

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

D99/01

CASE _____ NO: _____

2002/01/30

DATE:

30/01/02

HEARD:

30/01/02

DELIVERED:

In the matter between:

FIDELITY
Applicant

GUARD

HOLDINGS

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**
Respondent

First

R. PADAYACHEE
Second Respondent

(AS

COMMISSIONER)

THEMBA XULU & 56 OTHERS
Respondent

Third

JUDGMENT DELIVERED BY

**THE HONOURABLE MS JUSTICE PILLAY
ON 30 JANUARY 2002**

ON BEHALF OF APPLICANT

MR R MENTHEY

ON BEHALF OF RESPONDENT

MR P JAFTA

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN
JUDGMENT

PILLAY J

[1] This is an application to set aside a certificate of the second respondent Commissioner. The employees referred a dispute relating to their alleged unfair retrenchment to the CCMA for conciliation.

[2] At the conciliation, the applicant, that is the employer, had asked the Commissioner for a ruling *in limine* as the identity of the individual employees and their addresses had not been disclosed. Nor had they signed the referral to conciliation.

[3] The conciliation was adjourned on some basis. The applicant

alleges that it was to determine the names and addresses of the employees. The respondent alleged that it was to canvass settlement. There is a dispute of fact on what the reason for the adjournment was. In any event, there is no dispute as to whether the point *in limine* was raised at the conciliation.

[4] In any event, the applicant subsequently wrote to the first respondent, recording its objections to the referral and pointing out that it would be invalid for two reasons. Firstly, that the individual employees had not been properly identified and cited *Librapack CC v Moletsane NO & Others* 1998 19 ILJ 1169 (LC) in support of its position. Secondly, that the signature to the referral to conciliation was that of one Mr Mafsoa, an official of the Human Rights Workers Union, which was unregistered. That objection is dated the 1st November 2000 and was faxed on that date to the first respondent.

[5] The Commissioner, nevertheless, issued a certificate of non-resolution of the dispute on the 7th November 2000.

[6] Whether the Commissioner received the written objection is not

clear. However, from her response, it would appear that, even if she had received it, it was her view that as the parties had consented to the addition of "and others" to the applicant's citation, that the issuing of the certificate was entirely regular. She furthermore points out that the signature to the referral appeared to be not that of Mr Mafsoa.

[7] The information as to what transpired at conciliation is somewhat thin. Furthermore, it is also not clear as to precisely what the terms of the agreement were when the parties agreed to the addition of "and others" to the citation in the referral.

[8] I have considered the issue as to the prejudice that the applicant might suffer if the certificate were allowed to stand. The referral related specifically to 56 employees who had been retrenched. Their names have since been disclosed to the applicant and *prima facie* it would appear that the applicant would not be prejudiced, either if it wished to make an offer of settlement or to defend its position at adjudication.

[9] However, even if this were to be the case, the more important question is whether the referral was made by a person

properly authorised to do so. If, as alleged, the union was unregistered, then it could not refer a dispute on behalf of the individual employee. That issue, namely whether the union was registered or not or who referred the matter to the CCMA is not in dispute.

[10] In those circumstances, the Commissioner had a duty to apply her mind to the validity of the referral. From her response, it would appear that she was, firstly, not mindful of the point raised *in limine* and, secondly, had not considered particularly the *locus standi* of the parties referring the matter to conciliation at all.

[11] In the circumstances, I grant an order in the following terms:

- a) The three applications for condonation are granted with no order as to costs.
- b) On the merits, an order in terms of paragraph 1 of the Notice of Motion, reviewing and setting aside the Certificate of Outcome for Conciliation is granted, with no order as to costs. I make no order as to costs because the opposition was not frivolous or vexatious and was occasioned partly by the conduct of the Commissioner.

JUDGE D. PILLAY