

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 7 SEPTEMBER 1999

CASE NO. J2736/99

In the matter between:

PETUNIA BALOYI

Applicant

and

SWISS WHOLESALERS

Respondent

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J U D G

M E N T

MACROBERT, AJ:

[1] This is an application in terms of section 158(1)(c) of the Labour Relations Act in which the applicant, Ms Baloyi, requests an order that an arbitration award handed down by Commissioner A R Mudau on 18 June 1999 be made an order of this court.

[2] The application is in proper form and order and there is no appearance on behalf of the respondent. The one problem which the court had to confront was that ex facie the arbitration award itself it appears that the reason for the applicant's dismissal by the respondent company was on account of her pregnancy or alternatively on account of her having given birth to a child. Reference is made in the arbitration award to section 187(e) of the Labour Relations Act and it is

trite/..

trite law that the terminations in that particular section of the Labour Relations Act relate to so-called automatic unfair dismissals and they are adjudicable by the Labour Court and not by the CCMA unless the parties otherwise agree. There is no evidence of any agreement before me.

[3] However, this court is not in possession of all the documentation that served before the commissioner concerned, nor does the court have the form 7-11 which referred the dispute to the CCMA in the first place. So for example it may well have been, although there is no evidence of this before me, that the applicant in this matter referred a dispute to the commission in which she provided that she did not know what the reason for her dismissal was and if she did that then the CCMA would have had jurisdiction in terms of the Labour Relations Act, in terms of section 191(5)(a)(iii).

[4] That aside, the court has before it an arbitration award handed down by Commissioner Mudau and the respondent has not sought to review that award as it would have been entitled to, apply for a review, or alternatively there has been no application for rescission of the award in terms of section 144 which the respondent would also have been entitled to do.

[4] There are a number of writings on Administrative Law, including by the learned author Baxter and there are also a number of decisions which impact upon the extent to which an order which was obtained when there was no jurisdiction, may be a nullity or may stand until such time/.. time as it is set aside by one or other means. Now it also says of cases involving the so-called collateral attack rule, one of the leading cases of which was in the Cape Division decided, I think, by Conradie J in the National Panasonic matter in which courts have held before that unless a challenge is made at the right place, at the right time, then

even though an action that is complained of may have been done without jurisdiction, it can none the less stand.

[5] I have therefore come to the conclusion in this matter that to give effect to the primary purposes of the Act, and to do justice to the applicant, not that I am disregarding the rights of the respondent, that as the applicant is here today, she has an order of the CCMA, she wants it made an order of court, that in the premises I am going to make such an order.

1. I accordingly order in terms of prayers 1 and 2 of the notice of motion namely that the award of Commissioner Mudau handed down on 17 June 1999 be made an order of this court, a copy of that award being annexed hereto.

2. That the costs of this application be paid by the respondent.

3. That as claimed interest on the amount so ordered, namely R5 760,00 will be payable by respondent in terms of section 143 of the Labour Relations Act and the interest will be calculated and will run with effect from 6 July 1999 until date of payment.

MACROBERT, AJ

LABOUR COURT OF SOUTH AFRICA