VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 7 July 1998 CASE NO. J1029/98

In the matter between:

SECUNDA SUPERMARKET C.C. trading as SECUNDA SPAR First Applicant

ASAMBO Second Applicant

and

L. DREYER N.O. First Respondent

SACCAWU Second Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Third Respondent

SIMON NQCUBUKA AND OTHERS Fourth and Further Respondents

J U D G M E N T JALI, A.J:

[1] This is an application in terms of both section 145 and 158(1)(9) of the Labour Relations Act of 1995 for an order reviewing and setting aside :

1. decisions of the first respondent, made :

(a) on 5 March 1998, in disallowing that an

official of the second applicant represent the first applicant at the arbitration hearing which had been scheduled to resolve the dispute between the second, fourth, and further respondents and the first applicant;

(b) On 26 March 1998, in disallowing a legal practitioner to represent the first applicant at the arbitration hearing;

(c) On 26 March 1998, in disallowing that an application be made that the first applicant be represented by a legal practitioner at the arbitration hearing;

(d) On 26 March 1998, in refusing to entertain an application to recuse herself from the arbitration proceedings;

2. The entire arbitration award made by the first respondent, acting in her capacity as a commissioner of the third respondent, on 27th March 1998 and handed down on 24 April 1998, under case reference number MP 3754

[2] I have considered the various points which have been raised by the applicants in this matter and my findings are as set out hereinafter.

BACKGROUND:

[3] During October 1997 the first applicant dismissed the fourth to the tenth respondents for theft. The third respondent referred the dismissal to the Commission for Conciliation Mediation and Arbitration ("the CCMA")in terms of section 135 of the Labour Relations Act 1995 ("the Act"). During conciliation the dispute could not be resolved and it was referred to arbitration. The arbitration hearing was set down for 5 March 1998. According to the affidavit deposed to by Mr WilliamJames Cawthorne, who is a member of the first applicant, the first applicant is a paid up member of an employers' organisation , the Allied Small and Medium Business Employers Organisation, also known as, ASAMBO("the second applicant"). Mr Louw is an official(full time organiser) of the second applicant. On 5 March 1998 Mr Louw was denied the right of audience when he sought to represent the applicant at the aforesaid hearing. The first respondent ruled that she could not allow the first applicant to be represented by the said Louw. This was done after she had noted the presence of everybody who were present and enquired as to the capacity in which the said Mr Louw was present at the arbitration hearing. Mr Louw informed the first respondent that he was appearing on

behalf of the first applicant, in his capacity as an official of the second applicant, and the first applicant is a member of the second applicant.

[4] According to Mr Cawthorne the application for registration of the employers' organisation has not as yet been finalised. The first respondent, without giving the said Louw an opportunity to address her in argument, ruled that he could not represent the first applicant at the arbitration proceedings. Subsequent to that Mr Louw insisted on being heard and brought to the attention of the first respondent the various decisions which have been taken by this court and the CCMA regarding the right of audience in respect of officials of employers' organisations. The first respondent still refused to hear Mr Louw. Pursuant upon that Mr Louw took leave of the arbitration proceedings. Subsequent to that the hearing was then adjourned to 26 March 1996.

[5] On 26 March 1996 the applicants instructed Attorney, Mr Anton de Waal, to appear on their behalf with the intention of representing them at the said arbitration hearing.

[6] Before they proceeded with the said arbitration hearing, it transpired from the papers that a comment was made to Mr Cawthorne by the first respondent that she was not going to allow any third party to represent the first applicant.

[7] When the arbitration hearing commenced, Mr de Waal was also denied right of audience by the first respondent. At that stage Mr de Waal advised the first respondent of his instructions to move an application for her recusal and accordingly moved the said application for the first respondent to recuse herself as the first applicant regarded her as biased. Both applications were refused by the first respondent and in this regard the first respondent referred to the provisions of section 140 of the Act. Subsequent to that the applicants and Mr de Waal left the hearing.

[8] The hearing proceeded in the absence of the first applicant and the applicants did note that not all of the dismissed employees were present at the aforesaid hearing. Subsequent to that an arbitration award was made by the first respondent on 24 April 1998 in which award a finding (at pages 5-6) was made as follows:

" I accept the argument that the six other employees were

confronted with a choice between a similar (unfair) dismissal and a resignation with a good reference to future employers. It is understandable that they would have chosen to resign in the circumstances. To my mind this constitutes constructive dismissal in terms of the LRA. It follows that the dismissals were procedurally unfair in terms of the LRA. (Own emphasis)....

AWARD

I find that the dismissal of Mr Simon Ncube was both substantially and procedurally unfair. He must be reinstated with full pay back to the date of dismissal on the terms no more or less favourable to him than they were at the time of his dismissal.

I find that the resignation of the other six employees were in fact dismissals and that those dismissals were procedurally unfair. They must b e reinstated with full back pay to the date of dismissal on terms and conditions no less favourable to them than they were at the time of their dismissal."

NON-APPEARANCE BY APPLICANTS :

[9] The applicant also alleged that there were irregularities regarding the leading of evidence during the hearing, i.e. not all the dismissed employees were present at the arbitration hearing. However the matter proceeded in the absence of those employees and a finding was made with regard to evidence which had not been led by the affected parties. At this stage it is

important to note that according to Mr Cawthorne, the only people who were present at the hearing were Mr Sipho Mashiane (an official of SACCAWU), Mr Simon Nqcubuka (the fourth respondent), Mr Cawthorne (a member of the first applicant), Mr A B de Waal (an attorney from Cronje, De Waal and Van der Merwe) and Mr E.H. Louw, (an official of the second respondent). This information is also confirmed in the correspondence which was exchanged between the office of the second respondent and the CCMA.

[10] In my view, there was an irregularity with regard to the finding of the commissioner with regard to those employees who were not present at the hearing. The only employee who was present at the arbitration hearing was the fourth respondent. The fourth respondent was dismissed pursuant upon an inquiry which was held on 13 October 1997. The other six respondents are alleged to have resigned on 23 September 1997, after being confronted with the evidence of theft of goods belonging to the first applicant. It is apparent from the Court papers that this was a bone of contention as, in their CCMA referral, they alleged that they were constructively dismissed by the applicant.

[11] Evidence has got to be led for one to come to such a conclusion i.e. that the resignations were in fact dismissals. No evidence could have been led by the parties concerned, as they were not present at the hearing. If any evidence was led, it was obtained from parties on whose credibility the probative value of the evidence could not depend i.e. the evidence was based on hearsay evidence. Accordingly that is not admissible in the absence of a cogent reason as to why the other employees didn't attend the hearing. In any event the first respondent, does admit that she accepted the argument and not evidence for her to reach such a decision. An employee, who alleges a constructive dismissal in terms of section 186(e) of the Act, bears the onus to prove that he did not resign and that the employer dismissed him by making the continued employment relationship intolerable [see **SAPPI KRAFT (Pty)Ltd t/a Tugela Mill vs T.W. Majake N.O. and Others** at page 22-23, case no. D249/97(unreported judgement of Landman J)]. Mere argument, without any evidence, would not be sufficient to discharge that onus. Accordingly I find that there was an irregularity in this regard.

REPRESENTATION BY UNREGISTERED EMPLOYERS ORGANISATION :

[12] I now turn to deal with the question of the representation by an official of the employer organisation in an arbitration hearing. Mr Pretorius submitted that the right to representation in arbitrations is one of the rights which can be exercised even by unregistered employers organisations. Section 138(4) of the Labour Relations Act provides that:

"(4) In any arbitration proceedings a party to the dispute may appear in person or be represented only by a legal practitioner or a co-employee or by a member, office bearer or official of that party's trade union or **employers' organisation** and if the party is a juristic person by a director or an employee."

[13] In the aforesaid provision which refers to arbitration proceedings there is no reference to the fact that the employers' organisation should be a registered employers' organisation. The sub-section is clear and unambiguous.

[14] No distinction, in terms of the Act, is drawn between registered and unregistered employers organisation and also between registered and unregistered trade unions with regard to certain rights. One of those areas where there isn't a

distinction is the right of trade unions and employers organisations to represent its members in arbitration and other proceedings as referred to in sections 138(4) (Arbitrations), 161(Labour Court) and 178(Labour Appeal Court) of the Act. See also **Du Toit et al : Labour Relations Act of 1995, Butterworths, page 79**.

[15] Similarly the definition of "employers organisation" as contained in section 213 of the Act does not make reference to registration. There were other similar provisions of the Act, to which I was referred by Mr Pretorius. I do not intend dealing with them as they are not relevant for purposes of this judgement. Section 200 of the Act to which the commissioner referred at the time when he refused Mr Louw the right of audience in the hearing, stipulates that – "representation of employees or employers

(1) a registered trade union or registered employers' organisation **may act in any one or more or the following capacities** in any dispute to which any of its members is a party:

(a) in its own interests;

(b) on behalf of any of its members;

(c) in the interests of any of its members.

(2) A registered trade union or a registered employers' organisation **is entitled to be a party to any proceedings** in terms of this Act if one or more of its members is a party to those

proceedings.”

[16] In section 200 of the Act there is a reference to a registered employers' organisation. However, this particular provision is not dealing with representation in an arbitration which is the position with section 138(4) of the Act. Section 200(1) deals with the capacity in which the union or employers organisation may act. Section 200(2) deals with their right to be parties in proceedings involving their members, for example, in this matter SACCAWU is cited as a party to the proceedings. Accordingly the reliance upon section 200 in respect of representation in arbitration proceedings by the commissioner may have been misguided to a certain extent.

[17] The right to representation in a disciplinary inquiry or arbitration proceedings is such a fundamental right in our labour law that if the legislature intended to qualify same, the legislature would have expressly stated so. A restriction on such a fundamental right should be narrowly construed. It does not seem like the intention of the legislature was for the representatives to come from registered unions or employers organisations when it came to

representation in proceedings. This is also apparent if one reads schedule 8, items 4(1),8(1) and 10(2) of the Act regarding trade union representation during a disciplinary inquiry or inquiry regarding poor work performance or incapacity.

[18] Furthermore, Mr Pretorius referred me to another authority from this Court, which is dealing with the right of audience by representatives of unregistered employers organisations before the Labour Court, namely, **Marble Hall Spar v South African Chemical Workers Union and Others 1997 10 BLLR 1311 (LC).** At page 1313 Mlambo A.J, (as he then was), stated at H-J:

"During argument I requested Ms Hewzer to address me on the issue of representation as she alleged that she was an office bearer of an employer's organisation. I was referred to a document appearing on page 35 of the paginated bundle which purports to be a constitution of the employer's organisation. It appears that the employer's organisation from which Ms Hewzer comes has in effect made application to the Commission for Conciliation, Mediation and Arbitration for purposes of registration in terms of section 95 and 96. I perused the document and on the face of it, I could find nothing that suggests that Hewzer & Associates Employer's Association, as it is styled, is not an employer's organisation. Furthermore, as it is not a prerequisite that an employer's organisation must be registered for it to enjoy audience in this court, I allowed Ms Hewzer to appear and represent the applicant".

[19] Judge Mlambo's judgement clearly sets out the legal position with regard to the right of audience in respect of representatives of employers' organisations in the Labour Court. Representation before the Labour Court is governed by section 161 of the Act. It may be argued that the Marble Hall Spar case is distinguishable from the current matter as it was dealing with representation before the Labour Court. However I am of the opinion that the commissioner should have considered the Marble Hall judgement, instead of rejecting it out-right, as it might have guided her in respect of the approach which has been adopted by the Labour Court on the subject and also in interpreting the provisions of the Act, as the provisions of section 138(4) and 161 are similar, save for the reference to the arbitration and Labour Court proceedings respectively.

[20] In light of the aforegoing, I find that registration is not a pre-requisite for an employers organisation to be able to appear before the CCMA in arbitration proceedings on behalf of its members. A similar view has also been expressed by Tip A.J. in **Vidar Rubber Products (Pty) Ltd v CCMA and others**

(1998) 6 BLLR 634 at 638.

[21] In his award the commissioner also referred to the case of **SOM Garments (Pty) Ltd v Dokkum and others (1997) 9 BLLR 1234** for refusing to grant Mr Louw the right of audience. This case is distinguishable from this matter as there is no evidence to indicate that Mr Louw is a **consultant**. On the contrary, the evidence presented, which was not challenged, was that Mr Louw is an official of the second applicant. I have perused the constitution of the second applicant which was annexed to the Court papers in this matter. The second applicant is a duly constituted but unregistered employers organisation. The second applicant had applied for registration in terms of section 96 of the Act and as at the time of the hearing it was still unregistered. The first respondent did not challenge the purpose or bona fides of the membership of the first applicant or the true nature of the second applicant, but only inquired about registration as she regarded same as a pre-requisite to the right of audience in the CCMA. Accordingly that contention, as already indicated is incorrect.

[22] In the premises Mr Louw as a representative of the employers organisation is allowed in terms of section 138(4) to appear before the CCMA on behalf of the first applicant. Accordingly refusing him the right of audience was an irregularity.

LEGAL REPRESENTATION :

[23] Now turning to the question of the refusal by the first respondent to give Mr de Waal the right of audience, and the application which he moved for the first respondent to recuse herself, I am of the view that the provisions of section 140(1) of the Act are clear in this regard. The provisions of section 140(1) are that unless the commissioner and the parties agree to legal representation, the commissioner can only intervene under certain circumstances. Section 140(1) provides :

"(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless–

(a) the commissioner and all the other parties consent; or

(b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation,

after considering-

(i) the nature of the questions of law raised by the dispute;

(ii) the complexity of the dispute;

(iii) the public interest; and

(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."

[24] In this particular case the union refused to give the attorney right of audience, accordingly the second respondent had to consider the matter in terms of the criteria set out in section 140(1)(b)(i)-(iv). However, she did make a decision that she was not going to give Mr de Waal the right of audience. This is a discretionary matter in the absence of the consent by the commissioner or the parties concerned and I do not think that this Court, should intervene in that regard unless there is an irregularity. The section is clear that legal practitioners are not allowed to appear unless the commissioner has satisfied himself on the above-mentioned criteria. However, the commissioner is to do so judicially and not act on a mere whim.

[25] According to Mr Cawthorne, the first respondent had stated that she would not allow the first applicant representation, even prior to hearing the application

by Mr de Waal for the right to represent the first applicant. This is clearly irregular as she had pre-judged the issue before hearing the application.

[26] With regard to Mr de Waal's application for the first respondent to recuse herself, I do not believe that, the said application was properly before the commissioner. Unless Mr de Waal had the right of audience he could not move that particular application, until such time he was given the right of audience. The only person who could have moved the application for first respondent to recuse herself could have been the first applicant.

COSTS :

[37] On the question of costs, Mr Pretorius, on behalf of the applicants, has submitted that this court should consider awarding an order of costs against the first respondent. In this regard he submitted that it has often been ruled that costs should not be ordered against an official acting in good faith. However, this merely provides a very good guideline and should not be elevated into a rigid rate of universal application tending to restrict too narrowly the exercise of a judicial discretion. In this regard he

referred me to **Potter v Rand Townships Registers 1945 AD 292-293.**

[38] He further submitted that the irregularities which were referred to in the argument, coupled with the manner in which the first respondent conducted herself, even to the extent of warranting the recusal, entitled applicants to a costs order against the first respondent. Furthermore, the first respondent had been forewarned by way of correspondence but refused to adhere to reasonable requests.

[39] Mr Pretorius also requested me to consider an order of costs against SACCAWU. The said costs to include the wasted costs with regard to the application, which was made earlier on, for a postponement of the matter. The said application was refused by this court.

[40] I have considered the applications which have been moved by Mr Pretorius with regard to both respondents. Section 162 (1) of the Act requires me to, in making an order of costs, to consider points of law and also fairness. This Court is to give equal weight to both the requirements of law and those of fairness (See

Callguard Security Services (Pty) Ltd v Transport and General Workers Union and others (1997) 18 ILJ p 381).

[41] Section 162 (2)(b) states that in deciding whether or not to order the payment of costs, the "Labour Court may take into account the conduct of the parties in proceeding with or defending the matter before the Court; and during the proceedings before Court." What is of significance is the conduct of the parties in respect of the matter before Court. The conduct the applicant sought to rely on was the first respondent's during the arbitration. The first respondent, even though cited as a party, was not opposing the application. I am thus, not persuaded by this argument.

[42] Furthermore I do believe that even though there may have been irregularities emanating from the first respondent's actions, the said irregularities were not so gross as to justify the granting of costs against the first respondent. Such an order of costs would not assist in the dispute resolution function of the CCMA, and may only tend to inhibit the commissioner's in conducting their duties. In the circumstances I do not intend awarding the order of costs against the first

respondent, even though I do accept that there were irregularities.

[43] On the question of costs against SACCAWU, I will award costs against SACCAWU, but the said costs will only be limited to those costs which were wasted relating to the argument which was held before this matter proceeded. That is only limited to the application for postponement and nothing else. In any event, with regard to costs generally, the applicants would have had to present argument before this court for them to get the order setting aside the award. It is not one of those matters in which you could just obtain the order without presenting proper argument before the court. Due to the importance to the parties, of the issues raised, SACCAWU's opposition was not frivilous. In the circumstances, considerations of fairness call for a costs order in respect of the wasted costs only.

[44] For the reasons set out above, the order which I shall grant in this matter is that:

(a) The arbitration award made by the first respondent, under case reference MP3754 and dated 24 April 1998 is hereby set aside;

(b) it is ordered that the arbitration proceedings commence before a different commissioner and

(c) the second respondent, is hereby, ordered to pay only the wasted costs occasioned by the application for a postponement. Otherwise there is no other order as to costs.

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ACTING JUDGE JALI

LABOUR COURT :	JOHANNESBURG
DATE OF APPLICATION :	7th JULY 1998
DATE OF JUDGEMENT :	7th JULY 1998
APPLICANT'S COUNSEL :	Adv.J.J.Pretorius
INSTRUCTED BY :	Cronje, De Waal and van der Merwe, Secunda
SECOND RESPONDENT'S REPRESENTATIVE :	Mr Nobela of SACCAWU