IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case Number: JR 430/06

In the matter between:

PILLAY SAMYNATHAN **APPLICANT**

AND

THE NATIONAL BARGAINING
COUNSEL FOR CHEMICAL INDUSTRY **FIRST RESPONDENT**

COMMISSIONER G SHEEN **SECOND RESPONDENT**

JUSTINE AVON (PTY) LIMITED **THIRD RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] The applicant in this matter seeks an order to review and set aside the ruling issued by the second respondent (the commissioner) under case number GPCHEM1689 dated 13 January 2006. In terms of the ruling the commissioner upheld the jurisdictional point raised by the third respondent.

The background facts

[2] The applicant who prior to his dismissal was employed as a credit manager and worked his way up through to the higher ranks and held the position of a senior customer service manager was dismissed for operational reasons. At the time of his dismissal he was responsible for a number of the respondent's divisions which were part of the third respondent's supply chain.

[3] The applicant was dismissed for operational requirements. According to him, he was on the 06 May 02005 called to Mr. Wilson's office where he found Mr. Wilson and Ms Mojapelo, the human resources manager. He was informed that because of the restructuring his position had become redundant and therefore would be retrenched.

[4] Subsequent to his dismissal the applicant referred an unfair dismissal dispute to the first respondent. The dispute was conciliator on the June 5 August, 2005 and the parties having failed to reach an agreement the panelist who facilitated the conciliation process issued a certificate of none resolution which entitled the applicant to refer the dispute to arbitration. The certificate of outcome issued by the panelist recorded that the dispute concerned the provisions of s189 of the Labor Relations Act 66 of 1995 (the LRA).

[5] The arbitration hearing was set down for 24 November 25, and at the commencement of the hearing the panelist enquired as to whether there was any points in limine that any of the parties wished to raise. The third respondent answered in the affirmative and indicated that it wished to raise a point concerning the jurisdiction.

[6] In support of its point in limine the third respondent contended that the applicant's dismissal for reasons of operational requirements was part of the total restructuring of its business. It further submitted that the applicant was one of the 84 employees dismissed for operational requirements. In this regard the third despondent argued that the applicant was not the only manager who had been subjected to termination due to operational reasons. Mrs. Morodoh was according to the third respondent also one of the managers whose employment was terminated due to the structuring.

[7] It is common cause that none of the parties presented evidence in relation to the *point limine* raised by the third respondent. The matter was considered on the basis of submissions made by both parties.

Grounds of review

[8] The applicant raised three grounds in its challenge of the ruling of the third respondent; namely failure to - (a) arbitrate the dispute in the face of a valid certificate of outcome, (b) find that the point in limine was not raised within a reasonable time and (c) require the parties to present oral evidence.

[9] The applicant contended that in the absence of a review setting aside to the certificate of outcome the panelist was obliged to proceed with the arbitration hearing. In other words the essence of the applicant's argument was that once the certificate of outcome was issued in terms of se191 (5) stating that the dispute remains unresolved the bargaining council acquired jurisdiction to arbitrate the dispute. The jurisdiction of the bargaining council to arbitrate dispute can only according to the applicant be removed once the certification has been set aside. It was on the basis of this argument that the applicant argued that the panelist committed a gross irregularity and exceeded his powers by entertaining the *point in limine.*

[10] The applicant further argued that since the certificate of outcome has a range of consequences under the various sections of the LRA, a challenge to the validity of such a certificate must be done within a reasonable time. To this

extent the applicant argued that had the panelist properly applied his mind he would have found that the objection had not been raised timeously and therefore the first respondent had jurisdiction to arbitrate the dispute.

[11] The third ground upon which the applicant relied on, related to the fact that the panelist failed to require the parties to present oral evidence. The applicant argued that by not requiring the parties to present evidence before him, the panelist deprived himself of potentially relevant evidence regarding the jurisdictional dispute which could have been garnered from the examination, cross examination of relevant witness as well as documentary evidence that may have been submitted.

[12] The validity of the certificate issued in terms of section 135 of the LRA, was not in issue. The applicant contended correctly that the effect of the certificate was not only that the dispute remained unresolved but also that it entitled him to refer the dispute to arbitration.

[13] It is common cause that the administrative act of the panelist was never reviewed and the certificate set aside. This state of affairs obliged the second respondent to proceed to with arbitration.

[14] This issue was canvassed in detail in *Fidelity Guards Holdings (PTY) Limited v Epstein NO and others* (2000) 21 ILJ 2382 (L AC) where Zondo JP held that :

> " *[12] 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 s 191(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 the jurisdiction to arbitrate".*

[15] The learned Judge President went further and agreed with the court a quo and in this regard quoted with approval Pillimer AJ when he said:

> *'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 Harnaker G v Minister of Interior 1965 (1) SA 372 (C) at 381.)'*

[16] The essence of the principle enunciate in the *Fidelity Guard (supra)* is that where a dispute about fairness of a dismissal has been referred to the CCMA or the bargaining council and a certificate of non resolution of the dispute has been issued in terms of s191 (5), the CCMA or the bargaining council as the case may be has jurisdiction to arbitrate the dispute. The jurisdiction acquired as a result of the certificate of outcome will cease only ones the certificate is a reviewed and set aside. Because of the consequences that arise from the certificate of outcome, the challenge to its validity must be brought within a reasonable time.

[17] In the present case, the third that respondent, represented by its human resources manager did not raise the issue of jurisdiction at the conciliation stage. The jurisdictional issue was for the first time raised at the arbitration stage.

[18] In entertaining the point in limine regarding jurisdiction the panelist failed to apply his mind properly to the determination of such an objection. Had he properly applied his mind he would have found, firstly that the issuing of the certificate had not been reviewed and set aside and therefore he had jurisdiction to hear the arbitration.

[19] The last issue raised by the applicant in his challenge of the jurisdictional ruling, concerns failure by the panelist to require the parties to present oral evidence.

[20] Section 138 of the LRA provides that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. In terms of this section the commissioner is given the discretion to determine the appropriate form of procedure he or she may wish to follow. The various forms that the

proceedings may take include, a party to the dispute giving evidence, calling witnesses, questioning the witnesses of any other party, and addressing arguments to the commissioner.

[21] In exercising the discretion the commissioner must ensure that the form of procedure chosen does not deny any of the parties a fair hearing. It would be a gross irregularity if for instance the commissioner proceeds to hear a matter on the basis of a motion proceeding, in the face of facts and circumstances of such a matter calling for oral evidence. In excising this discretion the commissioner must always bear in mind the rules of evidence which are always essential to ensuring fairness to both parties.

[22] The nature of the dispute between the parties in this matter evidently required that oral evidence concerning the dispute about the number of employees who were affected be heard. Failure to require oral evidence deprived the applicant of a proper opportunity to show that the first responded had jurisdiction to arbitrate the disputes. The approach adopted by the panelist denied him the opportunity to hear relevant evidence regarding the jurisdictional disputes. In the circumstances of this case the panelist ought to have called on the parties to presents oral evidence regarding the *point in limine*.

[23] I see no reason why the costs should not follow the outcome.

[24] In the premises the following order is made:

a. The ruling issued by the second respondent is reviewed and set aside.

b. The matter is remitted back to the first respondent for arbitration to be heard by a commissioner other than the second respondent

c. Costs to follow the result.

MOLAHLEHI AJ

DATE OF HEARING **:** 30 MARCH 2007
DATE OF JUDGMENT **:** 30 AUGUST 2007

APPEARANCES

For the Applicant : Advocate A L Roeloffze
Instructed by : Fluxmans Incoporated

For the Respondent: Advocate H Gerber
Instructed by : Kocks & Dreyer Attorneys