REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR 17/12

In the matter between:

LATINSKY & CO (ESTATE LATE JE LATINSKY) **APPLICANT**

and

F MOOI *NO* **1ST RESPONDENT**

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION **2ND RESPONDENT**

BB KOUMARAS **3RD RESPONDENT**

Heard: 15 February 2013

Judgment delivered: 18 February 2013

JUDGMENT

VAN NIEKERK J

[1] This is an unopposed application to review and set aside a jurisdictional ruling made by the first respondent (the commissioner). The ruling was made in the context of a dispute between the third respondent and the applicant in which the third respondent contended that she had been unfairly retrenched. At the arbitration hearing, the applicant in the present proceedings took the point *that* the CCMA had no jurisdiction to arbitrate, since the dispute was not one that fell within the ambit of s 191(12). That section is often (but inaccurately) said to confer jurisdiction on the CCMA to arbitrate retrenchment disputes involving a single employee, at the election of the employee. The first respondent made the following ruling:

> ’21. The applicant was the sole person retrenched. The CCMA has jurisdiction to arbitrate. I rule that a new date be set for arbitration in front of another commissioner as commissioner Mooi has too much insight into this case.’

[2] The applicant seeks to set aside the ruling on the basis that it is incorrect. The material facts relevant to the ruling are recorded in the founding affidavit in the present proceedings, and I do not intend to repeat them here. For present purposes, it suffices to say that the applicant company was owned by its sole proprietor, the late Mr JE Latinsky. The company employed two employees, the third respondent and a Ms Lara Hopwood. When Mr Latinsky passed away, his widow (who is also the executor of his estate) decided to close the business. In her affidavit filed in support of the point in *limine*, Mrs Latinsky states that certain of the late Mr. Latinsky’s clients requested that Mr. Ilan Koral, a chartered accountant with whom he had shared premises, assume responsibility for their matters. She states further that all files in respect of those clients were handed to Koral. It is clear from the terms of a letter given to Hopwood on 23 September 2010 that she agreed to commence working for Koral on 1 October 2010. Indeed, attached to the letter was proof of payment of Hopwood’s final salary from JE Latinsky & Co and in the final paragraph,

Mrs Latinsky expressed the wish that Hopwood would '*be happy with the new setup as you start working for Ilan Koral*…'.

[3] It is equally clear from the papers before the commissioner that the third respondent's circumstances were not infused by the same degree of cordiality. On 27 September 2010, a letter was issued to the third respondent advising her that the company would be closing down and that her services would be terminated with effect from 30 September 2010. The letter further stated that alternative employment had been procured for the third respondent, and that she was required to take up that employment with effect from 1 October 2010. The third respondent rejected the alternative on offer. The applicant's response was to embark on a retrenchment procedure, which it invoked by issuing a notice of intention to retrench in terms of s 189 (3) and scheduling a date and time for a first consultation meeting. A consultation meeting was held in 13 October 2010, where the third respondent was represented by her legal adviser. The upshot of the meeting was that the applicant undertook to secure a written offer of alternative employment, which it did. That offer was later refused, and the applicant then decided to terminate the third respondent's employment. A notice of termination of employment was sent to the third respondent on 28 October 2010, recording in clear terms that the reason for dismissal was one related to the applicant's operational requirements, and denying severance pay on the basis that an offer of reasonable alternative employment had been rejected.

[4] The third respondent disputed the fairness of her dismissal and referred the matter to the CCMA. The applicant, as I have indicated, took the point that the CCMA had no jurisdiction to arbitrate the dispute since in terms of the Act, the third respondent was required to refer the dispute to this court.

[5] The commissioner's conclusion that the CCMA had jurisdiction to arbitrate the dispute rests on two premises. The first is that it was not clear that Hopwood had been retrenched – the letter addressed to her on 23 September made no mention of retrenchment or any reasons relating to the applicant's operational requirements. Secondly, the commissioner reasoned, even if Hopwood had

been retrenched, there was no multiple retrenchment More particularly, as at 1 October, Hopwood was no longer an employee of the applicant and was obviously not employed by the applicant at the time that a consultation process was initiated. At that point, the third respondent was the applicant's sole employee. In paragraph [16] of the award, the commissioner concludes as follows:

> 'As a separate consultation\termination process in respect of the applicant only commenced about two weeks after Ms Hopwood had already left the company, the applicant was at that stage the sole employee and they could not have been a multiple retrenchment. Furthermore, as the applicant was terminated on 28 October 2010 and Miss Hopwood had been terminated by the 1 October 2010. The dates of dismissal were different which negates the contention of a multiple retrenchment."

[6] The basis for the point in *limine*, as I have indicated, is that for the purposes of s 191 of the Act, more than one employee was dismissed by reason of the applicant's operational requirements, and that the matter therefore was required to be referred to this court for adjudication.

[7] Section 191 (12) reads as follows:

> '(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.'

[8] I turn next to the grounds for review. The grounds that are reflected in the founding affidavit are based on the assumption that the application is a so-called reasonableness review and in particular, that the commissioner failed properly to assess the evidence before him, and came to a decision to which no reasonable decision-maker could come. In particular, it is contended that the reason for what amounted to the termination of employment arising from the same factual circumstances in respect of both the third respondent and

Hopwood was the applicant's operational requirements. That being so, the CCMA had no jurisdiction to entertain an unfair dismissal dispute referred to it by the third respondent and the commissioner's decision to the contrary amounted to a reviewable irregularity.

[9] In my view, there is no merit in the applicant's submissions. First, the test for review in an application such as the present is not the reasonableness or otherwise of the commissioner's decision. Rather, the court is to determine whether objectively speaking there were, at the relevant time, facts which served to confer jurisdiction on the CCMA. This is a factual enquiry and this court must decide on this basis whether or not the commissioner was correct. In other words, the reasonableness or otherwise of the commissioner's ruling is not relevant.

[10] This much the applicant's attorney appears to have recognised and conceded in the heads of argument filed prior to the proceedings. But the heads do not reflect the case made out in the affidavits, by which the applicant remains bound. For this reason alone, the application stands to be dismissed.

[11] In any event, and more fundamentally, I am not satisfied that the commissioner was incorrect in coming to the conclusion that he did. On the material before the commissioner, it is not at all clear that Hopwood was dismissed for a reason relating to the applicant's operational requirements. On the face of it, alternative employment had been secured for her and she accepted that employment and the salary that she was owed in full and final settlement of any claim against the applicant. While the applicant's operational requirements no doubt gave rise to Hopwood's termination of employment, there is a compelling case to be made that by accepting the offer of alternative employment on the terms she did, there was no dismissal at the initiative of the applicant, and that her employment terminated by mutual agreement. In other words, what the applicant assumes in the present application, mistakenly in my view, is that Hopwood was dismissed in the sense that the word 'dismissal' is defined in s 186(1) of the LRA, and that the

reason for her dismissal was one related to the applicant's operational requirements.

[12] The wording of s 191 (12) admits a considerable degree of ambiguity. But the one thing that does not provide, contrary to what the applicant contends, is that the jurisdictional moment it creates lies in the reason for dismissal. The reason for dismissal is a given - what is relevant is the existence or otherwise of a consultation procedure initiated in respect of a single employee. In the present instance, on the facts, the applicant initiated a consultation process only in respect of the third respondent. It follows that the CCMA has jurisdiction to entertain the third respondent's claim. The application for review accordingly stands to be dismissed.

[13] Since the application is unopposed, the issue of costs does not arise. Had the matter been opposed, I may have been inclined toward an order for costs on a punitive scale. This dispute concerns the dismissal of an individual employee, more than two years ago. Had the applicant not resorted to technical, point-taking approach that it did, this matter would have been finalised a long time ago. Instead, the arbitration hearing, to which the third respondent is entitled, has yet to commence. This is entirely the fault of the applicant's legal representatives, whose conduct in this matter merits censure.

For the above reasons, I make the following order:

1. The application is dismissed.
2. The matter is remitted to the second respondent for an arbitration hearing before a commissioner other than the first respondent.

Andre van Niekerk
Judge of the Labour Court

Appearance
For the applicant: Ms S Morgan, Snyman Attorneys