IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO.

P 125/97

In the matter between:

VENTURE MOTOR HOLDINGS LTD
t/a WILLIAMS HUNT DELTA Applicant

and

NOMBULELO THELMA BIYANA First Respondent
E A MAEPE N.O. Second Respondent
NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA Third Respondent

JUDGMENT

TIP AJ

[1] Until her dismissal on 15 April 1997, the first respondent had been employed by the applicant for some five years as a petrol attendant. She was found to have been involved in a fraudulent transaction on the garage forecourt. The dismissal was disputed and referred to the Bargaining Council of the Motor Industry for conciliation.

[2] The conciliation was unsuccessful and it was then referred to the CCMA for arbitration. The arbitration was conducted by the second respondent on 15 September 1997. On the following day, the second respondent delivered his award, in which he determined that the dismissal was substantively unfair and ordered that the first respondent be reinstated.

[3] The applicant seeks to have that award reviewed and set aside. It relies on a number of grounds which may conveniently be condensed into three categories:

1. the applicant contends that the second respondent ought to have disclosed that he had previously been employed for a number of years as a legal adviser of the third respondent, of which the first respondent was a member and by which she was represented;
2. it contends that there were a number of irregularities in the manner in which the second respondent conducted the arbitration proceedings; and
3. it contends that the findings made by the second respondent stand in such stark contrast to the clear evidence presented that one must infer that he acted in a grossly irregular and/or biased manner.

[4] In respect of the second category, being the conduct by

the second respondent of the proceedings, certain aspects are common cause, whilst others are to varying degrees in dispute. For the purpose of this judgment, it is unnecessary for me to have regard to matters where disputes have been raised, since I have concluded that the applicant must succeed on the basis of what is common cause and on the inferences to be drawn therefrom.

[5] For the reasons that will be set out later in this judgment, the second respondent's award is to be reviewed and set aside because he did not take into consideration material evidence relating to the issue before him. That is a sufficient ground and I decide the matter on that basis. Nevertheless, it is apposite that I should address two other aspects of the proceedings, without deciding whether or not they are in themselves sufficient to warrant the review of the award.

[6] In relation to the second respondent's employment history, Mr Johns who is the applicant's financial manager and deponent to its founding affidavit, averred that:

> "If I had been made aware of second respondent's prior involvement with third respondent, I would have objected to him hearing the matter."

[7] Section 136 of the Labour Relations Act, No. 66 of 1995 ("the Act") contains certain provisions relating to the appointment of a commissioner for the purpose of arbitration proceedings. In section 136(3) provision is made for a party to object to the commissioner who conducted the conciliation being the one to conduct the arbitration. Section 136(4) stipulates that if such objection is made, the Commission "must" appoint another commissioner. Section 136(5) makes provision for parties to indicate a preference in respect of the arbitrator.

[8] None of those sections specifically provides for an objection to be made to the appointment of a particular commissioner, in the circumstances of the present matter. That, however, does not have the result that the capacity of a party to raise such objection is thereby removed. Such capacity has its origins in the common law. Where a party has a reasonably well founded apprehension that it will not receive an impartial and unbiased hearing, it will be entitled to seek relief.

See: Sera v De Wet 1974 (2) SA 645 (T) at 655 in fin-656B;

BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union 1992 (3) SA 673 (A) at 693I-J.

[9] The common law considerations relating to the impartiality of the arbitrator and, consequentially, the duty of disclosure, apply no less strongly where arbitration is compulsory than they do where the entry into arbitration is voluntary.

[10] In Butler & Finsen Arbitration in South Africa : Law and Practice (Juta 1993) at page 72, the learned authors identify "a business or social relationship, either present or past" as holding the potential that an arbitrator might be prejudiced one way or the other. They cite a passage from

Mustill and Boyd The Law in Practice of Commercial Arbitration in England (Butterworths 1989) at 252, which sentiment I consider applicable in the present matter:

> "A person who is approached with a request to act, and knows that he has some kind of relationship with one of the parties, should remember that there is no keener sense of injustice than is felt by someone who has doubts about whether the arbitrator is doing his honest best. He should also bear in mind that the question is not just whether he really is impartial, but whether a reasonable outsider might consider that there is a risk that he is not ... If he considers that the case is on the borderline, he should disclose the circumstances which may give rise to suspicion; and he will very often find that no objection is taken to his appointment: candour is always the best way to prevent misunderstandings."

[11] In response to the review application, the second respondent has filed a handwritten affidavit. In relation to the complaint that he should have disclosed his previous employment relationship with the third respondent, the second respondent states:"

> "There is no provision in the Act for a commissioner to disclose where he comes from by way of disclosing his background. It is not practice in any CCMA arbitration proceedings for an arbitrator to disclose his/her background prior to commencing arbitration proceedings. ... The CCMA has appointed commissioners from various fields and professions ... This background did not influence my decision ... It has never occurred to me in any arbitration proceedings that I have to disclose my previous involvement. Neither is it a requirement as indicated above."

[12] The tenor of this response does nothing to advance the view that the second respondent approached his task with a proper understanding of the importance of both real and perceived impartiality. Simply to aver that the Act does not require disclosure and that it is neither his practice nor that of the CCMA to do so, reinforces the sense that the second respondent conducted himself in an insensitive and inappropriate manner.

[13] It is by no means required of a CCMA commissioner who undertakes a conciliation or arbitration that he or she should in each and every case preface proceedings with an exposition of his or her background. But where, as in the present case, there was a lengthy and close relationship between the commissioner and one of the parties, then a clear duty arises to make disclosure of such fact.

[14] In the circumstances, I find there to be considerable merit in the complaint raised by the applicant.

[15] I turn now to a consideration of the facts relating to this matter, in the course of which I will deal with the second disturbing aspect of the approach by the second respondent to the matter before him.

[16] The first respondent's dismissal arose out of a

transaction conducted by her on 17 January 1997, in which she processed a Speedpoint debit against an Auto Card. Approximately two months later, the applicant received a letter and transaction report from the First Auto divisional office, setting out that the transaction in question was one of a series of fraudulent transactions involving a particular Auto Card. The applicant was informed that it would therefore not be paid out for the amount transacted by it, being R161,82.

[17] It is common cause that the second respondent was fully informed of the procedures on the applicant's forecourt, where petrol is dispensed. It is common cause also that part of the process involved checks by a supervisor before and after every shift, which inter alia established that the amount of takings (reflected in Speedpoint vouchers and cash) was in balance with the amount of petrol which had been pumped out. This had been done in respect of the shift in question. The amounts were in balance.

[18] The crisp question before the second respondent was whether or not the transaction in question was genuine or fraudulent. If it were genuine, it would mean that petrol was dispensed in the amount shown on the voucher. If fraudulent, in consequence of the fact that takings were in balance with the amount of petrol dispensed, it would mean that the first respondent had substituted a false Speedpoint voucher for an equivalent amount of cash. That amount of cash would necessarily have been extracted from the cash takings in respect of petrol which had in fact been dispensed.

[19] In the proceedings before the second respondent, four of the five vouchers and the First Auto transaction report were submitted in evidence. They show that in the space of less than 11/2 hours and at five different garages in and around central Port Elizabeth, the driver of a vehicle with registration number CB 75329 had conducted five transactions on an Auto Card. The fourth of these was the one transacted by the first respondent.

[20] In each case, the voucher purports to reflect that a substantial quantity of petrol had been dispensed. It is manifestly clear that they could not all have been genuine transactions conducted in the course of normal use of the vehicle in question.

[21] It is a striking and material feature of these five transactions that they were all made in virtually identical amounts: the first was in an amount of R161,81, the second in an amount of R161,81, the third in an amount of R161,80, the fourth (involving the first respondent) in an amount of R161,82 and the fifth and last in an amount of R160,00.

[22] The virtual identity of these amounts and their time frame raises as an overwhelming probability, the inference that the transactions could not have been genuine ones. The processing by the first respondent of the fourth of these transactions had to be evaluated in the context of them all. The same inference arises.

[23] It is common cause that the applicant's representative

in the arbitration proceedings outlined to the second respondent the virtual identity of all the transactions conducted that evening with the card in question and that the link between these transactions was explained. Notwithstanding that, the second respondent took the following view:

> "I am not satisfied that the documents obtained from other filling stations could be used to justify the dismissal of the applicant given the fact that she has no links with those particular filling stations."

[24] That approach on the part of the second respondent shows, at best, a complete failure on his part to grasp the significance of the similarity in transactions and the implications of the fact that the first respondent had carried one out during that sequence.

[25] During the arbitration, the applicant also presented in evidence a printout of the vehicle specifications for CB 75239. It reflects that its fuel capacity was 65 litres. The Speedpoint voucher transacted by the first respondent purports to show that 74,2 litres were dispensed. Clearly, the specifications also point strongly towards the transaction in question not having been a genuine one. In his award, the second respondent noted that the company had "stated that the capacity of the vehicle on which the card was registered i.e. CB 75239 was 65 litres ...". He noted also that the employee's representative had "stated that the witness had no knowledge of vehicle capacity". He did not in any way evaluate those submissions or the evidential value and significance of the specifications. He proceeded simply to find that the suggestion by the employer that "money may have been issued, which would have been shared between the [employee] and the owner of the vehicle" was an "assumption" which the second respondent found was "rather outrageous and unfair in the absence of evidence to substantiate it".

[26] What this amounts to is that the second respondent has in no significant way applied himself to highly relevant evidence which had been placed before him. In the affidavit filed by him in these proceedings, he added nothing by way of reasoning, merely stating that his reasons were set out in the award. Whether one examines this in terms of the grounds contained in section 145 of the Act or those implicit in section 158(1)(g) of the Act, the conclusion is the same. A fundamental requirement in any arbitration proceedings has not been met, namely that relevant evidence must be taken into account and reasonably assessed and that the outcome should be reasonably connected. That is not the position in this matter and the award cannot stand.

[27] It should be remarked here also that the first respondent had recorded the registration number as CB 15239 and not CB 75239. She alleged that this was nothing more than an innocent error. In context, I consider it more likely that it was a deliberate attempt to obfuscate.

[28] I turn now to a brief consideration of one of the procedural aspects complained of by the applicant. As already indicated in the above summary of the facts, a

matter of fundamental importance was whether or not the first respondent had indeed dispensed petrol. The prima facie contradiction between the specification suggesting that the vehicle in question had a fuel tank capacity of 65 litres, and the data recorded on the Speedpoint voucher that over 74 litres had been put into it, was accordingly a vital matter which the first respondent had to address. It was correspondingly a matter to which the second respondent should have accorded keen but impartial attention.

[29] His conduct was entirely the reverse of what was required of him. It is common cause that when the matter was raised, it was the second respondent who reacted; the applicant describes it thus in its founding affidavit and its account is confirmed by the first respondent to be true:

> "Second respondent asked first respondent whether it was not possible that she had put fuel into containers instead of the tank of the motor vehicle."

The first respondent avers that "nothing turns on the fact that the second respondent asked me this question".

[30] I do not share the first respondent's view of the import of the second respondent's suggestion to her. There can be no explanation for the second respondent's intervention, other than that he was concerned to come to the assistance of the first respondent, by suggesting a possible explanation for what on the face of it would otherwise be a telling piece of evidence against her. It is strongly suggestive of actual bias on the part of the second respondent in favour of the first respondent. Even if it falls short of that, it was a grossly irregular intervention by the second respondent. It was certain to and in fact did fuel the belief held by the applicant that it was not receiving a fair hearing.

[31] In the course of argument, I raised with the parties issues relating to procedural fairness in respect of the disciplinary proceedings conducted by the applicant. Mr Vally, who appeared on behalf of the first respondent, did not seek to relocate his case from substantive to procedural matters. He properly pointed out that procedural aspects had been expressly eschewed at the very beginning of the arbitration proceedings. In any event, I am satisfied that the first respondent was at all times confronted with a charge involving the conduct of a fraudulent transaction and that no prejudice in this regard has been demonstrated.

[32] Mr Van der Linde on behalf of the applicant argued that an order of costs should be made against the second respondent. Generally speaking, a court will be reluctant to order costs against commissioners of the CCMA. They play a vital role in the dispute resolution mechanisms created by the Act. The prospect of personal costs orders may have the effect of deterring able and experienced persons from taking up such positions. Similar views were set out in relation to shop stewards in Callguard Security Services (Pty) Ltd v Transport and General Workers Union & Others (1997) 18 ILJ 380 (LC) at 391D-F.

[33] Although there are doubtless circumstances where such

an order would be warranted, I am of the view that the present matter falls short of that point. I have regard also to the fact that the notice of motion seeks an order against the second respondent only in the event of opposition by him. There is no substantive prayer for a costs order on the basis purely of the conduct by him of the arbitration proceedings. Mr Van der Linde argued that the second respondent had in effect opposed the application, in consequence of the affidavit filed by him. I am unpersuaded that this is so. Allegations of improper conduct were made against him and I do not accept that a commissioner in such circumstance should not respond thereto, to an extent that goes beyond the conventional affidavit declaring merely that the commissioner will abide the decision of the court. The second respondent has not appeared in these proceedings and seeks no order.

[34] As to the position of the first respondent, I am satisfied that the evidence presented overwhelmingly establishes that she was involved in a fraudulent transaction. She has maintained the position that she did no more than make a mistake in respect of the recording of the registration number of the vehicle. She could not at any stage have honestly believed in her innocence and I see no reason why the fate of this application should not be accompanied by an order of costs.

[35] There is no need in the present matter for the issues to be remitted to the CCMA for fresh determination. The evidence is in my view clear and this Court is in as good a position to determine the matter as would be a commissioner appointed for a fresh hearing.

[36] In the result, I make the following order:

1. The award made by the second respondent under CCMA Case No. EC 2000 on 16 September 1997 is hereby reviewed and is set aside.
2. There is substituted for the award the following:

"The dismissal by the employer of the employee is determined to have been fair and is upheld."

36.3 The first respondent is ordered to pay the applicant's costs in these proceedings.

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K S TIP
Acting Judge

Date of Hearing	:	26 March 1998
Date of Judgment	:	8 April 1998
For the Applicant	:	Advocate Van der Linde
Instructed By	:	Claude Tee & Associates
For the First Respondent	:	Advocate Vally
Instructed By	:	Gray & Moodliar