IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1306/08

In the matter between:

SEKUNJALO INVESTMENTS LIMITED	Applicant
AND	
D MEHTA	1st Respondent
N MBELENGWA N.O	2nd Respondent
COMMISSION FOR CONCILATION, MEDIATION & ARBITRATION	3rd Respondent
SEKUNJALO CORPORATE SERVICES (PTY) LTD	4th Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in an application before the second respondent (the commissioner) sought to have the first respondent's claim of unfair dismissal dismissed for lack of jurisdiction. The point about jurisdiction was based on the contention that there existed no employment relationship between the applicant and the first respondent.

[2] The applicant has also applied for condonation for the late filing of its review application. The review application was one day late. I see no reason why the condonation should not be granted regard being had to the degree of lateness and the reasons proffered by the applicant.

Background facts

[3] The first respondent challenged his alleged unfair dismissal on the basis that he had been constructively dismissed by applicant. His referral of the dispute to the CCMA was accompanied by an application for the condonation of the late referral of his dispute. The applicant did not oppose the condonation application but reserved its right to challenge the alleged unfairness of the dismissal at the arbitration hearing.

[4] After granting the condonation for the late referral of the dispute, the CCMA issued a certificate confirming that the dispute remained unresolved and that it could be arbitrated upon. The first respondent then referred that dispute to arbitration.

[5] After the referral of the dispute to arbitration the applicant launched an application as a *point in limine*, seeking the dismissal, of the first respondent's case on the basis that the CCMA did not have jurisdiction to arbitrate the matter. In terms of the *point in limine* the applicant contended that the CCMA did not have jurisdiction because there was no employment relationship between the applicant and the first respondent.

[6] The first respondent opposed the *point in limine* on the basis that the applicant could not challenge the jurisdiction of the CCMA at that stage unless and until the certificate of outcome had been reviewed and set aside.

The arbitration award and the grounds for review

[7] The commissioner in his award ruled as follows:

> *"5.1 The respondent's application to dismiss this matter does not succeed.*
>
> *5.2 Sekunjalo Corporate Services (Pty) Ltd is joined as the co-respondent.*
>
> *5.3 The CCMA should send the notice of set down to both respondents.*
>
> *5.4 I make no order as to costs."*

[8] The commissioner in his award says that the reasons for the above conclusion are that:

> *"4.1 It is common cause that the applicant signed a contract of employment with Corporate Services, which is a subsidiary of the respondent (SIL), the holding company. The applicant was the CEO of the healthcare and biotechnology divisions of the group which is the current respondent. The applicant reported to Mr Kajee, the CEO of SIL and not the Board of Corporate Services or any other division within the group.*

4.2 It is submitted that the applicant applied for condonation for the late referral of the dispute and cited SIL as the respond. The matter was conciliated upon and nothing was done by the respondent to object to the wrong citation of the dispute. I am of the view that the respondent should have objected to the wrong citation at that time.

4.3 SIL as a holding company of subsidiary/divisions in the group has a substantial interest in this matter and therefore it should remain as the respondent. Corporate Service should also be joined in this matter as a respondent.

4.4 For the applicant to succeed in his claim of constructive dismissal, he has to prove that indeed continued employment was made intolerable. However such intolerability arose when the applicant was either employed by either SIL or Corporate Services and the applicant has to prove that at arbitration."

[9] The applicant contends that the commissioner's finding constitutes an irregularity which is reviewable. The essence of the applicant's attack on the commissioner's arbitration award is based on two grounds which are set out below.

[10] The first ground of review is that the commissioner committed a reviewable irregularity by holding that he was precluded from determining the *point in limine* by reason of the existence of the certificate of outcome.

[11] The second ground of review is that the commissioner committed a reviewable irregularity by making two findings which are contradictory. It was contended in this respect that on the one hand the commissioner found that the applicant being a subsidiary of the fourth respondent had a substantial interest in the matter and should for that reason remain as a party to the proceedings. And on the other hand the commissioner says that the decision as to who the employer of the first respondent was should be determined at the arbitration hearing. The applicant further contended that in failing to determine who the employer of the first respondent was, the commissioner exceeded his powers.

Evaluation

[12] The case of the applicant is that the commissioner refused to entertain its dispute on the basis of the authority of ***Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others [2000] 12 BLLR 1389 (LAC).*** The essence of that judgment is that by issuing a certificate of outcome, the conciliating commissioner condoned the late referral of the dispute. The certificate once issued, in the context of condoning the late referral of the dispute to the CCMA, becomes a bar to the employer raising the jurisdictional point concerning the late referral of that dispute unless the certificate was set aside.

[13] In ***Bombardier Transportation (Proprietary) Limited Lungile Mtyiya NO and others case number JR 644/09,*** soon to be reported, the court observed the two different approaches that have been adopted by the Labour Court in dealing with the consequences of the certificate of outcome in relation to the issue of jurisdiction.

[14] The first approach is that which is found in ***EOH Abantu (Pty) Ltd v CCMA &Another (2008) 29 ILJ 2588(LC),*** where the court taking its direction from ***Fidelity Guards Holdings (supra)*** held that once a certificate of outcome has been issue without the jurisdictional facts been satisfied, the arbitrating commissioner is obliged to arbitrate the matter despite the fact that the conciliating commissioner may have been wrong in as far as jurisdiction is concerned. In other words the arbitrating commissioner cannot dismiss the matter on the bases of lack of jurisdiction in the face of the certificate of outcome. In terms of this approach the only time that jurisdiction in the face of the certificate of outcome can be raised is if that certificate has been set aside irrespective of whether or not the conciliating commissioner was wrong. See ***Bombadier (supra)*** at paragraph [6]. In other words in terms of this approach a party is bared from raising any jurisdictional point as long as there is a certificate of outcome.

[15] The other approach is found in the view that the bar to raising a jurisdictional point is limited only to where the conciliating commissioner in issuing the certificate had discretion to exercise over any jurisdictional point that may have been in existence, like granting condonation as was the case in ***Fidelity Guards.*** Thus in my view the approach adopted in ***Fidelity Guards*** applies in instance involving what I would refer to as procedural jurisdictional points.

It however, has to born in mind that as a general rule the CCMA can not give itself jurisdiction by means of a certificate of outcome of the dispute.

[16] In dealing with the status of a certificate of outcome Van Niekerk J in ***Bombadier*** (***supra)*** had the following to say:

> *"[14] In other words, a certificate of outcome is no more than a document issued by a commissioner stating that on a particular day, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not the certificate of outcome has been issued. Jurisdiction is not granted or afforded to it by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as the fact or it does not."*

[17] This court aligned itself with the above approach in the unreported judgment of ***Road Accident Fund v South African Transport and Allied Workers Union & Others unreported case number: JS750/10*****.** In the present instance the issue that arose in ***Fidelity Guards*** concerning jurisdiction because of the late referral of the dispute does not arise. The condonation for the late referral which was granted was never opposed by the applicant neither does the applicant seek to raise that as an issue in the present instance. The issue raised by the applicant concerns the substantive issue of whether or not there existed an employment relationship between it and the first respondent. Thus the jurisdictional point raised in this matter is different to the one which was raised in ***Fidelity Guards (supra).***

[18] In my view, as will appear in more details below, the commissioner in the present instance did not dismiss the point raised by the applicant on the basis of decision in ***Fidelity Guards*** as contended by the applicant. All what the commissioner did was to postpone the issue and directed that it be determined at arbitration hearing.

[19] Although the commissioner in his finding at paragraph 4.3 of his arbitration award quoted above says, Corporate Service should be joined in this matter, I do not belief that on the proper reading of his reasoning the word *"joined*" in that paragraph is used in the technical sense of joinder. It is clear from the reading of the first part of that paragraph that the commissioner recognized that the applicant is already cited as a party and should remain as such. All what the commissioner does in that reasoning is to emphasize, the already existing state of affairs in the matter.

[20] Even if the above analysis was found to be incorrect, that would not advance the case of the applicant. At best if it was to be found that the contention of the applicant had some merit, then the conclusion would be that the commissioner committed a mistake. Such a mistake would not, in my view, be material enough to be said to have denied the applicant a fair hearing. The mistake would not be material because all what would have happened is that the commissioner's finding would have simply confirmed an already existing state of affairs. The applicant as stated above had already been cited as a party in the proceedings.

[21] I now turn to deal with the issue of the finding by the commissioner at paragraph 4.2 of the arbitration award that the applicant should have objected to its citation at the conciliation stage. I do not agree with the contention of the applicant that the commissioner based his finding on the decision in ***Fidelity Guards.***

[22] The statement by the commissioner that the issue of citation of the applicant should have been raised at the conciliation proceedings is of no consequence, because it does not dispose of the issue of jurisdiction.

[23] In my view the commissioner has not determined the jurisdictional issue concerning the existence of the employment relationship between the applicant and the first respondent. At paragraph 5.3 of the arbitration award, the commissioner concludes that the CCMA should send a notice of set down to the respondents. And more importantly at paragraph 4.4 of the arbitration award the commissioner says that for the first respondent to succeed in his claim of constructive dismissal he has to show that the "intolerability" arose when the applicant was employed by either SIL or Corporate Services and the applicant has to prove that at the arbitration proceedings.

[24] It is clear from the above that the commissioner did not determine or close the determination of the jurisdictional issue. In essence, all what the commissioner has done was to postpone the determination of the issue to the arbitration hearing. He arrived at this conclusion after determining the matter on the papers before him. Whilst I note the explanation of the applicant that they had indicated their wish to present oral argument before the commissioner, I do not belief that the approach adopted by the commissioner prejudiced them in any manner because the right to pursue its claim still stands. The commissioner adopted a practical approach in dealing with the application which was before him. The approach adopted by the commissioner is particularly correct if regard is had to the fact that the applicant had approached the CCMA on the basis of motion proceedings. There seems to be no doubt that on the papers before the commissioner there was a dispute of fact which can at best be resolved at the arbitration hearing where each party will have an opportunity to present oral evidence which will assist in resolving the question of whether or not the applicant was an employee of the first respondent. It is therefore my view that the approach adopted by the commissioner was the most sensible and reasonable in the circumstances. The commissioner in the approach he adopted, avoided a piece meal; approach to the matter. In this regard it needs to be emphasized that it is apparent that the issue of the existence or otherwise of the employment relationship between the applicant and the first respondent would have to be determined by way of viva voce evidence.

[25] In my view and in the light of the above analysis, I do not belief that the commissioner's award is unreasonable to warrant a review. For the purposes of clarity I read the commissioner's award to be saying the following:

1. The applicant's application to dismiss the first respondent's case is dismissed.
2. The CCMA should set down the arbitration hearing by notifying both parties.
3. The issue of the employment relationship between the applicant and the first respondent will be determined at the arbitration hearing.

[26] In the light of the above discussion, I am of the view that the applicant's application to have the commissioner's award reviewed and set aside stand to

fail. There is no reason in both law and fairness why the applicant should not be required to pay the costs of the first respondent.

[27] In the premises the applicant's case is dismissed with costs.

Molahlehi J

Date of Hearing : 23 April 2010

Date of Judgment : 21 October 2010

Representative

For the applicant : Adv A Oosthuizen

Instructed by : Cliff Dekker Hofmeyr Inc

For the respondent : Mr Malan

Instructed by : Edward Nathan Sonnenberg