IN THE LABOUR COURT OF SOUTH AFRICA

(Held in Cape Town)

Case No C237/04

In the matter between:	**Reportable**
CADEMA INDUSTRIES (PTY) LTD	Applicant
And	
U BULBRING NO	1st Respondent
SACTWU	2nd Respondent
J HEYNES	3rd Respondent
NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY (WESTERN CAPE SUB-CHAMBER)	4th Respondent

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JUDGMENT

STELZNER AJ

1. This is an application in terms of section 145(2)(a)(ii) of the Labour Relations Act of 1995 ("the Act") read with clause 37(6)(l) of the Main Collective Agreement for the Western cape Region of the Bargaining Council as published under Government Notice No. R322 in Regulation Gazette No. 7590 of 7 March 2003 in terms of which the Applicant seeks to review and set aside the arbitration award of the 1st Respondent dated 5 April 2004.

2. There was no dispute between the parties before me that this Court has the

power to review and set aside arbitration awards if the arbitrating body lacks jurisdiction either in terms of the Act or the gazetted agreement. Furthermore, jurisdiction needs to be objectively established. By virtue of clause 37(6)(l) of the Main Agreement this Court has the power to review the arbitration award which is the subject of this application.

3. The crisp point that the Applicant relies on is that the 1st Respondent did not have jurisdiction to arbitrate the dispute because it related to an unfair dismissal which the Applicant alleged was on the grounds of its operational requirements and the dispute resolution provisions of the Main Agreement deprived her of jurisdiction in such circumstances. The relevant clause of the Main Agreement is clause 37(4)(a)(i)(ac)(aA), which reads as follows:

> "*37(4)* ***Adjudication of certain disputes by the Council***
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> *a) If the dispute remains unresolved after conciliation, the Council or Regional Chamber shall –*
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> *(i) arbitrate the dispute if any party to the dispute has requested the Council or Regional Chamber in writing that it be resolved through arbitration and;*
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> *aa) the dispute has been referred within 90 days after the date on which that dispute's certificate of outcome in conciliation was issued. However, the Council or Regional Chamber on good cause shown, may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period; or*
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> *(ab) the Act requires arbitration; or*
>
> *(ac) the dispute relates to an unfair dismissal for which the Act permits the dispute to be referred to the Labour Court, save in respect of a dismissal which the employer alleges is:*
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> *(aA) based on the employer's operational requirements; or*
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> *(aB) for participating in or supporting or indicating an intention to participate in or support, a strike or protest action;*
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> *(aC) which must be dealt with in terms of paragraph (ii) below; or;*
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> *(aD) the dispute relates to the interpretation or application of this collective agreement or any collective agreement concluded in the Council; or*

(aE) all the parties to the dispute consent, in writing, to arbitration being conducted under the auspices of the Council or Regional Chamber in terms of sub-clause (6) below;

(ii) subject to paragraph (a)(i)(ab) above, refer the dispute to the Labour Court if the Act requires the dispute to be referred to the Labour Court and any party to the dispute has requested the Council or Regional Chamber in writing to refer the dispute on its behalf to the labour Court.

(b) Parties shall not be entitled to refer the disputes identified in paragraphs (a)(i)(ab) and (a)(i)(ac) to the Labour Court or Labour Appeal Court."

4. The background to the matter was as follows. The 3rd Respondent had been employed by Applicant since 27 May 1999 on various fixed term contracts the last of which expired on 20 October 2003. The contracts ranged in duration from 1 month to 6 months and ran on an uninterrupted and continuous basis. When on the last occasion the contract was not renewed (as had been the case on expiry of all the previous contracts) the 2nd and 3rd Respondents referred a dispute to the 4th Respondent alleging that the failure to renew the contract amounted to a dismissal as contemplated by the provisions of section 186(1)(b) of the Act.

5. The matter came before the 1st Respondent by way of arbitration. It was accepted that the 3rd Respondent bore the onus of proving that there had been a dismissal and therefore 3rd Respondent (Applicant in the arbitration proceedings) commenced giving evidence. The Applicant (Respondent in the arbitration proceedings) was represented by Ms Penelope Arendse, its Personnel Officer. Ms Arendse indicated that the Applicant's case was that there was no dismissal – this was a matter of a fixed term contract coming to an end. The contract had expired. The 3rd Respondent's case was that she had a legitimate or reasonable expectation of renewal. Ms Arendse said at the arbitration: *"And the company feels that because there wasn't any work at the time when they were terminated, there wasn't – we couldn't accommodate them for another – for her for another period of time."* Then she said: *"The defence of the company is that the company has made the employer aware, employee aware that she will only be employed on a contract basis."* The 3rd Respondent's representative argued that this should be deemed an unfair dismissal.

6. The 1st Respondent agreed that there had been a dismissal as contemplated by section 186(1)(b) of the Act and then went on to consider whether the dismissal

was procedurally and substantively fair. She found that the Applicant had not discharged its onus in this regard. Clearly no procedure was followed because the Applicant had viewed the matter simply as expiry of a contract and had taken the view that no procedure was necessary. On substantive fairness the 1st Respondent found that "*no details were given as to the operational requirements of the company or as to why Heynes was on a fixed term contract for a period of 4 1/2 years. The averment that there was 'no work' at the time of the expiry of her contract is not proof of substantive fairness."* Having found then that there was a dismissal which was both procedurally and substantively unfair, the 1st Respondent ordered Applicant to reinstate the 3rd Respondent.

7. It is common cause that the Applicant's complaints about the jurisdiction of the 1st Respondent to arbitrate the dispute were not raised at either the conciliation or arbitration stages of the dispute resolution process.

8. The 1st Respondent assumed jurisdiction without consciously considering the issue. In terms of clause 7.1 of the 4th Respondent's Dispute Resolution Code of Conduct she was obliged to faithfully observe the limitation and inclusions of her jurisdiction as conferred *inter alia* by the Agreement. In any event, she had an obligation to ascertain whether she had jurisdiction. See *Tier Hoek v CCMA* [1999] 1 BLLR 63 (LC) at paragraphs 5 and 9 on page 64 and *IMATU v CCMA & another* [2000] 5 BLLR 583 (LC). In *Fidelity Guards Holdings (Pty) Ltd v epstein & others* (2000) 21 ILJ 2009 (LC) and *BHT Water Treatment (A division of Afchem (Pty) Ltd Incorporating PWTSA) v CCMA & others* [2002] 2 BLLR 173 (LC) this Court also held that jurisdiction should be determined at the arbitration stage of proceedings.

9. Jurisdiction is something which has to exist and be established objectively. See *NUMSA v CCMA & others* [2000] 11 BLLR 1330 (LC) at page 1337 paragraph 25.

> "[25] This however, was said in the context, not of deciding the law, but of whether the commissioner's finding on the law was reasonable and justifiable. The question whether a valid referral has been made which entitles the CCMA to conciliate a dispute is a jurisdictional fact. A jurisdictional fact is one which must objectively exist unless the statutes entitle the decision-maker to make a subjective appreciation of the facts. See Pinetown Town Council v President of the Industrial Court 1984 (3) SA 173 (N) at 179B-D where it is said:
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> > "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as 'jurisdictional facts' (see Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (HL) at 208 per Lord Wilberforce) which must objectively exist before the tribunal has power to act;

> consequently a determination on the jurisdictional facts is always reviewable by the Courts because in principle it is not part of the exercise of the jurisdiction but logically prior to it. (See also Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (A) at 15)."

10. The Applicant argued that jurisdiction to arbitrate did not lie with the 1st Respondent once the employer (Applicant) alleged that the dismissal was on the grounds of the Applicant's operational requirements.

11. The 2nd and 3rd Respondents argued that applying the golden rule of interpretation to clause 37 of the Main Agreement I should find that effectively any dispute may be arbitrated. This is the consequence of the use of the word 'or' at the end of sub-clause (aa) rather than the use of 'and' in that place. This would effectively exclude the need for the rest of the clause and, in my view, is an unsustainable interpretation thereof. It is more likely that the use of the word 'or' was a mistake and that instead one should read it as an 'and' (as contended for by the Applicant).

12. The 2nd and 3rd Respondents also argued that the interpretation of the clause contended for by the Applicant effectively also ousts the jurisdiction conferred by the Act since its amendment in 2002 - through section 191(12) - in relation to retrenchments involving a single employee. I do not find such a consequence to be bizarre or absurd. Clause 37 is part of the Main Agreement collectively bargained at the Bargaining Council to which, incidentally, the 2nd Respondent is a party. The Agreement in its current form was gazetted in 2003 after the amendments to the Act and it must therefore be presumed the parties knew of the change wrought by the amendment to the Act in relation to retrenchments involving single employees but nevertheless chose to retain a regime in terms of which all retrenchment disputes must be dealt with by the Labour Court.

13. I find therefore that under the provisions of clause 37(4)(a)(i)(ac)(aA) of the Main Agreement jurisdiction over a dismissal in respect of which the employer has alleged operational requirements is reserved for the Labour Court. The fact that the Applicant's primary argument at arbitration was that there was in fact no dismissal does not alter this position because the 1st Respondent was obliged once she found that a dismissal had taken place (albeit a deemed dismissal) to move on to the next stage of the enquiry which was to consider whether or not that dismissal was procedurally and substantively fair.

14. The Act is quite clear, that in regard to the issue of fairness the onus is on the employer to prove the fairness of the dismissal. The substantive fairness thereof has to be proved with reference to either the employee's conduct or capacity or

the employer's operational requirements (section 188 of the Act). It is clear that this much was appreciated by the 1st Respondent in the manner in which she considered the issue after having found that there was a dismissal. She also clearly appreciated that the Applicant's case was that it did not renew the contract because it had no work. Clearly the Applicant was alleging operational requirements as the reason for the (deemed) dismissal. One cannot escape this fact simply because the Applicant's main argument was that there was no dismissal, but rather the expiry of a contract. When this became apparent the 1st Respondent should immediately have realised that she did not have jurisdiction and should have referred the parties to the Labour Court. In failing to do so and in continuing to arbitrate she exceeded her powers. This is a reviewable irregularity.

15. The decision in *SACCAWU v Garden Route Chalets (Pty) Ltd* [1997] 3 BLLR 325 (CCMA) referred to me by the 2nd and 3rd Respondents, which held that it is not permissible for a collective agreement to limit the right of a party to have its dispute determined through the dispute resolution mechanisms contained in the Act, is not on point as the alternative to arbitration in that case was no remedy at all whereas in the matter before me the Respondents are not left without a remedy. Their remedy simply lies with the Labour Court and not with a Bargaining Council arbitrator.

16. This is a case where this Court is clearly in as good a position as any to decide the issue of jurisdiction and no purpose would be served by referring the matter back to the 4th Respondent for hearing before another arbitrator.

17. On the issue of costs I am inclined to exercise my discretion against making an award of costs against the 2nd and 3rd Respondents even though the Applicant has succeeded in the review. This is because in my view the 2nd and 3rd Respondents were entitled to defend the ruling made in their favour when the review application was brought on a highly technical (albeit correct) ground. I also take cognisance of the fact that the jurisdictional point was not raised until the review stage. If it had been raised earlier by the Applicant (i.e. at arbitration) the 3rd Respondent would not have been put to the expense of the review or the delay in finalisation of the matter which is the inevitable consequence of the outcome of this review. There is also the issue of an ongoing relationship between the Applicant and the 2nd Respondent.

18. The Applicant indicated at the hearing of the matter (and in its papers) that it would not oppose the application for condonation that would be required in respect of a referral of the dispute to this court in the event of the review being successful. This was an appropriate concession and helpful in contributing to this matter moving with as much expedition as possible towards finality, in accordance with the objectives of the Act.

19. In the circumstances I make the following order.

19.1 The arbitration award of the 1st respondent on 5 April 2004 is reviewed and set aside.

19.2 In its place is substituted a ruling that the 1st Respondent does not have jurisdiction in respect of the dispute.

19.3 The 3rd Respondent is ordered to refer her dispute to this Court within 14 days of date hereof by way of a statement of claim. If the statement of claim is filed within the aforesaid time frame then it is recorded that by agreement with the Applicant there will be no opposition to condonation for the late referral of the dispute being granted.

19.4 There will be no order as to costs in relation to this application.

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Stelzner AJ

Date of hearing	26 April 2005
Appearance for Applicant	Mr H Niewoudt of Deneys Reitz Inc
Appearance for 3rd Respondent	Mr J Whyte of Cheadle Thompson and Haysom
Date of judgment	6 May 2005