

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:

C718/00

DATE:

1-3-2002

In the matter between:

THE DEPARTMENT OF JUSTICE

Applicant

and

THE COMMISSION FOR CONCILIATION,

Second and Further

MEDIATION AND ARBITRATION & OTHERS

Respondents

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J U D G M E N T

(Application for Leave to Appeal)

WAGLAY, J:

1. This is an application for leave to appeal against the judgement of this Court handed down on 7 September 2001.
2. The matter originally concerned an application to review and set aside the finding of the Commission for Conciliation, Mediation and Arbitration Commissioner concerning the alleged unfair failure to

promote the fourth and fifth respondents. The Commissioner found that the non-promotion of the respondents amounted to an unfair labour practice within the meaning of Item 2(1)(b) of Schedule 7 of the Act. He accordingly ordered what he took to be the effective instatement of the respondents' to the positions they had applied for. The decision of this Court was to review and set aside the arbitration award with costs.

3. The finding of this Court was based on the following considerations:

- 3.1. Based on general principles of law; the factors to be taken into account in determining how the question of jurisdiction should be resolved where there are two possible main causes of action, each with a different forum having jurisdiction.
- 3.2. After applying the consideration in 1 above in the form of the general test for causation, the Court held that where more than one cause constituted a proper cause of action applicant could select the cause he wished to pursue.
- 3.3. The Court agreed with the applicant in its contention that the fact that the positions could have been filled by external candidates precludes the possibility that the appointments were promotions as opposed to appointments.
- 3.4. That the finding of the Commissioner, that the National Director for

Human Resources Development should have been aware that the ultimate appointees were not suitable for the position in question was not rationally connected to the evidence before him.

3.5. The nature of the CCMA award: This Court held that insofar as the award effectively usurped the function of the Public Service Commission which was not joined as a party to the proceedings, the Commissioner had exceeded its powers and committed an irregularity.

4. In its prayer for leave to appeal, the respondent effectively challenges the findings of this Court in their entirety. It must be noted that the majority of applicant's points were those raised in the course of the trial and had accordingly already been dealt with in the judgement. Nevertheless, applicant is correct in its submission that the matter is one of general importance worthy of consideration by the Labour Appeal Court. Further, many of the issues dealt with in the judgement are ones that had not been exhaustively dealt with by the Legislature. In particular:

4.1. The general principles applied by the Court regarding the correct process by which the primary cause of action is to be established for purposes of jurisdiction were derived from various comparative examples in the field of labour law such as unfair dismissal and basic conditions of employment. Being the first time that these

principles, to this Court's knowledge, have been applied to the distinction between unfair labour practice and unfair discrimination, it is possible that another Court may arrive at a different interpretation and decide that other factors are relevant or apply the stated principles in a manner which leads to a different outcome.

4.2. The finding of this Court that the filling of the advertised positions amounted to appointments and not promotions based on the fact that the positions were open to be filled by external candidates may be open to a different interpretation. The Labour Appeal Court may choose to view the question of promotion purely from the standpoint of the respondent.

4.3. The issue of the Public Service Commission which was not raised in argument by either of the parties. It is possible that the Labour Appeal Court may come to a conclusion at variance with this Court's assumptions that in review proceedings the Court may consider relevant matters which have not necessarily been argued before it.

Although this Court has found the award of the Commissioner to be fatally flawed the Labour Appeal Court may find otherwise.

5. Leave to appeal against the whole judgement of this Court is

therefore granted. The issue of costs of this application should  
be  
dealt with on appeal.

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WAGLAY J