IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Reportable
Of interest to other judges

Case no: C255/09; C362/09

In the matter between:

SOUTHERN SUN HOTEL INTERESTS (PTY) LTD I.R.O. SOUTHERN SUN WATERFRONT HOTEL	Applicant
and	
CCMA	First respondent
C DE KOCK N.O.	Second respondent
SACCAWU	Third respondent
LYNNE ERNESTA	Fourth respondent

Date of hearing: 26 May 2011
Date of judgment: 21 June 2011

JUDGMENT

STEENKAMP J:

Introduction

1] Two applications served before the court. The first (under case number C255/2009) is an application to review and set aside a jurisdictional ruling issued by the second respondent, Commissioner Coenie de Kock. The second is an application for costs to be awarded against the CCMA (the first respondent) incurred in the interim application to stay the arbitration proceedings pending the outcome of the review application.

2] The parties agreed that the two applications should be heard together and that this judgement should address both applications.

Background

3] The fourth respondent, Ms Lynne Ernesta, is a foreign national hailing from the Seychelles. She was employed by the applicant (Southern Sun) as a receptionist at its Waterfront Hotel in Cape Town. At the time, she only had a study permit. That permit expired on 30 May 2008.

4] When the permit expired, Southern Sun told Ernesta that she could no longer lawfully tender her services in terms of the Immigration Act[1]. She was told to obtain a valid employment permit. Southern Sun continued to pay her until 31 July 2008, but says that was an oversight. Its stance is that she was not entitled to any payment as she could not lawfully tender her services. It stopped paying her from 11 August 2008. It did not accept her continued tender of her services as it was of the view that the tender was unlawful.

1 Act 13 of 2002.

5] By 18 September 2008, Ernesta had not succeeded in obtaining a valid permit. Southern Sun instructed her to attend a disciplinary enquiry on 25 September 2008. Pursuant to that enquiry, Southern Sun dismissed Ernesta on 7 October 2008 on the basis that she was unable to lawfully tender her services.

6] On 16 October 2008, Ernesta referred an unfair labour practice dispute to the CCMA in terms of section 186(2) (b) of the Labour Relations Act[2]. She claimed that she had been unfairly suspended and, in terms of the relief sought, asked that Southern Sun be ordered to pay her the salary due to her for the period of 11 August to 7 October 2008.

7] The dispute was conciliated only on November 2008. The applicant objected to the CCMA's jurisdiction to hear the dispute. The application failed and the Commissioner issued a certificate on 14 November 2008 that the dispute remained unresolved. Ernesta's trade union, SACCAWU (the third respondent), referred the dispute to arbitration on 20 November 2008.

8] After an initial postponement, the matter was set down for arbitration on 3 February 2009. At the arbitration hearing, the applicant again objected to the CCMA's jurisdiction. The arbitrator ruled that the CCMA does have jurisdiction to hear the dispute. It is that ruling that the applicant wishes to have reviewed

2 Act 66 of 1995.

and set aside.

9] At the arbitration on 3 February 2009, the arbitrator requested the parties to continue with the proceedings on the merits. He advised them that he would rule on the preliminary jurisdictional point at a later stage. He added that:

> "The parties were advised that, in the event that I should find that the issue in dispute is not one provided for in section 186(2)(b) of the LRA, there will be no need for me to address the merits of the dispute. In the event of a finding being reached that the issues are capable of being arbitrated, a determination would be made regarding the fairness of the [employer's] conduct in suspending the [employee]."

10] The arbitration proceeded on that basis. Southern Sun was represented by two attorneys, Ms C de Vries and Mr L Witten.

11] The arbitrator issued his award on 6 February 2009 (although it appears that it was only sent to the parties on 4 March 2009). He found that the CCMA did have jurisdiction; that the suspension of employees due to their status as illegal foreigners can be brought within the confines of section 186(2) (b) of the LRA; and that "it could possibly be argued" that Southern Sun's failure to assist Ernesta in getting a work permit amounted to an unfair labour practice. However, he considered it in the interests of fairness to both parties that the matter be rescheduled for another half a day's arbitration "...to allow [Southern Sun] to lead evidence on the contentious issues as are highlighted in this ruling".

12] On 5 March 2009, the CCMA set the arbitration down for continuation on 29 April 2009. SACCAWU sought and was granted a postponement. The applicant delivered its review application on 15 April 2009.

13] On 4 May 2009, the CCMA set the arbitration down for continuation on 1 June 2009. The applicant wrote to SACCAWU, copying the CCMA, requesting it to agree to a postponement pending the finalisation of the review. SACCAWU did not agree. On 25 May 2009, the CCMA advised the applicant that the arbitration would not be postponed. The applicant then launched an urgent application in the Labour Court to stay the arbitration proceedings pending the finalisation of the review. The applicant did not apply for a postponement at the CCMA in terms of CCMA rule 31.

14] The application for a stay was granted on an unopposed basis, although the CCMA was present at court on the date of the hearing, 29 May 2009. The applicant seeks costs against the CCMA on the basis that the CCMA should have granted a postponement pending the review and that the applicant "was compelled to launch an urgent application to stay the proceedings before the CCMA".

15] I will first consider the review application and then the application for costs.

The review application (case number 255/ 2009).

16] Having had regard to the judgment of the Labour Court in *Discovery Health Limited v CCMA and others*[3], the arbitrator noted that it is now beyond doubt that an "illegal foreigner" (or undocumented immigrant) is an employee for the purposes of the LRA. He found that Ernesta still enjoyed the status of an employee for purposes of the LRA and she was still entitled to the protection offered to employees in terms of the LRA, even though she did not have a valid work permit.

17] The second issue to be determined, based on the fact that Ernesta was an employee for the purposes of the LRA, was whether or not the suspension of her contract of employment on 11 August 2008 could be said to constitute a suspension as provided for in section 186(2) (b) of the LRA.

18] The arbitrator had regard to the judgement in *Koka v Director-General: Provincial Administration North West Government*[4]. In that judgement, the court considered suspension as an unfair labour practice in terms of the now repealed Item 2(1) (c) of Schedule 7 to the LRA. The court cited with approval the remarks by Grogan[5] that, whatever the reason, unilateral suspension of the contract of employment by the employer does not relieve the employer of its

3 [2008] 7 BLLR 633 (LC).
4 [1997] 7 BLLR 874 (LC).
5 Grogan *Workplace Law* 1st ed (Juta, 1996) at 86-7 as cited above n: 4 at 882 G-I.

duty to pay the employee.

19] The arbitrator came to the conclusion that the suspension of employees due to their status as illegal foreigners can be brought within the confines of section 186(2) (b) of the LRA and that the CCMA has the jurisdiction to deal with the dispute.

20] It is important to note that I need not consider whether the employee had a good cause of action, in other words, whether the decision of Southern Sun to stop paying her does amount to an unfair labour practice. I merely need to consider whether the decision of the arbitrator that the CCMA had jurisdiction to deal with the dispute as pleaded, is open to review.

21] In this regard, I consider the cautionary note sounded by the Supreme Court of Appeal in *Makhanya v University of Zululand*[6]. Nugent JA said that it is not unusual for two rights to be asserted arising from the same facts. A claimant could assert two claims, each of which is capable of being brought in a different forum. Whether the decision will succeed is another matter, but that is irrelevant to the jurisdictional question.[7] He made two further observations:[8]

> "The first is that the claim that is before a court is a matter of fact. When the claimant says that the claim arises from the infringement of the common law right to enforce a

6 2010 (1) SA 62 (SCA).
7 Id at para 39.
8 Id at para 71.

> contract, then that is the claim, as fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then, that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."

22] In the present case, the applicant argued that Ernesta could not lawfully tender her services; and, therefore, she was not entitled to any remuneration. It also argued that her claim was actually one for remuneration under the Basic of Conditions of Employment Act[9] and therefore the CCMA did not have jurisdiction.

23] It appears to me that, in advancing this argument, the applicant made exactly the mistake that Nugent JA cautions against. The question is not whether Ernesta has a good claim in the terms in which she couched it, i.e. as an unfair labour practice; the question is whether the CCMA had jurisdiction to consider that claim. Likewise, it matters not that she may have been better advised to have brought a claim for remuneration to this court under section 77 of the BCEA; the question is whether the CCMA had jurisdiction to deal with the dispute that was referred to it.

24] The same point was made by Wallis AJA in *South African Maritime Safety Authority v McKenzie*[10]:

9 Act 75 of 1997.
10 2010 (3) SA 601 (SCA) at para 7.

> "Once more, as in other cases that have come before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in *Gcaba v Minister of Safety and Security and Others,*[11] the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded, but could possibly arise from the same facts. In this case the particulars of claim could not have made it clearer that Mr McKenzie's claim is for damages for breach of contract."

Mr *la Grange*, for the applicant, sought to review the jurisdictional ruling on the grounds of unreasonableness, as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[12]. That is not the correct approach in jurisdictional matters. As Zondo JP pointed out in *Fidelity Cash Management Service v CCMA & others*"If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise."[13]

25] It is therefore not clear what the applicant's ground of review is. In its founding affidavit attached to the notice of motion, Mr Lonie submitted that the ruling was "ultra vires, not reasonable and rational and that no reasonable decision maker in the position of commissioner De Kock could have reached such a decision."

26] Even on a broad reading of these review grounds, I can find no reason to review

11 2010 (1) SA 238 (CC).
12 (2007) 28 ILJ 2405 (CC).
13 (2008) 29 *ILJ* 964 (LAC) at para 101.

the arbitrator's decision on jurisdiction. Whether or not Ernesta has a good claim is not for me to decide; however, the arbitrator's ruling on jurisdiction is not open to review.

27] It is inexplicable that the applicant attacks the views of the arbitratror and the CCMA on jurisdiction in such intemperate terms. The arbitrator, quite unsurprisingly and appropriately, considered himself bound by this court's view in *Discovery Health.* The applicant's attorneys must also have been well aware of the findings of the Labour Appeal Court in *Kylie v CCMA*[14]. In that case, it was held that even where the work itself is illegal – and not only the contract of employment, as in *Discovery Health* and in the case of Ernesta – the CCMA retains jurisdiction. It may be useful to refer to some of the relevant passages in *Kylie:*

> "[21] The question arises thus as to whether section 23 affords protection to a sex worker. In *NEHAWU v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) at paragraph 40 [also reported at 2003 (2) BCLR 154 (CC) – Ed], the Constitutional Court emphasised that the focus of section 23(1) of the Constitution was on the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.' That approach followed upon the judgment in *SANDU v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) at paragraphs 28–30 [also reported at 1999 (6) BCLR 615 (CC) – Ed]. Even if a person is not employed under a contract of employment, that does not deny the 'employee' all constitutional protection. This conclusion is reached

14 [2010] 7 BLLR 705 (LAC); 2010 (4) SA 838 (LAC) at paras 21-7 and 38.

despite the fact they 'may not be employees in the full contractual sense of the word' but because their employment 'in many respects mirrors those of people employed under a contract of employment.'

...

[27] Professor Rochelle le Roux expresses the point as follows:

'[It is] also important to bear in mind the fact that the unfair labour practice jurisdiction was introduced to counter the arbitrariness of lawfulness, in particular, termination by lawful notice. Furthermore, as suggested earlier, it is conceivable that a labour practice may well impact on the position of either prospective or retired employees. For these reasons, and in absence of an internal limitation clause, it is suggested that labour practices in section 23(1) ought to be approached dispassionately and be given a broad construction. An act of terminating employment, the structuring of working hours, or discipline at work remain labour practices, irrespective of whether they are done in the context of legal or illegal work.'

[See R le Roux "The meaning of 'worker' and the road towards diversification: Reflecting on Discovery, SITA and 'Kylie'" 2009 (30) *ILJ* 49 at 58.]

...

[38] I return to the key question: what discretion do the courts have in the determination of a remedy, in this case for an alleged unfair dismissal of a sex worker. Mr Trengove correctly noted that, while South African law eschewed the recognition of an illegal contract and the obligations and rights that flowed therefrom, in this case the appellant's contention was that, even if there was no valid contract, there was an employment relationship and in terms of that relationship, the appellant fell within the scope of the LRA.

"

28] After referring to the case of *Hoffman Plastics Inc v NLRA*[15], and specifically the minority judgment of Justice Breyer, the LAC came to the following conclusion:

> "[55] Accordingly, while the remedial issues must be tailored to meet the specific context of this case, the objects and provisions of the Act, the illegality of the work performed, there is for the reasons articulated above, nothing which indicates that no form of protection in terms of section 193 of the LRA should be available to someone such as the appellant who was unfairly treated within the context of the provisions of LRA.
>
> [56] When it comes to the question of remedy, each case will have to be decided in terms of the facts thereof. Manifestly, not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA. In so deciding, a tribunal or court is engaged with the weighing of principles; on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community. The *ex turpi causa* rule is, as is evident from its implementation by the courts, a principle of law for it guides rather than dictates a single result. The public policy considerations mentioned in this judgment have developed from those set out almost 75 years ago in *Jajbhay v Cassim*, but which now find definitive guidance in the Constitution (*Barkhuizen v Napier* 2007 (7) BCLR 671 (CC)) must be weighed against the principle of *ex turpi causa* to determine the outcome."[16]

15 535 US 137 (2002).
16 Above n: 15 at para 55-6.

29] Given the clear guidance of the courts in *Discovery Health* and *Kylie*, the applicant's glib assertion that Ernesta could not lawfully tender her services (because she did not have a valid work permit); that the applicant therefore did not need to pay her; and that the CCMA did not have jurisdiction, is far from "trite" or "plain", as Mr *la Grange* claimed in his heads of argument. That was the main ground of review; and it was on that basis that the applicant felt "compelled" to approach the court on an urgent basis to stay the continuation of the arbitration proceedings, to cite the CCMA as first respondent and to seek costs against it.

30] The application for review of the jurisdictional ruling is dismissed. The costs application must now be considered against that background.

The costs application (case number C 362/2009)

31] The applicant seeks an order for costs against the CCMA in the urgent application that it brought to stay the arbitration proceedings on 29 May 2009. It does so on the basis that it was "compelled to launch an interim application to stay the arbitration pending the finalisation of the review by dint of the CCMA's unilateral refusal to accommodate the applicants request first to have the CCMA's jurisdiction determined by higher authority (in the review application)."

32] The applicant argues that it is "inexplicable" why the CCMA would set the

matter down for a continued arbitration when, according to the applicant, the arbitrator "unreasonably, irrationally and grossly irregularly" held that the CCMA had jurisdiction; and that his failure to postpone the arbitration pending the review application "verges on the incredulous. It suggests the grossest of illegality and even a lack of bona fides." The applicant even accuses the CCMA of "flagrantly improper behaviour".

33] This intemperate language is hardly warranted. The applicant was not compelled to bring an urgent application. What it should have done, is to have applied for a postponement in terms of the rules of the CCMA. It does not explain why it did not make use of this simple procedure prescribed by the rules.

34] CCMA rule 23 provides as follows:

> "23. How to postpone an arbitration.—(1) An arbitration may be postponed—
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> (a) by agreement between the parties in terms of subrule (2); or
>
> (b) by application and on notice to the other parties in terms of subrule (3).
>
> (2) The Commission must postpone an arbitration without the parties appearing if—
>
> (a) all the parties to the dispute agree in writing to the postponement; and
>
> (b) the written agreement for the postponement is received by the Commission more than seven days prior to the scheduled date of the arbitration.
>
> (3) if the conditions of subrule (2) are not met, any party may apply in terms of rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled

> date of the arbitration.
> (4) After considering the written application, the Commission may—
> (a) without convening a hearing, postpone the matter; or
> (b) convene a hearing to determine whether to postpone the matter."

And rule 31 provides that an application must be brought on notice to all parties.

35] The applicant complains that SACCAWU requested and was granted a postponement on 25 November 2008 without a formal application. That is so. But on 3 April 2009, SACCAWU again requested a postponement that was refused. At no stage was the applicant told that it could ignore the CCMA rules; nor did SACCAWU agree to a postponement, which would have brought CCMA rule 23(2) into play.

36] When the applicant brought the application, the arbitration was part-heard. The arbitrator had already dealt with the merits of the dispute. He merely wanted to set it down for another half a day to provide the applicant with an opportunity to lead further evidence. It would have made absolute sense, bearing in mind the purpose of the CCMA to resolve disputes expeditiously, to finalise the matter. Had the arbitrator found against the applicant on the merits – which is by no means certain – the applicant could have delivered a review application in the normal course. As this court has stated numerous times in the past, piecemeal

litigation should be discouraged.

37] In the urgent application, the applicant sought a costs order against the CCMA, regardless of whether it opposed the application. It required the question of costs in that application to be argued together with the main review application. The CCMA thus had little option but to incur the legal costs of arguing the costs aspect.

38] As I have stated above, the applicant could have attended the part-heard arbitration in order to finalise the matter and, had it been dissatisfied, taken it on review. Alternatively, it could have applied to the arbitrator already hearing the matter to postpone the hearing pending the outcome of a review against his jurisdictional ruling. Had the arbitrator refused, the CCMA would have been *functus officio*. The applicant could then have applied to the Labour Court to review and set aside the arbitrator's refusal to postpone. Instead, the applicant launched an urgent application in this court – and sought costs against the CCMA – in circumstances where it had not followed the procedure prescribed by the CCMA rules.[17]

39] I agree with the sentiments expressed in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others*[18] regarding the practice of seeking the court to intervene in part heard CCMA proceedings by

17 Notably, the applicant's legal representatives also failed to comply with the Practice Directive of 2010 of this court when this application was heard.
18 (2009) 30 *ILJ* 2513 (LC) at paras 3 and4.

way of interdict:

> "There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason – for this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court."

40] As the court pointed out in *Bioinformatics,* this conclusion was recently underscored by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others.*[19]

41] As a matter of policy, the established practice is not to seek costs against a tribunal. The English courts have held that an exception to that practice would be where there was "a flagrant instance of improper behaviour" on the part of the tribunal or inferior court.[20] The CCMA in this case did not act in that manner.

19 (2008) 29 ILJ 2461 (CC) at paras 62-5 (per Ngcobo J).
20 *R v The Birmingham Deputy Coroner* [2004] 3 All ER 543 at 47.

42] Even if a public official acts in error in the course of his duties, but absent *mala fides*, it would be highly unusual to award costs against that official. In *Fleming v Fleming en 'n Ander*[21] the court had this to say:

> "Die algemene reël ... is dat 'n kostebevel nie toegestaan word teen 'n openbare amptenaar wat in die foutiewe maar *bona fide*-uitoefening van sy ampspligte opgetree het nie. Dit is egter nie 'n onbuigsame reël wat in alle gevalle geld sodat die Hof se diskresie aan bande gelê word nie."

43] The behaviour of the CCMA in the current case cannot be equated with that of the second respondent in *Fleming*'s case. In that case the following occurred:

> "Tweede respondent het deurgaans in die verkeerde stadpunt volhard dat permitnr 4/125/06 geldiglik aan die eerste respondent uitgereik is ... Die verwarring wat uit hierdie standpunt gespruit het, was na my mening die direkte oorsaak van die geskil en die daaropvolgende litigasie tussen die appellante en die eerste respondent."[22]

44] The general rule that costs will not be ordered against a judicial officer should, in my view, apply equally to a tribunal such as the CCMA. The exceptions to that rule, as expressed above and in *Regional Magistrate Du Preez v Walker*[23], are

21 1989 (2) SA 253 (A) at 262 C-D.
22 Id at 262 G-H.
23 1976 (4) SA 849 (A).

that the officer has chosen to "make himself a party to the merits of the proceedings" that have been instituted to correct his action or where his decision was "actuated by malice". Neither exception applies in this case.

45] I conclude that there is no reason why the CCMA should be held liable for the applicant's costs in the application to stay. The applicant cannot hold the CCMA responsible for its own non-adherence to the CCMA rules. What it should have done, had it not been prepared to run the course of the arbitration, was to have applied for a postponement in the proper form. Had that application been refused, and provided there were grounds to render such a refusal reviewable, the applicant could have taken that decision on review.

The costs of this application

46] It remains for me to consider the costs of this application. The CCMA was compelled to incur legal costs to argue the question whether it should be held liable for the costs of the urgent application on 29 May 2009. Given my views on the costs application and the review of the jurisdictional ruling, expressed above, those costs were unnecessarily incurred. The indemnity principle applies[24] and the applicant should pay the CCMA's costs necessitated by today's hearing.

Order

47] The application for review in case number C 255/09 is dismissed, with no order

24 As recently set out by Wallis J in *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) at 611.

as to costs.

48] The application for costs against the CCMA in case number C 362/09 is dismissed.

49] The applicant is ordered to pay the costs of the CCMA (the first respondent) in case number C 362/09, including the costs of senior counsel.

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ANTON STEENKAMP

Judge of the Labour Court

Cape Town

For the applicants:	Adv WG la Grange
Instructed by	Edward Nathan Sonnenbergs
For the first respondent:	Adv Colin Kahanovitz SC
Instructed by	Herold Gie