in terms of the Act. The applicant will then have to represent himself."

[9] The attorney remained seated next to the first respondent during the arbitration. The Commissioner permitted the attorney to assist the first respondent during the arbitration, by writing him notes on how to conduct his case, the questions to be put to the witnesses and the representations to be made.

[10] When Mnyandu objected at the arbitration to the role being played by the attorney, the Commissioner overruled him. His reasoning appears from the following extract of the record,

"Commissioner No, it's not nullified because the question is that the legal

representative doesn't represent him in cross-examination and the argument, and so forth. He can assist his client in terms of areas to be questioned and so forth. Every person has the right to consult an attorney, that's the right in terms of the Constitution, this prohibition, in terms of the Act, doesn't prevent him from, consulting with a legal. I could easily ask the legal representative to stay outside, but he's going to say, 'Hold on, I need to consult my legal representative on this issue', and come back, that's going to delay the issue.

Mr Mnyandu And then, what are the areas of prohibition, if maybe I can be clear on this one?

Commissioner That he's not allowed to speak to, on his behalf, not allowed to argue on his behalf.

Mr Mnyandu But he's doing that through the writings of the papers.

Commissioner He can write areas if he wants, he can cross-examine, he's assisting him. You have an assistance of a legal representing you, you have the right to be represented by him, it's a different concept.

Mr Mnyandu Ja, that's where I'm getting confused because, what he was, what he actually is doing, is that he's actually representing him through writing those questions and he's not doing the talking, but the talking is being done by the other party. Then, at the end of the day, he's representing him but he's the one who is doing the talking but the guy is actually representing him.

Commissioner The person who does the talking is the one that's representing. He can be assisted by anybody, he can be assisted by his wife, is that his wife, or whatever, he can be assisted by anybody." (*sic*)

[11] From the extract, it appears that the Commissioner misconceived the concept of legal representation. He

confined it to being a spokesperson for the first respondent at the arbitration.

[12] Section 140 does not justify such a restrictive interpretation. A legal representative who attends an arbitration usually assists the client in analysing the issues, formulating responses, questions and submissions and, as a spokesperson for the client, presents the case to the arbitrator. By preventing the applicant from being a spokesperson, the Commissioner did not bar legal representation altogether. That contradicted his earlier ruling disallowing the first respondent legal representation at the arbitration.

[13] When making that ruling, the Commissioner purposefully took into account the criteria enumerated in section 140 of the LRA, and found that there was insufficient public interest to warrant legal representation. As regards the comparative abilities of the parties, he found that the first respondent had recourse to trade union officials. The matter was not so complex, he said, as to warrant legal assistance.

[14] Having made his considered ruling, the Commissioner undermined it by permitting the attorney to participate in the process by writing notes to the first respondent to assist him in the conduct of the case. This irregularity, which pervaded the entire process, was compounded by the Commissioner calling on the first respondent to submit closing arguments which were to be prepared by his attorney. At the very least, this disturbed the balance between the comparative abilities of the parties. It would have affected the quality and content of the evidence that was advanced. It also caused confusion. Mr Mnyandu informed the Commissioner as much.

[15] Finding, as I do, that the entire process was vitiated, it is not necessary for me to consider the further grounds of review.

[16] The order that I make therefore is to review and set aside the award. I am not in a position to substitute my own decision for that of the Commissioner as the evidence on the record is not reliable, having found that the proceedings were vitiated by the manner in which the Commissioner allowed the first respondent to be legally represented.

[17] The order is therefore as follows:

- (a) The application for review is granted.
 - (b) The matter is referred back to the third respondent for arbitration by a Commissioner other than the second respondent.
 - (c) The first respondent is ordered to pay the costs of the review.
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PILLAY D, J

21 June 2003