

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

Case No: JR589/2010

In the matter between:

REIZELL LECHET

Applicant

AND

RED ALERT (PTY) LTD

1st Respondent

COMMISSION FOR CONCILIATION

2nd Respondent

MEDIATION AND ARBITRATION

3RD Respondent

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JUDGMENT

CAWE AJ

- [1] This is a review application wherein the Applicant seeks to review and set aside the arbitration award handed down by the Third Respondent (hereinafter referred to as the Commissioner), under case number GAJB16677/09. The Commissioner held that the CCMA lacked the requisite jurisdiction to arbitrate the constructive dismissal between the parties because clause 11.2.1 of the Service Agreement of the parties required the dispute to be referred to private arbitration.
- [2] The Applicant bases its review application on the contention that the Commissioner was not entitled to declare that the CCMA did not have jurisdiction to hear the matter on the basis of the arbitration clause because the issue was not raised by the First Respondent nor was it raised in the pre-arbitration minute between the parties.

- [3] Another contention held by the Applicant is that the Commissioner committed an irregularity in finding that;
- (i) The arbitration clause did not cover constructive dismissal dispute as such disputes are contractual and not covered by the Labour Relations Act.
 - (ii) The arbitration clause bars the CCMA from exercising jurisdiction over constructive dismissal cases.
- [3] The most important subclause of clause 11 is 11.2.7 which reads “shall be decided by arbitration and settled as set out in this clause”

The Facts

- [4] The Applicant alleges that he was employed by the First Respondent in terms of a Service Agreement. Clause 11 of the Service Agreement provides as that the arbitrator, in disputes arising from the agreement, shall be appointed by the Arbitration Foundation of South Africa and sets out the terms of reference of the arbitration.
- [5] The Applicant alleges that he was constructively dismissed by the First Respondent on the 29th May 2009. He duly referred a constructive dismissal dispute to the CCMA.
- [6] At the CCMA the First Respondent raised a point in limine contending that the Applicant was not its employee. This then meant, according to the First Respondent, that the CCMA did not have jurisdiction to arbitrate the matter. This is also noted in the arbitration minute of the parties as the only *point in limine* raised. The issue of the arbitration clause was never raised by the First Respondent at any stage of the proceedings before the Commissioner.

Grounds for review

- [7] Advocate Salooje, for the Applicant, submitted that an arbitrator is entitled to *mero motu* raise the issue as to whether or not he has jurisdiction to decide the matter. In this regard he cited **CWU v Tau Ying Metal Industries & Others [2008] 29 (ILJ) 2461 (CC)** and **Eskom v Marshal & others [2003] 1 (BLLR) 12 (LC)**.

He however, goes on to submit that the existence of an arbitration clause in a contract that does not raise any jurisdictional point. He cites Harms Amlers Precedents of Pleadings 6th ed at 32:

“An Agreement to arbitrate does not deprive the Court of its jurisdiction over the dispute encompassed by the agreement. An Arbitration Agreement is, therefore, not an automatic bar to legal proceedings in ordinary Courts.”

- [8] Citing **Yorigmi Maritime Construction Co Ltd v/s Nissho – Iway Co Ltd 1977 (4) SA 682 (c)** and **Stocks Contruction (OFS) (Pty) Ltd v/s Metter – Pingan (Pty) Ltd 1978 (4) SA 34(T)**, advocate Salooje submits that a defendant wishing to rely upon an arbitration clause, must either apply for the proceedings to be stayed or raise a special plea. Consequently, in the absence of the employer raising the existence of the arbitration clause, the arbitrator exceeded his powers in raising such a clause *mero motu*.

- [9] I find the above argument persuasive. The parties elected to refer the dispute to the CCMA. Both were well aware of the existence of the arbitration clause in the Service Agreement. Neither raised it at any stage in their interactions nor at the arbitration. By deviating from the pre-arb minute, that is whether or not the applicant is an employee of the First Respondent or not, the Commissioner deviated from the parties' mandate regarding the dispute he was called upon to settle.

- [10] Applicant's Counsel submitted that the **Carlbank Mining Contracts (Pty) Ltd v/s NBCRFI [2010] 11 BLLR 4412 (LC) 1148 – 1149** settled the matter regarding the referral of disputes to the CCMA as opposed to private arbitration. In that case Van Niekerk J states:

“Both counsel referred to section 147 of the LRA. Section 147(6) contemplates the referral of a dispute to the CCMA in circumstances where it becomes apparent that the dispute ought to be resolved through private dispute resolution in terms of a private agreement between the parties to the dispute. The section provides that the CCMA may either refer the dispute to the appropriate person or body for resolution through private-dispute resolution procedures or appoint a commissioner to resolve the dispute in terms of the Act”.

- [11] I find Applicant's counsel's submissions compelling as the relevant section of the LRA confers jurisdiction on the CCMA to hear disputes that are ordinarily referred to a private dispute resolution body. It is clear that the Commissioner failed to consider clause (b) of section 147 of the LRA which reads:

“the CCMA may appoint a Commissioner to hear the matter.”

- [12] The Applicant raised a further ground of review in that the dispute referred to the CCMA was that of constructive dismissal in terms of the Labour Relations Act and not the contractual relationship between the parties. The Commissioner, it was submitted by the Applicant's counsel, placed reliance on the contractual relationship of the parties in terms of the Service Agreement.
- [13] He went further to submit that an employee alleging constructive dismissal does not have to allege or prove a breach of contract or a repudiation of the contract in order to succeed. In view of this fact, he

continued, even if the Commissioner was correct in *mero motu* raising the jurisdictional issue, in light of the Service Agreement, the matter is still reviewable. Relying on **Murray v/s Minister of Defence [2008] 6 (BLLR) 513 (SCA)** Counsel cited paragraphs 10 and 11 of the aforementioned judgement which stipulate that;

“And it is no longer necessary under either the constitutionally developed common law or under the LRA to continue to invoke concepts such as repudiation (as was previously necessary) to unmask the true substance of the parties’ dealings.

That substance, as was pointed out before the 1995 LRA, is that the law and the Constitution impose ‘a continuing obligation of fairness towards the employee..... The obligation has both a formal procedural and substantive dimension: it is now capitulated in the constitutional right to fair treatment in the workplace.’”

[14] The arbitration clause sets out which dispute shall be arbitrated according to the Service Agreement. Any dispute arising out of or in connection with this agreement or the subject matter of this agreement including, without limiting, any dispute concerning:

“ 14.1 the existence of the agreement apart from this clause;

14.2 the interpretation and effect of this agreement;

14.3 the parties’ respective rights or obligations under the agreement;

14.4 the rectification of the agreement;

14.5 the breach, termination or cancellation of the agreement of any matter arising out of the breach, termination or cancellation;

14.6 damages in delict, compensation for unjust enrichment or any other claim, whether or not the rest of the agreement, apart from this clause, is valid and enforceable;

14.7 shall be decided by arbitration and settled as set out in this clause.”

[15] I tend to agree with the Applicant’s Counsel’s submission that in the instant case the arbitration clause simply does not cover the dispute in point. This means, therefore, the Commissioner erred in relying on the Service Agreement to oust the jurisdiction of the CCMA to hear the matter.

[16] Further, in the agreement of the Applicant’s Counsel, he submitted that there were cost implications for the Applicant if he were to go the private arbitration route. Counsel raises the point that;

“An Arbitrator cannot without more, non-suit an employee because there exists an arbitration clause, without considering the consequences of that party having to be saddled with legal costs in order to ventilate the dispute”

[17] I agree with this submission as the CCMA is freely accessible to the public. On the other hand private arbitration is costly and extremely arduous. By going the CCMA route, the Applicant was trying to guarantee the resolution of his dispute and ensuring that he does so at minimal cost.

[18] In response to the Applicant’s submission, advocate Hinrichson, for the Respondent, argued that before determining whether a disputant is an employee or not the Commissioner has to determine whether the CCMA has jurisdiction or not to hear the matter. He argued further that in terms of section 147 (6) of the LRA, once a dispute is referred to the CCMA and there is a private arbitration clause then the Commissioner has a discretion to refer it to private arbitration and the Courts are loathe to interfere with this discretion.

- [19] Advocate Hinrichson submitted that the **Carlbank** case (*supra*) deals with Bargaining Council and collective agreements and is, therefore, not applicable to the present case.
- [20] Counsel for Respondent ignores or fails to consider that the Judge in the **Carlbank** case (*supra*) in paragraph 18 says “.... *Counsel has a discretion to prevent or call a halt to any private arbitration and tackle the dispute itself.*” In the present case the parties were at the CCMA, an institution fully covered by the provisions of Section 147(b) of the LRA.
- [21] The Respondent’s counsel loses sight of the fact that paragraph 21 of its answering affidavit. Respondent admits that the issue to be decided was whether the Applicant was an employee or not. Significantly it is the Respondent that raised the point *in limine* at arbitration. That was the ideal forum to raise the jurisdictional point *in limine* regarding the Service Agreement of the parties. It elected to confine itself to the issue of whether the Applicant was an employee of the Respondent or not. The point *in limine* application raised by the Respondent only deals with proving that the Applicant was not an employee and therefore the CCMA lacks jurisdiction to entertain the dispute. The same stance is taken at the arbitration. No mention of private arbitration is made.
- [22] What complicates matters further is the fact that the Commissioner does not give reasons for using his discretion in out suiting the referral as in his award [paragraph 18] he states that “*It is not my intention to enquire or pronounce on the validity of the Service Agreement, more specifically oral evidence was not led in that regard, and further in view of the dispute surrounding its origins.*”
- [23] In dealing with Section 146 (b) the Commissioner states that;

“In my view, this is not an ordinary case where the Commission can willy-nilly assume jurisdiction over this matter as there is more to it than merely an issue of whether the Applicant was an employee or not. The relationship between the parties emanated from the Shareholders’ Agreement which also curiously contains a dispute (arbitration) clause which is an exact replica of the arbitration clause found in the Service Agreement.”

[24] In conclusion, I am persuaded that the Commissioner did not apply his mind to the issues raised in the Respondent’s point in limine. He went off at a tangent and dealt with an issue that was not raised in the Respondent’s papers and/or in oral argument at the arbitration.

Order

[25] I accordingly make the following order:

1. The Third Respondent’s (the Commissioner) ruling that the CCMA lacks jurisdiction to arbitrate the dispute and that the dispute should be referred to the private arbitration is reviewed and set aside.
2. There is no order as to costs.

CAWE AJ

Acting Judge of the Labour Court

Date of hearing: 05 May 2011

Date of Judgment: 23 June 2011

Appearances:

Applicant: Adv. YF Saloojee

Instructed by: Cliffe Dekker Hofmeyer Inc

Respondent: Adv. Hinrichson

Instructed by: Lee Attorneys

LABOUR COURT