IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: J1779/2010

In the matter between:

ROAD ACCIDENT FUND Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

BAILEY MBALU Second Respondent

COMMISSIONER L SHANDU N.O. Third Respondent

JUDGMENT

FRANCIS J

1. The applicant, the Road Accident Fund is seeking an urgent interim order, restraining the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) from continuing with the arbitration proceedings set down for 9 September 2010 until Part B of its application has been finalised. This was after its application to be legally represented in the arbitration proceedings concerning the second respondent's dismissal was refused by the third respondent (the commissioner). Part B of the application concerns an application in terms of section 145 and/or section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA) for an order to review and set the ruling and proceedings that seek to impugn the legality and/or constitutionality of rule 25 of the CCMA's rules, for various reasons.

2. The second respondent was formerly employed as the Chief Operations Officer (COD) of the applicant. He was charged with the following acts of misconduct:

"1. <u>False</u>

2. It is alleged that you committed gross misconduct in that you have unreasonably or without sufficient cause alleged that Lyndsey Steele had sabotaged the RAF's Direct Payment System.

2.2 You have also falsely or unreasonably or without sufficient cause accused Andre Grenandt, the CFO and Lyndsey Steele of colluding with Lana Nel, the Sheriff of Pretoria East, to issue a writ of execution against the RAF in general and against his department in particular.

3. <u>Gross insubordination</u>

3.1 You have refused to accept the findings of the sub committee of the board that there is no substance to your allegation that Lyndsey Steele had sabotaged the DPS.

3.2 You have also refused to carry out an instruction of the board and the CEO that he should recommence the DPS afresh.

3.3 Gross misconduct in that you have failed and/or refused to adhere to RAF's policies in that you concluded contracts contrary to your delegation of authority and/or without following proper procurement procedures. This charge relates to the following transactions:

3.3.1 Harry's Printers;

3.3.2 Malatji Training; and

3.3.3 Professor Klopper.

4. <u>General</u>

4.1 Your improper, unprofessional and discourteous conduct in relation to the above alleged acts of misconduct has created a work environment which is not

conducive to good employment practices. Effectively this has lead to the breakdown in the fabric of the employment relationship.

4.2 In particular you have behaved in a manner (if one or more of the charges are proven) which makes it unacceptable to continue the employment relationship which is based on trust and mutual respect".

3. A disciplinary hearing was convened on 7 September 2009. Both parties were legally represented at the disciplinary hearing. The applicant was represented by Eversheds Attorneys and by senior counsel. The second respondent was represented by Webber Wentzel Attorneys and by junior counsel. The disciplinary hearing was chaired by senior counsel. The second respondent was found guilty of all the charges and the chairperson recommended a sanction of summary dismissal. The chief executive officer of the applicant decided to implement the recommendation of the chairperson. The second respondent was summarily dismissed on 2 October 2009.

4. The second respondent referred an unfair dismissal dispute to the CCMA. The applicant received a CCMA rule 7.11 referral from the second respondent on 6 November 2009. On 24 March 2010, the applicant received a condonation application for the late referral of the second respondent's dispute. The applicant opposed the condonation application.

5. On 25 March 2010 the applicant received a notice of set down of the condonation hearing from the CCMA under case number GATW3356-10. In terms of this notice, the matter was enrolled for a condonation hearing on 9 April 2010. The applicant was later informed by the CCMA that the matter was not enrolled for 9 April 2010 and that the notice of set down was sent in error. Despite this, the condonation hearing was heard on 9 April 2010

and condonation was granted. The applicant applied for rescission of the condonation ruling which was granted on 31 May 2010.

6. After the rescission hearing, the applicant's legal representatives uplifted the contents of the CCMA file. It was discovered that the file contained proof of service of the CCMA's rule 7.11 notice. These were in the form of registered post slips that were filed by the second respondent. These registered slips were not attached to the condonation application served by the second respondent on the applicant. From the registered slips it was clear that the second respondent had posted his rule 7.11 referral on 30 October 2009, two days before the expiry of the 30-day referral period. The second respondent was therefore not out of time with his rule 7.11 referral. Consequently, the applicant decided to abandon its opposition to the condonation application. The applicant does not know why these slips were not previously brought to its attention and attached to the second respondent's condonation application served on the applicant.

7. The arbitration was enrolled for 25 July 2010. At the hearing the applicant's legal representatives handed in a formal application in terms of rule 25 of the CCMA rules, to be legally represented at the CCMA arbitration. Oral submissions were also made in support of the application. On 10 August 2010, the applicant's legal representatives received a notice of set down of the arbitration for 9 September 2010. The CCMA after the applicant's legal representatives requested a copy of the ruling, faxed a copy of the ruling on 12 August 2010. Legal representation was refused.

8. The applicant brought the interim order application which is Part A on an urgent basis. In

Part A the applicant seeks an order postponing the arbitration hearing pending the outcome of the review application contained in Part B. The grounds for urgency are as follows:

8.1 The timing of this application has been influenced by the timing of the arbitration hearing. Given that the hearing is scheduled for 9 September, it was considered necessary by the applicant to bring this application with enough time to enable this Court to make a determination on Part A prior to the hearing.

8.2.1 On 18 August 2010, the applicant's legal representatives and senior counsel met to discuss and consider the ruling and it was decided to recommend to the applicant that the ruling should be taken on review. The applicant's senior counsel, who had been involved in this matter since its inception, commenced a very lengthy trial (set down for more than 3 weeks) in the South Gauteng High Court on 24 August 2010. He was, prior to this, involved in lengthy preparations for the trial and 18 August was the first opportunity for the applicant's attorneys to consult with him.

8.2.2 The applicant gave the go ahead for the review on 24 August 2010 and the legal team started to draft the papers on 25 August 2010.

8.2.3 Although the papers were prepared as quickly as possible, the substantive aspect of this application (in particular, those which relate to Part B) are somewhat complex and required proper research before this application could be finalised.

8.3 On Monday 30 August 2010, when the papers in this matter were nearing completion, the applicant's attorney of record, wrote a letter to the CCMA calling on it to postpone the arbitration set down on 9 September 2010 pending the finalisation of this matter. The CCMA was given until the close of business on

Tuesday 31 August 2010 to give the undertaking, failing which Part A of this application would be brought on an urgent basis. The CCMA responded by email on the afternoon of 30 August 2010 declining to grant the postponement of the arbitration as requested by the applicant.

8.4 Upon receipt of the email, it became clear that the arbitration proceedings could only be stopped by order of this Court. The papers were finalised and the application was launched on 1 September 2010.

9. The applicant has set out the grounds of review in Part B of the application. It is for purposes of this judgment not necessary to repeat those. Since the applicant is seeking interim relief on an urgent basis, it must comply with the provisions of rule 8 of the Rules of this Court. The affidavit must set out the reasons for urgency and why urgent relief is necessary and the reasons why the requirements of the rules were not complied with.

10. It is clear from the founding affidavit that the applicant was informed by the CCMA on 10 August 2010 that the matter was enroled for arbitration on 9 September 2010. The applicant received the ruling refusing legal representation on 12 August 2010. The explanation tendered is that the applicant met with senior counsel on 18 August 2010 to consider the application. The senior counsel who was involved in this matter was busy in lengthy trial preparations in another matter and was only available on 18 August 2010. This explanation is unacceptable. Everything stopped until the said senior counsel became available. Several senior labour counsel frequent this Court on a regular basis. It is unacceptable that proceedings get delayed because a particular counsel is not available. The applicant gave the go ahead to proceed with this application on 24 August 2010. No

explanation is given why the applicant did not give the go ahead on 18 or 19 August 2010. After the go ahead was given on 24 August 2010 it took another six days before the application was finalised.

11. The applicant is seeking condonation for non compliance with the provisions of these rules. In doing so, it must explain the delays adequately. It has not done so. The true reason given why the application was filed on 1 September 2010 appears in paragraph 14.1 of the founding affidavit. It reads as follows:

The first point to make is that the timing of this application has been influenced by the timing of the arbitration hearing. Given that the hearing is scheduled for 9 September, it was considered necessary by the RAF to bring this application with enough time to enable this Honourable Court to make a determination on Part A prior to the hearing. I shall elaborate later in this affidavit on the reasons why, in the RAF's submission, the balance of convenience favours it and, therefore, why it would be appropriate for Part A to be upheld on an urgent basis."

12. The urgency is self created and the matter stands to be struck from the roll for this reason. However no purpose will be served to struck the matter from the roll since the application stands to be dismissed for another reason. It is trite that this Court has jurisdiction in terms of section 158(1)(g) of the LRA to review interlocutory rulings made by commissioners, and is empowered generally by section 158(1)(a)(i) of the LRA to grant urgent interim relief. I had at the commencement of the proceedings brought to counsel's attention the decision of Van Niekerk J in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 ILJ 2513 (LC)

where the Court had dismissed a similar application like in the present one. I share the views and sentiments expressed by van Niekerk J in the aforesaid judgment and align myself with what is stated at pages 2516 to 2518 which is as follows:

"In criminal and civil proceedings, intervention by way of interdict in uncompleted proceedings is exceptional - the exercise of this power has been held to be confined to those rare cases where a grave injustice might otherwise result or where justice might not by other means be attained. In general the court will hesitate to intervene, having regard to the effect on the continuity of the proceedings in the court below and to the fact that redress review or appeal will ordinarily be available. (See Wahlhaus & others v Additional Magistrate, Wynberg & another 1959 (3) SA 113 (A), and Ismail & others v Additional Magistrate Johannesburg & another 1963 (1) SA 1 (A)). Mr Rautenbach implied that the court ought to adopt a broad view on what constitutes a grave injustice, and referred to Olivier v Universiteit van Stellenbosch [2006] JOL 18108 (C), a case in which the High Court intervened in the conduct of a disciplinary hearing, setting aside a decision not to postpone the hearing. However, as Cheadle AJ observed in Booysen v SAPS & another (2009) 30 ILJ 301 (LC); [2008] 10 BLLR 928 (LC), that decision was partly based on an alleged violation of constitutional rights to fair administrative action and access to information, a matter since addressed and an avenue now closed by Chirwa v Transnet Ltd & others 2008 (4) SA 367 (CC); (2008) 29 ILJ 73 (CC); [2008] 2 BLLR 97 (CC). There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason - for this court routinely to intervene in uncompleted arbitration proceedings would undermine the

informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court. This conclusion was recently underscored by the Constitutional Court. In Commercial Workers Union of SA v Tao Ying Metal Industries & others (2008) 29 ILJ 2461 (CC) Ngcobo J stated at paras 62, 63 and 65:

'[62] The role of commissioners in resolving labour disputes is set out in s 138(1) of the LRA which provides:

> *"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with minimum of legal formalities."*

[63] The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution .....

[65] .... This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions."

The limitation on the right to legal representations is an integral element of a system of expeditious and informal dispute resolution. The default position established by rule 25 of the CCMA rules is that in cases of dismissal for misconduct and incapacity, a party to arbitration proceedings is not entitled to be represented by a legal practitioner unless the commissioner and the parties consent, or the commissioner concludes, after considering specified factors, that it is unreasonable to expect a party to deal with the dispute without legal representation.

Reverting to the facts of the present case, the effect of the commissioner's ruling is that the arbitration continues with both parties not represented by legal practitioners. Mr Rautenbach submitted that in these circumstances, the conduct of the applicant's case might be prejudiced, unattuned to the niceties of legal procedure as those currently representing the applicant are, for example, by making admissions they need not make or more generally by failing to cross examine witnesses with the skill of a seasoned legal practitioner. This submission overlooks the fact that any disadvantage consequent on a lack of legal representation is equally borne by the applicant and Jacobson, and that the commissioner's primary obligation is to conduct the proceedings with the minimum of legal formality, providing guidance in the conduct of the proceedings to the parties and their representatives where this is appropriate. Insofar as the factual and legal complexity of the dispute is concerned, there is nothing in the papers before me to sustain the argument that this matter is so complex that a failure to intervene at this point by interdicting the proceedings will result in a grave injustice. The applicant chose to ignore the formal workplace procedures prescribed by the Code of Good Practice and to conduct a disciplinary enquiry, at great expense to the taxpayer no doubt, in a form that

would make any criminal court proud. I have previously had occasion to comment on the profitable cottage industry that has developed from the application of unnecessarily complex workplace disciplinary procedures, and how inimical the actions of some practitioners, consultants, so-called trade unions and employer organizations and the various other carpetbaggers who populate this industry are in relation to the objectives underlying the LRA. The fact that the arbitration proceedings may raise, as the applicant submits, intricate legal questions concerning the law of trusts and Jacobson's fiduciary duties and that there is a broader public interest in the matter, are all issues that the applicant will in due course be entitled to address should it seek later to review the commissioner's award and to subject the commissioner's decisions and the reasons underlying them to scrutiny by this court. In short the applicant failed to establish a prima facie, right even subject to some doubt."

13. The views expressed by van Niekerk J referred to above apply equally to the present matter. The second respondent was charged with misconduct. He was dismissed on 2 October 2009. He thereafter referred an unfair dismissal dispute to the CCMA. It is not clear from the papers whether the applicant contended that the second respondent had to apply for condonation which he did. Condonation was granted. The applicant applied for a rescission which was granted. It later turned out that there was no need for the second respondent to have applied for condonation. The matter was set down for arbitration on 25 July 2010. The applicant brought an application for legal representation. The application was heard and was dismissed. The matter was re-enrolled for a hearing on 9 September 2010. The applicant was provided with a copy of the ruling on 12 August 2010. It was not satisfied with the ruling and brought an application to interdict the

arbitration hearing from proceeding on 9 September 2010 and a review to be heard later. It was contended that the issues are complex and the important public interest of the matter taking into account the applicant's status as a publicly-funded body. The issues are not complex at all. The applicant depends on public funds to compensate persons who have suffered injuries in motor collision accidents. It is public knowledge that it has approached Treasury on a regular basis for a bail out. It had at great costs to the applicant and ultimately to the tax payers decided to employ a senior counsel to chair the disciplinary hearing for the second respondent. It has also at great costs employed a labour law firm and senior counsel to prosecute the disciplinary hearing on its behalf. After the second respondent had referred his dismissal to the CCMA, it has persisted with proceeding with the legal team that represented itself at the disciplinary hearing at again great costs to the taxpayer. It has persisted with this application with senior and junior counsel. What is a simple dispute has become a frightfully expensive exercise for the applicant and ultimately the tax payers. The arbitration hearing would have been heard but for the intervention and the request for legal representation. If the applicant is allowed to proceed with the review application, it means that the arbitration hearing will be postponed for a second time until the review application is granted. Should the review application not be granted the applicant will in all probability appeal which would take a few years to be finalised.

14. It is trite that the LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. The facts of this case sadly demonstrate the opposite. The dispute

which is simple has now been dragged out and has become an expensive exercise for the taxpayers. It is now almost a year since the second respondent was dismissed and the matter is still to be arbitrated.

15. The applicant has failed to establish a *prima facie* right to the relief sought.

16. The application stands to be dismissed. Since the matter is unopposed there is no order as to costs.

17. In the circumstances I make the following order:

17.1 The application is dismissed.

17.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : P PRETORIUS SC WITH A FRIEDMAN INSTRUCTED BY EVERSHEDS

FOR RESPONDENTS : NO APPEARANCE

DATE OF HEARING: 6 SEPTEMBER 2010

DATE OF JUDGMENT : 7 SEPTEMBER 2010