



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR685/11

In the matter between:

COMPASS GROUP SA (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER THEMBEKILE SIBANYONI

Second Respondent

PATRICK MPHUTHI & 22 OTHERS

Third Respondent

SAAWU

Fourth Respondent

Heard: 27 August 2015

Delivered: 27 August 2015

Judgment edited and order corrected: 30 September 2015

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In his award the commissioner found that the individual employees represented by the fourth respondent had been unfairly dismissed by the applicant and ordered their reinstatement.
- [2] The basis for the present application is primarily that the first respondent, the CCMA, had no jurisdiction to entertain the dispute that gave rise to the proceedings under review. In particular, the applicant submitted that the reason for the employees' dismissal was their participation in an unprotected strike. A dismissal effected for this reason of course falls within the ambit of this court's jurisdiction, since section 191(5)(b)(iii) of the Act requires any unfair dismissal dispute, where the reason for dismissal is the employees' participation in a strike that does not comply with the provisions of chapter IV of the Act, to be referred to this court for adjudication.
- [3] To the extent that the third respondent submits that the dispute between the parties was one that concerned an unfair dismissal and that the CCMA accordingly had jurisdiction to entertain the claim, this begs the question of the reason for dismissal and its jurisdictional consequences. The Act establishes the jurisdiction of the CCMA and this court respectively by reference to the employer's reason for dismissal. Both institutions are creatures of statute and may only act within the jurisdiction that is

conferred on them by the Labour Relations Act and any other labour legislation.

- [4] In the present instance, the commissioner himself recorded that the employees were dismissed on 7 July 2010 'for misconduct in that they participated in an unlawful strike'. This categorisation is consistent with the referral documents. The referral form submitted to the CCMA on 14 July 2010 specifically records in the summary of facts the allegation that the employer dismissed the employees unfairly, having accused them of participating in a strike. The certificate of outcome issued by the CCMA on 3 September 2010, for reasons that are not explained, indicates that the dispute may be referred to arbitration. It is trite that a certificate of outcome has no legal effect. It is certainly not definitive of any jurisdictional matters.
- [5] The notice of set down in respect of the proceedings under review was issued on 15 September 2010 and it records that the primary issue in dispute is one that relates to a dismissal concerning participation in a strike. All of these indicators are consistent with the applicant's version of events - i.e. that the employees who were employed by the applicant to provide catering services at the OR Tambo International Airport embarked on an unprotected strike on or about 30 June 2010.
- [6] At the arbitration hearing the applicant raised the point in *limine* to the effect that the CCMA did not have jurisdiction to entertain the dispute as it concerned the dismissal of employees for participation in unprotected strike action. The commissioner dismissed this point without giving reasons. Jurisdiction or the lack of it is a factual enquiry. Either the CCMA has jurisdiction or it does not. It is a creature of statute and cannot decide its own jurisdiction. The CCMA cannot grant itself jurisdiction which it does not have. In the present instance the dispute between the

parties, in the terms in which it was referred, pointed to the existence of facts indicative of a lack of jurisdiction by the CCMA.

- [7] To the extent that the third respondent disputes the applicant's right to raise a jurisdictional point at this stage, jurisdiction is a matter that can be raised at any stage in proceedings. Indeed it is the matter that the court itself is obliged to raise if the facts indicate a lack of jurisdiction. In *Pankana CC t/a R and W Transport Components v Dreyer NO and Others* (2012) 33 ILJ 692 (LC), this court held that a party is not precluded from raising a jurisdictional point at the review stage. This must be so, since the issue of jurisdiction is closely related to that of the rule of law, and especially that element of it that demands that statutory institutions exercise only those powers that are conferred on them by enabling legislation.
- [8] This is not one of those cases where a dispute is referred to the CCMA in circumstances where, on the face of it, the terms of the referral as such that the CCMA has jurisdiction, but where a commissioner decides subsequently that the true dispute between the parties is one that is not reflected in the referral and is one that falls outside of the CCMA scope of jurisdiction. For example, the dispute concerning a dismissal for incapacity and referred to the CCMA on that basis might involve an automatically unfair reason for dismissal where the employee is a pregnant woman and where the facts indicate that the real rather than the apparent reason for dismissal was her pregnancy.
- [9] The present application concerns a case that never fell within the ambit of the CCMA's jurisdiction. The reason given by the employer for dismissal was participation in an unprotected strike. The employees did not dispute that that was the reason

for their dismissal. They may have disputed that they were not on strike at all, but that is not a consideration that is determinative of jurisdiction. Unsatisfactory that might be, the statutory foundation on which the dispute resolution system is constructed accords significance to the reason for dismissal. Indeed, this is the basis of the bifurcation between arbitration and adjudication procedures established by the Act.

[10] Neither party in the present instance, as I have indicated, disputed the reason for dismissal. And that reason, being one that dictated that the dispute be referred to this court for adjudication, necessarily meant that the CCMA had no jurisdiction to conduct the proceedings under review. For that reason alone, and aside from any of the reviewable irregularities that the applicant submits were committed by the commissioner during the course of the arbitration proceedings, the commissioner's award stands to be reviewed and set aside.

[11] The applicant charitably did not pursue the issue of costs. For the above reasons, I make the following order:

1. The arbitration award issued by the second respondent under case number GAJB 22109-10 dated 18 March 2011 is reviewed and set aside.
2. The award is substituted by the following:
 'The referral is dismissed'.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Labour Court