REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 717/10

In the matter between:

CLAUDIA MICKELET **Applicant**

and

TRAY INTERNATIONAL

SERVICES AND ADMINISTRATION (PTY) LTD **Respondent**

Heard: **24 August 2011**

Delivered: **6 September 2011**

Summary: ***In limine*** **– jurisdiction of Bargaining Council – certificate of non-resolution issued – not taken on review – jurisdiction to conciliate to be decided by Labour Court prior to trial as point *in limine.***

JUDGMENT

STEENKAMP J

Introduction

[1] The respondent in this matter raised a point *in limine* that the Court does not jurisdiction to hear the dispute, as the Bargaining Council that issued a certificate of non-resolution did not have the jurisdiction to conciliate; and hence

that it was not conciliated as required in section 191(1) of the Labour Relations Act.[1]

[2] The argument raises the question whether the respondent should have sought to review the issuing of the certificate by the Bargaining Council, or whether it is properly raised in this Court as a preliminary point; and if the latter, whether this Court can determine the point.

Background

[3] The applicant, Ms Claudia Mickelet ("the employee") was dismissed by the respondent for operational requirements. She referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight Industry ("the Bargaining Council") for conciliation on 31 March 2010.

[4] The respondent's Human Resources Manager, Ms Michelle Friedman, contacted a case management officer at the Bargaining Council, Mr Yondi Mwele, on 6 May 2010. She advised him that the respondent's business does not fall within the scope of the road freight industry. She informed Ms Mickelet (the employee) accordingly and confirmed all of this in a fax to the Bargaining Council on the same day.

[5] On 18 May 2011 the Bargaining Council sent the parties a notice of set down for a point *in limine* to be heard on 8 June 2010. The notice does not specify what that point is. The respondent's Friedman wrote to Mweli by email on 18 May, pointing out again that "Tray International does not belong to the Road Freight Industry".

[6] Mweli replied the next day and clarified that the matter was only set down for the point in limine. He said:

"The reason for that is, we explained to the applicant what the company's core function of their business is as according to you, but the applicant insisted that the company is involved in transportation of goods for hire...

So, on that day a point in limine will be dealt with to determine whether we have jurisdiction on this issue or not and then the commissioner will issue a jurisdictional

[1] Act 66 of 1995 ("the Act").

ruling to get the matter referred to the CCMA or any relevant institution to deal with the matter."

[7] At the hearing on 8 June 2010, Ms Friedman repeated her submissions – backed up by information from the Companies and Intellectual Property Commission (or CIPRO, as it then was) – that the activities of the company do not fall within the scope of the Bargaining Council.

[8] Nevertheless, the commissioner, Koos Kitshoff, did not issue a jurisdictional ruling. Instead, he issued a certificate stating that the matter remained unresolved and had to be referred to the Labour Court.

[9] The employee accordingly referred the matter to this Court. The parties held a pre-trial meeting and recorded in the pre-trial minute dated 4 March 2011 that:

"Respondent avers that the above Honourable Court has no jurisdiction to consider the Applicant's alleged unfair dismissal dispute on account of the dispute not having been conciliated in terms of section 191(1)(a) of the LRA."

[10] That point *in limine* was then set down for hearing in this Court on 24 August 2011.

Relevant legal principles

[11] In terms of section 191(1)(a), the Bargaining Council only had jurisdiction to conciliate the dispute if the parties to the dispute fell within its registered scope. That section states:

"If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to –

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction."

[12] In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*[2] the Labour Appeal Court considered the late referral of a dispute to conciliation. The commissioner issued a certificate in terms of s 135 of the LRA that the matter remained unresolved and the dispute was referred to arbitration. After the

[2] (2000) 21 *ILJ* 2382 (LAC)

arbitration award had been issued, the employer party applied to have it reviewed and set aside on the merits as well as on the jurisdictional point that the referral had been out of time, there was no application for condonation, and therefore the commissioner did not have the jurisdiction to arbitrate.

[13] In dealing with the jurisdictional point, Zondo JP said:[3]

"In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of s 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate."

[14] He went on to state[4] that a party who objects to the processing of the dispute, should institute review proceedings within a reasonable time.

[15] Van Niekerk J considered the effect of *Epstein* in the recent case of *Bombardier Transportation (Pty) Ltd v Mtiya NO & others.*[5] He noted[6] that *Epstein* 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.

[16] In a case such as the present one, though, where a commissioner issues a certificate of outcome without having resolved a jurisdictional challenge, Van Niekerk J took a different approach in *Bombardier.*[7] After considering his earlier

[3] *Epstein (supra)* para [12].

[4] At para [15]

[5] (2010) 31 *ILJ* 2065 (LC).

[6] At para [9].

[7] *Supra* para [14].

judgment in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*[8] he summarised the position as follows:

" 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."

[17] The learned judge also noted that, instead of making a ruling on jurisdiction at conciliation stage, a conciliating commissioner may defer the challenge to the arbitration stage.

[18] I agree with this approach. Commissioner Kitshoff did not make a jurisdictional ruling. Although one may be tempted to imply from his issuing a certificate that he assumed jurisdiction, one could also infer that he implicitly decided to defer the decision on jurisdiction. The only reason why the dispute has been referred to this Court for adjudication and not to a Bargaining Council arbitrator, is because it relates to a dismissal for operational requirements. I therefore find myself in the same position as an arbitrator who has to decide whether the bargaining council or the CCMA had jurisdiction to hear an unfair dismissal dispute.

[19] This is not a case such as the one in *Epstein* where the employer remained silent until the review stage to raise a jurisdictional challenge. The employer in this case raised it upfront; and the Bargaining Council set the jurisdictional question down for hearing as a point *in limine* accordingly. Unfortunately, though, Commissioner Kitshoff did not rule on it. As Van Niekerk J remarked in *Bombardier*, the fact that the commissioner issued a certificate of outcome did not confer jurisdiction on the Bargaining Council.

[8] (2010) 31 *ILJ* 371 (LC); [2009] 12 BLLR 1214 (LC).

Conclusion

[20] On the facts presented by the respondent, it is clear that its operations do not fall within the scope of the Bargaining Council. The Council did not have jurisdiction to conciliate the dispute. It follows that this Court does not have jurisdiction to hear the unfair dismissal dispute at this stage.

Costs

[21] The effect of this judgment is that it will inevitably lead to a delay in adjudicating the merits of the dispute. Unfortunate as it is, the employer party cannot be blamed for that delay, though. It raised the jurisdictional issue upfront. The fact that the conciliating commissioner did not rule on the question, despite it having been set down for hearing on that preliminary point, is not the respondent's doing.

[22] This judgment does not mean that the employee is without a remedy because of a technical point. This Court cannot assume jurisdiction where it has none. The employee may still refer a fresh dispute to the CCMA, together with an application for condonation.

[23] In these circumstances, neither party should be held liable for the other's costs.

Order

[24] The point *in limine* is upheld. This Court has no jurisdiction to hear the unfair dismissal dispute.

[25] There is no order as to costs.

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Anton Steenkamp

Judge

APPEARANCES

APPLICANT:	André le Roux Instructed by Africa & Associates, Woodstock.
RESPONDENT:	Wayne Field of Bernadt Vukic Potash & Getz, Cape Town.