IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN **CASE NO J6145/00**

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

COMMISSIONER L D E NTOMBELA, NO Second Respondent

ANTHONY JOHN TAYLOR Third Respondent

JUDGMENT

FREUND A J:

INTRODUCTION

1 In this application the applicant seeks an order *inter alia*:

"1 Reviewing and setting aside the ruling made by the second respondent on 20 November 2000 (Case No GA101/965) in terms whereof the second respondent ruled that the third respondent was an employee and employed by the applicant as defined in the Act;

2 Reviewing and setting aside the certificate of outcome issued by the second respondent on 12 December 2000;

3 Substituting the ruling made by the second respondent with an order that the third respondent was not an employee as defined in s213 of the Act and that the CCMA therefore lacks jurisdiction to conciliate his alleged unfair dismissal dispute."

2 The circumstances in which this application has come before this Court are the following. On or about 23 June 2000 the third respondent referred a dispute to the first respondent ("the CCMA") pertaining to his alleged unfair dismissal by the applicant. The applicant objected to the CCMA's jurisdiction to conciliate the dispute on the basis that the third respondent was not an "employee" as defined in s213 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant then served and filed an affidavit with the CCMA setting out the factual basis for its contention that the third respondent was not an employee. The third respondent filed an opposing affidavit in which he alleged that he was indeed an employee of the applicant and in which he set out the facts upon which he relied in this regard. He did, however, also submit in his affidavit that, for a proper finding to be made on the nature of the relationship between himself and the applicant, oral evidence would be required. The applicant filed a replying affidavit. On 2 October 2000 (i.e. more than three months after the referral to the CCMA) the "point *in limine*" relating to the third respondent's disputed status was set down

for argument before the second respondent ("the Commissioner"). The Commissioner made a ruling, for which he gave detailed reasons, that the third respondent was an employee as defined in s213 of the Act. The applicant received this ruling on 20 November 2000. A conciliation meeting was scheduled for 12 December 2000. It appears that this meeting did not take place. In any event, the Commissioner on 12 December 2000 issued a "certificate of outcome" certifying that the dispute had been referred for conciliation and remained unresolved. The aforementioned ruling and certificate gave rise to the present application. No arbitration hearing in respect of the dispute has yet been held.

3 The application is not opposed by the first or second respondents but is opposed by the third respondent.

The parties' contentions

4 Mr Halgryn, who appeared on behalf of the third respondent, submitted that conciliators (as opposed to arbitrators) of the CCMA should not enquire into and determine whether the party referring the dispute is in truth an employee. He submitted that a mere allegation by the party concerned that he or she is an

employee is sufficient to confer jurisdiction to conciliate. In the alternative, he submitted that a finding by the conciliating commissioner as to whether an employment relationship exists can in law not bind the commissioner appointed to arbitrate the dispute. He submitted that if the conciliating commissioner rules that an employer/employee relationship exists, nothing precludes the party found to be the employer from revisiting its jurisdictional objection at the arbitration stage. He submitted that, for this reason, it was premature and inappropriate for the court to entertain the review application and that this was a sufficient basis to dismiss the present application. In the further alternative he submitted that the evidence showed that the third respondent had been an "employee" of the applicant.

5 Mr Maserumule, who appeared on behalf of the applicant, responded that, in terms of s191 of the Act, the CCMA only has jurisdiction to conciliate a dismissal dispute if a "dismissed employee" refers the dispute. The existence of an employment relationship is thus a jurisdictional pre-requisite for conciliation. A commissioner appointed to conciliate a dispute must, he submitted, consider whether he or she has the necessary jurisdiction and this requires him or her to determine - if this is challenged - whether the person who referred the dispute to the

CCMA was an "employee" of the alleged employer. He pointed out that in *Tier Hoek v CCMA* [1999] 1 BLLR 63 (LC) Landman J held that it was incumbent upon the commissioner who was to conciliate the dispute to decide whether or not the dispute concerned an employer and employee. He further pointed out that in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others* [2000] 12 BLLR 1389 (LAC) at 1394-1395, the Labour Appeal Court stated the following:

"(16) Where a dismissal dispute has been referred to the CCMA or a 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 ...

(17) If the employer is aware of any one of the above possible grounds of objection, he would have to consider what he must do about them. He would 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 the dispute or whether he should first raise the objection before the commissioner appointed to conciliate and go to 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, proceed 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 which would be involved in approaching a court.

(18) If the dispute is not resolved at conciliation stage, he would have to consider whether he should then rush off to a court of competent jurisdiction at that stage to obtain an appropriate order on whether or not the CCMA or the council has jurisdiction to proceed to arbitrate the dispute. He would consider whether he should wait and see if the employer takes the dispute to

arbitration or to the Labour Court after conciliation has failed before he can take the costly route of approaching a court for a ruling on jurisdiction. He may legitimately think that he should reserve his rights and participate in the arbitration proceedings on the basis that, if the arbitrator finds in his favour on the merits which is likely to be a cheaper route in some cases, if not most, he will avoid legal costs but if he rushes off to court before the arbitration is completed, he may waste money on court proceedings in a case where he may be likely to end up with an award in his favour anyway.

(19) If the employer approached the court after the referral but before even the conciliation could start and sought a ruling that the council or the CCMA did not have jurisdiction on one or more of the grounds of objection I referred to earlier, he might be unsuccessful and might have to come back to participate in the conciliation process anyway. Then, maybe, he might have to approach the court again after the conclusion of the arbitration proceedings if the award is against him if he believes that the arbitrating commissioner has committed one or other reviewable irregularities entitling him to have the award set aside. That would be a second trip to the court. If, however, he raised whatever objections he has before the CCMA or the council but participated in the process up to the end of the arbitration proceedings before rushing off to court, this may be cost effective, more convenient and may avoid a duplication or multiplication of court proceedings. It would also not overburden the court.

(20) 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 processes before the CCMA or the council is not a simple question. I doubt that a hard and fast rule can be made about it. Considerations which this issue raises are not altogether dissimilar to some of the considerations which our courts have to deal with from time to time in different contexts (see Nugent J in *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 676G-680J; Nicholson J in *Gordon Verhoef & Krause & Another v Azanean Workers' Union & Others* (1997) 18 ILJ 707 (LAC) and Galgut J in connection with the *in medias res* rule in *Zondi & Others v President Industrial Court & Others* (1991) 12 ILJ 1295 (LAC) esp at 1300C-1303A.)"

6 Mr Maserumule submitted that in the above passage the Labour

Appeal Court made clear that there was no merit in the third respondent's point *in limine* that the present application is premature. The Labour Appeal Court, he submitted, had effectively held in this passage that it is open to an "employer" whose objection to the jurisdiction of the CCMA to conciliate a matter has been dismissed by a conciliating commissioner is entitled forthwith to approach this court on review. As to the merits of the application, Mr Maserumule argued that the evidence which I shall refer to below showed that the third respondent had never been an "employee" of the applicant.

Should a conciliating commissioner enquire into whether the referring party was an "employee" of the other party?

7 I have considerable sympathy with the argument that it is not necessary for a commissioner appointed to conciliate a dismissal dispute to enquire into and make a finding upon the question as to whether the referring party was indeed an employee of the other party. To my mind the scheme provided for in s191 of the Labour Relations Act, No 66 of 1995 ("the LRA") is for conciliation to take place speedily and with a minimum of legal formality, to be followed in due course, where necessary, by an arbitration at

which substantial points in dispute, including jurisdictional points, can be determined. Section 191(1) provides that, if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within thirty days of the dismissal to the appropriate bargaining council or to the CCMA. Section 191(4) provides that the bargaining council or the CCMA must attempt to resolve the dispute through conciliation. Section 191(5) then provides (in the relevant part):

"If a council or a commissioner has certified that the dispute remains unresolved, or if thirty days have expired since the council or the commission received the referral and the dispute remains unresolved -

(a) the council or the commission must arbitrate the dispute at the request of the employee ...". (My emphasis.)

8 The fact that s191(5) requires arbitration of the dispute even if the commissioner has not certified that the dispute remains unresolved and, by necessary implication, even if no conciliation has even been convened is, in my view, a strong pointer that the legislature could not have intended that complex jurisdictional disputes turning on disputed questions of fact and/or law should be entertained by conciliating commissioners.

9 It is also significant, in my view, that s136(4) does not permit legal representation in conciliation proceedings. By contrast,

s140(1) provides for legal representation to be permitted where the complexity of a dispute regarding a dismissal relating to the employee's conduct or capacity requires this. This is indicative of an intention on the part of the legislature that complex questions of law and fact should be resolved at the arbitration stage and not at the conciliation stage. (I accept that in the present case legal representation was in fact permitted by the second respondent when determining the jurisdictional issue, but the fact remains that no provision in the Act specifically caters for this.)

10 Furthermore, the scheme of s191 of the LRA is clearly intended to facilitate speedy arbitration of disputes brought by persons claiming to be the victims of unfair dismissals. If conciliating commissioners are required to resolve difficult questions of fact and law, and if it is open to aggrieved parties to bring such decisions on review prior to the commencement of arbitrations sought by the affected complainants, it is obvious that the policy underlying the LRA in favour of speedy arbitration will be frustrated.

11 In this regard I concur with the views expressed by Pillemer AJ in

BHT Water Treatment v CCMA and Others [2002] 2 BLLR 173 (LC). Although the facts in that case are distinguishable from the facts in the present case, the following comment by the learned Judge (at paragraph 17) appears to me to be in point:

> "The notion that a CCMA commissioner appointed to conciliate a dispute must decide the merits of the dispute before he has jurisdiction to conciliate conflicts with the scheme of dispute resolutions set out in section 191. What is so strange is that this type of jurisdictional challenge is not just a bizarre aberration in the present case, it seems to be fast on the way to becoming a practice. This was the third similar review that came before me during the course of a week in which I sat in Cape Town. In my view improper challenges like this frustrate the functioning of the dispute resolution process contemplated by the Act and must stop."

See also *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC) at paragraphs 32-34

12 However, I believe that I am bound to find that a commissioner appointed to conciliate a dispute is at least entitled (if not obliged) to investigate whether the party claiming to be a dismissed employee was in fact an employee of the other party.

13 In *Richards Bay Iron and Titanium (Pty) Ltd t/a Richards Bay Minerals & Another v Jones & Another* (1998) 19 ILJ 627 (LC) a party which had been cited as the alleged employer in a referral

to the CCMA approached this Court, while conciliation was pending, for an order declaring that it was not the employer and that the referral of the dispute to the CCMA was irregular. Brassey AJ rejected a submission on behalf of the applicant that the CCMA had no power to rule upon the question as to whether the requisite employer/employee relationship existed. He found that in the case before him the existence or otherwise of the requisite employer/employee relationship turned on complex questions. At 632E the learned Judge continued:

> "These complex questions are best resolved by the hearing of oral evidence and that evidence, in my view, is best heard by the CCMA. That body was established to provide a speedy and inexpensive solution to a variety of cases, including cases such as this in which employees complain of unfair dismissal. It fulfils the intention of the lawgiver better to leave these matters within its province than to allow them to be transferred to this Court, whose processes are most elaborate, expensive and time consuming. Nothing before me suggests that this is one of those "rare cases in which grave injustice might otherwise result or where justice might not by other means be obtained" if the matter is left to be decided by the CCMA. On the contrary: justice will be served, not compromised, by leaving the decision in the hands of a body in which access is ready and the determination both swift and cheap is obtainable."

Brassey AJ ruled that the application before him was premature and accordingly dismissed it.

14 In *Tier Hoek v CCMA supra* Landman J stated as follows:

"(8) When a commissioner embarks upon the process of conciliation it is incumbent on the commissioner, as has been found in various decisions of this court, to satisfy himself or herself that he or she has the necessary jurisdiction with regard, *inter alia*, to the area of jurisdiction, the persons concerned, the period of time involved and the *res* or matter in dispute.

(9) In this particular case it was incumbent upon the commissioner who was to conciliate the dispute to decide whether or not the dispute concerned an employer and employee. The commissioner, in my opinion, properly had regard to the representations made by Mr Claassens and to the written representations filed on behalf of *Tier Hoek* and came to the conclusion that *Tier Hoek*, represented by Mr Van Dyk, was the employer of Claassens. There is nothing in the affidavit which has been filed which makes me come to the conclusion that that ruling was defective as envisaged in section 145 of the Act. It was certainly within the competence of the commissioner to make that ruling and having made that ruling, it cleared the way for the arbitration proceedings to take place." (My emphasis.)

15 Several features in relation to the *Tier Hoek* decision must be noted. First, it is not entirely clear whether the learned Judge concluded that it was essential, or merely permissible, for the conciliating commissioner to satisfy himself or herself as to the existence of an employer/employee relationship. The statement in the last sentence of paragraph 9 that it "was certainly within the competence of the commissioner to make that ruling" may imply that this is all that the learned Judge was seeking to make clear. Secondly, in *Tier Hoek* the Court noted that, after the conciliating commissioner had ruled that there was an employer/ employee relationship and that the CCMA therefore had jurisdiction, the arbitrating commissioner had once again

satisfied herself that she had the necessary jurisdiction. It appears, although this is not clear, that the arbitrating commissioner once again considered the question as to the existence of the employer/employee relationship. The learned Judge did not comment negatively on the right of the arbitrating commissioner to re-enquire into this question.

16 Although *Benicon Earthworks & Mining Services (Eiendoms) Bpk v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC) is a case pertaining to the Labour Relations Act, No 28 of 1956, and not to the present Labour Relations Act, No 66 of 1995, the following comments by Nugent J (as he then was) in that case (at 803H-804H) are, in my view, in point:

> "There are cases which suggest that the Industrial Court is required to satisfy itself that the necessary jurisdictional facts exist before exercising its powers which are dependent thereon (see for example *Kloof Gold Mining Co Ltd v National Union of Mineworkers & Others* (1986) 7 ILJ 655 (T) at 673E-F; *Tornado Transport (Pty) Ltd* at 130C-D), which might suggest that in a case like the present the Industrial Court is called upon to enquire into the validity of the establishment of the conciliation board, and satisfy itself that it was validly established, before dealing with the application before it.
>
> If there is such a requirement, it arises only from practical considerations. The validity of the proceedings before the Industrial Court is not dependent upon any finding which that court may make with regard to the jurisdictional facts, but rather upon their objective existence. Accordingly any conclusion to which the court may come on this issue has no legal significance. As pointed out by Leon J in *Pinetown Town Council* at 179B-D:

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied ... [A] determination on the jurisdictional facts is always reviewable by the courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it."

Equally the tribunal cannot deprive itself of jurisdiction by an incorrect finding that the jurisdictional facts do not exist.

In practice, however, a court would be shortsighted 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 a jurisdictional challenge which is clearly without merit. Between these extremes, will be cases in which the court is called upon to exercise its judgment as to whether to proceed (at the risk to the parties that the proceedings may prove to be invalid), or to decline to do so until an authoritative ruling has been obtained from a competent court. The court's position in this regard is no different to that of an arbitrator whose jurisdiction is placed in issue (see Mustill & Boyd *Commercial Arbitration* (2 ed) at 574-5).

The powers of the Industrial Court do not extend to ruling upon its own jurisdiction. At best, it can make an assessment of whether a court reviewing its proceedings is likely to set them aside. Where the existence or otherwise of the jurisdictional fact is readily ascertainable, this prediction can usually be made with some confidence. However where the jurisdictional fact is dependent upon the validity of the exercise of statutory powers, any enquiry would most often be futile. The enquiry may raise difficult issues, and in any event, as I have already indicated, any conclusion to which the Industrial Court may come will in any event not be decisive.

In terms of the Act, this court is entitled to review proceedings of the Industrial Court for want of jurisdiction. In order to succeed, it is for the applicant to show objectively that the jurisdictional facts necessary for the exercise of its powers are absent." (My emphasis.)

17 I respectfully concur with the views set out in the above passage

and I believe that they apply equally to jurisdictional rulings made by CCMA commissioners in terms of the present Act. (See *Flexware (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (1998) 19 ILJ 1149 (LC) at 1153H-1155A.) The obligation on the part of a CCMA commissioner or arbitrator to enquire into his or her jurisdiction, if it exists, arises only from the practical considerations referred to in the above passage.

Application premature?

18 The next question to be considered is whether it is open to this Court, if it considers this to be appropriate, to dismiss the present application on the basis that it has been brought prematurely.

19 *Benicon Earthworks supra* makes it clear, in my view, that a finding by a conciliating commissioner cannot bind a commissioner subsequently appointed to arbitrate the same dispute on the question as to whether the requisite employer/employee relationship exists. The conciliating commissioner's finding on this issue constitutes nothing more than his or her opinion and binds no-one, including the arbitrating commissioner. I respectfully concur with the views expressed by Oosthuizen AJ in *Etschmaier v Commission for Conciliation,*

Mediation and Arbitration & Others (1999) 20 ILJ 144 (LC) at paragraphs 40-44; see also my comments above regarding *Tier Hoek*; and *see Von Baxtrom & Others v Independent Electoral Commission* (2000) 21 ILJ 434 (CCMA), where the arbitrating commissioner redetermined the question as to the existence of an employment relationship, notwithstanding an earlier ruling on this question by the conciliating commissioner.

20 In my view the fact that it is open to the arbitrating commissioner to reconsider the same question has significant implications. In particular, the facts disclosed to the arbitrating commissioner may well go beyond, or cast a different light on, those disclosed to the conciliating commissioner. Such facts may justify a different conclusion on a jurisdictional question, such as the existence or otherwise of the requisite employer/employee relationship, than the conclusion properly reached on the evidence before the conciliating commissioner.

21 In my view this consideration points against the advisability of this Court giving a final ruling on a jurisdictional question where the facts are not entirely clear and where the possibility exists that the facts which may emerge during the course of the arbitration may justify a different conclusion than a conclusion

based purely on the facts disclosed during the conciliation proceedings. A ruling by this Court that the complainant was an employee of the other party to the dispute and that the CCMA therefore has jurisdiction may well bind the parties and the CCMA. It would clearly be undesirable for such a ruling to be given in circumstances where the possibility exists that a subsequent hearing may disclose that the facts as understood by the Court are incorrect or incomplete. It is therefore my view that, in an appropriate case, it is open to this Court to decline to make a ruling on a jurisdictional issue where it is possible that a later hearing before the CCMA may disclose facts not before this Court. On the other hand, if it is clear on the common cause facts that the CCMA could not have jurisdiction, I can see no reason why this Court should not declare this to be the case even before the arbitration has been held.

22 In my view several previous decisions by this Court point towards the advisability of allowing the CCMA to ventilate all the relevant factual disputes before entertaining a review going to the question of the CCMA's jurisdiction. As referred to above, in the *Richards Bay Minerals* case *supra* this Court dismissed the application on the basis that it had been prematurely brought. Although the conciliating commissioner in that case had not - as

in the present case - made a ruling before the matter came before the Court on whether the requisite employer/employee relationship existed, the reasoning of the Court in dismissing the application appears to me nevertheless to be apposite in the present case. As appears from the passage from that judgment quoted in paragraph 13 above, the Court stressed that the factual questions should be resolved by the CCMA hearing the relevant oral evidence.

23 *Avroy Shlain Cosmetics (Pty) Ltd v Kok & Another* (1998) 19 ILJ 336 (LC) was another case in which a party alleged to be an employer approached this Court for an order declaring that it was not in fact the employer of the other party. By the time that the application was brought, a conciliation meeting had been held by the CCMA, notwithstanding an argument by the alleged employer that the other party had not been its employee, and an arbitration was pending. Material disputes of fact arose from the affidavits before this Court and the question to be determined was whether this Court should refer those disputes for the hearing of oral evidence. Jali AJ declined to do so and dismissed the application. He made clear that in his view the CCMA arbitrator should be given an opportunity to consider whether the requisite employee/employer relationship existed. I respectfully

concur with the following sentiments expressed by the learned Judge (at 349E-350A):

"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' (s1(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 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 there are circumstances which might lead to a grave injustice, then the superior court tends to intervene. See *Richards Bay Iron & Titanium Ltd t/a Richards Bay Minerals & Another v Jones & Another* per Brassey AJ together with the 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."

I should mention that, as regards the case before me, Mr Halgryn, for the applicant, made very similar points to those made by the learned Judge in the above passage. In particular, he stressed

the affordability of CCMA proceedings and the third respondent's desire that an oral hearing before the CCMA should enquire into all the relevant facts.

24 I do not agree with Mr Maserumule's submission that the decision by the Labour Appeal Court in the *Fidelity Guards* matter makes it clear that it is not open to this Court to uphold the respondents' point *in limine* that the present application is premature. In my view the facts of the present case are distinguishable from those in the *Fidelity Guards* case and the legal issue with which I am dealing at present was not before the Labour Appeal Court in the *Fidelity Guards* case.

25 The factual background to the *Fidelity Guards* case appears from the decision of Pillemer AJ in the Court *a quo* (reported as *Fidelity Guards Holdings (Pty) Ltd v Epstein and Others* [2000] 3 BLLR 271 (LC)). Pillemer AJ made clear that that case was an instance of what he called a "pernicious practice" that appeared to be developing where:

> "... an employer whose employee has lodged a claim with the Commission out of the thirty-day period (often, as in the present case, the employee believing that the date of dismissal is the date the appeal is refused), elects not to raise any complaint, anticipating that at the conciliation hearing no question of condonation will arise. The employer fails to conciliate on the

merits of the dispute, allows a certificate that the dispute remains unresolved to be issued without demur and engages in the arbitration that follows again without raising any question about the time when the dispute was referred. Then, if unsuccessful in the arbitration, the employer approaches the Labour Court relying upon the trump card presented to him by the *Checkers* case, contending that the arbitrator had no jurisdiction in the first place." (My emphasis.)

26 PillemerAJ stated:

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"Obviously this practice, which is unconscionable and borders on fraud, frustrates the purpose of the Act."

27 Pillemer AJ dissented from earlier cases in which it has been held that the arbitrator's jurisdiction is dependent upon a timeous referral and held that the relevant jurisdictional fact, as far as the arbitrator was concerned, was the s135(5) certificate. He stated (at paragraphs 9 - 12):

"(9) As I read the section the Commissioner is enjoined by the Act to arbitrate the dispute at the request of the employee if a commissioner certified that the dispute remains unresolved. It is that certification which constitutes the necessary jurisdictional fact. It confers jurisdiction. The Commissioner who issued the certificate performs an administrative act which has important consequences. Once he or she has so acted, then, to my mind, unless the administrative act is reviewed and the certificate set aside, the Commissioner is obliged to proceed with the arbitration. The section could not make this clearer. It uses the imperative form "must" to describe the duty to arbitrate the dispute.

...

(11) The certificate has a whole range of consequences under various

sections of the Act. If its validity is to be challenged that challenge must itself be timeous i.e. within a reasonable time, which, given the nature of the process and the consequences of the issue of the certificate of non-resolution, will inevitably be a short period and take place before further steps occur relying upon its issue. This is particularly so if the further steps take place with full participation and without objection.

(12) If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim *omnia praesumuntur rite esse acta*, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision (cf *O'Reilly v Mackman* [1983] 2 AC 237, 238 and *Harnmaker v Minister of Interior* 1965 (1) SA 372 (C) at 381)."

28 Pillemer AJ therefore ruled that the Commissioner had jurisdiction to arbitrate the dispute and dismissed the review application.

29 I pause to point out that the case before Pillemer AJ had nothing to do with whether the jurisdictional requirement of the requisite employer/employee relationship existed. The jurisdictional question arose from the lateness of the referral of a dismissal dispute to the CCMA. I also wish to point out that it is implicit in Pillemer AJ's judgment that the power to condone such a late referral vests in the conciliating commissioner and not in the arbitrating commissioner. In my view, this is distinguishable from the situation where the existence of an employer/employee relationship is disputed at the arbitration stage. As I have stated above, in my view nothing precludes the arbitrating commissioner from considering such a contention on its merits.

30 Pillemer AJ's judgment was upheld on appeal in the judgment quoted in paragraph 5 above. At paragraph 12 of the judgment of the Labour Appeal Court, Zondo JP held as follows:

> "In my view the language employed by the legislature in s191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of s191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without jurisdiction to arbitrate." (My emphasis.)

31 It was against the background of the above finding that Zondo JP made the comments in paragraphs 16 - 20 of his judgment quoted in paragraph 5 above and which were relied upon by Mr Maserumule in argument.

32 It should be noted that in the *Fidelity Guards* matter the fundamental question was whether it was open to an employer who had not objected to a late referral of a dismissal dispute to the CCMA at the conciliation stage to rely on such late referral as

a basis for challenging the jurisdiction of the arbitrator. Both the Court *a quo* and the Labour Appeal Court held that it was not. In essence this was because a timeous referral to the CCMA was not one of the jurisdictional facts necessary in order for the arbitrator, as opposed to the conciliator, to have jurisdiction. The only relevant jurisdictional fact insofar as the arbitrator was concerned, was the existence of the s135(5) certificate. The Court *a quo* and the Labour Appeal Court both made clear that, unless and until the s135(5) certificate was set aside on review, the arbitrator had jurisdiction. Apart from the fact that I am bound by the Labour Appeal Court's decision in this regard, I respectfully concur with the above views.

33 However, in my view, the above considerations have no bearing on the question as to whether an arbitrator is entitled to enquire into the existence or otherwise of a wholly different jurisdictional fact, namely whether the requisite employer/employee relationship existed, if the conciliating commissioner has issued a certificate in terms of s135(5). For the reasons that I have set out above, I believe that the arbitrator does have this power and I do not believe that anything stated by the Labour Appeal Court in the *Fidelity Guards* matter requires me to reach a different conclusion.

34 I would also point out that, although in the *Fidelity Guards* matter the Labour Appeal Court posed various questions pertaining to the appropriate time for an employer to bring a review application pertaining to jurisdictional questions, it refrained from answering these questions in any situation other than the situation which had arisen in that case. As I have made clear above, the jurisdictional issue in that case pertained to the question of a late referral of the dispute to the CCMA. I think that it is significant that, at paragraph 20 of his judgment, Zondo JP specifically stated that he doubted that hard and fast rule could be made about whether or not a party should approach the court about jurisdictional questions before or after the completion of the processes before the CCMA.

35 My conclusion is, therefore, that where a party brings a review application before this Court after the conciliation phase and before the arbitration phase, it is <u>open</u> to this Court, in appropriate circumstances, to dismiss the application on the basis that it has been prematurely brought. Whether a review application <u>should</u> be dismissed on such a basis depends *inter alia* on whether there is any realistic possibility that the facts which may be disclosed during the arbitration phase may affect

the outcome of the review.

The merits

36 It is against this background that I turn to consider whether the applicant has established that, on the common cause facts, the third respondent was not its employee.

37 In the founding affidavit before this Court the applicant has annexed the affidavits that were placed before the Commissioner. The founding affidavit then refers to various facts in the affidavits and annexures that were before the Commissioner which it alleges were common cause or could not be disputed by the third respondent. Mr Maserumule, who appeared in this application on behalf of the applicant, submitted that on these facts it was apparent that the third respondent was not an employee of the applicant.

38 In his answering affidavit the third respondent did not deal pertinently with the facts pertaining to his status as an employee but he did state the following:

"I also deny all the allegations made in the applicant's founding affidavit insofar as same may be inconsistent with what I have stated in the affidavits filed in the conciliation."

39 Having regard to the contents of the third respondent's affidavit filed at the conciliation stage, the above statement in the third respondent's answering affidavit has, in my view, given rise to material disputes of fact in the present application. Mr Maserumule informed the court that the applicant had elected not to apply to refer the dispute to oral evidence but this, of course, does not necessarily bind this Court.

40 I also think it relevant to record that, in his affidavit before the CCMA, the third respondent, after dealing in some detail with why he contended that he was an employee, stated the following:

"I am advised that for conciliation purposes it is not necessary to file this affidavit. Nevertheless, it is done in response to the point *in limine* and issues raised in the affidavit of Mr Mannie Alho. I submit with respect that for a proper finding to be able to be made on the nature of the relationship between the respondent and myself, oral evidence will need to be led subject to cross-examination. In that regard, I intend to subpoena certain members of the respondent's corporation in order that a proper investigation and arbitration ruling may be made ..."

41 I was informed from the Bar that this was not pursued when the matter came before the Commissioner.

42 The facts which the applicant alleged in its founding affidavit were common cause or could not be disputed by the third respondent were the following:

1 "15.1 the third respondent is a chartered accountant and had not previously been employed by the applicant;

15.2 the third respondent had been seconded to the applicant by KPMG Chartered Accountants, ("KPMG"), the applicant's external auditors, from at least January 1999 until August 1999;

15.3 From January to August 1999, KPMG invoiced the applicant for services rendered by the third respondent to the applicant on a monthly basis. The applicant paid KPMG a fixed amount of R 42 000, to which VAT of R 5 800.00 was added, bringing the total to R 47 800.00 per month;

15.4 From February to August 1999, the applicant:

15.4.1 was not aware of the nature of the relationship between the third respondent and KPMG, whether as a consultant or employee of KPMG;

15.4.2 did not conclude any contract of employment with the third respondent;

15.4.3 did not pay the third respondent any salary or benefits for his services; and

15.4.4 never received a complaint from the third respondent regarding the non-payment of salary to him or the non-provision of employment benefits.

15.5 From September 1999, KPMG stopped invoicing the applicant for services rendered by the third respondent. Instead, third respondent invoiced the applicant for his services through Elsa Taylor & Associates CC, a close corporation of which his wife, also a chartered accountant, was the sole member;

15.6 the close corporation charged the applicant a fee for "professional services rendered", for the same amount as KPMG had previously done, inclusive of VAT. The applicant paid the close corporation on the basis of each invoice;

15.7 until the termination of his contract in April 2000, the applicant did not pay a salary to the third respondent nor did it provide him with any employment benefits such as medical aid, pension fund or car allowance;

15.8 even after May 1999, when the third respondent claims he became applicant's employee, he was never paid a salary as KPMG, and later Elsa Taylor & Associates, invoiced the applicant for his services and were duly paid; and

15.9 there is no evidence of a complaint or grievance by the third respondent regarding the absence of a fixed term contract, until after the termination of his contract in April 2000."

43 In his answering affidavit before the CCMA the applicant stated the following:

"3 I was employed as a general manager: finance in January 1999. The intention was initially that I be employed on a fixed term contract, the basis of which was to resolve certain problems relating to stock levels and financial systems within the television division.

4 In May 1999 the nature of the relationship changed in that it was deemed necessary by the respondent to send me to the television market in Los Angeles to oversee the purchase of foreign material.

5 Prior to my departure I was interviewed by Mr Neil Harvey and Mr Mannie Alho (the deponent to the respondent's affidavit in support of its point *in limine*) and a verbal agreement was concluded whereby I would become an employee for a fixed period. This fixed period would expire in December 2000. Harvey required me to commit to the respondent in order that it could benefit from sending me to Los Angeles so that I could train a successor. I agreed.

6 Because I was in partnership with my wife in an accounting and business consulting practice, it was agreed that I could invoice the respondent on a month-by-month basis, as an interim measure only until I was entered on the QPAC system as an employee. It is this practice of monthly invoicing which the

respondent relies upon to argue that I was not an employee but was an independent contractor.

7 I am advised that the method of payment and of deducting tax is merely one of many factors to be taken into account when determining whether an employment relationship exists. Be that as it may, it was the intention of the parties to conclude a written employment contract. The fact that the contract was never put in writing was due to no fault of my own but due to the lackadaisical approach of the respondent.

8 This topic is addressed more comprehensively in my letter dated 3 June 2000 which is annexed hereto marked "AT1" and should be incorporated herein as if every allegation is specifically made in this affidavit. ..." (My emphasis.)

44 In annexure "AT1" the third respondent stated *inter alia* as follows:

"Whilst it is correct that there is no written agreement between the SABC and myself this was not due to any fault on my part. Indeed, the internal memo addressed to Mrs Khuzwayo herself prior to her meteoric promotion from HR to Chief Executive from Molefe Mokgatle, the then - Chief Executive of TV, instructs her to conclude a written contract between myself and the SABC commencing October 1999 and terminating 30 September 2000."

45 The "internal memo" referred to above is part of the papers before this Court. In it Molefe Mokgatle, then the Chief Executive - TV of the applicant advises Cecelia Khuzwayo as follows:

"I have since discussed finalised (*sic*) the above individual to be contracted for 1st October 1999 - which is for to 30 September 2000 (12 months).

We also agreed that we appoint an understudy by January 2000 to understudy him.

Could you please assist with the preparation of a contract appointment letter." (My emphasis.)

46 The words emphasised above do not make it clear whether the contemplated contract was to be an employment contract or some other form of contract. However, in his affidavit before the CCMA, the third respondent referred to a further letter dated 5 April 2000 addressed by Molefe Mokgatle to Dr Vincent Maphai, chairman of the applicant's board. In that letter Mr Mokgatle states the following (*inter alia*):

"A letter (attached) was sent to Ms Khuzwayo on the 25th September 1999 to issue an employment contract to Mr Taylor. Six months later nothing has happened ..." (My emphasis.)

47 The words that I have emphasised above show quite clearly that the contract contemplated in the "internal memo" from Mr Mokgatle to Ms Khuzwayo must have been an employment contract and not some other form of contract.

48 In the same letter of 5 April 2000 Mr Mokgatle implied that the third respondent's rights in terms of the Labour Relations Act had been infringed inasmuch as he had "personally agreed with Mr Taylor [*i.e. the third respondent*] on a twelve-month contract". In the third respondent's affidavit before the CCMA he commented

as follows:

"Since the Labour Relations Act only applies to employers and employees it is clear that I was regarded as an employee. Mokgatle's confirmatory affidavit is annexure AT6 hereto."

49 In his aforementioned confirmatory affidavit Mr Mokgatle confirms the contents of the third respondent's affidavit insofar as they relate to him and then goes on to state:

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"... in particular I confirm that the SABC at all times subsequent to May 2000 regarded the applicant as an employee."

(It seems to me that the reference to May 2000 was probably an error and that the reference was intended to be to May 1999.)

50 Mr Mokgatle was a senior executive of the applicant. His evidence that he had given instructions for an employment contract to be issued to the third respondent, together with his evidence that the SABC regarded the applicant as an employee, points towards a conclusion that, by the time that the third respondent's services were terminated by the applicant, the third respondent may indeed have become an employee of the applicant.

51 As against this I understand the force of the contention advanced

on behalf of the applicant that the manner in which the third respondent was remunerated, right up to the time that the relationship was terminated, indicates that he never became an employee of the applicant.

52 It was submitted on behalf of the applicant that the present case is on all fours with the facts in *CMS Support Services (Pty) Ltd v Briggs* [1997] 5 BLLR 533 (LAC). In that case the respondent requested the appellant to enter into a contract with a close corporation, of which she was the sole member, in terms of which the close corporation would procure that her services were provided to the appellant. The Labour Appeal Court overturned a decision by the Industrial Court that the respondent was an employee of the appellant. Central to the Labour Appeal Court's conclusion in this regard was the following paragraph in the judgment of Myburgh JP (at 538G-I):

"Having weighed up the advantages and disadvantages, the respondent made an election. She elected not to become an employee. Instead she elected to enjoy the advantages that a contract between the appellant and MCS would give and to forfeit the advantages of being an employee. What followed the respondent's election was a consultancy contract, a contract concluded between the appellant and MCS, a juristic person distinct from its member, the respondent. At no time did the respondent concede that the consultancy contract was a sham. On the contrary, and at all times, including in the witness box, she insisted that it was a valid and binding contract. She could hardly contend alternative (*sic*), of course, or she would be liable

to pay the income tax on the basis that she was an employee, and having misrepresented the true position to the Receiver of Revenue, she would be liable for penalties."

53 The court went on to find (at 540B):

"There was no contract concluded between the appellant and the respondent in her personal capacity. The contract which was concluded was the consultancy contract and that was an agreement between the appellant and MCS."

54 In my view the *CMS Support Services* case is distinguishable. In the present case, at least on the third respondent's version supported by the evidence of Mr Mokgatle, a verbal agreement existed in terms of which the third respondent was to become an employee of the applicant for a fixed period. It was the intention of the parties that this was to be confirmed in a written employment contract. It is true that the arrangements in terms of which the applicant continued to be invoiced for the third respondent's services points *prima facie* against the existence of this employment contract but, for the purposes of the present application, I must accept the third respondent's evidence that it had been agreed that he could invoice the respondent on a month by month basis as an interim measure only until he was entered on the QPack system as an employee. If this is indeed correct, the method of payment does not necessarily point conclusively against the existence of an employer/employee

relationship. Indeed, on the third respondent's version, I believe that it would be open to me to hold that, notwithstanding the manner in which he was paid, he was an employee of the applicant.

55 Mr Maserumule pointed out that, although VAT had been charged to the applicant on the services rendered by the third respondent, the payments made had not been regarded (at least by the applicant) as salary and income tax had accordingly not been paid thereon. This is undoubtedly an aspect of concern. If the third respondent's version that he became an employee of the applicant with effect from May 1999 is correct, income tax should of course have been deducted from his salary and paid to the South African Revenue Services. *Prima facie* the third respondent's version (taken together with facts put up by the applicant which he has not denied) suggests that there may have been a failure to comply with the provisions of the Income Tax Act. On the other hand, on the applicant's version, this Act does not appear to have been infringed.

56 In my opinion, notwithstanding the applicant's election not to refer the dispute before me to oral evidence, it is not appropriate for me to reach any conclusion in the present application as to

whether or not the third respondent was an employee of the applicant. If I were to rule, on the basis of the incomplete factual information before me, that the third respondent was an employee of the applicant, this could well bind the parties and the commissioner appointed to arbitrate the dispute. In the event that such a ruling rests on an incorrect factual foundation this would, in my view, be highly undesirable.

57 This leaves me with two choices: to refer the present application to oral evidence, or to dismiss the application, leaving it to the arbitrating commissioner to hear the evidence on the disputed issues. In the exercise of the discretion which I believe that I have not to entertain the present review application at this time, I believe that the latter option is the more appropriate. The third respondent has at all times been willing to ventilate the relevant factual disputes in the contemplated arbitration proceedings. The advantages to him of the CCMA as the applicable forum are obvious. The process should be cheaper, quicker and less formal than in this Court. In my view this is also the process most consistent with the purpose of the Act of promoting effective resolution of labour disputes (see s1(d)(iv) of the Act). Except where jurisdictional disputes can be resolved by the application of legal principles to undisputed facts, I believe that this Court

should discourage review applications of the present type prior to the conclusion of the arbitration proceedings for which the Act makes provision. I therefore propose to uphold the third respondent's point *in limine* that the present application is premature and to dismiss the application.

58 It follows that the third respondent will be entitled to refer the dispute concerning his alleged dismissal by the applicant for arbitration by the first respondent. If it should be found by the arbitrating commissioner that the third respondent was indeed an employee of the applicant and that the South African Revenue Services was misled in this respect, it is my view that it would be appropriate for the arbitrating commissioner to make his or her views in this regard known to the relevant authorities.

59 Inasmuch as the third respondent is the substantially successful party in this application, I see no reason why the applicant should not be ordered to pay his costs. Although it is by no means inconceivable that the applicant may ultimately establish that the third respondent was not its employee, I do not think that this is a sufficient reason not to require it to pay the costs occasioned by the present unsuccessful application.

60 In the circumstances the application is dismissed, with costs.

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A J FREUND
ACTING JUDGE OF THE LABOUR
COURT

G	:	23 May 2002
NT	:	
NT	:	Mr P Maserumule of Maserumule Inc
DENTS	:	Adv Leon Halgryn (Instructed by Joubert Attorneys)

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