



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no.: JR 1751/14

In the matter between

CINQPLAST PLASTOP (PTY) LTD

Applicant

And

C DUNN N.O

First Respondent

**THE METAL ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Second Respondent

**THE NATIONAL UNION OF
METALWORKERS OF SOUTH AFRICA**

Third Respondent

COMMISSIONER RAYNOLD BRACKS

Fourth Respondent

Heard: 19 November 2015

Delivered: 25 January 2016

JUDGMENT

VAN NIEKERK J

- [1] This matter has a long history. Its roots lie in a retrenchment that took place in 2004, almost 12 years ago. On 9 November 2003, the applicant gave notice of a proposed restructuring to all of its hourly-paid employees, and at that stage, contemplated the retrenchment of approximately 350 employees. The CCMA thereafter appointed a facilitator in terms of s 189A (3) of the LRA. The facilitator convened five meetings during February and March 2004. On 31 March 2004, 72 employees were retrenched and on 30 June 2004, a further 95.
- [2] In August 2004, the third respondent (the union), together with the Chemical, Energy, Paper, Printing, Wood and Allied Workers Union, filed an application in this court challenging the retrenchment of the 95 employees dismissed on 30 June 2004. In October 2006, that application was withdrawn. In June 2007 the unions filed a statement of claim under case number JS 619/04, alleging that the applicant had failed to consult in respect of the employees dismissed in June 2004. That matter was also withdrawn.
- [3] On 27 October 2008, two years later, the union referred a dispute to the second respondent (the bargaining council). The referral form alleges that the applicant unfairly dismissed the 105 employees whose names appear in an annexure to the referral. In paragraph 3 of the referral form, in addition to denoting that the dispute was one concerning unfair dismissal, the union ticked the box marked 'other' and recorded 'Failure to re-employ'. The employees who are the subject of the referral are those retrenched in 2004. In the space provided for a summary of the facts, the union noted 'The employer has failed to re-employ some of the retrenched employees.' The union also alleged that the applicant failed to consult with the applicant and

that there was no rationale for the retrenchment. The date on which the dispute arose is indicated as 22 October 2008, which is also denoted as the date of dismissal.

- [4] At the subsequent conciliation meeting convened by the bargaining council, the applicant took the point that the referral had not been made timeously. No ruling was made by the first respondent (Dunn). On 8 December 2008, Dunn issued a certificate of outcome to the effect that a dispute concerning an 'alleged failure to re-employ' remained unresolved as at that date. The dispute was then referred to arbitration.
- [5] On 17 April 2009, the union and the applicant concluded a pre-arbitration minute confirming amongst other things that the applicant had continued to employ staff after the 2004 retrenchments, and reflecting the names of those persons. The primary issue in dispute was recorded as the existence or otherwise of any agreement (the recall agreement) in terms of which the employees retrenched in 2004 would receive preference in the event of subsequent vacancies.
- [6] In August 2009, Dunn issued a directive in terms of which the union was required to provide details of the recall agreement on which it relied. The union did so, stating that the agreement was entered into between January and March 2004, during the course of the facilitation meetings.
- [7] The arbitration hearing proceeded over 10 days before commissioner Gaylard. The union's first witness testified that the breach of the recall agreement had arisen in March 2005 when new employees were engaged by the applicant. The union's case was that as late as October 2008, the applicant continued to refuse to re-employ the retrenched employees.
- [8] The applicant raised a point in *limine* that the bargaining council had no jurisdiction since the dispute had been referred more than 90 days after any alleged breach of the agreement. On 6 October 2009, commissioner Gaylard issued a ruling to the effect that she was not entitled to consider

the issue of jurisdiction because a certificate of outcome had been issued in respect of the dispute, and that certificate had not been set aside by this court.

[9] That ruling was not challenged and the arbitration hearing continued. It was finally concluded in July 2011. In the award, Gaylard held that the union had failed to establish the existence of the recall agreement and dismissed the referral with no order as to costs. The award was the subject of an application for review under case number JR 172/2012. The court file indicates that the application was not decided on the merits – there was no record of the proceedings available and the parties were unable to construct one. On that basis, and that basis only, the matter was remitted to the bargaining council for a hearing *de novo*.

[10] At the rehearing, as part of a number of interlocutory directives issued by the commissioner seized with the matter, the applicant contended that the bargaining council had no jurisdiction to arbitrate the dispute since the dispute had not been referred to the bargaining council within the prescribed 90-day period. As part of its contention, the applicant referred to correspondence placed before the commissioner to prove that the alleged unfair labour practice arose in 2004. The jurisdictional point was argued on 18 June 2014. In his ruling, issued on 8 July 2014, the fourth respondent, commissioner Bracks, said the following:

It is trite that the issuing of the outcome certificate has one important consequence in that, where a dispute was referred to conciliation out of time and condonation was not applied for and granted, the certificate cures the apparent defect in the dispute may be arbitrated...

[11] In this application, filed on 21 August 2014, the applicant seeks, to the extent that it is necessary, to review and set aside the certificate of outcome on the basis that the union deliberately misrepresented in its referral that the breach of the alleged recall agreement occurred in 2008, when in fact on the union's version any breach occurred in 2004, and that the referral

was made in 2008, outside of the 90 day period provided for in s 191 (1) (b) (ii) of the LRA. The applicant contends further that as a result of the referral not having been made within 90 days of the alleged unfair labour practice, and in the absence of condonation, the bargaining council did not have jurisdiction to conciliate the dispute and to issue the certificate of outcome.

[12] First, there is an application before the court to join commissioner Bracks to the proceedings. I did not understand this application to be opposed, and the commissioner is so joined.

[13] Both commissioners (Gaylard and Bracks), dismissed the applicant's jurisdictional point on the basis of their reading of *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* [2000] 12 BLLR 274 (LAC) and in particular, the view that once a certificate of outcome is issued, it cures any jurisdictional defect that may have existed on account of a late referral not accompanied by an application for condonation. In *Bombardier Transportation (Pty) Ltd v Mtiya* [2010] 8 BLLR 840 (LC) the court expressed the view at paragraph 15 of the judgment that:

...a certificate of outcome is no more than a document issued by commissioner stating that on a particular date, a dispute referred to the CCMA for conciliation remain 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 party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA a commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.

[14] This approach was upheld by the Labour Appeal Court in *BMW South Africa (Pty) Ltd v Numsa obo members* [2012] 3 BLLR 274 (LAC) where the court said at paragraph 31 of the judgment:

The Labour Court declined to review and set aside the CCMA certificate of outcome citing Van Niekerk J in *Bombardier Transportation (Pty) Ltd v Miya NO & others* [2010] 8 BLLR 840 (LC) at paragraph 15. This approach is the correct one.

[15] In *City of Johannesburg v SALBGC & others* [2014] ZALCJHB 68, 10 February 2014), this court affirmed the approach adopted in *Bombardier* and said the following:

[6] It is not disputed that the arbitrator rejected a submission by the applicant that the bargaining council lacked jurisdiction since the referring parties had failed to comply with the time limit prescribed by section 191 (b) (ii) of the LRA, in that the disputed had been referred to the council later than the 90 day period prescribed by the section. The basis of the arbitrator's ruling, it would appear, was that a certificate of outcome had been issued by the bargaining council on 28 March 2012 and that the certificate had not been taken on review. The arbitrator's reasoning appears to reflect the view that a party is not entitled to raise preliminary points at arbitration in the absence of a challenge to a certificate of outcome by way of review.

[7] It is now well-established that the existence of a certificate of outcome does not preclude an arbitrator from considering a jurisdictional issue, when a jurisdictional challenge arises at arbitration. When a jurisdictional issue arises, an arbitrator or commissioner is generally speaking obliged to consider the issue and satisfy him or herself that the bargaining council or CCMA, as the case may be, has jurisdiction - see *Bombardier Transportation (Pty) Ltd v Ntiya NO & others* [2010] JOL 25366 (LC), *BMW South Africa (Pty) Ltd v NUMSA obo members* [2012] 3 BLLR 274 (LAC).

[16] More recently, in *SAMWU v Ngwathe Local Municipality* [2015] 9 BLLR 894 (LAC), expressly stated that insofar as the judgment in *Fidelity Guards* has been interpreted to mean that the issuing of a certificate of outcome precludes any party from taking the jurisdictional point of the late referral, that interpretation was wrong. The court said at paragraph 42 of the judgment (per Kathree Setiloane AJA):

[42] The appellant also relies on the decision of this court in *Fidelity Guards* in support of its interpretation of section 191 (5) of the LRA. I am of the view that such reliance is equally misplaced because, as will be illustrated below, the decision is wrong. *Fidelity Guards* concerned an appeal against a dismissal of the review application in which, one of the grounds of contention was that the arbitrator lacked jurisdiction to hear the dispute as the conciliation proceedings were invalid due to the employee's failure to apply for condonation for the late referral of the dispute for conciliation outside of the statutory period of 30 days for an unfair dismissal dispute in terms of section 191 (1) (b) (i) of the LRA. The court held that the fact that a dispute is referred to the CCMA or a bargaining Council for conciliation outside of the statutory period of 30 days and no application for condonation is made or one is made but no decision on it is made, would not affect the jurisdiction of the CCMA or the bargaining Council concerned to arbitrate the dispute, provided the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome, the court held, that would render the CCMA or the bargaining Council concerned to be without jurisdiction to arbitrate.

[43] In arriving at this conclusion, the court appears to have impermissibly grafted the provisions of sections 135 and 136 (1) (a) and (b) of the LRA onto the referral, by an employee, of his unfair dismissal dispute to the CCMA for conciliation and arbitration which, as demonstrated above, is regulated exclusively by section 191 of the LRA. Having gone astray in this respect, the court then, erroneously, proceeded to link the setting aside of the certificate of outcome to the jurisdiction of the CCMA or bargaining Council to arbitrate an unfair dismissal dispute. As alluded to above, the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute is not conditional upon the issue of the certificate of outcome, as an employee's right of referral to arbitration accrues on the lapse of 30 days from the date on which the CCMA or bargaining council received a referral, and the dispute remains unresolved.

[44] ... Since the issue of a certificate of non-resolution by the CCMA or a bargaining council concerned, is not a pre-requisite for a referral to arbitration in terms of section 191 (5) (a) of the LRA, it cannot, in my view,

cure the lack of jurisdiction of the CCMA or a bargaining council to arbitrate an unresolved unfair dismissal or unfair labour practice dispute, where such certificate is issued after the lapse of 30 days from the date on which the CCMA or bargaining council received a referral, and the employee has not sought condonation for its non-observance of that timeframe.

- [17] It follows from the above authorities that the premise on which both commissioners Gaylard and Bracks made their jurisdictional rulings was fundamentally flawed and that in arriving at the decision they did (i.e. that the certificate of outcome precluded them from entertaining the applicant's jurisdictional point), they committed an error of law and the rulings stand to be set aside on that basis.
- [18] In the present instance, the union was required to refer the alleged unfair labour practice dispute to the bargaining council within 90 days of the date on which the dispute arose. The referral was made only in 2008. The material that served before the commissioner included the applicant's affidavit in which it made reference to correspondence that established that the alleged unfair labour practice arose in 2004, and not in October 2008. The affidavit made reference to a letter from CEPPWAWU to the applicant dated 1 April 2004, in which it was alleged that persons other than the retrenched employees were being employed. A letter from the union to the applicant dated 6 April 2004 alleged that the applicant was employing casual employees. On 2 July 2004, the union alleged that the applicant had employed 14 new employees. A letter addressed by the union to the bargaining council on 21 October 2008 alleged that the applicant had employed casual employees in or about June 2004. The union failed to file an answering affidavit to gainsay the applicant's contentions. In particular, there is no evidence that the applicant committed any breach of the recall agreement during the 90-day period preceding the referral. The fourth respondent was therefore obliged to have accepted the applicant's uncontested version that any alleged breach of the recall agreement occurred in 2004.

[19] On this basis, it is clear that the referral of the unfair labour practice dispute was made significantly outside of the period provided for in s 191 (1) (b) (i). There is no explanation by the union as to why the dispute was referred to the bargaining council four years after the applicant was alleged to have breached the recall agreement. Since the referral was made without any application for condonation, it follows that the bargaining council had no jurisdiction to conciliate the dispute, nor did it have jurisdiction to arbitrate the matter. It also follows that the first and second respondents had no jurisdiction to conciliate the dispute referral by the union, and the second respondent had no jurisdiction to arbitrate the dispute.

[20] To the extent that the union contends that the present application is defective since the ruling issued by commissioner Gaylard on 6 October 2009 remains in force, the commissioner decided no more than that she was not entitled to consider the jurisdictional point raised by the applicant because a certificate of outcome had been issued and not set aside. For the reasons reflected above, the existence of the certificate did not preclude the applicant from raising the jurisdictional point that it did. In any event, the proceedings before Gaylard were set aside in their entirety by this court on 12 November 2013, when a *de novo* hearing was ordered.

I make the following order:

1. The ruling issued by the fourth respondent on 8 July 2014 is reviewed and set aside.
2. The ruling is substituted by the following:

‘The referral is dismissed for lack of jurisdiction’.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv. F Boda, instructed by Norton Rose Fulbright

For the third respondent Adv. G Hulley SC, instructed by Phungo Inc.