



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: **JR 2672/08**

In the matter between:

SIEMENS LIMITED

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

DAVID DIKWABANE N.O

Second Respondent

ARNAUSE MOHLALA N.O

Third Respondent

GOVINDSAMY SILVAN CHETTY

Fourth Respondent

Heard: 8 November 2011

Delivered: 8 December 2011

Summary: Application to review and set aside certificate of outcome

dismissed. No employment relationship found to exist between the applicant and the fourth respondent. The first respondent lacks jurisdiction to arbitrate the dispute referred to it.

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an unopposed application in terms of which the applicant seeks to have a certificate of outcome issued by the third respondent (“the commissioner”) reviewed and set aside and an order granted that the fourth respondent was not employed by the applicant.

[2] The applicant contends that in terms of rule 14 of the CCMA Rules if a jurisdictional challenge arises at conciliation, the commissioner must determine whether the CCMA has jurisdiction to conciliate the matter prior to issuing a certificate of non-resolution in the matter. The applicant seeks that this Court decides the jurisdictional issue, orders that the fourth respondent was not employed by the applicant and that the CCMA lacked jurisdiction to arbitrate the matter, alternatively that the matter be referred back to the CCMA for an *in limine* hearing before a different commissioner.

The facts

[3] On 21 April 2008, the fourth respondent, acting in his capacity as a director of Quantum Leap Investments 596 (Pty) Limited concluded a contractor’s agreement with Faranani IT Services (Pty) Limited in terms of which he was engaged as an

independent contractor by Faranani to provide project management services to the applicant from 5 May 2008 until 31 October 2008.

[4] On 6 May 2008, the applicant and Faranani concluded a labour broker services agreement in terms of which it was agreed that Faranani would assign the fourth respondent to one of the applicant's projects to provide project management services. This agreement required Faranani to conduct ITC, criminal and educational verifications on the fourth respondent. When a possible match relating to a criminal offence was identified, the fourth respondent was required in July 2008 to provide Faranani with his fingerprints which he did on 16 October 2008. Due to time constraints, the criminal verification process could not be completed prior to the expiry of the contractor's agreement on 31 October 2008 and the fourth respondent was notified on 24 October 2008 by Faranani that the contractor's agreement would accordingly not be renewed.

[5] The fourth respondent referred an unfair dismissal dispute to the CCMA and the dispute was set down for a con/arb process first on 12 November 2008 and then on 13 November 2008. The second respondent commissioner indicated at these proceedings that he was not prepared to deal with the issue of jurisdiction at the conciliation stage. The matter was then, by agreement, set down for hearing on 24 November 2008 and the applicant served an in limine application and made an application for the recusal of the second respondent. The third respondent commissioner thereafter proceeded with the matter, ruled that the CCMA had jurisdiction to issue a certificate and that the fourth respondent could apply for arbitration.

[6] The applicant thereafter approached this Court. The applicant relies on a judgment by this Court in *EOH Abantu (Pty) Ltd v CCMA and Another*¹ to contend that the commissioner was bound to decide any jurisdictional point raised in conciliation proceedings before issuing a certificate of outcome, and that his failure to do so constitutes a reviewable irregularity.

The legal principles

[7] In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others*,² the Labour Appeal Court held that once a certificate of outcome has been issued stating that the dispute remains unresolved in terms of section 135(5) of the LRA, the CCMA has jurisdiction to arbitrate the dispute and the arbitrating commissioner has jurisdiction to determine the dispute until such time as the certificate is reviewed and set aside. The same approach was adopted in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Another* and in *Avgold- Target Divisions v CCMA*.³ In both matters it was held that the CCMA must determine its jurisdiction to conciliate a dispute before proceeding to conciliate the dispute and that once a certificate is issued, this binds an arbitrator to arbitrate the matter and it is only if the certificate is reviewed and set aside that the arbitrator is relieved of this obligation. Furthermore, rule 14 of the CCMA Rules provides that if a jurisdictional dispute arises at conciliation, the commissioner must require the referring party to prove that the CCMA has jurisdiction to conciliate.

[8] A different approach to the issue is evident in *Bombardier Transportation*

1 (2008) 29 ILJ 2588 (LC).

2 (2000) 21 ILJ 2382 (LAC).

3 **[2010] 2 BLLR 159** (LC).

(Pty) Ltd v Mtiya and Others⁴ in which Van Niekerk J held that certain questions such as whether a person is an independent contractor or an employee as defined in section 213 of the LRA fall within the power of the CCMA to determine in the course of the arbitration proceedings and are not necessarily to be determined prior to conciliation taking place. In *Bombardier* Van Niekerk J stated that the only true jurisdictional questions likely to arise at conciliation are whether the referring party referred the dispute within the time limit prescribed by section 191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all.

[9] The jurisdiction and powers of the CCMA arise from the Labour Relations Act. Section 135(5) provides that when conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties, the commissioner must issue a certificate of outcome stating whether or not the dispute has been resolved and serve a copy of the certificate on each party to the dispute or person who represented a party in the conciliation proceedings; and file the original of that certificate with the Commission. It is clear therefore that section 135(5) requires only confirmation that a dispute has not been resolved within the time periods provided.

[10] Section 191(5) provides that 'if a council or a commissioner has certified that the dispute referred remains unresolved, or if 30 days have expired since the council or the Commissioner received the referral and the dispute remains unresolved- (a) the council or the Commission must arbitrate the dispute at the request of the employee'. Consequently, even where a certificate has not been issued, arbitration

⁴ JR 644/09 (11 March 2010).

after the expiry of thirty days is mandatory if required by the employee.⁵

[11] The effect of the certificate of outcome is that it permits a party to refer a dispute to arbitration prior to the expiry of the 30 day period; or confirms the resolution of a dispute; or permits a party to give notice to strike or lock-out in a matter of mutual interest. Despite the contents of Rule 14, where a jurisdictional issue has not been raised at conciliation, any party to a dispute referred to arbitration may raise any challenge at arbitration.

Evaluation

[12] The issue to be determined by this Court is whether the commissioner committed a reviewable irregularity in issuing a certificate of outcome without determining whether an employment relationship existed between the applicant and fourth respondent prior to doing so. I am satisfied that on an application of the legal principles set out above and the judgment of this Court in *Bombardier* that the commissioner complied with the provisions of section 135(5) of the Act in issuing a certificate with the time periods provided upon the failure of conciliation in which the non-resolution of the dispute is recorded.

[13] Rule 14 of the CCMA rules requires of a commissioner to determine whether the CCMA has jurisdiction to conciliate on a jurisdictional challenge being raised at conciliation. I concur with Van Niekerk J in *Bombardier* that the only true jurisdictional questions likely to arise at conciliation, considering the provisions of section 135, are whether the referring party referred the dispute within the time limit prescribed by section 191(1)(b), whether the parties fall within the registered scope

⁵ *Seeff Residential Properties v Mbhele NO and Others* (2006) 27 ILJ 1940 (LC) at 1946A.

of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all.

[14] In the circumstances, the failure by a commissioner to determine whether an employment relationship existed between the applicant and the fourth respondent was not incorrect and does not constitute a reviewable irregularity for purposes of the current application. Consequently, the application to have the certificate of outcome reviewed and set aside on this basis must fail.

[15] On the uncontested evidence placed before this Court in the applicant's founding affidavit, it is apparent that the fourth respondent was not employed by the applicant and that no employment relationship accordingly exists between the applicant and the fourth respondent. The evidence shows that the fourth respondent was, in fact, employed by Faranani and not by the applicant. It follows therefore, that in the absence of an employment relationship between the applicant and fourth respondent, the first respondent has no jurisdiction over the applicant in relation to the dispute referred under case number GATW10954-08.

Order

Accordingly, I make the following order:

[16] The application to review and set aside the certificate of outcome issued under case number GATW10954-08 dated 24 November 2008 is dismissed.

[17] The fourth respondent was not employed by the applicant and the first

respondent accordingly lacks jurisdiction to arbitrate the dispute referred to it under case number GATW10954-08.

[18] There is no order as to costs.

K M Savage

Acting Judge

APPEARANCES

FOR THE APPLICANT: L Hollander

Instructed by R da Silva, Edward Nathan Sonnenbergs

THIRD RESPONDENT: No appearance