IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 2605/05

In the matter between:

VAC AIR TECHNOLOGY (PTY) LTD Applicant

and

THE METAL & ENGINEERING INDUSTRIES BARGAININ COUNCIL First Respondent

SHAER, M Second Respondent

MEISSNER, K Third Respondent

JUDGMENT

REVELAS J

[1] The applicant brought an application to review a jurisdiction ruling of the second respondent ("the commissioner") who found that the third respondent ("Meissner") was indeed dismissed by the applicant, whose case it was, that no dismissal had occurred. The applicant also sought condonation for the late filing of this application which is six months out of time. I was requested not to deal with both applications simultaneously, but to hear only the condonation application.

[2] The factual background to the case is as follows: The applicant contends that an agreement terminating Meissner's employ with the applicant, was entered into between Meissner and Mr Tuengerthal ("Tuengerthal"), the chairperson of the applicant's board of directors.

[3] The applicant's founding affidavit was deposed to by Tuengerthal, who alleges that because Meissner was involved in serious irregularities, disciplinary measures were required, but that he elected to settle the matter with Meissner amicably. He would pay him three months' salary minus certain sums owing to the applicant. The agreement, dated 8 May 2003 was supposed to be signed on 10 May 2003, but Meissner did not honour the arrangement to come to Tuengerthal's home to sign it.

[4] Tuengerthal did not testify at the arbitration hearing. Mr Dixon, who presented himself to be from an employer's organisation with the necessary *locus standi*, was the only witness for the applicant. He had no personal knowledge of the settlement discussions. I may just add that the document purporting to be an agreement, is a letter by Tuengerthal and is addressed to Meissner, in German.

[5] At the arbitration hearing Meissner denied receiving any documents from the applicant or the existence of any agreement. He said he was summarily dismissed without a hearing.

[6] The arbitrator accepted the evidence of Meissner in the absence of any testimony from Tuengerthal, and found that there was a dismissal. The matter was postponed so that the merits could be

considered separately. The commissioner to whom the matter was subsequently allocated on 18 November 2004, declined to proceed with the matter, declaring that the second respondent should arbitrate the matter as she was seized with the facts. The matter was then postponed to 23 February 2005 and proceeded on that day. That is clearly stated in the commissioner's ruling.

[7] On the 23 February the matter was arbitrated by the second respondent who found in Meissner's favour and he was awarded a substantial compensation award. A subsequent rescission application was unsuccessful. The commissioner who heard the matter was unpersuaded by Mr Dixon's explanation that when he phoned the offices of the first respondent ("the Council") on 16 February 2005, he was informed by someone from the Council that the matter had been scheduled for 25 February (not 23 February). He was unable to say who he spoke to. There was also no notice of set down sent to any party advising that the matter was to be heard on 25 February. Further, at paragraph (i) (page 55 of the record), Mr Dixon stated that the arbitration was to be set down at "a future date". Clearly this is at variance with the typed ruling of Mr Gunase, who on 18 November 2004, had specifically postponed the matter to 23 February 2005.

[8] The applicant, who contended it had left everything in the hands of Mr Dixon, only became aware of the default award on 30 May 2005. On this day, the applicant for the first time became aware of the rescission ruling. The applicant contends that it never knew

about the default award in terms whereof Meissner is to be paid compensation, notice and leave pay, totalling an amount of R41 3720, 20.

[9] The applicant blames Mr Dixon for all its woes. Its main ground of review is the fact that Mr Dixon was a labour consultant and did not have the necessary *locus standi* to represent the applicant in the matter. Whether that renders the award reviewable in circumstances where Mr Dixon had mislead the arbitrator about his position, is the main issue to decide.

[10] If it were not for Mr Dixon, probably no default award would have been made against the applicant. Mr Dixon knew very well that the matter was postponed to 23 February 2005. He was present on 18 November 2004, when the matter was postponed to that day. If Mr Dixon had led the evidence of Tuengerthal at the arbitration hearing, instead of giving evidence himself on an issue about which he had no personal knowledge, the arbitrator may have accepted that Meissner was not dismissed. If there was direct evidence on the letters recording a prior agreement, that might also have persuaded the arbitrator that Meissner was not dismissed. The letters do tend to support the contention that there was a prior agreement between Meissner and Tuengerthal to terminate the former's services.

[11] The applicant argued that there was a duty upon the commissioner to establish whether Mr Dixon was entitled to act on behalf of the

applicant, in other words, whether he had the necessary *locus standi*. In this regard, the applicant relied on the decision in *Vidar Rubber Products (Pty) Ltd v CCMA and Others (1998) 19 ILJ 1275*. In that case Tip AJ held that a failure on the part of a commissioner to comply with section 138(4) of the Act, which deals with representation and sets out the categories of permissible representatives, would constitute an irregularity.

[12] I am in respectful agreement with the aforesaid view. The facts in that case differ from the facts before me in that the commissioner, in the *Vidar* case, refused to permit a labour consultant to appear in the proceedings as a result of an objection and was taken on review. In the matter before me, the arbitrator was led to believe that Mr Dixon was *not* a labour consultant, but a representative from an employer's organisation.

[13] Meissner contended that the arbitrator must have given Mr Dixon the "benefit of the doubt" because it appears that at some stage at least, he did belong to an employer's organisation. The papers in these proceedings were in fact served on Mr Dixon. Mr Coetzee, who appeared on behalf of the applicant, informed me that he spoke personally to Mr Dixon. I therefore conclude that he elected not to respond to the allegations which relate to him. Consequently, I accept that he had no *locus standi* before the arbitrator.

[14] In *van Wyk and Taylor v Dando and van Wyk Print (Pty) [1997] BLLR 906 (LC)* at 911 C – D, Landman AJ (as he then was) held

that papers before the Labour Court signed by a person who does not fall within the permitted category are null and void, and proceedings relating thereto are also null and void.

[15] Meissner argued that the arbitrator had not misdirected herself nor had she committed an irregularity, because she believed Dixon was entitled to represent the applicant. The arbitrator's state of mind is irrelevant insofar as Mr Dixon's *locus standi* is concerned. In *Pharmaceutical Manufactures of South Africa: In Re: Ex Parte Application of the President of the Republic of South Africa 2000 (3) BCLR 241 CC,* the President prematurely issued a proclamation which was dependant on certain regulations which were not yet in place. He had acted *bona fide*, but on bad legal advice. The Constitutional Court held that it could review and set aside an act of parliament, even if it was made *bona fide,* if it resulted in unfair administrative action. The right to fair administrative action enjoys constitutional protection. The Constitutional Court observed that **"The fact that he was *bona fide* in the action that he took was irrelevant. Insofar as he purported to exercise any discretion that was conferred upon him by the Act, he did so prematurely and without yet having the authority to do so."**

[16] A labour consultant is not permitted to represent parties in terms of the Act. It follows that any affidavits he deposed to or any correspondence he wrote, in the capacity of a labour consultation representing a party are null and void. The proceedings are also null and void.

[17] It is unfortunate that the applicant left everything in Mr Dixon's hands. It is trite that there are limits beyond which a litigant cannot hide behind his representative (see *Saloojee NO v Minister of Community Development 1965 (2) SA 135 AD*). However, this representative was not only tardy, but acted deceitfully. He is also not an attorney. He misled the applicant about his expertise which he clearly did not have. He helped the applicant from the frying pan into fire. In my view, not setting aside the second respondent's award would lead to injustice. According to the applicant, Meissner committed acts of dishonesty. If he did, it seems unfair that he should be compensated with almost half a million rand because of the conduct of Mr Dixon.

[18] The applicant says it had problems in tracing Mr Dixon and only on 6 October 2005 did Mr Dixon bring the file pertaining to the dispute in question to the applicant, after a report was requested from him. However, the default award came to Mr Tuengerthal's attention as early as 30 May 2005. I also understand why the file had to be assessed before bringing a review application and to see what Mr Dixon had been doing in the matter. The degree of the delay is substantial. The explanation therefore is, in my view, a reasonable one. On Mr Dixon's representations the applicant left everything to him. He said he would attend to the review application. He never reported on the matter, but did things his own wrong way, from giving evidence himself to deposing to affidavits. When requested to report on the matter he merely returned the file after several attempts to contact him were made. As shown above,

the good prospects on the merits weigh strongly with me. Accordingly condonation for the late filing of this application is granted.

[19] I decline to make any costs order.

_____
Elna Revelas
Judge of the Labour Court

Date of hearing: 19 April 2006
Date of judgment: 21 April 2006

On behalf of the applicant:

Mr Dirk Coetsee of Dirk Coetsee attorneys

On behalf of the respondent:

Mr G.F Malan of Sonnenberg Hofmann and Galombik

.