IN THE LABOUR COURT OF SOUTH AFRICA

Sitting in Cape Town

Case No: C325/98

In the matter between :

COUNTY FAIR FOODS (Pty) Ltd	Applicant
and	
THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
MBULELO BIKWANA	Second Respondent
DEON VISAGIE	Third Respondent
BRIAN ARENDSE	Fourth Respondent
PATRICK CLAASEN	Fifth Respondent

JUDGEMENT

ZONDO J :

Introduction

[1] County Fair Foods (Pty) Limited, the applicant in this matter, has brought an application against an arbitration award which was issued by the second respondent, a commissioner for the Commission for Conciliation, Mediation and Arbitration, the first respondent in a certain dismissal dispute. The award was issued in favour of three erstwhile employees of the applicant who had

been dismissed by the applicant. Those former employees of the applicant are the fourth, fifth and sixth respondents in these proceedings. The three were members of the Food and Allied Workers Union, (**"the Union"**) the third respondent in this matter.

The relief being sought

[2] The order which the applicant seeks in terms of its notice of motion is one:-

1. condoning the late filing of the review application in respect of the ruling on legal representation made by the second respondent.

2. Reviewing, correcting and setting aside representation, as well as the award, made y the second respondent in the dismissal dispute between the applicant and the fourth, fifth and sixth respondents.

3. Directing that the second respondent did not have jurisdiction to arbitrate the dismissal dispute between the applicant and the fourth, fifth and sixth respondent .

[3] The fourth, fifth and sixth respondents were employed by the respondent. The respondent is involved in the **"Chicken industry".** The fourth, fifth and sixth respondents, who will herein after be referred to as **"employee respondents"**, were working on a night shift on a night of the 3rd July to the morning of the 4th July 1997. Their shifts appears to have commenced at about 16h00 or so on the 3rd July 1997 and went up to 01h40 on the 4th July .

[4] Apparently they were asked to work but they refused. There were seven other employees in their shift who were also asked to work over time who also refused while the employee respondents in this matter were members of the Food and Allied Workers Union, the other seven employees belonged to another union. Following upon this refusal to work, all the ten employees who had refused to work overtime including the employee respondents were dismissed after being found guilty.

[5] The other union to which seven of the employees belonged had an arbitration conducted under the euspices of the first respondent in respect to the dismissal dispute between itself and its members, on the one hand, and the applicant. That arbitration was conducted by one Mr Maritz, a part time senior commissioner of the first respondent The applicant took part in that arbitration. For convenience I will refer to that arbitration, where it is necessary to refer to it, as the Maritz arbitration.

[6] In that application the applicant applied for permission to be legally represented in the arbitration. The union representing those seven employees opposed the applicant's request for permission for legal representation. After hearing argument Commissioner Maritz granted the applicant's request for legal representation. A reading of his award does not disclose that Commissioner Maritz gave any reasons for permitting the applicant to be legally represented.

[7] The arbitration then proceeded on the fairness or otherwise of the dismissal of the seven employees. Commissioner Maritz later issued an award in which he concluded that the applicant had proved that the dismissal was fair. Pursuant to Commissioner Maritz's ruling on legal representation for the applicant the applicant had been represented by an attorney in those arbitration proceedings. It would appear that the employees involved in that matter were represented by a union official.

[8] The employee respondents in this matter and their union referred their dismissal dispute to arbitration separately. The second respondent was appointed to arbitrate the dispute under the auspices of the first respondent. By the time the employee respondents' dismissal dispute came before the second respondent for arbitration, the Maritz arbitration had already been completed and Commissioner Maritz had issued his award in the other dismissal dispute.

[9] The applicant turned up at the arbitration before the second respondent with an attorney moved an application before the second respondent for permission for the applicant to be legally represented - as had been done in the Maritz arbitration. The employee respondents were represented by a union official or organizer in the arbitration before the second respondent.

[10] The applicant's application for permission to be legally represented was opposed by the union and employee respondents' representative. Argument was heard. Later the second respondent gave a ruling refusing the applicant's request for legal representation. He gave his reasons for not permitting such representation. Thereafter the first respondent fixed the 23rd as a date on which

the arbitration would proceed on the merits. All parties were given due notice of the date of the arbitration.

[11] Aggrieved by the second respondent's decision refusing its application for legal representation, the applicant decided that it would make an application to have that ruling reviewed and set aside. On the 22nd June 1998 the applicant addressed a letter to the convening senior commissioner of the first respondent in the Western Cape in which it complained about the second respondent's ruling and asked that the senior commissioner should effectively remove the first respondent from the matter and appoint another commissioner to deal with it. The applicant threatened to institute review proceedings should its request not be granted.

[12] The senior commissioner refused to have the case removed from the second respondent and advised the applicant's then attorneys of the legal position which they should have known, namely, that the first respondent could not review rulings of its own commissioners and that only the Labour Court could review the second respondent's ruling. Against the above background the applicant's then attorneys addressed a letter to the senior commissioner saying they had been instructed by the applicant to advice that the applicant **"will not be attending the arbitration proceedings today and, in the light of previous correspondence, will be instituting review proceedings in respect of Commissioner Bikwani's refusal to permit legal representation in this matter as well as your refusal to assign an alternative arbitrator to hear the matter"**. The last sentence of the letter says : **"Our client apologises for any inconvenience this may cause"**.

[13] The second respondent proceeded with the arbitration on the morning of the 23rd June 1998. At the beginning of his written award the first respondent recorded that he had received a copy of the letter which the applicant's attorneys had sent to the senior commissioner which said the applicant would not attend the arbitration. The second respondent heard evidence and, apparently, reserved his award and only handed it down around the 8th July

1998. The second respondent found the dismissal unfair and ordered the applicant in its absence to pay certain amounts of compensation to each of the three dismissed employees. The second respondent gave written reasons for his award.

Review

[14] The first issue which this review is directed at is to review the second respondent's ruling on legal representation. The provisions of the Labour Relations Act, 1995 (Act No 66 of 1995) governing legal representation in arbitrations under the CCMA involving dismissals for conduct or capacity have been dealt with extensively in **Afrox Ltd v Adv. Laka & Others . . .** , an as yet unreported judgement which I gave recently in this Court. For that reason I do not propose considering those provisions at any length in this matter. It suffices to emphasise the point which is made in that judgement that the party seeking legal representation in circumstances where the other party or parties to the dispute have not consented to legal representation must seek to persuade the commissioner to conclude that it would be unreasonable to expect it to deal with the dispute without legal representation. Once the commissioner has so concluded, then the party becomes entitled to legal representation. At that stage there is no discretion. This means that the commissioner cannot say : I have concluded that it would be unreasonable to expect you to deal with the dispute without legal representation but, nevertheless, I refuse to grant legal representation. In fact to do so would be unreasonable.

[15] The applicant deals extensively with the issue of legal representation in its founding affidavit. It deals with in, among others, paragraphs 24.1 - 37 as well as from par 64.1 - 63.20 of the founding affidavit. I do not propose to deal in this judgement with all the individual complaints which the applicant raises about the second respondent's ruling because to do so would make this judgement unduly long. This is not to say that I have not considered them. Indeed I have. The respondent would have had to show in this proceedings not

only that on the material which was placed before the second respondent there was enough for the second respondent to conclude that it would have been unreasonable for him to expect the applicant to deal with the dispute without legal representation but also that the second respondent's (implied) finding that it would not be unreasonable in this case to expect the applicant to deal with the dispute without legal representation fell within the grounds of review that it relies upon in this matter.

[16] The applicant has failed to show even that the material that was before the second respondent was enough to justify the conclusion that it would have been unreasonable to expect it to deal with the dispute without going into details, bearing in mind the factors listed in sec 140(1)(I) - (iv), I can say the following :-

(a) with regard to the applicant's managers who were to deal with the arbitration if legal representation was not allowed, the applicant only said that had no experience in arbitrations without saying for example what their educational and other qualifications were this left the possibility that they might well have such a high level of academic education that they would either need very little **"coaching on how to conduct an arbitration or that they would be able to sufficiently represent the applicant even without further training e.g. they might have had legal qualifications - or some other university education".**

(b) the applicant did not say that the representative of the employees in the arbitration had any experience in arbitrations or what experience if any such representative had; the effect of this is that the second respondent could either not compare the two parties' representatives or if he could, he was not able to conclude that the representative of the employees was such that to place the potential representatives of the applicant at a disadvantage.

(c) despite the applicant's argument that there were complex issues of law in this dispute relating to the dismissal of the employees, quite clearly, there were no complex issues at all; employees were asked to work overtime; they refused and, after disciplinary inquiries, they were dismissed. If one has regard to the employees' evidence in the arbitration, their case was simply that the applicant asked them to work overtime too late - about 10 or so minutes before they were to knock-off.

(d) there was no complexity in the facts of the dispute.

(e) the dispute was not of any public interest.

In the light of the above I have no hesitation in concluding that the second respondent be faulted in refusing legal representation for the applicant in the arbitration. The application also criticised the second respondent's ruling in the light of the fact that Commissioner Maritz had allowed applicant legal representation. The answer to this is three fold :

(1) each commissioner had to decide for himself if it would be unreasonable to expect the applicant to deal with the dispute without legal representation and it can be expected that the two commissioners could well come to different conclusions on the same issue.

(2) as Commissioner Maritz did not give reasons for his ruling allowing the applicant to be legally represented, the second respondent had no way of ascertaining from the award how Commissioner Maritz came to conclude that the applicant be allowed legal representation.

(3) It is Commissioner Maritz's rather than the second respondent's one which appears to be strange in the light of the facts of the case - there was no reason why the second respondent should have sought to give a ruling similar to that of Commissioner Maritz.

Jurisdiction of the CCMA

[17] One of the points raised by the applicant is that the second respondent

did not have jurisdiction because the refusal of the employee respondent to work constituted a strike because it was coupled with a demand. There is absolutely no merit in this submission even when one has regard to what the applicant says in this regard in the founding affidavit. The findings of the disciplinary enquiries do not support by the allegations relating to the reasons for dismissal which is what the second respondent could look at, or, had to look at, in determining whether this was a matter for arbitration by the CCMA or one for adjudication. This was a dismissal for alleged misconduct which did not come anywhere near to constituting a strike. Accordingly the CCMA had jurisdiction to arbitrate the dispute.

Should the Second Respondent have proceeded with the arbitration on the 23rd June 1997

[18] One of the applicant's grounds on which it seeks to have the second respondent's award reviewed and set aside is the fact that the second respondent proceeded with the arbitration on the 23rd June 1998 when he knew **"that the reasons for the applicant not attending the arbitration related to the fact that applicant intended taking the second respondent's ruling not to allow the applicant legal representation on review"**.

[19] I find it very strange that the applicant should have the temerity to criticise the second respondent for proceeding with the arbitration on the 23rd June in the applicant's absence because it was the applicant and its then attorneys who advised the senior commissioner that the applicant would not attend the arbitration. The applicant did not apply for the postponement of the arbitration proceedings pending the outcome of the review application it was intending to make. The applicant's attorneys simply informed the CCMA that the applicant was not going to attend the arbitration. It was only in the letter sent by the applicant that an enquiry seemed to be implied on whether or not the applicant should attend. But the re is simply no basis to criticize the second respondent. He was fully entitled to proceed and deal with the dispute when no

application was made for a postponement of the proceedings before him.

[20] It is the applicant that needs to be criticised her what appears to me to have not only an obstructionist approach an attitude that the arbitration held on its be held on its terms. First it sought legal representation. When this was refused - in circumstances which not only did not disclose any bias on the second respondent's part but seemed to be perfectly legitimate - the second respondent sought to have that ruling overturned by the senior commissioner - something the senior commissioner had no power to do but also it sought to have the second respondent removed from the case altogether. For what reason.? Just because it did not like the ruling he had made on its request for legal representation!

[21] The applicant's founding affidavit is replete with many other criticisms which the applicant levels against the award of the second respondent about allegedly not applying his mind to various aspect of the case. I do not intend to deal with them in any manner other than to say most, if not all, of them have no foundation and would in any event, be the fruits which a party which decide not to take part in proceedings must reap and about which a party such as the applicant should not be heard to complain.

Reliance on the agreement of 4 October 1995

[22] The foundation of the second respondent's finding that the dismissal of the employee respondents was unfair was that the applicant had, contrary to its obligations in terms of a wage agreement dated the 4th October 1995, failed to have **"prior consultation"** with the employee respondents before they were required to work overtime.

[23] The wage agreement of the 4th October 1995 was annexed as annexure **"R"** to the founding affidavit. The first two sentences of clause 4 of that agreement read thus :- **"Requirements may neccesitate members to work morethan the required 46 hours per week. Employment with company is subject to the member availing themselves (sic) for such overtime, after**

prior consultation as required and allowed in legislation".

[24] The applicant submits that the wage agreement had lapsed by the time of the incident which gave rise to the dismissal of the employee respondents in this case. The incident occured on the morning of the 4th of June 1997. The wage agreement had been concluded on the 4th October 1995 and it was to endure until 30 September 1996. The applicant says that the agreement was to endure up to the 30th September 1996 appears ex facie the agreement and there is no reason why the second respondent did not see this. The clause which says thisis the very first clause of the wage agreement.

[25] The next question which arises is whether the second respondent :- committed miscunduct in relation to the duties of the commissioner AS AN ARBITRATOR (SEC 145(2)(AA