REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J837/98

In the matter between :

S H ZEELIE **APPLICANT**

and

PRICE FORBES [NORTHERN PROVINCE][1] **RESPONDENT**

R E A S O N S

APPLICATION TO REFER THE MATTER BACK TO THE COMMISSION IN TERMS OF SECTION 158[2] OF THE ACT.

DATE : 2ND AUGUST 2001.

JALI J.

1. At the close of respondent's case, the applicant moved an application for the matter to be referred back to the Commission for Conciliation Mediation and Arbitration ["the CCMA"] for arbitration in terms of Section 158[2][a] of the

Labour Act No. 66 of 1995 ["the Act"]. I refused the order and undertook to furnish my reasons later. These are my reasons.

2. Firstly, I will set out the brief background to this matter . The applicant is Siegfried Herman Zeelie, an adult male, Insurance Broker and who carries on business, as such, at Pietersburg, Northern Province. The respondent is Price Forbes [Northern Province], a member of Forbes Financial Services Group [Pty] Ltd. ["Forbes"], a company with limited liability, which carries on business, inter alia, in Pietersburg, Northern Province. The applicant, together with a certain Johan Hendrik Smith ["Smit"], were members of Smit & Zeelie Makelaars CC ["S & Z"]. S & Z carried on business as a short-term insurance brokerage under the name and style of Johan Smit Makelaars ["Smit Brokers"], at Pietersburg, Northern Province. The Smit Brokers business was conducted a few metres from the business of the respondent in Pietersburg. Smit was the senior member of S & Z holding 72% of the members' interest. The applicant held the remaining 28% interest in S & Z.

3. During or about October 1996, Forbes [on the one side] and S & Z, Smit and the applicant [on the other side] entered into a sale agreement. The material terms of the agreement were, inter alia, that Forbes purchased the brokerage business of S & Z [Smit Brokers] referred to above. The applicant was appointed as a director of the respondent. Smit was to work as a consultant for the respondent on

a full time basis for six [6] months. In his capacity as a director, the applicant would continue to work as an insurance broker for the respondent on a full time basis. The effective date of the sale was 1 November 1996.

4. In addition to the abovementioned terms of the agreement, applicant and Smit undertook in favour of Forbes or

its nominee to generally assist Forbes in the everyday running of the business; from the date of signature of the agreement, use their best endeavours to ensure that the goodwill attached to the business was maintained; visit, with individuals designated by Forbes from time to time, clients of the business; and do all things necessary and act in the utmost good faith to ensure the retention of the clients of the business for the continued profitability of the business.

5. During 1998, members of the Respondent staff did an investigation, which revealed that they had lost a lot of business. Predominantly the former Johan Smit Brokers' clients who were being serviced by the applicant. Neither the Board of Directors nor the management had been advised of these lost clients. This led to the Applicant being subjected to a disciplinary enquiry in which he was charged for, inter alia, failing to report lost business. On 15 October 1997, the applicant was found guilty of failing to report lost business. The applicant appealed. The Chairman of the Appeal confirmed his dismissal. On 5 November 1997, the matter was referred to the CCMA for conciliation and later an

application was moved in terms of Section 191[6] for the matter to be transferred to this Court. At the hearing, the respondent was first to lead evidence and at the close of the Respondent's case, the Applicant moved this application.

6. The gravamen of the applicant's argument was that this is a dismissal matter which should have proceeded through arbitration under the auspices of the CCMA, and not be referred to this Court. In reaching this conclusion, Mr Nel, on behalf of the applicant, sought support from the evidence of Mrs Botha, who chaired the disciplinary enquiry. She testified that she regarded this matter as a simple misconduct matter. Accordingly, the matter should have been arbitrated by the CCMA in terms of Section 158[1][a][iii].

7. The respondent's submissions in opposing the application to refer the matter back to the CCMA were that, firstly, this Court does not have jurisdiction to deal with this particular application. Secondly, if the Court has jurisdiction this Court could not be in a position to deal with this application as the complexity of the matter cannot be determined, at this stage of the proceedings, as the matter has not, as yet, been finalised. The various issues which were the basis of the application to refer this matter to this Court in terms of Section 191[6], would still be canvassed during the cross-examination of the applicant. The fact that they

may not have been referred to in the respondent's case, does not mean that they were no longer of relevance.

8. In order for me to consider this matter it will be necessary for me to refer to the grounds relied upon in the application in terms of sec 191(6) which was

moved with the Director of the CCMA. In the application which was moved by the respondent at the CCMA, it was submitted, amongst others, that the matter is a complex matter involving questions of law and factual complexity; it would bear reference to the issues of the interpretation and enforceability of the restraint of trade agreement between the applicant and the respondent; the documents are voluminous and it would be appropriate for the matter to be dealt with by a Judge in the Labour Court; the matter would take a number of days to finalise and the absence of continuous roll at the CCMA and the backlog at the CCMA would delay the finalisation of this matter and numerous expert witnesses may be called to testify about various issues. It would also be in the public interest to refer the matter to this court. This application was opposed by the applicant. However, the Director of the CCMA granted the application, which was moved by the respondent, without furnishing any reason for doing so.

9. Sec 191(6) of the Act empowers the director of the CCMA to refer the matter to the Labour Court upon receiving an application from any of the parties if the director is of the view that it would be appropriate to do so, after consideration of:

a) The reasons for the dismissal;

b) Whether there are questions of law raised by the dispute;

c) The complexity of the dispute;

d) Whether there is conflicting arbitration awards that need to be resolved;

(e) The Public Interest.

10. Sec 158(2) of the Act provides:

"*If it any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the court may:*

a) stay the proceedings and refer the dispute to arbitration, or

b) *with the consent of the parties and if it is expedient to do so, continue with the proceedings with the court sitting as an arbitrator, in which case the court may only make any order that a commissioner or arbitrator would have been entitled to make*".

11. In support of this application the applicant contended that he would suffer great prejudice if the matter was to proceed in the Labour Court. Furthermore, it was the applicant's submission that sec 158(2) was applicable in this situation, that is,

where a matter was referred to the Labour Court from the CCMA in terms of sec 191(6). I have great sympathy with the applicant's submission in this regard. However, I have difficulty in accepting same. In my view section 158(2) would not apply to a matter which has been referred to the Labour Court from the CCMA pursuant upon an application in terms of sec 191(6). I say this for the following reasons.

12. Firstly, section 158(2) states that the Labour Court will consider moving the application back to the CCMA when "it becomes apparent that the dispute **ought to have been** referred to arbitration". In this matter it became apparent at the time when the applicant referred the matter to the CCMA for the first time. It was clear when the respondent moved an application in terms of sec 191(6) that the matter should have been referred to arbitration. It became apparent to the court when the court was seized with this matter that this was a dismissal for misconduct which falls under the jurisdiction of the CCMA. Thus, the matter should have been referred to arbitration under the auspices of the CCMA. In the circumstances it can not be said that it only became apparent at close of the respondent's case that the matter should have been referred to arbitration. Secondly, if one accepts the interpretation of sec 191(5), a referral of a matter to the CCMA or this court is employee driven (**see Van Heerden – v – Spes Bona Financial Administrators Pty Ltd** (1999) 20 ILJ 2127 (LC), **NEHAWU – v – Pressing Metal Industries** (1998) 19 ILJ 1477 (LC), and **Dempster – v – Kahn**

NO and others (1998) 19 ILJ 1475 (LC) at 1476D), then the referral referred to in this section would be a referral by the applicant, as the employee, and not by the Director of the CCMA as was the case in this matter. Accordingly, the sub-section is applicable where the matter had erroneously been referred to the Labour Court, instead of the CCMA and not where the matter has been intentionally referred to the Labour Court pursuant upon an application in terms of sec 191(6).

13. Thirdly, it is clear that the intention of the legislature is that the decision of the Director of the CCMA regarding the referral of the matter to the Labour Court should be final and binding (see sec 191(9)) and also it should not be subject to any form of review (see sec 191(10)). In the circumstances, once one accepts the fact that this was not a review, as the applicant's representative submitted, one can not overlook the fact that the decision to send the matter back to the CCMA would have the same effect of setting aside the decision of the Director of the CCMA. Accordingly, it will defeat the very purpose of the Act and the intention of the legislature.

14. Fourthly, whilst one accepts that this court does not have jurisdiction to adjudicate on a dismissal for misconduct, the effect of sec 191(6) is to give this court jurisdiction to hear such matters. Once the court is seized with a matter, it cannot be referred back to the CCMA. If one were to interpret sec 158(2) as giving the court power to refer it back all over again, it is inconceivable that it could have

Page 9.

been the intention of the legislature as that power would defeat one of the main objects of the Act which is to promote, amongst others, the effective and speedy resolution of disputes (see sec 1(b)(i)-. (iv) read together with sec 3(a) of the Act).

15. In light of the aforegoing, I am in full agreement with the submissions of the respondent's counsel that referring the matter back to the CCMA would delay this matter further. If one considers the balance of convenience it is clearly convenient to proceed with this matter. This court has sat for more than 10 days hearing evidence and the record at the close of the respondent's case consists of over 900 typed pages. The question which needs to be answered is what will

happen to that evidence if the matter was to be referred back to the CCMA. Furthermore I am of the view that the application is premature as the issues which were the basis upon which the application in terms of sec

191(6) was granted may still arise when the applicant's case is being presented. According to the respondent's counsel some of the issues may be raised during the cross-examination of the applicant. I accept that when a party is involved in litigation it can not be said that one party has finished its entire arsenal of ammunition it intends using in the case, when the case has only proceeded as far as the closing of that party's case. In the absence of this court having details about the strategy which the respondent intends adopting in cross examining the applicant, one cannot exclude the possibility (or even the probability) of some of the ammunition being used in the cross examination of the applicant's witnesses, or the applicant

himself, by the respondent's counsel. Accordingly it cannot be apparent to this court that the matter should have been referred to the CCMA at this stage of the proceedings.

16. However, before bringing this issue to finality, I do believe it would be appropriate for this court to raise an issue, which has become of great concern to the Labour Court. The issue is the extent to which matters which should be resolved by the CCMA are referred to the Labour Court. There is an increase in the number of referrals to this court in terms of sec 191(6). Whilst some cases are deserving, it cannot be so with all cases. What has become of concern is the fact

that there are no set guidelines which are available to the litigants or practitioners in the CCMA Rules, on the manner in which these applications are dealt with by the CCMA, save for the broad grounds which are set out in the Act. One does not know what motivates the CCMA to grant or refuse such an application. This is especially so in the absence of reasons from the CCMA for referring matters to this court.

17. The important role of the CCMA in the dispute resolution machinery, set out in terms of the Act, cannot be underplayed. The Director of the CCMA has an obligation to ensure that the CCMA takes its rightful place in this machinery and ensure that matters which ought to be resolved within the CCMA are resolved within the CCMA and only exceptional cases or matters which meet the criteria set out in the Act are referred to the

Labour Court. Otherwise the Labour Court

will find itself being inundated by such applications by litigants who apply to the Director to avoid arbitration or who would prefer their matters being adjudicated in the Labour Court instead of being arbitrated by the CCMA for whatever reason. Every effort should be made to discourage such forum shopping. In **Adonis – v – Western Cape Education Department** (1998) 19 IJ 806 (LC), the court at 814F-H held:

"In the general scheme of things, the commission is meant to arbitrate disputes referred to it. The court assumes a supervisory role to the conduct and activities of the commission. In order to give effect to primary objects of the Act, that is, the effective resolution of disputes, each institution created in terms of the Act must be seen to be effective and to do what it has to do in terms of the Act. The commission has the infrastructure necessary to arbitrate even the most complex disputes."

18. Similarly, in **Avroy Shlain Cosmetics (Pty) Ltd – v - Kok and another** (1998) 19 ILJ 336 (LC) at 349F-G this court held that:

"…If considerations of convenience are to be taken into account, the Act is clear that its purpose is 'to promote the effective resolution of Labour Disputes' (s 1(d)(iv)), and also to promote simple procedures for the resolution of labour disputes through conciliation, mediation and arbitration. Accordingly, in this regard the CCMA was established. This was meant to be an affordable process in terms of which individuals could

resolve their disputes without being involved in lengthy and costly legal procedures. In my view, convenience also calls for the matter to be resolved through a forum which has been set by the Act, which will be affordable to all the parties concerned".

The common theme in all of the above quoted dicta is that the Labour Court has tried to ensure that the CCMA takes its rightful place in resolving labour disputes in terms of the Act. In so doing, it should not lose sight of

the main objects of the Act and the reasons for the establishing of the Commission.

19. It is clear that in terms of the Act a dismissal for misconduct should be arbitrated within the CCMA. That is a right which is given to an employee by the Act. The CCMA's actions are effectively removing that right and the employee whose rights are being affected needs to be given reasons as to why those rights are being affected. Such an action would also be in accordance with the provisions of sec 33 (2) of the Constitution (Act 108 of 1996) which stipulates that every one whose rights have been adversely affected by the administrative action has the right to be given written reasons. I am inclined to say in the circumstances such as in this matter where the application for referral to the Labour Court for adjudication was opposed by the one party, reasons for such a referral should have been furnished. Furnishing of reasons would ordinarily have concentrated or focused the mind and the resulting decision more likely to be soundly

Page 13.

based [see **Flannery and Another v Halifax Estate Agencies Ltd. (t/a Colleys Professional Services) [2000] 1 WLR 377 at 381 H]**. Furthermore, one should not be oblivious to the fact that such a referral has the potential of imposing grave financial consequences for one of the parties. The consequences may be so severe as to deny one party the opportunity of proceeding with his action or defense, as the case may be, because of financial constraints this might place on the party. Legal representation may be allowed in the CCMA as an exception. However, it can not be denied in the Labour Court. The right to legal representation in a court of law is guaranteed in terms of our Constitution.

20. Where the financial position of the parties is not comparable, such an application might be used to exclude the weaker party from the process. This might be tantamount to denying the financially weaker party justice. The scales in terms of expertise in presenting a case where one is represented by Counsel whilst the other cannot

afford one, may be tilted and that may lead to an unjust result.

21. I direct the Registrar to send a copy of these Reasons to the Director of the CCMA for her attention.

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JALI J.

Page 14.

DATES OF HEARING :

1999 – 20 TO 23 SEPTEMBER AND 27 SEPTEMBER

2000 – 28 AUGUST TO 1 SEPTEMBER AND 4 TO 5 SEPTEMBER

30 OCTOBER TO 1 NOVEMBER

30 NOVEMBER TO 1 DECEMBER.

DATE OF JUDGEMENT : 2 AUGUST 2001.

FOR THE APPLICANT : MR CORRIE NEL

INSTRUCTED BY :

CORRIE NEL INCORPORATED

ATTORNEYS OF PIETERSBURG.

FOR RESPONDENT : MR L HALGRYN

INSTRUCTED BY :

JOUBERT ATTORNEYS, JOHANNESBURG.