

166336IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT JOHANNESBURG)

CASE NO: J170/99

In the matter between:

**HEALTH & HYGIENE SERVICES**

Applicant

And

**SEEDAT N.O. (cited in her capacity as COMMISSIONER  
FOR THE COMMISSION FOR CONCILIATION,  
MEDIATION & ARBITRATION)**

First  
Respondent

**THE COMMISSION FOR CONCILIATION, MEDIATION &  
ARBITRATION**

Second  
Respondent

**DISTRIBUTIVE CATERING HOTELS & ALLIED  
WORKERS UNION**

Third  
Respondent

## **JUDGMENT**

**STELZNER AJ**

1. This matter came before me by way of a review in terms of the provisions of section 145 of the Labour Relations Act, No 66 of 1995 ("the Act"). A dispute was referred to the CCMA (the second respondent) by the third respondent concerning the exercise of organisational rights in terms of the Act, in particular the right to the granting of stop order facilities in terms of the Act. The parties failed to settle this dispute at conciliation and the dispute was then referred to arbitration in terms of the Act.

2. The arbitration proceedings took place before the first respondent on 23 November 1998. At the outset of the proceedings the applicant raised an objection *in limine* to the jurisdiction of the first respondent to entertain the matter. The objection *in limine* was based on the allegation that the provisions of section 21 of the Act had not been complied with in that the written notice addressed to the employer by the trade union wishing to exercise an organisational right had not contained all the details set out in section 21(2) of the Act.
  
3. It appears common cause from the documents forming part of the papers before me and from the arbitration award of the first respondent, that the notice given by third respondent in terms of the provisions of section 21 did not, as a matter of fact, comply with all the requirements set out in section 21(2). It is clear from the arbitration award of the first respondent that his finding was made on the basis that the failure of third respondent to adhere to the provisions of section 21(2) did not divest the CCMA (the second respondent) of jurisdiction to hear the dispute. In deciding that the CCMA was not deprived of jurisdiction first respondent held that the provisions of section 21(2) are directory rather than peremptory. In coming to this conclusion first respondent relied on the decision of Murphy C in *SA Clothing & Textile Workers Union v Sheraton Textiles (Pty) Ltd* (1997) 18 ILJ

1412 (CCMA).

4. It was argued on behalf of the applicant that section 21(2) of the Act in fact contains the prerequisite (procedural) jurisdictional facts which must exist before first respondent acting in his capacity as a Commissioner for second respondent can exercise any of the functions referred to in the remainder of section 21 of the Act and, in particular in this instance, the arbitral function referred to in section 21(7). As authority for this proposition the decision of the Labour Appeal Court in the matter of *SA Commercial Catering & Allied Workers Union v Speciality Stores* (1998) 19 ILJ 557 (LAC) was referred to. In that matter the Labour Appeal Court held as follows:

*“166336The substantive preconditions for the exercise of the commission's functions of conciliation and arbitration in terms of s 21(6) and 21(7) of the Act are those set out in s 21(1), viz that it can exercise those functions only -*

*in respect of organizational rights conferred by part A of chapter III of the Act; and*

*in respect of the exercise of the rights in a 'workplace' as defined by s 213 of the Act.*

*Procedurally, the following facts must exist:*

*a written notice must have been sent by a registered trade union to an employer (s 21(1));*

*the notice must be accompanied by a certified copy of the trade union's certificate of registration (s 21(2));*

*the notice must contain specific particulars (s 21(2)(a) -(c) );*

*the employer must have received the notice (s 21(3));*

*no collective agreement must have been concluded as to the manner in which the trade union will exercise the rights in respect of a particular workplace (either because no meeting was held in terms of s 21(3), or because no agreement was reached at such a meeting);*

*a dispute or alleged dispute must exist (s 21(4));*

*the dispute must have been referred to the commission by one of the parties (s 21(4));*

*a copy of the referral must have been served on the other party (s 21(5));*

*the commission must have appointed a commissioner to resolve the*

*dispute by conciliation (s 21(6));*

*in the case of arbitration, further, that the attempt at conciliation must have failed and that one of the parties requested arbitration (s 21(7)).*

*Before the commission exercises its function of conciliation and arbitration under the Act, the substantive and procedural preconditions set out in the previous paragraph must exist. It cannot validly exercise those functions if the preconditions do not exist."*

(At 562F - 563B of the judgment)

5. The Labour Appeal Court has thus confirmed that the procedural steps set out in the provisions of s 21 are peremptory and not merely directory. I am of course bound by that decision.
6. In the *Speciality Stores* decision the Labour Appeal Court also confirmed that generally speaking a superior court always has the power to determine whether the preconditions for the exercise of a statutory power to act have been met even in the absence of any statutorily provided remedy by way of an appeal or review. (At 563G-H of the *Speciality Stores* judgment and see

also *Minister of Public Works v Haffejee* NO 1996 (3) SA 745 (A) at 751G).

7. In this matter, however, the statute does provide for a remedy by way of review, being that contained in section 145 of the Act. Arbitration awards may be reviewed and set aside on the basis of a defect in the proceedings. A defect in the proceedings means, *inter alia*, that the commissioner -

committed misconduct in relation to the duties of a commissioner as arbitrator;

committed a gross irregularity in the conduct of the arbitration proceedings; or

exceeded the commissioner's powers.

8. In this instance it was alleged that the defect in the proceedings arose as a result of the commissioner exceeding his powers in terms of the Act in determining that he had the necessary jurisdiction to arbitrate the matter when the procedural preconditions for the exercise of that power did not exist. This would indeed appear to be the case.

*“Where the Commission purports to fulfil its conciliatory and arbitral functions it must do so in the same manner as other bodies authorised by statute to perform certain functions do theirs. This means that it can only lawfully perform those functions if it has the competence or jurisdiction to do so in terms of the Act. The manner in which it exercises that statutory competence or jurisdiction must also be in accordance with the provisions of the Act and the law.”*

*(The Speciality Stores decision at 560E).*

9. The application came before me on an unopposed basis. Applicant only sought costs against any respondent who opposed the granting of the application and in the circumstances it appears appropriate to make no order as to costs.
10. In the circumstances the following order is made:
  - 10.1 The award of the first respondent under case number GA33390 dated 3 December 1998 in the arbitration proceedings between the applicant and the third respondent is reviewed and set aside.
  - 10.2 The award of the first respondent is substituted with the

following award:

“The CCMA has no jurisdiction to entertain the application and the application is dismissed.”

10.3 There is no order as to costs.

**S STELZNER**

**Acting Judge of the Labour Court of South Africa**

DATE OF HEARING: 13 August 1999

DATE OF JUDGMENT: 18 August 1999

APPEARANCE FOR Mr S Snyman of Snyman  
APPLICANT: Van Den Heever Heyns Inc  
Attorneys