IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO.D.828/98

In the matter between;

M I T TISSUE Applicant

and

CORNELIUS HERMANUS THERON First Respondent
THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION ("CCMA") Second Respondent
JEFF FOBB N.O. Third Respondent

J U D G M E N T

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(1)The applicant is a manufacturer of toilet tissue at Isithebe. During November 1997 the first respondent started doing work at the applicant's factory. This work seemed to involve in the main doing electrical repairs, either at the factory or at the premises of electrical contractors. He left on 13 February the following year. His version is that he was dismissed on this day and that there was no basis for this dismissal. The applicant's version is that he left of his own accord and that he was in any event an independent contractor and not an employee. It follows and it is indeed common cause that if he was an employee and was dismissed, that such dismissal would have been both substantively and procedurally unfair.

(2)The first respondent referred the dispute to the second respondent, the CCMA, for conciliation and on 16 April 1998 the commissioner concerned issued a certificate to the

effect that the matter remained unresolved and it was accordingly referred for arbitration in terms of the Labour Relations Act No.66 of 1995 ("the Act").

(3)The arbitration hearing came before the third respondent, a senior commissioner in the CCMA, on 22 June 1998. The first respondent was present at this hearing. A Mr Naidoo, a supervisor in the employ of the applicant, appeared on its behalf and requested an adjournment of the hearing. In his application he told the third respondent that the director, Mr G Katsapas, was ill and therefore unable to attend. This application was opposed by the first respondent who told the third respondent that the applicant was a company and that apart from Mr Katsapas there were two other directors who were able to properly deal with the matter. The third respondent also noted that there had similarly been no appearance by the applicant at the conciliation. In these circumstances he refused the application for an adjournment. Mr Naidoo then withdrew from the hearing and the matter was then dealt with and concluded in the absence of anyone representing the applicant.

(4)The third respondent then heard evidence which was essentially to the effect that the first respondent was employed on 23 October 1997 at a monthly salary of R8 500.00. He only received his December salary cheque on 21 January 1998. This cheque was furthermore returned by the bank and only made good later that month. He was only paid for February in the work done in January and once again the cheque was returned and only subsequently made good. On 13 February he then met with the directors of the applicant to discuss his late payment for January, as well as other problems relating to inter alia the applicant's failure to provide medical aid as had been promised and also to reimburse him for petrol he had paid for out of his own pocket. Instead of dealing with these matters he was told by the two directors present, Mr G Katsapas and Mr J Naidoo, that he was dismissed and he was ordered to leave the premises. He never

received payment for the work done in February.

(5)This evidence was accepted by the third respondent who then went on to find that the first respondent's dismissal had been both substantively and procedurally unfair. He went on to award compensation to the first respondent in terms of Section 194(2) of the Act equivalent to 12 months' remuneration calculated at the rate applicable at the date of dismissal, the amount then totalling R102 000.00. The date of this award is 25 June 1998.

(6)The applicant did not seek to review this award in terms of Section 145(1) of the Act. Instead it applied to the third respondent for a rescission of the award in terms of Section 144(a) of the Act, which empowers a commissioner who made an award, either of his own accord or on application by an affected party, to vary or rescind an award where it was

"(a) erroneously sought or erroneously made in the absence of any party affected by that award;"

(7)It seems to me firstly that this section does not apply to a situation such as the present one.
This section is similarly worded and presumably based on rule 42(1)(a) of the Uniform Rules of the High Court, which has been held to be "a procedural step designed to correct expeditiously an obviously wrong judgment or order" - per Erasmus J. in Bakhoven Ltd. v. G.J.Howes (Pty) Ltd., 1992(2) SA 466 (E) at 471 E-F. Relief under this rule will then be granted where there was an irregularity in the proceedings, where the court lacked legal competence to have made the order and where the court at the time the order was made was unaware of facts which, if known to it, would have precluded

the granting of the order. See Promedia Drukkers & Uitgewers (Edms.) Bpk. v. Kaimowitz & Others, 1996(4) SA 411 (CPD) at 417 G-I.

(8)What the third respondent did was to exercise a discretion on the basis of all the facts which the parties chose to place before him. He did not overlook the fact that a party that had an interest in the matter was not present. The interested party was present but chose to leave. It seems to me that in these circumstances the third respondent cannot change his mind and allow the applicant, as it were, a second bite. He is functus officio. The applicant's only source of relief lies in a review to this court.

(9)I also do not think that the third respondent can be criticised for refusing to postpone the manner. In Carephone (Pty) Ltd. v. Marcus N.O. and Others (1998) 11 BLLR 1093 (LAC) Fronemann DJP at 1107 B-E expressed himself as follows:

"In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in the matter involving the lower court's exercise of a discretion would follow only if it is concluded that the discretion was not judicially exercised (Madnitsky v. Rosenberg, 1949(2) SA 392 (A) at 398-399).

There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with the dispute fairly and quickly (section 138(1)). Secondly, it must be done with "the minimum of legal formalities" (section 138(1). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (section 138(10))."

(10)In addition to the facts already recited and on the basis of the test in Plascon-Evans Paints v. Van Riebeeck Paints, 1984(3) SA 623 (A) I make mention of the following facts (dealing with what was before the third respondent on 22 June) set out in the first applicant's answering affidavit. At the hearing on 22 June the third respondent asked for proof of Mr G Katsapas' incapacity, but no such proof was forthcoming. Mr Naidoo also had no explanation as to why one of the applicant's other directors were not in attendance. The third respondent also satisfied himself that proper notification of the proceedings had been given to the applicant. The applicant had seven days' notice of the proceedings and in this time it did not inform either the third respondent or the first respondent of its alleged problems.

(11)In these circumstances I do not think that the third respondent erred in refusing the application for a postponement.

(12)Be that as it may, this application became before the third respondent on 14 August 1998 and he agreed to deal with it.

(13)In support of the application applicant's representative called firstly a Mr S Naidoo, a director of the applicant. He testified that at the time of the arbitration, 22 June, he was in Botswana and that he accordingly left the matter to be dealt with by his fellow director, Mr G Katsapas. He went on to say that Mr Katsapas could also not attend because he had been ill. No further proof of the alleged illness was tendered nor was any medical certificate handed in. Mr Naidoo went on to say that the first respondent had not been an employee but was a contractor. He however qualified this statement by saying that he had not been present when the terms of the contract and the basis of remuneration were discussed with the first respondent. This was all done by a Mr G

Katsapas. This gentleman did not however testify.

(14)According to Mr Naidoo what happened on 13 February was that the first respondent was called in to talk about future work and the applicant's dissatisfaction with his work performance, it being alleged that in February he had only worked for five out of ten days and in January only 12 out of 20. An argument then ensued and according to him the first respondent then left. In doing so, according to Mr Naidoo, "he never asked for his UIF card".

(15)The applicant's administration officer, a Miss Vardiah, then testified. In her evidence she stated that the first respondent was paid a monthly salary, that his details were entered into her computer programme under "salaries to be paid" and that this programme then automatically deducted the first respondent's PAYE deductions. She went on to produce a staff register which reflected the first respondent as a staff member and in which register his alleged absenteeism was shown.

(16)The first respondent again gave evidence. He testified that he was employed as the converting plant manager, again stating that this was at a salary of R8 500.00 per month. The first respondent went on to testify that on the day of the arbitration he telephoned the applicant's factory and established that Mr G Katsapas was in fact at work.

(17)The third respondent refused the application for rescission. In doing so he stated firstly that he was not satisfied with regard to the explanation of the applicant's "default" on 22 June. In this regard he commented that neither at the conciliation nor at the arbitration were either Mr G or Mr D Katsapas present and they offered no acceptable explanation for this or tendered proof with regard to any alleged illness. He went on to

find that the application for rescission was not made in good faith and that it appeared to him that it had been done simply in order to avoid making payments in terms of the arbitration award.

(18)On the merits he found on the evidence before him that it was unlikely that the defence as presented by the witnesses who testified before him on the applicant's behalf would succeed. Here he no doubt had in mind particularly the evidence of Miss Vardiah which corroborated the first respondent's evidence to the effect that he had been an employee and not an independent contractor.

(19)The applicant is now seeking to review both decisions of the third respondent in terms of section 145 of the Act. As regards the decision of 22 June, the prescribed period of six weeks has expired and no application for condonation has been made. The third respondent's decision in the rescission application is dated 19 August 1998. The present application is dated 12 October 1998, which is once again outside the six week period. Because there is uncertainty as to when the applicant became aware of this decision I will accept that the present application was brought within the prescribed period, alternatively I will grant the necessary condonation. Once this court decides to review and set aside the refusal to rescind it follows that it will also set aside the original award. See Cash Paymaster Services (Pty) Ltd. v. Mogwe & Others, 1999(20) ILJ 610 (LC) at 616 C.

(20)When he heard the application for rescission on 14 August the third respondent allowed the applicant to place before him whatever evidence it chose to. The evidence that was then led was that of a Mr S.M. Naidoo, a director of the applicant, and a Miss Vardiah. Mr Naidoo's evidence on the crucial issue as to whether the first respondent was an employee or an independent contractor is hearsay. And Miss Vardiah's evidence supports that of the first respondent, namely that he was an employee. For whatever

reason, the applicant chose not to call Mr G Katsapas.

(21)The third respondent, in refusing the rescission application, held that there was no reasonable likelihood that the evidence led before him could have resulted in a different determination.

(22)This finding is clearly justified and for this reason the review must fail. In addition I make mention of the following.

(23)Rule 7A(2)(c) requires that an application for review should set out "the factual and legal grounds upon which the applicant relies". See the remarks of Landman J. in County Fair v. CCMA & Others, (1998) 6 BLLR 677 (LC) at 580 E-F as to the effect of a failure to spell out the grounds in the founding papers. Such failure would normally be fatal. A fortiori if the grounds advanced are shown to place a serious question mark over an applicant's bona fides. This in my view is what one has in the present case.

(24)The basis set out in the founding papers and upon which this court is asked to find that the applicant has a good defence is the allegation that the first respondent was an independent contractor. Miss Vardiah's evidence cuts right across any such suggestion. It is presumably for this reason that Mr G Katsapas was conspicuous by his absence at the hearing on 14 August. The third respondent said in his reasons that the applicant "has not shown that it has made this application in good faith and it appears to have been done in order to avoid making payment in terms of the arbitration award". Bearing in mind particularly Miss Vardiah's evidence, it seems to me that these remarks also apply to the present application.

(25)Before the court is also an application in terms of section 158(1)(c) of the Act to

make the third respondent's award an order of court. It is agreed between the parties that in the event of the review not succeeding that such an order should be made and also that interest should be added at the current prescribed rate of interest of 15,5% per annum as from the date of the award, namely 25 June 1998.

(26)In the result then the application is dismissed with costs. In terms of section 158(1)(c) of the Act the award made by the third respondent on 25 June 1998 in favour of the first respondent in the amount of R102 000,00 is made an order of this court. The applicant is ordered to pay this amount to the first respondent, together with interest thereon at the rate of 15,5% per annum from 25 June 1998 to date of payment, within seven days of this order.

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G.H. Penzhorn A.J.

Matter argued 27 October 1999.
Judgment delivered on November 1999.

For the applicant:

Attorney D Farrell of
Shepstone & Wylie
Durban

For the first respondent:

Advocate R B Wade
Instructed by Kaplan Blumberg Friedman & Scheckter
of Port Elizabeth.