REPUBLIC OF SOUTH AFRICA

THE LABOURCOURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR 350/2012

In the matter between:

COOK4LIFE CC	**APPLICANT**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1ST RESPONDENT**
DK NKADIMENG NO	**2ND RESPONDENT**
LOURENS M DE BRUYN	**3RD RESPONDENT**

Heard: 25 January 2013

Judgment delivered: 29 January 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an unopposed application to review and set aside a jurisdictional ruling made by the second respondent (the commissioner) on 16 January 2012, and to set aside the certificate of outcome issued by the commissioner consequent on his ruling.

The commissioner's ruling

[2] The commissioner records in his ruling the point in *limine* raised at the conciliation phase to the effect that the third respondent had resigned and that therefore, in the absence of a 'dismissal' as defined by the Act, the CCMA had no jurisdiction to conciliate the dispute. The commissioner took the view that the existence or otherwise of a dismissal in the present instance was to be established at the arbitration phase. His formal ruling reads follows:

> '6.1 The CCMA has jurisdiction to conciliate of the dispute.
> 6.2 I hereby issue the relevant certificate of non-resolution.
> 6.3 The applicant may refer the dispute for arbitration if he so wishes.
> 6.4 The dispute may still be conciliated at the arbitration in terms of section 138 (3) of the Act.
> 6.5 I make no order as to costs.'

Background facts

[3] In April 2011, the third respondent was employed by the applicant as an imports buyer. The applicant contends that during November 2011, discussions were held between the applicant's CEO and the third respondent concerning the latter's work performance. The applicant contends that the third respondent conceded that his skills were not suitable to the position to which he had been appointed, and that the parties came to an agreement in terms of which the third respondent's employment would be terminated by mutual consent. The

agreement provided that the third respondent would be paid for the months of November 2011 through to February 2012, but that he would be relieved of any obligation to work with effect from 21 November 2012. The applicant contends that it has complied with the terms of the settlement agreement.

[4] In December 2011, the third respondent referred an unfair dismissal dispute to the first respondent. In the referral, the third respondent claimed that he had been unfairly dismissed for reasons relating to his incapacity, without any procedure being followed. A conciliation meeting was convened and took place on 11 January 2012. At this meeting, the applicant stated that it wished to raise an objection to the jurisdiction of the first respondent. In essence, the applicant contended that the third respondent had not been dismissed by the applicant given that a settlement agreement had been reached in terms of which the third respondent's employment terminated by mutual consent on 21 November 2011. The third respondent conceded that his employment had indeed been terminated by agreement, but claimed that he had concluded the agreement under duress.

Grounds for review

[5] The applicant contends that what the commissioner appears to have found is that notwithstanding the existence of a termination of employment by mutual consent, he was not entitled as a matter of law or otherwise to rule that the CCMA lacked jurisdiction to entertain the employees referral. More specifically, the applicant contends that in making his ruling, the commissioner lost sight of rule 14 of the CCMArules, which clearly requires a commissioner to establish whether the CCMA has jurisdiction to conciliate a dispute.Rule 14 of the CCMA Rules reads as follows:

> ‘If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the Commissioner must require the referring party to prove that the commission has the jurisdiction to conciliate a dispute through conciliation.

[6] In support of its submisssions, the applicant relies on the case of *EOHAbantu (Pty) Ltd v CCMA& another* 2008 (29)ILJ 2588 (LC) in which this court said the following:

> 'It is, in my view, clear from the section that it is peremptory for a conciliating commissioner to deal with a jurisdictional issue if it appears during the conciliation proceedings that a jurisdictional issue has not been determined. In other words, where a party raises a jurisdictional point during conciliation or where it appears that there exists a jurisdictional reservation, such point must be determined by the conciliating commissioner. Where the conciliating commissioner fails to do so, such a refusal will constitute a reviewable irregularity'.

The certificate issued by the commissioner

[7] As I have indicated, in the notice of motion, the applicant seeks to have the certificate of outcome issued by the commissioner reviewed and set aside. During argument, counsel submitted that the present proceedings did not "in principle" comprise an application to review and set aside the certificate – the review of the certificate was sought only as ancillary relief to the primary relief sought by the applicant, i.e. the review of the jurisdictional ruling made by the commissioner.

[8] In *Bombardier Transportation (Pty) Ltd v Mthiya NO & others* (2010) 31 *ILJ* 2065 (LC), this court held:

> 'In other words, a certificate of outcome is no more than a document issued by a commissioner stating that, on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a body wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not the certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.'

‘

[9] The judgment in *Bombardier* canvassed all of the relevant authorities, and I do not intend to repeat them here. The judgment has been applied by this court in a number of subsequent cases, to the extent that the principle reflected in the passage quoted above is well-established - a certificate of outcome issued by a commissioner has no legal significance beyond that stated above and ordinarily, is not an appropriate subject for an application for review. To the extent that the applicant seeks to have the certificate reviewed and set aside, that part of the application must fail.

The commissioner’s jurisdictional ruling

[10] In *Bombardier*, this court held that it was not necessarily a reviewable irregularity for a conciliating commissioner to defer challenge to the CCMA’s jurisdiction to the arbitration phase of the statutory dispute resolution process. In other words, Rule 14 must not be read so as to require that all jurisdictional questions of whatever nature raised that conciliation must necessarily be determined by the conciliating commissioner, on pain of a failure to do so being regarded as a reviewable irregularity. The court said the following:

> ‘The proper response of a Commissioner to jurisdictional challenges can therefore be summarised as follows:
> 1.` When respondent issues a jurisdictional challenge to properly completed referral form, a conciliating Commissioner may elect to determine the jurisdictional question ought to defer it. In the making that election, the Commissioner will generally regard a challenge to the effect that the dismissed person was not and "employee" is defined or that she was never dismissed, as matters that are not truly jurisdictional issues, and a further challenge to the arbitration phase. In respect of other challengers, the Commissioner ought to be guided by the nature of the challenge, the extent to which matters are intimately bound up with the substantive merits of the dispute, the determination of difficult questions of mixed law in fact, and the need for evidence to resolve them.
> 2. If a jurisdictional challenge is heard and upheld prior to the commencement of conciliation proceedings, the commissioner's ruling puts

> an end to the dispute. Is not necessary in the circumstances for the commissioner to issue a certificate of outcome (since the dispute was never capable of being resolved by the CC MA) and the ruling bounces CC are made all parties to the dispute. The jurisdictional ruling stands unless and until it is reviewed and set aside by this court….
>
> 6. In the absence of any relevant and prior jurisdictional ruling made by conciliating commissioner, any party to a dispute referred to arbitration may raise any challenge to the CCMA has jurisdiction at that stage, and the challenge must be dealt with by the arbitrating commissioner in terms of s 138 (1).'

[11] Again, all of the relevant authorities are referred to in the *Bombardier* judgment, and I do not intend to repeat them here. It follows, in the present instance, that the commissioner was not obliged to entertain the jurisdictional challenge presented by the applicant at the conciliation phase. This is particularly so since the jurisdictional challenge was not one that is identified in the *Bombardier* judgment as a true jurisdictional challenge, e.g. a failure to refer the dispute timeously, or a referral to the CCMA when a bargaining council has jurisdiction. The applicant's challenge (and the third respondent's response to it) required evidence to be led on the circumstances in which the agreement was concluded, and evidence of the nature and extent of any pressure placed on the third respondent to sign it. This is archetypically a challenge that is best deferred to the arbitration stage of the statutory process. The commissioner's ruling, which in effect deferred the applicant's jurisdictional challenge to the arbitration phase, therefore does not constitute a reviewable irregularity.

<u>CCMA'sjurisdiction to determine validity of an agreement</u>

[12] The applicant submits further that although the commissioner did not make any finding as to the validity of the agreement, he could not do so nor could any arbitrated Commissioner do so on the basis that the CCMA has no jurisdiction to entertain such a claim. Counsel relies on *First National Bank Ltd (Wesbank Division) vMooi NO and another* 2009 (30) *ILJ* 336 (LC) to contend that only

this court or a civil court has jurisdiction to make determinations on the validity of agreements, including employment contracts, settlement agreements, collective agreements and the like. On this basis, the applicant submits that if the third respondent wished to have the agreement declared null and void on account of any duress, that is a matter that ought to have been referred to this court in terms of s 77 (3) of the Basic Conditions of Employment Act.

[13] It is not uncommon, in review proceedings in this court, to encounter the attitude adopted by commissioners to the effect that the CCMA has no jurisdiction to determine the validity or otherwise of agreements. This view may be informed by the *First National Bank* decision, and appears to be predicated on the assumption that only a court of law has jurisdiction to enquire into the lawfulness of an agreement, and to make determinations of validity.

[14] In my view, the refusal by commissioners to enter into any consideration of the validityof an agreement confuses the concepts of jurisdiction and power. The CCMA has jurisdiction to determine unfair dismissal disputes and it is specifically enjoined, in terms of s 115 (1)(b), to arbitrate disputes referred to it after a failed conciliation. Section 191 contemplates that the CCMA must make a ruling when the existence of a dismissal is placed in issue, by determining whether or not an employee referring an unfair dismissal claim was dismissed within the meaning accorded to that term by section 186 (1) of the Act. That being so, I fail to appreciate why, in matters such as the present, when it is contended that an agreement is voidable on account of it having been induced by duress,the CCMA is not empowered to make that determination in the exercise of its jurisdiction to determine the existence or otherwise of a dismissal. To require an applicant in those circumstances to refer a contractual dispute to this court as a precondition to arbitration on an unfair dismissal claim would defeat the statutory purpose of informal and expeditious dispute resolution, and would import a requirement that finds no reflection in the Act.

[14] For these reasons, in my view, the application stands to be dismissed.

I make the following order:

1. The application is dismissed.

Andre van Niekerk
Judge of the Labour court

Appearances
Adv W Bekker, instructed by Gildenhuys Lessing Malaji Inc.