REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2996/10

In the matter between:

CITY OF JOHANNESBURG **Applicant**

and

SOUTH AFRICA LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

SMANGA TOLI N.O **Second Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS UNION **Third Respondent**

WILLY LEKOLOANE **Fourth Respondent**

MATSHEDISO MOGASE **Fifth Respondent**

Heard: **19 December 2012**

Delivered: **16 May 2013**

Summary: **Review of a jurisdictional ruling- Labour Court has exclusive jurisdiction to adjudicate dispute emanating from section 34 of the BCEA- first respondent lacks jurisdiction to deal with such matters-jurisdictional ruling**

made by the second respondent reviewed and set aside- arbitration award annulled- third respondent to pay the costs of the proceedings.

JUDGMENT

NKUTHA AJ

Introduction

[1] City of Johannesburg ["applicant"] seeks to review and set aside a jurisdictional ruling made by the Commissioner, Mr S Toli ["second respondent"] on 21 August 2009, and to set aside the arbitration award made by the second respondent on 15 September 2010 under case number JMD120802.

[2] The application is opposed by the third, fourth and fifth Respondents ["respondents"].

Condonation

[3] The applicant seeks, further, condonation for late filing of the application to review the jurisdictional ruling which is late by almost two years. Even though in the notice of motion the applicant clearly requests this relief in prayer 3 thereof, the founding affidavit failed to canvass facts to support the granting of this relief.

[4] The respondents on the other hand do not seem to bemoan the said omission nor raise an objection in its answering affidavit. However, the objection was raised for the first time in the respondents' heads of argument filed on 25 January 2012.

[5] The applicant filed the supplementary affidavit in support of its applications for condonation on 8 February 2012 consequent to the respondents' objection.

The respondents saw no need to grace it with an answer; not even an oral submission was made in this regard from the bar in Court.

[6] I am satisfied with the explanation furnished for the delay. I endorse the applicant's prudent approach to continue and participate in the arbitration proceedings with a view that an award in its favour would have rendered the review of the jurisdictional ruling moot. Even though the degree of lateness is extensive, the respondents suffered no prejudice as result of the said delay and overall the applicant has good prospects of success.

[7] In the circumstances, condonation is granted.

Jurisdiction Ruling

[8] The second respondent premised his finding on the case of *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others.*[1] He recounts in his jurisdictional ruling made at the commencement of arbitration proceedings that he derived his right to arbitrate the matter from the outcome certificate confirming the dispute as unresolved and that the said outcome certificate remains valid until reviewed and set aside.[2]

Factual Background

[9] The fourth and fifth respondents are in the employ of the applicant's Development Planning and Urban Management Department. During December 2006 the applicant's forensic audit service issued its investigation report consequent to their investigation pertaining to the Cellphone Policy and non-payment of excess amount due to the service provider, Vodacom ["Vodacom"] by its employees. The applicant had to pay the outstanding amounts in excess of its subsidised limits when Vodacom failed to recover same from defaulting employees.

[10] The forensic report concerned found the fourth and fifth respondents to have exceeded their subsidised amounts by R26 483.55 and R1 520.60 correspondingly, the debts they ardently disputed. The fourth and fifth

[1] (2000) 21 ILJ 2382 (LAC).
[2] See Paragraph 11 of Jurisdictional Ruling.

respondents requested proof of indebtedness in a form of itemised billing from Vodacom to no avail.

[11] The fourth and fifth refused to sign acknowledgment of debt in accordance with the forensic report. At this, the applicant began to deduct from their salaries monies owned by them, R2000.00 monthly instalments from the fourth respondent and the whole amount due was deducted from the fifth respondent.

[12] The fourth and fifth respondents lodged an internal grievance which was unsuccessful. Consequently, an unfair labour practice dispute was referred to the first respondent and the main issue in dispute being the unlawful deduction of monies from the fourth and fifth respondents' salaries.

Grounds for Review

[13] The applicant contends, firstly, that the second respondent failed to consider whether he had jurisdiction to hear the matter and such failure amounts to irregularity.

[14] Secondly, the applicant contends that the first respondent lacked jurisdiction to determine the respondents' dispute as it pertains to the legality of the deductions by the employer from employees' remuneration. In essence, the applicant contends that the ward is a nullity since the second respondent had no jurisdiction to issue it.

Legal Principles and Analysis

[15] The crux of the matter is whether or not the certificate of outcome issued by the conciliating commissioner conferred jurisdiction to the second respondent to determine the matter concerning legality of the deduction of monies from the fourth and fifth respondents' salaries by the applicant.

[16] The second respondent's ruling seem to have been induced by *Fidelity Guards* where the Labour Appeal Court held that once a certificate of outcome is issued by a conciliating commissioner, an arbitrating

commissioner has jurisdiction to determine a dispute until such time as the certificate is reviewed and set aside.

[17] However, the facts in that case are distinguishable from the matter at hand. In *Fidelity Guards* the jurisdictional issue pertained to the late referral of the dispute to the Commission for Conciliation Mediation and Arbitration ["CCMA"]. Despite being aware of the late referral, the applicant in that case objected to the CCMA jurisdiction for the first time in its review application. Accordingly, the second respondent seriously misapprehended the context within which the learned Judge President Zondo, as he was then, dealt with the question of reasonableness of the time within which a party may object to the processing of the dispute because CCMA lacks of jurisdiction.[3]

[18] In *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others*[4] Van Niekerk J, after extensive analysis of relevant case law, succinctly provided a more practical and plausible approach which I align myself with :

> '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 the 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.'[5]

[19] This Court has, on several occasions and subsequent to *Bombardier*, endorsed the finding that a certificate of outcome issued by a commissioner has less legal significance, if at all. The second respondent's finding that unless reviewed and set aside, the certificate of outcome gave him jurisdiction to arbitrate the matter clearly shown that he misconstrued his statutory powers.

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[3] *Fidelity Guards* at para 15.
[4] (2010) 31 ILJ 2065 (LC).at para 14.
[5] See also *Seeff Residential Properties v Mbhele NO and Others* (2006) 27 ILJ 1940 (LC) at para 12.

[20] Furthermore, regard must be had to the provisions of Rule 22 of the CCMA Rules which enjoined a commissioner to deal with a jurisdictional issue if during arbitration it becomes apparent that it has not been determined. In essence, the second respondent should have satisfied himself that, based on evidence before him, he had jurisdiction to arbitrate the matter.

[21] Reliance on the outcome certificate was misplaced and did not amount to a proper application of the second respondent's mind to Rule 22 obligation for, at least, one or more or all of the reasons hereunder.

(i) The respondents had conceded in their submission, as recorded in paragraph 5 of the jurisdictional ruling, that the dispute before the second respondent had nothing to do with unfair labour practice as it did not relate to benefits as provided for in section 186(2)(a) of the Labour Relations Act 66 of 1996 as amended ["LRA"].

(ii) The main issue in dispute had to do with amounts of money allegedly deducted from the fourth and fifths respondents' salaries in breach of section 34 of the Basic Conditions of Employment Act 77 of 1997 as amended ["BCEA"].

(iii) Section 77(1) of the BCEA grants this Court exclusive jurisdiction in respect of all matters in terms of that Act, subject to the Constitution and the jurisdiction of the Labour Appeal Court and except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92 or where that Act provides otherwise.

[22] In *S A Rugby Players Association and Others v S A Rugby (Pty) Ltd and Others,*[6] the Labour Appeal Court, following the approach in In *Benicon Earthworks and Mining Services (EDMS) BPK v Jacobs NO and Others*[7] held that:

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a

[6] (2008) 29 ILJ 2218 (LAC) at para 40 .
[7] (1994) 15 ILJ 801 (LAC) at para 804 C to D.

matter to be decided by the Labour Court... The CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon*'s case the Court said at 804C-D:

> 'In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit...'

[23] The same approach was endorsed in *Sanlam Life Insurance Ltd v CCMA and Others,*[8] wherein the Labour Appeal Court stated that:

> 'It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute. The issue of jurisdiction is dependent on the answer to this question. In my view the Labour Court erred in holding that the issue of jurisdiction was an interlocutory point which the commissioner could revisit and on which he could perhaps later come to a different conclusion. The Labour Court was called upon to decide de novo whether there was an employer/employee relationship between the parties. It was not called upon to decide whether the commissioner's findings were justifiable or rational.'[Emphasis added]

[24] It was argued on behalf on the applicant that the second respondent's failure to consider the existence of a jurisdictional facts amounts to a gross irregularity rendering the award reviewable on that ground alone, a submission correctly conceded by the respondents in Court. However, the respondents argued further that cell phone allowance is a benefit in terms of the section186(2)(a) of the LRA and therefore it is merely the second respondent's incorrect reliance on section 34 of the BCEA that should be

[8] (2009) 30 ILJ 2903 (LAC) at para17.

reviewed and set aside. Instead of remitting the matter to CCMA, this Court should replace the award with the order that the a cell phone allowance is a benefit section186 (2)(a) of the LRA and the result would remain the same.

[25] The respondents' proposition stands to be rejected, firstly, because it is flawed in the light of the facts that they had placed before the second respondent, which were manifestly about unlawful deductions in terms of section 34 of the BCEA. Secondly, and disconcertingly, it is an opportunistic afterthought which is not only a deviation from the respondents' written submissions, but amounts to a counter review application lodged from the bar.

[26] In conclusion, it is abundantly clear that the second respondent misconstrued the legal principles relating jurisdictional authority of the first respondent. It is discernible from above that this Court has exclusive jurisdiction to adjudicate dispute in terms of section 34 of the BCEA. In coming to the conclusion that the first respondent had the requisite jurisdiction to arbitrate the dispute, the second respondent committed a material error of law and his jurisdictional ruling stands to be reviewed and set aside accordingly.

[27] In light of the above, the arbitration award is accordingly nullified. The only issue remaining is whether or not to remit the matter to the first respondent. The finding that the first respondent lacked jurisdiction to deal with the matter has in essence deposed of the matter. Remitting it back to the first respondent is accordingly rendered moot.

Costs

[28] There is no reason to depart from the usual rule that costs follow the result in respect of the third respondent, who is the fourth and fifth respondent's trade union and represented them the during arbitration proceedings. The respondents opposed the relief sought by the applicant even though they had consistently maintained during the arbitration proceedings that the dispute was about unlawful deductions.

[29] Given their late concession, the respondents may well have been better advised to abide by this Court's decision, rather than to oppose the application.

[30] For these reasons, I make the following order:

1. The jurisdictional ruling made by the second respondent on 21 August 2009 is reviewed and set aside and, for it, is substituted with the following order:

   'That this Court has exclusive jurisdiction to adjudicate dispute emanating from section 34 of the BCEA and the first respondent, South Africa Local Government Bargaining Council, accordingly lacks jurisdiction to deal with such matters.'

2. The arbitration award made by the first respondent on 15 September 2010 is accordingly annulled.

3. The third respondent is to pay the costs of these proceedings.

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P Nkutha

Acting Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	Advocate FA Boda
	Instructed by Norton Rose Attorneys.
FOR THE RESPONDENTS:	Advocate M Euijesil
	Instructed by Cheadle Thomson & Haysom.