166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **J1146/99**

In the matter between:

RUFUS MOTHOKA MALATJI	Applicant
And	
INDEPENDENT MEDIATION SERVICES OF SOUTH AFRICA	First Respondent
TRANSNET BARGAINING COUNCIL	Second Respondent
CALVIN A PAUL N.O.	Third Respondent
JAN PETRUS STEMMETT N.O.	Fourth Respondent
TRANSNET LIMITED t/a METRORAIL / SPOORNET	Fifth Respondent

JUDGMENT

STELZNER AJ

1. This is an application for the review and setting aside of the arbitration award of the fourth respondent sitting under the auspices of the Independent Mediation Services of South Africa (first respondent), which arbitration was conducted in terms of the provisions of the Transnet Bargaining Council Constitution.

2. It is common cause that the applicant was dismissed from the

services of fifth respondent (Transnet Limited) on 8 May 1998 at the conclusion of a disciplinary enquiry which investigated and considered various charges brought against him. After that dismissal the applicant lodged a dispute with the second respondent (the Transnet Bargaining Council) challenging the fairness of his dismissal. By agreement between the applicant and the fifth respondent the dispute relating to the applicant's dismissal was referred to the fourth respondent for resolution by arbitration. Fourth respondent is a member of first respondent's panel of arbitrators and was appointed by virtue of the provisions of the constitution of second respondent.

3. Whilst the arbitration proceedings were pending, these proceedings having at a point been postponed *sine die*, one Cohen purporting to act on behalf of the fifth respondent engaged in negotiations with the applicant which led to the conclusion of a so-called settlement agreement. The settlement agreement was signed by one Stander, who purported to act, similarly, on behalf of fifth respondent. In terms of that purported settlement agreement the sanction of dismissal dated 8 May 1998 was altered to a serious written warning valid for 6 months, the applicant was transferred to another depot and the intervening period was to be regarded as unpaid leave. By implication the applicant was, in terms of the agreement,

reinstated in fifth respondent's employ.

4. At the relevant time, fifth respondent had in operation a policy which defined managerial powers to sign agreements on its behalf. The policy provides that:

   "*Under no circumstances are industrial relations staff to sign any agreement. Their mandate only extends to negotiating and drafting any agreement.*"

   It was clear that neither Cohen nor Stander fell within the category of managerial positions entitling them to conclude or sign the settlement agreement relied upon by the applicant. In confirmatory affidavits both Cohen and Stander simply assert the conclusion that they had the authority to conclude and sign, respectively, the settlement agreement on fifth respondent's behalf. They do not indicate from where they derive the source of their authority.

5. Subsequent to the applicant having recommenced working for fifth respondent the matter was investigated in full by the human resources office which discovered serious flaws in relation to the manner in which the settlement agreement had been concluded and signed. The conclusion reached was that neither Cohen nor Stander had the necessary authority to conclude and sign the

agreement and that the agreement was therefore null and void. The applicant was advised, therefore, that the original verdict of dismissal reached at the disciplinary enquiry in May 1998 still stood and he was relieved of all his duties.

6. The applicant then referred a new dispute in accordance with the provisions of the Transnet Bargaining Council Constitution concerning the alleged non-compliance by fifth respondent with the settlement agreement. Fourth respondent was re-appointed to arbitrate this dispute.

7. None of the first to fourth respondents opposed the application for review but the fourth respondent filed an affidavit in which he records certain facts about the issues which were placed before him for determination. In his affidavit he states as follows:

"*Since the arbitration was conducted in terms of the Transnet Bargaining Council Constitution, an arbitration agreement was not required. At the commencement of the proceedings on 02/02/99, it transpired that there were two issues in dispute: the fairness of Mr Malatji's dismissal and the validity of a subsequent agreement to reinstatement him. The company's representative, Mr James Tshabalala, objected to the second issue and the applicant's representative, Mr Titus Greyling of Salstaff, indicated*

that he was prepared to withdraw the second issue if the matter could be postponed in order that he could prepare himself on the dismissal issues. The company agreed and the matter was postponed until 08/02/99."

8. It is common cause that the matter then proceeded on 8 February 1999. In regard to the proceedings which took place before him on that day fourth respondent states as follows in his affidavit:

"*The issue of the settlement agreement was already dealt with on 02/02/99 and was withdrawn by applicant's representative. At the commencement of the proceedings on 08/02/99 the parties were* ad idem *that the only issue was the fairness of the applicant's dismissal.*"

And further

"*I conducted the arbitration on the basis of the dispute as it was agreed upon between the parties. I would not have proceeded with the arbitration if there was disagreement over the issue in dispute*."

9. On 23 February 1999 fourth respondent gave an arbitration award dismissing the applicant's claim of unfair dismissal by the

fifth respondent. Having emerged unsuccessful from these proceedings, the applicant seeks an order reviewing and setting aside the fourth respondent's award together with certain consequential relief which is, in the main, directed at reinstating him as an employee of the fifth respondent on terms no less favourable than those which were applicable to him at the time of his dismissal by fifth respondent in May 1998.

10. The arbitration was conducted under the auspices of the first respondent and not the Commission for Conciliation, Mediation & Arbitration. The applicant does not state in his notice of motion or his affidavits specifically under which section of the Labour Relations Act, No 66 of 1995 ("the Act") he brings this review. Logically, however, he cannot rely on the provisions of section 145 of the Act. In similar circumstances in the matter of *Portnet (a division of Transnet Ltd) v Finnemore & others* [1999] 2 BLLR 151 (LC), in considering an application to review an award handed down by an arbitrator where the dispute had been referred in terms of the provisions of the Transnet Bargaining Council Constitution, Landman J held that clause 13 of the constitution of the Bargaining Council defines and regulates the powers of the Bargaining Council to resolve disputes. The 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 42 of 1965. It follows that the review powers of this court under section 158(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 section 157(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."* (At 152F-H).

11. In the same judgment Landman J goes on to refer to the grounds for review as set out in section 33 of the Arbitration Act, which provides for review where –

any members of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or

an award has been improperly obtained.

12. It is clear that the grounds of review as set out in section 33 of the Arbitration Act are almost identical to those contained in section 145 of the Labour Relations Act.

13. The applicant formulated his case for review on the grounds that the settlement agreement entered into between himself and the fifth respondent had settled the dispute about the fairness of his dismissal and that this constituted a compromise which had the effect of rendering the issue *res judicata*. Accordingly he alleges that the fourth respondent had no jurisdiction to arbitrate the dispute about the fairness of his dismissal. In other words it would appear that he is alleging that the fourth respondent exceeded his powers as arbitrator.

14. In the circumstances it appears that the two crisp issues before me are as follows. In the first instance, whether or not the dispute surrounding the dismissal of the applicant by the fifth respondent on 8 May 1998 was settled. Secondly, whether the fourth respondent was in the circumstances precluding from

determining that dispute on the grounds that it had been settled and therefore whether by nevertheless doing so he assumed jurisdictional powers which he did not have or, put differently, exceeded the powers which he did have.

15. The fifth respondent disputes the validity of the settlement agreement on the basis that it did not authorise any person to enter into negotiations with the applicant and to conclude the settlement agreement, specifically, that it did not authorise either Cohen or Stander to act on its behalf in that regard. Secondly, it alleges that the conduct of Cohen and Stander was in conflict with the established policy of the fifth respondent which requires a settlement agreement to be concluded by the industrial relations or human resources managers of the fifth respondent.

16. It is clear that the parties' versions on the validity or otherwise of the settlement agreement are contradictory. There is a serious dispute of fact on the papers. Despite the serious dispute of fact, however, the applicant seeks final relief. In dealing with this dispute this court has to apply the well known principles as set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1994 (3) SA 620 (A) and in particular as set out at 634E-H. These principles are frequently applied by this court, see for

instance *National Union of Mineworkers v Freegold Consolidated Gold Mines (Operations) Ltd (President Steyn Mine); National Union of Mineworkers v Freegold Consolidated Mines (Operations) Ltd (Western Holdings)* [1998] 9 (5) SALLR 122 (LC) at page 142 para 66 of the judgment, where Zondo J (as he then was) held:

"In this regard it must also be borne in mind that as the applicant is seeking final relief, the decision of the court must be based on the respondent's version of what happened if there is a dispute of fact between the versions of the two parties unless the respondent's version is so untenable that the court would be justified in rejecting it on the papers."

17. The fifth respondent denied the authority of both Cohen and Stander and this denial appears to accord with the provisions of respondent's policy as contained in the papers. Neither Cohen nor Stander are able to indicate in their affidavits where they derived the source of their alleged authority. Even if one has regard to the evidence of Cohen and Stander themselves, therefore, it would appear that the applicant has failed to demonstrate actual or ostensible authority on their part to negotiate and conclude the settlement agreement relied upon by him. There are, furthermore, inherent probabilities which militate

against the applicant's version but which support the respondent's version. For instance, the applicant's dismissal was based on a finding and a sanction made after a duly established disciplinary enquiry. It appears highly unlikely that such a finding would be reversed and certainly not without the sanction of those duly authorised officials of the fifth respondent who were involved in the disciplinary process in the first place.

18. Accepting, therefore, that the so-called settlement agreement was not valid, the original dispute arising from applicant's dismissal on 8 May 1998 had not, therefore, been validly compromised and could not be regarded as *res judicata*. The fact that the Bargaining Council may have been advised, in the meantime, that the dispute had been settled and might have closed its files cannot alter this fact.

19. The fact remains, most importantly, that when the matter came before fourth respondent in February 1999 he canvassed carefully with the parties the nature of the issue/s which he was required to decide and he states quite categorically in his affidavit that he conducted the arbitration on the basis of the dispute as it was agreed upon between the parties. To the extent that there is a dispute of fact about what happened in this regard there is no doubt that I must prefer fifth respondent's

version as corroborated by the version of fourth respondent himself, in line with the *Plascon Evans* principles as referred to above.

20. Furthermore, it appears appropriate to take account of the following facts, namely, that the applicant was represented at the arbitration proceedings when they commenced on 2 February 1999, that the proceedings were postponed to 8 February 1999 at the request of the applicant's representative, that the postponement was requested by the applicant's representative because he was not fully prepared to proceed with the arbitration in regard to the dismissal, that when the proceedings resumed on 8 February 1999 it was quite clear that the only issue on which the parties presented evidence was the fairness or otherwise of the dismissal on 8 May 1998 and, finally, that the applicant presented his evidence in this regard through the assistance of the selfsame representative who had requested the postponement. It is inconceivable that the applicant and his representative would have remained quiet and would have abided by the supposed direction issued by the fourth respondent that the only issue for determination was the fairness of the applicant's dismissal if they had in fact thought that the only issue properly before the arbitrator was the question of fifth respondent's alleged non-compliance with a settlement

agreement. Applicant's version in this regard is so improbable that it falls to be rejected.

21. In the circumstances I find that by agreement between the parties, the fourth respondent was entitled to arbitrate on the dispute arising from applicant's dismissal of 8 May 1998. Fourth respondent, furthermore, arbitrates by virtue of the submission to arbitration by the parties. His powers are conferred on him by the parties and not by the Act. (See the *Portnet* decision referred to above.) In so doing, he did not exceed the powers conferred upon him. As such he did not fall foul of the provisions of section 33(1)(b) of the Arbitration Act and applicant has failed to establish a ground for review.

22. Even if I am wrong in regard to the invalidity of the settlement agreement then it appears that applicant subsequently, by his conduct at the arbitration proceedings in February 1999, waived any such rights as he might have had under the settlement agreement. The settlement agreement in this instance, even if it were a valid agreement, constituted a contract between the parties the provisions of which could be waived in accordance with the normal principles of contract. The facts in this case are distinguishable from the facts in the case of *Macyusuf v North West Communication Services* (1999) 20 ILJ 1061 (LC) where the

court was concerned with a settlement agreement entered into under the auspices of conciliation proceedings at the CCMA and where it was held that the provisions of the Act do not allow for the challenging of allegedly defective settlement agreements or for the resolving of disputes concerning the terms of settlement agreements.

23. This is a case where the applicant, having emerged unsuccessful from arbitration proceedings brought the present proceedings by making what have turned out to be spurious allegations against the fourth respondent. I agree with the submissions made by Mr Maleka, who appeared on behalf of the fifth respondent, that applicant appears to have invented the arguments presented in this case after the award was made against him and in a manner which suggest opportunism. There is no ongoing relationship between the parties and there appears, therefore, no good reason why costs should not follow the result.

24. In the circumstances I make the following order:

24.1 The application for the review and setting aside of the arbitration award of the fourth respondent is dismissed.

24.2 Applicant is ordered to pay fifth respondent’s costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:	12 August 1999
DATE OF JUDGMENT:	25 August 1999
APPEARANCE FOR APPLICANT:	Mr D Maluleke
OF:	National Entitled Workers' Union
APPEARANCE FOR RESPONDENTS:	Mr I V Maleka
INSTRUCTED BY:	