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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 175/10

In the matter between:

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA **Applicant**

and

NEHAWU OBO 3 MEMBERS **First respondent**

CCMA **Second respondent**

HILARY MOFSOWITZ N.O. **Third respondent**

JUDGMENT

STEENKAMP J:

Introduction

1] This is an application to review and set aside a jurisdictional ruling by the arbitrator, Ms Hilary Mofsowitz (the third respondent) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).

2] The crisp issue to be decided by the arbitrator was whether the cause of action of the first respondent[1] – the National Education, Health and Allied Workers' Union (Nehawu), acting on behalf of three of its members – was a dispute about an alleged unilateral change to terms and conditions of employment or an alleged unfair labour practice in relation to demotion.

3] The significance of this distinction is that Nehawu's members (the three individual respondents, to whom I shall refer as "the employees") are employed by the Parliament of the Republic of South Africa (the applicant in the review application), and are designated as fulfilling essential services in terms of s 71 of the LRA.[2] This has the further implication that they cannot strike over matters of mutual interest (such as an alleged unilateral change to terms and conditions of employment) in terms of s 64 of the LRA. Such disputes are governed by s 74 of the LRA. The employees or their trade union (Nehawu) may refer a dispute to the CCMA for conciliation, but if it remains unresolved, they can only request that it be resolved through arbitration – they cannot strike.

4] In the arbitration proceedings forming the subject of this review application, Nehawu and its members referred a dispute over an alleged unilateral change to terms and conditions of employment to the CCMA in terms of s 74. Parliament argued that the real dispute concerned an alleged unfair labour practice in the form of a demotion, as envisaged by s 186(2)(a). If this is so, the referral was late; the union did not apply for condonation; and hence the CCMA did not have jurisdiction.

Background facts

5] The employees were employed in the post of Controller: Committee Secretaries at post level C3. During 2008 Parliament embarked on a restructuring exercise, culminating in a decision to phase out the position of Control: Committee Secretary. The three employees remained on grade

1 The applicant before the CCMA.
2 The Labour Relations Act, Act 66 of 1995.

C3 but were henceforth employed in the position of Committee Secretaries.

6] Nehawu, on behalf of the three employees, referred a dispute to the CCMA under the heading of "unilateral change to terms and conditions of employment". Under the heading, "Special features / additional information" in the form for referral to conciliation[3] they noted:

> "Re-instatement of positions as proposed in a Nehawu document to bring fairness. Upgrading of the positions and appropriate remuneration."

7] The dispute remained unresolved and the union referred it to arbitration in terms of s 74. In the request for arbitration[4], under the heading: "What decision would you like the commissioner to make?" it indicated:

> "1. Reinstatement to former position of controllers.
>
> 2. Incumbents to be moved from salary grade C3 to C5 level retrospectively."

8] At the arbitration, Parliament's representative raised a point *in limine* that the CCMA did not have jurisdiction.

9] The arbitrator ruled that the dispute concerned an alleged unilateral change to terms and conditions of employment; that she did have jurisdiction; and that the matter should be enrolled for arbitration on the merits.

The award

10] The reasons given by the arbitrator for her decision are very scant. Her entire analysis of the argument reads as follows:

> "13. I am persuaded that Applicants are the masters of their suit.
>
> 14. I consider the certificate to be valid and binding.

3 Form 7.11.
4 Form 7.13.

15. Applicants have referred an interest dispute and wish to proceed on that basis. Respondent is not prejudiced as it was aware at all material times of the nature of the dispute.

16. The dispute must be enrolled for arbitration. The dispute to be arbitrated concerns the alleged unilateral change to terms and conditions of employment. The arbitrating commissioner will decide on the merits of the dispute.

17. I cannot find any compelling reason to interfere in Applicants' categorization of the dispute despite the Respondent's arguments in this regard."

Grounds of review

11] The applicant (Parliament) submits that the arbitrator failed to determine the true nature or substance of the dispute before her. This failure was so unreasonable as to make it reviewable. Her conclusion based on that determination, it submits, was so unreasonable that no reasonable decision-maker could have arrived at it.

Determining the jurisdiction of the CCMA

12] CCMA commissioners are duty bound to satisfy themselves that the requisite jurisdictional facts conferring jurisdiction on the CCMA exist. In assessing whether the CCMA has jurisdiction to entertain a dispute, the commissioner must determine what the true nature of the dispute is.

13] In *Zeuna-Stärker Bop (Pty) Ltd v NUMSA*[5] Myburgh JP held that:

> "The commissioner was obliged to enquire into the facts to decide whether he had jurisdiction to conciliate the dispute. He was not bound by the description, and date, of the dispute provided by the respondent in form LRA 7.11. Rather, the commissioner was obliged to examine all the facts in order to ascertain the real dispute between the parties ... and having done so, to determine the actual dispute and the date that that dispute arose."

14] In the absence of any relevant and prior jurisdictional ruling made by a

5 (1999) 20 *ILJ* 108 (LAC) 109J – 110C; [1998] 11 BLLR 110 (LAC).

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 section 138(1).[6]

15] A jurisdictional ruling is subject to review by the Labour Court on objectively justiciable grounds. In other words, if the commissioner incorrectly concludes that the CCMA has jurisdiction, the ruling will be set aside on this basis alone.[7] The Labour Appeal Court explained the position as follows in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd*:[8]

"The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others* (1994) 15 *ILJ* 801 (LAC)2 at 804C–D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter, provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon*'s case, the court said:

"In practice, however, an Industrial Court would be short-sighted 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 faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." (At 804C–D.)

In my view, the same approach is applicable to the CCMA.

The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding

6 *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* [2010] 8 BLLR 840 (LC) para [16.6].
7 *Zeuna-Stärker (supra)* para [6];
8 (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC) para [40] – [41].

of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary."

The true nature of the dispute

16] I am persuaded that the dispute concerns an alleged failure to promote and not a unilateral change to terms and conditions of employment.

17] This is apparent from the following:

17.1 It is clear from the initial written complaints raised by the employees that their concern was that their posts had not been regraded in the course of the restructuring of the applicant's committee section whereas the position of committee secretary had been graded up two notches from level C1 to C3. The employees did not complain that their job had been changed. They framed their complaint as follows in their letter of 13 March 2009 to the Labour Relations Unit of Parliament:

> "A month ago Committee Section implemented new salary grading for some levels in the section, and the level we serve as [sic] was deliberately excluded, ostensibly because the level is allegedly being phased out. Strangely though, the incumbents continue to be expected to execute the responsibilities of the same level."

17.2 At a meeting held to discuss the employees' concerns on 28 April 2009, the employees repeatedly emphasised that it would be "unfair" for them "to go back to being committee secretaries" , since this would amount to a "demotion of some sort".

17.3 In the employees' referral of their dispute to the CCMA, the relief sought included "upgrading of their positions and appropriate remuneration".

17.4 The true nature of the dispute also apparent from the pre-arbitration

minute, which sets out the relief sought in the following terms:

> "The relief that the applicant's members claim is their promotion from the Grade C3 to the Grade C5 and remuneration appropriate for Grade C5."

18] The employees have at all material times been employed at Grade C3. It is clear that they are disgruntled that they were not promoted to Grade C5 pursuant to the restructuring of the applicant's committee section.

19] If the dispute were really about a change to their terms and conditions of employment, the employees would have sought a restitution of the *status quo ante,* not a two-notch jump in pay upgrade.

20] It seems clear to me that the true nature of the dispute is an alleged unfair labour practice and not an alleged unilateral change to terms and conditions of employment. The CCMA accordingly did not have jurisdiction to arbitrate the dispute under section 74 of the LRA.

Costs

21] There is not only an ongoing relationship, but also an ongoing dispute between the parties. In law in fairness, I do not consider any costs order to be appropriate at this stage.

Order

22] The *in limine* ruling of teh third respondent dated 10 February 2010 under case number WECT 10945-09 is reviewed and set aside.

23] The ruling is substituted with a ruling that the CCMA (the second respondent) does not have jurisdiction to arbitrate the dispute referred under case number WECT 10945-09.

24] There is no order as to costs.

STEENKAMP J

Date of hearing: 19 May 2011

Date of judgment: 26 May 2011

For the applicants: Adv GA Leslie

Instructed by Chennels Albertyn

For the respondent: Mr N Thaanyane