IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO : C 654/2002

In the matter between:

1 **WESTERN CAPE BEDDING MANUFACTURERS CC**

Applicant

(Registration No 1999/046843/23

and

2 ONDERHANDELINGSRAAD VIR DIE

MEUBELVERVAARDINGINGS INDUSTRIE (WES KAAP)

ADV J M BROWN NO Second Respondent

JOHN EDWARD BAILEY Third Respondent

JUDGMENT

TIP A J

INTRODUCTION

1 The applicant seeks to have reviewed and set aside a determination and award of the second respondent, made on 14 May 2002 pursuant to an arbitration conducted under the auspices of the first respondent. The application has not been opposed by any of the three respondents.

2 The arbitration dealt with the alleged unfair dismissal of the third respondent by the applicant. Whether or not there had indeed been a dismissal is one of the matters in dispute. However, a key preliminary question concerns whether the third respondent was an employee of the applicant at the relevant time.

3 That issue presented itself because the applicant had shortly before disposed of the foam manufacturing component of its business. That transaction was far from crisply defined. No formal sale agreement had been signed. Moreover, the apparent purchaser was a close corporation yet to be established. That process was as it happened never completed, because the entire plant was consumed in a fire soon after the events here in question.

4 The degree of uncertainty surrounding this transaction is reflected in the record of the proceedings before the second respondent. Varying indications are given from time to time as to the understanding that the individuals had of the status of the transaction and, more particularly, what the exact position was of the third respondent. By way of illustration, the third respondent stated at one stage that he

understood that he had become employed by a different entity from the applicant. On the other hand, he also continued to assert that the applicant was throughout his employer.

5 In view of the conclusion that I have reached in this matter, it is neither necessary nor desirable for me to analyse the evidence. It is sufficient for me to summarise the highlights of the chronology of the events:

5.1 The applicant engaged the third respondent as the manager of its factory at Parow-East, with a salary of R5000 per month and the use of a bakkie. In evidence before the second respondent, the third respondent said that there was also mention of profit-sharing, but nothing further was discussed about it.

5.2 Mr Carel Bosch is a member of the applicant and it is he who was involved at all relevant stages.

5.3 The third respondent was employed to manage the production of foam rubber, together with associated purchasing and administrative functions.

5.4 In the course of September 2001 the foam rubber business was sold to Western Cape Foam Suppliers CC ("WCF"), in the somewhat inchoate circumstances that I have already described.

5.5 The principal member of WCF was Mr Johan Rossouw.

5.6 On 1 October 2001 the third respondent was informed that part of the foam-rubber division has been sold to Mr Rossouw. There is a dispute about whether the third respondent was told that he would thereafter be working for Mr Rossouw.

5.7 In mid-October the foam plant was moved to different premises. The third respondent assisted in the pricing of materials that were to be taken over.

5.8 Mr Rossouw had the keys to the new premises.

5.9 Mr Rossouw told the third respondent that he would no longer have the use of a bakkie.

5.10 Mr Rossouw put two alternatives before the third respondent in relation to his new position.

5.11 On 1 November 2001 the third respondent took sick leave until 5 November 2001.

5.12 On his return, Mr Rossouw told him that he wasn't actually required at the factory.

5.13 Mr Bosch told him (again) that Mr Rossouw was in charge of the new business. The third respondent was aware that there was now a different CC doing the foam manufacturing.

6 As will be immediately apparent from the preceding summary of the events, Mr Rossouw would in the normal course have been a very material witness in respect of, especially, what the third respondent understood his position to be and by whom he was indeed employed at the time.

7 Mr Rossouw did not testify at the arbitration. In the founding affidavit filed in support of this review, Mr Bosch states the following in this regard:

> "*Ek is ingelig deur Mnr Van Renssen, die kommissaris van Eerste Respondent wat die konsiliasie verrigtinge waargeneem het, dat Applikant nie geregtig is op regsverteenwoordiging by die arbitrasie verrigtinge nie. Voor die konsiliasie is ek deur Mnr Van Renssen ingelig dat slegs ek en my vrou die verrigtinge moet bywoon …*

"*Ek het Mnr Van Renssen weer die dag voor die arbitrasie gebel en hom meegedeel dat ek graag regshulp wil hê by die arbitrasie en hy het my meegedeel dat ek nie geregtig is op regsverteenwoordiging nie. Ek het aanvaar dat ek ook nie getuies kon roep nie en niemand het tydens die arbitrasie vir my die geleentheid gegee om getuies te roep nie.*

> "*Op die dag van die arbitrasie het Van Renssen ook telefonies met Mnr Rossouw gepraat. Mnr Rossouw het hom ingelig dat Derde*

Respondent by WCF werksaam was en dus nie deur Applikant ontslaan kon word nie. Van Renssen het geen verdere stappe geneem nadat hierdie inligting aan hom verskaf is nie. Van Renssen het ook vir Rossouw ingelig dat geen mondelinge getuienis deur Rossouw gelewer kan word nie."

8 A confirmatory affidavit deposed to Mr Rossouw was filed with this application.

9 As I have already indicated, this application is unopposed. The first respondent simply filed a notice indicating in essence that it would abide the decision of this Court. As a result, these averments about what Mr Van Renssen said concerning the evidence of Mr Rossouw stand uncontradicted. I must accept them at face value. I must similarly accept that the course of the arbitration would on the probabilities otherwise have been different, at least in the important respect that the evidence of Mr Rossouw would have been presented.

10 On the face of it, Mr Van Renssen was informed by Mr Rossouw that WCF was the employer of the third respondent and not the applicant. That would plainly have been highly relevant in the arbitration which was shortly thereafter to begin before the second respondent. In those circumstances, it is inexplicable that Mr Rossouw should have been advised that he could not give oral evidence.

11 There is no suggestion in the papers before me that any of these exchanges were brought to the attention of the second respondent. Nonetheless, they impact directly and materially on the arbitration that he conducted. That arbitration was

arranged within the framework of the first respondent and Mr Van Renssen, as a designated agent of the first respondent, cannot be regarded as a stranger to the proceedings.

12 This is not a case where this Court is in a position to substitute its findings for those of the arbitrator. That follows from the mere fact that the evidence of a material witness came not to be presented. It is also not a case where justice will be served through an order simply reviewing and setting aside the determination and award of the second respondent.

13 In the result, I make the following order:

1 The determination and award made by the second respondent on 14 May 2002 in his capacity as an arbitrator of the first respondent is hereby reviewed and set aside.

2 This matter is remitted to the first respondent for fresh enrolment for arbitration before an arbitrator other than the second respondent.

3 There is no order as to costs.

_____

K S TIP

Acting Judge of the Labour Court

Date of hearing : 6 May 2003

Date of judgment : 10 September 2003

For the applicant : Adv H E De La Rey
instructed by Bornman & Hayward Inc