REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1095/10

In the matter between:

CONSOL GLASS (PTY) LTD	**Applicant**
and	
CCMA	**First respondent**
CARLTON JOHNSON N.O.	**Second respondent**
MARYKA GREEFF	**Third respondent**

Heard: **10 August 2011**

Delivered: **25 August 2011**

Summary: **LRA s 142A – settlement agreement before referral to CCMA – jurisdiction – review of arbitration award.**

JUDGMENT

STEENKAMP J

Introduction

1]The crisp question in this review application is whether section 142A of the Labour Relations Act[1] is applicable in situations where the parties had reached a settlement agreement before the dispute had been referred to the CCMA[2]; in other words, does the CCMA have jurisdiction to make such an agreement an arbitration award?

Background

2]Maryka Greeff, the third respondent ("the employee"), was employed by the applicant as an accounts manager.

3]The applicant embarked on a process in terms of section 189 of the LRA to consult with staff in contemplation of dismissals for operational requirements pursuant to a restructuring process.

4]On 8 October 2010, and while she was still employed by the applicant, the employee entered into a written agreement with the applicant. That agreement was encapsulated in a letter that stipulated, *inter alia*, the following:

"1. The effective date of termination of your contract of employment will be 30 November 2010.

2. Subject to you being able to conclude the handover duties assigned to you during this period, you may not be required to work the contractual one month's notice period during the month of November and your last day at the office will be 31 October 2010. Should you however not be able to finalise these duties as required, you may be required to work part of or the entirety of your notice period."

5]The letter then sets out a severance package and other benefits due and stipulates that it is in full and final settlement of all claims that the employee may

1 Act 66 of 1995 (the LRA).

2 The Commission for Conciliation, Mediation and Arbitration.

have, and that it precludes her from disputing the termination of her employment at the CCMA or this Court. She countersigned the agreement on 12 October 2010.

6]The employee subsequently asked to be released from her duties as from 18 October 2010. It is in dispute whether she was due to take up other employment as from that date or whether she merely needed to go to an interview for other employment; what is common cause, though, is that the applicant insisted that she work out her notice period; and that the applicant wrote to her on 18 October 2010 to place on record that it had accepted her resignation that she allegedly tendered on 12 October. She denies that she resigned and says that the applicant breached the settlement agreement. The applicant, on the other hand, alleges that the employee had resigned prematurely; that she was, therefore, in breach of the agreement; and that it no longer needed to pay her any severance pay.

The arbitration award

7]The employee applied to the CCMA to make the settlement agreement an arbitration award in terms of s 142A of the LRA. That section reads as follows:

"(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7)."[3]

8]The arbitrator, commissioner Carlton Johnson (the second respondent), did not hear oral evidence or argument. On 25 November 2010 he handed down an award in the following terms:

"On the 12th of October 2010 the parties entered into an agreement in terms of which the dispute that had been referred to the CCMA was settled.

3 The exclusions refer to essential services and maintenance services, and are irrelevant to this application.

A copy of the settlement agreement is attached hereto marked 'A'.[4]

The settlement agreement is hereby made an arbitration award in terms of section 142A(1) of the Labour Relations Act 1995 as amended."

Grounds of review

9]The applicant seeks to have the award reviewed and set aside on two grounds: firstly, that the CCMA did not have jurisdiction to enable the arbitrator to make the award that he did; and secondly and alternatively, that he acted unreasonably by failing to take into account relevant considerations relating to the employee's alleged breach; and acted unprocedurally in failing to hear oral argument on the application.

10]If the CCMA did not have jurisdiction, *caedit questio.* That is the end of the matter and I need not consider the alternative grounds of review.

11]The question of jurisdiction is a factual one and the reasonableness test applicable to reviews of CCMA awards in terms of s 145 of the LRA generally, as set out in *Sidumo v Rustenburg Platinum Mines Ltd*[5], does not apply.[6]

Interpretation of s 142A

12]In his award, the arbitrator describes the agreement between the parties as one "in terms of which the dispute that had been referred to the CCMA was settled". This is patently wrong. The only matter that the employee referred to the CCMA was the application to have the settlement agreement made an arbitration award in terms of s 142A; no other dispute had been referred to the CCMA.

13]In those circumstances, did the CCMA (and thus the arbitrator) have jurisdiction to make the settlement agreement an arbitration award?

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4 That is the letter dated 8 October 2010 and countersigned by the employee on 12 October 2010.

5 (2007) 28 *ILJ* 2405 (CC).

6 *SA Rugby Players Association & others v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC).

14]The plain language of s 142A appears to me to be abundantly clear: it specifies that the CCMA may, by agreement or on application, on application by a party,

"make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award."[7]

15]The plain language of the section states that it is only where a dispute had already been referred to the CCMA, and the parties reach a settlement, that the arbitrator can make that settlement agreement an arbitration award.

16]And yet there are judgments that appear to be in conflict when interpreting the section. As my analysis will show, that conflict may be more apparent than real; but yet I have to deal with it.

17]In *Molaba & others v Emfuleni Local Municipality*[8] Van Niekerk J, in the context of discussing the meaning of "settlement agreement" in s 158(1)(c), held as follows with regard to the interpretation of s 142A:

"The wording of section 142A suggests that for an agreement to constitute a settlement agreement, a number of requirements relating to nature and form must be met. First, the dispute that is the subject of settlement must have been 'referred to the Commission'. 'Referred' cannot mean referred to arbitration in terms of section 136 – section 142A(1) requires that the dispute must be one that a party has the right to refer either to arbitration or to the Labour Court. 'Referred to the Commission' therefore means referred for conciliation in terms of section 134. This section, read with the requirement that the dispute be one that a party has the right to refer to arbitration or to the Labour Court, means that it is only settlement of disputes about a matter of mutual interest that are either arbitrable or justiciable by this Court that may be the subject of an arbitration award in terms of section 142A."

18]Van Niekerk J further expressed the view that the 2002 amendments to the LRA that introduced section 142A meant that a settlement agreement concluded in the circumstances discussed in *Harrisawak v La Farge (SA)*[9] can be made an arbitration award in terms of s 142A – but that is because the

7 My underlining.

8 [2009] 7 BLLR 679 (LC) para [6].

9 (2001) 22 *ILJ* 1395 (LC); [2001] 6 BLLR 614 (LC).

dispute in that matter had been referred to the CCMA for conciliation. But the broad interpretation afforded s 158(1)(c) in *Harrisawak* would not, in his opinion, survive the 2002 amendments.

19]In *Tsotetsi v Stallion Security (Pty) Ltd*[10]*,* delivered a few months after *Molaba*, Molahlehi J cited the passage in *Molaba, supra.* He did not expressly agree or disagree with it. Yet he added:

"In my view, agreements that may be made orders of court include those disputes which may have not yet been referred for which a party has a right to refer to the Labour Court. In other words, agreements which may be made orders of court, would include those agreements concluded is for such disputes referred for conciliation or litigation. By way of example if parties reach an agreement regarding a discrimination dispute before it is referred to conciliation, such an agreement could be made an order of court. Similarly, in the case of an arbitrable dispute, if parties reach an agreement regarding an unfair dismissal for such a dispute is referred for conciliation, such an agreement could be made an arbitration award records it is a dispute which a party has the right to refer to the commission."

20]Those remarks were made in the context of an application for leave to appeal. Leave to appeal was granted. Unfortunately, it does not appear that the Labour Appeal Court has pronounced on the principle. However, on the facts of that case, the employee had already referred a dispute concerning an alleged unfair dismissal to the CCMA; an arbitration award had been issued; and the parties were engaged in review proceedings when they reached a settlement agreement. The remarks of Molahlehi J pertaining to section 142A therefore do not form part of the *ratio* of this judgement and must be seen as *obiter*.

21]The next case in which the issue was discussed was *Dell v HPD Construction.*[11] In that case, Molahlehi J repeated his view that agreements that may be made orders of court include those disputes which may have not yet been referred for which a party has a right to refer to the Labour Court; and that, if parties reach an agreement regarding an unfair dismissal before such a dispute is referred for conciliation, it could be made an arbitration award.

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10 (2009) 30 *ILJ* 2802 (LC) para [17] – [18].

11 [2010] 6 BLLR 626 (LC).

22]However, once again, the settlement agreement in *Dell* followed a dispute that had been referred to conciliation. Therefore, it met the prerequisites outlined in section 142A.

23]Insofar as the trio of judgements discussed above are in conflict with each other, I respectfully align myself with the sentiments of the Niekerk J in *Molaba.*

24]In my view, the prerequisites for making a settlement agreement an arbitration award in terms of s142A(1) could not be clearer. The section expressly provides that the agreement in the must be in respect of "any dispute that has been referred to the commission". A settlement agreement in respect of a dispute that has not been referred to the CCMA cannot, in my view, be made an arbitration award in terms of section 142A(1).

Application to this dispute

25]It follows from my reading of section 142A(1) that the arbitrator in this dispute did not have jurisdiction to make the settlement agreement an arbitration award. The agreement was not in respect of a dispute that had been referred to the Commission.

26]Given the conclusion I have reached on jurisdiction, I need not consider the other grounds of review.

27]Mr *Soldatos*, who appeared for the applicant, did not persist in his prayer for costs.

Order

28]The ruling of the second respondent dated 25 November 2010 is reviewed and set aside. There is no order as to costs.

Anton Steenkamp
Judge

APPEARANCES

APPLICANT:	Mr Ari Soldatos of Fluxmans Inc.
THIRD RESPONDENT:	Adv Coenie de Kock, instructed by Carelse Khan.