

**IN THE LABOUR COURT IN SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO. JR1092/02

In the matter between:

ALFRED SPENCER CLOSE

Applicant

and

SHINN FU (PTY) LTD SA

First Respondent

ZWANE BUTI

Second Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

JUDGMENT

NDLOVU AJ

[1] The ruling issued by the second respondent (“the commissioner”) dated 13 May 2002 (erroneously referred to in the notice of motion as 15 May 2002) under Case No. GA2243-01 (“the Ruling”) was challenged by the applicant who sought an order that the said ruling be reviewed and set aside. The commissioner operated under the auspices of the third respondent (“the CCMA”) when he attended to the conciliation process in the dispute between the applicant and his alleged former employer, the first respondent herein.

[2] The applicant alleged that he was employed by the first respondent as manager in its trading division called Omega Cycling from 1 July 1999 until 5 April 2001 when he was constructively dismissed by the first respondent. Hence the applicant referred the dispute to the CCMA for conciliation.

[3] At the conciliation meeting, which was held on 28 May 2001, the first respondent raised a point *in limine* contending that the applicant was not employed by the first respondent within the meaning of section 213 of the Labour Relations Act 66 of 1995 (“the Act”) and that there was, therefore, no employment relationship between the parties. For this reason, the first respondent submitted that the CCMA and the commissioner had no jurisdiction to deal with the matter.

[4] Thereupon the commissioner required the parties to submit written submissions on the legal point raised by the first respondent. He called upon the first respondent to file, within 7 days, what the commissioner termed “a formal application” setting out the grounds of its objection and thereafter the applicant to file what the commissioner termed “a reply” within 7 days of his receipt of the first respondent’s “formal application”. The commissioner further indicated that the filing of the said documents by the parties would have been in compliance with Rule 19 of the CCMA Rules. He then adjourned the matter pending the filing of the documents aforesaid.

[5] It appeared *ex facie* the Ruling that since the adjournment of the matter on 28 May 2001 next to happen was the commissioner issuing the Ruling only on 13 May 2002. In paragraph 3.2 thereof he made the following observation:

“3.2 The respondent filed the application for the jurisdictional point *in limine* in terms of Rule (19) of the Rules of the CCMA on 4th June 2001. To date the applicant has failed to file a reply in terms of Rule 19(4) of the Rules of the CCMA.

And at paragraphs 5 and 6 the commissioner concluded as follows:

“5.1 It is clear from Mr Deveugele’s supporting affidavit that the applicant is an independent contractor and is therefore excluded from the definition of an employee. In the circumstances I am satisfied that the applicant is not an employee within the meaning of the Act as contemplated in terms of section 213 of the Labour Relations Act of 1995 “the Act”.

“6.1.1 Having heard all the evidence on the application for the above preliminary point and having considered all the relevant aspects. (sic) As the applicant did not oppose the application as such I have no reason not to accept it. I am satisfied on the basis of the evidence before me that the applicant is not an employee as contemplated in section 213 of the Labour Relations Act. Accordingly the application is successful. The CCMA does not have jurisdiction. No order as to costs”.

[6] A copy of the first respondent’s so-called formal application on the point *in limine* before the commissioner was attached to the applicant’s founding affidavit and marked “FA3”. The said “application” was accompanied by the first respondent’s supporting affidavit, deposed to on its behalf by its managing director, Mr Deveugele.

[7] According to the applicant, he responded to the first respondent's point *in limine* by filing his answering affidavit (as respondent in that matter) on 13 June 2001, a copy whereof the applicant included in his founding affidavit, marked "FA4". He further submitted that on the same day (i.e. 13 June 2001) he delivered copies of his answering affidavit to the first respondent, the commissioner and the CCMA, per facsimile. Copies of facsimile slips to that effect were also attached to the applicant's founding affidavit.

[8] On 28 June 2001 the first respondent (as applicant in that matter) filed its replying affidavit (albeit referred to as "answering affidavit") in response to the applicant's answering affidavit (the applicant being a respondent in that matter). A copy of the replying affidavit was also included in the applicant's founding affidavit and marked "FA6".

[9] Counsel for the first respondent pointed out, in any event, that the applicant's review papers did not reflect the relevant section of the Act on which the application was based. He further submitted, on the merits, that if the position was that the commissioner, when he made the Ruling, had not taken into account the two documents in question, then the remedy available to the applicant was to have applied to the commissioner for rescission of the Ruling and not to take the matter up for review.

[10] Although it was important for the party initiating the review application proceedings to indicate the relevant section and statute on which the application was founded, it did not seem to me that this point was sufficient to serve as a ground for dismissing, or even striking off, the application. I was satisfied that the Court had the jurisdiction to entertain the application in terms of section 158(1)(g) of the Act.

[11] It is quite clear from the Ruling itself that the commissioner did not consider the applicant's "answering affidavit" and the first respondent's "replying affidavit" in the matter before him. In paragraph 3.2 of the Ruling he specifically stated: **".....To date** (referring to the date when he issued the Ruling - being 13 May 2002) **the applicant has failed to file a reply in terms of Rule 19(4)....."**. This statement was obviously incorrect. The applicant did file his "answering affidavit" and cogent proof thereof was the first respondent's replying

affidavit in response thereto. What appeared likely, therefore, was that the two documents were not brought to the attention of the commissioner, even though they might probably have been served on the CCMA.

[12] I do not agree with the first respondent's Counsel that the only appropriate remedy at the applicant's disposal was to launch a rescission application to the commissioner. The context in which the commissioner dealt with the matter did not, in my view, necessarily render his Ruling a decision granted by default. The representatives for both parties appeared before the commissioner on 28 May 2001 for the conciliation meeting. When a point *in limine* was raised on behalf of the first respondent the commissioner then directed both parties to file written submissions on the legal point raised. His apparent intention was then to consider the point *in limine* on the basis of the parties' written submissions, without requiring the parties' representatives to appear again before the commissioner for oral arguments. The commissioner described this procedure as a formal application in terms of Rule 19 of the CCMA Rules. However, Rule 19 does not relate to any such procedure. It only relates to the filing of a statement of case by the referring party and the answering statement by the other party in arbitration proceedings - the equivalent of Rule 6 of the Rules of Court in respect of referral (trial) proceedings in this Court. Clearly, the commissioner was not engaged in the arbitration process as to have entitled him to invoke rule 19 of the CCMA Rules. Indeed, he conducted an enquiry to determine whether or not he had the jurisdiction to conciliate the dispute (or alleged dispute) between the parties. Whether he even had the authority (in his capacity as conciliating commissioner) to make such enquiry, was another issue which was, however, not before the Court. It was noted that the applicant, in his "answering affidavit" of 13 June 2001 ("FA4") (which the commissioner did not consider) challenged the commissioner's authority in that regard.

[13] In my view, therefore, even if the first respondent had not filed the so-called formal application on the point *in limine* the commissioner would nevertheless still have been entitled to issue his ruling on the point. It seems to me the commissioner, wittingly or unwittingly, misquoted the CCMA Rules and he also gave wrong and misleading labels to the processes which he directed the parties to file in respect of the proceedings before him. Therefore, if only one party

filed the written submissions (as, in terms of the Ruling , only the first respondent did) the position did not render the Ruling (given thereon) a “default ruling” within the meaning of Rule 32 of the CCMA Rules.

[14] In any event, it is common cause that the applicant filed his “answering affidavit” on 13 June 2001 and the first respondent filed its “replying affidavit” on 28 June 2001, both which documents the commissioner did not take into account in the Ruling which the applicant now challenges. This alone would be a valid and sufficient ground for the commissioner to rescind the Ruling and reconsider the matter afresh on the basis of all the material properly presented to him, including the two documents in question. However, such procedure would further delay the finalisation of the dispute between the parties. There is no reason, in my view, why the Court may not entertain the application in terms of section 158(1)(g), as indicated above.

[15] I further noted that even if the procedure adopted by the commissioner was not fatally irregular on the basis of my criticism above, there was no indication, *ex facie* the Ruling, that the commissioner satisfied himself that the Applicant was served with the first respondent’s “formal application” papers to have justified the commissioner to deal with the matter in the absence of the applicant’s “answering papers”.

[16] It seems to me, in the circumstances, that the Ruling should be set aside and the first respondent’s point *in limine* referred back to the commissioner to reconsider the matter on the basis of all the material properly made available to him on the question in point, including the two documents concerned.

[17] Shortly prior to the hearing of this application, attorneys for both the applicant and the first respondent filed an affidavit and answering affidavit, respectively, on what the applicant’s legal team appeared to have believed were legal developments since the launchment of this review application, on the question of whether a conciliating commissioner’s ruling had any binding force on the arbitrator who would subsequently arbitrate the dispute. The applicant’s attorney referred to the cases: *Virgin Active SA (Pty) Ltd vs Mathole NO and Others* [2002] 23 ILJ 948 (LC) and *SABC vs CCMA and Others* [2003] 24 ILJ 211 (LC). He submitted that in terms of a supplementary judgment in the *Virgin Active* case (not

reported yet) the Court **“recorded that the conciliating commissioner’s decision is not binding on the arbitrating commissioner** (*paragraph 7 of the applicant’s attorney’s affidavit*) and that these judgments were brought to his attention by Counsel who then advised that **“he was of the opinion that it was no longer necessary to proceed with the review proceedings”**. (*Paragraph 5 of the same affidavit*). The applicant’s attorney further submitted, in his affidavit, that he had thereupon suggested to the first respondent’s attorney to have the matter removed from the roll or be postponed *sine die*. In response, the first respondent’s attorney, in his own affidavit, objected to the application for postponement of the review and submitted that the review should be dismissed with costs. He argued that the applicant could not, on the one hand, submit that the review application was no longer necessary and, on the other, request that the same review application be postponed.

[18] I should point out at the outset that I simply could not comprehend the reason why the parties’ attorneys felt entitled to engage themselves directly in this litigation in the manner that they did (through their affidavits), as though they were the parties themselves. Whilst it might be permissible for an attorney, in appropriate circumstances, to depose to an affidavit in a matter involving his or her client, it did not seem to me that the present instance were such circumstances. In any event, as alluded to earlier, I was satisfied that the Ruling was subject to review by the Court under section 158(1)(g) of the Act. I have already indicated my finding on the merits of the review application.

[19] Accordingly, I make the following order:

- 1) The Ruling issued by the commissioner on 13 May 2002 under Case No. GA2243-01 is rescinded and set aside.
- 2) The dispute between the applicant and the first respondent is referred back to the CCMA in order for the commissioner (the second respondent), or any other commissioner appointed thereto by the CCMA, to reconsider the first respondent’s point *in limine* in the light of this Judgment.
- 3) There is no order as to costs.

NDLOVU, AJ

Appearances:

For the Applicant : Mr F G Barrie
Instructed by : Harvey Nossel & Turnbull
Melrose Arch
Johannesburg

For the Third Respondent : Mr L Charoux
Instructed by : Yusuf Nagdee Attorney
Marshalltown
Johannesburg

Date of Judgment : 13 February 2004