VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 3406/98

In the matter between:

SYBILLA HILZINGER MAAS Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

KAIZER THIBEDI (SENIOR COMMISSIONER) Second Respondent

THE PREMIER OF THE MPUMALANGA PROVINCIAL GOVERNMENT Third Respondent

J U D G M E N T

BASSON, J:

[1] This is an application for the review of a decision taken under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA") by a senior commissioner, the second respondent, to the effect that the

CCMA did not have jurisdiction to conciliate the dispute between the third respondent, the Premier of the Mpumulanga Provincial Government, and the applicant.

[2] The said dispute concerns a residual unfair labour practice allegedly committed by the third respondent in allegedly unfairly discriminating against the applicant in terms of item 2(1)(a) of Part B of Schedule 7 of the Labour Relations Act 66 of 1995 ("the Act").

[3] Item 2(1)(a) of Part B of Schedule 7 reads as follows:

"Residual Unfair Labour Practices:

For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

(a) the unfair discrimination, either directly or indirectly, against an employee on an arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

[4] Item 2(2)(a) of part B of Schedule 7 then states the following:

"**For the purposes of sub-item (1)(a)**- "employee" includes an **applicant_for employment**" (emphasis supplied).

[5] In the present matter the applicant was not as yet employed by the third respondent but was an applicant for employment in terms of item 2(2)(a) quoted above.

[6] It is important to note that it is only “for the purposes of sub-item (1)(a)” that the word "employee" includes such applicant for employment.

[7] It is clear in terms of the definition clause of the Act (section 213) that “employee” would usually mean:

"(a) **any person** excluding an independent contractor **who works for** another person or for **the State and who receives** or is entitled to receive any **remuneration**; and

(b) any person who in any manner assists in carrying on or conducting the business of an employer” (emphasis supplied).

[8] It is therefore clear that the present applicant is not an employee as defined in the Act but only for the purposes of sub-item 2(1)(a) dealing with the residual unfair labour practice of unfair discrimination (quoted above). Such applicant for employment is thus regarded as an employee for the purposes of these provisions **only**.

[9] It appears from the papers that, although no reasons are given, the CCMA

regarded the applicant to be an employee of the State as employer and therefore the CCMA concluded that the employee fell in the scope of a bargaining council, that is, a statutory bargaining council in terms of section 37 of the Act or the Public Service Co-ordinating Bargaining Council (the constitution of which is attached to the papers as “SHM5").

[10] It is important to note that the constitution of this bargaining council defines an “employee” who falls within its registered scope as “the employee of the employer”, meaning, of course, the State as employer, and I quote from clause 2.1 of the said constitution:

"Any expression used in this constitution which is defined in the Labour Relations Act, 1995 (Act 66 of 1995) shall have the same meaning as in the Act **except** that employee shall mean the employee of the employer" (emphasis supplied).

[11] It would appear therefore that persons who are not employees of the employer are in terms of the constitution of the Public Service Co-ordinating Bargaining Council, excluded from the registered scope of such bargaining council. It is, of course, not denied that the Mpumulanga Government, the third respondent, is part of the public service and as such falls within the registered scope of the bargaining councils concerned.

[12] Disputes such as the dispute in the present matter must be referred first to

conciliation before the dispute (if it remains unresolved) may be referred by any party to the Labour Court for adjudication in terms of item 4(a) of Part B of Schedule 7 of the Act.

[13] In this regard item 3(1) of Part B of Schedule 7 states the following:

"Any party may refer a dispute about an alleged unfair labour practice in writing to- (a) a council **if** the **parties to the dispute** fall within the **registered scope** of that council or the commission (CCMA) **if no council has jurisdiction**" (emphasis supplied).

[14] It is clear that the applicant in the present matter, being a party to the present dispute, does not fall within the registered scope of the bargaining councils for the public service. The applicant is namely not an “employee” in the public service or a public servant (as is required in terms of the definition of “employee” contained in the constitution of the bargaining council) but merely an applicant for employment.

[15] In the event, item 3(1) (quoted above) applies and such dispute must be referred to the CCMA for conciliation which must be undertaken in terms of item 3(3) of Part B of Schedule 7 to the Act which states:

"The council or the commission (the CCMA) must attempt to resolve the dispute through conciliation."

[16] In the event, the refusal by the CCMA to accept the present dispute for conciliation as is indicated in Annexure “SHM3" can not be justified in view of these provisions of the Act.

[17] This refusal therefore falls to be set aside on review in terms of section 158(1)(g) of the Act.

[18] The applicant also prayed for an order that the CCMA be directed to conciliate the dispute which was thus referred to it by the applicant under Case No. MP7756.

[19] I believe that the applicant is entitled to her full relief namely the setting aside of the said decision by the first respondent (made by the second respondent, a senior commissioner) that the first respondent did not have the jurisdiction to conciliate the said dispute as well as that the first respondent be directed to conciliate the said dispute referred to it.

[20] In the event, I make the following order:

1. The decision of the first and second respondents dated 27 August 1998 that the first respondent did not have jurisdiction to conciliate the dispute referred to the first respondent by the applicant under Case No. MP7756 is hereby reviewed and set aside.

2. The first respondent is directed to conciliate the dispute referred to it by the applicant under Case No. MP7756.

3. No order is made as to costs.

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BASSON J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

PLICANT : ADV W G LA GRANGE

: Allardyce & Partners

SPONDENTS : NO APPEARANCE

: 21 JANUARY 1999

NT : *EX TEMPORE* (EDITED VERSION)