

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO JR 945/01

In the matter between:

VIRGIN ACTIVE SOUTH AFRICA (PROPRIETARY) LTD

Applicant

and

L E MATHOLE N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MOLLY REDDY

Third Respondent

JUDGMENT

JAMMY AJ

1. In this unopposed application, the Applicant seeks an order in the following terms:
 - “1. Reviewing and setting aside the jurisdictional ruling made by the First Respondent in terms of Section 158(1)(g) of the Labour Relations Act 66

of 1995 as amended on 6 June 2001.

- “2. Replacing the jurisdictional ruling of the First Respondent with an order stating that the CCMA does not have jurisdiction to entertain Reddy’s dispute and that Reddy was not an employee of the Applicant.”
2. The background to this matter is the referral by the Third Respondent to the Second Respondent for conciliation in terms of Section 191 of the Labour Relations Act 1995 (“the Act”), of a dispute arising from what is alleged to have been her unfair dismissal by the Applicant on 8 February 2001.
3. The First Respondent was the Commissioner designated by the Second Respondent to conduct the conciliation process. At the outset and as recorded by him in his “Jurisdictional Ruling Reasons” dated 6 June 2001 —

“The Respondent, Virgin Active, raised a technical point which needs determination before the CCMA can assume jurisdiction”.

The basis of that technicality, namely that, for the reasons stated, the Third Respondent was not an employee of the Applicant, was then briefly outlined and examined by the First Respondent who, having done so, made the following order:

- “ (a) The CCMA has jurisdiction and the Applicant is an employee to the new employer, Virgin Active by virtue of Section 197 of the Labour Relations(*sic*).

(b) No order as to costs.”

4. Counsel for the Applicant, Mr F G Barrie, submitted in his argument in support of this application that the dispute itself is not a matter for determination by this Court, the sole and essential issue being whether the relationship of employer/employee, as an objective fact, is a jurisdictional fact that has to be established before a Commissioner of the Second Respondent in conciliation proceedings in terms of Section 191(4) of the Act. He referred to a number of decisions in which the issue was either touched upon or substantively dealt with by this Court.
5. The conclusion reached by Brassey A J in –

Richards Bay Iron & Titanium (Pty) Ltd t/a Richards Bay Minerals and Another v Jones and Another (1998) 19 ILJ 627 (LC)

that whether or not a relationship of employer/employee exists was a matter for the CCMA to decide, seems to me to be not open to debate in the context of the relevant provisions of the Act. At page 629 of the report, the learned Judge, with reference to those provisions, says this :

“Implicit in these provisions, it seems to me, is the proposition that a dispute cannot be referred to the CCMA unless the parties to it share a mutual interest and, where they are individuals, that this interest takes the form of a bond of employment between them”.

6. In the case in question the alleged employer approached the Labour Court to interdict conciliation and arbitration proceedings in the CCMA on the basis that it had not been the Applicant’s employer. The application was

dismissed on the basis that it was premature, Brassey A J finding that the CCMA had the authority to decide the issue and that the application to the Labour Court, before the CCMA had been called upon to decide that question, was premature.

7. The Court in that matter however, did not specifically address the situation arising where the issue in dispute is not one capable of resolution by arbitration under the auspices of the CCMA but is one which, where conciliation fails, must, as the law stands at present, be determined by the Labour Court, as for example where termination of employment is alleged to have been automatically unfair or unfair in the context of the operational requirements of the employer.
8. If the principle enunciated in **Richards Bay Minerals** is to be accepted as one of general application, - that any application to the Labour Court arising from a dispute as to whether or not an employment relationship exists between the contesting parties, will be premature if that specific issue has not first been referred to the CCMA for determination – then of necessity the CCMA, where the dispute is sourced either in the provisions of Section 187 or Section 189 of the Act, must *ipso facto* be vested with the power to determine it at the conciliation stage. What will thereafter be open to the parties or either of them, in a proper case, will be the exercise of their right to seek a review by the Labour Court of any such ruling.
9. If I am correct in that analysis therefore, there can to my mind be no validity in an argument that such authority exists selectively and can be exercised only in the narrow categories of dispute (Sections 187 and 189) to which I have referred. Either the CCMA is entitled generally to determine the jurisdictional fact to which I have referred at the conciliation

stage, or it is not. There can be no substance to any argument (hypothetical in this case) to the effect that it may do so in certain cases but not in others.

10. The broad issue was alluded to but not comprehensively determined in –

Flexware (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (1998) 19 ILJ 1149 (LC)

in which Zondo J (as he then was), in an application brought *after* the conciliation proceedings had been finalised and after the Commissioner in ensuing arbitration proceedings had issued a ruling that an employer/employee relationship between the parties existed, suggested that enquiry into the existence of such a relationship was something that the CCMA had to undertake when it conducted “conciliations and arbitrations”. The necessary implication from that conclusion is that the CCMA would not have jurisdiction to conciliate a dispute if the parties before the Commissioner were not in an employment relationship.

11. A contrary view however was expressed by the Labour Court in –

Dempster v Kahn N O and Others (1998) 19 ILJ 1475

in which Revelas J set aside a jurisdictional ruling made by a CCMA Commissioner in conciliation proceedings to the effect that the Applicant was not an employee for the purposes of the Act. A Commissioner charged with conciliation proceedings, the learned Judge held, did not have the authority or power to determine whether the requisite relationship existed. That was an issue to be dealt with in arbitration or adjudication

proceedings as the case may be. That the parties to the dispute had to have been in an employer/employee relationship was not a jurisdictional fact requisite to conciliation proceedings in terms of Section 191(4) of the Act. That section requires an attempt to resolve the dispute through mediation and that is what the Commissioner is bound to do without further enquiry.

12. For the reasons which I have stated, I am respectfully unable to agree with that conclusion. Section 191 of the Act prescribes a conciliation procedure relating to “a dispute about the fairness of a dismissal” and it is “the dismissed employee” who may refer such dispute to the Commission. *A fortiori*, a person who is not an employee may not do so. His or her status as such, if challenged at the conciliation stage therefore, must logically and practicably be thereupon determined. To hold otherwise would, in my opinion, serve only to undermine a legislated procedure designed to facilitate and expedite the resolution of employment-related disputes. The review jurisdiction of the Labour Court and indeed, to give that term a wider meaning, of an arbitrator where that procedure is indicated, serves adequately as a refuge available to an aggrieved employer able to establish a basis to invoke it.
13. For these reasons I have concluded that no basis exists for the interference by this Court with the ruling of the First Respondent in question and that the matter must take its course.

The application is accordingly dismissed.

B M JAMMY

Acting Judge of the Labour Court

11 April 2002

Representation:

e Applicant:

Advocate F G Barrie instructed by Sampson Okes Higgins Inc.

No appearance for Respondents