

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Reportable
Case no: JR1800/09

In the matter between

**PANKANA CC t/a R & W TRANSPORT
COMPONENTS**

Applicant

and

L DREYER N.O

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

INAAAYAT CASSIM

Third Respondent

DATE OF HEARING: 28th day of July 2011

DATE OF JUDGMENT: 14th day of September 2011

JUDGMENT

COOK AJ

Introduction

1. The application for review was filed in Court on 7th July 2009. The arbitration award came to the attention of the Applicant on 1st June 2009.

2. The Applicant seeks:

- 2.1 To set aside the arbitration award dated 16 May 2009 in terms of which the First Respondent, the commissioner, ordered the Applicant to pay the sum of R48 429, 99 under case number GATW2178/09 of the Second Respondent [“the CCMA”] together with the certificate of outcome issued by the CCMA in the matter. (on the ground that the CCMA lacked jurisdiction to hear the matter)
 - 2.2 Further, should it be found that the CCMA had jurisdiction to consider the employee’s claim of unfair dismissal against the Applicant, an order replacing the CCMA’s ruling with an order that the Applicant did not dismiss the employee, alternatively that the matter be remitted to the CCMA for determination afresh before a commissioner other than the First Respondent.
3. *The Issue*
- 3.1 The Applicant’s case is that the award and the certificate which were issued pursuant to the employee’s referral of the dispute fall to be reviewed and set aside for want of jurisdiction.
 - 3.2 The allegation is based on
“the fact that the business conducted by the Applicant described above, and the place from which it conducted that business, caused it to fall under the jurisdiction of the Motor Industry Bargaining Council. In terms of the applicable provisions of the Act, the dispute between the Third Respondent and Applicant should have been referred to and processed by that bargaining council and Third Respondent had no jurisdiction in respect of the said dispute.”

[The reference to Third Respondent in the second last sentence is obviously an error and should be a reference to the Second Respondent.]

4. The Applicant goes on to state that should the jurisdictional point of review not be upheld, then the award should be set aside on review based on the manner in which the commissioner dealt with the evidence.

Jurisdiction

5. In terms of the founding affidavit, the Applicant is cited as follows:

“The Applicant is Pankana CC t/a R & W Transport Components, a company with its postal address at P O Box 34406, Erasmia ... It conducts business as a retail store for truck and trailer spares and operates from industrial premises at Unit 1, ...”¹ [Paragraph 3, page 7 of the paginated bundle]

6. The Applicant’s first ground of review “is that since Applicant was covered by the Motor Industries Bargaining Council (“MIBCO”) that a suit should have been referred to that council for resolution and that Second and First Respondents had no jurisdiction to make the order sought to be reviewed – they thus exceeded their powers as contemplated in Section 145(2) (a) (iii) of the Labour Relations Act, (“the Act”).”²

7. It is argued that the starting point in determining this ground of review is

¹ Paragraph 3, page 7 of the paginated bundle.

² 66 of 1995. This appears at Paragraph 2.1 page 2 Applicant’s heads of Argument.

Section 191(1) (a) (i)-(ii) of the Act which provides that:

“(1) (a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the dispute in writing to-

- (i) a *council*, if the parties to the *dispute* fall within the registered *scope* of that *council*; or
- (ii) the Commission, if no *council* has jurisdiction.

8. Section 29(15)(a) of the Act requires the Registrar of Labour Relations to issue to a registered bargaining council a “certificate of registration in the Applicant’s name that must specify the registered scope of the Applicant”.

9. A copy of the application for variation of scope of the Motor Industry Bargaining Council was handed up by Counsel at the hearing of the matter. The scope and registration of the Motor Industry Bargaining Council with effect from 29th of April 2009, records the following:

“Motor industry” means without in any way limiting the ordinary meaning of the expression –

...

(h) The business carried on mainly or exclusively for the sale of motor vehicles or motor vehicle parts and/or spares and/or accessories (whether new or used) pertaining thereto, whether or not such sale is conducted from premises that are attached to a portion of an establishment wherein is conducted the assembly of or repair of motor vehicles is carried out.”

10. In terms of section 147 (3) (a) of the LRA

“If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* fall within the *registered scope of a council* and that one or more parties to the *dispute* are not parties to the *council*, the Commission may-

(i) refer the *dispute* to the *council* for resolution; or
(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of *this Act*.”

11. I was referred to the case of *Magic Company v CCMA and Others*³ [which it was submitted was distinguishable to the facts of the matter before me.

12. In *Magic Company*, the employer raised a point *in limine* at the review stage that the CCMA lacked jurisdiction to hear the matter on the ground that the dispute should have been referred to the Bargaining Council for the Entertainment Industry of South Africa. The employer argued that the arbitration was conducted irregularly by the CCMA even though it was aware that it lacked jurisdiction.

13. The court found that:

“On the limited evidence available, and relying particularly on the applicant’s evidence that the CCMA was twice informed that the council had jurisdiction to

³ [2005] 4 BLLR 349 (LC).

determine the dispute, I am persuaded on the probabilities that the Commission opted to assume jurisdiction and appointed the commissioner to resolve the dispute. Since the third respondent, unlike the applicant, was not a party to the council, the assumption of jurisdiction was proper and in accordance with the pre-conditions stipulated in the subsection. The fact that the appointed commissioner, without the benefit of any argument on the point, did not record the basis of his jurisdiction, is neither here nor there. The authority to appoint the commissioner vested in the Commission, acting through the Director or any other official to which the power might have been lawfully delegated. Once the CCMA was informed of the council's jurisdiction it seems likely in the circumstances that it elected to proceed, as it was entitled to do, under section 147(3) (a) (Act 66 of 1995). Such a finding is in keeping with the spirit of the general canon of construction: *verba ita sunt intellegenda ut res magis valeat quam pereat* and the evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*, both of which are fortified in this instance by the legislative injunction in section 1 calling on functionaries, including judges, when applying the LRA to promote the effective resolution of labour disputes. In the premises the applicant's challenge to jurisdiction must be dismissed".⁴

14. In the present matter, the issue of jurisdiction was not raised by any of the parties until raised by the Applicant at the review stage. It is argued that the *Magic* case can be distinguished on this basis as in this matter there can not have been an

⁴ Ib at para 12.

election to proceed as envisaged in section 147(3)(a) of the LRA.

Analysis

15. In *SA Broadcasting Corporation v Commission For Conciliation, Mediation and Arbitration and Others*,⁵ Freund AJ discussed *Fidelity Guards Holdings (Pty) Ltd v Epstein and Others*⁶ as follows:

“ The factual background to the *Fidelity Guards* case appears from the decision of Pillemer AJ in the court a quo (reported as *Fidelity Guards Holdings (Pty) Ltd v Epstein and Others* (2000) 21 ILJ 2009 (LC); [2000] 3 BLLR 271 (LC)). Pillemer AJ made clear that that case was an instance of what he called a 'pernicious practice' that appeared to be developing where -
'an employer whose employee has lodged a claim with the commission out of the 30-day period (often, as in the present case, the employee believing that the date of dismissal is the date the appeal is refused), elects not to raise any complaint, anticipating that at the conciliation hearing no question of condonation will arise. The *employer* fails to conciliate on the merits of the dispute, allows a certificate that the dispute remains unresolved to be issued without demur and *engages in the arbitration that follows again without raising any question about the time when the dispute was referred*. Then, if unsuccessful in the arbitration, the employer approaches the Labour Court relying upon the trump card presented to him by the Checkers

⁵ (2003) 24 ILJ 211 (LC) at para 25 -27..

⁶ (2000) 21 ILJ 2009 (LC).

case, contending that the arbitrator had no jurisdiction in the first place' (emphasis added).

Pillemer AJ stated:

'Obviously this practice, which is unconscionable and borders on fraud, frustrates the purpose of the Act.'

Pillemer AJ dissented from earlier cases in which it has been held that the arbitrator's jurisdiction is dependent upon a timeous referral and held that the relevant jurisdictional fact, as far as the arbitrator was concerned, was the s 135(5) certificate. He stated (at paras 9-12):

".....

[12] If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim omnia praesumuntur rite esse acta⁷, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision (cf *O'Reilly v Mackman* [1983] 2 AC 237, 238 and *[Harnaker] v Minister of Interior* 1965 (1) SA 372 (C) at 381)."

16. The rationale for section 147 is to avoid delays that might otherwise be caused by jurisdictional disputes. (See in this regard *Speciality Stores v SACCAWU and Another*⁸.) However in order for the section to serve its purpose, the jurisdictional dispute needs to be raised. In situations like this when all the parties fail to do so, the opposite is achieved. As a result of the failure to raise the point, the parties went to the expense of both time and money and ran an entire arbitration.

17. The Applicant then at the review stage, after seeking legal advice, raises the

⁷ All (official) acts are presumed to have been lawfully done

⁸ [1997] 8 BLLR 1099 (LC) at 1112 B.

point for the first time. The effect is that the matter is delayed and if the matter is to be referred to the bargaining council, the process will have to start *de novo*, with the leading of all the evidence afresh. This offends the concept of speedy resolution of labour disputes.

18. The applicant alleges the MIBCO has jurisdiction since the Applicant is covered by MIBCO. The basis for this allegation is to be found in the citation of the Applicant in paragraph 3 of the founding affidavit

19. The Applicant failed to attach to its affidavit a certificate of registration certifying that the Applicant is registered by the bargaining council as an employer in the motor industry nor did it attach a certificate of accreditation of the council issued by the CCMA in terms of section 127 of the LRA accrediting the bargaining council to perform dispute-resolution functions including the authority to resolve disputes about unfair dismissals through conciliation and arbitration. At the hearing of this matter, a certificate of accreditation was handed in by Counsel for the Applicant for the first time.

20. Counsel for the Applicant also placed on record the Applicant's reassurance to the Court that MIBCO had jurisdiction and that the Applicant would not raise the point that the MIBCO did not have jurisdiction had this not been the true position.

21. There is nothing before the Court to suggest that the raising of the jurisdictional point at the review stage was done on purpose for a tactical advantage. If there were such allegations perhaps the Court's view would have been different.

Conclusion

22. The central issue to be determined is, can a party raise the technical point of jurisdiction at the late stage of review, or ought this point to have been raised before arbitration failing which, the party loses the right to raise the point.

23. As a consequence of the issue of jurisdiction having not been raised at arbitration, (or more appropriately having not been raised before the arbitration commenced), the CCMA could not exercise the discretion conferred upon it in terms of section 147(3) (a) of the LRA. If the Applicant had raised the jurisdictional challenge or the evidence led at arbitration indicated that the MIBCO had jurisdiction, then in terms of Rule 22 for the conduct of proceedings before the CCMA, the commissioner could have required the referring party to prove that the Commission had jurisdiction to arbitrate the dispute.

24. Jurisdiction is a matter of fact, either the CCMA has jurisdiction or the CCMA lacks jurisdiction. In the case of *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and Others*,⁹ Basson J held:

“It has been made clear in the decision of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 (LAC) that the question before the court in reviewing such a ruling, is whether

⁹ (2009) 30 ILJ 2093 (LC).

objectively speaking the facts gave the CCMA jurisdiction to entertain the dispute. The review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) therefore does not find application in reviewing a jurisdictional ruling:

'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is,

however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon's* case the court said at 804C-D:

"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit."

In my view, the same approach is applicable to the CCMA."¹⁰

25. The raising of the jurisdictional point at the review stage, in the absence of proof of a deliberate attempt to pull out a "trump card", does not deprive the Applicant of the right to raise the issue. As this matter was unopposed, the Court has the undisputed allegations of the Applicant, that due to the nature of its business, that it falls within the jurisdiction of the MIBCO. Furthermore on the facts, the CCMA did not exercise its assumption of jurisdiction in terms of section 147(3) (a) of the LRA. Accordingly objectively speaking the facts did not give the CCMA jurisdiction to entertain the dispute.

26. The employee will have to apply for condonation for the late referral to the MIBCO as a result of the incorrect referral to the CCMA, but due to the fact both parties were under the erroneous belief that the CCMA had jurisdiction, and did not

¹⁰ Ib at para 6 .

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raise an objection, on this basis, good cause ought to be established for the purposes of condonation. The Applicant ought not to oppose the condonation application, and if it does it would demonstrate a lack of *bona fides*.

27. As a result of the Court upholding the point of lack of jurisdiction, it is not necessary to consider the review on the merits.

28. In the circumstances, I make the following order:

1. The arbitration award dated 16th May 2009 under case number 2178-09 is reviewed and set aside.
2. The matter is to be referred to the MIBCO
3. No order of costs.
4. The order is to be served on the employee within 10 days of the date of this order.

COOK A.J
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: R.G. Beaton SC instructed by Vogel Malan Attorneys

LABOUR COURT