C4/2586
VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 17 March 2000 CASE NO. J1061/00

In the matter between:

COMMISSIONER STAFF ASSOCIATION

ON BEHALF OF MEMBERS Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION AND OTHERS Respondents

J U D G M E N T

PILLAY, AJ:

[1] My ruling on the issue of costs is as follows: This matter was brought as an urgent application and enrolled for hearing this morning. When the matter was called up the parties indicated that they wished to discuss the matter as there was a possibility of an agreement. The court stood the matter down until after lunch. But before standing the matter down, the court indicated to the parties, and particularly to the applicant, that its prima facie view was that it would be disinclined to intervene in a disciplinary enquiry that was pending and asked the parties to make a serious effort at resolving the dispute.

[2] When the matter was called up shortly after 14:00, the court was surprised to find that it was being opposed. Opposing affidavits were filed for the respondents and the applicant sought to have the matter stand down in order to consider the opposing affidavit. The court granted a brief period to enable the applicant to do so. The court granted a shorter period than was requested because of the indication given earlier in the morning that the matter might be settled. It was in this context that the court wished to hear whether as a result of the matter being opposed formally what the attitude of the applicant might be.

[3] Mr Lebea, for the Respondents submitted that after the matter was stood down,

the parties had resolved the matter but for the issue of costs. It also transpired that the Respondents had agreed to furnish the registers that the Applicant had requested. It would appear therefore that the only reason that the Applicant persisted with the application this afternoon is because it could not agree on the issue of costs with the Respondents.

[4] Nevertheless, it is now almost 18:30 on a Friday night and the court has had to listen to lengthy argument initially on an application for my recusal. That application was refused and it was followed by submissions on the merits of the matter. Midstream, the applicant, after discussion with the respondent, agreed that it would accept the tender of the information relating to the attendance registers. As a result the need for this application fell away. The Applicant withdrew the application. Having received the tender of the documents the Applicant should have withdrawn the matter the moment it was recalled at 14h00. This did not happen and more than an hour was wasted in arguing the matter on the merits.

[5] Then there remained the matter of costs. I should mention that the nub of the applicant's case is that disciplinary enquiries had to be interdicted so that the first respondent can furnish it with information, namely the registers. Now that the information had been provided or tendered, the application fell away. I will not delay these proceedings by tracing the issue beyond the recent few days. The first respondent's last word on the matter before this dispute was referred for conciliation appears in Annexure BK11 where the first respondent indicated that it was not obliged to provide the applicant with records concerning other members of staff. It went on to urge the applicant to indicate the relevance of the records that it sought and enquired how it would be prejudiced if it did not receive them prior to the hearing. There were a number of other items of information that the applicant had sought and the first respondent dealt with these in Annexure BK11 to the satisfaction of the Applicant. There is no dispute in relation to those other items. The only issue was that of the registers.

[6] The applicant referred the matter for conciliation. It did not respond to the first respondent by explaining the relevance of these records or how it would be prejudiced but assumed that there was a deadlock. If the applicant had simply come back to the first respondent and explained what the relevance of the documents were, and how its members would be prejudiced, that might have been the end of the matter there and then. Instead the First Respondent is now having to deal with one more conciliation referral.

[7] In a letter which appears as Annexure 13 to the applicant's papers the second respondent replied by expressing surprise that the matter had been referred for conciliation without the applicant reverting to the respondent to say what aspects of the

disclosure were inadequate. At the bottom of the same annexure Mr Ngenzana e-mailed Mr Bongani Khumalo stating that:

> *"In the light of the fact that the CSA has referred the matter to conciliation on the issue of refusal to disclose information, we would like to know if the disciplinary hearings will be proceeding on Friday, 17th March. Please let us have your response by no later than close of business today so that we can move an urgent application to stop the disciplinary proceedings. Failure to respond by not later than the close of business today, 14th March 2000, we will assume that the disciplinary hearings will be proceeding."*

[8] The first finding I make is that the applicant was precipitous in concluding that there was a deadlock on the issue of the disclosure of the information relating to the registers. Secondly, on the basis of the evidence that I have traversed, it would appear that there is some merit in Mr Lebea's submission that the Applicant was primarily bent on scuttling the enquiry, if that could be achieved firstly through the conciliation referral and then through this process. That is an abuse of this court's processes.

[9] I have considered the fact that the substantive matter has been settled in the sense that it has been withdrawn. However, the first respondent submitted that it has not offered the information not out of any sense of a legal obligation. In any case, whether it is a legal obligation or not is not the issue before this court. It elected to do so. Whether it might have done so before today and whether the information is indeed relevant to the proceedings is not a matter for this court to decide.

[10] The issue before this court is to consider whether the Applicant had exhausted all the remedies it had available to it before using the facilities of this court under these extreme conditions. And the conditions I am referring to is that the staff of the court who are also employees are having to work late as a result of this application at no extra overtime pay.

[11] There is the aspect that the format of the applicant's papers do not comply with the rules. That is an issue which can attract an order for costs. However, in the totality

of the evidence before this court if that was the only issue warranting an order for costs the Court have been inclined to refuse the order. However, there more compelling reasons why an order for costs should be made.

[12] In response to Mr Moletsane's submissions, something needs to be said about whether the applicant and respondents have the same status as any other employer and trade union. The rights of the parties as employer and an employee organisation are enshrined in the Act and no one can deny that. However, the First Respondent is a special institution. The First Respondent and its staff must be seen to practice what they preach to the public in order to inspire public confidence and to promote effective dispute resolution. If Commissioners want to command the respect of the public for their awards and for their decisions, then they must conduct their affairs in a manner that assures that the public that it can place its trust in their hands. Statements to the effect that the management of the First Respondent does not understand the issue of disclosure of information which, in the context is an elementary issue, does not attract public confidence in the institution.

[13] Mr Moletsane, for the Applicant, brought to my attention that an award of costs was given against a trade union this morning to pay 20% of the employer's taxed or agreed costs in a similar application this morning. There is a difference between this case and that one. The trade union official, amongst other reasons raised a constitutional point in his papers. He had a bona fide belief that the application was justified. He was also a lay person. The applicant today has the benefit of an attorney and an advocate. In addition to all their obligations as employees of the CCMA and as professional resolvers of disputes, they are also expected to be familiar with the rules and decisions of court and with the approach of the CCMA. In particular, as officers charged with resolving disputes for the public and in the public interest, one would expect that attempts would have been made to resolve this dispute as soon as it arose at the lowest possible level with the minimum amount of costs, and particularly the minimum amount of cost to the relationship between the parties. If the applicant had applied the lessons it has learnt in conflict management and dispute resolution to itself, this dispute should have been resolved as soon as possible after Annexure BK11 had been received.

[14] I find therefore that the Applicant did not exhaust all its remedies before approaching this Court. It should have replied to Annexure BK11. Even if the Respondents refused to furnish the register before the enquiry, the next step should

have been to apply for an urgent conciliation and arbitration for disclosure or to ask the chairperson of the enquiry to rule on the matter. Until those remedies are exhausted an application to this Court is premature.

[15] There was no basis to cite the Second to Fifth Respondents in their individual capacities. They act for and on behalf of the First Respondent. Any relief granted against the First Respondent would have been adequate to secure compliance by the Second to Fifth Respondents.

[16] It is getting quite late into the night and I think I have covered all aspects of the evidence and the submissions that were made. There is the last aspect, the scale of the costs. But for the fact that this matter was settled, I would have been inclined to grant costs on a higher scale than party and party. As the matter has been settled on the merits, I make the following order as to costs: The applicant is ordered to pay the costs of the respondents on a party and party scale.

PILLAY AJ

LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANT	:	MR MOLETSANE
Instructed by	:	Commissioner Staff Association
ON BEHALF OF RESPONDENTS	:	MR JUSTICE LEBEA
Instructed by	:	Lebea and Associates
DATE OF ORDER	:	17 MARCH 2000