**THE LABOUR COURT OF SOUTH AFRICA**
**(HELD AT JOHANNESBURG)**

**CASE NO. JR 644/09**

In the matter between:

**BOMBARDIER TRANSPORTATION**
**(PROPRIETARY) LIMITED** **Applicant**

and

**LUNGILE MTIYA N.O** **1ST Respondent**

**THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **2ND Respondent**

**DERICK JOHANNES** **3rd Respondent**

**BOMBARDIER TRANSPORTATION (CHINA) LIMITED** **4TH Respondent**

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**JUDGMENT**

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**VAN NIEKERK J**

## Introduction

[1] This is an application brought in terms of s 158(1) (g) of the Labour Relations Act in which the applicant seeks to have a certificate of outcome issued by the first respondent ('the commissioner') reviewed and set aside. The applicant claims that when she issued the certificate, the commissioner exceeded her powers (because there was a jurisdictional challenge that had not been resolved), that she ignored relevant evidence indicating that there was a jurisdictional issue to be decided, and that she committed misconduct in the form of a material error of law. The applicant further contends that the Court should decide the jurisdictional issue by substituting the commissioner's

ruling with a decision to the effect that the CCMA lacks jurisdiction to entertain the third respondent's referral of his unfair dismissal dispute.

**The facts**

[2] The factual background to the application is briefly the following. The third respondent ('Johannes') was employed by Bombardier China as a commercial director. He was engaged in terms of a fixed term contract, initially to expire in June 2008. Johannes was assigned to South Africa to work on the Gautrain Project, and that it was agreed that his remuneration would be paid through Bombardier Canada's payroll to Johannes's bank account in Hong Kong, the city of which Johannes is a resident. The contract contains a choice of law clause in terms of which its terms are to be interpreted and enforced in accordance with the laws of Hong Kong. Various discussions took place between the applicant and Johannes concerning an extension of the contract. On 18 September 2008 Bombardier China advised Johannes that his contract would be extended for a further 6 months only, a period that included agreed notice. The applicant claims that Johannes subsequently left its employ on 31 October 2008 in circumstances where he (Johannes) terminated the contact.

[3] On 10 November 2008 Johannes referred an unfair dismissal dispute to the CCMA. On 2 February 2009, the applicant filed an application in terms of Rule 14 of the CCMA rules setting out a number of grounds on which it contended that the CCMA lacked jurisdiction to entertain the dispute. These included a challenge to the CCMA's territorial jurisdiction (on the basis that the law of Hong Kong applied) and a denial that the applicant had dismissed Johannes.

[4] At a hearing convened on 13 February 2009, it was agreed that Johannes would file an answering affidavit and that the matter would be set down for argument on 14 April 2009. On 13 February 2009, the commissioner

issued a certificate of outcome recording that the dispute remained unresolved. An explanatory note, dated 16 February 2009, was also sent to the parties. The note reads as follows:

> *"The above case was scheduled for a conciliation of the 13th February 2009 before Commissioner Lungile Mtya.*
> *The scheduled conciliation could not commence because the employer representative, Fritz Malan, raised a jurisdictional point and also requested a Senior Commissioner to deal with the matter.*
> *The commissioner recorded that the parties agreed to re-schedule on the 14th April 2008* (sic).
> *It would seem that parties did not take cognizance of the provisions of section 135(2) of the Labour Relations Act (LRA). This matter was initially filed with the CCMA in November 2008 and the provisions of Section 135(5) must apply. The commissioner will thus issue a certificate.*
> *The applicant may apply for arbitration and the employer can then raise the jurisdictional issue at arbitration…"*

[5] The applicant filed this application in response to the certificate. The applicant relies primarily on a judgment by this Court in *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 *ILJ* 2588 (LC) to contend that a commissioner was bound to decide any jurisdictional point raised in conciliation proceedings before issuing a certificate of outcome, and that her failure to do so constitutes a reviewable irregularity.

**The relevant legal principles**

[6] Two different approaches to the status of certificates of outcome issued in the face of jurisdictional challenges have emerged. The first is that adopted by this Court (per Basson J) in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & another* (*supra)* and *Avgold – Target*

*Divisions v CCMA* [2010] 2 BLLR 159 (LC). In terms of this approach, the CCMA's jurisdiction to conciliate is dependent on a number of jurisdictional facts having been satisfied. While the CCMA may not rule on its own jurisdiction, it must assess whether it has jurisdiction and must do so before conciliation commences. If a conciliating commissioner issues a certificate of outcome without the jurisdictional conditions having been met, a commissioner later appointed to arbitrate the dispute has no power to dismiss the matter on the basis of a lack of jurisdiction, even if the arbitrating commissioner thinks that the conciliating commissioner's ruling was wrong. Where a conciliating commissioner declines to make a decision on jurisdiction but has nonetheless issued a certificate of outcome, the arbitrating commissioner is bound to arbitrate the dispute unless the certificate is reviewed and set aside. In short, a certificate of outcome confers jurisdiction on the CCMA to adjudicate a dispute referred to it, and remains valid and binding on the parties until such time as it is reviewed and set aside.

[7] This approach draws much of its inspiration from *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* (2000) 21 ILJ 2382 (LAC), a case in which the Labour Appeal Court held that once a certificate of outcome is issued by a conciliating commissioner, an arbitrating commissioner has jurisdiction to determine a dispute until such time as the certificate is reviewed and set aside. That case concerned a dispute that had been referred to the CCMA outside of the statutory time limits. The employer was clearly aware of the point, but remained silent until the stage of an application to review the arbitration award in the employee's favour. In the review proceedings, the employer contended that in the absence of a timeous referral, the CCMA did not have the necessary jurisdiction to make the arbitration award. The Labour Appeal Court rejected this submission and as I have indicated, held that once a certificate of outcome has been issued stating that the dispute remains unresolved, the CCMA has the jurisdiction to arbitrate the dispute.

[8] The first approach also holds that is peremptory for a conciliating commissioner to deal with a jurisdictional issue if it appears during the conciliation phase that a jurisdictional issue has not been determined. Support for this view is found in the provisions of Rule 14.[1] On this basis, in *EOH Abantu,* the Court concluded: *"In other words, where a party raises a jurisdictional point during conciliation or where it appears that there exists a jurisdictional reservation, such point must be determined by the conciliation commissioner. Where the conciliating commissioner fails to do so, such a refusal will constitute a reviewable irregularity."*

[9] To the extent that this approach is based on the *Fidelity Guards* judgment, it is not clear to me that the judgment serves as authority for the assertion that a certificate of outcome affords the CCMA jurisdiction to arbitrate an unfair dismissal dispute. In truth, *Fidelity Guards* is concerned only with the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law (in the sense that it will not be susceptible to review) even though the act is invalid and unlawful.

[10] The alternative approach to the status of certificates of outcome issued in the face of a challenge to the CCMA's jurisdiction is that set out in *EOH Abantu (Pty) Ltd v CCMA & others* [2010] 2 BLLR 172 (LC). In that case, the Court (per Cele J) held that Rule 14 means no more than that a conciliating commissioner should determine whether or not the referral alleges that the respondent is an employer and that the referring party is an employee who has been dismissed (at 184G). If no such allegation is made, the commissioner should issue an 'advisory jurisdictional ruling' to the effect that the CCMA has no jurisdiction to conciliate the dispute. The referring party may then refer the dispute to arbitration, when the arbitrating commissioner will be able to determine the jurisdictional issue, assisted by evidence. If the

[1] Rule 14 states: "If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation".

necessary averments are properly made in the referral form (i.e. it is evident from the referral that it was made by an employee who was employed by the respondent employer) but the respondent later counters them and challenges the CCMA's jurisdiction, the conciliating commissioner must find that there is a dispute of fact, a dispute which must be resolved through the leading of evidence. In these circumstances, the commissioner must issue a certificate to the effect that the dispute could not be resolved through conciliation. In either instance, it would seem, the conciliating commissioner makes no ruling on the jurisdictional challenge, but defers that determination to the arbitration phase of the statutory dispute resolution process.

[11] There are at least two difficulties with this approach. First, not all jurisdictional challenges involve only disputes of fact – one can imagine many examples where the parties would agree on the facts but differ on the legal principles to be applied. Secondly, and more fundamentally, it seems to me that it is not always appropriate that the mere existence of a jurisdictional challenge requires a conciliating commissioner always to defer the challenge to the arbitration phase. In my view, there is a category of jurisdictional dispute that a conciliating commissioner might easily and appropriately determine. I refer to these below.

**The third way**

[12] There is a third approach to these issues that may address some of the difficulties identified above, and which may have the additional benefit of a greater degree of flexibility in the management of the conciliation process, thus promoting the statutory goal of expeditious and efficient dispute resolution.

[13] The first step in this approach is to recognise that many "jurisdictional issues" raised by parties in conciliation proceedings are not jurisdictional questions in the true sense. For example, whether a person is an independent

contractor or an 'employee' as defined in s 213 of the LRA is more properly a question that falls within the power of the CCMA to determine in the course of the arbitration proceedings (i.e. the adjudication stage of the matter) in relation to a dispute before it. It is not a question that must necessarily be determined prior to conciliation taking place, nor is it a jurisdictional question contemplated by Rule 14 of the CCMA's rules. A challenge to the CCMA's jurisdiction on the basis that there was no dismissal falls into the same category. The only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time limit prescribed by s 191(1) (b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all.[2] The distinction to be drawn is one between facts that the legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers.[3] The power given to the CCMA to determine the fairness of a dismissal includes the power to determine whether or not an applicant was an employee, and whether she was dismissed. These questions ordinarily fall to be determined in the course of the CCMA's adjudication functions. It follows that a conciliating commissioner is under no obligation to determine them at the conciliation phase.

[13] In relation to the status of a certificate of outcome, in *Goldfields Mining South Africa (Kloof Mine) v National Union of Mineworkers & others* [2009] 12

[2] In other words, is the dispute one that concerns a matter of mutual interest between employer and employee. See s 135 (1) of the LRA. Ordinarily, all of these matters ought be detected and dealt with during the initial screening of referrals for jurisdictional compliance, and not many of them ought to reach the point of a challenge after a conciliation meeting has been convened.

[3] See Hoexter Aministartive Law in South Africa at 260 -261.

BLLR 1214 (LC), a case that dealt with a challenge to the reason for dismissal proffered by a referring party in an unfair dismissal claim, I said the following:

> "*Two broad approaches appear to have emerged. The first is to regard the matter as one concerning jurisdiction, and to require a conciliating commissioner to determine the dispute about the reason for dismissal at the conciliation stage. On this approach, the certificate of outcome (at least in so far as it categorises a dispute and indicates the forum to which it should be referred) represents a jurisdictional ruling. The second approach is to attach no jurisdictional significance to the certificate of outcome, and to regard the certificate as no more than a record that on a particular date, a dispute referred to the CCMA in particular terms remained unresolved. On this approach, while a conciliating commissioner will normally indicate the nature of the dispute in the certificate of outcome, the categorisation or description of the dispute has no bearing on the future conduct of the proceedings. In particular, the forum for any subsequent proceedings initiated by a referring party is determined by what the employee alleges the dispute to be, and irrespective of the terms in which the certificate was completed.*
>
> *[12] In my view, for the reasons recorded below, the LRA clearly adopts the latter approach. In other words, a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be. In so far as the pro forma certificate makes provision for a commissioner to categorise the dispute and to indicate the means by which or the forum in which it is ultimately to be resolved, these are not functions contemplated by the Act, and they have no legal significance.*

*[13] Section 135 of the LRA regulates the resolution of disputes through conciliation. In broad terms, the section requires a commissioner to be appointed to attempt to resolve a dispute referred to the CCMA within a period of 30 days from the date on which the referral was received. Section 135 (5) provides:*

> "When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-
>
> (a) the commissioner must issue a certificate **stating whether or not the dispute has been resolved**; (emphasis added)
> (b) the Commissioner must serve a copy of that certificate on each party to the dispute or person who represented a party in the conciliation proceedings; and
> (c) the commissioner must file the original of that certificate with the Commission."

*The subsection is curiously drafted. The preamble anticipates the failure of the conciliation process and the lapse of the 30-day (or agreed further period), but not the successful resolution of the referred dispute. It seems to me that two scenarios are contemplated. The first is that a conciliation meeting is convened within the 30-day period and that the commissioner's intervention fails to resolve the dispute. In this instance, the commissioner must issue a certificate stating that the dispute remains unresolved. The second scenario contemplates the expiry of the 30-day period (or further agreed period) with no conciliation meeting having been convened; alternatively, the expiry of the 30-day period or any agreed further period. At that point, a conciliation meeting may have been convened (or not), and the dispute*

*would have been resolved (or not) through conciliation or by any other means. In the first instance, the obligation to issue a certificate is triggered by an event (the failure of a conciliation convened within the 30-day period); in the second instance, the obligation is triggered by the effluxion of time (the expiry of the 30-day or agreed further period).*

*[14] Section 135 (5), to the extent that it considers the issuing of a certificate to be mandatory, sits uncomfortably with those provisions of the Act that regulate the statutory dispute resolution process beyond the conciliation stage. In the case of disputes about unfair dismissals,*[4] *section 191 (5) provides:*

> "If a council or a commissioner has certified that the dispute referred remains unresolved, **or if 30 days have expired since the council or the Commissioner received the referral and the dispute remains unresolved**-
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee …

*This wording clearly contemplates that if 30 days have elapsed from the date on which the CCMA received the referral of the dispute, the dispute may be referred to arbitration or to this court for adjudication without a certificate of outcome,. Or, as Freund AJ put it in Seeff Residential Properties v Mbhele NO & others (2006) 27 ILJ 1940 (LC), "… even if a certificate of outcome has not been issued, arbitration remains mandatory if 30 days have expired since the council or the*

[4] In the context of strikes and lock-outs, s 64(1) (a) (i) and (ii) impose as one of the procedural constraints on the exercise of those rights that *"a certificate stating that the dispute remains unresolved has been issued…"* or "a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral of was received by the council or the Commission:…". If there is a dispute about the categorisation of the dispute that gives rise to the industrial action (and in particular whether the dispute is one lawfully capable of resolution by industrial action) this would normally be resolved by this court in an application to interdict the industrial action concerned.

*commission received the referral and if the employee requires this." (at 1946A). In this sense, the legal effect of a certificate of outcome is therefore minimal, if there is any effect at all. It is a misconception to suggest therefore, as the applicant does in these proceedings, that a party is entitled to secure, whether by way of an application to vary or an application for review, that a certificate is cast in particular terms as to the nature of the dispute or the ultimate destination of the dispute in the statutory dispute resolution scheme."*

[14] In other words, a certificate of outcome is no more than a document issued by a commissioner stating that on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.

[15] On this approach, rule 14 does no more than require a conciliating commissioner to give proper consideration to any jurisdictional points raised, including an assessment of whether it is a 'true' jurisdictional point and if so, whether it is reasonably capable of being disposed of prior to conciliation, or properly left to the arbitration stage. The proper response of a commissioner to jurisdictional challenges can therefore be summarised as follows:

1. When a respondent issues a jurisdictional challenge to a properly completed referral form, a conciliating commissioner may elect to determine the jurisdictional question or to defer it. In making that election, the commissioner will generally regard a challenge to the

effect that the dismissed person was not an 'employee' as defined or that she was never dismissed as matters that are not truly jurisdictional issues, and defer the challenge to the arbitration phase. In respect of other challenges, the commissioner ought to be guided by the nature of the challenge, the extent to which matters are intimately bound up with the substantive merits of the dispute, the determination of difficult questions of mixed law and fact, and the need for evidence to resolve them.

2. If a jurisdictional challenge is heard and upheld prior to the commencement of conciliation proceedings, the commissioner's ruling puts an end to the dispute. It is not necessary in these circumstances for the commissioner to issue a certificate of outcome (since the dispute was never capable of being resolved by the CCMA) and the ruling binds the CCMA and all parties to the dispute.[5] This jurisdictional ruling stands unless and until it is reviewed and set aside by this Court.

3. If within the 30-day period assigned for conciliation the conciliating commissioner elects not to determine any jurisdictional challenge, the commissioner must issue a certificate reflecting that the dispute remains unresolved. The commissioner issues the certificate in terms of s 135(5) because conciliation has failed, not because the jurisdictional challenge has been deferred.

4. If 30 days have elapsed since the referral was received, the commissioner is bound to issue a certificate stating that the dispute remains unresolved, despite the existence or otherwise of any

[5] It seems to me that a ruling made by a commissioner on a true jurisdictional issue is a binding ruling rather than the mere expression of a view, with the parties free to raise the same point again at arbitration. But see *Seeff Residential Properties v Mbhele NO & others* (2006) 27 ILJ 1940 (LC).

jurisdictional challenges. The commissioner issues the certificate because she is required to do so by s 135 (5).

5. Any certificate of outcome issued by a commissioner has no legal significance other than to certify that on the date it was issued, a dispute referred to the CCMA for conciliation remained unresolved. The certificate has no bearing on any jurisdictional issue raised by any party, and is not relevant in any process in which a jurisdictional question is determined.

6. In the absence of any relevant and prior jurisdictional ruling made by a conciliating commissioner, any party to a dispute referred to arbitration may raise any challenge to the CCMA's jurisdiction at that stage, and the challenge must be dealt with by the arbitrating commissioner in terms of s 138(1).

**The merits of the review application**

[16] Of course, the issue in the present matter is rather narrower, in the sense that it relates to the appropriate time at which a party to a dispute may raise a challenge to jurisdiction. The crisp issue before the Court warrants restating, and can be expressed as follows – is it a reviewable irregularity for a conciliating commissioner to defer a challenge to the CCMA's jurisdiction to the arbitration phase of the statutory dispute settlement process?

[17] It follows from the approach articulated above that the answer to this question must almost always be in the negative. The approach assumes that while the limited category of true jurisdictional questions lend themselves to determination at the conciliation phase and ought to be dealt with at that point, this cannot be an inflexible rule – the conciliating commissioner must be given a discretion in appropriate circumstances to defer a decision to the arbitration phase. The present case is a good example. While it may be suggested that

the question of territorial jurisdiction is not dissimilar to one that would be raised in respect of the jurisdiction of a bargaining council, a moment's reflection will reveal that the private international law issues raised by the applicant's claim raises the matter to a different level of complexity. Rule 14 must necessarily be read in this light. In other words, the Rule does not mean that all jurisdictional questions raised at conciliation must necessarily be determined by the conciliating commissioner, on pain of a failure to do being regarded as a reviewable decision.

[18] It follows that when in the present matter the commissioner deferred the applicant's jurisdictional challenges to the arbitration phase of the dispute resolution process, she did not commit a reviewable irregularity. It follows too that the certificate of outcome issued by the commissioner was properly issued, and that the dispute between the parties should be enrolled for an arbitration hearing, at which any jurisdictional challenges that the applicant elects to pursue should be determined.

**Substitution**

[19] Johannes has undertaken to abide by the court's decision in the application to review and set aside the certificate of outcome. He only opposes the relief sought in paragraph 2 of the notice of motion, i.e. that the commissioner's ruling should be substituted by a ruling to the effect that the CCMA has no jurisdiction to entertain the referral. The Labour Appeal Court and this Court have held that they should correct a decision rather than refer it back to the CCMA for a hearing *de novo* in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the court is in

as good a position as the CCMA to make the decision itself. [6] In the present matter, the parties have not put before the CCMA (nor this Court) the full facts and arguments on jurisdiction. The parties agreed to do so on 14 April 2009, and a determination of the jurisdictional challenge may well have occurred on that date but for the present review application. In effect, the applicant, having agreed that the jurisdictional issues are yet to be determined by the CCMA now requires a reviewing court to be a court of first instance in respect of the jurisdictional dispute. The CCMA has not even considered the question of jurisdiction. The CCMA has not yet accepted that it has jurisdiction, nor has it made a ruling to the effect that it has no jurisdiction. In these circumstances, I fail to appreciate on what basis it can be contended that there is a decision of the CCMA which ought to be substituted.

[20] Finally, in relation to costs, the applicant has persisted in seeking substitutionary relief and for this reason, the opposed costs of the application incurred by the third respondent ought to be paid by the applicant.

For the above reasons, I make the following order:

1. The application to review and set aside the certificate of outcome issued by the first respondent is dismissed
2. The dispute is referred back to the CCMA to be enrolled for an arbitration hearing, at which any disputes relating to the CCMA's jurisdiction must be determined.
3. The applicant is to pay the costs of these proceedings.

**ANDRE VAN NIEKERK**

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[6] See: *Department of Justice v CCMA & others* (2004) 25 *ILJ* 248 (LAC) at 304, para 48; *Rustenburg Platinum Mines Ltd v CCMA & others* (2007) 28 *ILJ* 417 (LC) at para 12.)

**JUDGE OF THE LABOUR COURT**

Date of Judgment: 11 March 2010

Appearances:

For the applicant: Mr. Fritz Malan
ENS Attorneys

For the respondent: Adv A Redding SC
Instructed by Brian Bleazard Attorney.