

SOUTH AFRICA / JUDGMENT

**Protech Khuthele (Pty) Ltd and Another v
Wabile
NO and Others (JR 179/11) [2012] ZALCJHB 168;
(2013) 34 ILJ 1246 (LC) (12 October 2012)**
[2012] ZALCJHB 168

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 179/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 179/11

In the matter between:

PROTECH KHUTHELE (PTY) LTDFirst Applicant

PELA PLANT (PTY) LTDSecond Applicant

and

KATHOLO WABILE N.OFirst Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATIONSecond Respondent

NATIONAL UNION OF MINEWORKERSThird Respondent

Date of application: 11 October 2012

Date of judgment: 12 October 2012

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent ('the commissioner'). The point argued in these proceedings was limited, by agreement between the parties and in terms of a directive issued by this court, to one of the grounds for review raised by the applicants. That ground is based on the commissioner's failure to disclose certain material facts to the parties relating to his prior association with the South African Commercial Catering and Allied Workers union (SACCAWU), and in particular, SACCAWU's shared affiliation to the trade federation COSATU with one of the parties before the commissioner, the National Union of Mineworkers (NUM). This case therefore concerns the apprehension of bias not in the form of a prior direct association with any of the litigants before the commissioner, but his prior association with a trade union that enjoys with one of the litigants a shared affiliation to a trade union federation, and the extent to which any shared values flowing from those associations might preclude the commissioner from bringing an impartial and unprejudiced mind to bear on the resolution of the dispute before him.

Factual background

- [2] The arbitration proceedings under review were initiated consequent on the dismissal for misconduct of individual members of the first respondent, the National Union of Mineworkers (NUM). The misconduct occurred during the course of a strike called by NUM in February 2009 in support of a demand that the applicant recognise the union for collective bargaining purposes. In December 2010, the commissioner issued an award in favour of NUM, and found that the dismissal of the affected employees was substantively fair. He ordered their reinstatement, with retrospective effect.
- [3] It is common cause that after receipt of the award, the applicants initiated an investigation into the commissioner's background and discovered that he was a senior official of SACCAWU, a registered trade union and an affiliate of the trade union federation COSATU. The applicants discovered further that the commissioner had represented SACCAWU in an arbitration hearing reported in 2002, some eight years prior to the proceedings under review. The award issued in those proceedings is reported as *Robson/ SACCAWU* [2002] 12 BALR 1341 (CCMA). The precise nature of the commissioner's status within the union is not readily ascertainable from the papers before me, nor are the dates of his employment. I accept for present purposes the applicants' assertions that that he was employed by SACCAWU, in a senior position, prior to his appointment as a commissioner. It is not disputed that NUM, the first respondent in these proceedings and the applicant in the arbitration proceedings, is a registered trade union and like SACCAWU, an affiliate of COSATU.

- [4] After completing their investigation, the applicants filed an application to review and set aside the award, raising some 40 grounds of review. As I have indicated, these proceedings concern only what has been referred to as the 'recusal' ground.
- [5] The basis of the applicants' ground for review concerns SACCAWU's affiliation with COSATU, NUM's affiliation with the same federation, the relationship between COSATU and its affiliates and in particular, the COSATU's objectives. These objectives are listed in COSATU's constitution, and as one might expect from any trade union federation here or abroad, they include objectives that relate to the protection and furtherance of the interests of workers, the securing of social and economic justice, and the attainment of freedom from oppression and economic exploitation under the leadership of a united working class. The constitution also requires that affiliates of the federation abide by the terms of its constitution and the policies of the federation.
- [6] In essence, the applicants contend that given the commissioner's prior employment by SACCAWU, given the fact that one of the parties before him (NUM) was like SACCAWU an affiliate of COSATU, might cause a reasonable, objective and informed person reasonably to apprehend that he would and could not bring an impartial mind to bear on the dispute before him. Put more robustly (as it was in argument), the applicants are concerned that the commissioner advanced the cause of the dismissed employees unfairly because as a supporter of COSATU, he would seek to protect and further the interests of workers. The applicants accordingly submit that the commissioner's failure to disclose his interest in SACCAWU and less directly in COSATU, constituted a reviewable irregularity and that his award stands to be reviewed and set aside on that basis.

The applicable principles

- [7] Although the CCMA is not a court of law, the same test for disqualifying bias that applies to a judge is applicable to a commissioner. In broad terms, this requires a commissioner to disclose all facts that might give rise to a reasonable apprehension of bias. The principle is captured in the CCMA's Code of Conduct for commissioners. Item 3(1) of the Code states:

'3.1 Commissioners should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of partiality. The duty to disclose rests on the commissioners.'

Item 3.2 of the Code requires commissioners, before being appointed to intervene in any matter, to disclose to the CCMA *inter alia* the following:

'3.2.1 Any direct or indirect financial or personal interest in the matter;

3.2.2 Any existing or past financial, business, professional family or social relationship which is likely to affect impartiality or may lead to a reasonable perception of partiality or bias...'

- [8] Of course, not every failure by a commissioner to disclose facts is actionable, just as not every suspicion or perception of bias has the consequence that an arbitration award is reviewable. Commissioners are required to disclose to the parties appearing before them only those facts as might reasonably be relevant to a recusal application.¹
- [9] The crisp issue that arises for decision in the present proceedings is therefor whether the fact of the commissioner's prior association with SACCAWU might reasonably be relevant to a recusal application.
- [10] The applicants rely on the principles established in *BTR Industry South Africa (Pty) Ltd and others v Metal and Allied Workers Union* and another², where the court said the following:

'It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so trivial in nature as to be disregarded under the deminimis principle) he is disqualified, no matter how small the interest may be ... The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If a suspicion is reasonably apprehended, then that is the end of the matter.'

Further, in *Ndimeni v Meeg Bank Ltd (Bank of Transkei)*³ the Supreme Court of Appeal found that a judgment of this court was a nullity in circumstances where the acting judge concerned ought to have made disclosures in a dispute involving the dismissal of the manager of a bank on account of his professional relationship with the bank. The court said the following:

'Counsel for the respondent conceded that ZilwaAJ should have made disclosure of his relationship with the respondent, in the circumstances of this case, and that the logical conclusion from his failure to do so was that the proceedings before him would be a nullity.... There is no reason, in my view, while the appellant or litigants in labour disputes generally, should be denied the right to fair trial, to which everyone else is entitled. In cases where the judicial officer refuses to recuse himself or herself when he or she should in fact have done so, what occurs thereafter, i.e. the continuation the proceedings, is a nullity.

- [11] I was also referred to two judgments by this court dealing with the review of arbitration awards in circumstances where the awards were set aside on account of bias in the form of prior association. The first is the judgment by Boda AJ in *Daniel Sefafe v Sasol Infrachem & others* (unreported, JR 1034/08) where the court held that an award was reviewable in circumstances where a bargaining council arbitrator was a director and shareholder of an entity that supplied services to the employer party. In *KwaZulu Transport (Pty) Ltd v Mnguni & others* (2001) 22 ILJ 1646 (LC), Pillay J held that a commissioner who rendered services as a commissioner and as a labour consultant should have recused himself on account of a reasonable apprehension of bias based on his dual role.⁴ In that case, the commissioner had, in his capacity as a labour consultant, represented employees previously dismissed by the employer party. Further, the first respondent in the proceedings (a shop

steward) had previously referred matters to the commissioner, acting in the capacity of a consultant, for advice.

[12] All of these cases share the common element of a relationship or association, in one form or another, between the presiding officer and one of the parties to the litigation.

The BTR judgment concerned a presiding officer in the industrial court who had during the course of litigation made a presentation at a seminar conducted by the industrial relations firm that was an adviser to the employer party, whose advice was material to the case before him. In doing so, the court found that he had displayed too great an association with the firm and this would have created a reasonable apprehension of bias in the reasonable minds of union officials. The Meeg Bank case more directly concerned a commercial relationship between the presiding judge and one of the parties (the acting judge concerned, in his capacity as an attorney, had received regular instructions from the bank that was a party to the proceedings before him). The Sasol and KwaZulu Transport judgments similarly concerned direct professional relationships between the arbitrator and one of the parties to the dispute. In the present matter, it is not disputed that the commissioner had no direct relationship with the NUM. As I have indicated, the applicants' complaint relates more indirectly to a prior employment relationship between the commissioner and a trade union sharing a common affiliation with the trade union party before him.

[13] In this sense, the facts of the present case are more closely aligned with those in *President of the Republic of South Africa and others v South African Rugby Football Union and others*.⁵ In that case, the South African Rugby Football Union (SARFU) sought the recusal of a number of judges of the constitutional court on the grounds of their past relationships either with then president Mandela or with the African National Congress (ANC). SARFU argued that even though the ANC was not a party to the litigation, the president and the ANC were so closely identified that a past relationship with the ANC amounted to a past relationship with the president. The application for recusal was refused. In his judgment, Chaskalson P (as he then was) stated the following:⁶

'Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. There this consideration was elegantly described as follows by Cardozo J:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tagging at them – inherited instincts, traditional beliefs, acquired conviction; and the resultant is an outlook on life, a conception of social needs... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.... Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions which make the [person] whether [she or he] be litigant or judge."

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in *R v S* (RD)

“It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.”

[14] The court added:7

‘In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers

should share all the views and even the prejudices of those who appeared before them. In *S v Collier*, before the commencement of a criminal trial in the magistrate's court, the accused insisted that he be tried by black magistrate. The white magistrate before whom the matter was called refused to recuse himself. In dismissing an appeal against the decision, Hlope J said:

“Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand. In such a manner that it could prevent the decision maker from reaching a fair decision... Prof Baxter gives a commonly cited example, namely, 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....”

[15] In relation to the fact that certain judges had a past close relationship with and membership of the ANC, the court said the following:8

‘That a judge may have been engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies, including our own. Nor should it surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that he or she has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to the subject of personal views. This is what the Constitution requires.

[16] More recently, in relation to the question of perceptions of bias by reason of prior association, the Constitutional Court has affirmed that prior association with an institution cannot form the basis of a reasonable apprehension of bias unless the subject matter of the litigation arises from the prior association or activities.⁹ Ngcobo CJ, writing for a unanimous court, said the following:

‘Most judicial officers would have been engaged in a number of activities in pursuit of their professional lives before the appointment. These activities contributed expertise the judicial officers bring to the bench. What is required is that judicial officers should decide cases that come before them that fear, final prejudice, according to the facts and the law, and not according to their objective personal views.’¹⁰

Analysis

[17] The above remarks are particularly apposite to commissioners appointed to the CCMA under the Labour Relations Act. In terms of s

117 (1), the governing body of the CCMA must appoint as commissioners as many adequately qualified persons as it considers necessary to perform the functions of commissioners by or in terms of the Act. It is inevitable that those persons who have the necessary knowledge and experience of labour law to qualify for appointment as commissioners would have their foundational experiences informed either from a trade union or a management perspective. It may be that a commissioner’s perspective was acquired in circumstances where the commissioner was an office-bearer or official of a trade union or an employers’ organisation, or in the course of employment by a company or an NGO. Even those commissioners drawn from the ranks of the legal profession may in their professional capacities have tended to act primarily if not exclusively for either trade union or management clients.

[18] In the case of a prior trade union affiliation, the perspective acquired by the commissioner is no doubt one that would find resonance the terms of the preamble to COSATU’s constitution, a vision of a united, democratic South Africa, free of oppression and economic exploitation under the leadership of a united working class. Similarly, commissioners drawn from the ranks of employers or employers’ organisation would no doubt share a perspective that placed greater emphasis on the merits and values of a free-market system, with more limited regulation of the labour market. These differences in outlooks on life and conceptions of

society are not remarkable, nor are they objectionable. On the contrary, they are inevitable, and should be welcomed. The diversity

of commissioners, drawn as they are mainly from the ranks of persons engaged in one way or another in the industrial relations community, and the diversity and richness of their experience, is no doubt an integral component of the CCMA’s success as a statutory dispute resolution agency. But what remains fundamental and what is required in each and every arbitration hearing is that commissioners conduct proceedings and issue awards without fear or favour, according to the facts and the law, without allowing their personal views to intrude on their decision-making.

[19] What the applicants submit in essence is that the existence of a commissioner’s prior association with a trade union affiliated to COSATU in itself creates a reasonable apprehension of bias in any dispute to which a COSATU affiliate is a party. In my view, there is no merit in this submission, since there is no necessary or logical connection between the

commissioner's association with SACCAWU and the feared deviation from a fair and impartial hearing. The absence of any present or past interest by the commissioner in NUM aside, there can be no suggestion that the subject matter of the litigation before the commissioner arose from his prior association with SACCAWU, or SACCAWU's affiliation to COSATU. In particular, there is no suggestion that in the course of his association with SACCAWU, the commissioner acquired personal information that was relevant to the dispute that he was required to determine. The commissioner was required only to determine whether the individual employees on whose behalf NUM had acted committed acts of misconduct. The right to strike was not at issue, nor were the merits of NUM's demand that it be recognised as the collective bargaining agent for its members. The subject matter of the arbitration proceedings before the commissioner was wholly remote from the commissioner's

association with SACCAWU and SACCAWU's shared affiliation with NUM to COSATU, or with any program or objective that either trade union for the federation might pursue. In the circumstances, there was no obligation on the commissioner to disclose his prior association with SACCAWU. It follows that the recusal ground for review stands to be dismissed, without prejudice to the applicants' right to re-enrol the application for hearing, should they so wish, on any of the remaining grounds for review.

[20] Finally, I deal with the applicants' submission that the failure by the CCMA and the commissioner to oppose these proceedings and in particular, to take issue with what are referred to as 'damning allegations' made against the commissioner necessarily have the consequence that the court should accept what the applicants aver concerning the commissioner and his conduct. The CCMA filed a notice of intention to abide, reflecting that the commissioner had read the notice of motion and supporting affidavit, and that he stands by the reasons for his decision and abides by the decision of this court. In my view, this means no more than that the first and second respondents, the commissioner and the CCMA respectively, do not dispute the facts deposed to in the founding affidavit. Insofar as the deponent to the founding affidavit has sought to draw inferences from those facts, whether or not those inferences are capable of being sustained is a matter for the court to determine.

[21] There is no reason why costs ought not to follow the result.

[22] For these reasons, I make the following order:

The applicants' ground for review based on the contention that the first respondent was biased on account of his prior association with the South African Commercial Catering and Allied Workers Union is dismissed, with costs.

Andre van Niekerk

Judge of the Labour Court

Appearances.

For the applicants: Adv. N Cassim SC, with Adv. PBuiski, instructed by SaljeeDu Plessis Van Der Merwe Inc

For the third respondent: Adv. P Kennedy SC, with Adv. C Orr, instructed by Cheadle Thompson and Haysom Inc.

1 President of the Republic of South Africa and others v South African Rugby Football Union and others [1999] ZACC 9; 1999 (4) SA 147 (CC) at para 89; Benert v ABSA Bank 2011 (3) SA 92 (CC) at para 79.

2 [1992] 4 All SA 701 (AD)

3 2011

(1) SA 560 (SCA)

4 At p 1651D.

5 [1999] ZACC 9; 1999

(7) BCLR 725 (CC).

6 At para 42 of the judgment, footnotes omitted.

7 At para 4, footnotes omitted.

8 At paragraph 70 of the judgment, footnotes omitted.

9 See Benert v ABSA Bank 2011 (3) SA 92 (CC).

10 At para 78.

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