REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P285/07

In the matter between:-

THEMBASILE JUSTICE MAKINANA &

15 OTHERS **Applicants**

and

ALBERT MULLER HARBRON t/a HARBRON QUARRIES

AND GROENENDAL BOERDERY **Respondent**

Heard: 20 August 2012

Delivered: 14 February2013

Summary: application to prevent respondent from denying he is employer – dispute as to identity of employer – commissioner ruling respondent is employer –t ruling binding on respondent for purposes of trial. Unless ruling set aside

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JUDGMENT

GUSH J

[1] This is an interlocutory application brought by the applicants for the following relief:

[1] Declaring that the arbitration award, issued under the auspices of the commission for sedation mediation and arbitration under case number ECPE 2971 – 05 where it was found that the respondent was the true and only employer of the applicants, is binding for the purposes of the present trial proceedings brought under the above case number.

[2] The applicants had referred a dispute to the CCMA following their dismissal. The applicants had cited Harbron Quarries as the employer. It is apparent from the pleadings, that on 12 July 2006 the dispute was enrolled for an *in limine* hearing before a Commissioner, Ngcola Hempe. It appears from the *in limine* ruling by Hempe that the purpose of the hearing was, in accordance with a prior ruling issued by a Commissioner Faizal Fataar, to enquire into and determine who the applicants 'real employer' was.

[3] The pre-trial minute filed by the parties in the main application records that it is common cause that after the applicants had filed a dispute the respondent had raised a point *in limine* before the CCMA in averring that a Mr Andre Gerber was the applicant's employer and not the respondent. In order to deal with this point *in limine* Mr Andre Gerber was joined as a respondent with Harbron Quarries.

[4] At the *in limine* hearing, the applicants were represented by an official from their union and the then respondents, both Harbron Quarries and Gerber were represented by a Mr Johann de Jager from COFESA, an employers' organisation.

[5] Hempe, the arbitrator, in his ruling, considered the submissions made by both parties, analysed their submissions and issued the following ruling:

1 Albert Muller Habron of Habron Quarries is the owner, the employer and the correct respondent in this matter.

2 Future communications and correspondence must be sent to an addressed to Albert Muller Habron.

3 In view of the expiry of the 30 days since the application for conciliation was made a certificate on non-resolution is simultaneously issued with this ruling.(sic)[1]

[1] *In limine* ruling pleadings page 12

[6] On 19 October 2006 the matter was enrolled for arbitration of the dispute before an arbitrator appointed by the CCMA, this time Ms Julia Cameron. The applicants were again represented by their union official and the respondents, both Harbron Quarries and Gerber, were represented by an attorney, a Mr S Laubscher.

[7] The jurisdictional ruling records that at the outset of the arbitration the applicants' representative confirmed that the basis of the dispute arose from an allegation that the applicants had been dismissed because they had joined a trade union. Ms Cameron advised the parties that as the dismissal fell under the definition of an automatically unfair dismissal it accordingly should be referred to the Labour court as the CCMA lacked jurisdiction to arbitrate the dispute. Ms Cameron issued a ruling that the CCMA did not have jurisdiction to arbitrate the dispute.

[8] Pursuant to the ruling issued by Ms Cameron, the applicants filed a statement of case with this court in which they aver they had been unfairly dismissed by respondent, who was cited as Albert Muller Harbron t/a Harbron Quarries and Groenendal Boerdery.

[9] There is nothing in the pleadings to suggest that the respondents did anything to challenge the *in limine* ruling by Commissioner Hempe that Albert Muller Harbron, the respondent, was the applicants' employer after the ruling or when the dispute was enrolled to be arbitrated.

[10] In the applicants' statement of claim filed with this court, the applicants specifically aver that they were employees of Albert Muller Harbron t/a Harbron Quarries and Groenendal Boerdery and that he was their employer.[2]

[11] In his response to the applicants' statement of case, the respondent admitted that he traded as Harbron Quarries but denied that he traded as Groenendal Boerdery. Despite the ruling by an arbitrator Hempe, the respondent denied that he was the 'employer of the applicants'.[3]

[12] The pre-trial minute filed by the parties simply records that it is common cause that the CCMA had issued a ruling by arbitrator Hempe that 'Albert Muller

[2] Statement of claim page 5 paragraphs 19 and 20
[3] Response to applicant statement of case page 31 paragraphs 3 and 4

Habron of Habron Quarries is the owner, the employer and the correct respondent in this matter'. The consequence of this ruling is not dealt with and it is not mentioned again.

[13] Likewise, conspicuous by its absence is any reference or challenge to Commissioner Hempe's *in limine* ruling by the respondent in the pleadings. It is abundantly clear that the respondent has not at any stage challenged or sought to review the ruling issued by the Commissioner Hempe. In particular the respondent simply refrained from mentioning the *in limine* ruling in its pleadings nor does he attempt in any way whatsoever to show that the ruling is incorrect. In fact it appears as if the respondent ignores the *in limine* ruling in the hope that it might go away.

[14] The pre-trial minute was filed on 20 September 2009 and on 6 May 2010 the applicants filed this application for an order that the respondent is bound by the ruling of commissioner Hempe for the purposes of the trial.

[15 The respondent opposed the applicant's interlocutory application and *in limine* raised an issue concerning the founding affidavit in the application alleging that it is hearsay and that accordingly the application should be dismissed.

[16] The founding affidavit is deposed to by the applicants' attorney who records that he is duly authorised to depose to the affidavit and to bring the application on behalf of the applicants (which is not challenged by the respondent). The deponent in his affidavit records the sequence of events which led to the *in limine* ruling by a Commissioner Hempe and refers to that portion of the respondent's plea where the respondent denies that he was the employer of the applicants.

[17] The respondents' objection is based on the averment that the deponent to the affidavit cannot depose to these facts as he was not involved in any of the matters before the CCMA and therefore his affidavit is hearsay. The respondent's point *in limine reads* 'it is submitted that the attorney for the applicants cannot dispose to this affidavit as he was not involved in any the matters in the CCMA and accordingly should the application be struck and is it based on hearsay'. (sic)

[18] This objection to the founding affidavit ignores the fact that the issue in question is the effect of the rulings made by the CCMA's commissioners in this matter. It is not necessary for the deponent to have been present at the CCMA in order to place before the court the relevant rulings. I therefore dismiss the respondent's point *in limine*.

[19] It is the applicants' case that the Commissioner's *in limine* ruling to the effect that the respondent Albert Muller Habron was the employer and the correct respondent renders the issue of the identity of the employer *res judicata* and is accordingly binding on the respondent in the trial.

[20] The respondent in turn disputes that the issue of the identity of the applicants' employer is *res judicata* and argues that the relevant principle to be applied is 'issue estoppel' and that these principles properly applied should result in the applicants' application being dismissed.

[21] I am of the view that neither the applicant's argument on res judicata nor the respondent's "issue estoppel" apply and therefor in the specific circumstances of this matter it is not necessary, for the reasons set out below, to consider whether the *in limine* ruling renders the question of the identity of the employer *res judicata* or whether the applicable principle is 'issue estoppel'. There has been no challenge to the *in limine* ruling by applying to review it or even challenging the ruling in the pleadings and in addition there is absolutely nothing on record to suggest that the ruling is wrong, apart from the bald averment in the respondent's heads of argument that "it is an undisputable fact on the papers that the ruling was in fact wrong ..." .

[22] As the ruling has neither been challenged nor set aside, the crisp issue the court must decide is this: in light of the ruling is the respondent entitled to deny that he is the applicants' employer?

[23] The applicants, having been dismissed, referred a dispute to the CCMA alleging in the referral that the respondent was their employer. The respondent disputed this and the matter was enrolled to determine who the employer was. After hearing the parties, the Commissioner appointed to determine the matter issued a ruling that the respondent was the employer.

[24] The CCMA clearly fulfilled its function as required by sections 133 and 135 of the Labour Relations Act.[4] The CCMA duly appointed a Commissioner to determine the issue of the identity of the employer and to conciliate the dispute. The Commissioner ruled that the respondent was the employer and the correct respondent and issued the requisite certificate that the dispute had not been resolved. The respondent appears to suggest that the CCMA's descision on the identity of the respondent was not a descision taken in the conciliation process but was an "in limine proceeding". The respondent further challenges the issueing of the certificate of non resolution given the time that elapsed before it was issued.

[25] The respondent not only participated in the hearing to determine the identity of the employer, but initiated the enquiry by challenging the averment in the referral that he was the employer. As is set out below conciliation cannot logically be conducted until the commissioner is satisfied that the correct employer is a party to the dispute referred. Having determined this issue the commissioner correctly issued the requisite certificate. It is also so that the respondent attended the scheduled CCMA arbitration when the matter was due to be arbitrated and the arbitrating Commissioner ruled that the CCMA did not have jurisdiction and that the matter was to be referred to the Labour court. The respondent has simply ignored the *in limine* ruling and has proceeded as if it did not exist.

[26] Sections 133 and 135 oblige the CCMA to appoint a Commissioner to attempt to resolve the dispute through conciliation of any dispute referred to it and in the event that conciliation fails, to issue a certificate to that effect.

[27] Disputes about unfair dismissals are specifically dealt with in section 191 of the Labour Relations Act. The section requires an employee who disputes the fairness of a dismissal to refer such dispute to the CCMA and that the CCMA 'must attempt to resolve the dispute through conciliation'[5]. If the dispute remains unresolved and the Commissioner alleges that the reason for the dismissal is automatically unfair, the dispute may be referred to the Labour Court.

[4] Act 66 of 1995
[5] Section 191(4)

[28] It is a statutory requirement therefore that in order for an alleged automatically unfair dismissal dispute to be adjudicated, it must have been conciliated and a certificate issued that the dispute remains unresolved.

[29] It is clear that at the commencement of the conciliation process a Commissioner is obliged to determine for the purposes of conciliating the dispute, whether the respondent employer before him or her is the correct employer of the employee or employees.

[30] In circumstances where a dispute regarding an unfair dismissal is referred to the CCMA and the respondent in the referral challenges the averment that it is the employer, it is logically necessary for the commissioner appointed to conciliate the dispute, to proceed to determine who the correct employer is in order to comply with the statutory obligation to conciliate the dispute.

[31] Having established or ruled on the identity of the employer, the CCMA Commissioner must then conciliate the dispute and issue a certificate of non-resolution in order for the dispute to be adjudicated. This is precisely what transpired in this matter.

[32] The respondent challenged the applicants' averment that he was the employer. The CCMA accordingly appointed Commissioner Hempe to conduct a hearing in order to determine this issue, which he did.

[33] The ruling is a jurisdictional fact upon which the applicants have brought their application. As such it remains a jurisdictional fact until it is set aside. In the absence of any attempt by the respondent to set aside the *in limine* ruling, they are bound by it. Section 158(1)(g) of the Labour Relations Act specifically provides that the Labour Court has the power to review such a ruling. The respondents however have not elected to challenge the ruling. It would make a nonsense of the dispute resolution process if a determination by a commissioner as to the identity of the employer (in particular in the circumstances of this matter), which is necessary to establish the jurisdictional facts upon which an unfair dismissal may be adjudicated are simply ignored. If the respondent is not the employer then no dispute can exist between the applicant's and the respondent and there would be nothing to adjudicate.

[34] In the circumstances I am satisfied, in the absence of the ruling having been set aside by this court, that the respondents are bound by this ruling for the purposes of the trial for so long as the determination that the respondent is the employer remains in effect. There is no reason why the costs should not follow the result.

[35] I therefore grant the following order:

1. The *in limine* ruling issued under the auspices of the Commission for Conciliation Mediation and Arbitration under case number P2971-05 that the respondent 'is the employer and correct respondent in this matter', unless reviewed and set aside, is binding on the respondent for the purposes of the trial;
2. The respondent is ordered to pay the applicants' costs.

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D H Gush
Judge

APPEARANCES

APPLICANT:	Adv M Euijen
	Instructed by Fabian Pretorius Attorneys
RESPONDENT:	M Niehaus
	Instructed by Minnaar Niehaus Attorneys