

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**SITTING IN DURBAN**

Not reportable

CASE NO:           **D277/99**

DATE HEARD:       2002/10/23

DATE DELIVERED: 2002/10/23

In the matter between:

P HLEKWAYO

First Applicant

Q P MLAMBO  
Applicant

Second

and

THE SECRETARY, DEPARTMENT OF  
FINANCE  
Respondent

First

T W MAJAKE  
Respondent

Second

THE CPMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION  
Respondent

Third

---

**JUDGMENT DELIVERED BY**

**THE HONOURABLE MS JUSTICE PILLAY  
ON 23 OCTOBER 2002**

---

<u>ON BEHALF OF APPLICANT</u>	:	ADVOCATE M DE KLERK	
<u>INSTRUCTED BY</u>	:	NGWENYA & ZWANE INC.	
<u>ON BEHALF OF RESPONDENT:</u>		ADVOCATE C BOLTON	
<u>INSTRUCTED BY</u>	:	STATE	ATTORNEY –
KWAZULU			
NATAL			

TRANSCRIBER  
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN  
JUDGMENT

PILLAY J

- [1] This is an application to review and set aside a ruling of the second respondent Commissioner. The Commissioner ruled that the CCMA had no jurisdiction to arbitrate this matter as the dispute arose in 1995 when the Labour Relations Act, Act No 66 of 1995 had not come into effect. The Commissioner dismissed the matter.
- [2] The Commissioner must, firstly, be criticised for failing to provide any reason for his ruling. His reasons are not evident from any record that he kept. No adequate record is before me. I am left to decide this matter on the basis of the facts that are common cause as presented in the affidavits of the parties.

[3] The applicant contends that the ruling falls to be reviewed and set aside because the Commissioner failed to take into account the fact that the dispute arose on the date on which one Masondo was appointed, that is on the 29th November 1996. The Commissioner was preoccupied with the fact that the issue was raised in 1995.

[4] On the respondent's version the evidence is that Masondo might have been appointed three months before the court order directing that he be paid his salary for three months was granted. Whether the court order actually directed the respondents to appoint Masondo is not clear. However, it appears not to be in dispute that that might have been the order of Court.

[5] What is in dispute, however, is whether Masondo was appointed before the Court order and whether that appointment was confirmed by the Court.

[6] The first applicant maintains that irrespective of whether there is a court order or whether Masondo was appointed by agreement at any stage before the court order, the date on which the dispute arose fell within

the jurisdiction of the Labour Relations Act. The Commissioner had a duty to enquire into all the facts about the dispute. The dispute is not about the first applicant's right to promotion but a right to fair labour practice and to be considered fairly for promotion.

[7] In the absence of any information from the Commissioner, I rely on, as I have said, the facts that are common cause. The Commissioner ought to have considered that the dispute might have arisen on the 29th November 1996 because that is the basis on which the applicant contended that the dispute arose after the Labour Relations Act came into operation.

[8] The new information that Masondo was appointed three months before the court order is information within the knowledge of the first respondent. Whether that information was before the Commissioner is not clear in the absence of a record.

[9] This matter ought to be reheard by another Commissioner who should keep an open mind to all the facts relating to the cause of action and the date on which that cause arose.

[10] I would like to sound a word of concern. Assuming that the Arbitrator or the Commissioner finds that he or she does have jurisdiction and entertains the arbitration, what might the appropriate remedy be? If it is proved that there is an order of Court, the respondent's hands would be tied. The cases that you referred to of the other four applicants were appointments made long before the Labour Relations Act. So I think that both parties need to apply their minds towards resolving this dispute substantively, without incurring any further costs in litigation. It might be a technical victory for the time being. I do not know that it is going to get you anywhere.

-----

MS BOLTON M'Lady, sorry, just before the order is made, perhaps then the matter could be referred for conciliation first at the bargaining council, that the certificate issued initially at the CCMA would then not stand. Because they do have a conciliation and then the arbitration. So perhaps if it is referred.

PILLAY J Well, I don't have a problem about referring it back for conciliation but it seems to me that if ever there was a will to conciliate you do not need a court order to do that, but if that's what both of you would prefer me to do I will refer it back to the bargaining council for conciliation.

MS BOLTON I think that should be spelt out because they're quite ...  
[intervention]

PILLAY J Are you okay with that, Ms de Klerk?

MS DE KLERK M'Lady, I don't have instructions on that.  
Unfortunately I can't see my attorney. I'm sure there wouldn't be any  
problem in that regard, especially in light of what M'Lady has  
suggested.

PILLAY J So should I make the order for conciliation?

MS DE KLERK Perhaps ...[incomplete]

-----

JUDGMENT (Continued)

PILLAY J

[11] The ruling of the second respondent Commissioner is set aside.

[12] The matter is referred back to the General Public Service Sectoral  
Bargaining Council for conciliation.

[13] There is no order as to costs.

-----

MS BOLTON M'Lady, shouldn't you also spell out conciliation and  
arbitration, if necessary? Just being that because I am on the

bargaining council and these little points, it depends which Commissioner it goes before, will create a lot of difficulties.

PILLAY J Are you okay with that Ms de Klerk?

MS DE KLERK Yes, M'Lady.

-----

JUDGMENT (Continued)

PILLAY J The order is amended by the insertion of the words, "and, if necessary, arbitration", after the word, "conciliation".

\_\_\_\_\_

JUDGE D PILLAY

\_\_\_\_\_