IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No. J94/98

In the matter between:

DEMPSTER, C A Applicant

and

COMMISSIONER NERINE KAHN First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION Second Respondent

ARIEL TECHNOLOGIES Third Respondent

REASONS FOR JUDGMENT

Date of Hearing: 30 April 1998

Date of Judgment: 4 May 1998

On behalf of Applicant

Instructed by: Anderson & Kloppers Attorneys

Ref: Ms R Anderson

On behalf of Third Respondent:

Instructed by:

Smit Hauptfleisch Inc.

Ref: Mr J J du Plessis

REVELAS, J:

[1] The applicant applied to this court to review and set aside a ruling made by the first respondent, a commissioner appointed by the Commission for Conciliation, Mediation and Arbitration (the "CCMA") in her capacity as a conciliator (my underlining). The ruling constitutes a final award and was handed down as such. The ruling was to the effect that the applicant was not an employee for the purposes of the Labour Relations Act, No 66 of 1995 (hereafter "the Act").

[2] There are several bases upon which this application is brought. Much time was spent on arguing what evidence the first respondent should have taken into account and which evidence she shouldn't have. The nature of the evidence taken into account was also attacked. The main question however is whether the first respondent was empowered to, and had the necessary jurisdiction to make such an award at the conciliation stage.

[3] Sections 191 (1) to 191(5) of the Act is applicable to disputes regarding alleged unfair dismissals. The relevant sections read as follows:

"(1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of

the date of dismissal to–

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

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

(5) If a council or a commissioner has certified that the dispute remains unresolved, if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved–

(a) the council or Commission must arbitrate the dispute <u>at the request of the employee</u> if–

(i) <u>the employee has alleged</u> that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph(b)(iii) applies:

(ii) <u>the employee has alleged</u> that the reason for dismissal is that the employer made continued employment intolerable; or

(b) <u>the employee may refer the dispute to the Labour Court</u> for adjudication <u>if the employee has alleged</u> 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." (My underlining)

[4] It is quite apparent from the above sections that the

referral of a dismissal dispute is an employee driven process. If a dispute about a dismissal is conciliated, it is still open to the employee at that stage to refer the matter to the Labour Court for adjudication or for arbitration, by a council or the CCMA depending on its nature. A certificate to the effect that the dispute remains unresolved does not even have to be issued before the employee can refer the dispute, provided that 30 days have expired in terms of section 191(5) of the Act.

[5] It is the employee who determines the jurisdictional facts in terms of section 191(5) of the LRA. It also remains open to the employee to amplify or change his or her description of the reason for the dismissal for he or she is not obliged to give a definition to it at the conciliation stage. Even though it may be found later, that the employee is in fact not an employee in terms of the Act, such a finding cannot be made prior to the referral by the employee. A point *in limine* raised by one of the parties, such as the one in question, should only be entertained during adjudication or arbitration.

[6] There is no provision in the Act which empowers a conciliator, at the conciliation stage, to make final and

binding awards, particularly if the effect thereof is to preclude the employee from exercising his or her rights in terms of section 191 of the Act. The CCMA is a statutory body and its commissioners derive their powers from the Act.

[7] Section 135(2) and (3) of the Act clearly stipulates the powers and obligations of a commissioner during conciliation.

[8] The commissioner **"must attempt to resolve the issue through conciliation"** within a certain time period. (Section 135(2) of the Act). Further, a commissioner **"must determine a process to attempt to resolve the dispute"** which may include mediation, a fact-finding exercise or making a recommendation in the form of an advisory award. (Section 135(3) of the Act). There is no provision in section 135 of the Act, which is applicable to conciliation, which entitles a commissioner to hand down a binding award prior to referral of the unresolved dispute.

[9] The first respondent's findings may even be correct. She, with respect, wrote an elegantly worded award which is clearly indicative of someone who is very knowledgeable in

the labour law field. However, the first respondent exceeded her powers by making the award prematurely.

[10] Another important indicator which supports the argument that final awards may not be given at the conciliation stage, particularly as to the *locus standi* of the employee, is that in terms of section 135(4) of the Act, an employee is not entitled to legal representation during conciliation. Significantly, legal representation is permitted during arbitration proceedings. (Section 138(4) of the Act). The award in question is based on a legal question on which there isn't unanimity amongst lawyers. To expect of an employee to deal with difficult legal issues during conciliation is clearly not envisaged by the Act.

[11] For all the aforesaid reasons the award falls to be set aside in terms of both sections 145, and in terms of section 158(1)(g) of the Act.

[12] I accordingly make the following order:

1. The award (ruling) of Commissioner N. Kahn is hereby set aside.

2. The matter may now be referred to either adjudication or

arbitration.

3. The third respondent is to pay the costs of the applicant.

E REVELAS

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http://www.law.wits.ac.za/labourcrt.