**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO. J1383/97**

**In the matter between:**

**J. P. OOSTHUIZEN** **APPLICANT**

**and**

**C.A.N.MINING&ENGINEERING.SUPPLIEBJ** **RESPONDENT**

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**JUDGMENT**

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[1] The applicant has referred a dispute concerning his alleged unfair dismissal to this Court in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act"). Prior to the hearing, the respondent signified that it intended raising two points *in limine*. It was agreed these would be dealt with independently. This judgment deals with the first point *in limine*, namely, that the Court lacks jurisdiction as the CCMA is seized of the matter.

[2] The facts relevant to this submission are as follows. The alleged dismissal of the applicant took place on or about 31 July 1997. On 8 August 1997 the applicant referred a dispute to the CCMA. Conciliation was unsuccessful and the CCMA certified on 6 September 1997 that the dispute remained unresolved. On the same day the applicant referred the dispute to arbitration in terms of section 191(5)(a) of the Act. After the respondent had received the referral, it requested the CCMA to appoint a senior commissioner as arbitrator. Commissioner P Roopa was duly appointed, and commenced the proceedings on 25 September 1997. Before evidence was heard, however, the commissioner suspended the arbitration proceedings in terms of section 138(3) and attempted further conciliation. The parties subsequently met, together with their legal advisers, to discuss issues that were the subject of a civil action by the applicant against the respondent. On 24 October 1997 the applicant referred the dispute to the Metal and Engineering Industries Bargaining Council, which issued a certificate on 9 December 1997 stating that the dispute between the parties concerning the "alleged unfair dismissal for operational requirements s 179 [*sic*] and s 191(1)" remained unresolved. The present application was filed with this Court on 19 February 1998.

[3] The respondent now contends, in essence, that once he referred the matter to the CCMA, the applicant exercised an election by which he is

bound, and that the CCMA irrevocably assumed jurisdiction. Since the CCMA has jurisdiction over the dispute, so the respondent contends, it follows that this Court does not have jurisdiction. The applicant contends that the respondent challenged the jurisdiction of the CCMA during the arbitration proceedings, and that Commissioner Roopa expressly ruled that the Commission lacked jurisdiction when he was informed that the respondent fell under the jurisdiction of the bargaining council. The applicant says further that once the commissioner so ruled, the only course open to him was to refer the matter to the council and apply for condonation for the late referral, which was done and granted.

[4] The principal factual dispute in this matter is whether Commissioner Roopa indeed ruled that the commission lacked jurisdiction to arbitrate. If he did so, the respondent's point *in limine* must fail.

[5] Mr Roopa testified that, as far as he recalled, he did not rule that the CCMA lacked jurisdiction. He stated in his evidence that, as far as he recalled, it had become apparent to him that the dispute before him was intertwined with pending civil litigation between the parties, and that his objective in attempting further conciliation was to clarify a host of issues. When Mr Roopa had been informed that the parties were to meet with their legal advisers, he had suggested to them that they continue to discuss the

matter. Both the applicant and his adviser, Mr V de Kock, testified that they clearly recalled that the respondent's labour consultant, one Peet Venter, had challenged the Commission's jurisdiction and that Mr Roopa had ruled thereon in the respondent's favour.

[6] I do not intend to analyse the evidence in detail. It suffices to say that Mr Roopa was a commendably honest witness, and that he frankly conceded that he could not recall with certainty whether or not the respondent's representative had raised a jurisdictional point, or whether he had ruled upon it. He expressed the view, however, that it was unlikely that he had made a ruling, as he had not recorded the point, and would probably have remembered had he applied his mind to the question. In the face of such uncertainty I cannot reject the positive claims of the applicant and Mr De Kock that the respondent's representative informed the commissioner that the respondent fell under the jurisdiction of a bargaining council. This claim is supported by a letter in the agreed bundle dated 29 October 1997 to the Metal & Engineering Industries Bargaining Council from Mr N C Gey van Pittius, a legal practitioner who on the instructions of the applicant attended to the referral of the matter to the council. Apparently for the purpose of seeking condonation for late referral, Mr Van Pittius recorded in the said letter that the respondent had challenged the CCMA's jurisdiction during the arbitration hearing. No conceivable

advantage could have been gained by the applicant by fabricating this claim at that stage - or indeed by lodging an application to the bargaining council. The respondent did not venture to suggest what benefit the applicant might have gained in view of the fact that he could simply have proceeded with the matter under the auspices of the CCMA, to which he had elected to refer the matter in the first place. I accordingly have no hesitation in finding that on the probabilities the applicant referred the matter to the bargaining council because he was under the *bona fide* impression that he could not proceed with the matter before the CCMA.

[7] I am unable to find on the evidence whether this impression was created by an express ruling by the commissioner that he lacked jurisdiction to arbitrate the matter, by a misapprehension on the part of the applicant that such a decision had been made, or simply as a result of the general uncertainty that prevailed when the parties left the CCMA. While the applicant and Mr De Kock were certain that the respondent's representative had raised a jurisdictional challenge during the arbitration, their recollection was less than vivid when it came to whether Mr Roopa had made an express ruling. If he had done so, the probabilities would be that he would have informed his case management officer that the case had been closed. No evidence was led in this regard. While I am aware that for purposes of this point *in limine* the onus rests on the respondent, I

intend basing my finding on the supposition that the commissioner made no formal ruling in relation to jurisdiction.

[8] The question, then, is whether in the absence of a formal ruling relating to jurisdiction, the applicant remained, as it were, "locked into" the process of arbitration under the auspices of the CCMA, and was thereby precluded from re-directing the proceedings via the bargaining council to this Court. Mr *Loyson*, who appeared for the respondent, contended that once a party has referred a matter to the CCMA for arbitration, the only way the dispute can be transferred to this Court is by the procedures provided for in the Act. These are sections 191(6), 141(3) and 141(4) and 147(2)(a)(ii).

[9] Section 191(6) reads as follows:

"(6) Despite section 5(a), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering -

(a) the reason for the dismissal;

(b) whether there are questions of law raised by the dispute;

(c) the complexity of the dispute;

(d) whether there are conflicting arbitration awards that need to be

resolved;

(e) the public interest."

[10] Section 141(1) provides that parties may agree that the CCMA arbitrate disputes that should otherwise be referred to the Labour Court, and section 141(3) provides that such agreements may be terminated only with the consent of all the parties, unless the Labour Court sets aside the agreement on application under section 141(4).

[11] Section 191(6) regulates situations where one or both of the parties to a dispute concerning dismissals of the type specified in section 191(5)(a), over which the commission alone otherwise has jurisdiction, wish to have the dispute adjudicated by the Labour Court. Apart from making it possible for the Court to adjudicate such matters, the intention behind this provision is clearly to make referrals to this Court subject to the discretion of the director of the CCMA.

[12] Section 141 deals with the converse situation - namely, where the parties wish to have the commission arbitrate disputes otherwise reserved for the Labour Court. The intention behind sections 141(3) and (4) is to ensure that once parties agree that the CCMA may arbitrate a dispute otherwise reserved for the Labour Court, they do not unilaterally withdraw without the leave of the Court.

[13] The respondent now claims that its participation in the arbitration proceedings amounted to an agreement as contemplated by section 141(1). Even assuming that the respondent's representative did not challenge the jurisdiction of the commission on the basis that the dispute should have been referred to the council, I cannot accept that the respondent's mere participation in the arbitration proceedings amounted to an agreement within the intended meaning of that term in section 141(1). For one thing, the applicant had simply referred the dispute as an "unfair dismissal", and stated in evidence that at that stage he was unaware of why he had been dismissed. The respondent's representative could accordingly not have known that the dispute was one which the applicant "would otherwise have been entitled to refer ... to the Labour Court for adjudication". It seems clear from the use of the phrase "arbitration agreement" in sub-sections (3), (4) and (5) of section 141 that a specific agreement is contemplated. There was certainly no conscious agreement between the parties in this case that the CCMA would arbitrate a matter which both parties knew should otherwise be adjudicated by this Court.

[14] The respondent claims further that the only way in which the applicant could lawfully have transferred the dispute from the CCMA to the Labour Court was to make an application to the director of the CCMA

under section 191(6). Mr *Loyson* seeks support for this contention in *Magubane & others v Mintroad Saw Mills (Pty) Ltd* [1998] 2 BLLR 143 (LC), in which the applicants had referred a matter to the CCMA, and then unilaterally withdrawn from arbitration before the CCMA after it had became clear from the respondent's opening statement that the dismissals concerned were for operational requirements. Jali AJ observed at :

"The Labour Relations Act gives the employee the discretion to decide on the forum in which a matter will be instituted.... Once an employee says that it is a dismissal for misconduct or incapacity, the procedure to follow is set out in terms of the Act. On the other hand, once it says that the dismissal is for operational requirements there is a procedure to be followed in resolving that particular dispute, namely, conciliation before the CCMA, failing conciliation then the matter is followed by referral to the Labour Court.

Needless to say that it is possible that the description which may be given by an employee of the nature of the dispute, might lead to a matter going to an incorrect forum. However, the Act does make provision for dealing with that eventuality in the event of the matter being in the one forum or the other."

[15] After setting out the provisions of section 191(6), the learned judge comments at :

"The procedure as set out in terms of the said subsection is clearly that if the applicants felt that the reasons for the dismissal was because of operational requirements they should have moved an application with the director of the CCMA for the transfer of the matter to the Labour Court. This would have been an application which would have been appropriately considered in terms of section 191(6)(a). In the circumstances, it is clear that the applicants were obliged to follow this procedure if the applicants sought to take the matter away from the CCMA.... It is clear from the subsection that this decision should have been made by the director of the CCMA and not by the applicants, notwithstanding that the applicants have got a discretion to refer the matter to the CCMA or to refer it to the Labour Court as previously stated. Once a party makes the election of either referring the matter to the CCMA or the Labour Court, he is bound to follow the procedures set down by the Act in respect of that forum."

[16] At first glance, this judgment appears to give direct support to the respondent's case. However, the facts in *Mintroad Saw Mills* are distinguishable in a number of respects from the facts *in casu*. Firstly, in *Mintroad Saw Mills* the applicants were expressly advised by the commissioner that they should not refer the matter to the Labour Court themselves. In the present case no such advice was given. Secondly, the

applicants in that case transferred the matter because they had discovered that they had incorrectly categorised the reason for their dismissals. Judge Jali held that section 191(6)(a) is created for that situation (although, and I merely mention this in passing, it may be arguable that section 191(6)(a) is intended solely to make it possible for disputes mentioned in 191(5)(a)) to be brought before the Labour Court with the permission of the CCMA director, and that the correct course for the CCMA is to dismiss the matter if it is discovered that the dismissals fall under section 191(5)(b), and the parties are not willing to consent to arbitration in terms of section 141(1)).

[17] What is clear, however, is that sections 191(6) and 141 do not apply when it is discovered, as *in casu*, that the parties to the dispute fall within the registered scope of a council. Such situations are covered by sections 147(3) and 147(4). The former sub-section provides:

"(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute fall within the registered scope of a council and that one or more parties to the dispute are not parties to the council, the Commission may -

(i) refer the dispute to the council for resolution;

(ii) appoint a commissioner or, if one has been appointed, confirm the

appointment of the commissioner, to resolve the dispute in terms of this Act."

[18] It is apparent that when it is discovered that a matter has been erroneously referred to the CCMA by a party falling within the registered scope of a council, the CCMA has a choice whether to refer the dispute to the council or to resolve the dispute itself. It follows that the CCMA has jurisdiction over such disputes at the outset. However, section 147(3)(a) suggests that the choice must be considered before the CCMA elects to arbitrate and that, if it chooses to refer the matter to the council, the CCMA must itself do the referring. The duty to exercise this choice rests, not on the parties, but on the CCMA.

[19] If the applicant's version is to be accepted, the course that should have been followed after the respondent notified the commissioner that it fell within the scope of a council was that prescribed in section 141(3)(a). In other words, the commissioner should have decided whether to refer the matter to the council or to continue with the arbitration. On the other hand, if the respondent's version is to be accepted, the commissioner simply converted the matter into a conciliation, sent the parties off to attempt settlement on their own, and did nothing more about the matter because they did not revert to him. On either version, the choice conferred by

section 141(3)(a) was neither considered nor exercised by the CCMA.

[20] When the arbitration hearing was suspended, the applicant was confronted with two choices. He could either follow what he (or his advisers) deemed to be the correct route - that ia, refer the dispute to the bargaining council - or revert to the CCMA and request that the suspended arbitration be resumed with. He chose the former course. Had he chosen the latter, the CCMA would have had to consider whether to refer the dispute to the council or whether to appoint a commissioner, or confirm the appointment of Commissioner Roopa, to arbitrate. In my view the applicant cannot in the circumstances be blamed for re-directing the referral to what he (and his advisers) had by then come to believe was the correct body. Nor in my view can they be blamed for proceeding with the application in this Court after the bargaining council designated the dismissal as one for operational requirements. The form of the dismissal had not been addressed in the conciliation or arbitration hearings by the CCMA because the applicant had referred the matter simply as an "unfair dismissal". But had the classification of the dismissal been considered, and had it transpired that the commissioner was satisfied that the dismissal was for operational requirements, the parties would have had to formally agree to proceed with the arbitration in terms of section 141(1). If they had not so agreed, the applicant would have been free to refer the matter to this Court in terms of section 191(5)(b)(ii). As indicated above, no such

agreement was concluded.

[21] In the final analysis, the applicant has referred the dispute to this Court as he would have been free to do if the CCMA had considered the matter and characterised his alleged dismissal as a retrenchment. The respondent now wishes to hold the applicant to arbitration by the CCMA, whether by direct order of this Court, or by the revival of the dormant arbitration proceedings, which must be the inevitable consequence if the application is dismissed on the basis of the respondent's present contention. Apart from being wastefully circuitous, such a result will not accord with one of the primary objectives of the Act, namely, the effective and expeditious resolution of labour disputes. In my view, the solution that best accords with that objective is to treat the original referral for what it in reality was - an erroneous referral to the CCMA which was never re-directed in terms of section 147(3), and which must accordingly be deemed to have lapsed when the applicant chose to re-direct the application to the council himself.

[22] It follows, for the above reasons, that the respondent's point *in limine* is dismissed. The costs incurred thereby will be costs in the cause.

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GROGAN A J

ACTING JUDGE OF THE LABOUR COURT

For the applicant: Advocate Kruger, instructed by Basie Gey Van Pittius

For the respondent: Advocate Loyson, instructed by Eric Louw Attorneys

Date of hearing: 3 December 1998

Date of judgment: 7 December 1998