IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 251/06

In the matter between:

CELL C (PTY) LTD Applicant

and

GEORGE FINGER First Respondent

THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

M S RAFEE N.O Third Respondent

JUDGMENT

REVELAS J

[1] The applicant instituted an urgent application to review and set aside the decision of the third respondent, a commissioner who had recused himself from arbitration proceedings, following an objection by the first respondent (who describes himself as a black man) to the race of the arbitrator who is indian. The applicant also sought an order compelling the arbitrator to discharge the duties under the Labour Relations Act no 66 of 1995, as amended ("the Act"), and to arbitrate the dispute to its finality. The dispute was

referred to the second respondent ("the CCMA") by the first respondent, against the applicant, and related to an alleged unfair dismissal.

[2] The basis of the first respondent's racist objection was that since the applicant's attorney and counsel were also indian, and the arbitrator was "pre-appointed", he (as a black person) perceived the situation as "racially imbalanced" against himself.

[3] The third respondent clearly rejected any notion that there were grounds for his recusal, but held:

> **"Having heard this application, I find that the affront to my dignity may lead to the seeds of bias being planted. In the circumstances, it will be in the interest of both parties if the matter is heard before another commissioner".**

After he recused himself, the arbitrator made a punitive cost order against the third respondent's attorney, despite the fact that he was *functus officio*.

[4] The costs order is an indication of the arbitrators' state of mind. Understandably, he was angry. He also spoke of "preserving his sanity" when he gave the reasons for his recusal. It may be that he should have stood his ground and proceeded with the matter. The question I have to decide is whether I should set aside his decision. The applicant says if I do, I must then consider what happens thereafter.

[5] The applicant argued that in the event that I do set aside the arbitrator's decision to recuse himself, I could also refer the matter to a different commissioner to reconsider the application or refer the matter to a different commissioner to arbitrate the alleged unfair dismissal dispute. The applicant also seeks a punitive costs order against the first respondent, who has opposed this matter.

[6] I will first deal with the question of whether I can set aside the arbitrator's decision to recuse himself.

[7] An objection to his or her race can never be a reason for a presiding officer to recuse himself or herself. Apart from the fact that the objection itself is reprehensible, it would make litigation in a multi-racial country such as ours impossible. It should not be tolerated. In *S v Collier 1995 (2) SACR 648 C* the appellant, a black person, objected to the race of a white magistrate who presided over his trial. He demanded to be tried by a black magistrate. He argued that the white magistrate's refusal to recuse himself contravened section 25(3) of the Constitution, because the magistrate and the complainants were white, and some of the charges against the appellant had certain racial connotations attached to them. Hlope J, in the judgment, referred to Professor LG Baxter, *Administrative Law,* at 566, where the learned author gives a commonly cited example, namely, that the mere fact that a decision-maker is a member of the SPCA, does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, Hlope J, stated the obvious

principle:

> "**the mere fact that the presiding officer is white, does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true".**

[8] The fact that I agree with the proposition that the arbitrator should not have recused himself, does not mean that his decision may be set aside. According to our law, a decision by a presiding officer *not* to recuse himself is appealable (or reviewable, depending on the nature of the case). However, the converse will seldom apply, and then only when the review relates to unterminated proceedings where grave injustice might result or where justice might not by other means be attained (see: *Newell v Cronje and Another 1985 (4) SA 692 (E)* and *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another 1959 (3) SA 113 (A)*).

[9] In the case of *S v Suliman* 1969 (2) SA 385 A, the Appeal Court (as it then was), had to consider whether a trial judge who had recused himself from a criminal trial, committed an irregularity warranting a finding that a failure of justice had occurred as contemplated in section 364(1) of the former Criminal Procedure Act. The alleged prejudice which the appellant said he had suffered lay therein that: "**whether such recusal has resulted in a failure of justice because His Lordship did not afford the defence an opportunity of being heard as to the expediency of his recusal (386 H, 388 E – F)".**

[10] The learned judge observed in the same case (at 391E-F) that if a

judge *bona fide* recuses himself, the court who sits in judgment of that decision, even if it disagrees that recusation was necessary, **"should be very slow indeed to hold that such recusation constitutes an irregularity".**

[11] To force an arbitrator who has recused himself from a matter, to continue with that same matter, particularly in a case such as this, where the arbitrator was provoked into recusing himself, would be imprudent. I am in respectful agreement with the observations of Thompson JA in the *Suliman* case (*supra)* in that regard. Apart from the fact that the arbitrator is *functus officio*, the notion of ordering a presiding officer who had resiled from a matter for very personal, even though insufficient reasons, to arbitrate or adjudicate the matter, is highly undesirable. Not only would it be humiliating to him or her, but it would also defeat the ends of justice. At the onset of the matter the arbitrator's judgment, and a hearing free of any influence, would be compromised. In this particular matter, it would be playing into the hands of the first respondent if the case goes against him. He would simply, and perhaps even successfully, rely on the arbitrator's bias, based on the fact that the arbitrator was reluctant to do the matter in the first place, and has in fact alluded to his own bias.

[12] I understand why the applicant, and more particularly, its legal team who were also deeply insulted by the first respondent's comments, felt that steps should be taken and something should be done about the first respondent's conduct, but a review application was not the appropriate route to follow.

[13] If the first respondent persists with the approach he has adopted (and he has indicated that he would), the best way to deal with him, would be to deprive him of a remedy, as was done in *Soller v Soller 2001 (1) SA 570 (C).* In that matter Thring J stressed that it is not **"lightly that a High Court will close its doors to a litigant"** and warned that a litigant who has **"contemptuously turned his back on these doors and has repeatedly treated with contumely the Judges who sit within them must not be surprised if, when he attempts to re-enter the tribunal halls of justice to seek relief, he finds the way barred to him until he has purged his contempt for the very tribunal from which he now seeks justice"** (at 573 E – F). In that matter, the litigant in question had made defamatory comments in a letter, about two of the judges of the Cape Provincial Division. The letter was addressed to the Registrar of that Court and to a judge of that division. An order was then made that the litigant be barred from filing or serving any papers in his matter until he filed an affidavit in which he retracted his remarks and apologised for them. I see no reason why the third respondent should not be barred from pursuing his dismissal dispute in the CCMA under similar conditions if he persists in his attitude.

[14] To set aside the arbitrator's decision is clearly not appropriate. Even though the arbitrator should not have recused himself, he unfortunately has chosen to do so. Having done so, he has become *functus officio*. He may not reconsider the question as to his recusal again. That is what would be before him if I set his decision aside.

[15] The applicant's suggestion that another commissioner reconsider the matter does not solve the problem either. Commissioners do not have the power to "reconsider", each others' decisions, particularly not decisions which are inherently so personal in nature. The matter has in any event been postponed, and will be heard by a different arbitrator who has already been allocated to the matter by the CCMA. Apparently that arbitrator is african. The first respondent has placed on record that he would also object to an african arbitrator. Hopefully that arbitrator would be made of sterner stuff. He would also be in a position to determine the question of the costs occasioned by the previous post-ponement which costs order the third respondent was not entitled to make by virtue of his recusal.

[16] The applicant has not demonstrated a clear right, entitling it any relief. Even though the applicant should not have instituted this review application, I decline to make any costs order, in view of the first respondent's conduct.

[17] The application is dismissed.

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E Revelas
Judge of the labour Court

Date of hearing: 13 March 2006

Date of judgment: 28 March 2006

On behalf of the applicant
Adv F.A. Boda
Instructed by: KNRP Attorneys

On behalf of the respondent
Adv H.H. Cowley
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