IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR1583/09

DATE: 22/01/2010

In the matter between

DE BEERS CONSOLIDATED MINES (PTY) Ltd **APPLICANT**

and

CCMA AND OTHERS **RESPONDENTS**

J U D G M E N T

SONI AJ

Introduction

The Applicant seeks to have reviewed and set aside a ruling made by the Second Respondent in respect of the jurisdiction of the CCMA to arbitrate a dispute that had been referred to it.

The dispute had been referred to the CCMA – which is cited as the First Respondent – by the Fourth to Eleventh Respondents, who are employees of the Applicant. The Third Respondent is the union of the employees.

The review application is not opposed. Nevertheless, I am required to properly consider whether the ruling made by the Second Respondent falls to be reviewed and set aside. Clearly, if on a proper consideration of the matter I find that the CCMA does not have jurisdiction I am required to set aside the ruling.

The matter had been conciliated, despite the fact that the Applicant had requested that a ruling on the jurisdiction question be made first. No such ruling was given. The dispute was then set down for arbitration, where the question of jurisdiction was re-argued, this time as a point *in limine*.

Before the matter was set down for conciliation, the Applicant filed a Notice of Application to Raise a Point *in limine.* In that notice, the Applicant indicated that it intended to raise a point *in limine* that the CCMA did not have jurisdiction to conciliate the dispute that the Fourth to Eleventh Respondents had referred to it. In support of the application for that ruling the Applicant filed an affidavit. There was no answering affidavit from the employees or the union. The Applicant also submitted heads of argument. As I have already indicated, the conciliation commissioner, who was not the Second Respondent, did not make a ruling on the point *in limine*. As I understand the Applicant's case, nothing appears to turn on this omission.

The dispute was then set down for arbitration on 15 April 2009 before the Second Respondent. He instructed the parties the re-argue the point *in limine*.

On 24 April 2009 the Second Respondent made his ruling. In his ruling he dismissed the application – which was for the purposes of the proceedings before the Second Respondent confined to seeking a ruling that the CCMA did not have jurisdiction in the matter.

10 It is necessary now to consider what had been said by the Applicant in support of its application for the ruling. However, before doing so it will be instructive to point out that the employees who had referred the dispute were employed in terms of written contracts of employment. A copy of one of the contracts is included in the court papers. It is not necessary to refer in detail to the contract. It will suffice to consider only those aspects that are dealt with immediately hereunder.

The contractual provisions

20 The contract is addressed to each of the employees who had brought the application. The document is headed "Offer of employment at De Beers Consolidated Mines Ltd, Voorspoed Mine. It begins as follows:

> "We have pleasure in offering you a position as security officer (Manage Self Specialist) at De Beers Consolidated Mines Ltd, Voorspoed Mine with effect

from [date]."

I point out in parenthesis that the starting dates of the employees was not necessarily the same.

Clause 1 deals with the question of remuneration. It points out that the employee would enjoy a total remuneration package ("TRP") and the rate of that is set out.

Clause 2 states:

> "This offer of employment is subject to your agreeing to the attached schedule (COE Annexure of conditions of employment as applicable to you."

Clause 3 says:

> "Please signify your acceptance of this offer of employment by signing in the space provided and returning a copy of this letter, together with the attached documents duly completed, within 7 days to [the given address]."

The provision of the COE annexure that is central to the dispute is clause 9. In view of the importance it plays in this matter I will set it out in full. The heading of clause 9 is: "Benefits parity allowance". Clause 9 reads as follows:

> "A non-pensionable benefits parity allowance is payable on a monthly basis, in addition to the TRP. The allowance will only be payable to employees employed by Johannesburg Campus, Cullinan Diamond Mine, Kimberley Mines, Kimberley Head Office, Voorspoed Mine or De Beers Marine Cape Town. This allowance will not be included for the purpose of calculating your annual performance bonus, leave encashment and other salary based allowances, payments and bonuses. It has been designed as compensation towards the additional costs associated with living in city centres as compared with the operations."

The Applicant's case

I turn now to consider what the Applicant said in support of its application for the ruling. In the relevant part of the affidavit filed in support of the ruling that it had sought the Applicant made the following submissions.

1. It is clear from the [employees'] own version that they allege that in essence the [Applicant] has breached their contracts of employment by not providing them with the BPA.

2. The Labour Court has jurisdiction to deal with breaches of contracts of employment. It has jurisdiction to order specific performance or compensation

3. The BPA is not something which the [Fourth to Eleventh Respondents] are entitled to in terms of their contracts of employment. It is trite in terms of current labour jurisdiction that the unfair labour practice jurisdiction does not extend to asserting rights to benefits or remuneration which an employee is not entitled to in terms of their contracts of employment.

4. The [Fourth to Eleventh Respondents] are in essence making a demand to a new term and conditions of employment. But this is a matter of mutual interest. The CCMA did not have jurisdiction to deal with the dispute as currently referred. The dispute would have to be re-referred as one of mutual interest.

The referral

It will be helpful now to consider what dispute the Fourth to Eleventh Respondents had referred to the CCMA. In the referral form, they summarise the facts of the dispute thus: “Failed to Benefit Parity Allowance as documented and specified in the contract of employment.” I must and shall assume that the words “The employer” should have appeared before the word “[f]ailed and the word “pay” should have

appeared between the words “to’ and “benefit”. Read this the complaint was that the Applicant failed to pay the allowance as documented and specified in the contract of employment. In the referral form the Fourth to Eleventh Respondents then go on to say that the outcome that they require is that the allowance be paid retrospectively, as stated in their contracts of employment and conditions of employment.

The ruling

10 After having heard argument, the Second Respondent made his ruling. He records in the ruling that the issue to be decided was whether the CCMA had jurisdiction to arbitrate the matter at hand. He briefly indicated what the Applicant had said in its supporting affidavit. He then noted that the employees had not opposed the application, but had left the decision in the hands of the CCMA. He pointed out however that they had insisted that the CCMA does indeed have jurisdiction, as the dispute related to a benefit. It is not clear whether they actually submitted argument.

20 In his analysis of the evidence and argument, the Second Respondent says among other things the following:

> “It was common cause between the parties that the issue relates to a benefit.”

He then goes on to state:

> “I must be very clear that the challenge of the

> [Applicant] was never related to the benefit itself,
> but to the correct forum to deal with the dispute."

In his view, s 191(5)(a)(iv) of the Labour Relations Act, No 66 of 1995, makes it clear that the CCMA has jurisdiction. He points out that the Applicant had contended that s 77(3) and 77(A)(e) of the Basic Conditions of Employment Act, No 75 of 1997, indicated that the Labour Court was the competent forum to adjudicate the matter. He goes on to state that the Applicant's argument was that where the dispute relates to non-performance by a party to a contract of employment, it is the Labour Court that must adjudicate it.

In response to the Applicant's contentions, the Second Respondent says that the Applicant had misinterpreted the wording [presumably of sections 77(3) and 77(A)(e)] of the BCEA so as to limit all disputes related to contracts of employment to adjudication by the Labour Court. The Second Respondent rejects that contention. He says that s 77(3) gives the Labour Court concurrent jurisdiction with the civil courts in respect of matters concerning employment contracts. Section 77(A)(e) sets out the orders that the Labour Court can make. But it does not provide that the Labour Court therefore has exclusive jurisdiction to solely determine all and every dispute related to contacts of employment.

He goes on to point out that the BCEA gives wide-ranging powers to

officials of the Department of Labour to determine disputes and even issue compliance orders. He also points out that in terms of s 74 of the BCEA the CCMA is entitled to arbitrate certain disputes.

The Second Respondent then points out that where a condition of employment is not described in legislation it is based on a contract of employment whether oral or written. In the case at hand it was contained in a written contract. He then goes on to say that the dispute is that some employees received the benefit, but others did not. This is the basis for most if not all disputes of this nature before the CCMA. He points out that it is difficult to imagine what else could be seen as an unfair labour practice relating to the provision of benefits. If one accepted the argument of the Applicant, then the provisions of unfair labour practices relating to benefits would be superfluous. However, in terms of the Labour Relations Act the CCMA may arbitrate those disputes.

In the light of the foregoing the Second Respondent concluded that the Labour Court would have jurisdiction to deal with the matter, had the dispute been referred to it. But the CCMA would also have jurisdiction because of the provisions of the Labour Relations Act allowing it to arbitrate matters concerning unfair labour practice related to benefits.

It is for those reasons that the Second Respondent dismissed the application and ruled that the CCMA had jurisdiction to deal with the

matter.

The basis of the review

The affidavit in support of the review application sets out the reasons why the ruling falls to be reviewed and set aside. Very briefly the following reasons were forwarded.

1. The Second Respondent unreasonably found and/or committed a gross irregularity in finding and/or misconducted himself in finding that it was common cause between the parties that the issue related to a benefit. But that was not the issue. The issue was whether the CCMA had jurisdiction in terms of the Act and the provisions relating to unfair labour practices to decide whether the employees were contractually entitled to the allowance in question.

2. The Second Respondent unreasonably found that despite the provisions of s 77 of the BCEA, the CCMA had jurisdiction to decide the dispute before it.

3. The Second Respondent unreasonably failed to take into account the nature of the dispute that had been referred to the CCMA. Because the employees had complained that the Applicant had breached their contracts of employment by failing to comply with

> a term thereof, the CCMA did not have jurisdiction to enforce the terms of the contract: such jurisdiction fell within the exclusive domain of the Labour Court.

In its Heads of Argument, the Applicant in essence made the same attack on the Second Respondent's ruling.

It is necessary now to consider very briefly the relevant provisions that occupied the attention of the arbitrator and formed the basis of the challenge to his ruling.

The relevant statutory provisions

First, s 186(2)(a) of the LRA says:

> An unfair labour practice means (among other things) an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee.

Section 193(4) of the Labour Relations Act provides:

> "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute

> referred to the arbitrator on terms that the arbitrator deems reasonable which may include ordering reinstatement, re-employment or compensation.

It is necessary now to consider s 77 of the BCEA. The relevant provisions read as follows:

> 1. Subject to the Constitution and the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction *in respect of all matters in terms of this Act* except in respect of an offence specified in sections 43, 44, 46, 46, 48, 90 and 92. [My emphasis.]
> 2. [Not relevant]
> 3. The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract.
> 4. [Not relevant]
> 5. [Not relevant]

I deal now with the provisions of Section 77(A)(e). It provides as follows:

> Subject to the provisions of this Act, the

> Labour Court may make any appropriate order, including an order … making a determination that it considers reasonable on any matter concerning a contract of employment in terms of Section 77 (3) which determination may include an order for specific performance, an award of damages or an award of compensation."

Should the ruling be reviewed and set aside?

10

It is against the factual and statutory matrix summarised above that I deal now with the question of whether the ruling of the Second Respondent falls to be reviewed and set aside. I should begin by pointing out that the Applicant is quite correct when it says that the arbitrator is required to determine the nature of the dispute before him. That point was stressed by the Constitutional Court in *Cusa v Tao Ying Metal Industries and others* 2009 (1) BLLR 1 (CC). There, at paragraph [66], the CC pointed out:

> ***"A commissioner must as the LRA requires,***
> 20 ***'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representative say the dispute is. The***

> ***labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration, including a description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome."***
>
> [Footnotes omitted.]

With respect, that is precisely what the Second Respondent did. He pointed out, correctly in my view, that the issue to be decided is whether the CCMA has jurisdiction. However, in determining whether or not it did, he looked at the complaint made by the employees and the basis of the complaint. He concluded that the complaint related to whether or not in terms of their contracts of employment they were entitled to the allowance which he was of the view constituted a benefit as contemplated in s 186(2)(a) of the LRA.

It is worth emphasising that when determining matters relating to

jurisdiction one must bear in mind what has recently been said on this issue. I refer only to two recent cases where the courts have pointed out what is meant by *jurisdiction*. In *Chirwa v Transnet Limited and others* 2008 (4) SA 367, at paragraph [155] under the heading "The correct approach to determining jurisdiction", the following was said:

> ***"It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it."***

Thereafter the following was said:

> ***"The mere fact that an argument must eventually fail cannot deprive a court of jurisdiction."***

The same point was made by Nugent JA in *Makambi v MEC for Education Eastern Cape* 2008 (5) SA 449 (SCA). At paragraph 30 of the judgment, the learned judge of appeal said the following:

> "Whether a court has jurisdiction to consider a particular claim depends on the nature of the rights that the claimant seeks to enforce. Whether a claim is good or bad in law is immaterial to the jurisdictional inquiry."

The question then is this. When regard is had to those principles, does the CCMA have jurisdiction to arbitrate the dispute that had been

referred to it?

The Labour Appeal Court in the case of *Hospersa and another v Northern Cape Provincial Administration* 2000 (21) ILJ 1066 (LAC) made the following point about the unfair labour practice provision that is in issue in this case. It must be noted that that at that stage the provision appeared in a different section of the LRA. For present purposes however that is irrelevant. At paragraph 9 of the judgment of the LAC the following was said:

> "It appears to me that the Legislator did not seek to facilitate through the provision in question the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that the provision was ever intended to be used by an employee who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her to create an entitlement to such benefits through arbitration in terms of the provision. It simply sought to bring under the unfair labour practice jurisdiction disputes about benefits to which an employee is entitled *ex contractu* by virtue of the contract of employment or collective agreement or *ex lege* the Public Service Act or any other applicable act. Such disputes must be distinguished from disputes of interest. The former

> are arbitrable, the latter are not. They must be determined through other mechanisms."

In the case of *Protokon (Pty) Ltd v CCMA and others* 2005 (26) ILJ 1105 (LC), the question of whether or not a benefit such as an allowance similar to the one in issue in this case can be the subject of an arbitration had to be determined. There the same point was made, namely that the employee in question did not have a contractual right to the benefit. The Court rejected the argument.

10

In my view the Applicant has throughout these proceedings – both before the arbitrator and in this Court – misconceived what the real issue is.

The employees in question, it would appear to be clear from the referral that they had made, were not relying on the BCEA for their claim. The expressly stated that they wished to be paid the allowance which was documented and specified in the contract of employment. That in my view is the correct understanding of their complaint. Whether or not as

20 a result of a proper reading of the contract, together with clause 9 of the annexure thereto, the employees are entitled to the allowance is at this stage of the inquiry totally irrelevant. That much is clear from the *Chirwa* and *Makimba* cases to which I have already referred. If on a proper reading of the contract, when the dispute is arbitrated, an arbitrator finds that the employees are in fact entitled to the allowance,

that decision can be taken on review. If there is no such entitlement in terms of the contract it is unlikely that the award would be upheld. On the other hand, it cannot be said that simply because, on the understanding of the Applicant, the contracts in question do not provide for, or do not allow the employees in question, the allowance, the employees are not entitled to have that dispute properly arbitrated.

It is of course a dispute that can be determined by the application of law. Consequently, it must be borne in mind that the Fourth to Eleventh Respondents have the right, in terms of Section 34 of the Constitution, to refer the dispute to any court or tribunal. It goes without saying that that tribunal must have jurisdiction before it can determine the dispute. Nevertheless, the employees have a right to have the dispute determined. Their contention is that in terms of their contracts of employment as they understand those contracts they are entitled to the allowance. Whatever the contention of the Applicant on that issue, in my view the CCMA has jurisdiction to determine that dispute. In my view the provisions of sections 77 and 77(A) of the BCEA do not serve to oust the jurisdiction of the CCMA. The exclusive jurisdiction of the Labour Court referred to in s 77 is confined to matters “in terms of the” BCEA. The employees’ claim is not in terms of the BCEA: it is in terms of the provisions of their contracts of employment.

After all, if an employee is in terms of her contract of employment entitled to a car allowance and the employer refuses to pay it, the

employee is entitled to approach the CCMA and complain that a benefit to which she is entitled is not being paid and that the conduct of the employer accordingly constitutes an unfair labour practice. She could of course approach the Labour Court, which also has jurisdiction in terms of the BCEA. But the fact that she can approach the Labour Court does not mean that she is not entitled to also approach the CCMA.

I may point out that the employees in question where *domini litis.* They were the persons who could choose the forum. If the forum has jurisdiction, they were entitled to choose that particular forum, in this case the CCMA. The Applicant on the other hand, if it had wished to refer the dispute to the Labour Court say for a declaratory order may have been entitled to do so. The employees could not then say that the matter had to be determined by the CCMA.

This is one of those cases where two *fora* referred to in labour legislation have jurisdiction and the person who makes the referral is entitled to choose the forum.

Conclusion

The Applicant sought costs only from those Respondents who opposed the application. I have already pointed out that the matter was not opposed. As a result, the question of costs does not arise, whether or not the application succeeds.

I have already found that that no case for review has been made out. Consequently, the application must fail.

In the circumstances, I make the following order.

1. The application for the ruling to be review and set aside is dismissed.
2. There is no order as to costs.

10

_____

Soni AJ

Date of Judgment: 22 February 2010

APPEARANCES:

For Applicant: Mairead Edwards of Perrott; Van Niekerk; Woodhouse; Matyolo inc.

For 1st Respondent: CCMA

20 For 2nd Respondent: Commissioner S. v.d. Merwe

For 3rd Respondent: NUM obo L. Khanyago and 6 others