IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J504/99

In the matter between:

MACEBO MATTHEWS MAFUYEKA	Applicant
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	First Respondent
SALEEM SEEDAT	Second Respondent
WALTERNAN DORMAS (PTY) LTD	Third Respondent
KENNETH STEVEN BUNCE	Fourth Respondent

JUDGMENT

MARCUS AJ:

[1] This is an interlocutory application. It arises out of review proceedings instituted by the applicant ("the employee") against the CCMA as the first respondent, Saleem Seedat ("the commissioner") as second respondent, Walternan

Dormas (Pty) Ltd ("the Company") as third respondent and Kenneth Stephen Bunce ("Bunce") as fourth respondent.

[2] According to the employee, he was unfairly dismissed by the company on 2 June 1998. This dispute was referred to the CCMA. A conciliation meeting was held on 16 July 1998. The employee was represented by a union official. The company was represented by Bunce. The union objected to Bunce's presence, initially on the basis that Bunce was described as a "lawyer" but also on the basis that Bunce was not a director of the company. This point flows from section 138(4) of the Labour Relations Act, 66 of 1995 ("the Act") which provides:

"In any arbitration proceedings a party to the dispute may appear in person or be represented only by -

(a) a legal practitioner;

(b) a director or employee of the party; or

(c) any member, officer bearer or official of that party's registered trade union or registered employer's organisation."

Bunce claimed that he was a duly appointed director of the company. He was challenged on this issue by the union official and was required to produce proof of his appointment as a director of the company. The conciliation proceedings were terminated and the commissioner ruled that the issue of Bunce's capacity to represent the company would be dealt with at the arbitration.

[3] A few days before the arbitration, the company furnished a form CM29 which reflected Bunce as a director of the company. The endorsement on this form, however, bears a date stamp from the Registrar of Companies substantially later than 16 July 1998, when Bunce was first challenged on the issue. It also appears that Bunce signed the form on 28 September 1998. The form states that Bunce was appointed as a director on 11 March 1997. Bunce explains in an answering affidavit that the Registrar of Companies was not immediately advised of his appointment as a result of an administrative oversight. Bunce also states:

"I was lawfully appointed as a director of third respondent by virtue of a resolution dated 10 July 1998."

Bunce annexes a copy of this resolution to his affidavit. The resolution in question reflects a decision taken at a meeting of the Board of Directors held on 14 July 1998 (and not 10 July 1998 as alleged in the affidavit) appointing Bunce as a director of the company "with effect from the date of the resolution in order to accept responsibility for all personnel and labour related matters and to represent the company in all its dealings in this respect in whatever forum such affairs need to be attended to".

[4] The question of Bunce's capacity to represent the company was argued before the commissioner. He ruled in favour of the company. The commissioner concluded that there was nothing to suggest that Bunce's appointment was fraudulent and that he did not fall outside the ambit of persons entitled to represent

parties at arbitration proceedings in terms of the Act. It is this decision which the employee seeks to have reviewed and set aside. The employee also seeks a declarator that the company may not be represented by Bunce in proceedings before the CCMA concerning his dismissal.

[5] Pursuant to the application for review, the employee has filed two sets of affidavits dated 6 and 9 February 1999 respectively. In these affidavits the employee seeks to make out a case that the appointment of Bunce as a director of the company is a mere sham calculated to evade the provisions of section 138(4) of the Act. In order to support this contention the employee alleges that Bunce has repeatedly procured an appointment as director of a company "for (the) sole purpose to secure a right of appearance to which he is not entitled". The employee cites the case of A Ntaka v Skip Waste (Case No. GA21678) in which it is alleged that Bunce claimed that he was a director of Skip Waste and therefore entitled to represent that company. Reference is also made to the case of Tivani v African Hoe (Pty) Ltd (Case No. GA6791) in which it is alleged that Bunce's capacity to represent the company was challenged. Here too, it is alleged that Bunce claimed that he was a "full time director" of African Hoe (Pty) Ltd and had been "associated" with that company for 13 years. In the supplementary affidavit it is alleged that Bunce claimed that he had been associated with this company for 15 years).

[6] In the supplementary affidavit by a union official, on behalf of the employee, there are further allegations concerning Bunce's capacity to represent various companies. It is stated:

"On 04-03-99 I conducted investigations into Mr Bunce's history of his appearances by making research and perusing some arbitration awards of CCMA in Gauteng Province. The following is the outcome of the aforesaid investigation:

(a) In 1997 in the matter between UPUSA obo J Nkosi v Astoria Bakery (Case No. GA2927) Mr Bunce represented Astoria Bakery under the false pretence that he was its attorney while he was not an attorney. ...

(b) In 1998 in the matter between NUMSA v Girder Naco (Pty) Ltd (Case No. GA30075) Mr Bunce represented Girder Naco (Pty) Ltd under the false pretence that he was its attorney while he was not an attorney. ...

(c) On 27/07/98 in the matter between T & GWV obo Sheila Zondo v First Park (Pty) Ltd (Case No. GA12553) Mr Bunce appeared on First Park (Pty) Ltd's behalf notwithstanding the fact that he was not First Park (Pty) Ltd's director. ..."

In the case of all three examples referred to, documentary evidence evidencing Mr Bunce's appearances are furnished.

[7] Bunce filed an answering affidavit in response to both the founding

affidavit and the supplementary affidavit in which he deals, in the main, with his appointment as a director of Walternan Dormas (Pty) Ltd. With regard to the other instances referred to above in which Bunce has allegedly represented companies in proceedings before the CCMA, Bunce simply states that he denies the allegations and further that he has been advised that these allegations are not relevant to the present proceedings "and require no further comment".

[8] In order to enable the employee to file a replying affidavit, he has instituted the present interlocutory application in which he seeks to compel the company to furnish certain information contained in a letter dated 8 April 1999, addressed by the union to Bunce and the company. This letter states:

"In the affidavit of Mr Bunce there is Annexure SKB4 alleging that 'it was resolved at a meeting with the Board of Directors held on 14 July 1998 to appoint Mr S K Bunce as a director of the company with effect from the date of the resolution'. In order for us to be able to file a replying affidavit properly and timeously:

(a) kindly give us proof of the quorum for a meeting with the Board of Directors held on 14 July 1998 to appoint Mr S K Bunce; and

(b) kindly also give us copies of the books in which minutes of the aforesaid meeting are kept showing:

(i) all appointments of Mr Bunce made by the directors;

(ii) the names of the directors present at such meeting of the directors and

of any committee of the directors;

(iii) all resolutions and proceedings at such meetings of the company and of the directors and the resolution in writing of the directors and every director present at such meeting of directors having signed his name in a book in which aforesaid minutes are kept."

[9] The employee then describes various attempts by him and the union to secure the requested information from both Bunce and the company, but all to no avail. He has therefore resorted to the present application to compel the company to furnish the information.

[10] This is an unusual application and the question that immediately arises is whether it is within the powers of this court to grant the relief sought. The employee relies on Rule 7(3)(b) of the Rules of the Labour Court which, when read with Rule 7(4)(c), requires that an answering affidavit must set out the "material facts" with sufficient particularity to enable the applicant to reply thereto. I am doubtful whether this rule would entitle me to grant the relief sought.

[11] Mr Wilke, who appeared on behalf of the company has argued that I do not possess the powers to grant the relief sought. He draws specific attention to the provisions of Rule 7(4)(c), read together with Rule 7(1)(f). The effect of these

two rules read together, is that it is incumbent upon a respondent in an answering affidavit to ensure that the affidavit contains a schedule listing the documents that are material and relevant to the application. Mr Wilke contrasts this rule with Rule 7A, which governs the procedure for review. Rule 7A makes no mention of a requirement to furnish a schedule of relevant documents. Hence, on this argument, a comparison between Rule 7(2)(f) and Rule 7A gives rise to the inference that the omission in Rule 7A is deliberate and there is accordingly no obligation to furnish a schedule of documents. The reason for the omission in Rule 7A, argues Mr Wilke, lies in the nature of review proceedings.

[12] Mr Wilke draws attention to the decision of the Labour Appeal Court in Carephone (Pty) Ltd v Marcus NO and Others (1998) 19 ILJ 1425 (LAC). In that case the Labour Appeal Court laid down the test for review under section 145 of the Act. It stated at 1435E that the question to 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".

[13] It should be emphasised that for purposes of the present application, I am not called upon to determine those issues which will ultimately be decided by the reviewing court. In the present case, the applicant seeks to go behind the veneer of what on the face of it appears to be a regular appointment of Bunce as a director of

the company and to expose it as a sham.

[14] It seems clear that a situation of the sort presently under consideration is not expressly catered for by the Labour Court Rules. There are, however, two potential sources from which authority for the relief now claimed may be derived. Firstly, Rule 11 is designed specifically to deal with interlocutory applications and procedures not specifically provided for in other rules. Rule 11(3) and (4) provide:

"(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act."

[15] The second potential source of authority is section 151 of the Act which provides:

"151 (1) The Labour Court is hereby established as a court of law and equity.

(2) The Labour Court is a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction equal to that which a court of a Provincial Division of the Supreme Court has in relation to

the matters under its jurisdiction. ..."

[16] For the better part of this century the Supreme Court of South Africa has acknowledged that it is possessed of inherent jurisdiction in order to regulate its own procedures in circumstances not contemplated by legislation or the rules of court. As the Appellate Division pointed out in Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) SA 734 (A):

"There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice." (at 754G)

In Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A-D the court cited with approval the decision in Ncoweni v Bezuidenhout 1927 CPD 130 where the following was stated:

"The rules of procedure of this Court are devised for the purpose of administering justice and not hampering it and where the rules are deficient I shall go so far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the rule, one is bound to follow this rule. But if there is a construction which can assist the administration of justice, I shall be disposed to adopt that construction."

The Appellate Division also cited, with approval, the observations of Williamson J in Brown Bros Ltd v Doise 1955 (1) SA 75 (W) at 77:

"In my view, this is a case where the Rules of Court, as framed, do not provide for one particular set of circumstances which can arise and I think that the Court has inherent power to read the rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and the matter to be handled along practical lines."

See also S v Malindi and Others 1990 (1) SA 57 (A) at 69G-I.

[17] The Supreme Court has emphasised that it will only exercise its inherent jurisdiction with great caution. There are, however, many examples where this power has been exercised in the interests of justice. In Seetal v Pravitha and Another NO 1983 (3) SA 827 (D) it was held that the Supreme Court's inherent power allowed for the issuing of directions concerning the collection of evidence that was needed in litigation (at 832D). In reaching this conclusion, the court quoted with approval a dictum of Lord MacDermott in which reference was made to the High Court's "inherent jurisdiction to make interlocutory orders for the purpose of promoting a fair and satisfactory trial" (S v S; W v Official Solicitor 1972 AC 24 at 46E quoted at 832E of Seetal's case).

[18] In a case somewhat analogous to the present, the inherent jurisdiction of the Supreme Court was relied on in order to justify an order on the secretary of an unincorporated body to furnish an ordinary member with the names and addresses of the members of the executive in circumstances where the members intended to

institute proceedings against the executive committee (see Stuart v Ismail 1942 AD 327).

[19] In my view the present is an appropriate case for the exercise of this court's inherent powers. The case made out by the employee in the review application is indeed suggestive of a stratagem to evade the provisions of section 138(4) of the Act. Bunce's refusal to deal with the various cases in which he allegedly represented companies in his capacity as director simply serves to fuel suspicion. At issue is whether Bunce and the company acted in fraudem legis (See Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.) This is not an issue with which I am presently concerned. It will be the subject of review proceedings in due course.

[20] Mr Wilke argues that even on the assumption that section 151 of the Act permits an order of the present sort, it should not be exercised to order the production of irrelevant material. He argues that the production of the form CM 29 at the arbitration is essentially an end of the matter. As indicated, however, the case which the employee seeks to make is that Mr Bunce and the company were party to a stratagem to evade the provisions of the Act. The documents requested are, in my view, relevant to the issues in dispute.

[21] The employee has made repeated, but unsuccessful, attempts to obtain the information requested. These requests have been directed to both Bunce and the

company. The employee has been repeatedly fobbed off. The furnishing of such information, will entail no significant inconvenience to either the company or Bunce.

[22] It was urged upon me by Mr Wilke that no order for costs should be made against Bunce since the actual relief sought is only against the company. Mr Maluleka, however, argues that the attempts to obtain the documentation have been directed at both Bunce and the company. It seems to me that Mr Maluleka's contentions are correct. Had either Bunce or the company complied with the repeated requests to furnish the information, the present application would not have been necessary.

[23] In the circumstances I make the following order:

1. The third respondent (Walternan Dormas (Pty) Ltd) is ordered to deliver the particulars contained in the applicant's letter of request dated 8 April 1999 and annexed to the founding affidavit as Annexure M1 to the applicant within one week of this order.

2. The third respondent and the fourth respondent (Kenneth Stephen Bunce) are ordered to pay the costs of this application.

3. The late filing of the applicant's replying affidavit in the review proceedings is condoned.

4. The time within which to file the applicant's replying affidavit in the review proceedings is extended by five days from the date of the respondent's

compliance with the order referred to in paragraph 1.

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G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 11 JUNE 1999

DATE OF JUDGMENT: 11 JUNE 1999

On behalf of applicant: MR MALULEKA of NEWU

On behalf of respondent : ADV F J WILKE

Instructed by : A J Oberlechner