IN THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION
(HELD AT JOHANNESBURG)

CASE NO: GATW3508/15

In the application by:

MEDIA 24 (PTY) LTD First Applicant

M & G CENTRE FOR INVESTIGATIVE JOURNALISM Second Applicant

In the matter between:

ADRIAN MARCK LACKAY Employee

and

SOUTH AFRICAN REVENUE SERVICES Employer

APPLICANTS' SUPPLEMENTARY SUBMISSIONS

INTRODUCTION

1. These submissions are filed in response to the submissions filed by the South African Revenue Service ("SARS") in opposition to media access. In its submissions, SARS makes five contentions. They are:

    1.1. that the CCMA is not empowered to consider matters such as "media presence in arbitrations";[1]

    1.2. that the arbitration involves documentation which contains confidential tax-payers information which "cannot land in the hands of the media";[2]

    1.3. that "documentary evidence will unnecessarily resuscitate and resurrect dead media publications about former SARS officials which have nothing to do with the dispute at hand";[3]

    1.4. that there is no public interest in the dispute between Mr Lackay and SARS;[4] and

    1.5. that allowing the media access to the arbitration will mean that "witnesses might not be at ease to give information" with the result that SARS will not have a fair hearing.[5]

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[1] SARS Submissions, para 5.

[2] SARS Submissions, paras 6 and 7.

[3] SARS Submissions, para 8.

[4] SARS Submissions, para 9.

[5] SARS Submissions, para 10.

2. It is respectfully submitted that there is no merit in any of SARS's contentions. They will be dealt with in turn below.

THE POWERS OF CCMA COMMISSIONERS

3. CCMA commissioners have wide powers to conduct arbitrations in the manner that they see fit and in accordance with the procedure which they consider to be appropriate. The commissioners' powers in this regard are conferred by sections 138(1) and (2) of the Labour Relations Act 66 of 1995 ("the LRA") which provide as follows:

> "**138 General provisions for arbitration proceedings**
>
> (1) 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 a minimum of legal formalities.
>
> (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner."

4. Paul Benjamin has noted the following regarding the wide powers of CCMA commissioners to conduct arbitrations in the manner that they see fit:

> "Commissioners have a wide discretion as to how to conduct arbitration proceedings. The Act, unlike many other statutory arbitration or adjudication systems, does not prescribe a basic format or procedure for an arbitration hearing. As a result an arbitrator is required to exercise a

> discretion in terms of section 138(1) in each arbitration as to the procedure to be adopted during the arbitration. This places a very significant burden on the shoulders of individual arbitrators…."[6]

5. It is submitted that the power of CCMA commissioners to allow the media access to arbitrations and to regulate the manner in which that access may be exercised falls squarely within the power granted to CCMA commissioners in terms of section 138 of the LRA to regulate arbitrations in the manner that they consider appropriate.

6. It is pointed out that it was precisely this reasoning that led the Johannesburg Bar Council to conclude that the default position concerning disciplinary enquiries of the Bar Council is that the media have access thereto. It was held in *Media 24 Limited and Another v Simelane and Another*[7] that the clause in the Constitution of the Johannesburg Society of Advocates which entitles the presiding officer to determine the procedure to be followed in every disciplinary enquiry, necessarily includes the power to allow the media to attend such enquiries and report thereon. Thus it was held as follows:

> "….It does not follow that, because the rules of the Bar do not expressly provide for disciplinary enquiries to be open to the media, the media should be barred from reporting on the proceedings."[8]

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[6] Paul Benjamin *Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA* (2007) 28 ILJ 1 at 8.

[7] Ruling on Media Access in the Disciplinary Enquiry of the Johannesburg Bar Council into the Conduct of Adv Menzi Simelane, handed down on 26 February 2014.

[8] At para 20.

> "Clause 22(b) of the Society's Constitution empowers us to determine the procedure to be followed in this disciplinary enquiry. We must act in accordance with the nature of the matter to be investigated. There is nothing in clause 22(b) that prohibits us from allowing the media to attend the hearing and to report thereon.
>
> The fact that the Society is a voluntary association does not mean that it is immune from the reach of the Constitution of the country. Section 16 which guarantees, *inter alia* the media the freedom to receive and impart information or ideas, is of direct horizontal application.
>
> In our view, the constitutional imperative of open justice is applicable to disciplinary enquiries of the Bar Council.
>
> We therefore conclude that the default position concerning disciplinary enquiries of the Bar Council must be that the press is entitled to attend the proceedings and to report thereon, unless the circumstances of the particular case justify a denial of access."[9]

7. The position in respect of CCMA arbitrations is, if anything, stronger than that in respect of internal disciplinary enquiries held by the Bar Council. This is by virtue of the LRA's explicit imperative that its provisions must be interpreted to give effect to the primary objects of the LRA and in compliance with the Constitution.

8. Thus section 3 of the LRA provides as follows:

> "**3 Interpretation of Act**
>
> Any person applying this Act must interpret its provisions:
>
> (a) to give effect to its primary objects
>
> (b) in compliance with the Constitution; and

[9] Paras 27 – 30.

(c) in compliance with the public international law obligations of the Republic."

9. The Labour Court has made it clear that the provisions of the LRA which deal with the powers of CCMA commissioners must be interpreted in accordance with a purposive and common sense approach which gives commissioners the flexibility they need in order to effectively perform their mandate. The Labour Court has repeatedly held that to interpret these provisions otherwise would frustrate the primary objects of the LRA.

10. In *Food and Allied Workers Union v Buthelezi & Others*,[10] it was argued (adopting an extremely literal interpretation of sections 138(1), 138(7) and 138(9) of the LRA) that the Commissioner had not been empowered to make a declaratory order before considering the substantive merits of the dispute as he had done in the arbitration before him. Mlambo J, as he then was, rejected this argument in the following terms:

> "A careful consideration of the above provisions leads me to the conclusion that commissioners arbitrating disputes do not simply have to go through the motions in a parrot like fashion in complete ignorance of the surrounding circumstances. Commissioners should adopt a purposeful and common sense approach in arbitration proceedings and should consider each and every issue brought before them and dispose of same in a manner appropriate. I am of the view that to deny commissioners such flexibility will have the effect of straight-jacketing them. This would be unduly restrictive and would lead to undesirable consequences which would defeat the primary objects of the Act.

[10] (1998) 19 ILJ 829 (LC)

> Whatever commissioners do should, however, be appropriate in each given situation. When first respondent initiated what may be viewed as an interlocutory application, third respondent, as commissioner, had to consider and dispose of it in a manner appropriate under the circumstances. Appropriate would assume the meaning of enhancing the resolution of the dispute.
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> Presented with such a situation a commissioner will be guided by what is appropriate under the circumstances and whether the decision he is called upon to make at that point in time gives effect to the primary objects of the Act, such as the effective resolution of disputes.
>
> In such a situation I cannot rule out the possibility of a commissioner making a declaratory order before he considered the substantive merits of the dispute. I do not therefore agree that the third respondent exceeded his powers when he made a declaratory order before considering the substantive merits of the dispute. It was appropriate under the circumstances for him to do so."[11]

11. In *Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake and Others*[12] a conciliating Commissioner when faced with what he referred to as an "irreconcilable dispute of fact" regarding whether the CCMA had jurisdiction to entertain the dispute, had concluded that the correct course of action was to make no further decision in the matter and to bring the conciliation to an end with the issue of a certificate. On review, the Labour Court held that this had constituted an irregularity and that the Commissioner had been under a duty to enquire further and to determine the jurisdictional question one way or another.

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[11] At paras 14 – 16.

[12] (2002) 23 ILJ 1603 (LC)

12. The Labour Court held that, depending on the nature of the dispute regarding jurisdiction, it may be necessary for the commissioner to require the parties to present oral evidence. The Court held that although there was no express provision for this in the LRA, it was necessarily implicit in the powers of a commissioner appointed for the purpose of a conciliation process. The Labour Court, per Tip AJ, held as follows:

> "If it were not so, the objects of the Act would be frustrated every time such dispute presents itself……..Hence my view that it is a capacity that must be read separately into the section as a whole, as a matter of necessary implication, in order that its operation should not be nullified. It is a capacity that should be exercised in the spirit of the non-technical efficacy that imbues the Act as a whole."[13]

13. It is accordingly respectfully submitted that:

13.1. The power of CCMA commissioners to allow the media access to arbitrations falls squarely within the power granted to CCMA commissioners in terms of section 138 of the LRA to regulate arbitrations in the manner which they consider appropriate. It is submitted that the meaning and import of section 138 of the LRA is clear in this regard.

13.2. If there were to be any doubt about the meaning and import of section 138 of the LRA in this regard (which is denied) then it is submitted that the LRA's injunction to interpret its provisions in a manner which gives effect to its primary objects and in a manner compliant with the Constitution compels

[13] At para 10.

the conclusion that CCMA commissioners are empowered to allow media access to arbitrations. Indeed, it is submitted that the requirement that section 138 of the LRA must be interpreted in compliance with the Constitution (which include the right to freedom of expression and the right of access to courts discussed in detail in the Applicant's main submissions) compels this conclusion, in and of itself.

14. It is accordingly respectfully submitted that there is no merit in SARS's contention that CCMA commissioners are not empowered to allow and regulate media access to arbitrations.

ALLEGED CONFIDENTIAL TAX-PAYERS INFORMATION

15. SARS alleges that the documentary evidence in the arbitration includes confidential tax-payer information and that media access should be refused on this ground. It is respectfully submitted, in the first place, that this arbitration is not about confidential tax-payers information. It is about Mr Lackay's claim that he was sidelined and victimised and ultimately constructively dismissed because of his opposition to certain actions taken by Mr Moyane – notably his purge of a number of senior SARS officials. This is what Mr Lackay stated in his letter to Parliament which was subsequently made public and has been widely reported on. Mr Lackay's letter is attached hereto as **Annexure "A".**

16. For this reason alone, it is submitted that SARS's contention under this heading is without merit. Even however, if SARS were arguably able to show that some confidential taxpayer's information forms part of the documentation before the arbitration, the approach adopted by SARS is, with respect, fundamentally flawed.

17. SARS' approach is to say that because some confidential information may form part of the documentation in the arbitration, a total media ban should be imposed. Effectively then, according to SARS, the right to privacy must trump the right to freedom of expression and the principle of open justice. This is a fundamentally incorrect approach. Constitutional rights have equal value and, as such, one cannot jettison another. Where constitutional rights have the potential to come into conflict with one another, they are required to be balanced and reconciled as far as possible.

18. The SCA set out the approach to be followed in *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*[14] as follows:

> "where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily entails the full enjoyment of the other and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one against the value of the other and then preferring the right that is considered to be more valued, jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some

[14] 2007 (5) SA 540 (SCA).

> cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by section 36."[15]

19. The SCA went on to summarise the correct legal position where press freedom is sought to be restricted for the protection of the administration of justice or for the protection of some other right (such as privacy) as follows:

> "In summary, a publication will be unlawful and thus susceptible to being prohibited only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless the court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but more importantly the interests of every person in having access to information."[16]
>
> "Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to apply, with the appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right…..Where it is alleged that a publication is defamatory but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed and an anticipatory ban on publication will seldom be necessary for that purpose. Where there is a risk to rights that are not capable of subsequent vindication a narrow ban might be all that it required if any ban is called for at all. It should not be assumed in other words that once an infringement of rights is threatened, a ban should immediately ensue, least of all

[15] At para 11.

[16] At para 19.

> a ban that goes beyond the minimum to protect the threatened right."[17] (emphasis added)

20. Applying these principles to the matter at hand, the obvious way to reconcile the right to privacy with the right to freedom of expression and the principle of open justice (assuming of course that SARS is able to show that the right to privacy does truly come into play in this matter (which is denied)) would be for the Commissioner to issue an order in respect of the prohibition of confidential information which may serve before the arbitration. The duty would be on SARS to first demonstrate that specific information indeed qualify as "confidential taxpayer information" and further that restrictions on the dissemination of such information, whether by redaction or other means, strike a fair and reasonable balance between the competing rights. This would be a straightforward and effective means of ensuring that all constitutional rights at play are given effect to and protected (assuming again that SARS is able to show that the right to privacy is truly in play here).

21. It is accordingly respectfully submitted that even if SARS is arguably able to show that the documentation before the arbitration includes confidential tax-payer information, this is no reason to disallow media access.

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[17] At para 20.

ALLEGATION THAT MEDIA ACCESS WILL RESUSCITATE AND RESURRECT DEAD AND IRRELEVANT MEDIA PUBLICATIONS

22. SARS's submissions state that *"documentary evidence will unnecessarily resuscitate and resurrect dead media publications about former SARS officials which have nothing to do with the dispute at hand."*[18] It is assumed that the words "documentary evidence" were inserted in error and ought to have been "media access."

23. It is respectfully pointed out that it is not up to SARS to decide what is or is not newsworthy. The media are entitled to do their job subject to the constraints that exist upon them through, for example, the office of the Press Ombudsman. What SARS considers to be newsworthy or indeed relevant to the dispute from a reporting point of view is neither here nor there. This cannot conceivably be a basis to deny media access to the arbitration.

PUBLIC INTEREST

24. SARS contends that *"there is no public interest about this matter and this renders media presence irrelevant."*[19]

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[18] SARS Submissions, para 8.

[19] SARS Submissions, para 9.

25. The clear public interest in this dispute has been dealt with in some detail in the Applicants' main submissions and will not be repeated here. The letter written by Mr Lackay to Parliament is attached hereto. It is clear from the letter that the allegations that arise in this matter and which will be ventilated in the arbitration bear on the constitutional mandate and the integrity of SARS – a vital state institution.

26. In essence, the Applicants submit that:

26.1. The question of whether SARS or any of its members has acted in breach of its constitutional mandate is a matter of inherent and critical public interest and import; and

26.2. SARS is subject to the constitutional principles of transparency and accountability to the public it serves. This means that the constitutional imperative of open justice must apply in circumstances where this question is investigated.

27. It is submitted, with respect, that it is difficult to think of a clearer case of public interest than in respect of the dispute at hand.

ALLEGATIONS REGARDING FAIR HEARING

28. SARS submits that media access should be refused because it "*will not have a fair hearing since its witnesses will be testifying in the presence of media. They might not be at ease to give more information, which regarded to be confidential, which they could."*[20]

29. Again SARS adopts the approach that if the right to a fair hearing and the right to freedom of expression and the principle of open justice come into conflict then its right to a fair hearing must prevail. For the reasons set out above, this approach is fundamentally incorrect. In the event that these two sets of rights truly come into conflict with one another then an attempt must be made to balance and reconcile them.

30. However SARS, with respect, does not even get out of the starting blocks as far as this argument is concerned. This is because, on his own version, the prejudice it alleges as a result of media access is speculative. Thus it states that its witnesses *"might not be at ease to give information."* The legal position is clear. As the SCA held in *Midi Television (Pty) Ltd v Director of Public Prosecutions:*

> "In summary, a publication will be unlawful and thus susceptible to being prohibited only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless the court is satisfied that the disadvantage

[20] SARS Submissions, para 10.

of curtailing the free flow of information outweighs its advantage."[21] (emphasis added)

31. All that SARS has alleged is conjecture and speculation. There can therefore be no question of any infringement of SARS's right to a fair hearing and there is therefore no substance to its argument under this heading.

CONCLUSION

32. For all of the above reasons it is submitted that there is no merit in the contentions advanced by SARS in opposition to media access. The Applicants accordingly persist with the relief they seek as set out in their main submissions.

Heidi Barnes
Applicants' Counsel

Sandton Chambers
15 October 2015

[21] At para 20.