IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE: YES/NO
Case number: 522/98

In the matter between:

SACCAWU & OTHERS
Appellants

and

THE PRESIDENT OF THE INDUSTRIAL TRIBUNAL 1st Respondent

ASINO 2nd Respondent

CORAM: **HEFER ADCJ, HOWIE, PLEWMAN JJA, MELUNSKY and FARLAM AJJA**
HEARD: **20 NOVEMBER 2000**
DELIVERED: **29 NOVEMBER 2000**

SUMMARY: Industrial Tribunal - Members alleged to be biased - Whether bias established.

JUDGMENT

MELUNSKY AJA:

[1] This is an appeal against a decision of the High Court of Venda (Coetzee AJ). The appellants, the applicants in the court *a quo*, are the South African Commercial Catering and Allied Workers Union ("the Union") and 173 individuals who had been employed by Venda Sun Hotel and Casino Limited, the second respondent in the court *a quo* ("the second respondent"). The first respondent in the High Court was the President of the Industrial Tribunal of Venda. At the relevant time labour matters in Venda were regulated by the Venda Labour Relations Proclamation, 3 of 1991 ("the Proclamation"). The Industrial Tribunal of Venda ("the tribunal") which was established in terms of the Proclamation, was authorised to determine disputes relating to alleged unfair labour practices.

[2] In the court *a quo* the appellants sought orders in the following terms:

> "1. Calling upon the Respondents to show cause why the determination and/or proceedings of the tribunal given on or about the 9th May 1997 under Case Number IT 23/06/93 should not be reviewed and corrected or set aside; and
>
> 2. Calling upon the First Respondent, the President of the said Tribunal, to dispense (sic) within 21 days of the receipt of the notice of motion to the Registrar of this Honourable Court the record of such proceedings sought to be corrected [and] set aside together with any such reasons as [he] is by law required or obliged to give or make and to notify the applicants that he has done so."

Coetzee AJ dismissed the application with costs but granted the appellants leave to

appeal to this Court.

[3] The application arose out of the dismissal of 180 employees (173 of whom are appellants in this Court) by the second respondent during January 1993. Some of the employees were dismissed for taking part in an illegal strike and others for being absent from work without leave. In June 1993 the Union and the dismissed workers brought an application before a tribunal consisting of Advocates Nthabalala and Mojapelo and Mr Netshifhefhe, an attorney, for an order declaring the dismissals to be an unfair labour practice and for reinstatement of the employees. The second respondent raised a point *in limine* to the effect that, in terms of the Proclamation, an application for reinstatement was time-barred and that the employees were not entitled to that form of relief. The tribunal decided the point in the second respondent's favour and thereafter the proceedings were adjourned. They resumed at a later date before a tribunal consisting only of Mojapelo (as president) and Netshifhefhe. After a lengthy hearing the tribunal eventually made its determination on 9 May 1997. It held that the dismissals of the striking workers did not constitute an unfair labour practice but that the dismissals of seven of the applicants who were absent without leave were procedurally unfair. There was no express determination relating to the other

workers who had been dismissed for being absent without leave but from the reasons given it may be assumed that the tribunal considered that their dismissals did not amount to an unfair labour practice.

[4] The application in the court *a quo* was based on two main grounds - irregularities allegedly committed by the tribunal and the alleged bias of both of its members. In this Court counsel for the appellants restricted his argument to the question of bias. He was correct in doing so for the alleged irregularities cannot be properly adjudicated upon in the absence of the record of the proceedings before the tribunal, a matter which will be commented upon later. The question of bias was dealt with in a superficial manner in the founding affidavit which was deposed to by Mr Gelebe. He stated that Mojapelo and Netshifhefhe displayed bias during the hearing by failing to treat the appellants' attorney with the same courtesy and respect that they showed towards the second respondent's legal representative. Gelebe went on to say:

> "At every opportunity available to them [Mojapelo and Netshifhefhe] endeavoured to show how ignorant [our attorney] was and how unsuitable he was in the conduct of our application. This belief was strengthened in us when on or about the 10th day of February 1997, Mycolens, Mutangwa and myself were sent by the Registrar of that Tribunal to pass on a message to Mr Netshifhefhe at his offices ..... Upon our arrival at Mr Netshifhefhe's office and after passing on the message from the Registrar he turned to us and informed us that we had wasted money and time by employing an attorney of record who came from far away. He further stated that if he had handled our case he would have won it and in fact it would have been finalised much sooner than it took for the proceedings to finish in this matter. Naturally, we were taken aback by his attitude but as we did not want to question him we left his office and reported the matter to our attorney of record."

[5] Both in this Court and the court *a quo* it was only the second respondent

who opposed the application. The first respondent did not reply to the appellants' allegations nor did he intimate whether he or the tribunal abided by the decision of the court. If the first respondent was aware of the application, his silence was, to say the least, discourteous. It is possible, however, that the first respondent did not know of the proceedings. According to the return of the deputy sheriff of Thohoyandou, the notice of motion was served on an adult person (described as a "security manager") who was apparently in control of the first respondent's place of business at an unspecified address in Thohoyandou. In the founding affidavit it was stated that the first respondent's "address for service is c/o The Registrar, The Industrial Court, Pretoria" which, counsel for the appellant appeared to concede, was the place where service should have been effected. It may be noted that the notice of motion was directed to both Mojapelo and Netshifhefhe at "c/o Industrial Court, Pretoria" and was received by an official or officials of that court (one of these was L Cloete, Security Manager, apparently the same person on whom service was effected in Thohoyandou). There is nothing to indicate how the documents were delivered to the Industrial Court or that they were passed on to the members of the tribunal. It is only necessary to add that Netshifhefhe was not cited as a party to the proceedings. In *Safcor Forwarding (Johannesburg) (Pty)*

Ltd v National Transport Commission 1982 (3) SA 654 (A) it was pointed out at 672E-F that in the case of an application for the review of a decision of a statutory body, the notice of motion is to be directed and delivered to the chairman of the body in his representative capacity and that there is no need to cite the body itself. In view of certain specific allegations of bias on the part of Netshifhefhe, it might have been desirable for the appellants to have cited him as a party to the proceedings but there is no need to express a firm view on whether this was necessary. Despite the facts mentioned above, it will be assumed for the purposes of the appeal that service was properly effected on the first respondent.

[6] At the commencement of the hearing in the court *a quo* the attorney representing the second respondent informed the learned judge that the record of the proceedings before the tribunal was available at the offices of the Industrial Court in Pretoria. He applied for a postponement, coupled with a tender to pay the costs occasioned thereby, to enable him to place the record before the court. The application for a postponement was opposed by the appellants' counsel and was refused. Consequently Coetzee AJ had before him only the affidavits and the tribunal's reasons and on a consideration of these documents he held that the appellants had not established the grounds of review.

[7] In terms of rule 53 of the Uniform Rules of Court (similar to the rule that applied in Venda at the time), the right to require the record of the proceedings of a body whose decision is taken on review is primarily intended to operate for the benefit of the applicant (see *Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 625F and *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660E-H). However, and depending on the circumstances, a respondent should not be prevented from placing the record, or the relevant parts thereof, before a court simply because the applicant does not do so. Moreover - and this is of particular significance in the present matter - an applicant who does not furnish the record to the court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue.

[8] On the appellants' behalf it was argued in this Court that the second respondent's opposing affidavit was so concise as to amount to little more than a bare denial of the appellants' allegations. Consequently it was contended that we should decide the appeal solely on the facts put forward by the appellant and that the record of the proceedings was unnecessary. It is true that Mr Nicholls, the deponent to the second respondent's affidavit, could hardly have expressed himself more economically. However he denied all the material allegations made by the appellants, save for those relating to what Netshifhefhe was alleged to have said on 10 February 1997, of which Nicholls had no knowledge. With the exception of the last-mentioned occurrence, the appellants' allegations relating to bias or partiality lacked particularity and the second respondent's denial, without elaboration, was sufficient to raise substantial disputes of fact. Without recourse to the record of proceedings the disputes cannot be resolved on the affidavits. The result is that the appellants' generalised allegations of bias have not been established. 7

[9] The appellants' counsel seemed to recognise the difficulty with which his clients were faced and he directed most of his argument to what allegedly took place in Netshifhefhe's office on 10 February 1997. He submitted that Netshifhefhe's comments were a clear indication that at least one member of the tribunal was biased and he suggested that the matter should be referred back to the court *a quo* in the light of the record which, he eventually conceded, should have been placed before that court. Coetzee AJ, it should be noted, did not deal with the aforesaid remarks attributed to Netshifhefhe, which, in my view, is the only issue that warrants further consideration.

[10] The test for apprehended bias is objective and the onus of establishing it rests on the applicant (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at 175 B-C, par 45). The existence of a reasonable suspicion of bias satisfies the test (*Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 8H-I). It is beyond question that members of the tribunal had to act impartially. It is, moreover, not only actual bias, but the outward appearance of bias, that may vitiate the decision of a body such as the tribunal as justice must be seen to be done (see *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 690A-695B).

[11] Whether the appellants have established a disqualifying bias depends on what Netshifhefhe is alleged to have said to the Union's representatives. The background to the specific occasion was the general averment that members of the tribunal made it clear that they regarded the appellants' attorney as incompetent and that they humiliated or belittled him. This was denied by the second respondent and does not, in the circumstances of the case, provide assistance in

determining whether Netshifhefhe, in particular, was biased. His extra curial criticism of the appellants' attorney to lay clients, if it occurred, is obviously to be deplored. But, however deplorable his conduct might have been, it does not follow that he was biased against the appellants or that the appellants should reasonably have suspected that he was. It is clear that Netshifhefhe's remarks related to the first hearing before the tribunal and its decision that the claim for reinstatement could not be pursued because the application therefor was made out of time. Netshifhefhe seems to have implied that the attorney concerned had failed to apply for reinstatement within the prescribed time and that if he (Netshifhefhe) had represented the employees they would have been entitled to claim reinstatement and that the whole application would have been disposed of more expeditiously. I doubt whether it is reasonable to read more than this into the extract from the founding affidavit, which I have quoted in par 4. It may even be that Netshifhefhe's statement indicated that he had a degree of sympathy towards the appellants and their predicament. Whatever may be said about his remarks, however, they cannot reasonably be construed as an indication of bias against the appellants. It may also be of some significance that after the matter was reported to the appellants' attorney nothing was said about it until after the tribunal's determination, some three months later. It suffices to say, however, that the appellants have not discharged the onus of establishing bias on the part of Netshifhefhe and it is not necessary to speculate on the possible reasons for the attorney's inactivity. 8

[12] The appeal is dismissed with costs.

L S MELUNSKY

ACTING JUDGE OF APPEAL

CONCUR:
HEFER ADCJ)
HOWIE JA)
PLEWMAN JA)
FARLAM AJA)