

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JR 1091/03

In the matter between:

UNITED TRANSPORT AND ALLIED WORKERS Applicant
UNION obo S G VAN ROOYEN

and

SAM PLAATJIES N.O	First Respondent
THE TRANSNET BARGAINING COUNCIL	Second Respondent
TRANSNET LIMITED t/a TRANSWERK	Third Respondent

JUDGMENT

SANGONI AJ

THE PARTIES

[1] The applicant is United Transport and Allied Union (UTATU) previously called United Transport and Allied Workers Union which has undergone a name change subsequent to an amalgamation with some other unions. It is a union registered in accordance with the Labour Relations Act (LRA). It acts in these proceedings on behalf of one S G Van Rooyen, its member.

- [2] The first respondent is cited herein in his capacity as an arbitrator appointed by the Transnet Bargaining Council (TBC) to arbitrate under the latter's auspices.
- [3] The second respondent is the Transnet Bargaining Council duly established in terms of the LRA.
- [4] The third respondent is Transnet Limited a registered company wholly owned by the State.

INTRODUCTION

- [5] The dispute in the arbitration before the first respondent concerned whether it was an unfair labour practice or not for the third respondent to appoint one Van Rensburg to a vacant post without it being advertised, effectively excluding Van Rooyen who would have applied and perhaps appointed.
- [6] The first respondent came to the conclusion that the second respondent lacked jurisdiction to arbitrate the dispute as the appointment of Van Rensburg was the product of an agreement entered into by and between the applicant union, third respondent and other relevant unions.

- [7] This is an application for the review of the arbitrator's award, if needs be, to set it aside or correct it.

CONDONATION

- [8] It is common cause that this application was brought 24 days outside the period of six weeks stipulated in section 145 (a) of the LRA. The award was telefaxed to the applicant union on 25 April 2003. These proceedings were instituted on 2 July 2003.
- [9] In support of the application for condonation the applicant union alleges that it took time to contact Van Rooyen to advise him of the award and to obtain instructions. Coupled with that is the fact that the union official, handling the matter on behalf of Van Rooyen, forgot to diarise the relevant file. As a person without training in the proper administration processes to ensure the timeous filing of applications of this nature, he claims he slipped and was not able to do it within the stipulated time.
- [10] I am of the view that this is not the best kind of explanation regarding the reasons for lateness and the degree thereof. I, however, think fairness to both parties is a real and material consideration. As will be shown hereunder in this judgement, I hold the view that there are prospects of success. I thus grant the application for condonation.

THE FACTS

[11] The applicant was at all material times, and still is, the employee of the third respondent. During or about December 2001 he was employed as an Inventory Manager. Without the position of Profit Centre Manager having been advertised, Van Rensburg was appointed to it. The applicant complained about the fact that the post had not been advertised nor were there interviews held for the appointment.

[12] The basis of the opposition of the current application is that the applicant union is a signatory to the constitution (“the constitution”) of the Transwerk Joint Transformation Committee (TWJTC) drawn and signed by the third respondent’s management and labour, the latter represented by several labour unions on 21 July 1998. It is the third respondent’s case that as a consequence to the constitution, a collective agreement was entered into between the parties, appointing Van Rensburg to the position in question. The applicant union signed the said agreement. The contention of the third respondent is thus that the applicant is barred or estopped from challenging its own decision and therefore Van Rooyen, its member, stands to suffer the same fate.

[13] The document, recording the supposed collective agreement, is annexure B to the founding papers. It reflects that it was signed on 14 November 2001 by eight persons from management and labour. One of them is Mr B Jonker (Jonker) signing on behalf of applicant

union. The document is headed TRANSWERK: UITENHAGE. There is nowhere on the document where what is being agreed upon is expressed. It sets out only the details relating to the position in question as well as Van Rensburg. They are recorded as follows:

POSITION	-	Profit Centre Manager(RER)
SALARY GROUP	-	109
NAME	-	F Janse van Rensburg
EMPLOYEE NUMBER	-	578252
REASON	-	Vacancy
WHITE	-	1
BLACK COLOURED INDIAN	-	
FEEDING SOURCE	-	Operations (RFR)-110

Mr Hutchinson has, however, conceded from the bar that the recommendation to appoint Van Rensburg was made but there is nothing to show that it was communicated to the person who has the power to appoint or that it was acted upon.

[14] The applicant contends that annexure B embodies a recommendation made by a local working committee of the TWJTC, a structure that has no decision making powers except to make recommendations. This is in terms of clause 5.3.4 which reads:

“Working committees shall make recommendations to the TWJTC and shall have no decision making powers”.

[15] A dispute of fact should have confronted the commissioner. The respondent averred that local working committee was mandated to take decisions regarding junior personnel. A further such dispute was that the position in question was a senior post. The commissioner has not dealt with this issue in his award.

[16] At the arbitration the representative of the third respondent argued that annexure B embodied an agreement between the parties to nominate Van Rensburg with a view to avoiding possible retrenchment of its employees, which would be possible if the post had been advertised. If advertised, a person from outside Transwerk could be appointed, that would then lead to retrenchment of at least one of the internal employees. The commissioner also referred to annexure B as a nomination form and that the approval and appointment of Van Rensburg was done by the third respondent. In the opposing affidavit it is stated on behalf of the third respondent that annexure B “records that Janse Van Rensburg is appointed as Profit Centre Manager by reason of a vacancy”. This is not reconcilable with the arguments of the respective parties before him. One argument says the parties to the agreement appointed, the second one speaks of a recommendation. No one speaks of appointment by the third respondent or approval of a nomination.

[17] Another issue is whether the commissioner should not have considered whether the ‘agreement’ falls within the ambit of the constitution. It would appear that the genesis of the constitution was the quest for transformation. TWJTC is described in the constitution

as “Corporate and final decision making body of the transformation process in Transwerk”. Counsel agreed though, that the objective to be achieved relates to the transformation process. Nothing in the constitution indicates that the constitution is all about transformation matters. I can only express some doubts that appointing a person from a non-designated group accords with the transformation process. Mr Makka, for the respondent, submitted that the appointment was about restructuring which is closely related to transformation. The question of whether the appointment fits in with transformation was not placed before me nor the arbitrator. I am thus making no decision in this regard.

[18] Section 10 of the constitution reads:

“Failing all good faith attempts to achieve consensus, disputes between the parties shall be resolved in terms of the Transnet JTC guidelines. This does not in anyway infringe on the right of any party in terms of the Transnet Bargaining Council and the Labour Relations Act of 1995”.

[19] A reasonable interpretation seems to be that each union, including individual members thereof, retain their rights envisaged in the LRA. One of such rights is the right to refer the dispute to the relevant bargaining council. The argument presented on behalf of the third respondent was that the applicability of section 10 was not raised before the commissioner. Indeed the point was not raised at the arbitration. Mr Makka conceded, fairly in my view, that had the point been taken it would have been appropriate for the arbitrator not

to uphold the point *in limine*. The concession takes care of the submission to the effect that Van Rooyen, being a member of the applicant union that signed the agreement to appoint Van Rensberg, waived his right to challenge the appointment.

[20] What remains to be determined in this regard, is whether the omission to take that point before the commissioner precludes the commissioner from considering it. For the purpose of his award the constitution was placed before him. The main issue he had to decide was whether annexure B bound Van Rooyen, having regard to the fact that it was signed by the applicant union of which he was, and still is, a member. That exercise would necessitate the perusal of the constitution. Whether the provisions of section 10 thereof were raised specifically or not, would be immaterial. Failure to consider such provisions, points to the commissioner misconducting himself in relation to his duties as an arbitrator. Such omission also constitutes gross irregularity, justifying the setting aside of the award.

[21] The respondent has abandoned its prayer for costs because of the employment relationship that still exists between it and Van Rooyen. In deciding on costs I take into account the said relationship and also the fact that this case has its own history. At some stage the applicant withdrew the application and later resuscitated it due to some misunderstanding between the applicant union and Van Rooyen. My view is that costs should not follow the result.

I thus make the following order:

- a) The award of the arbitrator made on 17 April 2003 is hereby set aside;
- b) The matter referred to the second respondent for arbitration by an arbitrator other than the first respondent;
- c) Each party to pay their own costs.

C T SANGONI

ACTING JUDGE OF THE LABOUR COURT

For applicant: **Advocate E Hutchinson**
 (instructed by Fluxmans Incorporated)

For the respondent: **Mr Ajay Makka**
 (instructed by Hofmeyr Inc)

Date of hearing: **23 August 2006**

Date of judgment: **15 September 2006**