IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: JR 67/03

In the matter between

ISRAEL ISBATA PAPANE	Applicant
And	
MARTINUS VAN AARDE N.O.	1st Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	2nd Respondent
SOUTH AFRICAN BROADCASTING CORPORATION	3rd Respondent

JUDGMENT

REVELAS, J.:

[1] This is an application to review and set aside an award made by the first respondent ("the arbitrator") and to the effect that the dismissal of the applicant by the third respondent ("the SABC") was fair. The arbitrator found that the dismissal was both procedurally and substantively fair.

[2] The applicant had been employed by the SABC as a senior production assistant until his dismissal on 10 October 1999. The applicant then referred the dispute to the second respondent, ("the CCMA") where conciliation failed and the matter was referred to an arbitration hearing which was conducted by the arbitrator.

[3] The misconduct with which the applicant was charged at the disciplinary inquiry and which resulted in his dismissal was that he refused to work certain scheduled afternoon shifts on 13, 14 and 15 September 1999.

[4] At the onset of the arbitration hearing, the issues which were to be decided was discussed in a pre-arbitration meeting and were listed by the arbitrator at the beginning of his award. The facts which were before the arbitrator emanated from the evidence of two witnesses on behalf of the respondent, (Mr Richter and Mr Van Tonder), the applicant's own testimony, and the bundle that was handed to the arbitrator.

[5] It is common cause that during July 1999 the applicant lodged a grievance with the third respondent about the long unsociable hours which he had to work and which had a negative impact on his health. At this stage I may just point out that it was conceded during the arbitration hearing, by the applicant, that it was inherent in the position of production assistant, that long hours were foreseen. Since 1998 the applicant and other employees worked long hours. It was the applicant's case that there were ten production managers and only two worked these long hours.

[6] The applicant then in July 1999 wrote a letter or lodged a grievance with the SABC about these long shift hours. This issue was then addressed by the third respondent by introducing a new roster system termed a four-man rotary system and which accommodated the production assistants. On 3 September 1999 the applicant then reiterated his stance in a letter. He was informed by the SABC (his employer), that his refusal to work such hours which he agreed to, could lead to his dismissal. The applicant simply wrote another letter on 11 September restating his case, and subsequently failed to report for the scheduled duty on 13, 14 and 15 September and did not notify his employer or his superiors that he was about to act in this fashion.

[7] In his findings the arbitrator took into account that the applicant was appointed in the

position of production assistant in response to an advertisement for the position which made it quite plain that the person who was to be appointed in that position would have to be able to work under pressure and should be prepared to work long shifts. The arbitrator further found that the applicant then took matters in his own hands in an endeavour to compel the SABC to revisit the issue of unsociable hours which was addressed by corrective measures, subsequent to his complaint made in July 1999. The arbitrator found that if this was indeed the case, the applicant considering his status as chairman of the shop stewards committee in the Free State, had exceeded his powers.

[8] The arbitrator made the point - and correctly so - in my view, that if an employee wishes to challenge the conditions of his or her employment, he or she should do so with reference to an unfair labour practice which the applicant in this case did not declare. In this regard it was pointed out by the arbitrator that such an employee would need the support of his trade union and fellow employees in a process of collective bargaining. The applicant was not the only employee affected by these conditions and there is nothing to fault about the view that such long hours are inherent in the nature of the SABC's business.

[9] The applicant claimed that the conditions of his employment were contrary to the provisions of the Basic Conditions of Employment Act. Here the arbitrator correctly pointed out that a senior employee, (a person earning more than R89 500 per annum) was not entitled to invoke section 6(1)(b) of the Basic Conditions of Employment Act of 1997.

[10] Insofar as the alleged health hazard which the long hours imposed on the applicant the arbitrator pointed out that there was no evidence to support this contention. It was argued on behalf of the applicant that the arbitrator had overlooked the evidence contained in a medical certificate that was produced. This medical certificate however, pertains to a specific three days in August 1999 and as such as no evidentiary value in deciding whether or not the hours were a health risk. Furthermore a doctor's report or such evidence could perhaps have substantiated such a claim and then it must be pointed out that such evidence should have

been placed before the SABC along with the initial complaint which was made in July or even the first letter of 3 September 1999.

[11] Insofar as the argument goes that the applicant did not sign the collective agreement and was therefore not party to it, the arbitrator pointed out that the affected employees or those employees affected by these long hours had been offered a choice. They would choose whether they wished to return to the old shift program or for the qualifying credits by working the said hours. The applicant did not sign, in particular page 50, of that agreement, but he did accept the credits for working the said hours. In this regard the arbitrator held that a distinction must be made between overtime pay and working shifts *per se* since the latter was an inherent requirement of the applicant's position.

[12] With regard to the shift rosters as stated the working hours were not contrary to the provisions of section 9 to 10 of the Basic Conditions of Employment Act. The arbitrator in this regard relied on **Maluti Transport Corporation Ltd v MARTAW (1999) 2 ILJ 2531** regarding the estoppel by selection or a waiver in an instance such as this. The arbitrator accepted that the shift roster was implemented equally amongst the available staff due to the SABC's corrective action. The arbitrator did however, point out that the initial grievance of the applicant was justified and hence his letter in July, but considered the fact that this complaint was sufficiently addressed.

[13] Finally the arbitrator found in respect of the substantive fairness or not, of the dismissal that the applicant himself decided not to work the scheduled shifts applicable to his job description, decided on his own that he would only work normally hours, that is 08:00 to 16:00 and refused to do specific work he was required to do on three afternoons and he was specifically warned that his actions could result in his dismissal. Since he ignored this advice and still refused to do the work as scheduled, this would amount to gross insubordination. In this regard the arbitrator referred to the case of **SACCAWU on behalf of Fortuin v Lewis Stores 2002 BLLR 182 CCMA**, read together with schedule 8 and

with reliance on **County Fare Foods (Pty) Ltd v CCMA 1999 20 ILJ 1701 LAC**, the arbitrator held that there was no reason for him to interfere in the sanction imposed by the employer.

[14] He found that the applicant acted headstrong and challenged his employer's *bona fide* instructions and added that to hold otherwise it means that an employee working shifts as a result of operational requirements, would simply decide on his account what he or she wishes to do and in doing so ignore the operational requirements which is the essential reason for the employer's existence by providing a 24 hour service.

[15] I now return to the procedural aspects which the arbitrator had to decide upon and which were raised by the applicant before the arbitrator. The applicant complained that he was not given sufficient notice of the disciplinary inquiry and that his union was not notified of the inquiry. First of all it must be pointed out that it appears there is a dispute between the applicant and the union regarding his membership. In any event the applicant was given five days' notice of the disciplinary inquiry and the arbitrator found that the applicant was notified of his right to call witnesses and when having regard to the record of the disciplinary hearing which the arbitrator read, the applicant was indeed given the opportunity to cross-examine witnesses contrary to what he contended at the arbitration hearing.

[16] The applicant chose to represent himself even though notice of the disciplinary inquiry was served on his trade union and even then the applicant did not request to have the matter postponed. The applicant also stated that the fact that Mr Tati was part of the disciplinary committee, prejudiced him in that Mr Tati was biased and prejudiced against him. Here the second respondent found that the applicant did not save for a mere allegation, establish that he had been prejudiced by the representation or the fact that Mr Tati did not recuse himself and that therefore the disciplinary committee was correct to dismiss the recusal application. At no time did the applicant disclose facts to the committee prior to the

hearing to substantiate any bias on their part or thereafter.

[17] The arbitrator in my view handed down a well-reasoned award. For this court to interfere in the findings of a statutory commissioner, I have to find that the conclusions reached by the commissioner was not rationally connected to the facts before him. The issue was quite simple. That was: Can an employee impose his will on an employer in these circumstances? I believe not. There were alternatives open to the employee in this case. He could apply for another position since several of them became vacant. He knew all along what the inherent requirements of the job was and it was not for him to introduce a new standard. His complaints were adequately addressed and this was also demonstrated in the award by the arbitrator's reference to the roster which was set out on page 10 of the award, that is the hours worked.

[18] There is simply nothing to persuade me that the arbitrator did not apply his mind, committed an irregularity or misconceived the inquiry which he was obliged to conduct. In the circumstances the application falls to be dismissed with costs.

[19] The questions of costs for the appearance on a previous occasion before my colleague Francis J, on 30 July 2004 arose. On this day Mr Buthelezi acting for the applicant was not present in court due to personal problems which he had regarding weather conditions in Kwa Zulu-Natal. It was the third respondent's stance that it had to be in court, had to employ attorneys and counsel to be present at the day and that these costs should be paid by Mr Buthelezi *de bonis propriis*. I have considered the matter and in my view I do not believe that there was any wilful conduct on the part of Mr Buthelezi and in the circumstances I make no cost order as to the proceedings on 30 July 2004 as it would appear that it was an act of God (a river in flood) that prevented Mr Buthelezi from appearing in court.

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E REVELAS

Appeared in Person, as well Mr N Buthelezi of Mthembu Zulu Buthelezi Inc who appeared on his behalf.

For the Respondent: Mr Maserumule of Maserumule Inc.

Date of hearing: 14 October 2004

Date of judgment: 14 October 2004