"TRUE" JURISDICTIONAL QUESTIONS AND THE IRRELEVANCE OF A CERTIFICATE OF OUTCOME

Bombardier Transportation (Pty) Ltd v Mtiya NO [2010] 8 BLLR 840 (LC)

1 Introduction: Jurisdiction in the CCMA context

In the context of proceedings before the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), the concept of "jurisdiction" generally refers to the authority of the CCMA to conciliate and arbitrate disputes between parties. The CCMA is an independent statutory body established in terms of section 112 of the Labour Relations Act 66 of 1995 ("the LRA"). It does not enjoy the wide powers of inherent jurisdiction and, furthermore, does not derive its jurisdiction from the common law, performing only the functions indicated by labour-related statutes such as the LRA.

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 the CCMA if no bargaining council has jurisdiction (s 191(1)(a)). Such a referral must generally be made within 30 days of the date of a dismissal or within 90 days of the date of the act or omission which allegedly constituted the unfair labour practice (s 191(1)(b)). The CCMA must attempt to resolve such a dispute through conciliation (s 191(4)). If a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the CCMA received the referral and the dispute remains unresolved, the CCMA must arbitrate the disputes referred to in section 191(5)(a) upon request.

Given the wording of such provisions, it is unsurprising that employers have requested conciliating commissioners to make *in limine* rulings on matters pertaining to the nature of the dispute (including whether or not the case involves a "dismissal" at all), time limits and applications for condonation and the identity of the parties (in particular, whether the applicant meets the definition of an "employee"). Section 192(1) of the LRA may support the validity of such a request at conciliation. It states that *in any proceedings* concerning any dismissal, the *employee* must establish the existence of the *dismissal*. Such an approach raises a number of questions. For example, are such matters really best dealt with as a point *in limine* prior to any attempt being made to conciliate the matter, or should they form part of the evidence at arbitration in cases where the dispute could not be

conciliated? In addition, what is the effect on jurisdiction of a conciliating commissioner's certificate of outcome indicating that a dispute remains unresolved? Such matters were raised for adjudication in *Bombardier Transportation (Pty) Ltd v Lungile Mtiya NO* (Unreported Case No. JR 644/09, Labour Court) ("*Bombardier*").

2 The facts

The third respondent, Johannes, was employed by Bombardier China in terms of a fixed term contract, initially due to expire in June 2008. Although he was assigned to work on the Gautrain Project in South Africa, the terms of Johannes' contract made it clear that he would be remunerated in Hong Kong, where he was resident, and that and contractual dispute would be determined in accordance with the law of Hong Kong. The contract was extended until 18 September 2008, and then again for a further, final, six month period. The applicant contended that Johannes terminated the contract of his own accord and left its employ on 31 October 2008 – some months before the final period of extension of the contract was to expire. When Johannes referred an unfair dismissal dispute to the CCMA on 10 November 2008, the applicant filed an application in terms of Rule 14 of the Rules for the Conduct of Proceedings before the CCMA ("the Rules") arguing that the CCMA lacked jurisdiction on two grounds: firstly, the law of Hong Kong, and not South Africa, was the applicable law; and secondly, Johannes had not been "dismissed" because he had terminated the contract of his own volition.

For reasons unknown, a conciliation hearing was convened on 13 February 2009 – over two months after the 30-day period for conciliation had expired. The first respondent ("the commissioner") decided that Johannes should file an answering affidavit to the applicant's claims regarding jurisdiction and that the matter should be set down for argument on 14 April 2009. More importantly, the commissioner issued a certificate of outcome in accordance with the provisions of s 135(5) on the basis that the 30-day period for conciliation had expired. The commissioner drafted an "explanatory note" to this certificate a few days after having issued the certificate, explaining that the applicant could raise any jurisdictional issues at arbitration.

The applicant sought to review and set aside the commissioner's certificate of outcome by averring that the commissioner had exceeded her powers and committed misconduct in the form of a material error of law by ignoring the jurisdictional issues before her. The applicant prayed for an order substituting the certificate with a decision that the CCMA lacked jurisdiction to entertain Johannes' referral of an unfair dismissal dispute.

3 The relevant legal principles

Prior to the judgment in *Bombardier*, judges of the Labour Court had disagreed about the correct approach to adopt in dealing with jurisdictional issues at the conciliation stage of the dispute resolution process. These differences of opinion also resulted in the precise status of a certificate of outcome being questionable.

3 1 Relevant Labour Appeal Court judgments

In *Zeuna – Starker Bop (Pty) Ltd v NUMSA* ([1998] 11 BLLR 1110 (LAC) the Labour Appeal Court ("the LAC") found that the CCMA was bound to establish that it has jurisdiction to entertain a dispute before proceeding with conciliation. The dispute arose before the LRA had come into existence, but the commissioner nevertheless certified that the dispute was unresolved. The employer brought a review to set aside the certificate on the ground that the commissioner exceeded his powers. The LAC agreed and found as follows:

> "The Commissioner was obliged to enquire into the facts to decide whether he had jurisdiction to conciliate the dispute … The Commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justifiable grounds."

In *NUMSA v Driveline Technologies (Pty) Ltd* ([2000] 1 BLLR 29 (LAC), the LAC found that a certificate that a dispute has been unresolved is conclusive proof that conciliation had taken place and that the Labour Court was not empowered to remit the matter for conciliation when such certificate has been issued. The court held that obligations imposed on parties are not usually intended to be jurisdictional preconditions.

The often referred to and leading Labour Appeal Court judgment of *Fidelity Guards Holdings (Pty) Ltd v Epstein NO* ([2000] 21 ILJ 2382 (LAC) followed. In this case the employer referred a dispute concerning his alleged unfair dismissal to the CCMA out of time. A certificate was issued without condonation being granted. It was contended that the conciliation proceedings had been invalid because the commissioner had not granted condonation. The court held that the dispute, although having been referred outside the thirty day period for conciliation without condonation being granted, could still be arbitrated as it would not affect the jurisdiction to arbitrate as long as the certificate of outcome had not been set aside. The court held that the setting aside of a certificate of outcome causes the CCMA or a Bargaining Council to lack the jurisdiction to arbitrate (par 12).

The court held furher:

> "Where a dismissal dispute has been referred to the CCMA or 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 thirty day 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 Labourt Court, is that the referral form was not signed by the employee but by somebody else and that such referral is not valid and therefore that the CCMA or the Council lacks jurisdiction.
>
> If the employer is aware of any of the above possible grounds of objection, he would have to consider what he must do about them. He will 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 a 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, … 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 if he should be involved in approaching the Court. …
>
> 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 process before the CCMA or the Council, is not a simple question. I doubt that a hard and fast rule can be made about it" (par 16-20).

3 2 The approach in EOH Abantu (Pty) Ltd v CCMA and Avgold – Target Divisions v CCMA

In *EOH Abantu (Pty) Ltd v CCMA* ((2008) 29 *ILJ* 2588 (LC)) ("*EOH Abantu*"), Basson J held that a commissioner was bound to decide any jurisdictional point raised in conciliation proceedings *before* conciliation commenced and prior to issuing a certificate of outcome. Failure to do so constituted a reviewable irregularity. According to this view, an arbitrating commissioner had no power to dismiss a matter due to a lack of jurisdiction once a conciliating commissioner had issued a certificate of outcome indicating that the matter remained unresolved – even if the arbitrator believed that the conciliating commissioner had erred. The arbitrator was, essentially, bound to arbitrate the case unless the conciliating commissioner's certificate of outcome had been reviewed and set aside. This view made it peremptory for a conciliating commissioner to deal with a jurisdictional issue, thereby giving real meaning to rule 14, ("If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation") and elevated the status of a certificate of outcome so that it served to confer jurisdiction on the CCMA to adjudicate a dispute referred to it. This approach was followed in *Avgold – Target Divisions v CCMA* ([2010] 2 BLLR 159 (LC)).

3 3 EOH Abantu (Pty) Ltd v CCMA

By contrast, in *EOH Abantu (Pty) Ltd v CCMA* ([2010] 2 BLLR 172 (LC)) ("*EOH Abantu II*"), Cele J was of the view that rule 14 merely required the averments that the applicant was an employee who had been dismissed and that the respondent was an employer (at 184G). In the absence of such

statements in the referral form, the conciliating commissioner should merely issue an "advisory jurisdictional ruling" explaining that the CCMA had no jurisdiction to conciliate the dispute. This ruling did not prevent the applicant from referring the matter to arbitration where the 'jurisdictional issues' could be determined with the assistance of evidence by an arbitrator. In cases where the respondent challenged jurisdiction at conciliation despite the proper averments having been made in the referral form, it was suggested that the conciliating commissioner should issue a certificate of non-resolution on the basis that there existed a dispute of fact requiring the leading of evidence. Determination of the actual "jurisdictional" challenge itself was thereby deferred to the arbitration phase in both such instances.

This was also the approach in *Seeff Residential Properties v Mbhele NO* ([2006] 27 ILJ 1940 (LC)), where the court held that a certificate of outcome was not a jurisdictional prerequisite to proceed to arbitration. The court furthermore held that if a conciliator declined to issue a certificate of outcome or was of the view that the CCMA lacked jurisdiction, such decision had no consequence since the arbitrating commissioner was entitled to consider the jurisdiction issue afresh. The ruling of the conciliating commissioner would not be binding (par 15).

3 4 The "Third Way" of Van Niekerk J: "True" jurisdiction

The approach adopted in *Bombardier* was premised on the notion that many so-called "jurisdictional issues" raised at conciliation proceedings were actually not jurisdictional questions "in the true sense" (par 13). Importantly, Van Niekerk J listed two specific examples which did not constitute actual jurisdictional issues which had to be dealt with prior to conciliation (and which were not contemplated by rule 14), namely the determination as to whether a person was an employee or an independent contractor and the question as to whether or not the employee had been dismissed (par 13). This conclusion appears to have been reached on the basis that it was more appropriate to resolve such matters at arbitration proceedings. The judge also enumerated the following "true jurisdictional questions" which could be raised at the conciliation phase:

- whether the referring party referred the dispute within the time limit prescribed by section 191(1)(b);
- whether the parties fell within the registered scope of a bargaining council that had jurisdiction over the parties to the dispute (to the exclusion to the CCMA); and
- possibly, whether the dispute concerned an employment-related matter at all.

In reaching this outcome, a distinction was drawn between "facts that the legislature has decided must necessarily exist for a tribunal to have the power to act ... and facts that the legislature has decided must be shown to exist by a party to proceedings before the tribunal". More specifically, it was

held that the CCMA's power to determine the *fairness of a dismissal* included the power to determine the matters mentioned above which did not constitute true jurisdictional issues. Such problems were, therefore, best dealt during the course of the CCMA performing its adjudication functions during arbitration (par 13). Consequentially, it was unnecessary for commissioners to resolve such matters during the conciliation process.

3 5 The irrelevance of a certificate of outcome

Van Niekerk J placed reliance on his own judgment in *Goldfields Mining South Africa (Kloof Mine) v National Union of Mineworkers* ((2009) 12 BLLR 1214 (LC)) in order to explain his view regarding the insignificance of the certificate of outcome for the purpose of establishing jurisdiction. This approach essentially attaches no jurisdictional significance to the certificate of outcome, regarding it merely as a record of a dispute before the CCMA remaining unresolved on a particular date (par 14). According to this argument, it is not a statutory function of a commissioner to categorise the nature of a dispute at conciliation and the portion of a certificate of outcome which purported to do this lacked legal significance and had no bearing on the future conduct of the proceedings. The forum for subsequent proceedings is then determined by the employee's understanding of the dispute and not by the description ticked by a commissioner when completing a certificate of outcome.

Support for this approach may be found in the wording of section 191(5)(a):

> "If a council or a commissioner has certified that the dispute referred remains unresolved, **or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved**, the council or the Commission **must** arbitrate the dispute at the request of the employee" (authors' own emphasis).

In other words, even if a certificate of outcome has not been issued, and upon request by the employee concerned, arbitration remains mandatory if 30 days have expired since the commission received the referral (*Seeff Residential Properties v Mbhele NO supra*). It then follows naturally that the effect of a certificate of outcome is very limited and has practically no impact on the question of jurisdiction. The jurisdiction of the CCMA is not determined by what is indicated upon the certificate of outcome and this document cannot preclude the CCMA from exercising any of its statutory powers. As Van Niekerk J wrote, "jurisdiction either exists as a fact or it does not ..." (par 15).

From the employer's perspective, and since jurisdiction is not granted by a commissioner issuing a certificate of outcome, this approach may be useful in allowing it to challenge the jurisdiction of the CCMA to deal with an unfair dismissal dispute at arbitration irrespective of whether a certificate of outcome has been issued. The role of rule 14, in alignment with this explanation, is merely to empower a conciliating commissioner to give

proper consideration to whether a point raised amounts to a "true" jurisdictional point and, if so, whether the matter is "reasonably capable" of being disposed of prior to conciliation (par 16). Such considerations may be influenced by the nature of the challenge; whether the matters are intimately bound up with the substantive merits of the dispute, the determination of difficult questions of mixed law and fact, and the need for evidence to resolve them (par 16). A commissioner who decided to uphold a jurisdictional challenge prior to the commencement of conciliation proceedings would end the dispute by way of his/her ruling, without a certificate of outcome being necessary. Such a finding would bind the CCMA and all parties unless it was reviewed and set aside by the Labour Court (par 16). Should a commissioner not dispose of a jurisdictional challenge in this manner within the allocated 30-day period, a certificate of outcome should be issued in accordance with the directive contained in section 135(5). It would be open to the employer to raise any jurisdictional challenge at arbitration provided no relevant jurisdictional ruling had already been issued at the conciliation phase. The arbitrating commissioner should then deal with such an issue in terms of section 138(1):

> "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

This explanation is considered in greater detail in the conclusion.

4 The outcome

Applying these principles to the facts in *Bombardier*, the judge concluded that it was not a reviewable irregularity for a conciliating commissioner to defer a challenge to the CCMA's jurisdiction until the arbitration phase of the dispute resolution process (par 17 and 18). While it was suggested that "true" jurisdictional questions ought normally to be dealt with at the conciliation phase, the commissioner enjoyed the discretion to defer even these matters to the arbitration stage. It was proper for the dispute in *Bombardier* to be enrolled for arbitration, at which point any jurisdictional challenges could be launched – even those of the "false" kind.

5 Concluding observations

A significant benefit of the approach in *Bombardier* is that the emphasis in conciliation may now be squarely placed on "trying to settle" – without a commissioner having to worry about complex jurisdictional issues being raised at that stage and the corresponding rigours of having to address such matters on the day of conciliation. Conciliation can now be left to conciliation specialists – who do not have to concern themselves with adjudicating evidentiary matters prior to the conciliation process actually commencing.

5 1 The practical benefit of the "Third Way"

This does not mean that the conciliating commissioner should not attend to jurisdictional challenges that are apparent, such as a late referral of a dispute to the CCMA. In such a case the conciliating commissioner should entertain the challenge and make a jurisdictional ruling. This ruling will be binding on the arbitrating commissioner and can only be set aside on review. This view is in line with the LAC authority referred to above and makes it clear that the *EOH Abantu (Pty) Ltd v CCMA* (*supra*) and *Seeff Residential Properties v Mbhele NO* (*supra*) decisions are incorrect inasmuch as that they suggest that the conciliation commissioner is not empowered to make jurisdictional rulings.

Following an active and even robust mediation, the dispute may still be unresolved, and it is possible that certain jurisdictional difficulties were neither raised nor considered and were overlooked at conciliation. The effect of *Bombardier* is that such jurisdictional challenges can still be raised later, at arbitration. It follows that the commentary views of *EOH Abantu (Pty) Ltd v CCMA* (*supra*) are jettisoned, and it is submitted, not a minute too soon. *EOH Abantu (Pty) Ltd v CCMA* (*supra*) developed this proposition from the LAC judgment in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO* (*supra*). It is apparent from the LAC judgment that it is in fact only authority for the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law even if the act is invalid and unlawful, since the act will not remain susceptible to review (see *Bombardier* par 9).

This means that the certificate of outcome does not vest any jurisdiction, and if issued by a conciliating commissioner in stances where the CCMA has no jurisdiction, the arbitrator may, and should, determine the issue of jurisdiction before determining the merits of the case. If the jurisdictional challenge concerns a late referral, the arbitrator could in order to expedite the resolution of the dispute entertain an application for condonation, determine whether there are grounds for such condonation and issue the certificate. The arbitrator may do that after a consideration of evidence.

In *Bombardier* the principle in *Seeff Residential Properties v Mbhele NO* (*supra*) was recognised, namely that an arbitrable dispute or a dispute that may be referred to the Labour Court may be referred if no certificate is issued at the end of the 30 day period. This conclusion further supports the (correct) view that a certificate does not vest any jurisdiction. It is submitted that the 90 day period within which to refer such a dispute to arbitration or the Labour Court (envisaged in s 191 (11) of the LRA) commences at the end of the 30 day period and not when the certificate is issued after the expiry of the 30 day period.

5 2 The change in approach

The LAC *in Zeuna-Starker BOP v NUMSA* (1998 7 (LAC) 1.1.5) held that a conciliator was obliged to enquire into the facts of a case, prior to conciliating

the dispute. The CCMA has interpreted this statement to require conciliators to determine whether the CCMA has jurisdiction to conciliate a dispute.

The *Bombardier* case requires re-conceptualisation of the notion of "jurisdiction" and how commissioners should deal with it: the "who, what, when, where" approach which is used to train commissioners should be revisited and aligned with a new understanding of rule 14.

The precise difference in the treatment of "true" jurisdictional challenges and other questions which are not considered as true jurisdictional issues (for instance whether an applicant is an employee and whether there was a dismissal) must be interrogated. Van Niekerk J stopped short of holding that *all* instances of the three true jurisdictional issues *must* be handled at conciliation – arguing that in appropriate circumstances even these may be deferred. This suggestion is correct, since it is accepted that the outcome certificate does not vest jurisdiction on the arbitration or Labour Court. Van Niekerk J also provided some support for conciliating commissioners who choose to deal with the "jurisdictional" issues of whether the applicant is an employee or whether the applicant was dismissed at conciliation – indicating only that these issues would "generally" be dealt with better at arbitration. The uncertainty created by aspects of the judgment is unfortunate as it diminishes the impact of the distinction between "true" and "false" jurisdictional challenges itself. The Judge also seemed to have a loose understanding of the three "true" jurisdictional issues – holding in paragraph 18 that the question of territorial jurisdiction 'is not dissimilar' to one that would be raised in respect of the jurisdiction of a bargaining council.

The judgment also failed to clarity whether the finding (at arbitration) that the applicant was not an employee or was not dismissed should be expressed in the form of a "jurisdictional ruling". It is submitted that these issues should form part of a collapsed enquiry, which sees the person who bears the onus leading all their evidence (both regarding the "false" jurisdictional issue as well as the fairness of the dismissal itself), after which the other party leads all their evidence. The arbitrator then writes an award (not a "jurisdictional ruling"), obviously dealing with the issue as to whether the applicant is an employee and whether he/she was dismissed prior to dealing with the fairness of the dismissal. In this sense, it is perhaps confusing to talk about these issues in the same breath as a "true" jurisdictional matter which requires a ruling.

The Labour Appeal Court has in the past viewed issues about the existence of an employment relationship and whether a dismissal took place as jurisdictional issues. It was accordingly held in *SA Rugby Players' Association (SARPA) v SA Rugby (Pty) Ltd; SA Rugby (Pty) Ltd v SARPU* ([2008] 9 BLLR 845 (LAC)) that where jurisdiction is in issue the review test is the following:

> "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 section 191 of the Act."

Consequently it is submitted that the arguments concerning this issue in the *Bombardier* case conflicts with Labour Appeal Court authority. It is of importance that the Labour Appeal Court pronounces on whether questions as to whether or not an applicant is an employee, and whether a dismissal has taken place, are jurisdictional questions. Such pronouncement should be clear in order to promote much needed legal certainty in this regard.

Avinash Govindjee
and
Adriaan van der Walt
Labour and Social Security Law Unit
Nelson Mandela Metropolitan University, Port Elizabeth