IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1009/98

In the matter between :-

MORGAN FASHIONS SA (PTY) LIMITED Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

KIDIBONE QUEEN MOHLANGA Second Respondent

SUSAN HARRIS Third Respondent

JUDGMENT

1 In response to an application by the second respondent ("the employee") to have an arbitration award delivered by the third respondent ("the Commissioner") made an order of Court, the applicant ("the Company") instituted review proceedings in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") to have the award set aside.

2 On 10 September 1997, the employee was dismissed by the employer pursuant to charges against her relating to work performance. A dispute concerning the fairness of the dismissal was referred to the CCMA. The Commissioner found that the dismissal of the employee was substantively unfair and ordered the Company to pay the employee an amount of R18 000.00 within thirty days of the date of the award.

3 The arbitration award was delivered on 15 March 1998. The notice of motion initiating the application for review is dated 28 May 1998. It was served without any supporting affidavit. A supporting affidavit was signed on 25 June 1998. Even if one takes the date on which the notice of motion was signed, namely 28 May 1998, the review has not been instituted within the six week period stipulated in section 145 of the Act.

4 Whether or not the failure to institute review proceedings within the six week period stipulated in section 145 of the Act may be condoned, is the subject of competing decisions. In **Kruger & Ano v McGregor N.O. & Ano (Labour Court, Case No. J123/99, 18 June 1999, unreported)** I held that such failure was subject to condonation. In the present case, however, there is no application for condonation before me.

5 The absence of an application for condonation is not the only procedural

shortcoming in the present matter. No heads of argument have been filed by the Company as required by paragraph 9.1 of Practice Direction 1 of 1998. Moreover, the papers have not been prepared, paginated and indexed in accordance with the requirements of paragraph 9.2 of Practice Direction 1 of 1998.

6 The Company is represented by an attorney in the present proceedings. No acceptable explanation for the non-compliance with the Practice Direction has been furnished. I was merely informed that the appearance on behalf of the company was to resist the application to have the arbitration award made an order of court. However, the very basis of that resistance rests on the application for review.

7 Compliance with the Practice Directions is necessary for the efficient running of this Court. The requirements relating to the proper preparation of papers in opposed applications enables the judge allocated to hear the matter to read the papers intelligently and to know what the case is about. Heads of argument direct both the Court and the opposing parties to the issues in dispute and the relevant case law.

8 In **Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC)**, the Labour Appeal Court stated that "**failure by practitioners to file their heads of argument timeously is becoming a problem**" in the Labour Appeal Court - at

580 H. In the Labour Court, failure to file heads of argument timeously or at all has become a chronic problem. It hinders the proper running of the courts and places an undue and unfair burden on the court. Where parties are represented by attorneys, it is appropriate that such conduct be subject to censure in the absence of any acceptable explanation. Practitioners who appear in this Court are expected to know the Rules and the Practice Directions.

9 While on the subject of non-compliance with the proper requirements of procedure, it is appropriate that I mention the practice in some quarters of filing a notice of motion initiating review proceedings unaccompanied by any supporting affidavit. Section 145 of the Act empowers a party to "**apply to the Labour Court for an order setting aside the arbitration award**". The Rules of the Labour Court deal generally with applications and specifically with applications for review. The former is dealt with by Rule 7, the latter by Rule 7A which was introduced with effect from 4 September 1998. Although Rule 7A was not in force at the time that proceedings were instituted in the present matter, any application must be supported by an affidavit. It is not sufficient merely to serve a notice of motion.

10 It would be open to me to postpone the present matter at the Company's cost and to give it leave to file a substantive application for condonation for the late noting of the review. To do so, however, merely shifts the burden to another

judge at another time. Despite all the procedural shortcomings, I have at least read the papers. To postpone the matter would not be an appropriate use of scarce judicial resources. I have accordingly decided to hear the matter on the assumption that I can condone the failure to institute the review within the six week period and on the further assumption that there is an acceptable reason for the delay.

11 The founding affidavit in the review proceedings comprises two pages. It is deposed to by Serge Glowiczower, the Managing Director of the Company. It sets out the attempts by the Company to obtain the record of the proceedings before the Commissioner. As at the date of signing the affidavit, namely, 25 June 1998, the applicant had still not received the documentation. The affidavit then states:

"**8 I submit that it is necessary for the applicant to obtain the documentation ... in order to substantiate its concerns that the award made by the third respondent does not reflect what transpired during the course of the arbitration hearing under Case No. GA16312.**

9 I submit that applicant's case was based upon the poor work performance and gross negligence of the second respondent. The third respondent, in making her award, ignored the issue of gross negligence in its entirety and failed to apply her mind to all the issues presented to her at the said hearing. The award made by the third respondent ignores a substantial portion of evidence presented by the applicant at the said arbitration hearing."

12 The test for review in terms of section 145 of the Act has been authoritatively laid down by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC)**. The question that must be asked is whether there is "**a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at.**" - at 1435 E.

13 The "grounds" of review advanced by the Company are stated in stark and unsubstantiated terms. Although the Company's standpoint was that it required the record of proceedings in order to motivate the review, the Company was, at least, in possession of the arbitration award. That award runs to some 11 pages typed in single spacing. It is extremely detailed and, on the face of it, appears to represent a careful and lucid analysis of all the issues in dispute. In the review proceedings, however, there is no attempt whatsoever to analyse the award or to point to any defect in reasoning, error of fact or error of law. The award reflects a consideration by the Commissioner of the documentary evidence that was placed before her.

14 Approximately a year has elapsed since the signing of the founding affidavit in the review proceedings. The papers disclose no attempt by the Company to compel the CCMA or the Commissioner to furnish such additional documentation as the Company may require. Nor is there any explanation before me as to why

no such steps have been taken. On the papers before me, therefore, there is simply no basis for the reviewing and setting aside of the arbitration award. In the circumstances, the application for review is dismissed with costs.

15 There remains the application by the employee to have the arbitration award made an order of Court. There is no appearance by or on behalf of the employee. The notice of motion in that matter cites Serge Glowiczower as the respondent. As indicated, the affidavit in support of the review proceedings was deposed to by Mr Glowiczower who is the Managing Director of the Company. The arbitration award, which the employee seeks to have made an order of court, clearly reflects the correct name of the Company. The answer to the application to have the arbitration award made an order of court is that Mr Glowiczower has been wrongly cited as the respondent. He denies that the arbitration award was the result of a dispute between him and the employee. This is nothing more than a technical defence to an obvious error on behalf of the employee. Clearly the correct respondent ought to have been the Company. Mr Glowiczower, as the Managing Director of the Company would obviously have appreciated this error. He has not sought to advance any defence to the merits of the application to have the arbitration award made an order of Court. Mr Gild, who appeared on behalf of the company, conceded that no prejudice would ensue if I substituted the company for Mr Glowiczower as the respondent in the application to have the arbitration award made an order of court. I am of the view that the ends of

justice would not be served if a technical error of this sort were allowed to non-suit the employee. I accordingly make the following order:

1 The application for the review and setting aside of the arbitration award made by Commissioner Susan Harris on 15 March 1998 under Case No. GA16312 ("the arbitration award") is dismissed with costs.

2 Morgan Fashions SA (Pty) Ltd is substituted as the respondent in the application to have the arbitration award made an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995.

3 The application to have the arbitration award made an order of court is postponed sine die.

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G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 24 JUNE 1999

DATE OF JUDGMENT: 24 JUNE 1999

For the applicant: No appearance

For the respondent: Mr T Gild