IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case Number: P128/98

In the matter between

Portnet, A Division of Transnet Ltd Applicant

and

M Finnemore 1st Respondent

W Hattingh 2nd Respondent

Employees Union of South Africa 3rd Respondent

JUDGMENT

LANDMAN J

[1] Portnet, a division of Transnet Limited, has applied to review an award handed down by Commissioner Finnemore in connection with an arbitration concerning Mr Hattingh, an employee of Portnet. The third respondent is Mr Hattingh's union, the Employees Union of

South Africa.

[2] Portnet and its employees, including Mr Hattingh, are subject to the Transnet Bargaining Council, established and deemed to be registered in terms of the Labour Relations Act 66 of 1995 ("the Act"). Section 28(c) of that Act empowers the Bargaining Council to resolve disputes. This power is defined and regulated in clause 13 of the constitution of the Bargaining Council. That clause provides, *inter alia*, that parties who are in dispute about alleged misconduct of an employee are referred to arbitration. This arbitration, in essence therefore, amounts to compulsory arbitration. The Council does not itself arbitrate the matter. The arbitrator is an independent person who is appointed to arbitrate the matter. The arbitrator does not act on behalf of the Council but arbitrates by virtue of the submission to arbitration, and in terms of the Arbitration Act No. 45 of 1965. It follows that the review powers of this Court under s158(1)(g) of the Act, which provide for the review of the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law, are not applicable. The review of the arbitrator's award must therefore be determined in terms of s157(3) of the Act which provides that any reference to the Court in the Arbitration Act of 1965 must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

[3] Quite clearly the matter in issue is a dispute which could be referred to arbitration in terms of the Labour Relations Act 66 of 1995. Section 33 of the Arbitration Act of 1965 provides:

(1) Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the Court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

[4] Of course the Arbitration Act of 1965, like any other Act and indeed the common law, must be read subject to the Constitution of the Republic of South Africa of 1996. The Labour Appeal Court in dealing with s145 of the Labour Relations Act of 1995 had occasion to consider the relationship between that section and the Constitution in **Carephone (Pty) Ltd v Marcus NO & Others** 1998 (10) BCLR 1326 (LAC). The conclusion which was reached in that case is that the CCMA was an administrative body and thus that the decisions of the CCMA, when it arbitrates, were required to be justifiable, and if they were not justifiable that would enable the Court to intervene on the grounds set out in s45 of the Act. However, as I have indicated, in this case we are dealing with a private arbitration conducted in terms of the Arbitration Act of 1965. The High Court in **Patcor Quarries CC v Issroff and Others** 1998 (4) BCLR 467 (SE) had occasion to consider certain constitutional points raised in regard to the ambit of arbitration in terms of the Arbitration Act of 1995. The Constitution at that particular stage was the Constitution of the Republic of South Africa of 1993, i.e. the interim

Constitution. In that case Mpati J said, at 479, of s24(d) of the interim Constitution, that:

It is quite clear that the section provides protection against the violation of a person's rights, which may be affected or threatened by administrative action. The question is whether an arbitrator, in the performance of his duties as such, performs an administrative act when he adjudicates in arbitration proceedings and whether his decision (award) can be said to be an administrative decision. I think not. An arbitration is in the nature of litigation. There is a dispute between two or more parties, which, more often than not, may be adjudicated upon by the Courts, but in a quest for speedy and less costly resolution, the parties agree to submit such dispute to arbitration. One of the characteristics thereof "is the finality of the arbitrator's award" (**Kollberg v Cape Town Municipality** 1967 (3) SA 472 (A) at 481F), hence the provisions of section 28 of the Arbitration Act (see also the definition of the word "arbitration" in Butler and Finsen *Arbitration in South Africa, Law and Practice*, and in Jacobs *The Law of Arbitration in South Africa*). I am accordingly of the view that an arbitrator does not perform an administrative function when adjudicating over a dispute in arbitration proceedings but rather a judicial function. It follows that section 24 of the interim Constitution cannot be invoked to challenge his award. The first constitutional point must fail.

[5] For present purposes it is unnecessary for me to deal with the extent to which the Arbitration Act of 1965 must be dealt with in terms of the Constitution. On the facts of this case I am able to apply s33 as it reads, without requiring a liberal or restrictive interpretation.

[1]

[6] Portnet alleges that the dispute between itself and Mr Hattingh was referred to arbitration

by the Transnet Bargaining Council where it was arbitrated by the first respondent, Commissioner Finnemore. She rendered an award and concluded as follows:

The arbitrator finds the dismissal substantively and procedurally unfair. However, in making the award it is noted by the arbitrator that Mr. Hattingh, although authorised to collect the sheets in the manner he did, should also have been aware of the rule about collection, as everyone else knew about it. Although Mr. Hattingh said he did not know about the rule, Mr. Nel said it appeared on the board in the elevator. Furthermore, Mr. Hattingh, (sic) himself admitted that he was aware that there might be a problem as the workers were watching intently what he was doing. It also appears that he pressurised Promat management to make the alternative arrangements. Mr. Hattingh thus acted irresponsibly for such a senior manager by conducting the removal of the sheets from the elevator area in the manner he did, especially without Mr. Bauer being the witness. Rules should be adhered to especially by senior managers. There was no urgency for the removal of the sheets. Mr. Hattingh's behaviour is thus partly responsible for the debacle. Mr. Hattingh is thus only reinstated from the 1st January 1998.

[7] Dr Grogan, who appeared on behalf of Portnet, submitted that the arbitrator's award contained patent and latent irregularities of such a nature that it would enable this Court to intervene and set aside the award. For reasons which will become apparent it is only necessary for me to deal with some of the patent irregularities.

[8] The first relates to the failure to administer the oath. It was submitted, and it is common

cause, that the oath was not administered by the arbitrator. It was further submitted that although arbitrators are entitled to conduct proceedings relatively informally, neither the Transnet Bargaining Council Agreement nor its constitution impose an obligation to conduct proceedings "with a minimum of legal formalities". In any event, a minimum of legal formalities does not mean that even the most fundamental of formalities can be disregarded. Dr Grogan went on to submit that the matter to which an arbitrator must have regard must, in the absence of agreement to the contrary, be evidence as contemplated in law. In the case of *viva voce* testimony this can only be given under oath or on affirmation. See Hoffmann and Zeffert **The South African Law of Evidence** 4th ed at p.440. Dr Grogan pointed out that s14(1) of the Arbitration Act of 1965 provides that an arbitration tribunal may, unless the arbitration agreement provides otherwise, administer oaths or take the affirmations of the parties and witnesses appearing to give evidence. It is the submission of Portnet that this section is mandatory and not permissive. Reference is made to Butler and Finsen **Arbitration in South Africa, Law and Practice** 1993 at pp.183-4. I have read that passage carefully and the furthest that it takes this is the following where it is said:

Oral evidence, particularly in more formal arbitration proceedings, is almost invariably given

under oath.

[9] It is true that it has been held by the Labour Court in regard to s145 of the Labour Relations Act 66 of 1995 that the failure to administer an oath in itself amounts to an irregularity which entitles the Court to intervene. See **Morningside Farm v van Staden and Others** 1998 (5) BLLR 488 (LC) at 491B-E. The submission was made that the principle laid down in that case must apply to arbitrations conducted in terms of the Arbitration Act of 1965. However, it does not necessarily follow that the principle that evidence must be given under oath also applies to the Arbitration Act. Jacobs **The Law of Arbitration in South Africa** 1997, states at p.80:

In an application to make an award an order of court, the respondent opposed this on the grounds that, *inter alia*, the evidence, if any, was not given on oath and that the arbitrator had gone beyond the scope of the deed by having taken into account certain items. It was held that the parties when before the arbitrator had agreed to waive the necessity for taking evidence on oath or for recording the evidence and the award was confirmed.

Jacobs refers, as authority for this proposition, to **J W Irons v Francis & Sons** (1907) 28 NLR 221.

[10] I am not convinced that, where the parties are in agreement that in private arbitration proceedings evidence need not be led under oath or where no objection is taken at any stage, a

party can subsequently approach this court and cry foul. Accordingly, I do not think that the arbitration award is reviewable because of the failure to administer the oath. This of course does not imply that such action should be taken lightly. An arbitrator should bear in mind that an arbitration is a formal proceeding and that it is most desirable that evidence be given under oath or that an affirmation be made before the evidence is given.

[1]

[11] The next ground on which Portnet relies is that there was undue interference with the applicant's representative. It was submitted that the arbitrator did not deny Mr Moeti's allegation that he himself, in his capacity as the representative, was subject to lengthy "cross-examination" by the arbitrator regarding an incidental matter when he was attempting to cross-examine Mr Hattingh. It has been said that this must have distracted his attention and this must be self-evident. Quite clearly it is not desirable to interfere with the way in which a representative conducts cross-examination, particularly when it may lead him to be distracted. However, in this case, there does not seem to have been any prejudice and certainly not sufficient prejudice, nor was it an irregularity of such a nature, as to warrant the review of the arbitration award.

[12] Next, reliance was placed on the fact that the arbitrator relied on the notes of the presiding officer of the disciplinary inquiry. It was submitted that Mr Moeti gave the notes to the arbitrator who accepted them, stating that she would read them overnight. There was no agreement or even discussion about their status. In fact no reason has been offered as to why

the notes were tendered in the first place. The arbitrator has stated that Mr Moeti did not object to her considering them in coming to any decision concerning the arbitration. The submission was made that whether or not Mr Moeti objected to her considering the notes is beside the point. The fact is that by considering them she had regard to evidence that was not properly before her. The arbitrator confirms that she did have resort to them in this manner. She says in a document titled "Further Reasons and Clarification of Award" that:

It would have been impossible not to refer to them and do justice to the case for the following reasons. Mr. van Vuuren, the union representative, referred to a witness that only presented evidence in the disciplinary enquiry, namely Mr. Lindane, and therefore the arbitrator had to use these documents to assess whether Mr. van Vuuren's statements were correct or not.

[13] She also says:

It was in perusing the disciplinary enquiry document that the arbitrator became aware of inconsistencies in Mr. Faleni's statements between the arbitration hearing and the disciplinary enquiry relating to his whereabouts that day and his description of the car.

[14] The submission was made that these inconsistencies were not put to Mr Faleni by the arbitrator, or to Mr Hattingh's representative, yet they were relied on by the arbitrator to discredit Mr Faleni's evidence. This, it is contended, amounts to a patent irregularity which in itself vitiates the proceedings and the award.

[15] This particular case turns very much on the evidence of Mr Faleni and what he saw on the day in question. Mr Faleni was not given an opportunity to deal with the inconsistencies relied on by the arbitrator; neither were any of the parties.

[16] The evidence of Mr Lindane was not before the arbitrator and none of the parties were afforded an opportunity to deal with it. No-one knew that the arbitrator was going to rely upon the disciplinary record in this way in coming to her conclusion. In my opinion this is a grave irregularity which goes to the root of the matter. The *audi alteram partem* rule requires that the parties and their representatives be given an opportunity to be heard in regard to every matter and every piece of evidence which an arbitrator may take into account. They were denied this opportunity. The evidence, in my opinion, was improperly admitted and the *audi alteram partem* rule was not complied with. On this basis alone it is appropriate to set aside the award. As such, it is not necessary for me to consider what was done with the material before the arbitrator or to consider whether latent irregularities also took place.

[17] In consequence

1. The arbitration award made by the first respondent on 23 March 1998 in the arbitration between the Employees Union of South Africa on behalf of Mr W Hattingh and Portnet, a division of Transnet, is hereby reviewed and set aside.

2. The matter is remitted to the Transnet Bargaining Council for the resolution of the dispute between Portnet and Mr Hattingh by the referral of the dispute to an arbitrator other than the first respondent to re-hear the matter.

[18] There was an agreement that no costs would be sought by Portnet against Mr Hattingh and in my opinion no costs should be awarded against the union either. In the circumstances there will be no order for costs.

A A LANDMAN
Judge of the Labour Court

DATE OF HEARING: 20 November 1998

DATE OF JUDGMENT: 25 November 1998

For the Applicant: Dr J G Grogan
Instructed by: Pretorius Herbert & Barnes