IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case Nr: JR689/2004

In the matter between:

PATRICK LEBOHO Applicant

and

CCMA 1st Respondent
NAD MURUGAN 2ND Respondent
SOUTH AFRICAN REVENUE SERVICES 3RD Respondent

JUDGMENT: MUSI J

HEARD ON: 18 FEBRUARY 2005

DELIVERED ON: 14 APRIL 2005

---

[1] This is an application brought in terms of Section 145 of the Labour Relations Act 66 of 1995 (the Act) for the review and setting aside of the arbitration award made by the second respondent under the auspices of the CCMA on 27 February 2004. In terms thereof the second respondent found that the dismissal of the applicant by his employer,

the third respondent, on 25 November 2002 was fair.

[2] In brief, the applicant had been employed by the South African Revenue Services as an assessment officer and stationed at the Johannesburg International Airport (the airport). On 30 August 2002 a passenger of Chinese decent alighted at the airport on board Singapore Airways. As he went through an airport customs checkpoint the passenger was called to a separate room by the customs officials of the SARS and searched. On him was found a number of passports which he had apparently brought along for friends and relatives. The customs officers told the passenger that it was a serious offence to carry other people's passports and that he could be jailed for it. They literally extorted money from the passenger through the threat of incarceration and they were given 600 American dollars. Subsequently the passenger reported the incident to the authorities and the Police respondent by visiting the airport the following day on 31 August 2002. The Police contacted the SARS manager on site, Helena Tripmaker,

who together with the Police accompanied the passenger on a tour of the airport. The passenger pointed out one of the customs officers, Mathonsi, as one of the officers involved and later the passenger was shown photos of the SARS officers at the airport. The passenger (the complainant) identified three of the officers that extorted money from him. The suspects included Mathonsi and the applicant. The suspects were arrested and subsequently charged with bribery and/or fraud but the case was withdrawn because the complainant had in the meantime left South Africa and could not attend Court to testify.

[3] The applicant was also charged with misconduct by his employer and was brought before a disciplinary enquiry wherein he was found guilty and dismissed. He then took the matter to the CCMA alleging unfair dismissal. The matter ended up in an arbitration hearing which culminated in the award now being challenged in this Court.

[4] The grounds upon which this Court can review and set

aside the award are fully set out in Section 145 (2) of the Act. The applicant seems to challenge the award on all the grounds set out in subsection 2. But only two aspects of the arbitration proceedings have been singled out for attack. Firstly that the arbitrator based his decision on hearsay evidence. Secondly that the arbitrator committed a gross irregularity when, the hearing having been concluded with closing arguments on 26 November 2003, he reopened it and *mero motu* called further witnesses on the 26 January 2004. It is contented that this also showed bias on the part of the second respondent. The argument was advanced that on the evidence before him on 26 November 2003 the second respondent would have been obliged to find in favour of the applicant. He therefore called for further evidence in order to avoid that finding. It is also contented that in thus calling for further evidence the second respondent exceeded his powers. And further that the second respondent made himself guilty of misconduct in relation to his duties as an arbitrator.

[5] I shall now deal with the above two main points and shall start with the second point relating to the calling *mero motu* of further evidence and witnesses by the arbitrator. In a criminal trial in a Court of Law the presiding officer has the power to call witnesses *mero motu* at any stage of the proceedings before judgement, not only to clarify aspects of the evidence but also the help the presiding officer make up his/her mind as to what the truth is. The discretion is not limited to the recalling of witnesses who have already testified but extends to the calling of new witnesses. This common law power is reinforced by Section 186 of the Criminal Procedure Act 51 of 1977. The presiding officer has such a wide discretion because, as it is said, he is not like a referee whose only role is to see to it that the rules of the game are observed by the participants. He is an administrator of justice and must see to it that justice is done. See **R v HEPWORTH** 1928 AD 265. Of course the discretion must be exercised judicially. For an overview of the case law and the factors to be taken into account in the use of the discretion, see my judgement in **S v BOSULE**

(2000) 3 ALL SA 241 OPD.

[6] The position in civil procedure is different. A presiding officer has no power to *mero motu* to call witnesses. He can only do so with the consent of the litigants. However, a civil court has the power to recall witnesses that have already testify before it for purposes of further examination or cross-examination. It can do this at any stage of the proceedings before judgement. However this is done not by the Court *mero motu* but upon application by one of the parties. See **MLAMBO v FOURIE** 1964 (3) SA 350 TPD at 357. The reasons for this position are set out in full in **SIMON alias KWAYIPA v VAN DEN BERG** 1954 (2) SA 612 SR at 613 to 614. One of the import considerations is that a civil contest, unlike a criminal trail, is not a matter for the public but one essentially between the parties involved and the Court is not expected to help the parties or take sides. If there is inconclusive evidence on the issues involved, the Court merely asks itself whether the party on whom the onus rests has discharged it. It is not for the

Court to get out of its way to establish the truth. It only decides on the truth on the basis of evidence before it.

[7] Now an arbitrator conducting arbitration proceedings is, strictly speaking, not obliged to follow the rules of procedure applicable to Courts of Law. Compare my remarks in **MHLAMBI v MATJABENG MUNICIPALITY AND ANOTHER** 2003 (5) SA 89 O at 95 G. It is noteworthy that the Labour Relations Act does not prescribe any definite procedure for the conduct of such proceedings. Significantly section 138 (1) of the Act makes it clear that the bottom line is that the arbitrator must:

> "determine the disputes fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities".

In my view, this express wording of the Act sounds a warning that Courts of Law and legal practitioners should not impose their formalistic rules of procedure on Commissioners charged with resolving labour disputes

through conciliation and arbitration.

[8] Having said that, it is a fact that arbitration proceedings are generally conducted in line with the rules of civil procedure and the standard of proof is the same. Proof is established on a balance of probability. In this sense, the rules of civil procedure are broadly adhered to; at the very least they provide valuable guidelines. In my view, whereas the Act gives an arbitrator a wide discretion on how to conduct proceedings, the bottom line is that the procedure followed must be fair and should not result in prejudice to any of the parties involved.

[9] With that prelude, I look into the conduct of the proceedings herein. If these were civil proceedings before a Court of Law, the calling of the witnesses Tycoon Khoza and I. A. Sirkhot *mero motu* by the arbitrator would be a gross irregularity. These two witnesses had not testified before and the consent of the parties was not obtained. This much is clear from the arbitrator's opening remarks at page

21 of the pleadings:

> "However when writing my award I discovered several parts of the evidence submitted to be inconclusive and I therefore rescheduled the meeting for a re-hearing on the 26 January 2004. I requested several documents and certain witnesses to be recalled. Both parties were appropriately represented but elected not to cross-examine the witnesses I recalled".

Not only was the consent of the parties not sought but they were also not consulted on the re-opening of the hearing. In say re-opening because that is what it is. No wonder that the representatives of the parties were startled by the turn of events and that may explain why they elected not to cross-examine.

[10] The only witness who had testified and was recalled is Helena Tripmaker. She was not recalled at the request of any of the parties. Neither was she recalled for purpose of further examination or cross-examination. She was recalled in order to close loopholes or provide missing links

in the evidence before the second respondent. From the summary of the evidence as given by the second respondent, it is clear that she was not only asked to clarify her earlier evidence but new evidence was led. It is also clear that she was patching loopholes in the version of the employer, the third respondent.

[11] The rationale for forbidding a Court hearing a civil case from *mero motu* calling witnesses is, in my view, equally valid in respect of arbitration proceedings. In the instant case there was an onus on the third respondent to establish the fairness of the applicant's dismissal. As at the final hearing on 26 November 2003 the evidence on this score was, to use the second respondent's own language, inconclusive. By *mero motu* not only recalling Tripmaker but also calling new witnesses, the second respondent assisted the third respondent to discharge the onus resting on it. By this I am not saying that the second respondent deliberately went about to do that; I am merely saying that that is the effect of his conduct aforesaid. Certainly such

action created a perception of bias in the mind of the applicant. The perception that the arbitrator was bent on finding in favour of the employer is one that ought to have been avoided. What complicates matters is that the applicant was not given the opportunity to respond to the new evidence of Khoza and Sirkhot. Khoza, in particular, had featured prominently earlier in the proceedings and either of the parties could have called him but they declined to do so. It was therefore improper for the second respondent to call him under those circumstances.

[12] I conclude that the second respondent committed a gross irregularity in re-opening the hearing and calling and re-calling witnesses without the consent of the parties. The award stands to be reviewed on that ground alone. In view of this conclusion, it is unnecessary to deal with the issue of hearsay evidence. I should, however, point out that there are other discrepancies in this matter.

[13] Firstly, the record of the disciplinary hearing about which

Sirkhot had been called by the second respondent to testify was not furnished to this Court. When I enquired about it, I was informed that it was not available even during the arbitration hearing but that only the tapes thereof were available. Yet the second respondent made the following statement at page 27 of the pleadings:

> "6. Having perused the disciplinary records and findings of the chairperson of the enquiry, in particular, to his sensitivity to all parties concerned, I find no reason to interfere with his findings that the applicant is guilty of the alleged misconduct."

It was very important to get a transcript of the record of the disciplinary enquiry given that the complainant, Mr Chang (ineptly and strangely called "the China" by the applicant's representative) is said to have therein identified the applicant as one of the fraudsters and explained his role. Secondly, there is no transcript of the record of the evidence of the three witnesses called *mero motu* by the arbitrator. Only a summary of their evidence as given by

the second respondent is on record.

[14] Finally at the conclusion of the award the second respondent said the following and I quote:

> "The representative from the union quoted case law in respect of **EARLY BIRD FARMS (PTY) LTD v MLAMBO** (1997) 5 BLLR 541 LAC. I find absolutely no connection in this case that is of any relevance to this particular dispute. Is it just a question of case law just to impress their members?"

The same representative appeared before me on behalf of the applicant, and these remarks make sense to me. The record of the arbitration proceedings teems with long-winded, repetitive and irrelevant arguments. It is an unfortunate situation which, unfortunately, can only be avoided with the engagement of suitably qualified people in these sorts of matters.

[15] In the result, the following order is made:

1. The arbitration award made by the second

respondent on 27 February 2004 under number GA901/03 is set aside and the matter is remitted to the CCMA for arbitration afresh before another Commissioner.

2. There shall be no order as to costs.

_____

H.M MUSI, J

On behalf of Applicant: E Luthuli
Representative of
United Peoples Union of S.A.
PRETORIA

On behalf of Respondents: I Molelekeng
Representaive of
South African Revenue Service
PRETORIA

/em