IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR 217/01

In the matter between:

NORTHERN PROVINCE DEVELOPMENT CORPORATION
Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **First Respondent**

ERIC PHINDELA **Second Respondent**

MXOLISI NICK BAMBO **Third Respondent**

JUDGMENT

TIP AJ :

1. The third respondent is a former employee of the applicant. At the time of

his dismissal on 13 May 1999, he was employed as the Corporate Manager : Remuneration. He disputed the fairness of the dismissal and referred the matter to the CCMA. The dispute was ultimately referred to arbitration before the second respondent, for hearing on 7 February 2001. On that day, the second respondent ruled that the applicant's counsel was not entitled to appear in the matter, he being a part-time commissioner of the CCMA. The second respondent also dismissed an application for the postponement of the hearing. The matter proceeded in the absence of the applicant and an award was made in favour of the third respondent. This is an application for the review of that award.

THE REPRESENTATION ISSUE

2. This question turns on the status of a policy decision taken by the governing body of the CCMA. It is not clear when the relevant decision was taken but it appears to have been circulated on 2 November 2000 under the subject "Part-time Commissioners appearing in the CCMA". The text of the communication, from the director of the CCMA, was in the following terms:-

"I have received numerous requests from part-time Commissioners wanting to appear on behalf of parties at the CCMA. This matter was discussed extensively by the National Directorate and the Governing Body. The GB came to the conclusion that part-time commissioners should not

appear in the CCMA."

3. At the hearing on 7 February 2001, the third respondent was represented by his attorney, Mr Mahlase. Mr Mahlase had been a part-time commissioner of the CCMA but, evidently in response to the policy decision set out above, he had resigned by the time of the hearing. He presented a letter to that effect.

4. By contrast, Adv Laka, who had been instructed on behalf of the applicant, was also a part-time commissioner of the CCMA but had not resigned. As appears more fully below, he informed the second respondent that he had been advised by the convening senior commissioner of the CCMA in Mpumalanga, the province where he was enrolled as a part-time commissioner, that he could appear in other provinces. Since the dispute had arisen and was heard in the Northern Province, Mr Laka contended that he was therefore entitled to appear. The second respondent nevertheless interpreted the CCMA policy directive as being of general application and therefore held that Mr Laka could not appear.

5. Mr Laka appeared for the applicant in these review proceedings also. Given that the key issue was concerned with his *locus standi* as a representative in the CCMA, as well as ancillary issues which I will set out below, it is in my view undesirable that he should have appeared in this court in these proceedings. Inevitably, given the background to this

matter, he appeared not only as counsel for his client but also as counsel in his own cause. Be that as it may, the first question to be addressed is whether the exclusion of Mr Laka at the arbitration hearing was competent as a matter of law.

6. The functioning of the CCMA is regulated in part A of Chapter VII of the Labour Relations Act No. 66 of 1995 ("the LRA"). Section 116 establishes the governing body of the CCMA and provides that its acts are "acts of the Commission".

7. Section 117 deals with the appointment of commissioners, including part-time commissioners. Such appointments are made by the governing body. Section 117(1) stipulates merely that such commissioners are to be "adequately qualified persons". Section 117(2)(d) requires the governing body, when making appointments, to "have due regard to the need to constitute a Commission that is independent and competent and representative in respect of race and gender". Section 117(4) provides that::-

> "The governing body must determine the commissioners' remuneration, allowances and any other terms and conditions of appointment not contained in this section."

Section 117(6) is in these terms:-

"The governing body must prepare a code of conduct for the commissioners and ensure that they comply with the code of conduct in performing their functions."

In terms of section 117(7)(c) the governing body may remove a commissioner from office for "a material violation of the Commission's code of conduct."

Consideration must also be given to section 115, which sets out the functions of the commission. One of those is to make rules *inter alia* regulating the practice and procedure for conciliation and arbitration proceedings (section 115(2)(cA)(iii)).

8. To complete this review of the statutory framework, it is necessary to have regard also to the provisions of section 138(4) of the LRA, which is in these terms:-

"In any arbitration proceedings, a party to the dispute may appear in person or be represented only by –

(a) a legal practitioner;

(b) a director or employee of the party; or

(c) any member, office bearer or official of that party's registered trade union

or registered employers' organization."

Section 140(1) deals with the circumstances under which legal practitioners may appear in arbitration proceedings. I need not consider those provisions in any detail, since it is common cause in this matter that it was resolved that legal practitioners could indeed appear in the arbitration before the second respondent.

9. Against the backdrop of the various provisions set out above, it is necessary next to consider what the source of authority is for the decision of the governing body that was circulated on 2 November 2000. In doing so, I bear in mind two general perspectives:-

9.1. The first is that the governing body of the CCMA is a creature of statute with no inherent power to regulate its own affairs or those of the CCMA.

9.2. The second is that a purposive approach must be taken to the interpretation of the LRA. The CCMA performs a vital dispute resolution function and, in doing so, contributes substantially to the achievement of the overall objects of the LRA. The independence of commissioners is an important part of that process. Plainly, commissioners must not only indeed be independent but must manifestly be seen to be so. The need

for an independent CCMA is indeed one of the specific statutory charges upon its governing body. In such circumstances, it would form part of the duty of the governing body to address a situation, assuming that such exists, where individuals frequently sit as part-time commissioners and frequently appear before it as representatives, since that may well negatively affect the public's perception of the independence of commissioners. That is a policy and regulatory matter that is properly to be dealt with by the governing body. I should add that it is in general far from being this court's function to substitute its views on such matters for those of the governing body. Thus, it falls within the province of the governing body to consider the facts and statistics before it and to decide whether there should be a policy that is in absolute terms and whether or not it should differentiate the situation where a part-time commissioner who sits in one province should be excluded from appearance as a representative in another.

10. A purposive approach to the role of the governing body of the CCMA does not however mean that the structure and wording of the LRA can in effect be disregarded. The policy decision here at issue must therefore be located within the Act itself. The attempt to do so does not produce a readily apparent answer. Three specific possibilities present themselves:-

10.1. The first is that the governing body's decision falls within the ambit of "any other terms and conditions of appointment" contemplated in section 117(4). However, that construction may more readily present itself as producing a valid result in respect of appointments made after the decision than those effected before it. In this regard, the "fixed term" of appointment of a commissioner, as stipulated in section 117(2)(b) is relevant. For some individuals, it may be a very material alteration of the basis upon which they were appointed as commissioners, to be instructed midstream that they are no longer permitted to appear before the CCMA. There is nothing before me to suggest that the change brought about by the policy directive has been anything but unilateral.

10.2. The second possibility is that the decision is to be read as forming part of the "code of conduct" referred to in section 117(6). If that had indeed been the intention then, in my view, it was more than a little desirable that it should have been described as such. This is particularly so having regard to the provisions of section 117(7)(c) which contemplates a related removal from office. Again, the question presents itself as to the validity of a unilateral alteration to a code of conduct in terms of which commissioners have been appointed and have operated until the decision circulated on 2 November 2000.

10.3. The third possibility is that the decision of the governing body amounts to a rule as envisaged in section 115(2)(cA)(iii). It may well be that this interpretation is unavoidable, given that Rule 21 of the CCMA Rules promulgated on 31 March 2000 in Government Gazette No. 29081 expressly deals with the application of section 138(4) of the LRA. These rules are described as "rules regulating the practice and procedure for resolving disputes through conciliation and at arbitration proceedings" and were made in terms of section 115(2)(cA)(iii) and (iv). Rule 21 deals with representation at arbitrations in *inter alia* the following terms:-

"21.1 Section 138(4) read with section 140 of the Act exclusively states who may appear or be represented in arbitration proceedings. A commissioner has no discretion to permit any person other than those listed in that section to appear or act as a representative even if the other parties have no objection.

21.2 If a party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of one of the parties to the dispute does not fall within the ambit of section 138, the commissioner must determine this issue."

The relevance of that rule to the present issue is that the responsibility of a commissioner *vis-à-vis* representation is explicitly placed within the confines of section 138(4) read with rule 21, neither of which in any way contemplates the situation of a would-be representative who happens also to be a part-time commissioner. In this context, the question mark over the status of the policy directive is clear Moreover, if the decision of the

governing body were intended to fall within the ambit of a rule, it would have required publication in the Government Gazette. See section 115(6) of the LRA. Insofar as the decision is not a rule, it leaves commissioners with the difficulty that they are required to apply rule 21 in a situation where the decision of the governing body has no equivalent status.

11. It is however unnecessary for me, for the purpose of this judgment, to make a final determination in respect of the validity of the governing body's decision, having regard to the difficulties that I have briefly outlined above. This is so because analysis of the decision resolves into two components:

11.1. firstly, does the governing body have the power to decide that persons who appear as representatives before the CCMA shall not be appointed as commissioners of the CCMA or, having been so appointed, shall be removed from office;

11.2. secondly, does the governing body have the power to determine that persons who sometimes sit as part-time commissioners of the CCMA shall be excluded if they present themselves as representatives in a dispute.

The application before me requires a decision on the second component but not the first.

12. Mr Laka argued that section 138(4) sets out a clear statutory definition of who is entitled to appear as a representative. As a duly admitted and properly instructed advocate, he asserts that he falls clearly within the ambit of that statutory stipulation and that it is beyond the power of the governing body or, in this instance, the second respondent, to exclude him from performing that representative function. He submitted further that the CCMA could at the most act against him in his capacity as a part-time commissioner, but not in his capacity as a representative. On the basis of the analysis that I have set out above, I must conclude that this submission is well founded. Neither section 115 nor section 117 of the LRA purports to empower the Commission or its governing body to vary the terms of section 138(4). As already indicated, CCMA rule 21 is consistent with section 138(4) and is plainly calculated to give effect to it.

13. I accordingly find that the exclusion by the second respondent of Advocate Laka from the proceedings before him on 7 February 2001 was not competent. It follows that the award which resulted after the exclusion of the applicant's chosen legal representative cannot stand.

THE POSTPONEMENT ISSUE

14. In case I should be wrong in relation to the representation issue, I proceed

to consider the ruling made by the second respondent in refusing a postponement as requested by the applicant's representatives on 7 February 2001. The application for postponement was made after the ruling that Adv Laka could not represent the applicant and was said to be for two purposes: an application for the review of the decision to exclude Adv Laka; and, an opportunity to arrange alternative legal representation. That those two reasons could not meaningfully co-exist is self-evident, but of no real consequence for the purpose of this judgment. The second respondent was unpersuaded that the intimation of a review obliged him to postpone the proceedings. I agree with him. However, I do not share his view that the circumstances before him were such as to warrant the refusal of a postponement in relation to the second reason.

15. The relevant background factors may be summarized as follows:-

15.1. The arbitration was first enrolled for 25 October 2000 but, evidently by agreement, was postponed to 20 November 2000. It appears that the issue of legal representation arose on that day, that it was decided that there could be legal representatives, and that the matter was again postponed in relation to that issue. There is a dispute on the papers as to whether or not the decision of the governing body was pertinently raised on that occasion. There are strong indications that it was, but these are

not reflected in the award made by the second respondent. In any event, I need not determine that question. I should add that the second respondent's award states that the postponement on 20 November 2000 was at the request of the employer, i.e. the applicant. However, the affidavit of the third respondent filed in the proceedings before me states that this postponement was agreed upon his "special request and instance".

15.2. The matter was then enrolled for 29 January 2001 and proceeded to hearing, as already indicated, on 7 February 2001. Again, and as reflected in the award, this appears to have been done by agreement between the parties.

15.3. It is common cause that the third respondent's attorney contacted the applicant's attorney to advise that an objection would be made to Adv Laka representing the applicant at the arbitration, on the ground that he was a part-time commissioner. According to the affidavit of Ms Morobane, a candidate attorney employed at the applicant's attorney, this was on 24 January 20001.

15.4. Ms Morobane than contacted a commissioner at the CCMA in Gauteng, Mr Hlongwane, relating to this objection and was informed by him that part-

time commissioners were not allowed to appear as representatives in the province where they were engaged as commissioners. It was suggested by him that this should be confirmed with Mr Van Zeydman, whose capacity is not described in the affidavit but may be assumed to be a senior official of the CCMA.

15.5. Mr Van Zeydman was contacted by Ms Morobane. His advice was that Adv Laka should get permission from his convening senior commissioner in Mpumalanga to appear in a CCMA hearing conducted in the Northern Province.

15.6. On 7 February 2001, the second respondent was informed of these enquiries and their fruits. He was informed also that Adv Laka had indeed approached the convening senior commissioner in Mpumalanga and that he had been told that he could appear in a different province, being the Northern Province. There is nothing on record to suggest when this conversation took place. It is also clear that none of the steps outlined about were conveyed to the third respondent's attorney before the hearing on 7 February 2001.

16. The second respondent was unpersuaded by these considerations. He held:-

"The employer was warned well in advance by Mr Mahlase on 25 January 2001, some ten days before the hearing, that its chosen counsel would not be allowed to appear in the proceedings. It must have anticipated this by making alternative arrangements. On the other hand, Ms Snyders who was the instructing attorney in this matter, was in attendance. Ms Snyders' submission that only Advocate Laka prepared for the matter has a hollow ring and can therefore not be sustained. In my view Ms Snyders, as an instructing attorney, is privy to the issues which were to be raised in the proceedings and she was accordingly competent to represent the employer. I need not canvass in full the involvement of an attorney in a matter in which she/he is instructing a counsel. It is sufficient to state that to my mind an attorney instructing discusses the matter with counsel and together they outline the line of defence to be followed.

Alternatively, if Ms Snyders was serious about representing the employer or the employer was serious about defending the matter, she could have applied that the matter stand down for an agreed time so that she could refine her preparations and the employer could have instructed her accordingly. In my view such an application would not have been unreasonable, more so that the matter was set down for the whole day."

17. In my view, these reasons for refusing the postponement show that the second respondent did not have adequate regard to the full set of facts that had been placed before him. Although he had been informed of the various measures that had been taken in relation to the position of Mr Laka and although the second respondent noted "that they laboured under the impression that he would be allowed to appear", that factor appears not to have weighed with him at all. Instead, he adopted the robust approach that there had been a warning on 25 January 2001 and that the applicant should therefore have made alternative arrangements.

18. In this context, he took the view that Ms Snyders was in a position to

represent the applicant or could, without requiring a postponement, “refine her preparations” if given a short adjournment. In expressing that view, the second respondent entirely discounted the statement made by Ms Snyders that Adv Laka had been briefed to represent the applicant and that he was prepared, whereas she was not. The hearing was evidently to be a fairly substantial one. It is common cause on the affidavits that the matter had been set down for two days of hearing, with a third day in reserve. In those circumstances, it is in my view thoroughly unrealistic to take the view that an instructing attorney can simply step into the shoes of counsel briefed to conduct the matter or would be in a position to do so after a short adjournment to refine her instructions. (Equally, I am unpersuaded by the submission advanced to me on the third respondent’s behalf by Mr Nowosenetz that the applicant’s team present at the arbitration consisted of senior and competent people and that any one of them could simply have substituted as the representative.) Such approach has no regard to what is involved in a proper process of preparation for the conduct of a hearing, including the presentation of one’s own evidence, the cross-examination of opposing witnesses and the submission of arguments. In addition, it must be observed that the dispute concerned a senior employee and was a matter of some consequence.

19. It is clear from the background events outlined above that it had throughout been the intention of the applicant to resist the relief sought by the third respondent at the arbitration. It is in my view difficult to understand how the second respondent could have formed the view that Ms Snyders was not serious about representing the employer or that the employer itself was not serious about defending the matter. Although I agree with the second respondent to this extent, that Mr Laka and other members of the legal team representing the applicant should have done more to clarify and formalise his status before the hearing of 7 February 2001, this is far from being a situation where the notification of the proposed objection was simply ignored. Steps were taken and the second respondent was informed *inter alia* that a convening senior commissioner had given the advice that it would be in order for Adv Laka to appear in a hearing in the Northern Province. The deficiency that arises from this is that no formal ruling was obtained and that the obvious precaution of securing an endorsement of that advice by the head office of the CCMA was not pursued. Likewise, the failure to respond to Mr Mahlase before 7 February 2001 was more than professionally discourteous; it was certain to contribute to a dispute at the hearing. The approach of, particularly, Adv Laka was in my view unacceptably casual. All considered, it would certainly have been appropriate for the second respondent to require that the applicant pay the costs of a postponement.

20. In the result, it is my conclusion that the second respondent erred in an unjustifiable manner in refusing a postponement on 7 February 2001, for the purpose of arranging properly prepared legal representation. In coming to that conclusion, I do not lose sight of the fact that the granting or withholding of a postponement involves a considerable degree of discretion and that this court should interfere with the exercise of such discretion only in very limited circumstances. As an illustration of the common law approach to this question see *Tuesday Industries (Pty) Limited v Condor Industries (Pty) Limited & Another* 1978 (4) SA 379 (TPD). I have regard also to the approach of this court in decisions such as the following:

Ross & Son Motor Engineering v CCMA & Others [1998] 11 BLLR 1168 (LC);

Dimbaza Foundries Limited v CCMA & Others [1999] 8 BLLR 779 (LC);

MIT Tissue v Theron & Others [2000] 8 BLLR 947 (LC).

At the same time, it remains an important feature of the matter before me that the applicant arrived at the arbitration hearing on 7 February 2001 fully prepared and willing to proceed. It was believed that Adv Laka had clarified his position and that the impediment raised by the decision of the governing body had been cleared. In this important respect, this case is

distinguishable from those that I have referred to, in which a party came to the proceedings intending to secure a postponement.

21. It is therefore my conclusion that the award made by the second respondent in the absence of the applicant should be set aside also on the ground of his refusal of the application for postponement, to the extent that this was for the obtaining of properly prepared legal representation.

22. Although the applicant must succeed, it does not follow that it should enjoy the benefit of a costs award in its favour. I have already described the extent to which I consider there to have been significant shortcomings in the manner in which the notice of objection by Mr Mahlase was responded to. Had that been dealt with timeously and in a thorough and professional manner, the situation which the second respondent was called upon to deal with might well not have arisen. Likewise, recourse to this court may then also have been unnecessary. A further consideration is that although the applicant has succeeded in its principal point, that concerning the legal standing of the decision of the governing body of the CCMA, no contention with that formulation was placed before the second respondent at the time of the hearing before him. At that stage, Mr Laka's objection was that the second respondent himself did not have the authority and that it was for the governing body to decide. The status of the governing

body's decision was itself not challenged. Having regard to all the circumstances and the terms of section 162(1) of the LRA, it is my conclusion that no order as to costs should be made in respect of this application.

23. The applicant has sought a determination by this court that the dismissal of the third respondent by the applicant was fair. There is no basis for the granting of such relief. The transcript of the proceedings in the CCMA obviously records only the version of the third respondent. That version has not been tested by the applicant. Likewise, the applicant's version has not been tested on behalf of the third respondent.

24. I make the following order:-

24.1. The award made by the second respondent under CCMA case number NP12992 on 22 February 2001 is hereby reviewed and set aside to the extent of paragraph 1 thereof.

24.2. Paragraph 2 of the said award is varied to read: 'The employer is to pay the costs of today, as on postponement, on the Magistrates Court scale'.

24.3. The matter is remitted to the CCMA for hearing *de novo* before a commissioner other than the second respondent.

24.4. No order is made as to costs.

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K S TIP
Acting Judge of the Labour Court

Date of hearing : 28 September 2002
Date of judgment : 12 October 2001
For applicant : Adv A P Laka
Instructed by : Maponya Inc.

For third respondent : Adv L Nowosenetz

Instructed by : Mahlase, Nonyane-Mahlase