IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg) **CASE NO J202/97**

In the matter between :

AVROY SHLAIN COSMETICS (PTY) LTD **Applicant**

and

SUSAN KOK **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

& ARBITRATION **Second Respondent**

CONSTITUTIO

N OF THE COURT:

THE HONOURABLE ACTING JUDGE JALI

On behalf of Applicant:

ADV P J PRETORIUS SC

assisted by ADV C E WATT-PRINGLE

instructed by Edward Nathan & Friedland Inc

On behalf of Respondent:

MR E H LOUW

of E H Louw Attorneys

BACKGROUND

This was an interlocutory application before me to consider the applicant's application to refer the application which they had brought

against the respondents to hearing of oral evidence in terms of rule 7(8)(b) of the rules of this honourable court promulgated in terms of Labour Relations Act No 66 of 1995 (hereinafter referred "the Act").

The background to this application is that on or about 17 December 1996 the first respondent received 3 months notification of the termination of her employment. The termination was going to be effective on the 31st March 1997. This letter was addressed to the first respondent by a Mrs Ria Cassell. Mrs Cassell is a national distributor of the applicant's products. The first respondent approached consultants called Allied Werkgewers Konsultante BK ("consultants"). On the 9th January 1997 the consultants wrote to the applicant advising the applicant that they perceived the applicant's termination of the first respondent's services as constituting an unfair labour practice. As such they regarded the termination as both procedurally and substantively unfair and they were demanding reinstatement.

In response to the consultant's letter the applicant's attorneys of record, Edward Nathan & Friedland ("the attorneys"), responded to the consultant's letter advising them that the first respondent had never enjoyed the status of an employee with the applicant and that the contractual nexus was between the first respondent and Mrs Ria Cassell. It was Ms Ria Cassell who had terminated the contractual relationship. On the 16th January 1997 the first respondent referred the aforesaid dispute regarding her dismissal to the second respondent for conciliation.

On the 25th February 1997 the conciliation was held at the second

respondent's Klerksdorp offices (North West Province). Mr Bothma of the applicant attended the aforesaid conciliation and indicated that in the applicant's view the first respondent never was an employee of the applicant as defined in terms of the Act and therefore in their view, the second respondent lacked jurisdiction to conciliate the dispute between the parties. It was at this meeting where Mr Bothma advised the commissioner and the first respondent that the applicant had prepared papers in respect of another of the distributors of its products, where a similar dispute existed, on the basis of which the applicant intended to make application to the High Court of South Africa (Cape of Good Hope Provincial Division). The application would be seeking an order to review the decision of the then provincial director of the Department of Labour (Western Cape) to establish a conciliation board under the Labour Relations Act No.28 of 1956 ("the 1956 Act"). The dispute between the parties could not be resolved and on the 25th February 1997 the commissioner issued a certificate to that effect.

On the 1st May 1997 the first respondent applied for the matter to be referred to arbitration. The second respondent scheduled the arbitration for the 19th and 20th May 1997 at the second respondent's Klerksdorp offices. On the 12th May 1997 the applicant's attorneys sent a request to the second respondent's offices in Klerksdorp requesting them to stay the arbitration proceedings pending the outcome of an application for review which the applicant intended instituting out the High Court of South Africa, Transvaal Provincial Division. The attorneys still contended that the first respondent was not an employee of the applicant but worked on her own account.

On about the 17th June 1997 the applicant issued application papers out

of this court for an order declaring that the first respondent was neither an employee of the applicant nor was she dismissed by the applicant as contemplated in the Act, declaring that the second respondent has no jurisdiction to conciliate or arbitrate in the alleged dispute and reviewing and setting aside the second respondent's decision to appoint a commissioner to conciliate or arbitrate the alleged disputes. In addition,
they are also seeking an order of costs against any of the respondents in the event of any of the respondents defending the application.

The applicant's case was that the first respondent was an independent contractor not an employee of the applicant. Even if she was an employee, she would not have been an employee of the applicant as she had been appointed by a national distributor who was also not an employee of the applicant. Mr Avroy Shlain, the chairman of the applicant, in paragraph 9 of his affidavit went into detail to give an explanation of the applicant's nature of business, namely, distributor of cosmetics and fragrances, and the system of distribution which was employed by the applicant in distributing the aforesaid products. He stated that since inception of the applicant, its cosmetics and fragrances have been distributed by independent distributors who purchase the products and distribute them directly to consumers. The distributors are entitled to purchase the applicant's products for resale strictly on the basis that they are independent distributors and not employees or agents of the applicant. There are different tiers of independent distributors who are entitled to sell the products on a system of sub-distributors. Within the independent distributors there are different tiers, namely national, regional and area distributors. It is only the

national distributors who have a direct contractual relationship with the applicant. The area distributors have a direct contractual nexus only with the regional distributors of the applicant's products. There is no contractual nexus, whatsoever, between the regional or area distributors of the applicant's products and the applicant. It was their case that the first respondent was appointed as an independent contractor who would act as a regional distributor reporting to the national distributor, Mrs Ria Cassell.

The first respondent filed an answering affidavit in which she raised a number of issues which clearly showed that there was a dispute of fact and the matter should be referred to oral evidence. The crux of the first respondent's defence was that she was an employee of the applicant. She had been employed by the applicant as a consultant to market and distribute the applicant's products during 1979. She was later appointed to be a Group Manager. On the 7th April 1983 she was appointed area manager designate for Potchefstroom - Klerksdorp area. In support of this allegation she sought to rely upon a number of issues including, amongst others, the manner in which her salary package as to how it was structured. She agreed having signed an agreement with a certain Mrs Reid but clarified as to why she signed that. Mrs Reid seemingly was later replaced by Mrs Ria Cassell. She also disputed that the second respondent lacked jurisdiction to appoint a commissioner as she regarded herself as an employee of the applicant as defined in the Labour Relations Act 65 of 1995.

On the 3rd November 1997 this matter was before me to consider referring the issue of the employer/employee relationship for the hearing of oral evidence.

It was common cause between the parties that if this court does consider the matter and does accept jurisdiction in the matter, then the issue of whether the applicant and the first respondent are employer and employee respectively cannot be determined on the papers and should be referred to oral evidence. It became clear during the parties' argument that the first respondent's representative was challenging the court's jurisdiction to even hear this matter which had been referred to it as, in his view, it related to an unfair dismissal for which the court did not have jurisdiction but fell within the ambit of the Commission for Conciliation, Mediation & Arbitration ("CCMA").

On the question of the referral of a matter to oral evidence the court has the ultimate discretion in deciding whether to refer the matter to oral evidence or not. In exercising its discretion the court should consider the circumstances of each case. See Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) 1155 (T) and also Abbas and Others v Dawood 1960 (1) 833 (C).In the current case there is clearly a dispute of fact and it is an appropriate matter for referral to oral evidence as a dispute of fact cannot be resolved of in motion proceedings. However, as the respondent has raised the point about the jurisdiction of this court to hear this matter, it would be appropriate to deal with that point first as I am of the view that it might dispose of this entire application.

The applicant's counsel, on the other side, submitted that this court does have unfettered jurisdiction to hear all matters in respect of labour relations or any other matter which falls within the ambit of the Act. The applicant's counsel, in support of his contention that this court does have jurisdiction to hear this dispute relating to whether the relationship between the applicant and the first respondent was that

of an employer and employee he raised a number of arguments which are set out hereinafter.

1.Firstly, this court has the unfettered jurisdiction to hear all matters which are related to labour relations. In this regard he referred me to sections 145(2)(iii), section 158(1)(a)(i) – (iv) and section 158(1)(b). This has also been dealt with by this court in that it has investigated the question of an employer/employee relationship in the judgment of Zondo AJ (as he then was) in Medical Association of South Africa v Minister of Health and Others, 1997(18) ILJ 528.

2.The applicant's counsel also argued that this court has supervisory powers over all creatures of statute which are created by the Act. For example, the CCMA, the bargaining councils, all private arbitrators. Accordingly if it had this supervisory power it would definitely have the power to make a determination in this regard; thus it would be competent for this court to order by way of a declarator or interdict that the CCMA must comply with the Act in matters concerning its powers and jurisdiction. This could be done either before or after the event, that is by declarator or by review respectively.
stage.

3.Mr Pretorius, for the applicant, also referred me to a number of decisions which were decided in terms of the 1956 Act relating to the jurisdictional factors which the courts had to consider before deciding on matters, i.e. the Industrial Court was called upon to enquire into the validity of establishment of the conciliation

board and satisfy itself that it was validly or legally established before dealing with the matter before it. In this regard he referred me to the case of Benicon Earthworks & Mining Services v Jacobs NNO & Others, 1994 (15) ILJ 801 LAC at 803 and 804; Pinetown Town Council v the President of the Industrial Court, 1984 (3) SALR 173 and Gcwensha & Others v Gaspec 1988 (2) SA 69 at 79D in this regard.

He also submitted that the Pinetown Town Council and Benicon Earthworks cases are authorities for the proposition that the final arbiter of whether a creature or statute whether that tribunal has jurisdiction or not is always a court of law. In this case it would be this court in terms of the Act.

4.Mr Pretorius also submitted that, it might be foolhardy for the CCMA to proceed with this matter and only to find that it did not have jurisdiction to hear the matter which might be reversed on Review as the determination on jurisdictional facts is reviewable. In the circumstances, it may be appropriate to make a ruling on the existence of the employer/employee relationship at this stage.

5. Mr Pretorius also made a comparison between the provisions of the 1956 Act and the current Act which, in his view, showed that the CCMA does not have the power to decide its own jurisdiction. In this regard he compared section 17(11)(h) of the 1956 Act which he felt was more permissible than section 115(4) of the current Act. On his interpretation of section 115(4) the CCMA's powers are limited to those expressly granted to it and it does not have the

power expressly to determine its own jurisdiction. He submitted that this effectively confirms that the final arbiter in terms of section 145 and section 158(1)(b) will be this court, which has not only the power but the duty to ensure that the creatures of statute created by the Act comply with the provisions of the Act.

6.Lastly, he submitted that matters of convenience dictate that the Labour Court should deal with the jurisdictional issue in this matter. Reverting this matter back to the CCMA would be a waste of the taxpayer's funds. If the matter was to be referred to the CCMA, the applicant would be in a position to obtain a directive from the Director of the CCMA for the matter to be referred to the Labour Court in terms of section 191(6) of the Act, as the issue of interpretation of the employer/employee relationship affects thousands of applicant's employees. This issue is a complicated question of law, which would be appropriately resolved in this court. The court should be taking a pragmatic approach rather than a technical approach. In this regard, applicant's counsel referred us to the judgment of His Lordship Mr Justice Nugent in the matter of Nicelow v Liberty Life Association of South Africa 1996 (17) ILJ 673 (LAC). He submitted that the court should consider adopting a similar approach in dealing with this matter.

The respondent's counsel, Mr Louw, argued that the determination of the employer/employee relationship or jurisdictional facts should be made by the CCMA as provided by the Act. The decision can then be taken on review to decide whether it was a right or wrong decision. The only decision the CCMA took was to appoint a commissioner to conciliate. If that is the decision they are challenging then this

court will have to decide whether it was a right or wrong decision. He went on to argue that the applicant wants this court to assume jurisdiction on a dismissal on which it does not have jurisdiction. He went on to submit that there are three cases in terms of which this court can exercise jurisdiction, namely the first one being where the dismissal occurred for operational requirements, and secondly, if the dismissal is an automatically unfair dismissal and thirdly, in the instance where this court can assume a decision in any dispute relating to either misconduct or incapacity. In the circumtances, the respondent's counsel submitted, that this court does not have jurisdiction to hear this matter and cannot assume jurisdiction.

Mr Louw aslo submitted that the applicant should have followed the simple procedure as provided in terms of section 191(6) to (9) of the Act. He also argued that the order as it stands should be dismissed with costs. The court cannot usurp the powers of the CCMA. The respondent has no objection to the referral of the matter to oral evidence provided the court has jurisdiction to make that referral in respect of unfair dismissal matters.

JURISDICTION

The issue in dispute as defined in the first respondent's CCMA Dispute Referral form 711 is defined as:"'n Onbillike arbeidspraktyk, waar ek ontslaan is sonder enige dissiplinêre verhoor en aftrekkings van my salaris sonder my toestemming gemaak is."

In the application for arbitration form dated the 1st May 1997 which was made with the CCMA the issue in dispute was also defined as "die onbillike diensbeëindiging van me Susan Kok en onbillike arbeidspraktyk

deur eensydige verandering van diensvoorwaardes".

It is apparent from The CCMA referral, the Application for Arbitration and the application papers which were filed before this court by the parties that the first respondent referred a dispute regarding an unfair dismissal in terms of section 191(5)(a) of the Act to the second respondent. The said dismissal, was neither automatically unfair as defined in section 187 of the Act nor a dismissal based on operational requirements as defined in section 189 of the Act. Accordingly, this was a dismissal which is defined in section 188 as "other unfair dismissal" and which, in terms of section 191, should be resolved through the offices of the second respondent. In this regard I agree with the respondent's representative i.e. in terms of the Act there are only certain types of dismissals which are expressly set out to be falling within the jurisdiction of the Labour Court. The said dismissals are referred to in Section 191(5) (b) (i),(ii),(iii) and (iv) and also Schedule 7 paragraph 2 (1)(a) of the Act.

Section 191(5)(b) stipulates that:

"(5) If a council or a commissioner is satisfied that the dispute remains unresolved, or if 30 days have expired since the council or the commission received a referral and the dispute remains unresolved:

(a) the council or the commissioner must arbitrate the dispute at the request of the employee ...

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is:

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or (iv) because the employee refused to join, was refused
membership of or was expelled from a trade union party to a closed shop agreement.

The use of the word " may " Section 191(5)(b) gives the discretion to a dismissed employee to refer the disputes set out therein to the Labour Court. These disputes, however, may be determined by the CCMA if the employee so wishes unless if the employee wants to send them to the Labour Court. The Act does not give the employer the sole discretionary power to decide the forum for any of these dispute.

Paragraph 2 (1)(a) in Schedule 7 of the Act deals with unfair Discrimination between an employer and an employee which could be regarded as an Unfair Labour Practice. Paragraph 3 (4)(a) of the Schedule stipulates that any party may refer the dispute Labour Court for adjudication.

The applicant's counsel also argued that the court has unfettered jurisdiction and final jurisdiction in respect of all matters that fall within the ambit of the Act. In this regard he referred to section 145 and section 158.

The section which deals with the jurisdiction of the Labour Court is section 157 (1) which states that :
"Subject to the constitution and section 173 and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms

of any other law are to be determined by the Labour Court".

Section 157(5) states that:
"Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."

It is clear that all unfair dismissals (excluding the ones referred to in section 191(5)(b)) as required by the Act need to be resolved through arbitration. Accordingly,
if they need to be resolved through arbitration, section 157(5) of the Act excludes this court from dealing with those matters which need to be resolved through arbitration. In the circumstances it is clear in terms of section 157(1) that unless the matter falls within the jurisdiction of the Labour Court, the Labour Court does not have any jurisdiction to deal with that matter.

Section 158(2) states that where a dispute has been referred to the Labour Court and it becomes apparent that it should have been referred to arbitration then the court may stay the proceedings and refer the dispute to arbitration or the court may continue with the proceedings siting as an arbitrator on certain conditions. I have considered whether implementing the provisions of this Section might be a solution. The First respondent has already applied for Arbitration with the CCMA so it would be a duplication. Sub-section (b) has two prerequisites, namely, the consent of the parties,and considerations expediency. It may be expedient for the court to sit as an arbitrator but this possibilty was not raised with the parties. In any event the Second Respondent has expressed her views i.e. she wants Arbitration by the CCMA.

The provisions referred to by the applicant's counsel, namely section 158 (1) deal with the powers of the Labour Court and not the question of the jurisdiction of the Labour Court. I am of the view that a distinction has got to be drawn between jurisdiction and powers of the court. In so doing, I would like to refer to the judgment of my brother, Landman J, which he delivered in the matter of Dinky Moropane v Gilbey Distillers & Vintages (Pty) Ltd & Another, case number J868/97 (unreported) at page 7 where he stated that :

"This court is a creature of statute, albeit a superior court having the status and the standing of a high court, with the statutorily conferred inherent powers of a high court in relation to matters within its jurisdiction. It does not have an all-embracing jurisdiction over the employer/employee relationship. Its jurisdiction is a sporadic one. One interspersed in life cycle of employment. Not only that, but the moment of intervention is regulated by statute. Moreover, its jurisdiction is sometimes indirect. It may supervise the duties of the council or the CCMA dealing with an aspect of employment relationship but it does not necessarily mean that it may directly supervise the antecedent activities before a complaint is made and disposed of by the CCMA or a council. This court does not have jurisdiction over dismissals due to alleged misconduct or incapacity. This jurisdiction is exclusively conferred on the CCMA or an accredited council." (Own emphasis)

JURISDICTIONAL FACTS

The applicant referred me to the case of the Medical Association of South Africa and Others v The Minister of Health and Another, (above) for the proposition that Judge Zondo assumed similar jurisdiction to the one which the applicant is currently asking for, namely, that this court should determine whether there is an employer/employee relationship between the applicant and the First Respondent. The Medical Association case, in my view, can be distinguished from the current case in that the CCMA in that matter had not been involved at the stage when the parties approached the court for

an interdict, and secondly, the parties in that matter submitted the matter to the Labour Court by agreement for the determination of the existence of the employer/employee relationship. None of the parties challenged the Labour Court's jurisdiction to hear the matter.

The parties did not disagree that the employer/employee relationship is a jurisdictional fact or a prerequisite which should exist to enable the CCMA to conciliate or arbitrate in a matter. In this regard, as I have already
indicated, I was referred to Benicon Earthworks case, 1994 and Gcwensha & Others v Gaspec and the Pinetown Council v President of the Industrial Court cases. In this regard I would also refer to the judgment of Corbett J (as he then was) in the matter of S A Defence & Aid Fund & Another v Minister of Justice 1967 (1) SA 31 (C) at 34 - 35 where he deals with various types of jurisdictional facts as recognised in our law and the cases quoted therein.

The applicant's counsel also referred to a statement in Benicon's case where Nugent J stated at page 804 that "The powers of the Industrial Court do not extend to ruling upon its own jurisdiction" in submitting that the CCMA, as a creature of statute like the Industrial Court will have no jurisdiction or power to determine its own jurisdiction. In the premises, he submitted, the matter should proceed in this court to decide whether the jurisdictional fact does exist or not and it is not an appropriate issue to be decided by the CCMA. This case related to whether the Industrial Court in exercising its unfair labour practice jurisdiction could decide upon its jurisdiction. I am not persuaded that the correct conclusion to be drawn from the aforesaid passage is the one which has been arrived at by the applicant.

If one reads the rest of the judgment, in its context, it is clear that the court meant that the Industrial Court could do it subject to the power of the higher court to review same. At page 804c–f Nugent J said:

"Equally the tribunal cannot deprive itself of jurisdiction by an incorrect finding that the jurisdictional facts do not exist.In practice, however, the court would be short–sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of jurisdictional challenge which is clearly without merit. .... The powers of the Industrial Court do not extend to ruling upon its own jurisdiction. At best it [the tribunal] can make an assessment of whether a court, reviewing its proceedings, is likely to set them aside".

Mr Pretorius also referred me to Gcwensha and Others v Gaspec (above).

In the Gwensha matter Van Heerden J (who was sitting with Page J and who delivered the judgment on behalf of the full bench of Natal Provincial Division) at page 76D – H considered Section 17 (11)(g) and (h) OF THE 1956 Act and thereafter stated:

"It could never have been the intention of the legislature that whenever a dispute in regard to the existence of such relationship arose, the Industrial Court would not have the authority to enquire into the existence or otherwise of the very jurisdictional fact upon which this jurisdiction under the Act depended. It could likewise never have been the intention that the matter of jurisdiction would first have had to be referred to another forum and only after it had been found to exist

would the Industrial Court be able to proceed. Sub-section 11(a) is general and wide enough to allow the Industrial Court to be approached directly on the issue whether or not the Act is applicable and too wide to confine a party to the limited and cumbersome procedure contended for by counsel of first having to proceed under sub-section 35, 43 or 46(9). ... This court is accordingly satisfied and holds that it was within the jurisdiction of the Industrial Court to have entertained the application in order to decide the existence or otherwise of jurisdictional fact."

In his submission Mr Pretorius stated that the respondent was incorrectly relying on this judgment to submit that the CCMA has jurisdiction to decide jurisdictional facts. On a reading of this paragraph, I tend to take a contrary view to that which was taken by the applicant's counsel with regard to the interpretation of this particular passage. In my view the jurisdiction of the Industrial Court to look into jurisdictional fact on matters before it was not solely based on this particular section. For one to come to that conclusion, one would be giving a very narrow interpretation to the judgement or passage as one would be overlooking the fact that this right, that is, for a tribunal to look into its own jurisdiction, also exists in terms of the common law.

He also sought to obtain support for this proposition from comparing sections 17(11)(h) of the 1956 Act,(which he submitted Van Heerden J in the Gcwesha case relied upon) and section 115(4) of the Act. Section 17(11)(h) states that The Industrial Court has the power "generally to deal with all matters necessary or incidental to the performance of its function under this Act".

Section 115(4) of the new Act states that :

"The Commission must perform any other duties imposed and may exercise any other powers conferred on it by or in terms of this Act and is committed to perform any other functions entrusted to it by any other law".

In light of the provisions of the aforesaid 1956 Act, the applicant come to the conclusion that the CCMA's powers are limited to those expressly granted to it by the Act which excludes looking into the jurisdictional facts. I disagree with this contention by the applicant's counsel. The CCMA or any tribunal for that matter can, on a preliminary basis, subject to subsequent review by a court, decide on its jurisdiction i.e. it should be the very first enquiry which the CCMA will have to make before it proceeds to determine whether the dismissal of an employee was fair or unfair.This is in accordance with the views of Judge Nugent in the Benicon case at page 804 C-f above.

In my view, the same enquiry is made by any tribunal before commencing its proceedings with regard to whatever steps it may be taking. In the circumstances I do not believe that it does not have the power to enquire into jurisdictional facts because the legislature did not expressly give that power to the CCMA. Section 192 of the Act puts the onus on the employee to establish the existence of a dismissal. In my view, you can only be dismissed if you are an employee. So as a preliminary issue the employee does directly or indirectly get involved in the exercise of proving the employer/employee relationship. If one considers the primary objects of the Act it would be inconceivable to even think of the resultant situation - if the CCMA did not have this

jurisdiction as suggested by the applicant.

Baxter, in his book "Administrative Law" (1984) at page 452 states : "Wherever it acts, a public authority must determine the scope of its own powers. It must ascertain whether the prescribed preconditions for acting exist and it must determine the permissible limits of its authority in the circumstances. This enquiry will involve an investigation into questions of fact and law."

The English authorities on the subject also make a similar observation. Sir William Wade in his work "Administrative Law", Sixth Edition, at page 283 he observes that "Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it." Sir William Wade goes on to observe that the exception to that proposition would be where a statute provides otherwise, which is clearly not the case with the Labour Relations Act.

In the case of R v Fulham, Hammersmith & Kensington Rent Tribunal Ex p. Zerek 1951 (1) A E R 482 at 485 Lord Goddard C.J. said:
"If there was no tenancy, there was nothing on which the tribunal could adjudicate. The law to be gathered, especially from R v Income Tax Special Purposes Comra (3) and R v Lincolnshire JJ Ex p. Brett (4), is that if a certain state of facts has to exist before an inferior tribunal has jurisdiction, *it can inquire into the facts in order to decide whether or not it has jurisdiction*, but it cannot give itself jurisdiction by a wrong decision on them, and this court may, by means of proceedings for certiorari inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends thereon, it is not

the main question which the tribunal has to decide." (Italics added)

In the case of Richard's Bay Iron & Titanium (Pty) Ltd t/a Richard's Bay Limited and Another v Jennifer Eugene Jones and Another, unreported case number D81/97, Brassey AJ had to decide whether the first respondent was employed by Richard's Bay Minerals or Quest and that referral of the dispute to the CCMA was irregular because it cited both applicants as employer. In considering this matter, he decided on the question of whether this court had jurisdiction to entertain the application. He held that

it could not have been the intention of the legislature that every dispute before the CCMA in which such an issue arises should be held in abeyance until the ruling is obtained from the Labour Court. I agree with the view of

Brassey AJ in this regard. The CCMA does have the power to inquire into this issue.

Applicant's counsel went on to submit that the Pinetown Council and the Benicon cases are authority for the proposition that the final Arbiter of whether a tribunal has jurisdiction or not, is always the court. In this case, it would be the Labour Court. I agree with his submission in this regard in so far as it means that the court has Review powers, in this regard.

As a result The applicant's counsel raised concern about the limited powers of review which are given to the Labour Court in respect of CCMA arbitration awards. I am not persuaded by this argument as Sec 158 (1) (g) gives court very wide review powers. Furthermore, even though I disagree that Review powers of Court cannot remedy this concern that the aforesaid concern of the applicant could also be circumvented by the

applicant moving an application, which it ought to have moved in the first place at the CCMA to have the matter transferred to the Labour Court. This particular application, would effectively confer upon this court the jurisdiction to hear the unfair dismissal.

In light of the views which I have expressed above, the only issue which remains to be considered is whether the court should exercise its discretion and entertain this application as it did not comply with the provisions of the Act.

COURT'S INTERVENTION

The applicant's counsel also raises some concern about what the applicant regarded as a wasteful, circuitous and inconvenient route because the applicant would eventually end up in the Labour Court for the Labour Court to decide whether there was an employer/employee relationship between the parties. This could either happen in the form of a review or it could happen after referral to the Labour Court in terms of the provisions of the Act.

The legal position is that the Act does regulate the time when the court should intervene in unfair dismissal disputes, that is the court may intervene pursuant upon the section 191(6) application to the Director of the CCMA seeking a referral of the matter to the Labour Court or pursuant to an application for review which might be lodged by one of the parties with the Labour Court. There are other times when it may intervene which are not relevant to this matter

Obviously because of the cost implications and the basic purpose of the

Act, section 191(7) of the Act stipulates that upon any party moving an application to have the matter referred to the Labour Court in terms of Section 191(6), the other pary together with the Commissioner who attempted to conciliate the dispute, would be given an opportunity to make representations regarding the aforesaid application. This clearly is an attempt by the legislature to try and regulate the transferring of matters to the Labour Court. This would ensure that the Director makes an objective evaluation of the matter taking into consideration the factors set out in the Act. In my view this is an important provision especially as the aforesaid transfer could have cost implications for the parties.

The Labour Court will only have jurisdiction over with this particular dispute once an appropriate referral to the Court had been made by the Director of the CCMA. At this stage, the CCMA is still seized with the matter as it was referred to the CCMA by the first respondent. As the CCMA is seized with the matter, it
must arbitrate the dispute or decide whether to refer the matter to the Labour Court for adjudication once there is an application by the Applicant. See Du Toit et al "The Labour Relations Act of 1995" page 298.

The applicant submitted that as a matter of convenience the court should exercise its discretion in its favour and grant the order it was seeking as it would in any event end up in the Labour Court again. If it were to proceed with the application to the Director, it submitted that due to the complexity of the issue relating to the employer/employee enquiry it would be able to convince the Director of the CCMA to refer the matter back to the Labour Court. Once again, this will be a circuitous,

exercise for all the parties involved. The applicant, in order to guide the court in determining whether this issue should be determined now, or referred to the CCMA, referred the court to the case of Nicelow v Liberty Life Association of South Africa 1996 (17) ILJ 673 (LAC) 678B. Mr Pretorius suggested that this court should adopt the approach which was adopted by Justice Nugent when he was considering whether an appeal should be allowed on a preliminary point where the merits of the matter had not yet been dealt with by the Industrial Court or he should wait for the whole matter to be dealt with before coming to court. In his judgment, Justice Nugent stated that "in more recent times the approach taken has been increasingly flexible and pragmatic, directed more to doing what is appropriate to the circumstances of the particular case than to elevating the decision to one of principle".

The approach of Justice Nugent in the Liberty Life case is the appropriate approach in dealing with disputes in the labour relations arena as they needed to be brought to their conclusion expeditiously. I have no doubt in my mind that that will be an expeditious and cost effective manner of dealing with labour disputes as by their very nature they are dealing with very sensitive issues which might lead to economic hardship and suffering for the parties. However, in exercising the aforesaid discretion, one must be conscious of whether he has jurisdiction or not. It is apparent, after considering all the authorities and the Act, that there is no legal basis upon which the Labour Court can seek to exercise this particular discretion in this matter.

Furthermore, if considerations of convenience are to be taken into account, the Act is clear that its purpose is

"to promote the effective resolution of labour disputes". (Section 1(d)(iv)) and also to promote simple procedures for the resolution of labour disputes through conciliation, mediation and arbitration. Accordingly, in this regard the CCMA was established. This was meant to be a an affordable process in terms of which individuals could resolve their disputes without being involved in lengthy and costly legal procedures. In my view convenience also
calls for the matter to be resolved through the forum which
has been set by the Act which will be affordable to all
the parties concerned.

A higher court may have to exercise its discretion in deciding whether a matter which is before a lower court could be referred to it either for an appeal or review or any other relief. In exercising the aforesaid discretion, there are a number of considerations which are usually exercised to avoid illegalities in inferior courts.
However, these discretionary powers are sparingly exercised by the superior court unless where there are circumstances which might lead to a grave injustice, then the superior court tends to intervene. See Richards Bay Iron & Titanium Limited t/a Richards Bay Minerals & Another v J E Jones & Another, unreported case of Brassey A J together with cases referred to therein.

The first respondent has argued that it has been brought to this court and has been subjected to an expensive process when there was a free process which was convenient and cost effective for the first respondent. In the circumstances, I am inclined to take the abovementioned concerns into consideration in exercising my discretion in considering whether to retain this matter within the confines of the

Labour Court for adjudication.

In the matter of Towles Edgar Jacobs Ltd v President, Industrial Court 1986 (4) 660 at 664 G – I, Conradie A J (as he then was) stated that: "... the court, in exercising its power to intervene, requires to be satisfied that there will be some appreciable advantage such as a major saving in time and cost before it would permit a litigant to bring uncompleted proceedings on review. I am satisfied, however, that since the point brought on review is a crisp jurisdictional issue, and the hearing, if it were to proceed, is likely to be protracted, this court may properly entertain review proceedings ..." Wahlhaus & others v Judicial Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119 – 120 E.

Clearly, in this matter the question of expediency and costs was considered by the court in making the decision. In this matter the parties have confirmed that oral evidence will have to be led. In the circumstances, it would lead to an unjust situation to allow this to be argued in the Labour Court as it might be costly for the employee (the first respondent) who chose to resolve this dispute through the state funded CCMA. This, on its own, might lead to an injustice. An intervention by a higher court is usually resorted to with the intention to try and achieve a just outcome.
In the circumstances, I do not believe that this would be an appropriate case for the court to exercise its discretion in favour of an intervention the appellant has failed to reveal to me any special or persuasive reason which would persuade me to intervene in this matter.
The Application is dismissed with costs.

The failure by the applicant to comply with the provisions of the Act, cannot be remedied by an application to this court, even the provisions of Sec 158 (1)(b) can not assist because this court does not have jurisdiction as it has already been stated.

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JALI A. J.

Date of Hearing: 3 November 1997

Date of Judgment: 28 November 1997

Referral to oral evidence

The question of the referral of this matter to oral evidence which is the matter which was before me at the commencement of this application is clearly set out in the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at pp 1164 - 1165 where Marais A J P stated that :

"The presiding judge may find it convenient in cases where the issues are clearly defined, the dispute of fact comparatively simple even though material and a speedy determination of the dispute desirable, to act under Rule 9. The employment of this rule is at the court's option, exercisable whether or not either party requests him to invoke it - and

even if the party who has raised the dispute by denials or counter-allegation refused oral evidence ... what particular course should be taken depends upon the circumstances of each case and it is undesirable to lay down any rule regarding the exercise of the court's discretion."

In the abovementioned matter as I have clearly stated, there is clearly a dispute of fact which is apparent from the facts of the matter. The applicant alleges that the

respondent was self-employed and was not an employee of the applicant. However, on the other side the respondent contends that she was an employee of the applicant. This is clearly an issue which needs to be decided by leading of viva voce evidence and also looking into the question of law.

The applicants go on further to state that not only was the respondent a consultant but she was also employed by
Mrs Ria Cassell, who, should have asked the respondent to sign an agreement which, due to an oversight, was never signed. In the circumstances, there is not only the issue of the attorney/client relationship but there is also the issue of whether this particular agreement was the agreement which was going to govern the terms and conditions of employment between the first respondent and whoever employed her. This one issue as well, will need oral evidence to be led.

In the circumstances, I do agree with both parties that this is one

issue which needs to be resolved by the leading of oral evidence.

It is apparent from the application papers which were lodged by the applicant that the relationship between the applicant and its employees is a bone of contention which
needs to be resolved one way or the other. This became apparent even at the conciliation stage when this issue was conveyed to the commissioner to the effect that there is not only this dispute which relates to the appointment of consultants but also another one which is likely to be raised at the Cape of Good Hope Division of the High Court of South Africa. And if, this is not the only issue relating to the employment relationship of the applicant, in one way or another, the matter will end up before this court for a final determination. If it is not before this court, it will end up with the Labour Appeal Court.
As previously stated, section 158 of the Act does give the Labour Court power to give an order which includes amongst others interdict, a declaratory order and the rest of the orders which have been referred to above. Even though I have my reservations about whether the ultimate application when it has been heard after the leading of oral evidence will succeed in light of the decisions I have referred to in the matters of Richards Bay Minerals and Dinky Maropane where this court has refused to intervene in almost similar matters, I have decided to refer this matter to oral evidence as I do believe there are issues which have not been clarified even on papers which might call for the leading of oral evidence. For example, some of the affidavits which were filed left the court with oral
evidence which will have to be clarified once the deponents to those affidavits do lead oral evidence to clarify the circumstances.

The applicant furnished me with a draft order which he asked me to consider for purposes of referral of the matter to oral evidence. This order had seemingly, been discussed with the respondent who confirmed during the hearing that he has seen same. In the circumstances, it is ordered that:

1. The matter is referred to hearing of oral evidence in terms of rule 7(8)(b) at a date to be arranged with the Registrar of this court on the following issue:

(a) whether the respondent was at any time material to the alleged dispute with the applicant, an employee as defined in section 213 of the Labour Relations Act No.66 of 1995 (the Act);

2. The evidence shall be that of any witness whom the parties or any of them may elect to call subject, however, to what is provided in paragraph 3 hereof.

3. Save in case of the persons who have deposed to affidavits or filed, neither party shall be entitled to call any witness unless:

(a) such party has given notice to the other party of its or her intention to call any other witness at least 14 days before the date appointed for the
hearing (in the case of a witness to be called by the respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant);

(b) the court, at the hearing, permits such persons to be called despite the fact that no such notice has been given;

4. The fact that a party has given notice in terms of paragraph 3 hereof or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

5. Within 21 days of the making of this order, each of the parties shall deliver a schedule as contemplated in rule 6(1)(c), listing the documents

that are material and relevant to the questions in issue between the parties, excluding any document already filed of record.

The applicant, also requested that I should consider giving an order of costs against the first respondent and such cost to include the costs of one counsel. I have considered the question of costs and I have decided that I will not be making any order of costs in respect of any of the parties. The Act entitles me to make an order of costs which takes into consideration the law and fairness. I do believe that it would be fair for the question of costs to stand over in this matter in light of the nature of the dispute and the fact that the first respondent had initially instituted this matter at the CCMA and did not want to proceed with same at this particular forum. In the circumstances, if any party was to be burdened with costs at this stage, it would be inappropriate. In the circumstances, I order that the question of costs will stand over to the adjourned hearing.