IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
held in Durban

Case No: DA 25/99

In the matter between:

FIDELITY GUARDS HOLDINGS (PTY)LTD Appellant

and

EPSTEIN L M N. O.

First Respondents

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION

Second Respondents

SUKHNANAN, MOHANLALL

Third Respondents

JUDGEMENT

ZONDO JP

Introduction

[1] In this appeal the appellant appeals against a judgement given by Pillemer AJ in the Labour Court in which the learned judge dismissed with costs a review application which had been brought by the appellant. The review application was aimed at the reviewing and setting aside of an arbitration award previously issued by the first respondent, a commissioner of the Conciliation Mediation and Arbitration in respect of a dispute between the appellant and the third respondent.

The Facts

[2] The third respondent was employed by the appellant. He was dismissed from the appellant's employ. A dispute arose between the two parties about the fairness of that dismissal. The third respondent referred the dispute to the second respondent, (the Commission for Conciliation, Mediation and Arbitration) outside the statutory 30 days'

period from the date of dismissal within which he was required to have referred it in terms of sec 191(1)(b) of the Labour Relations Act, 1995 (Act NO 66 of 1995 (**"the Act"**). Attempts were made to conciliate the dispute but those attempts did not yield any results. The commissioner who had conciliated the dispute issued a certificate in terms of sec 135 of the Act to the effect that the dispute remained unresolved. Thereafter the dispute was referred to arbitration. The arbitration took place. The commissioner who arbitrated the dispute issued an award to the effect that the dismissal was unfair and ordered the appellant to pay the third respondent certain compensation.

[3] After the issuing of the arbitration award, the appellant launched an application in the Labour Court to have the award reviewed and set aside. The review application was based on two grounds. The first one, which went to the issue of jurisdiction, was that the commissioner who arbitrated the dispute had no jurisdiction to do so because the conciliation proceedings had been invalid because the

third respondent had not made an application for condonation for the late referral of the dispute even though it had been referred to conciliation outside the 30 days statutory period and the commissioner had not condoned the late referral. In those circumstances, so contended the appellant, the arbitrating commissioner could not have had jurisdiction to arbitrate the dispute.

[4] The second ground went to the merits of the arbitration proceedings. It was that, having found the third respondent guilty of the misconduct he had been charged with in the internal disciplinary inquiry, the arbitrating commissioner was not entitled to interfere with the sanction of dismissal that the appellant had imposed. It is necessary to state at this stage that the basis on which the arbitrating commissioner found the dismissal unfair was that the appellant had applied discipline to him in a manner which was inconsistent with the manner in which it had applied discipline to other employees who had committed similar offences. This point is not covered by the grounds of appeal which the appellant gave in its

notice of appeal. However, for the same reasons given by the court a quo, I would have found it to be without merit even if it was covered by the grounds of appeal.

The jurisdictional point

[5] The jurisdictional question which this appeal raises relates to the identification and determination of the true conditions which must exist under the Act before a dispute in respect of which an **"unresolved outcome certificate"** can be arbitrated or adjudicated. Is there one condition or are there a number of conditions? What are they? What is the effect of a failure to comply with them? As the passage I shall quote shortly will indicate, there are different categories of jurisdictional facts.

[6] In SA Defence & Aid Fund & NO v Minister of Justice 1967(1) SA 31(C) at 34H - 35D Corbett J, as he then was, had this to say about jurisdictional facts:. **" Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two**

broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see e.g. Kellerman v. Minister of Interior , 1945 T.P.D. 179; Tefu v. Minister of Justice and Another, 1953 (2) S.A. 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power

had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter. (See e.g. Minister of the Interior v. Bechler and others, supra; African Commercial and Distributive Workers' Union v. Schoeman, N.O. and Another 1951 (4) S.A. 266 (T); R.V. Sachs, 1953 (1) S.A. 392 (AD)".

[7] In my view where the power to be exercised is statutory, the answer to the question of what the jurisdictional fact(s) is (are) which must exist before such power can be exercised lies within the four corners of the statute providing for such power. Accordingly the provisions of

such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are). In the light of this I consider it necessary to have regard to the provisions of the Act to determine what the necessary jurisdictional fact(s) is (are) which must exist in a case such as this one before it can be arbitrated or adjudicated in terms of the Act.

(8) Sec 191 of the Act deals with disputes about unfair dismissals. The provisions of sec 191 (1)-(5) read thus:.

"**1. If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to -**

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

2. If the employee shows good cause at any time, the council or the

Commission may permit the employee to refer the dispute after the 30-day time limit has expired.

3. The employee must satisfy the council or the Commission that a copy of the referral had been served on the employer.

4. The council or the Commission must attempt to resolve the dispute through conciliation.

5. If a council or a commissioner has certified that the dispute remains unresolved, or, if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved -

(a) the council or the Commission must arbitrate the dispute at the request of the employee if -

(I) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable; or

(iii) the employee does not know the reason for dismissal; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -

(I) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[9] Certain of the provisions of sec 135 and 136 of the Act may also be relevant: The heading to sec 135 is: Resolution of disputes through conciliation. Sec 135(5) says:-

"When a conciliation has failed, or, at the end of the 30 day period or any further period agreed between the parties -

(a) the commissioner must issue a certificate stating whether or not the dispute had been resolved;

(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a

party in the conciliation proceedings;

and

(c) the commissioner must file the original of that certificate with the commission."

[10] Sec 136(1) of the Act provides:

"If this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that dispute if -

(a) a commissioner had issued a certificate stating that the dispute remains unresolved; and

(b) within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non observance of that time frame and allow a request for arbitration filed by the party after the expiry of the 90-days period."

There is also sec 157 (4)(b). It says:

"A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve the dispute through conciliation."

[11] It will be clear from the provisions of ss(1) to (5) of sec 191 above that, when there is a dispute about the fairness of a dismissal, a certain process may be followed which ultimately leads to the resolution of such dispute either by way of arbitration or by way of adjudication. The first step in that process is the referral of the dispute to a council or the CCMA for conciliation. The second is that the applicant must satisfy the CCMA or the council that a copy of the referral has been served on the other party to the dispute. Subject to sec 191(5) the third step is that the council or the CCMA must attempt to resolve the dispute through conciliation. In terms of sec 191(5) the commissioner must then issue a certificate of outcome to the effect that the dispute remains unresolved or a period of 30 days must expire after the council or the CCMA received the referral. Thereafter comes the arbitration of the dispute by the council or the CCMA or the adjudication of the dispute by the Labour Court, as the case may be. The dispute is required to be referred to either a council or the CCMA within 30 days of the date of dismissal. However, if it is

not referred within that period, the council or the CCMA has power to permit a late referral on good cause shown.

[12] In my view the language employed by the legislature in sec 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and, the council or commissioner has issued a certificate in terms of sec 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate.

[13] In par 12 of his judgement, Pillemer AJ said:-

“If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim omnia praesumuntur rite esse acta, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision. (Cf. O’Reilly v Mackman [1983] 2AC 237,238 and Harnmaker v Minister of Interior 1965(1) SA 372(c) at 381)” I agree with this.

[14] I also agree with the views expressed by the court a quo in par 15 of its judgement. There the learned judge had this to say:.

“**I have considered the remarks of Mlambo J in Van Rooy v Nedcor Bank Ltd [1998] ILJ 1258 (LABOUR COURT). In that case the learned judge rejected the submission that the Labour Court could not interfere with a certificate issued by a**

commissioner if the matter was not brought before the court on review on the basis that the court has a supervisory role to the commission and its commissioners. It is not necessary to consider whether this court has an inherent power of review in certain circumstances, but I respectfully do not agree with the learned judge when he states that for the court to have jurisdiction to deal with the matter before it, the commission must have had jurisdiction (used in the special sense of such jurisdiction flowing from a referral made timeously). To my mind jurisdiction of the court under section 191(5) flows from the existence of the appropriate certificate in those classes of dispute which have to be referred to the court. Section 157 (4)(b) goes so far as to provide that a certificate by its mere production constitutes prima facie proof that an attempt has been made to resolve the dispute; this, not in the context of section 195, but generally, limiting the jurisdiction the court has to refuse to determine a dispute in

respect of which there has been no attempt as (sic) resolution by conciliation. The power to issue the certificate is conferred by section 135. That section requires the commissioner appointed to resolve the dispute through conciliation to issue a certificate issued out of time may be set aside on review, that is a far cry from the conclusion that the commissioner lacked power to issue a certificate is a nullity to be regarded as pro non scripto and having no legal effect with the dire consequence that an arbitrator or the court, as the case may be, has no jurisdiction to determine a dispute which is otherwise properly referred to it for resolution after a genuine attempt at conciliation".

[15] A question which arises in a case such as this one is at what stage of the dispute resolution process contemplated by the Act should a party who objects on one or other ground to the processing of the

dispute institute review proceedings? In the absence of a

statutory provision to the contrary, I am of the opinion that it should be done within a reasonable time. The question which arises is whether that means before any further steps are taken after the event giving rise to the objection or that means within a reasonable time after the party has allowed the entire process to be concluded so that it can see whether its objection does not become academic for one or other reason in the process.

[16] Where a dismissal dispute has been referred to the CCMA or a council for conciliation, there are a few matters which can possibly give rise to a jurisdictional objection by, for example, the **“employer”**. The one is that it can be disputed that there was an employer - employee relationship between the parties. Another one could be that the referral is outside the 30 days period and that, therefore, the Council or the CCMA has no jurisdiction to conciliate the dispute. Yet another one, which has been taken in some cases which have come before the Labour Court, is that the referral form was not signed by the employee but by someone else and that such referral is

not valid and therefore, that the CCMA or the council, lacks jurisdiction.

[17] If the employer is aware of anyone of the above possible grounds of objection, he would have to consider what he must do about them. He would have to consider whether he should immediately rush off to a court of competent jurisdiction to seek an order to the effect that the CCMA or the Council has no jurisdiction to conciliate the dispute or whether he should first raise the objection before the commissioner appointed to conciliate and go to such court only if the ruling is against him or whether he should raise the objection before the conciliating commissioner and even if the ruling is against him, proceed to participate in the conciliation process because, if the matter is resolved at conciliation, the ruling against him will become academic and in that way he will avoid the legal costs which would be involved in approaching a court.

[18] If the dispute is not resolved at conciliation stage, he would have to consider whether he should then rush off to

a court of competent jurisdiction at that stage to obtain an appropriate order on whether or not the CCMA or the council has jurisdiction to proceed to arbitrate the dispute. He would consider whether he should wait and see if the employee takes the dispute to arbitration or to the Labour Court after conciliation has failed before he can take the costly route of approaching a court for a ruling on jurisdiction. He may legitimately think that he should reserve his rights and participate in the arbitration proceedings on the basis that , if the arbitrator finds in his favour on the merits which is likely to be a cheaper route in some cases if not most - he will avoid legal costs but if he rushes off to court before the arbitration is completed, he may waste money on court proceedings in a case where he may be likely to end up with an award in his favour any way.

[19] If the employer approached the court after the referral but before even the conciliation could start and sought a ruling that the council or the CCMA did not have jurisdiction on one or more of the grounds of objection I

referred to earlier, he might be unsuccessful and might have to come back to participate in the conciliation process anyway. Then, maybe, he might have to approach the court again after the conclusion of the arbitration proceedings if the award is against him if he believes that the arbitrating commissioner has committed one or other reviewable irregularity entitling him to have the award set aside. That would be

a second trip to the court. If, however, he raised whatever objections

he has before the CCMA or the Council but participated in the process upto the end of the arbitration proceedings before rushing off to court, this may be cost effective, more convenient and may avoid a duplication or multiplication of court proceedings. It will also not overburden the court.

[20] I think from the above it should be clear that whether or not a party should approach the court about jurisdictional objections before or after the completion of the processes before the CCMA or the council is not a simple question. I

doubt that a hard and fast rule can be made about it. Considerations which this issue raises are not altogether dissimilar to some of the considerations which our courts have to deal with from time to time in different contexts (see. Nugent J in **Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 676G-680J;** Nicholson J in **Gordon Verhoef & Krause & Another v Azanian Workers Union & others (1997) 18 ILJ 707 (LAC) and Galgut J** in connection with the in medias res rule in **Zondi & others v President Industrial Court and others (1991) 12 ILJ 1295 (LAC) esp at 1300c - 1303A.)**

[21] In conclusion I am unable to find that the court a quo erred in any way in dismissing the review application. In fact I am satisfied that the judgement of the court a quo is correct in upholding that as long as the certificate of outcome stands, the CCMA has jurisdiction to arbitrate the dispute.

[21] In the result the appeal falls to be dismissed. It is

dismissed with costs.

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RMM Zondo

Judge President

I agree

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C.R Nicholson

Judge of Appeal

I agree

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R. Nugent

Acting Judge of Appeal

Appearances:

For the Appellant : Mr S. Snyman

Instructed by : Snyman Van Der Heever

Heyns

For the 3rd Respondent : M Sukhnanan

Instructed by :

Date of hearing : 30 May 2000

Date of judgement : 2000