IN THE LABOUR COURT OF SOUTH AFRICA **Reportable**

(HELD AT CAPE TOWN)

CASE NO: C166/99

DATE: 6-8-1999

In the matter between:

VITA FOAM SA (PTY) LIMITED **Applicant**

and

THE COMMISSION FOR CONCILIATION **First and Further Respondents**

MEDIATION AND ARBITRATION & OTHERS

J U D G M E N T

BASSON, J:

[1] This is a review in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant, Vita Foam South Africa (Pty) Limited, seeks to review the award of the second respondent given under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

[2] The second respondent found the dismissal of the fourth to eighth respondents (“the employees”) to have been unfair both substantively and procedurally and reinstated the employees in the employ of the applicant (“the employer”).

[3] As a so-called point in limine an objection was raised in that paragraph 21 of the founding affidavit was allegedly vague and embarrassing as it did not substantiate the cause of action based on the facts, evidence and law which would persuade this Court to make a finding in the applicant's favour.

[4] In this regard there was a so-called application for striking out on behalf of the respondents in order to strike out the offending paragraph 21 of the founding affidavit.

[5] Although there is no specific mechanism in the Rules of the Labour Court for striking out portions of affidavits, the Court is master of its own procedure and should adopt the relevant provisions of the High Court Rules in this regard.

[6] In terms of the High Court Rules such matters can be struck out if they are of a scandalous, vexatious or irrelevant nature and prejudicial to the objecting party.

[7] In my view, the grounds relied upon in the present matter are more akin to an objection on the basis that the founding affidavit is vague and embarrassing and therefore fails to adequately specify the grounds relied upon for the relief claimed. The question is therefore whether the application sets out a prima facie case based upon the facts and grounds therein described, or whether it does not do so and therefore falls to be dismissed for this reason.

[8] In deciding whether the founding affidavit is vague and embarrassing, it must also be noted that there is no requirement for argument to be contained therein. In fact, it is to be frowned upon if argumentative matter is set out in a founding affidavit. Both parties agreed that the arguments which the applicant may wish to put forward should not be included in the founding affidavit. I was referred in this regard to, inter alia, the case of Reynolds N.O. v Mecklenberg (Pty) Limited 1996(1) SA 75 (W) at 78I and I respectfully agree with the sentiments expressed therein.

[9] It is therefore essentially a question whether the averments contained in paragraph 21 of the founding affidavit are vague and embarrassing to such a degree that it would prejudice the respondent.

[10] It would appear that the main ground for objecting to these allegations is that the allegations do not refer to the record of the proceedings before the Commissioner (the second respondent).

[11] At paragraph 21 it is stated:

"21 Applicant avers that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings, which renders the findings susceptible to review in terms of section 145 of the Act, more particularly in that;

21.1 The Commissioner found that no misconduct had been proven, as applicants had failed to identify the persons who were guilty of the misconduct complained of. Applicant avers that this finding was made in the face of direct and acceptable evidence which established the identities of fourth to eighth respondents as being the guilty parties."

[12] It would appear that what is argued for by the applicant in the application for striking out is that the applicant (in the review matter) in its founding affidavit should have referred to the record of the proceedings and the evidence referred to in the paragraph above, that is, the evidence of Van Rooyen and Coetzee, who both testified on behalf of the applicant in the arbitration proceedings.

[13] In my view, although it is to be preferred that the record is referred to by way of direct reference, it cannot be said that this averments or the facts set out here, namely that there was direct and acceptable evidence which established the identity of the fourth to eighth respondents as being the guilty parties, are so vague and embarrassing that it does not enable the respondent to answer thereto.

[14] In my view, the same reasoning applies to paragraphs 21.2, 21.3 and 21.4 where the factual averments are that there was substantial and acceptable evidence which established that the fourth to eighth respondents had been in breach of the Court order and that the second respondent's finding is blatantly wrong, taking into consideration the nature of the misconduct that was perpetrated during the strike; the issuing of the ultimatum and the forewarning on 4 August.

[15] In the event, I find that the applicant's application can not be dismissed on this ground.

[16] This brings me to the merits of the case. The applicant attacks the findings of the Commissioner (the second respondent) both in regard to the substantive unfairness and the procedural unfairness of the dismissal.

[17] In regard to the substantive unfairness of the dismissal the second respondent (at page 28 of the record) in the arbitration award found that:
"I accept the evidence of Coetzee and Van Rooyen that Petersen was actively involved in holding the cloth up and on a balance of probabilities all the applicants were at least infringing the picketing rules by being outside the designated areas and associating themselves with the general intention to block the gates. This is impermissible in an environment of a protected strike.

The question is whether the respondent has discharged its onus to prove that the misconduct on the part of the five individuals concerned was sufficiently serious to justify the sanction of immediate dismissal. There is no direct evidence that these particular five applicants in the words of the interdict actually prevented and/or interfered with employees, suppliers or customers from performing their normal duties including access to and egress from the applicant's premises. Van Rooyen could not positively testify that he saw Williams and Van Wyk physically engaged in blocking the gates. There is no corroborating evidence in respect of Claasen. I find that Nieman's evidence was self-serving in implicating other members while attempting to exonerate himself. Coetzee so contradicted himself as to whether he could say he had seen him leaning against the gate and there is no evidence that his hands were on it. The five individuals were identified just prior to the (indistinct) with the bakkie not prior to the attempt with the bakkie" (emphasis supplied).

[18] The above findings of the second respondent were, however, not supported by the evidence in that there was evidence given by Van Rooyen where he positively identified Williams, Van Wyk and Claasen as well as Petersen in either holding the gate or leaning against the gate.

[19] Further, there was cogent evidence given by Coetzee that leaning against the gate has the same effect as blocking the gate in that it cannot open when a person leaned against the gate.

[20] Accordingly, there was direct evidence that the five individual respondents were indeed blocking the gate and therefore it was not merely an act of associating themselves with the general intention to block the gate, but they were indeed blocking the gate.

[21] Further, the five individuals were identified just after the attempt to go through with the bakkie and not prior to the attempt of going through with the bakkie.

[22] It is clear that these factual findings of the Commissioner, which was not supported by the evidence before her, must have influenced her reasoning when she decided on the seriousness of the misconduct of the five individuals concerned.

[23] In the result, this finding which was not justified on the basis of the evidence presented, must have had a bearing on the outcome of the arbitration award.

[24] For this reason alone it appears that the arbitration award must be set aside as it contains this very

serious defect.

[25] I can in this regard also add that the Commissioner found that:
"On Mr Coetzee's own evidence, the respondent was just testing the water to see whether normal deliveries would be allowed through. They were not at that stage attempting to carry out normal duties. My sense is that although deplorable and not to be condoned in any way, the misconduct proved on the part of the applicants was not serious enough to warrant dismissal. There are no allegations of violence or abusive language or threats or actual damage or injury to property or persons on the part of these applicants."

[26] This finding of the Commissioner that the five individuals concerned were not in breach of the Court order appears to lose sight of the fact that their animus was clearly proven by their conduct and that, in blocking the gate, they were clearly showing their intention of not complying with the Court order. I say this as aside but it obviously also has a bearing on the justifiability of the findings of the Commissioner.

[27] As far as the findings of the Commissioner on the procedural fairness of the dismissal of the five respondents were concerned, it was argued that her finding in this regard (at page 29 of the record) was unjustifiable:
"The respondent argues that the code is not mandatory in exceptional circumstances. That may be so, but then it bears the onus to prove that the circumstances were such as to justify departure from the norms the Act establishes. I am not convinced that this was the case and find that the respondent has not discharged its burden in this regard as I find the dismissals to have been procedurally unfair."

[28] I can, however, find no fault with this finding of the Commissioner, based on the very sparse evidence of so-called exceptional circumstances presented to the arbitration.

[29] There was namely only reference in passing to the throwing of items which may have included stones.

[30] This, to my mind, does not amount to the kind of crisis zone which may, in applicable circumstances, justify not granting the employees concerned the benefit of procedural fairness in the form of a proper hearing. This principle was set out in the case of Lefu & Others v Western Areas Goldmining Company Limited 1985(6) ILJ 307 IC.

[31] The Commissioner (the second respondent) further found on the issue of procedural unfairness that the appeal that was offered could not cure the defects of the absence of a proper hearing.

[32] In this regard the following *dictum* in Wandwe v M&L Distributors (Pty) Ltd & Another 1996 (17) ILJ 798 IC appears opposite:
"The debate in regard to whether a procedural irregularity in disciplinary proceedings can be cured in an appeal hearing remains largely unresolved."

[33] Because of the fact that there are conflicting judgments on the issue of whether an appeal hearing can cure the complete absence of procedural fairness, especially (as the Commissioner pointed out) in instances where the employees concerned are being faced with the *fait accompli* of a dismissal has not been resolved. I therefore cannot find that this reasoning of the Commissioner is either unreasonable or unjustified.

[34] In the event, the finding of the Commissioner (the second respondent) on procedural unfairness appears to be justifiable and sustainable.

[35] The review application is accordingly only partly successful.

[36] The question then arises as to what remedy the Court must award to the applicant who has only been partly successful in its review of the arbitration award.

[37] In the light of the fact that the award is partly correct and partly incorrect and in the light of the fact that it is not for this Court to usurp the functions of the CCMA which arbitrates disputes of this nature and the fact that the result is not a foregone conclusion based on the evidence as it appears from the record, I believe that the correct and reasonable remedy would be to set aside the award in its entirety and to remit the matter for a fresh hearing before another Commissioner. I do not, however, believe that such Commissioner should be fettered in any manner. The matter should therefore start afresh on the basis of all the issues dealt with in the arbitration award that is being set aside on review.

[38] As the applicant has only been partially successful in the review, I intend to make no order as to costs.

[39] In the event, I make the following order:

1. The arbitration award dated 5 March 1999 and issued under the auspices of the first respondent (the Commission for Conciliation, Mediation and Arbitration) is reviewed and set aside.

2. The matter is referred back to the CCMA for an arbitration anew before a different Commissioner.

3. No order is made as to costs.

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Basson, J

Appearing on behalf of the applicant:	Mr Presbury of Deneys Reitz Attorneys
Appearing on behalf of the respondent:	Mr Jason Whyte of Chennells Albertyn
Date of hearing:	6 August 1999
Date of judgment:	*Ex tempore*