REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C592/2011

Reportable

In the matter between:

SEARDEL GROUP TRADING (PTY) LTD

trading as BERG RIVER TEXTILES **Applicant**

and

SOUTH AFRICAN CLOTHING AND TEXTILE

WORKERS UNION (SACTWU) **First respondent**

COMMISSIONER NATASHA ABRAHAMS N.O. **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION (CCMA) **Third respondent**

Heard: **28 February 2012**

Delivered: **14 March 2012**

Summary: **Review of certificate of outcome – mutual interest or rights dispute – LRA s 23 – *Bombardier Transportation* followed – certificate not subject to review.**

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant has applied to review and set aside the certificate of outcome issued by second respondent (the commissioner) on 28 June 2011 following a conciliation hearing held under the auspices of the third respondent (the CCMA) on the same date.

[2] In its notice of motion, the applicant referred to a "ruling" by the commissioner. This is patently incorrect. Mr *Cronjé*, for the applicant, confirmed in oral argument that he was referring to the certificate of outcome issued by the commissioner on that date. The relevance of this fact is not insignificant, as I shall explain shortly.

[3] The first respondent (SACTWU) opposes the review application. Mr *Whyte* initially conceded that this Court has the power in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("the LRA") to consider on review whether the certificate was issued in accordance with the requirements of the LRA. He revised his views somewhat after I had debated the judgment of Van Niekerk J in *Bombardier Transportation (Pty) Ltd v Mtiya N.O and Others*[1] with the parties. I shall return to this aspect.

Background

[4] On 11 November 2009, the applicant and SACTWU entered into a collective agreement in order to regulate a new shift pattern regime at the applicant's business, with a view to reducing the applicant's overall wage bill.

1 [2010] 8 BLLR 840 (LC).

[5] It is common cause that the agreement is a collective agreement as defined by section 213 of the LRA[2] and regulated by sections 23 and 24 of the LRA. SACTWU accepts that the agreement was, but for its alleged termination, binding upon it.

[6] On 18 January 2011, SACTWU wrote to the applicant stating:

> 'In terms of section 23(4) of the Labour Relations Act 66 of 1995 we hereby give you one month's notice of the termination of the agreement.'

[7] Section 23(4) of the LRA provides that:

> '(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.'

[8] SACTWU also invited the applicant to negotiate a new shift pattern arrangement, failing which a dispute would be declared and dealt with in terms of the LRA – in other words, through power play by strike action.

[9] On 7 February 2011, the applicant wrote to SACTWU, rejecting its right to cancel the agreement.

[10] On 9 March 2011, SACTWU referred a dispute to the CCMA on the prescribed form 7.11, from which the following is apparent:

10.1 Under clause 3, 'Nature of the Dispute', the box 'Other' is checked and described as "Part B – LRA Section 23(4)";

10.2 Under 'Summarise the facts …' it is stated:

2 Labour Relations Act 66 of 1995.

'We serving notice (sic) upon the employer party to terminate the collective agreement reached in November 2009'; and

10.3 Under clause 6, 'Result of Conciliation', it is stated: 'Collective agreement to be terminated'.

[11] A conciliation hearing took place on 28 June 2011, following which the commissioner issued the certificate of outcome indicating that the dispute concerning "matters of mutual interest" was not resolved and could be "referred" to a strike or lock-out.

[12] The applicant wishes to review this certificate. Its argument is that the dispute which was to be conciliated by the CCMA is not a dispute of mutual interest, but is a dispute about the interpretation and application of the collective agreement which falls under the ambit of section 24(5). That section states that, if a dispute about the interpretation and application of a collective agreement remains unresolved after conciliation, any party to the dispute may request that the dispute be resolved through arbitration.

[13] The applicant submits that the commissioner committed a gross irregularity and misdirected herself by categorising the dispute as a dispute of mutual interest. Therefore, it says, the certificate should be reviewed and set aside.

The legal framework

[14] For present purposes, section 213 of the LRA simply defines a collective agreement as a "written agreement" between employer and trade union. At common law, such an agreement is binding in accordance with its express or interpreted terms. At common law, and to the extent that the agreement is silent on duration, a party may (assuming that breach or non-performance is not a factor) resile from the agreement on the giving of written notice.

[15] SACTWU submitted that sections 23 and 24 of the LRA largely remove the collective agreement from the sphere of the common law. Thus where an agreement is concluded (in writing) between employer and trade union, and such an agreement regulates matters of mutual interest, the LRA becomes applicable.

[16] Section 23(3) of the LRA provides that where a collective agreement varies any contract of employment that *ipso facto* varies the individual contracts of employment already in existence between an employee and his or her employer. From this, it would follow that the mere termination of the collective agreement does not revert terms and conditions of employment to the pre-agreement *status quo ante*, but rather that the individual contracts continue in their amended form until further agreement is reached.

[17] In the case of a collective agreement concluded for an indefinite period, either party may unilaterally resile from the agreement simply by giving "reasonable notice" as envisaged by s 23(4). If such notice is given, the agreement comes to an end by operation of law.

[18] If a party to the agreement wants to make a demand which would change the terms and conditions regulated by that agreement and thus the amended individual contracts of employment, it would have to cancel the agreement. In the absence of cancellation, the trade union party would not be entitled to resort to strike action by virtue of the provisions of section 65(1)(a) of the LRA.

[19] Section 24 of the LRA provides that where there is a dispute about "the interpretation or application" of a collective agreement, a party may have that dispute resolved by conciliation and arbitration as a dispute of "right".

[20] The applicant submits that this is such a dispute, and that the commissioner wrongly described it as a matter of mutual interest.

[21] The applicant argues that the dispute that was to be conciliated properly fell under s 24(5) of the LRA. In describing it as a matter of mutual interest, it argues, the commissioner committed a gross irregularity and exceeded her powers. On this basis it argued that the certificate of outcome should be reviewed and set aside.

[22] Neither party referred to the judgment in *Bombardier*[3] in their heads of argument. When I brought it to their attention in oral argument, neither Mr *Cronjé* nor Mr *Whyte* had considered it and they were not in a position to address oral argument to me on its effect. I therefore asked them both to submit a supplementary note, which they did.

[23] In *Bombardier,*[4] Van Niekerk J held:

> '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.'

[24] I followed that approach in *Mickelet v Tray International Services and Administration (Pty) Ltd.*[5] I remain of the view that it is a correct statement of the law.

[25] The following principles were established *Bombardier*:

1.1 A certificate of outcome issued by the CCMA in

3 *Supra*
4 *Supra at* para 15.
5 Unreported, case no C717/10 (Labour Court, Cape Town, 6 September 2011).

terms of section 135(5)(a) amounts to nothing more than the fact that either:

1.1.1 An attempt has been made to conciliate the dispute, but this attempt has failed; or

1.1.2 The 30-day time period has elapsed.

1.2 The certificate of outcome does not confer jurisdiction on an arbitrator (or judge), nor does it entitle the arbitrator (or judge) to arbitrate (or adjudicate) the dispute where he or she does nor have the power, in terms of the LRA to do so.

1.3 The arbitrator (or judge) must determine a jurisdictional complaint at any stage of the proceedings.

1.4 It is not a reviewable irregularity for a conciliating commissioner to 'defer' the jurisdictional decision to an arbitrator (or judge).

[26] The Court in *Bombardier* found, on the basis of the principles set out above, that the certificate of outcome in that matter was properly issued and could not be challenged on review. In essence, the Court found that because the arbitrator had not made a ruling there was nothing to which the Court's review powers could be applied.

[27] In this matter, on SACTWU's version, the certificate issued by the second respondent purports to be one issued in terms of section 64(1)(a)(i) of the LRA which provides that:

> 'Every employee has the right to strike … if the issue in dispute has been referred to … the Commission … and a certificate stating that the dispute remains unresolved has been issued'.

[28] The certificate issued in terms of section 64 is thus similar to one issued under section 135, in that both only purport to confirm that the dispute is unresolved. The certificate does not "confer jurisdiction" to the employees to take strike action or, put simply, does not make an unprotected strike protected.

[29] The commissioner did not make a ruling which is capable of being challenged in review proceedings under section 158(1)(g) of the LRA. She merely confirmed that she was unable to resolve a dispute between the parties which had come before her as conciliating commissioner. Her characterisation of the review is not a ruling that is subject to review. In my view, there is no basis in law for a distinction to be drawn between the scenario presented by this matter and that in *Bombardier*.

[30] The only point of distinction is one of practicalities. Whilst, in *Bombardier,* the employer party had the right to challenge the arbitrator's jurisdiction during the arbitration proceedings, the applicant here of course has no similar recourse. Mr *Whyte* submitted in his supplementary note that the answer would appear to be that the employer's true recourse would be to attempt to interdict the strike on the basis that it is one not complying with the requirements of the LRA, i.e. because it is underpinned by a dispute of right. I express no view on the proper course that the applicant should follow.

[31] Mr Cronjé submitted that this case can be distinguished from the *Bombardier* case, for the following reasons:

31.1 The *Bombardier* case involved a jurisdictional dispute, i.e. whether the CCMA had

jurisdiction to even conciliate the dispute, let alone arbitrate it.

31.2 In the *Bombardier* case, the jurisdictional issue could still be decided at arbitration, irrespective of what was stated in the Certificate of Outcome.

31.3 In the instant case, there is no dispute as to the jurisdiction of the CCMA to conciliate. The categorisation of the dispute, however, determines the way in which the dispute is ultimately to be resolved, i.e. through arbitration, or strike action. Once categorised as a "mutual interest dispute", the certificate of outcome bestows at least a *prima facie* right on the first respondent to embark on strike action in terms of Section 64 of the LRA. The CCMA therefore becomes *functus officio* with respect to the dispute.

31.4 If a dispute is wrongly categorised as a dispute of mutual interest, there is no recourse for the applicant, to prevent strike action, other than interdict proceedings in this court.

[32] That may be so; but the fact remains that, in law, the certificate of outcome has no legal significance other than to state that, on the date it was issued, the dispute referred to the CCMA remained unresolved. It is not a ruling that is open to review. And as I have stated above, I express no view on the proper avenue for the applicant to follow.

[33] Mr *Cronjé* also referred to *Zeuna – Stärker Bop (Pty) Ltd v NUMSA,*[6]

6 (1999) 20 ILJ 108 (LAC); [1998] 11 BLLR 1110 (LC) at para 6.

the earlier decision where the Labour Appeal Court held that:

> '[T]he 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 the dispute arose'.

But that dispute dealt with the question of jurisdiction, and the commissioner had made a ruling on jurisdiction – one that could thus be reviewed. The court held that the commissioner's decision that the CCMA did not have jurisdiction was wrong and that it could be reviewed by the Labour Court. The same applies to the recent decision of *Parliament of the Republic of South Africa v NEHAWU obo Members and Others.*[7]

Conclusion

[34] The certificate of outcome is not subject to review. The application must, therefore, fail.

[35] Given that the application of the *Bombardier* decision was raised by the Court *mero motu*, Mr *Whyte* quite properly conceded that there should be no order as to costs.

Ruling

[37] The application is dismissed. There is no order as to costs.

7 [2011] 9 BLLR 905 (LC).

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

APPEARANCES

Applicant:	F Cronjé attorney.
First respondent:	J Whyte of Cheadle Thompson & Haysom Inc.