NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 745/06

WORKERS EQUALLY SUPPORT UNION OF SOUTH AFRICA
("WESUSA") obo AMOS MODISE & 4 OTHERS Applicant

and

SLABBERT BURGER TRANSPORT (PTY) LTD Respondent

CASE NO. J 1840/05

In the matter between:

SLABBERT BURGER TRANSPORT (PTY) LTD Applicant

and

NATIONAL BARGAINING COUNCIL
FOR THE ROAD FREIGHT INDUSTRY First Respondent

COMMISSIONER P COHEN N.O. Second Respondent

AMAWU obo P NTULI & 5 OTHERS Third Respondent

JUDGMENT

VAN NIEKERK J

Introduction

[1] There are two applications before the Court. The first (under case number J745/06) is an application in terms of section 158(1)(c) of the Labour Relations Act in terms of which the Applicant (to which I shall

refer as the union) seeks to have a settlement agreement concluded with the Respondent made an order of this Court. The second application (under case number J1840/05, and in respect of which I refer to the applicant as “the Respondent” for the sake of convenience) is one in which the Respondent seeks to have the settlement agreement reviewed and set aside, alternatively an order directing that the agreement is of no force and effect. Other parties to that application are a Mr Motime (substituted for Mr Cohen, who was mistakenly cited) and the Bargaining Council for the Road Freight Industry. Neither of these parties opposes the application.

[2] The factual circumstances in which these applications arise are not contentious. The Respondent dismissed the individual applicants who referred a dispute, categorised as a dispute concerning an unfair labour practice, to the bargaining council. A telephonic conciliation failed to resolve the dispute and a certificate of outcome confirming that the unfair labour practice dispute remained unresolved, was issued.

[3] The dispute was referred to arbitration on 17 August 2005 before Mr Motime, to whom I shall refer as "the arbitrator". In the absence of a pre-arbitration meeting, the arbitrator suggested that the parties might wish to conduct such a meeting and in this context, enquired whether the Respondent was prepared to settle the case. The Respondent’s representative at the proceedings, Mr Beer, indicated that for commercial reasons, the Respondent was prepared to consider

a settlement. At the same time, Mr Beer avers that he drew the arbitrator's attention to the fact that he intended to argue that the bargaining council had no jurisdiction to arbitrate the dispute since the dispute referred was one concerning an unfair labour practice rather than an unfair dismissal. Having said that Beer, on his own version, was aware that the arbitrator was not necessarily bound by the characterisation of the dispute in the referral form. It bears mentioning too that Beer's jurisdictional point was limited to the characterisation of the dispute - he did not allege, nor was it contended in these proceedings, that the bargaining council had no jurisdiction over the parties in the sense that they were engaged outside of its registered scope or that the dispute was not otherwise the subject of a proper referral.

[4] The arbitrator separated the parties and engaged in what was referred to as "*to-ing and fro-ing"* between them to discuss a possible settlement. Beer disclosed to the arbitrator that he had a mandate to settle the claims on terms that would give each of the individual Applicants the equivalent of 3 months remuneration. During the course of the discussions, the arbitrator disclosed to Beer that the Union was prepared to accept payment of the equivalent of 7 months' remuneration in respect of each of the individual Applicants. Beer replied that he had no mandate to settle on that basis, but attempted to contact one of the Respondent's directors. In this context, Beer avers

that the arbitrator made it clear that the case was scheduled for arbitration and would be finalised on that day.

[5] Beer was unable to contact a director and could not get a mandate to settle the dispute on the basis of the Union's proposal. He says that he conveyed this to the arbitrator and was told by him that if the matter did not settle "*that he would be asked, and had the power to make an award of a year's salary …".* Further, Beer avers that the arbitrator indicated that there was a strong possibility that the union's members had a good chance of success since the union had alleged that its members were not allowed to be represented by the trade union at their hearings and that if he found that the Applicant had not followed a fair procedure he would have the power to make a significantly greater award than 7 months. Beer avers further, "*the Second Respondent* [the arbitrator] *reiterated and told me that he could make an award of 12 months' salary and that the Third Respondent* [the union] *would ask that he do so if we did not settle."*

[6] On this basis, Beer avers that he was "overwhelmed and unsure" as to what the Applicant's rights were, and that he was out of his depth. He submits that under an unacceptable level of pressure, coercion and duress, he was compelled to sign the agreement on the basis proposed by the Union and supported by the arbitrator. On his return to Cape Town, having explained to the Applicant's directors what had

transpired, he was instructed to seek legal advice and the application to review was launched.

[7] I do not intend for the purposes of this judgment to canvas all of the arguments submitted by the Respondent in support of its contention that the arbitrator committed a reviewable irregularity. One of the Respondent's primary contentions is that the arbitrator ought to have enquired into the merits of the dispute, and ascertained, in particular, whether the bargaining council had jurisdiction to entertain the dispute. It was also submitted that the arbitrator ought to have investigated the facts and made a determination on the basis of what the Union had pointed out its case to be. In short, it was submitted that the arbitrator orchestrated an environment for settlement discussions to the prejudice of the Respondent and that he failed properly to advise Beer of his rights and obligations.

[8] I am not persuaded, on the Respondent's own version, that it is entitled to the relief that it seeks. The LRA acknowledges mediation (the nature of the process undertaken by the arbitrator in the pre-arbitration phase) as a preferred form of dispute resolution. Mediation is often a robust process in which the mediator will seek to persuade and cajole parties, using techniques that rely on gentle and less gentle pressure to reach agreement. Obviously, a mediator cannot overstep the mark and act dishonestly, or misrepresent a position to the parties, or engage in conduct that amounts to intimidation. In *National Union of Metalworkers*

of SA & others v Cementation Africa Contracts (Pty) Ltd (1998) 19 *ILJ* 1208 (LC) Waglay J said:

> "While a commissioner may not advise the parties on the merits or compel parties to adopt any particular view, he or she may indicate to the parties making the claims or demands the possible weaknesses in their claims or demands."

[9] There may often be a fine line involved here, but there are a number of self-evident guidelines that might apply in a situation where a panelist attempts, with the parties' agreement, to explore the prospect of a settlement before arbitrating a dispute. First, the hallmark of the process is its voluntary nature. The panelist must therefore protect the voluntary participation in the process of each party, and respect the right of the parties to reach their own agreement. Secondly, the panelist should conduct the process impartially. By this, I mean not only that the panelist should avoid a conflict of interest, but also that the panelist should avoid communicating any pre-existing opinion that might bring her integrity and impartiality into question. Any conduct that might compromise the position of the panelist as a neutral intermediary should be avoided. This does not imply, as the quote from the *Cementation Africa* judgment suggests, that the panelist is not entitled to provide an evaluation of a party's position nor sketch likely outcomes should a dispute proceed to arbitration. But the panelist should avoid

any expression of her own views to the parties on the merits of their positions.

[10] I am not persuaded that in the present instance, the arbitrator acted unethically. This is evident from Beer's own evidence in which the arbitrator's language is expressed in tentative terms. He avers that the arbitrator stated that if the matter proceeded to arbitration he *would* be asked and *would* have the power to award the employees a year's remuneration. These are the arbitrator's powers under the LRA, and the union would have been quite within its rights to seek that relief. It does not appear from Beer's evidence that the arbitrator expressed his own opinion on the outcome of any arbitration, or that he ever stated that he would make an award less favourable to the Respondent than the terms of the union's proposal. In other words, there is no evidence that the arbitrator pointed out anything other than a range of possibilities should the matter proceed to arbitration. It was for Beer to assess the Respondent's risk in the light of those possibilities, and to decide whether to settle the dispute on the terms proposed. In short, I am unable to find on the evidence before me that the arbitrator made any misrepresentations to Beer, that he subjected Beer to any form of duress, or that he acted otherwise in a manner that was unbecoming.

[11] In relation to the submission that the arbitrator was obliged to have dealt with the jurisdictional point, nothing precluded Beer from persisting with the point rather than agreeing to participate in the

conciliation process. It was always open to Beer to contest the merits of the dispute (which included any jurisdictional point about the characterisation of the dispute) rather than seek a settlement. Beer does not suggest that he participated in the process against his will - on the contrary, he had arrived at the proceedings with a mandate to settle the dispute based on a payment of 3 months' remuneration to each of the dismissed employees. Instead, Beer elected to remain a participant in the conciliation proceedings, and concluded the settlement agreement on behalf of the Respondent in circumstances where he knew he had exceeded his mandate. On his return to Cape Town, he had to face the wrath of his principals. The irresistible conclusion is that this is what ultimately prompted this application. Beer's conduct is of course not a basis on which the agreement may be set aside - Beer held himself out to have the Respondent's authority to sign the agreement and the union acted on that representation. There is accordingly no reason for this Court to set aside the agreement.

[12] Finally, the individual applicants joined the union that initiated these proceedings (the Workers Equally Support Union of South Africa) after the referral of the dispute to the bargaining council. Until then, another union had acted on their behalf. In these circumstances, there must be some doubt whether the union is a genuine trade union as contemplated by the LRA and the guidelines that apply to the determination of genuine trade unions and employer organisations. In these circumstances, it is prudent to order that all monies due to the

individual applicants in terms of the settlement agreement be paid directly to them, and that none of them be obliged to make over any amounts to the union or any of its officials.

[13] I therefore make the following order

1 The agreement concluded under the Bargaining Council's reference number D454/JHB/4740/05A on 17 August 2005 is made an Order of Court;

2 The full amounts payable to the individual applicants in terms of the settlement agreement, with interest payable at 15% from the date of the agreement shall be paid directly to them, and none of them shall be required to pay over any part of the amount to the union or any of its officials;

3 the application to review and set aside the settlement agreement is dismissed;

4 there is no order as to costs.

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ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

3 February 2009

APPEARANCES

For the Applicant:	C Ndlovu (Union Official)
For the Respondent:	Attorney Grant Marinus
	Jan S De Villiers