IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR1583/09

DATE: 22/01/2010

In the matter between

DE BEERS CONSOLIDATED MINES (PTY) Ltd APPLICANT

and

CCMA AND OTHERS RESPONDENT

J U D G M E N T

SONI J: The applicant in this matter seeks to have reviewed and set aside a ruling made by the second respondent in respect of the jurisdiction of the CCMA to arbitrate a dispute that had been referred to it.

The dispute had been referred to the CCMA which is cited as the second respondent in these proceedings by the thought to 11 respondents who are employees of the applicant. The third respondent is the union of the employees.

The review application is not opposed. Nevertheless, I am required to properly consider whether the ruling made by the second respondent falls

to be reviewed and set aside. Clearly, if on a proper consideration of the matter I find that the CCMA does not have jurisdiction I am required to set aside the ruling.

The matter had been conciliated, despite the fact that the applicant had requested that a ruling on the jurisdiction question be made. No such ruling was given.

The dispute was then set down for arbitration where the question of jurisdiction was re-argued, this time as a point *in limine*.

The applicant had filed a notice in which it indicated that it sought a ruling that the CCMA did not have jurisdiction to arbitrate or even conciliate the dispute that the 4th to 11th respondents had referred to it. In support of that application for the ruling the applicant filed an affidavit. There was no answering affidavit from the employees or the union.

On 24 April 2009 the second respondent made his ruling. In his ruling he dismissed the application in which the applicant had sought a ruling that the CCMA did not have jurisdiction in the matter.

It is necessary now what the issue was that had been said by the applicant in support of the application for the ruling. However, before doing so it is necessary to point out that the employees who had referred the dispute where employed in terms of a written contract of employment. A copy of the contract is included in the court papers. It is not necessary to refer in detail to the contract. It will suffice to refer in particular to three aspects of the contract.

First, the contract is addressed to each of the employees who had brought the application. The document is headed "Offer of employment [at the mine in question]" and it goes on to say:

> "We have pleasure in offering you a position as security officer manage self-specialist at De Beers Consolidated Mines Ltd, Voorspoed Mine with effect from 1 June 2008."

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

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

Clause 2 states:

> "This offer of employment is subject to your agreeing

to the attached schedule COE annexure of conditions of employment as applicable to you."

Clause 3 says:

"Please signify your acceptance of this offer of employment by signing in the space provided and returning a copy of this letter to an address indicated on the contract."

The provision of the contract that is in dispute constitutes clause 9 of the annexure to the contract. In view of the importance it takes in this matter I will read it out in full. It is referred to, or the heading of clause 9 is "Benefits parity allowance." It reads as follows:

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

I turn now to a consideration of what the applicant said in support

of its application for the ruling. As I have indicated, it filed an affidavit. In the relevant part of the affidavit the applicant makes the following submissions.

1. It was clear from what the employees themselves had said that they alleged that the essence of their claim was that the applicant had breached their contracts of employment by not providing them with the allowance in question.

The Labour Court has jurisdiction to deal with breaches of contracts of employment.

2. The allowance is not something which the applicants are entitled to in terms of their contracts of employment. t is trite that he unfair labour practice jurisdiction does not extend to a certain rights to benefits or remuneration which an employee is not entitled to in terms of their contracts of employment.

The applicants are in essence making a demand to a new term and conditions of employment.

It would be helpful to consider however what the applicants, or the dispute which the applicants had referred to the CCMA. They say failed, I take it they mean the employer, failed to benefit. What they say in effect is that the employer failed to pay the allowance as documented and specified in the contract of employment. They then go on to say that the outcome that they require is that the allowance be paid retrospective as stated in the contract of employment and conditions of employment.

Having heard argument apparently from both sides the second respondent then made his ruling. He records in the ruling that the issue to be decided was whether the CCMA had jurisdiction to arbitrate the matter at hand. Having pointed out what had been said by the applicant in its

supporting affidavit and pointing out further that the employees had not opposed the application, but had left the decision in the hands of the CCMA, they had however stated that the CCMA does have jurisdiction.

In his analysis of the evidence and argument the arbitrator says the following:

> "It was common cause between the parties that the issues relate to a benefit."

He then goes on to state:

> "I must be very clear that the challenge of the respondent was never related to the benefit itself, but to the correct forum to deal with the dispute."

In his view Section 191 (5) (A) (4) of the Labour Relations Act makes it clear that the CCMA has jurisdiction.

He points out that the applicant had contended that Section 77 (3) and 77 (A) (E) of the Basic Conditions of Employment Act indicated that the Labour Court was the competent forum to adjudicate the matter. He goes on to state that the applicant's argument was that where the matter relates to non-performance by a party to a contract of employment, it is the Labour Court that must adjudicate it.

Considering these contentions, the second respondent says the applicant had misinterpreted the wording, presumably of Section 77 so as to limit all disputes related to contracts of employment to adjudication by the Labour Court. The second respondent rejects that contention. He says that Section 77 and Section 77 (A) does not provide that the Labour Court has exclusive jurisdiction to solely determine all and every dispute related to contacts of employment.

He goes on to point out that the Basic Conditions of Employment Act give wide ranging powers to officials of the Department of Labour to determine disputes and even issue compliance orders in terms of the Act. He also points out that in terms of Section 74 of the Act the CCMA is entitled to arbitrate certain disputes.

The second respondent then pointed out that where a condition of employment is not described in legislation it is based in a contract of employment whether oral or written, in the case at hand it was contained in a written contract.

He then goes on to say, the dispute is that some employees receive the benefit, but others did not. This is the basis for most, if not all

disputes of this nature before the CCMA. He points out that it is difficult to imagine what else could be seen as an unfair labour practice relating to the provision of benefits. If one accepted the argument of the applicant, then the provisions of unfair labour practices relating to benefits would be superfluous. However, in terms of the Labour Relations Act the CCMA may arbitrate those disputes.

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

It is for those reasons that the second respondent dismissed the application and ruled that the CCMA had jurisdiction to deal with the matter.

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

1. The second respondent unreasonably found or committed a gross irregularity in finding, or misconducted himself in finding that it was common cause between the parties that the issue related to a benefit.

That was not the issue. The issue was whether the CCMA had jurisdiction in terms of the Act and the provisions relating to unfair labour practices to decide whether the respondents were contractually entitled to the allowance in question.

2. The commissioner unreasonably found that despite the provisions of Section 77 of the Basic Conditions of Employment Act, the CCMA had jurisdiction to decide the dispute before it.

The commissioner unreasonably failed to take into account the nature of the dispute that had been referred to the CCMA.

Because the employees had complained that the applicant had breached their contracts of employment by failing to comply with a term thereof, the CCMA did not have jurisdiction to enforce the terms of the

contract, such jurisdiction fell within the exclusive domain of the Labour Court. Much the same attack was made on the ruling in the heads of argument submitted by the applicant.

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

First, Section 186 (2) (A) says that

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

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

> "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator on terms that the arbitrator deems reasonable which may include ordering reinstatement, reemployment or compensation."

It is necessary now to consider Section 77 of the Basic Conditions of Employment Act. The provisions are as follows:

1. "Subject to the constitution and the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act except in respect of an offence specified in sections 43, 44, 46, 46, 48, 90 and 92."

The provisions of subsection (2) are not relevant and will not be dealt with.

The provisions of subsection (3) read as follows:

3. "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract."

The provisions of subsections (4) and (5) are also not relevant and will not be considered.

I deal now with the relevant provisions of Section 77 (A). This provides,

"Subject to the provisions of this Act the Labour Court may make any appropriate order, including an order

E) Making a determination that it considers reasonable on any matter concerning a contract of employment in terms of Section 77 (3) which determination may include an order for specific performance, an award of damages or an award of compensation."

It is against the factual and statutory matrix summarised above that I deal now with the question of whether the ruling of the second respondent is reviewable. I should begin by pointing out that the applicant is quite correct when he says that the arbitrator is required to determine the nature of the dispute before him. That point was stressed by the Constitutional Court in *Kusa v Tayo Young Metal Industries and others* 2009 (1) BLLR 1 (CC). There at paragraph 66 the Constitutional Court pointed out that

"A commissioner must as the Labour Relations Act

> requires, deal with the substantial merits of the dispute. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representative say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration, including a description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome."

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

the Labour Relations Act.

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

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

Thereafter the following was said:

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

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

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

The question then is, when regard is had to those principles, does the CCMA have jurisdiction to arbitrate the dispute that had been referred to it. The Labour Appeal Court in the case of *Hospisa and another v Northern Cape Provincial Administration* 2000 (21) ILJ 1066 (LAC) made the following point about the unfair labour practice provision that is in issue in this case. I must point out however that at that stage it appeared in a different section of the Act. For present purposes it is irrelevant at

paragraph 9 of the judgment of the LAC the following was said:

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

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

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

The employees in question, it would appear to be clear from the referral that they had made, stated that they wished to be paid the allowance which was documented and specified in the contract of employment. That is a proper understanding of their complaint. Whether or not on a proper reading of the contract together with clause 9 of the annexure, the employees are entitled to the allowance is at this stage of the inquiry totally irrelevant. That much is clear from the *Chirwa* and *Makimba* cases to which I have already referred.

If on a proper reading of the contract, when the dispute is arbitrated, an arbitrator find that the employees are in fact entitled to the allowance, that decision can be taken on review if there is no such entitlement in terms of the contract it is unlikely that the award would be upheld. On the other hand, it cannot be said simply because on the understanding of the applicant the contracts in question do not provide for, or do not allow the employees in question the allowance, does not mean that they are not entitled to have that dispute properly arbitrated.

It is of course a dispute that can be determined by the application of law. Consequently it must be borne in mind that the 4th to 11th respondents have the right in terms of Section 34 of the Constitution to refer the dispute to any court or tribunal. Of course that tribunal must have jurisdiction before it can determine the dispute, but nevertheless, the applicants have a right to have the dispute determined. Their dispute is that in terms of their contracts of employment as they understand those contracts, they are entitled to the allowance. That dispute can be determined by an arbitrator.

After all if an employee is in terms of his contract of employment entitled to a car allowance and the employer refuses to pay it, the employee is entitled to approach the CCMA and complain that a benefit to which he is entitled is not being paid, as a result the conduct of the employer constitutes an unfair labour practice. He could of course approach the Labour Court in terms of the Basic Conditions of

Employment Act, but the fact that he can approach the Labour Court does not mean that he is not entitled to approach the CCMA.

I may point out that the employees in question where *domini litis*, they were the persons who could choose the forum if the forum has jurisdiction, they were entitled to choose that particular forum, in this case the CCMA.

The employer on the other hand, if he had wished to refer the dispute to the Labour Court would have been entitled to do so. It could not then be said that the matter had to be determined by the CCMA. This is one of those cases where two forums referred to in the Labour Relations Act have jurisdiction and the person who makes the referral is entitled to choose the forum.

In all the circumstances I find that no case for review has been made out. Consequently the order I make is as follows:

The application for review is dismissed in view of the fact that there has been no opposition.

There is no order as to costs.

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