REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Reportable

Case no: D124/12

In the matter between:-

H & A MANUFACTURING (PTY) LTD **Applicant**

and

JENNIE PENDER-SMITH **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

ALMEIRO DEYZEL N.O **Third Respondent**

Heard: 8 February 2013

Delivered: 22 February 2013

Summary: Review of arbitration ruling regarding jurisdiction of CCMA to proceed with unfair dismissal dispute

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JUDGMENT

HASLOP, AJ

[1] This is an application for the review of a ruling by the third respondent, a commissioner at the CCMA, to the effect that the jurisdiction of the CCMA in this matter is not ousted by virtue of the fact that it would be necessary, during the course of the arbitration of the dispute, to make a finding whether or not the parties entered into a valid agreement (the commissioner's emphasis), whether such agreement terminated the employment relationship by consent and whether the applicant at the CCMA, who is the first respondent in this application, waived her rights in that agreement to pursue the dispute that is the subject of the arbitration.

[2] The review application was not opposed and was heard on 8 February 2013. The late delivery of the application was condoned.

[3] The background to this matter is that, during the arbitration at the CCMA to determine the employee's claim that she had been unfairly dismissed, and that she should be paid allegedly outstanding commission, notice pay, leave pay and severance pay, it emerged that the employee had signed what was described as a retrenchment agreement.

[4] After reflecting, in its preamble, that the employee's position with the employer had 'become redundant', the retrenchment agreement provides that the employee's services would terminate on a particular date and that she would receive a 'final severance package inclusive of Notice Pay, Leave Pay and Severance Pay' in an amount set out in the agreement. The agreement went on to state that it had been entered into after due and proper consultation and that the employee waived any right that she may have had to proceed with any dispute, howsoever arising, and in any forum whatsoever.

[5] During her attorney's opening statement at the arbitration, it was claimed, on behalf of the employee, that the retrenchment agreement misrepresented the true position in that the employee's position was not, in fact, redundant, no consultation process had taken place, no agreement had been reached on severance pay and the employee did not waive any of her rights to pursue her dispute.

[6] Indeed, it was claimed that she had signed the agreement under duress, the details of which were set out in the opening statement, and that the agreement was therefore invalid.

[7] As I have indicated, the employee claimed further that she had been dismissed, and that her dismissal was unfair.

[8] The employer denied that the agreement had been signed under duress and argued that, in any event, the CCMA did not have jurisdiction to determine its validity.

[9] The third respondent then issued his ruling referred to above.

[10] Stated briefly, the applicant contends that the commissioner's ruling is grossly irregular and ought to be set aside because the determination of the validity of an agreement such as the one in question falls outside of the jurisdiction of the CCMA.

[11] It must be noted, in that regard, that the commissioner's ruling is not that the CCMA does in fact have jurisdiction to determine a dispute concerning the validity of an agreement of the sort involved in this matter, but that the jurisdiction of the CCMA to proceed with the arbitration is not ousted because it will be

necessary to make a finding on such validity during the course of such arbitration. The distinction is fine, but important.

[12] It concerns the vexed question of interim rulings by commissioners concerning their own jurisdiction and the desirability or otherwise of this court entertaining jurisdictional disputes while the CCMA arbitration process is in progress.

[13] I was referred, in the applicant's heads of argument, to the decision in *EOH Abantu v Commissioner for Conciliation, Mediation & Arbitration & another*[1]. The commissioner also refers to this judgment in his award. In that matter this court granted interim relief staying a CCMA arbitration pending the finalisation of a review application regarding a commissioner's jurisdiction.

[14] I should mention, though, that the approach in that case was not followed in *EOH Abantu v Commissioner for Conciliation, Mediation & Arbitration & others*[2], a subsequent judgment involving the same parties, when Cele J refused to grant final relief in the matter. In his judgment, he points out that, 'the expeditious resolution of labour disputes is not served by a piecemeal approach'[3].

[15] The approach of Cele J in the second *EOH Abantu* judgment found favour with this court in *Workforce Group (Pty) Ltd v National Textile Bargaining Council & Another*[4]. In fact, this court has, in a number of cases,[5] expressed its disapproval of the piecemeal approach to the resolution of disputes whereby parties interrupt arbitration proceedings to bring jurisdictional questions to the Labour Court. I associate myself with that disapproval.

[1] (2008) 29 ILJ 2588 (LC).
[2] (2010) 31 ILJ 937 (LC).
[3] Above at para 16.
[4] [2011] 11 BLLR 1136 (LC), para 19 of the judgment.
[5] See also, for example, *Jiba v Minister of Justice & Constitutional Development & others* [2009] 10 BLLR 989 (LC) and *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* [2010] 8 BLLR 840 (LC).

[16] This application ought therefore to be dismissed for that reason alone.

[17] However, the basis of this review, as set out in the applicant's heads of argument, is that the CCMA does not have jurisdiction to deal with the validity of agreements, and that the agreement in question could, on various grounds that were argued before me, in any event not have been an agreement of the sort referred to in s 24(8) of the Labour Relations Act 66 of 1995. Indeed, one of the grounds of review is that the commissioner failed to follow a binding judgment of this court, namely *First National Bank Ltd (Wesbank Division) v Mooi NO & others*[6].

[18] I therefore consider it appropriate to deal with the jurisdiction of the CCMA as conferred on it by s 24(8) of the LRA.

[19] Jurisdiction is a matter of legal fact, rather than reasonableness[7]. The question, therefore, is not whether a commissioner's jurisdictional ruling is grossly irregular, as suggested by the applicant, but whether it is legally wrong.

[20] Counsel for the applicant referred to *First National Bank Ltd (Wesbank Division) v Mooi NO & others*[8] as support for the proposition that the CCMA, which has no jurisdiction outside of matters in respect of which jurisdiction has specifically been conferred upon it, does not have jurisdiction to determine the validity of an agreement such as the one described in this case as a retrenchment agreement.

[21] In that case, Molahlehi J, held, that 'the powers of commissioners of the CCMA to rule on the interpretation and application of agreements (are), in my view, confined to collective agreements in terms of s 24 of the Labour Relations Act 66

[6] (2009) 30 ILJ 336 (LC).
[7] See, for example, *J & J Freeze Trust v Statutory Council for the Squid & Related Fisheries of SA & others* (2011) 32 ILJ 2966 (LC) at para 22 and *Gubevu Security Group (Pty) Ltd v Ruggiero NO & others* [2012] 4 BLLR 354 (LC) at para 19.
[8] Above at 6.

of 1995'[9]. This view found support in *Premier, Limpopo Province v Makgoka & others*[10] where Lagrange J stated that the arbitral powers of CCMA commissioners '. . . are limited when it comes to matters of interpreting agreements to the interpretation and application of collective agreements'[11].

[22] But, as the commissioner pointed out in his ruling which is the subject matter of this review, this court has expressed conflicting views concerning the meaning and applicability of s 24(8) of the LRA.

[23] In an unreported judgment handed down in *Fidelity Security Services (Pty) Ltd v Paul Jacobus Benneker*[12], Conradie AJ considered the matter and held, without referring to either of the judgments mentioned above, that the wording of the section clearly applies to settlement agreements in general, as long, of course, as they are settlement agreements contemplated in either s 142A or s 158(1)(c)[13]. I find myself in respectful agreement with that conclusion, although the language of the section does require some interpretation.

[24] Section 24(8), which was inserted into the LRA by amendment effected some six years after the date of commencement of the Act itself, reads as follows:

> 'If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.'

[25] It will be noted that the phrase 'collective agreement' does not appear in that wording. However, the general heading of s 24 is 'Disputes about collective

[9] Above at para 16.
[10] (2010) 31 ILJ 2974 (LC).
[11] Above at para 23.
[12] Case number C933/2008, dated 18 August 2011.
[13] Above at para 11.

agreements'. That appears to have given rise to a view that everything contained in the section must, of necessity, apply only to collective agreements. I do not agree.

[26] While 'headings to chapters and sections of (a statute) … may in principle be consulted in determining the meaning of doubtful and ambiguous parts of the contents of. . . the section to which they refer'[14], that particular aid to interpretation is not, in my opinion, to be preferred either to the principle of statutory interpretation that words are to be given their ordinary meaning[15] or to the presumption that statute law is not purposeless[16].

[27] In relation to the first of these principles, the wording of s 24(8) that refers to settlement agreements contemplated in s 142A and s 158(1)(c) (read, as it must be, with s 158(1A)), does not confine itself to collective agreements.

[28] In relation to the second, subsections (3) to (5) of s 24 already refer to 'a dispute about the interpretation or application of a collective agreement' that is required to be referred to the Commission in terms of s 24(2) in the absence of an operative dispute resolution procedure contained in the collective agreement itself. It would appear to be entirely superfluous or, to use the language of the presumption, purposeless, to restate that position in s 24(8), but to confine its operation to a specific class of collective agreements that would already have been covered by the more general provision earlier in the section.

[29] I point out that there is, in fact, one jurisdictional distinction between s 24(2) and the plain wording of s 24(8). Disputes under s 24(2) may be referred to the CCMA only, while those under s 24(8) may be referred to the CCMA or the relevant bargaining council.

[14] 25 Part 1 *Lawsa* 2 ed para 351.
[15] Above at para 337.
[16] Above at para 330.

[30] If, as s 24(2) suggests, it had been the intention of the legislature that, where collective agreements did not contain their own operative dispute resolution clauses, the CCMA was to have exclusive jurisdiction to rule on their interpretation and application, then it is, in my opinion, much more likely that the purpose of s 24(8) was to deal with settlement agreements generally, and not only settlement agreements collectively concluded.

[31] I have not lost sight of the fact that a possible consequence of this interpretation is that bargaining councils now, subsequent to the 2002 amendment, have the jurisdiction to interpret and apply some collective agreements in respect of which they did not previously have that jurisdiction. However, that broadening of their jurisdiction will only apply to collective agreements in settlement of disputes that have been referred to the council (s 142A read with s 51(8)) and of disputes that a party had the right to refer to arbitration by the council or to this court (s 158(1)(c) read with s 158(1A)), where those collective agreements do not, in any event, prescribe a dispute resolution process involving arbitration by a council.

[32] Since experience has demonstrated that the overwhelming majority of the types of dispute referred to in those sections will be individual rather than collective disputes, it seems unlikely that this is the only distinction that the legislature intended to make by promulgating s 24(8).

[33] The consequence of this is then that the CCMA has jurisdiction, in terms of s 24(8), to interpret and apply settlement agreements that are not collective in nature.

[34] But the matter does not end there. The applicant argued that such an interpretation of the section would still not give the CCMA jurisdiction over this particular agreement.

[35] For the section to apply, the agreement must be one envisaged by s 158(1A). In other words, it must be a written agreement in settlement of a dispute that a party had the right to refer to arbitration or this court. In addition, the CCMA only has jurisdiction to hear a dispute concerning the interpretation or application of such an agreement.

[36] Counsel for the applicant distinguished the concepts of interpretation and application of agreements from determinations about their validity. He also argued that this agreement is not a settlement agreement for the purposes of the legislation. I disagree with both of these arguments.

[37] Having regard to the fact that no evidence concerning the conclusion of the particular agreement in this matter has yet been led at the arbitration, I understood his argument on the second issue to be that an agreement concerning the termination of an employee's employment that purports to fully and finally deal with 'any dispute howsoever arising', whether or not such dispute had already arisen, is not a settlement agreement.

[38] It seems to me, firstly, that the very point of the agreement, on the applicant's own case, was that it should deal finally with the termination of the first respondent's employment and its consequences. A dispute regarding the termination of her employment on grounds of redundancy is one that the first respondent would have had the right to refer to arbitration or the Labour Court, and a dispute, as defined in the LRA, includes an alleged dispute.

[39] The parties do not have to be in agreement over the fact that a dispute exists. I do not agree with any suggestion that the fact that the employee signed a waiver of her rights to proceed with 'any dispute howsoever arising' means that the intention of the agreement was not to settle a dispute that the employee had the

right to refer to arbitration or the Labour Court. I note, from the arbitration award, that it was the applicant who called the agreement a retrenchment agreement. I cannot imagine what its purpose can have been if the applicant had not intended it to settle, possibly amongst others, at least any disputes that might arise from the applicant's retrenchment.

[40] I now turn to the contention that a dispute over the validity of an agreement, where the employee avers that it was obtained under duress, is not a dispute over its interpretation or application. Surely what an employee in the position of the first respondent is saying in a matter such as this is, 'I am not bound by this agreement. It is not applicable to me because I was forced to sign it.'

[41] I disagree with the contention, made by the applicant's counsel, that the question of the application of an agreement only arises in the context of a collective agreement, or at least of an agreement concluded with a number of people. That seems to put unnecessary strain on the ordinary meaning of the word 'application'.

[42] Although the word does not appear in the definitions section of the Act, its ordinary meaning[17] includes 'relevance' and 'practical operation'. The CCMA therefore has, in terms of s 24(8), the jurisdiction to determine the relevance and practical operation of a settlement agreement. I find, therefore, that the words 'interpretation or application', as they appear in the section, are sufficiently broad to encompass a dispute about the validity of an individual agreement that deals with a dispute that, but for the dispute over the validity of the agreement, an employee had the right to refer to arbitration or the Labour Court and that was allegedly signed under duress.

[17] *New Shorter Oxford English Dictionary*.

[43] In other words, an agreement of the sort referred to in this matter may, subject to the evidence that might be led at the arbitration, be an agreement as envisaged in s 158(1)(c) and, consequently, s 24(8).

[44] In the circumstances, it is unnecessary for me to decide whether the statement made by Molahlehi J[18] was made *obiter dictum*, as suggested by the third respondent, or was part of the *ratio decidendi* of his judgment, as argued by the applicant.

[45] Finally, it seems to me that the bottom line in this particular matter is that the onus will be on the employee to prove that she was dismissed. If she cannot do so, perhaps because the employer is able to demonstrate that she signed a valid retrenchment agreement, that is the end of the matter. The question of jurisdiction will then be merely incidental and the object of the LRA to promote the effective resolution of labour disputes will have been achieved.

[46] In the premises, I make the following order:

1. The review application is dismissed;
2. There is no order as to costs.

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Haslop, AJ

Judge of the Labour Court

[18] *First National Bank* judgment, para 16.

Appearance:

For the Applicant: W. Shapiro
Instructed by Futcher Attorneys