IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:

J2937/98

CASE NO:

J3270/98

In the matter between

ARMATO FOODS (PTY) LIMITED	**Applicant**
and	
R J TUCKER N.O.	**First Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
FRANSIE STAPELBERG	**Third Respondent**

JUDGMENT

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de VILLIERS AJ

1. This is the combination of an application by the Third Respondent to have the award of the First Respondent ("the Commissioner") dated 21 September 1998 made an order of Court in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 ("the Act") and an application by the Applicant to have that award of the Commissioner set aside in terms of section 145 of the Act.

2. Certain time limits prescribed in the Rules of this Court were not

complied with. However, because the default was not prejudicial and because the parties, at the hearing, chose not to take issue with each other in this regard, the Court considered it expedient to condone the non-compliance by both parties and to proceed with the merits of the application.

3. Because the only opposition to the Third Respondent's application to have the award made an order of Court is that the award ought to be set aside on review, it is appropriate to determine the review application first. The parties are therefore cited as they appear in that application.

4. The Applicants argued that, based on the following facts, which were admitted by the Commissioner in his Explanatory Affidavit, the Court ought to conclude that the Commissioner acted in a biased and unfair manner towards the Applicant during the arbitration proceedings alternatively acted in a manner which could reasonably be construed as biased and unfair by the Applicant.

4.1. During the course of the arbitration the Commissioner observed that he considered one of the Applicant's witnesses (a Ms Ronald) unreliable.

4.2. Before giving one of the Applicant's witnesses an opportunity to explain her absence on 11 August 1998 (the date set for the arbitration hearing) the Commissioner awarded costs in favour of the Third Respondent and ordered the Applicant to pay the Commission's costs.

4.3. During the course of the arbitration, the Commissioner directed a remark to the Applicant's legal representative that the arbitration proceedings were not "LA Law".

5. The Applicant argued that the Commissioner's behaviour served to "bolster" the Third Respondent and the Third Respondent's representative which, in turn, served to undermine the confidence of the Applicant's witnesses.

6. As a further indication of bias the Applicant pointed to the fact that the commissioner included the payment of commission in the calculation of the quantum of compensation awarded to the Third Respondent when:

6.1. it was common cause that the Third Respondent had been unable to attain her sales target; and
6.2. there was no evidence of quantum.

7. This Court, relying particularly on **BTR Industries SA (Pty) Ltd v MAWU & Others** (1992 (3) SA 673 (A) at 693I–J) has accepted that it is the conduct of a commissioner which goes towards creating a **reasonable** (my emphasis) suspicion of bias which is reviewable by the Court (See **Mutual & Federal Insurance Co Ltd v The Commissioner for Conciliation, Mediation and Arbitration & Others** [1997] 12 BLLR 1610 (LC) at 1618H -1619B and **Afrox v Laka & Others** J847/97 unreported).

8. In **Afrox v Laka** (at paragraph 31) Zondo J put it like this:

"……..the test for bias is the existence of a reasonable suspicion of bias. The question therefore is whether, on the facts on which the applicant relies, it can be said that the applicant's representatives at the arbitration proceedings developed a reasonable suspicion of bias on the part of the first respondent. The suspicion of bias or partiality must be one which might reasonably have been entertained by a lay litigant in the circumstances of the applicant. If such a suspicion could reasonably have been apprehended, the test of disqualifying bias is satisfied. It is not necessary to show that the apprehension is that of a real likelihood that the

first respondent would be biased or was biased.

9. It is important to note that the test is an objective one (see **BTR Industries** supra) allowing the decision-maker to take account of the manner and the context in which the conduct took place. Although **BTR Industries** (supra) was dealing with an application for the recusal of the presiding officer at an Industrial Court hearing, I believe the test is equally applicable in this matter. The headnote properly summarizes the test as follows:

The test to be applied therefore involves the legal fiction of the reasonable man. That the test is an objective one does not mean, however, that the *exceptio recusationis* is to be applied *in vacuo*; the hypothetical reasonable man is to be envisaged in the circumstances of the litigant who raises the objection to the tribunal hearing his case.

10. The Court does not have the benefit of a verbatim transcript of what transpired and there are numerous disputes of fact. However I do have the benefit of the Commissioner's detailed affidavit and of the Third Respondents' Answering affidavit which place the allegations made by the Applicant in context and on which I can rely. (See **Afrox v Laka & Others** at paragraph 32 and **County Fair v CCMA & Others** [1998] 6 BLLR 577 LC at 583 C- D).

11. I also have copies of the Commissioner's notes which he concedes do not reflect rulings made by him against either parties' representatives, their objections or any of the "confrontational situations" which arose during the course of the proceedings although they do represent an accurate recordal of the material evidence of all the witnesses and the arguments presented.

12. I shall therefore deal with each of the allegations made by the Applicant having regard to what the Commissioner and the Third

Respondent has to say about the context in which they occurred.

13. During the course of the arbitration the Commissioner observed that he considered one of the Applicant's witnesses (a Ms Ronald) unreliable.

14. At paragraph 4 of his Affidavit, the Commissioner admits that he indicated that he did not consider that Ms Ronald was a reliable witness. He then goes on to say:

"I consider that I was entitled to put to Ronald that the contents of her decision on appeal did not support her statement that she had considered the evidence presented to her in an unbiased and careful manner….. I consider this to be part of my duties as a Commissioner so that she and Ledden would have the opportunity of dealing therewith. The said Ronald appeared to me to be mostly concerned with protecting her status as chairperson of the appeal and treated both my questions and those of Dorkin as reflections on her integrity instead of applying her mind to the unsatisfactory aspects of her evidence to which her attention was drawn."

15. At paragraph 7.3 (Page 12) of her affidavit, the Third Respondent states:

I deny that the First Respondent made snide remarks to the effect that Ronald was being "untruthful" and was an "unreliable" witness in so many words. [The Commissioner] indicated to Ronald that from Ronald's answers he could not understand how she could state that, in her opinion, I was guilty of poor performance and that the Code of Good Practice had been followed by the Applicant. My impression was that the First Respondent was trying to assist Ronald.

16. Earlier in the paragraph 7.3 (at Page 11 of her affidavit), the Third Respondent says the following:

The [Commissioner] **asked questions of all the witnesses, including myself, during the proceedings. He also asked questions of the representatives of the parties. However, this could hardly be described as "continuous" interjection.**

Under cross-examination Ronald was evasive and, as I am informed by my legal representative at the arbitration, indicated a clear lack of knowledge on the different procedures outlined in Schedule 8 to the Labour Relations Act 1995 dealing with poor performance and misconduct. In fact, under cross-examination,

Ronald appeared to be completely unaware of the existence of the Code of Good Practice, Schedule 8 to the Labour Relations Act, 1995. Ronald was clearly not at ease under cross-examination and appealed to the [Commissioner] **that my representative was badgering her when in fact she was unable to adequately reply to the questions put to her. The** [Commissioner] **informed Ronald that my legal representative was entitled to put questions to her and that she should answer the questions and also not ask questions of my legal representative."**

17. Seen in the context of the picture painted by the Third Respondent, the Applicant's allegations in its Founding Affidavit that the Commissioner, in questioning Ronald, "adopted a blatantly aggressive and hostile attitude towards Ronald", that he "made snide remarks to the effect that Ronald was being untruthful", that his interjections "went beyond attempting to clarify unclear evidence and constituted very incisive cross-examination of the Applicant's witnesses" and that, in doing so, he assisted the Third Respondent in establishing that her appeal hearing was unfair, cannot be sustained.

18. In dealing with a matter fairly (which section 138 (1) obliges a Commissioner to do), in appropriate circumstances, it may be incumbent upon a Commissioner who has formed the impression that evidence is unreliable to alert the witness to this in order to give the witness an opportunity to restore his/her credibility by way of explanation. It may be appropriate to do so even when a witness is under cross-examination (which the Applicant alleges is the case here).

19. Obviously, the way in which this is done is important. The way in which the Commissioner, in this instance, conducted himself led the Third Respondent to believe that the Commissioner was assisting the witness. She would not have come to this conclusion, had the Commissioner's attitude been "blatantly aggressive and hostile".

20. For all these reasons, the Applicant's contentions in this regard do not persuade me that the Commissioner's conduct in this regard could reasonably have led to a suspicion of bias.

21. Before giving one of the Applicant's witnesses an opportunity to explain her absence on 11 August 1998 (the date set for the arbitration hearing) the Commissioner awarded costs in favour of the Third Respondent and ordered the Applicant to pay the Commissioner's costs.

22. The Commissioner explains this as follows at paragraph 4.5.1 of his affidavit.

The matter had been postponed on 17 July 1998 to 11 August 1998. The date was agreed to by the parties and myself as this was a date on which Mrs Levitas, a key witness for the Applicant, would definitely be available to give evidence.

When the parties assembled on 11 August, Ledden stated that the matter would not take long as Mrs Levitas was not available and a postponement had to be granted. I pointed out that he had no right to demand a postponement and that I required an explanation for her absence. Neither Ledden nor the deponent was able to tender an explanation. I directed that Mrs Levitas secretary be telephoned to ascertain if she had knowledge of the reason for Mrs Levitas absence and it was reported to me that she also did not know where Mrs Levitas was.

Either the deponent or Ledden could only say that Mrs Levitas's mother was in South Africa from abroad and it was believed that she had gone to her in Cape Town but had no other information for me. In these circumstances the provisions of the Labour Relations Act relating to an award of costs appeared appropriate especially as Ledden was not prepared to call any of his other witnesses until Mrs Levitas was called to testify.

In view of the fact that Dorkin a practising attorney had been engaged for the day there was no reason why the Third Respondent should have to bear his wasted costs. Furthermore, the Commission for Conciliation, Mediation and Arbitration was obliged to pay my fees as Commissioner (R1 500 plus VAT) for the day. The Commissioner's (sic) budget is severely strained and considerable amounts are wasted arising out of postponements. The postponement was entirely caused by the absence of the witness for the Employer (she being its Sales Director) and the indifference shown by her to the process bordered on contempt as she did not so much as inform her representative of the reason for her absence.

When Mrs Levitas gave evidence on the next occasion she endeavoured to explain her absence on the previous occasion. However I pointed out to her that this was irrelevant as the order for costs had been made. I deny that this order showed bias or an unreasonable attitude towards the Applicant."

23. The Third Respondent says the following at paragraph 7.5 Page 14 of her affidavit.

On 11 August 1998, the second day of the arbitration hearing, the Applicant was due to commence with its case at approximately 09h00. Ledden informed the [Commissioner] **that the Applicant requested a postponement of the matter as Levitas was not available to give evidence. Lombard, who also gave evidence at the arbitration, was present.**
The [Commissioner] **asked Ledden and Lombard where Levitas was and both stated that they did not know where she was. It is a blatant untruth that Ledden informed the** [Commissioner] **that Levitas was unavailable due to a medical emergency.**

After Ledden and Lombard were requested to establish the whereabouts of Levitas by the [Commissioner] **they returned after approximately half an hour to say that apparently Levitas's mother was in South Africa and that Levitas was in Cape Town with her mother. They had not been able to contact Levitas on her cellular telephone.**

I submit that the costs order was justified in the circumstances especially as Lombard was not prepared to give evidence at that stage. Our entire day was wasted and Levitas did not even have the courtesy to explain her absence.

24. Later in her affidavit, the Third Respondent says the following (at paragraph 7.6 Page 16):

It should be mentioned that on the day that Levitas did attend and give evidence she informed the [Commissioner] **that she was not feeling well. When the** [Commissioner] **asked her whether she wished to continue she said that she did and gave evidence from 09h00 to 10h00 when she again complained of not feeling well. When the** [Commissioner] **asked her again whether she wished to continue she said that she did not and the matter was postponed again to a later date.**

25. CCMA commissioners are entitled to be more stringent than a Court with its requirements for granting postopnements. (See **Carephone (Pty) Limited v Marcus N.O. and others** [1998] 11 BLLR 1093 LAC; **Ross & Son Motor Engineering v CCMA & Others** [1998] 11 BLLR 1168 LC).

26. If the Commissioner had continued the arbitration in the absence of Levitas in the face of *prima facie* evidence before him that Levitas was not available due to a medical emergency, I could understand the Applicant's complaint. But both the Commissioner and the Applicant deny that the Commissioner was advised by the Applicants on 11 August 1998 that the reason for Levitas's failure to attend was due to a medical emergency.

27. Relying on the Commissioner's and the Applicant's version of what transpired on 11 August 1998, I am satisfied that the delay in finalizing the arbitration on that day was occasioned by the frivolous and vexatious conduct of the Applicant in failing to ensure that its witness, Levitas, was present, the proceedings already having been postponed once before because of Levitas's unavailability, alternatively its failure to establish where she was prior to the hearing. I agree with the Commissioner when he says in his Explanatory Affidavit at paragraph 4.5.3 that her failure to inform her representatives of the reason for her absence bordered on contempt.

28. Before making application for a postponement, it is incumbent upon parties, particularly in arbitrations under the auspices of the CCMA because of its limited resources, to lay a proper foundation for the application. In this case, the Applicant's appear to have adopted a frivolous and vexatious attitude to the arbitration proceedings by not even attempting to ensure, prior to the hearing, that Levitas would be there or making any kind of enquiry as to her whereabouts prior to making application for the postponement. I do not believe that the Applicant, as her employer, would have had much difficulty in doing so.

29. It is **this** conduct which justified the order for costs. Any explanation for the reasons for the absence subsequently would be irrelevant.

30. There is nothing in the Act which suggests that the Commission's costs should not be included in such an order and, where parties are properly found to have acted frivolously or vexatiously, there is no reason

why the prejudice suffered by the Commission, as a result of the frivolous and vexatious conduct, should not be taken into account in the order to alleviate the prejudice suffered by the Commission.

31. On the papers, there appears to be nothing untoward about the way in which the Commissioner went about making the order, which was reasonable in the circumstances and hence any suspicion that the Applicant's may have had that this indicated bias on the part of the Commissioner is unreasonable.

32. During the course of the arbitration, the Commissioner directed a remark to the Applicant's legal representative that the arbitration proceedings were not "LA Law".

The Commissioner deals with this as follows at paragraph 4.4 of his affidavit.

"I admit that I reprimanded Ledden on more than one occasion when he attempted to object to aspects of Dorkin's legitimate cross-examination and told him that this was not "LA Law" …… Ledden's objections almost without exception were raised in the abrupt and cryptic manner of lawyers in the "LA Law" television series whenever his witnesses were having difficulty in answering Dorkin's questions. These objections appeared to me to be attempts to frustrate the process and to assist the witnesses. I frequently had to explain to Ledden that provided the questions were relevant, a cross-examiner had wide discretion as to the questions he asked."

33. The Third Respondent has this to say at paragraph 7.4 Page 13 of her affidavit:

It is not true that my legal representative, Dorkin cross-examined Ronald in an aggressive and badgering manner. The truth, I submit, is that Ronald became increasingly uneasy under cross-examination and she and Ledden sought to rescue the Applicant's position by objecting to the questions put to Ronald. On every occasion that Ronald experienced difficulty in answering questions, she became aggressive towards Dorkin, objected to the questions put to her and answered questions with questions. Ledden took the opportunity to object to questions on almost every occasion that Ronald appeared to be in difficulty. For example, when Dorkin put it to Ronald that she had not answered the question put

to her, Ledden would object that she had in fact answered the question when in fact she had not. After repeated objections by Ledden which were done in the most dramatic fashion, the [Commissioner] **advised Ledden that Dorkin was entitled to put the particular question and told him that this was not "LA Law"……**

As someone not familiar with legal processes, I was appalled at Ledden's behaviour during the arbitration. He adopted a hostile attitude towards me when I was under cross-examination and he objected whenever it appeared that the Applicant's witnesses were experiencing difficulty.

34. It is evident that the behaviour of the Applicant's representative, Ledden, warranted some form of admonishment and hence the remark was not made gratuitously or for want of provocation. While I accept that the remark may have been unfortunate and that perhaps it may have been more appropriate for the Commissioner to have called the representatives aside and admonished the Applicant's representative out of earshot of his client, put in context, it was a frivolous remark, and is not such as could lead to a finding that it created a reasonable suspicion of bias.

35. Regarding his decision to include commission in the amount of compensation awarded to the Third Respondent, the Commissioner explains that he considered this appropriate for the following reasons.

- There was no dispute that the total remuneration earned by the Third Respondent comprised a basic salary and commission.
- Not to have included commission in the calculation would have operated to the unfair disadvantage of the Third Respondent.
- Having regard to the definition of "remuneration" in the Labour Relations Act, he considered that it was appropriate so to do.
- There was no dispute that the average commission earned by the Third Respondent was R2 732,00 per month.

36. Commission is part of an employee's remuneration. (In this regard, see **Schoeman and Another v Samsung Electronics SA (Pty) Ltd** (1997) 18 ILJ 1098 at 1102 I - J). Thus, a Commissioner is obliged to take it into account for the purposes of quantifying the amount of compensation payable in terms of section 194 (1) and (2) irrespective of whether the employee would have been entitled to that remuneration had they still been in employment.

37. Having decided that the dismissal was both procedurally and substantively unfair, the Commissioner declined to order reinstatement or re-employment, exercised his discretion to award compensation and correctly related the quantum to the remuneration of the Third Respondent as required by the provisions of section 194 (2).

38. While I accept that there could be no evidence of what the Third Respondent would **actually** have earned in commission, the Commissioner's decision to award an amount equivalent to the average, which was based on the evidence before him, was reasonable and hence not indicative of bias.

39. During argument the Court's attention was drawn to the following remarks made by the Commissioner at paragraph 5.4 in his explanatory affidavit as an indication of his attitude towards the Applicant:

If Ledden felt humiliated by his absence of understanding of the correct procedures then so be it. I certainly did not use disrespectful or demeaning language towards him. To suggest that a Commissioner is not entitled to engage or criticise a witness in the presence of the Third Respondent or her representative or to engage in dispute a representative of the Employer in the presence of his client shows a poor understanding of the process of testing evidence.

In any event I cannot understand how the so-called belittling and humiliation of

Applicant's representatives and witnesses in the presence of the Third Respondent and her representative (even if it did take place) "undermined" the arbitration proceedings and prevented the Applicant from properly presenting its defence to the allegations."

40. In this regard, the headnote to **BTR Industries** (supra) is helpful. The relevant portion reads as follows:

"It is important, nonetheless, to remember that the notion of the reasonable man cannot vary according to individual idiosyncrasies or the superstitions or intelligence of particular litigants"

41. Whether the Applicant's representative may or may not have **felt** belittled or humiliated is not the point. The question is whether the Commissioner behaved in such a way that a reasonable person would have come to the conclusion that Ledden was being humiliated and belittled and that the humiliation or belittling was such as to lead the reasonable lay litigant to question the partiality of the Commissioner.

42. While the Applicant has attempted, in its Founding Affidavit, to show that the Commissioner behaved in this way, there is no support for the Applicant's submissions either in the Third Respondent's affidavit or that of the Commissioner. In fact, both deny that the Commissioner belittled or humiliated the Applicant's representative.

43. Had the Commissioner belittled or humiliated the Applicant's representative, one would have expected Ledden (who appears to have had little difficulty raising objections during the proceedings) to have raised an objection at the time which he did not do, according to the Commissioner (at paragraph 4.3 of his Explanatory Affidavit). This point was not denied by the Applicant in its replying affidavit.

44. I must therefore accept that Ledden did not take issue with the Commissioner regarding his conduct during the hearing and find that the probabilities, therefore, favour the Commissioner and the Applicant's versions that Ledden was not belittled or humiliated. If this is so, then the Commissioner's comments, made after the event, has no relevance to the decision which the Court has to make now, a decision which involves an examination of the conduct of the Commissioner **during** the course of the hearing. One cannot infer bias from conduct *post facto*.

45. In the circumstances the review of the Commissioner's conduct does not succeed and the application is dismissed.

46. The Applicant has made the following unsubstantiated allegations of misconduct on the part of the Commissioner.

46.1. The Commissioner continually interfered with Ledden's attempt to lead the Applicant's witnesses and cross-examine the Third Respondent;

46.2. The Commissioner continually interjected whilst the Applicant's witnesses were attempting to give their evidence. When Ronald attempted to place evidence before the Commissioner, the Commissioner adopted a blatantly aggressive and hostile attitude towards Ronald. For example, when Ronald testified that she had considered all the evidence presented to her in an unbiased and careful manner, the Commissioner made snide remarks to the effect that Ronald was being untruthful;

46.3. The Commissioner reprimanded Ledden by telling him to "shut up";

46.4. When Ledden attempted to explain to the Commissioner that

Levitas as not available to give evidence on 11 August 1998 due to a medical emergency, the Commissioner was not prepared to accept this explanation and again became aggressive and antagonistic towards the Applicant.

47. These are indeed extremely serious and damaging allegations made about a senior Commissioner of the CCMA for which there is no support on the papers. They are denied by both the Commissioner and the Third Respondent.

48. It is clear from the Commissioner's notes, which run to some 150 handwritten pages, that the Applicant had a full opportunity to cross examine the Third Respondent and to present its case. If anyone's conduct requires admonishment it appears to be that of the Applicant's representative at the hearing, conduct which "appalled" the Third Respondent.

49. In these circumstances, the Court has an obligation to show its displeasure in order to deter others from pursuing the same course in future. (See, for example, **Karbochem Sasolburg v Kriel & Others** J2161 unreported). Litigants who make such allegations and are unable to adduce any evidence to prove them must know that they do so at their peril. As Cheadle AJ points out in **Coetzee v Lebea NO & Another** 1999 (20) ILJ 169 at paragraph 4:

"It does great disservice to our public institutions to weigh in with unsubstantiated claims of impropriety"

50. The Court's displeasure in this instance is reflected in the costs order in the review application.

51. I therefore make the following order:

51.1. The application to have the award of the First Respondent set aside is dismissed.

51.2. In terms of the award of the First Respondent, the Applicant is to pay the Third Respondent the sum of R94 608,00 (Ninety Four Thousand Six Hundred and Eight Rands) plus interest in terms of section 143 (2) of the Labour Relations Act of 1995 at the rate of 15,5 percent per annum from 21 September 1998 to date of payment.

51.3. The Applicant is to pay the costs of the Third Respondent's application in terms of section 158 (1) (c) on a party and party scale.

51.4. The Applicant is to pay the costs of Third Respondent's opposition to the application to have the award of the First Respondent set aside on an attorney and client scale.

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I de VILLIERS A J
Acting Judge of the Labour Court

Date of Hearing	:	29 April 1999
Date of Judgment	:	6 July 1999
For the Applicant	:	Advocate M van As instructed by Sampson Okes Higgins
For the Third Respondent	:	Advocate C Bredenkamp instructed by Rooth and Wessels