REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C02/2014

In the matter between:

HELDERBERG INTERNATIONAL IMPORTERS (PTY) LTD	Applicant
And	
J.W. McGAHEY *N.O.*	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
E. HERSKOVITZ	Third Respondent

Date heard: 6 August 2014

Delivered: 23 January 2015

Summary: Application to review an arbitration award: whether jurisdictional pre-requites existed to arbitrate a dispute in which constructive dismissal referral pre-dated the end of the employee's notice period; section 190 of the LRA not applicable to constructive dismissal disputes.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an arbitration award under case number WECT 14750. The second respondent (the

Commissioner) found that the third respondent (Herskovitz) had been constructively dismissed and compensated him in an amount equivalent to six months salary, being R342,000.00.

[2] A *point in limine* was raised by the applicant (the company) at the beginning of the arbitration. It pertained to the allegation that the CCMA referral was served prematurely, and prior to the effective date of dismissal as defined, and as contemplated in section 190(1) of the LRA. Herskowitz's contract of employment was terminated by him (on notice of one calendar month) on 31 August 2013. It was submitted by the company that that the effective date of termination of the contract of employment was therefore 30 September 2014 as Herkowitz continued to tender his services up to that date. The referral to the CCMA was made on 26 September 2013.

[3] The Commissioner records his dismissal of the point *in limine* as follows:

> "10. The respondents argued that the CCMA did not have jurisdiction to hear the matter as the applicant had referred the dispute during his notice period and before the date of dismissal. He believed that the applicant should now re-submit his referral form and apply for condonation for a now late referral. This was their interpretation of section 190(1) of the Act. The applicant argued that was just another example of the respondent attempting to prejudice the applicant for no good reason. It had not been raised as a problem at conciliation.
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> 11. I ruled that section 191(1) required a referral to be made within 30 days of the dismissal. The respondent resigned on 31 August 2013 which I take as the date of the dismissal (see also section 186(1)(e) of the Act) and agreed to work out his one month's notice. The applicant referred the alleged constructive dismissal to the CCMA on 26 September 2013. There is nothing in the Act which removed jurisdiction from the CCMA in these circumstances. To do so would severely prejudice the applicant and unnecessarily prolong the whole process. I could see no prejudice to the respondents in doing so and none was suggested."

[4] Section 186 (1) (e) of the LRA, referred to by the Commissioner, provides that "dismissal" means that:

> "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

[5] It is submitted on behalf of the company that the Commissioner ignored the provisions of section 190(1)(a) of the LRA in making the above finding. Section 190(1) of the LRA reads as follows:

"190 Date of dismissal

(1) The date of dismissal is the earlier of-

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer."

Evaluation

[6] It is now trite that on jurisdictional points such as that before the Commissioner, this court does not apply the review test as set out in **Sidumo**. In **SA Rugby Players Association & others v SA Rugby (Pty) Ltd** [1], Tlaletsi AJA (as he then was) writing a judgment for the Labour Appeal Court, held that:

> '[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
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> [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In Benicon

[1] (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 (LAC) at paras 39-40

Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act.

[41] The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.'

[7] Section 190 of the LRA was amended in 2000 to deal with the issue of the "date of dismissal". The rationale of this particular amendment was set out in the *Labour Relations Amendment Bill, 2000 Explanatory Memorandum* in which the drafters stated that:

"Date of Dismissal - Amendment to Section 190

An amendment has been made to clarify the date of dismissal as being the date on which a final decision to dismiss an employee was made. This clarifies the position when employers have internal appeal procedures."

[8] Section 190(1) does not apply to a constructive dismissal as is clear from the purpose of the provision. In a constructive dismissal, an employee makes the final decision as to when she ceases providing services. In terms of section 186(1)(e) she can do so with or without notice, and may refer a dispute to the CCMA that she was constructively dismissed. The employment relationship terminates on the day she leaves service. In my judgment, in any constructive dismissal dispute the date of termination of the contract of employment and the date of leaving the service of an employer are contemporaneous – on that date, an employee will no longer be remunerated or tender her services.

[9] Herskowitz tendered his services until the end of his notice period and received remuneration for this period. The employment relationship still subsisted at the date of his referral to the CCMA. A different situation pertained in the matter of **Chabeli v Commission for Conciliation, Mediation & Arbitration & others**[2] in which an employee claimed constructive dismissal after giving notice. In that case the employer did not require him to work out his notice period, and the court found that the date of his dismissal was the date on which he ceased to provide services to the employer. It was necessary therefore that he referred his dispute to the CCMA within thirty days of ceasing to provide his services.

[10] It was submitted on behalf of Herskowitz that the judgment in **Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others**[3] applies to this matter, with that case being understood as authority for the proposition that once a certificate of outcome is issued by a conciliating commissioner, an arbitrator has the requisite jurisdiction to hear a matter until that certificate is set aside. However that reading of the **Fidelity Guards** matter has not been sustained in this court. In **Bombardier Transportation (Pty) Ltd) v Mtiya N.O. and Others**[4] my brother van Niekerk J stated that:

> "In truth, Fidelity Guards is concerned only with the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law (in the sense that it will not be susceptible to review) even though the act is invalid and unlawful."[5]

[11] I align myself with the conclusions reached in the Bombardier judgment, as have a number of other decisions in this court, that a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be.[6] Further, in the absence of any relevant and prior jurisdictional ruling made by a conciliating commissioner, any party to a dispute referred to arbitration may raise any challenge to the CCMA's

[2] (2010) 31 ILJ 1343 (LC) per Molahleli J
[3] (2000) 21 ILJ 2382 (LAC)
[4] (2010) 31 ILJ 2065 (LC)
[5] At paragraph 9
[6] At paragraph 12

jurisdiction at that stage, and the challenge must be dealt with by the arbitrating commissioner in terms of s 138(1).[7]

[12] In this matter the referral to the CCMA was premature in that the employment relationship still existed at the date of the referral. In **Avgold-Target Division v CCMA & Others** (2010) 31 ILJ 924 (LC) my sister Basson J considered an evidentiary version before her which would have rendered a CCMA referral premature:

> "[30] Returning to the point at issue: If the respondent's version is to be accepted (which I do not accept) that he was permanently employed, then the date of his dismissal will be determined with reference to s 190(1)(a) and (b) of the LRA which provides that the date of dismissal is the earlier of the date on which the contract of employment terminated or the date on which the employee left the services of the employer. It was common cause that the contract came to an end on 31 May 2003. It was also common cause that the respondent left the applicant in the middle of May 2003 which is some weeks after the dispute had been referred to the CCMA. On this version the dispute was therefore referred to the CCMA before the respondent was actually 'dismissed' as contemplated by the LRA. The referral to the CCMA was therefore clearly premature and the CCMA did not have jurisdiction to conciliate (and/or arbitrate) the dispute." (my emphasis)

[13] In this case too, the referral took place before a 'dismissal' as contemplated in Section 191 (1) took place. Section 191 (1) of the LRA provides:

> "191 Disputes about unfair dismissals and unfair labour practices
>
> (1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-

[7] At paragraph 15

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

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

(b) A referral in terms of paragraph (a) must be made within-

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[14] In all the circumstances of this case, the CCMA did not have jurisdiction to conciliate or arbitrate the dispute. This means that the arbitration award stands to be set aside. Nothing precludes the third respondent from referring the dispute to conciliation afresh, together with an application for condonation. I do not consider it apposite that costs should follow the result in this matter and I make the following order:

1. The award under case number WECT14750-13 is hereby reviewed and set aside.
2. There is no order as to costs

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H. Rabkin-Naicker

Judge of the Labour Court

Applicant: L van Zyl Attorneys

Third respondent: Assreeton Smith Inc