IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: D935/97

In the matter between

PHILLIP SITHOLE	**Applicant**
and	
LUNGILE NOGWAZA N.O.	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
WARDKISS HOMECARE D.I.Y. SUPERSTORES t/a FT BUILDING SUPPLIES (PTY) LIMITED	**Third Respondent**

JUDGMENT

de VILLIERS AJ

1. Before proceeding with the merits of the matter, I must dispose of a preliminary issue.

2. In terms of my order dated 6 May 1999, the parties were to file their Heads of Argument at least five days before the hearing of this matter, that is by 14 May 1999 (a Friday). A copy of the Respondent's heads were faxed to the Court on 17 May 1999 (the following Monday).

3. According to an affidavit filed by the Third Respondent's attorneys' personal assistant (a Ms van Wyk) at the hearing of this matter, the Third Respondent's attorney (Mr Soldatos) was unaware that this matter had

been set down until 10 May 1999 when they received the Applicant's heads and telephoned the Court to determine the status of the matter.

4. It was after this telephone call that the Registrar faxed the order referred to above to the Third Respondent's attorney (on 11 May 1999). Because Mr Soldatos was out of town, the heads were drafted on 14 May 1999 and Ms van Wyk attempted to fax them to the Court and to the Applicant's attorney on 14 May 1999 at approximately 16h45 without success. She then faxed them to the Court on Monday 17 May 1999, with the original to follow by courier. She did not fax them to the Applicant because the Applicant's attorney advised her that his office had run out of telefax paper and that the heads would be collected from the Court.

5. The Applicant's attorney advised the Court that he had only received the heads on the day of the hearing.

6. On the morning of the hearing this matter was stood down until after tea. I asked the Applicant's attorney, in chambers, whether this would be sufficient time for him to peruse the heads and he replied in the affirmative.

7. Because I was satisfied that the Third Respondent had shown good cause and that the Applicant did not suffer any prejudice as a result of the late filing of the heads, condonation was granted.

8. I now deal with the merits.

9. The Applicant was employed by the Third Respondent ("the employer") as a General Labourer and was dismissed on 24 January 1995 for misconduct.

10. On 19 February 1996, an agreement was concluded between the South African Commercial Catering and Allied Workers Union ("the union"), of which the Applicant was a member, and the employer to the effect that the dispute about the dismissal of the Applicant be referred to voluntary arbitration. It is common cause that the agreement in this regard was never committed to writing.

11. The next step was for the union to propose an arbitrator to the employer.

12. On 9 March 1996, the employer received a letter from the union *inter alia* demanding the Applicant's immediate reinstatement failing which the union would "seek recourse through the provision of the labour relations act of 1956" (sic).

13. This was followed by a letter from the employer to the union on 12 March 1998 which confirms the agreement made on 19 February 1996 and concludes as follows:

> **Your fax clearly indicates that you now have no intention of proceeding in the manner agreed to on the 19 February 1996".**

14. This in turn was followed by a response from the union on 14 March 1996 in which the employer's letter is acknowledged and which indicates that the union's legal unit would be communicating with the employer regarding the date and name of the arbitrator.

15. The next communication between the union and the employer regarding this dispute took place some eight months later, on 15 November 1996, when the union advised the employer that that it was awaiting a list of available arbitrators from the "MCC" and that, as soon as the list was

forthcoming, the union would notify the employer of its choice.

16. On 20 November 1996, the employer responded as follows:

> **"I would like to refer you to a fax sent by SACCAWU on 9 March 1996 which was after the verbal agreement of arbitration. This fax demanded immediate reinstatement and our failure to do so would result in SACCAWU seeking recourse through the provision of the Labour Relation (**sic**) Act.**
>
> **To me this was a clear indication that SACCAWU was not interested in arbitration and I indicated such in my fax dated 12 March 1996.**
>
> **Therefore in response to your fax dated 15 November 1996, the offer by the company no longer stands."**

17. This was followed by a further letter from the employer to the union dated 6 December 1996 wherein the employer confirms that the offer of arbitration by the company no longer stands.

18. On 23 March 1997 and 28 October 1997, the union applied to the Department of Labour for the establishment of a conciliation board to determine the dispute concerning the dismissal of the Applicant in terms of the Labour Relations Act of 1956. The latter application was accompanied by an application for condonation which was refused. The refusal was communicated to the parties on or about 10 December 1997.

19. The next communication regarding this dispute took place on 12 August 1998 when the Applicant's attorney wrote to the employer calling upon it to give reasons why it was "no longer prepared to abide by the agreement to resolve the dispute through the process of arbitration" and indicating that if it did not do so, within five days, "we shall be constrained to enforce the agreement by Court action".

20. On 13 August 1998, the employer responded to the Applicant’s attorney

by way of a letter setting out the history of the dispute and concluding as follows:

> **"We believe that the Company gave the dismissed Mr Sithole and his representative union more than enough time to take the matter to arbitration before the offer was withdrawn.**
>
> **We see no reason to accommodate your request as the applicant and his various representatives have not followed the matter through timeously for no apparent reason that would condone this extreme lateness. The matter is now nearly two years and 8 months old and we see no reason to continue with the matter.**

Furthermore, the matter is also out of time in terms of the CCMA conciliation process as the alleged unfair dismissal is out of the 30 day period (section 135 (2)) of the Act.

> **We believe that we have tried to accommodate Mr Sithole and have acted reasonably and believe that the matter is now closed."**

21. The matter was referred to the Second Respondent ("the Commission") on or about 20 August 1998. The nature of the dispute is described as:

> **"Refusal to comply with an agreement to submit dispute to arbitration."**

22. The date of the dispute is indicated as being 13 August 1998. The relief sought by the Applicant is as follows:

> **"I would like the commission to direct the employer to comply with the agreement to submit the dispute to arbitration".**

23. As a "Special Feature" the Applicant says:

> **"The employer has no right to withdraw unilatrally (sic) from the agreement to go to arbitration in respect of the dispute concerning my unfair dismissal."**

24. On or about 21 August 1998, the First Respondent ("the CMO") returned the referral (to which had been allocated case number KN20658) to the Applicant because the nature of the dispute was not clear and suggesting that the dispute be referred as an "unfair dismissal".

25. On 26 October 1998 the Applicant's attorney wrote to the Commission's director *inter alia* requesting the allocation of a date for the conciliation meeting within seven days failing which "we shall commence legal

proceedings against the CCMA in the Labour Court".

26. On 12 November 1998 during a telephone discussion between the Applicant's attorney and the CMO, the CMO advised the attorney that the conciliation meeting would not be scheduled because the nature of the dispute was not correctly defined in the referral. The CMO appears to have indicated to the Applicant's attorney that if he was not satisfied with the decision, that decision should be taken on review. The substance of this telephone discussion was confirmed in a letter to the Commission from the attorney.

27. It is the Commission's alleged failure to discharge its functions in terms of the Labour Relations Act of 1995 that has led to this application by the Applicant for an order reviewing and setting aside the decision by the CMO and the Commission not to convene the conciliation meeting in the dispute between the Applicant and the Respondent in Case Numbers KN20658 and KN21111.

28. In an explanatory affidavit, the CMO submits that the dispute as reflected in the referral is not one which the Commission has jurisdiction to conciliate and the outcome which the Applicant seeks is not possible because the Commission does not have jurisdiction to arbitrate a dispute without attempting conciliation first.

29. The CMO and the Commission have not opposed the application and have agreed to abide the decision of the Court.

30. At the outset I must point out to the Applicants that there is no case made out on the papers in respect of KN21111. The correspondence from the CCMA indicates that the dispute which is before the Court is the one

referred to the CCMA under case reference number KN20658 and therefore the judgment and order refer only to that referral.

31. The Applicant seeks to have the decision of the Commission reviewed and set aside for the following reasons.

    1. The refusal is wrong in law and fact;
    2. The refusal constitutes an irregularity or misdirection which is "disquietingly inappropriate;"
    3. The First and Second Respondent wrongly adopted the attitude that the dispute was not correctly defined in the referral.
    4. The First and Second Respondents have failed to discharge their statutory duties and their failure to convene a conciliation meeting constitutes a violation of the Labour Relations Act of 1995.
    5. There is no rational or justifiable basis for the refusal to convene a conciliation meeting and the refusal is grossly unreasonable.
    6. The First and Second Respondents' actions in refusing to establish and convene a conciliation meeting constitutes an abuse of statutory powers and is arbitrary and capricious.

32. The employer has opposed the review saying the CCMA correctly refused to entertain the referral for the following reasons.

    1. The dispute arose on 12 March 1996 when the employer repudiated the agreement, some eight months prior to the commencement of the Labour Relations Act of 1995. In terms of Schedule 7 Item 21 (1) of the Act, any dispute contemplated in the Labour Relations

laws that arose prior to the commencement of the Act must be dealt with as if those laws had not been repealed. Therefore the dispute must be dealt with in terms of the 1956 Labour Relations Act. (See **Edgars Stores Limited v SACCAWU** (1998) 19 ILJ 771 (LAC)).

2. If the letter of 12 March 1996 does not evince a clear intention on the part of the employer not to be bound by the agreement concluded between it and the union, at best for the Applicant the dispute arose on 20 November 1996, some nine months later which makes the delay between the dispute and the referral to the Commission, in the absence of an adequate explanation, unreasonable.
3. The Applicant has couched the dispute as one to be dealt with in terms of the Residual Unfair Labour Practice provisions of Schedule 7. The dispute is not one which falls within the definition of unfair labour practices contained in that Schedule.

33. It seems to me that the issue is a fairly simply one. If the dispute arose prior to 11 November 1996 that is the end of the matter (**Edgars Stores Limited v SACCAWU** supra). If it arose after 11 November 1996 and is one which the Commission is **obliged**, **in law**, to resolve through conciliation and arbitration, then clearly its decision not to accept the referral falls to be reviewed and set aside for all the reasons advanced by the Applicants.

34. The crisp question then is: did the dispute arise after 11 November 1996 and, if so, was the Commission obliged, in law, to accept the referral on 20 August 1998?

35. The first consideration is to establish the date on which the dispute arose.

In this regard there are three possibilities : 12 March 1996 (by virtue of the employer's letter to the union of even date); 20 November 1996 (by virtue of the employer's letter to the union of even date); or 13 August 1998 (by virtue of the employer's letter to the Applicant's attorney of even date).

36. There is no doubt that the dispute concerns the repudiation by the employer of its verbal agreement to resolve the dispute concerning the Applicant's dismissal by private arbitration.

37. The test for repudiation is best summarized as being conduct which, fairly interpreted, exhibits a **deliberate and unequivocal intention** no longer to be bound. (See Christie *The Law of Contract in South Africa* Third Edition at page 572 and the authorities cited there). Applying this test to the facts, it seems to me that the employer's communication on 12 March 1996 does not "exhibit a deliberate and unequivocal intention no longer to be bound". It appears to indicate an assumption, on the part of the employer, that the union no longer wishes to pursue the offer of voluntary arbitration.

38. But when the employer informed the union on 20 November 1996 that "the offer of arbitration by the company no longer stands" there can be little doubt that it clearly, deliberately and unequivocally intended no longer to be bound by the agreement. Further communication between the employer and the Applicant's representatives merely confirmed this.

39. I am therefore of the view that, in this matter, the dispute arose on 20 November 1996 and hence the argument by the employer that the Commission did not have jurisdiction by virtue of the provisions of Schedule 7 Item 21 (1) cannot be sustained.

40. Having decided that, I now turn my attention to whether the Commission

was obliged to accept the referral on or about 20 August 1998. I shall first deal with the Commission's reason for rejecting the referral.

41. The Commission derives its jurisdiction from section 115 read with sections 133, 134, 135 and 136 of the Labour Relations Act of 1995.

42. What these sections clearly indicate is that the Commission is only obliged to appoint a commissioner to resolve the dispute through conciliation in the first instance, if the dispute is a matter of mutual interest (section 133 (1) (a) read with section 134) or is one specifically mentioned in the Act (section 133 (1) (b) or any other law (section 115 (4)) which the parties may refer to the Commission for resolution through conciliation. If it is such a dispute, then, if conciliation fails, it can only be arbitrated if the dispute is one for which the Act provides arbitration as the process for resolution of that dispute.

43. The Act is very specific about which disputes may be conciliated. The dispute between these parties(namely the employer's refusal to comply with the verbal agreement to submit the dispute about the employees dismissal to private arbitration) is not one of them. Had the agreement been committed to writing between the union and the employer, then it may have qualified as a dispute in terms of section 24 regarding the application of a collective agreement.

44. The Applicant attempted to argue that it qualified as a residual unfair labour practice in terms of Schedule 7 Item 2 (1) (b) because it related to a benefit. I do not accept this argument for two reasons.

45. Firstly, the remedies available in Schedule 7 Item 3 relative to the residual labour practices listed in Item 2 (1), with the exception only of Schedule 7

Item 2 (1) (d), are available only for disputes which arise between employers and employees, that is where there is an existing employment relationship at the time the dispute is referred to the Commission. (For reasons see award by Commissioner Jammy in **Graeme Loudon Tucker and Northern Metropolitan Local Council** GA5658 unreported). In this case, the dispute arose one year and eleven months after the employment relationship had been severed and was referred to the Commission three years and eight months after the employees' dismissal.

46. Secondly, the issue in dispute is not a "benefit" for the purposes of Schedule 7 Item 2 (1) (b). There can be no better exposition on the question of what constitutes a "benefit" than the one by Commissioner Hutchinson in **SA Chemical Workers Union v Longmile/Unitred** (1999) 20 ILJ 244 which has been cited with approval by this Court in **Northern Cape Provincial Administration v Hambidge NO & Others** J1907/98 unreported.

47. Although opinions as to what constitutes a benefit (as opposed to remuneration) differ, the common thread running through all the decisions and the academic writings is that a "benefit" constitutes a **material** benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society. In other words, the benefit must have some monetary value for the recipient and be a cost to the employer. It is also something which arises out of a contract of employment.

48. While there is no doubt that the offer of private arbitration to a former employee has value (by allowing him/her to choose the arbitrator and frame terms of reference, for example), the value does not sound in money and it does not arise out of the contract of employment and hence

cannot constitute a "benefit" for the purposes of Schedule 7.

49. The Commission, therefore, does not have jurisdiction to deal with the matter in terms of section 133 (1) (b) or to resolve the issue in dispute through arbitration because the issue is not one which the Act requires to be resolved through arbitration.

50. The only other basis on which the Commission could be obliged to accept the referral and deal with it is if the dispute is a "matter of mutual interest" (in terms of section 133 (1) (a) read with section 134).

51. What constitutes a "matter of mutual interest" has been dealt with by du Toit et al in *The Labour Relations Act of 1995* Second Edition at page 315 as follows.

> **The Act does not define a dispute about a matter of mutual interest. Section 133 suggests that it is something other than a dispute referred to the CCMA 'in terms of the Act' and that it is a hold-all or residual category capturing all disputes other than those referred to the CCMA 'in terms of the Act' [s133]. These would be interest disputes and any rights disputes which may not be referred to the CCMA 'in terms of the Act' because they do not arise out of the interpretation and application of the Act."**

52. Making the distinction between disputes of interest and disputes of right have worried the courts and the academics for years. It would not really serve any purpose to enter into a long discourse on the issue. For the purpose of this judgment, I believe the above interpretation by du Toit et al as well as the following interpretation given to interest disputes below by Prof PAK le Roux in his paper "Criteria in Interest Arbitrations", a paper delivered at the 1992 Independent Mediation Service of South Africa (IMSSA) conference and published by IMSSA, will suffice.

> **"The meaning of the terms 'dispute of right' and 'interest disputes' have been the subject of some debate. Rights disputes are normally seen as disputes concerning the existence, content and extent of legal rights and the interpretation of a legal rule. Disputes of interest, on the other hand, are generally regarded as being concerned with the creation of new rights rather than the interpretation and application of existing rights."**

53. The question that this Court has to answer, therefore, is whether the dispute which was referred to the Commission concerns the existence of a legal right or whether it is concerned with the creation of a new right.

54. I believe it is the latter.

55. An arbitration agreement is defined in the Arbitration Act 42 of 1965 as:

> **"…a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not".**

56. Until such time as an agreement to refer a matter to arbitration is committed to writing, the parties thereto have merely a hope that their verbal agreement will ripen into an arbitration agreement to which both will be bound. Only once the agreement has been committed to writing can either party say that they have acquired a legal right to have their dispute determined in terms of the Arbitration Act. (In this regard see **Mandhla v Belling & Another** [1997] 12 BLLR 1605 (LC) at 1609B)

57. Hence, when parties verbally agree to commit the dispute to private arbitration they are indicating an intention to create a new right and thus a dispute about the failure of one or other of the parties to follow through on

the verbal agreement is a matter of mutual interest.

58. The Commission is therefore obliged to accept a dispute of the kind referred by the Applicant and appoint a Commissioner to attempt to resolve the dispute through conciliation because it would qualify as a dispute referred to it in terms of section 133 (1) (a) read with section 134, namely a dispute about a matter of mutual interest. However, should conciliation fail to resolve the dispute it could go no further because the Act does not allow the dispute to be resolved through arbitration under the auspices of the Commission.

59. That, however, is not the end of the matter. The employer has argued that the Commission was entitled to refuse to deal with the referral because it was referred "hopelessly beyond what would otherwise have been a reasonable time".

60. Although the Labour Relations Act of 1995 does not specify a time limit within which such a dispute can be referred to the Commission, I believe the Commission is not obliged to accept disputes if there is an unreasonable delay between the date on which the dispute arose and the date of referral for the following reasons.

61. The Act places a premium on expedition. Not only is expedition one of the express purposes of the Act (section 1 (d) (iv)), but the Act requires conciliation to take place within 30 days of the date on which the dispute was referred, for dismissal disputes to be referred within 30 days of the date of dismissal (section 191 (1) and for arbitration awards to be rendered within 14 days of the conclusion of the arbitration proceedings (section 138 (7)).

62. Although the Act does not specify a time limit for the delivery of a statement of claim or an application for review in terms of section 158 (1) (g) in the Labour Court, the Court has accepted the principle that this ought to be done within a reasonable time (**Building Construction and Allied Workers Union & Others v B & E Quarries (Pty) Ltd and Another** P173/97 unreported; **Moolman Bros v Gaylard NO & Others** (1998) 19 ILJ 150 (LC)).

63. The reasons given by the Court in these matters are equally applicable to the referral of disputes to the Commission.

64. Although there is no time limit prescribed in the Act for the referral to the Commission of a dispute concerning a matter of mutual interest, for the reasons stated above, I believe that the dispute ought to have been referred within a reasonable time. To come to the rescue of the Applicant and find otherwise would be to undermine one of the primary objects of the Act.

65. The test for what is reasonable was set out by the Appellate Division (as it then was) in **Setsokosane Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoer Kommissie en Andere** 1986 (2) SA (A) namely that the presiding officer must examine the facts in order to determine whether the period that has elapsed is, in the light of all the circumstances, reasonable or unreasonable.

66. In this regard I am only concerned about the delay from the date on which the dispute arose, namely 20 November 1996, to the date on which the Applicant referred the dispute to the Commission, namely 20 August 1998.

67. After applying to the Department of Labour in terms of section 35 of the

1956 Act (first on 26 March 1997 and again on 28 October 1997) and receiving notification on 10 December 1997 that the Director-General did not condone the late lodging of the application, the Applicant and/or his representatives, without any explanation, waited a further eight months before doing anything.

68. I have no hesitation in finding, on these facts and in the absence of an explanation, that, while the Commission wrongly decided that it did not have jurisdiction to deal with the dispute as referred, there was no obligation on it then or now to deal with the dispute because of the unreasonable delay between the date on which the dispute arose and the date on which it was referred to the Commission.

69. The employer has not sought a costs order against the Applicant.

70. I therefore make the following order:

    1. The application is dismissed.

……

I de VILLIERS AJ

Date of Hearing	:	21 May 1999
Date of Judgment	:	27 July 1999
For the Applicant	:	Mr Mbatha M.A.S. Mbatha and Company Attorneys
For the Third Respondent	:	Mr Soldatos Fluxman Rabinowitz-Raphaely Weiner