

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J457/99

In the matter between:

SWART, J J

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION AND OTHERS

Respondents

J U D G M E N T

KENNEDY, AJ:

[1] In this matter, Mr Swart, the applicant, has brought an application on notice of motion seeking the review and setting aside of a decision of a commissioner, Mr Breedt, in the CCMA. In terms of the award handed down it is apparent that the commissioner decided that the CCMA lacks the necessary jurisdiction to hear the labour dispute on the basis of a finding that the applicant was not an

employee and therefore fell outside the ambit of the Labour Relations Act.

[2] The notice of motion filed by the applicant in the present matter is supported by an affidavit which follows the standard form referred to in the rules but it simply sets out a few basic facts such as to identify both the applicant and the respondents and it refers also to the fact that he seeks to review the award handed down by the commissioner.

[3] The founding affidavit does not, however, set out any grounds on which he seeks to review the award and does not set out any factual averments as to why he seeks to attack the validity or the regularity of the award.

[4] The rules of this court in such matters are clear. The procedure for reviews of CCMA awards is dealt with in Rule 7A of the Rules of this Court. In particular I refer to Rule 7A(2) which reads as follows:

"The Notice of Motion must -

(a) call upon the person or body to show cause why the decision or proceeding should not be reviewed and corrected

or set aside;

(b) call upon the person or body to despatch within ten days after receipt of the Notice of Motion, to the Registrar, the record of the proceedings sought to be corrected or set aside together with such reasons as are required by law or desirable to provide and

to notify the applicant that this has been done; and

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside."

[5] In the present matter it is clear that the latter provision, namely the requirement in subrule (2)(c), that the factual and legal grounds be set out on which the applicant relies to have the decision corrected or set aside, has not been complied with at all.

[6] On the face of it, therefore, the founding affidavit fails to comply with the requirements of the rules. I must, however, take into account the fact that Mr Swart is a lay person who is unrepresented and is clearly not familiar with the provisions of the court rules. He seeks

the opportunity to have the matter postponed in order for him to supplement or amend his affidavit in support of his review. I asked him briefly to give an outline of the nature of the grounds on which he alleges that the arbitrator acted in an irregular or improper way, in other words the grounds for the contemplated review. Much of what he submitted to me appeared to be irrelevant as far as review grounds are

concerned but he did none the less indicate at least one point on which there seems to be at least the kernel of a possible ground for review, namely that he alleged that the third respondent in the present matter, Mr Lyczynski, had submitted documents to the arbitrator on which the arbitrator relied in coming to his decision and which documents were not given to the applicant in order for him to peruse them and to have an opportunity to deal with them either in evidence or argument. Of course it is not appropriate for me at this stage to deal with whether or not that allegation is correct, that is a matter that seems to be required to be dealt with by way of proper affidavits to be filed by the parties concerned and, if necessary, for the commissioner, if called upon to do so, to deal with that in due course.

[7] The third respondent, Mr Lyczynski, resisted the application for postponement on the basis, firstly, that the case had properly been heard by the arbitrator in the CCMA and, secondly, on the basis of a submission that the applicant was abusing the court process by bringing a case devoid of merit as he has allegedly done, according to Mr Lyczynski, in other courts and on other occasions.

[8] Neither of these points, in my view, is a proper basis to avoid the request for postponement. Whether or not the case was properly heard by the commissioner, by the arbitrator in the CCMA, is of course the question which will have to be decided in due course in the review application. If I grant the postponement to allow the applicant to put forward his allegations in proper form, in the form of an affidavit, to set out *inter alia*, the ground that he has referred to already, that affidavit will then have to be served on Mr Lyczynski as well as on the CCMA and the commissioner to enable each of them to file whatever affidavit or other evidence they may wish to resist the review. The court in due course can then test and decide whether the case was indeed properly heard by

the commissioner.

[9] The second point raised by Mr Lyczynski, namely that the applicant is abusing the court process is, in my view, on the evidence before me not supported by any proper basis for me to reach such a conclusion. It appears to me on the face of it that the applicant is simply ignorant of the court processes and rules and he should, in the interests of fairness and in the interests of resolving the dispute on its merit, be granted to an opportunity to file further papers.

[10] However, this matter cannot be left on an indefinite basis and he therefore should be put on terms to file

the affidavit with reasonable time. I there grant the following order:

- (a) This application is postponed *sine die*;
- (b) The applicant is directed to file a supplementary affidavit to set out the grounds on which he seeks to review the second respondent's decision;
- (c) That affidavit is to be filed within ten days of today.

ACTING JUDGE KENNEDY

APPLICANT IN PERSON

THIRD RESPONDENT IN PERSON

DATE OF HEARING : **17 AUGUST 1999**

DATE OF JUDGMENT : **17 AUGUST 1999**