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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: **C131/2000**

In the matter between:

COUNTY FAIR FOODS (PTY) LIMITED	Applicant
And	
COMMISSIONER JAN THERON N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION (CCMA)	Second Respondent
WESTERN CAPE WORKERS ASSOCIATION obo LITHONIE	Third Respondent

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JUDGMENT

STELZNER AJ

1. This was matter came before me by way of an opposed review in terms of the provisions of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant seeks an order that the arbitration award handed down by the first respondent on 22 December 1999 under the auspices of the second respondent be reviewed and set aside and, in the event of the review being successful, that the matter be referred back to the second respondent for determination *de novo* by a Commissioner other than the first respondent.

2. As indicated, the matter was opposed. However, when the matter came before me I was not in possession of heads of argument from the respondent as required by Practice Direction 1 of 1998 of this Court. I was therefore not in a position to prepare for the hearing of the matter with reference to the propositions to be raised by the respondent, simply having had the benefit of the applicant's heads of argument. Mr August,

who appeared for the respondent, indicated that he did not seek a postponement for the purposes of enabling him to file heads of argument but elected that the matter proceed on an unopposed basis, apparently because he did not wish to run the risk of an adverse costs order. Having established clearly that Mr August wished to waive the rights of the third respondent (and thus Mr Lithoni whom the third respondent represents) to argue in opposition to the matter I then proceeded to hear the matter on the basis of the argument presented by the applicant's Counsel alone. I nevertheless am required to satisfy myself with reference to all the documents properly before me that a proper case has been made out for review. The documents before me include not only the opposing affidavit filed on behalf of the third respondent but a fairly detailed affidavit filed by the second respondent, albeit that the second respondent does not oppose this application.

3. The factual background to the matter is as follows. Lithoni was employed as a truck driver by the applicant, was charged with and dismissed for reckless driving. The incident giving rise to the charge took place on an inclining public road near the applicant's premises. Lithoni had attempted to overtake another truck belonging to the applicant. As the two trucks drew level, a vehicle appeared at the top of the rise heading in the direction of the truck. The driver of the slower truck took evasive action by moving his vehicle entirely off the road onto the gravel verge. This allowed Lithoni to move his truck over into the road space vacated by the other driver and so to avoid a collision with the oncoming vehicle. Lithoni, as I have stated, was charged with and was dismissed for reckless driving, after the holding of a disciplinary enquiry.

4. When the matter came before the first respondent by way of arbitration evidence was heard from a number of witnesses on behalf of the applicant. These witnesses were one Matthys, the driver of the vehicle which Lithoni had been trying to overtake, one Erasmus who had at the time been travelling a short distance behind Lithoni in another of applicant's vehicles and who observed the incident, one Hobden, who was the chairperson of the disciplinary enquiry, as well as one Pieters who proffered certain evidence including an estimation of how long it would have taken for one truck to pass another on the hill, although he did not observe the incident in question. The evidence before the first respondent was tape-recorded and transcribed but it transpired that the tape recorder had erroneously been switched off during the course of

the evidence of Pieters and that evidence was accordingly not available by way of transcription. Lithoni gave evidence on his own behalf.

5. As I have already stated this application was brought under the provisions of section 145 of the Act with particular reference to section 145(2)(a)(i) and/or section 145(2)(a)(ii). In short it was submitted that the award was vitiated by defects in the sense of misconduct in relation to the duties of the first respondent as an arbitrator, as well as gross irregularities in the conduct of the arbitration proceedings. The applicant's case under the heading of misconduct was based on the submission that the first respondent conducted the proceedings in such a way that his conduct gave rise to a reasonable apprehension of bias. While it was submitted that his conduct in this regard constituted misconduct it was submitted in the alternative that, at the very least, the conduct constituted a gross irregularity in the conduct of the arbitration proceedings. The applicant raised further concerns in regard to what has been termed previously by this Court and the Labour Appeal Court "*latent irregularities*" in the reasoning process of the arbitrator. Because of the conclusion which I have reached on the submission that the first respondent's conduct was such that a reasonable apprehension of bias existed I have not found it necessary to consider the further contentions put forward by the applicant.

6. I turn then to deal in further detail with the issue of alleged bias and to consider whether or not misconduct, alternatively a gross irregularity in the conduct of the proceedings, occurred.

7. For there to be misconduct, it has been held that there must be some "*wrongful or improper conduct*" on the part of the decision-maker, in this instance the Commissioner. (See *Dickinson & Brown v Fisher's Executors* 1915 AD 166 at 176). Misconduct has also been described as requiring some "*personal turpitude*" on the part of the decision-maker. (See *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v S Naicker & others* (1997) 18 ILJ 1393 (LC) at 1395H-I.) The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter *Administrative Law* at 536). These principles

have been reinforced by the constitutional imperatives regarding fair administrative action. (See *Carephone (Pty) Ltd v Marcus NO* (1998) 19 ILJ 1425 (LAC) at 1431I-1432A.) The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision-maker (*nemo iudex in sua causa*). (See Baxter (*supra)* at 536.)

8. It follows from the above principles that a Commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a Commissioner has the power to conduct arbitration proceedings in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of section 138(1) of the Act, this does not give him the power to depart from the principles of natural justice. Thus, further, although it clearly lies within the Commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties.

9. In Brassey et al *Commentary on the Labour Relations Act* at A7:49 the following guidance with regard to the choice between forms of procedure is provided:

"*In adversarial proceedings the litigation process is in the control of the parties; the evidence that is adduced is that which the parties choose to present and the arbitrator operates rather like an umpire. In inquisitorial proceedings the arbitrator plays a more active role in the hearing, calling witnesses and interrogating them in order to ascertain the truth … Where an arbitrator adopts an inquisitorial approach to the arbitration, she cannot abandon the well established rules of natural justice; on the contrary, she must be especially careful to guard against creating a suspicion of bias in the breasts of litigants who will have little, if any, experience of a process so foreign to our system of adjudication. See* Mutual & Federal Insurance Co Ltd v CCMA & others *[1997] 12 BLLR 1610 (LC) at 1619-20.*"

10. Where a Commissioner has adopted an adversarial approach, he or she should stand entirely away from

inquisitorial style questioning of witnesses, leaving the parties to adduce and test evidence as they see fit, alternatively, if he or she wishes to descend into the arena, this should be done in a consistent manner so as to avoid giving rise to suspicion of bias.

11. It is now accepted in our law that bias will be held to exist not only where the decision-maker was in fact partial, but also where reasonable people might form the impression of bias. In the *Mutual & Federal* case (supra) at 1618H-1619C the Court, in the person of my brother Jali AJ, summarised the position as follows:

"*The applicant's Counsel submitted, and rightly so, that a Commissioner does not need to be biased but it is the conduct of the Commissioner which goes towards creating a suspicion and perception of bias which might be entertained by a lay litigant, which should be reviewed by this court. In this regard he referred me to* BTR Industries SA (Pty) Ltd v Mawu & others *(1992) 131 ILJ 803. In this matter Hoechstra JA also set out the test to be applied in assessing whether the Industrial Court could be said to have been biased. At page 817C-D he also said:*

"*For present purposes there may be adopted the definition of "bias" stated in the House of Lords by Lord Thankterton in* Franklin v Minister of Town & Country Planning *1948 AC 84 (HL) at 103. It was there stated that the proper significance of the word … 'is to denote the departure from the standard of even handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi judicial office*'."

At 822B-C Hoexter JA also said:

"Provided the suspicion of partialities one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risks. If suspicion is reasonably apprehended then that is the end of the matter. I find myself in complete agreement in what was forcibly stated by Edmund Davies L in the Metropolitan Property *case at 314C-D:*

'*With profound respect to those who are propounded the "real likelihood" test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in a case where bias is alleged, and that any development which appears to emasculate that requirement should be strongly resisted.*"'"

12. (See also *President of the Republic of South Africa & others v SA Rugby Football Union & others* 1999 (7) BCLR 725 (CC) at 747C-748F and *Afrox v Laka* (1999) 20 ILJ 1237 at 1242F-H).

13. In the *Mutual and Federal* case *(supra)* this Court with reference to our common law regarding entering an arena found aggressive cross-examination of a witness by a Commissioner to constitute an irregularity. The comments of the court with reference to an earlier decision of the Appellate Division were as follows, at 1620G-1621B:

"*Whilst the Commissioner might be doing what is expected of him in terms of section 138 it is important that he should be conscious of our common law regarding entering an arena. In the case of* Solomon & another NNO v De Waal *1972 (1) SA 575 (A) Potgieter JA dealt with the intervention by a Judge and the descending by the Judge into the arena of conflict between the parties. Potgieter JA held at 580E-H that:*

"*A perusal of the record reveals that the learned trial Judge often and, unfortunately, quite unwarrantedly, intervened in the proceedings while defendant's Counsel was cross examining plaintiff's witness and during the hearing of defendant's case. It is unnecessary to quote the numerous passages in question. Suffice it to say that during the hearing of the plaintiff's case the learned Judge asked certain questions and made certain observations which reflected favourably upon the plaintiff's case and adversely upon the evidence that the defendant's Counsel asserted would be adduced for the defendants. Furthermore during the hearing of the defendant's case the learned Judge examined their witnesses in such a manner and made observations in the course thereof of such a nature as to evince his ostensible disbelief, or at any rate, his doubt about their credibility. Those and other interventions by the learned Judge must have been most*

harassing for the defendant's Counsel, but fortunately he did not allow the actual presentation of the defendant's case to suffer thereby. However, by descending into the arena of the conflict of the parties in that manner the learned Judge might have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues, and the amount of the damage sustained by the plaintiff. Even if it were not so, such intervention might well have created the impression, at least in the mind of the defendant, that he had also disabled himself and that he was favouring or promoting the plaintiff's cause and prejudging the case against the defendant. In that regard it must be borne in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done.""

14. On the basis of the transcript of the proceedings before the first respondent in this case I am entirely satisfied that the first respondent questioned at least two of the applicant's witnesses, namely Erasmus and Hobden, in a manner which essentially amounted to cross-examination. For instance, the first respondent put to Erasmus propositions of his (the first respondent's) own making, interrupted Erasmus' answers, challenged Erasmus on the consistency of his answers with his previous evidence (when there was in fact no real inconsistency), reminded Erasmus that he was under oath (thereby impliedly indicating that he doubted his incredibility), and made "submissions" regarding the reasonable construction of his evidence. On one particular issue where it is certainly arguable that Erasmus' evidence was not inconsistent the first respondent engaged vigorously with Erasmus and in a manner which would undoubtedly have created the impression that he was prejudging the case against the interests of the applicant. On reading certain passages of the record one would certainly form the view, without being informed otherwise, that the first respondent was not in fact the arbitrator but the representative of the third respondent.

15. In regard to the evidence of Hobden the first respondent similarly engages in an interchange with him apparently to clarify an issue but in such a manner so as to challenge his credibility. The manner of the questioning is such that it appears to cross the line between seeking clarification and challenging the witness's version which is an unacceptable position for an impartial arbiter to adopt.

16. The applicant alleges similar conduct on the part of the first respondent in dealing with the evidence of Pieters, however, in the absence of a transcript of this part of the proceedings there is insufficient evidence before this Court to substantiate the allegation.

17. When dealing with Lithoni, on the other hand, the first respondent, while he asked certain questions of him, at no time challenged his evidence or acted in a manner which could be likened to cross-examination.

18. In all the circumstances I am satisfied that the behaviour of the first respondent, certainly insofar as the evidence of Erasmus and Hobden is concerned, oversteps the boundaries of fair procedure in the conduct of arbitration proceedings. I am satisfied that his descent into the arena gives rise to a reasonable apprehension on the part of the applicant that he was not impartial. On the basis of the authority set out above it is clear that this is a reviewable defect. If it does not amount to misconduct then it certainly amounts to a gross irregularity in the conduct of the proceedings. While first respondent's conduct was wrong and improper I cannot find any basis on which to conclude that there was "personal turpitude" on his part. In the circumstances, and it being unnecessary in order to decide this matter to make a finding of misconduct, I decline to do so.

19. There appears to be no reason not to follow the normal rule in regard to costs in this matter as the application was opposed by the third respondent until the commencement of the hearing before me.

20. In the circumstances I make the following order:

20.1 The arbitration award handed down by the first respondent under case number WE21751, dated 22 December 1999, is reviewed and set aside.

20.2 The matter is referred back to the second respondent for determination *de novo* by a Commissioner other than the first respondent.

20.3 The third respondent is ordered to pay the costs of this application.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:	11 SEPTEMBER 2000
DATE OF JUDGMENT:	15 SEPTEMBER 2000
APPEARANCE FOR APPLICANT:	Mr MW Janisch (instructed by Cliffe Dekker Fuller Moore Inc)
APPEARANCE FOR THIRD RESPONDENT:	