IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN REPORTABLE

Case number C219/2005

In the matter between:

Bernard Ivan Miskey	First Applicant
F J Van Zyl	Second Applicant
J M N Bester	Third Applicant
C P R Cronje	Fourth Applicant
M Ngo N.O.	Fifth Applicant

And

B M Maritz N.O	First Respondent
CCMA (Western Cape)	Second Respondent
The Provincial Government: The Department of Transport, Public Works and Property Management	Third Respondent

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JUDGMENT

TOKOTA AJ.

[1] The material facts of this matter are either common cause or not seriously disputed and can be summarised as follows:

[2] The applicants (except the fifth applicant who is the administrator of the deceased estate of the late Mr Ngo) were appointed as members of the Local Road Transportation Board Western Cape ("the Board") in terms of section 4(2) of Road Transportation Act No. 74 of 1977("The Transportation Act") by

the National Minister of Transport. The first applicant was appointed as Chairman thereof. The first applicant was a public servant at the time of his appointment.

[3] During May 1996 the functions of the Board devolved from the National Ministry of Transport to the Provincial Ministry and the first applicant was assigned to the Provincial Board although at that time he was still within the organisational structure of the Department of Transport. He later took voluntary severance package in 1998 and left the public service. After he left the public service he continued to be a member of the Board and remained the Chairperson thereof.

[4] During the year 2000 the National Land Transport Transition Act 22 of 2000 ("the New Act") was passed to provide for the transformation and restructuring of the national land transport system of the Republic and to provide for incidental matters.

[5] The power to appoint members of the Board is vested in the Minister or in the case of a Province the provincial Minister or MEC for Transport. Henceforth any reference to the MEC should be construed as reference to provincial Minister as well. This power is derived from section 4 of the Transportation Act.

[6] Pursuant to the provisions of the New Act the MEC published in the newspapers a notice of intention to appoint new members of the Board in accordance with the New Act. The newspaper notice was titled "*Invitation for Nominations to the Local Road Transportation Board".* In the invitation it was specifically stated that the nominations must "*ensure that the Board is more representative than at present".* The closing date was set as 21 July 2000.

[7] After the publication of invitations in the newspaper applications were received including those of the applicants. The process was finalised and new Board members were appointed but none of the applicants were re-appointed.

[8] On 5 July 2002 letters were addressed to the applicants individually. I quote the relevant portions of the letters.
"As you are aware, the Local Road Transportation Board is to be replaced by the Provincial Public Transport Operating Licensing Board (POLB), which will come into effect with the appointment of its members as from 15 July 2002. The new board will operate in terms of the National Transport Transition Act, 2000 (Act 22 of 2000).

I wish to inform you that as of 14 July 2002 your services as a member of the Local Road Transportation Board will be terminated.

Allow me to express my gratitude to you for many years of dedicated service to the transport industry, also in your capacity as member of the LRTB.

I wish you all the best in future."
The letters were signed by the provincial Minister.

[9] The applicants were aggrieved by the fact that they were not appointed in terms of the New Act. They then referred a dispute of unfair dismissal in terms of section 191 of the Labour Relations Act No.66 of 1995("the LRA") to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA ruled that it had no jurisdiction to entertain the matter. The matter was then referred to the General Public Service Sectoral Bargaining Council (GPSSBC). The GPSSBC also ruled that it did not have jurisdiction to determine the matter. The matter was once again referred to the CCMA. The CCMA ruled once again that it did not have jurisdiction of the matter, as the applicants were not employees.

[10] The applicants are now approaching this court for the review of the very last ruling. The general grounds for review such as bias, irrationality, acting in excess of powers, gross unreasonableness and misconduct were set out as the grounds for review of the arbitrator's ruling.

[11] The grounds of review as set out by the applicants do not assist the court. The issue that made the arbitrator to refuse to entertain the matter is simple and, in my view, it is only upon that issue that this matter has to be decided, namely whether or not the applicants fall within the definition of 'employees'. In the GPSSBC it was correctly conceded on behalf of the applicants that they were not public servants as envisaged in the Public Service Act Proclamation No 103 of 1994. It was on that basis that the arbitrator in the GPSSBC ruled that he had no jurisdiction to adjudicate on the matter.

[12] The applicants were satisfied with the ruling of the GPSSBC and referred the matter to the CCMA. The matter was heard on 11 May 2004 and 20 to 21 July 2004. On 4 August 2004 the arbitrator in the CCMA ruled that he too had no jurisdiction on the basis that the applicants did not fall within the definition of 'employees'.

[13] It follows from the above that what has to be decided is whether or not on the evidence that was placed before the arbitrator, the applicants established that they were indeed employees as defined either in the LRA or any other relevant statute. The argument on behalf of the applicants is that they did.

Notwithstanding the argument that was advanced based on other grounds of review, I am of the view that there is no merit in that argument. However, I deem it expedient to examine the ground for review of the award based on irrationality regard being to the facts that were placed before the arbitrator.

[14] It has been argued on behalf of the applicants that the decision was irrational in that, inter alia, the third respondent did not lead any evidence and therefore the matter had to be decided on the basis of the evidence of the applicants. Furthermore, so the argument ran, the dominant impression was that applicants were employees of the third respondent. I do not intend to analyse all the argument on behalf of the applicants. Suffice it to say that I am

not persuaded that the arbitrator interpreted the law wrongly so as to render his decision not in accordance with law and therefore liable to be set aside. In any event the applicants' version was that they structured their meetings in terms of their availability. This is not consistent with the submission on their behalf that they were directed and controlled by the third respondent.

[15] Generally it is the correct approach for the arbitrator to first determine, when seeking to resolve any labour law problem whether the parties are indeed 'employees' and 'employers' within the meaning of the applicable statute and/or the common law. Once the arbitrator finds that there is no such relationship then he has no jurisdiction to resolve the issues between those parties. Their remedy, depending on the circumstances and the nature of the case and the parties involved, lies in the review of the decision of the functionary by the High Court either in terms of the Constitution or the Promotion of Administrative Justice Act No.3 of 2000 ("the PAJA").

[16] In deciding the question now in issue it is necessary to examine the nature of the relationship between the applicants and the third respondent with specific reference to the applicable legislation regulating the appointments of the members of the Board. This matter was argued on the basis that the applicants were appointed in terms of the New Act. Although there was a letter addressed to the fourth applicant in this regard appointing him in terms of the New Act it does not appear that they were indeed appointed as such.

[17] However in the light of the view I take, it makes no difference as to whether they were appointed in terms of section 4 of the Transportation Act or the New Act. I would still come to the same conclusion. An examination of the New Act reveals that the members of the Board cannot be classified as employees

[18] Section 78 of the New Act provides that:

"(1*) The board must exercise or perform its powers and functions independently, free from governmental, political or other outside influence, and impartially, without fear, favour or prejudice*.'
Furthermore section 30 of the New Act provides that every MEC responsible for the department of Transport must establish a board for the province and appoint fit and proper persons as members thereof who are characterised by their independence, impartiality and fairness and who are suitable for membership by reason of their understanding of and expertise in or knowledge of the public transport industry. Section 4 of Road Transportation Act also provides that the Minister shall appoint persons *"who shall be persons who possess wide experience of, and have shown ability in, transport, industrial, commercial or financial matters or in the conduct of public affairs*."

[19] Section 4 also provides that a member of the Board holds office at the pleasure of the Minister. This implies that the member concerned can be removed at any time provided that a fair administrative procedure has been followed. As I understood the argument on behalf of the applicants, this is not their complaint. Indeed there can be no valid complaint in that regard. They were informed of the intended appointments and they also participated in the process of appointments by submitting their applications. It is only after they could not make it that they complained.

[20] A proper reading of these sections seems to indicate the nature of the relationship between the third respondent and members of the Board. Over the years courts have dealt with various tests as to what has to be established by a person claiming to be an employee. I do not intend to analyse those tests. I think they are well established. However, the most important one, in my view, is that generally speaking an employee cannot operate 'independently' and 'free' from interference and influence by the employer. The employer must exercise control over the actions of its employees and be free to direct and supervise and dictate how the work is to be done. These cases include:

Dempsey V Home & Property (1995) 16 ILJ 378 (LAC)

Smit v. Workmen's Compensation Commissioner 1979 (1) SA 51 (A). FPS Ltd v Trident Construction (Pty) Ltd 1989 (3) SA 537 (A) at 542F-543B:

[21] Despite the argument on their behalf the applicants have acknowledged that they operated independently and even where there was an attempt to influence them, such had failed. However, there is no sufficient evidence that the MEC or the Minister has ever interfered with the functioning of the Board.

[22] The applicants seem to base their contention that they were employees of the third respondent, on, i*nter alia,* the fact that

(a) tax was deducted from their salaries;

(b) that their salary structure was tailored in such a manner that it was linked to the salaries of the public servants;

(c) that, the Chairperson's salary was equal to that of a Director in the public service and those of Board Members were equal to that of a Deputy Director in the public service.

(d) that their salary increases were also linked to that of the public sector.

(e) furthermore, they were provided by the department with the facilities and secretariat for their services.

(f) that they were subject to the discipline by the third respondent; and

(g) that they were to be granted leave by the third respondent.

[23] The above contentions can be dealt with as follows:

1. Section 5 of the Income Tax Act 58 0f 1962 makes it obligatory to deduct tax from the salaries of the members of the Board as such salaries constitute taxable income.

2. The salaries of the members of the Board are determined by the MEC

with concurrence of the Minister of Finance (section 77(1B) of the New Act, and section 4 of the Transportation Act).
It stands to reason that if the salaries are to be paid from National Revenue Fund and in terms of the persal system such salaries must be linked to the public servants in order to facilitate the administrative procedures for payments thereof;

There is, in my view, nothing wrong in aligning the salary structure of the members of the Board with that of the public sector in determining their remuneration. This arrangement did not and could by itself make them public servants hence they have conceded that they were not.

3. It is not uncommon for some departments linked to certain tribunals to provide administrative staff and facilities for the proper performance of their duties. A clear example is that of the Department of Justice and Constitutional Development. Magistrates and Judges are not employees of the State but the Department of Justice makes provision for the facilities and support staff; (See also **Baxter Administrative Law p249).**

4. From their own version the third respondent never subjected the applicants to any disciplinary proceedings. This argument is therefore hypothetical;

5. There was no evidence that the applicants had ever taken leave. This argument is likewise hypothetical.

6. It has also been argued on their behalf that applicants formed part of the organisational structure of the department. This contention flies in the face of the concession that applicants are not employees of the

State. It can only be public servants that can form part of the organisational structure of the department. The argument is therefore irreconcilable with employment of persons in the State as is required by the Public Service Act.

[24] In my opinion the legislative framework governing the appointment and removal of members of the Board is such that the applicants cannot be classified as employees of the State. Employees of the State do not hold office at the pleasure of any Minister. They can only be removed and/or dismissed in terms of the Public Service Act. The MEC cannot employ any person in his official capacity other than by means of the Public Service Act save as is provided for in statute such as the present one. For a person to be an employee of the State he/she must be appointed in terms of the Public Service Act and only after the post has been advertised. The post must also appear in the organisational structure of the department.
It is common cause that the applicants were not appointed in terms of the Public Service Act. Accordingly I conclude that the applicants cannot be classified as employees either of the State or of the third respondent.

[25] It is now necessary to examine the Basic Conditions of Employment Act 75 of 1997(BCEA) and the Labour Relations Act 66 of 1995 ("the LRA"). An employee is defined in the BCEA and LRA as

(a) any person, excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer. Sections 83A and 200A of the BCEA and LRA, respectively, create presumptions to the effect that, regardless of the form of the contract, a person is an employee if that person is subject to the control or direction of another person or forms part of the employer's organisation, or has worked for the other person for an average period of at least 40 hours, or is economically dependent on the other person, or works for

only one person, or if the other person provides the tools of the trade.

[26] The evidence, which was placed before the arbitrator as to the manner in which the applicants performed their duties was that they attended meetings, conducted inspections and interviewed members of the public concerning their complaints, etc. When government transport was used officials of the department would drive that transport and if private transport was used subsistence allowances would be paid. There is nothing untoward in this regard. This kind of situation also obtains in the case of judicial officers who are not employees of the State. Judicial officers are allowed to drive government vehicles and a claim for subsistence allowance is allowed in the event of use of privately owned vehicles on official duties. This does not entitle them to be classified as employees of the State.

[27] The applicants did not form part of the departmental organisational structure. Despite the argument on their behalf, I am not persuaded that they were under any direction or control of any person in the performance of their duties. The fact that the MEC at times had to call upon them for the performance of certain duties does mean that he had to direct them as to how to perform those duties. Furthermore there is no prohibition against taking other employment or undertaking business operations by the members of the Board in the Act under which they were appointed. The fact that they concentrated on the duties as members of the Board was their own choice.

[28] I am accordingly not persuaded that that the arbitrator's ruling was irrational let alone that he had committed any of the alleged grounds for review. This court is not concerned as to whether or not the decision or award was right or wrong fair or unfair as long as the manner of taking the decision was in accordance with law. The review is aimed at the maintenance of the legality of the process. It is not directed at correcting a decision or award on the merits.

(See: **Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) at 292 para87; Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) at 402B).**

[29] Even if I am wrong on one or more of the above analyses there is still another problem for the applicants. In terms of the New Act a new Board with new Board members had to be established. The procedure which was followed in the appointment was inevitable in view of the fact that the Board had to be more representative. The procedure is prescribed by section 77 of the New Act. Therefore in terms of the law their tenure of office had come to an end. Their removal from office was brought about by operation of law. The third respondent had no choice but to replace the old members of the Board in accordance with the New Act. In my view therefore it cannot be said that the applicants were dismissed by the third respondent. He was implementing legislation. The applicants as already stated above participated in that process.

[29] In the circumstances even if the arbitrator was wrong in the analysis of the law it would serve no purpose to set aside his ruling. The applicants had no right to remain members of the Board after the implementation of the New Act. This application therefore falls to be dismissed.

[30] The question that remains is that of costs. The general rule is that costs should follow the event. The court has a discretion upon considerations of the facts of each case, which must exercised judicially, as to whether or not to award costs to a successful party. (See **A C Cilliers : Law of Costs** para 2.27).

In Labour law context courts sometimes make no order as to costs. In my view I see no reason why in this case this general rule should not be applied and none has been advanced in argument.

In the result I make the following order:

1. The application is dismissed with costs.

B R TOKOTA: ACTING JUDGE OF THE LABOUR COURT:

DATE OF HEARING: 24 August 2006.
Date of Judgment : 29 November 2006

Appearances: For the Applicant :Adv E Benade
Instructed by Miskey Incorp.

For the Third respondent: Adv T Masuku

Instructed by the State Attorney