IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

Case No: D1256/13

In the matter between:

PECTON OUTSOURCING SOLUTIONS CC	Applicant
and	
PILLEMER, B N.O.	First Respondent
CCMA	Second Respondent
THULASIZWE SHOZI & 205 OTHERS	Third & Further Respondents

Heard: 9 September 2015

Delivered: 12 November 2015

Summary: **Dismissal - fixed term contract may lawfully terminate automatically by the coming into being of an event, thus no dismissal - however, an automatic termination clause that prevents employees exercising their rights in terms of the LRA is unenforceable and such a termination therefore a dismissal - Temporary Employment Services - automatic dismissal clauses – validity thereof – unlawful and invalid in certain circumstances – Jurisdiction - CCMA lacking jurisdiction over mass retrenchments even if already seized with determining whether a dismissal occurred**

JUDGMENT

Whitcher J

Introduction

[1] This is an application to review and set aside the CCMA award of the first respondent, (the "commissioner") in which she found that the applicant dismissed the third and further respondents ("respondents") and that this dismissal was procedurally unfair.

Background Facts

[2] For ten years, the applicant supplied temporary employment services solely to Unilever, in terms of a service agreement. The applicant placed the respondents all at Unilever, its only customer.

[3] Each respondent signed and concluded a fixed term contract of employment with the applicant, the fixed term being directly linked to the continuation of the service agreement between the applicant and Unilever. The relevant term of the agreement was:

> 'On cancellation of the service contract between Pecton Outsourcing Services and the client (Unilever), this employment contract shall automatically terminate. Such termination shall not be construed as a retrenchment, but shall be a completion of the contract'

[4] At the end of 2012, Unilever approached the applicant and sought a reduction in the rates of pay of the personnel supplied to it by the applicant. Unilever demanded that the applicant reduce the pay rates or face having its service

agreement terminated. At the time, the applicant had some 400 employees on site at Unilever.

[5] The applicant duly reduced the employees' rate of pay. This led to a number of disputes and disruption of work. In May and June 2013 there were intermittent unprotected strikes by the applicant's employees at Unilever.

[6] Unilever were displeased by the unprotected strikes. In July 2013, the applicant's employees again embarked upon an unprotected strike at Unilever. Their demand was that they be paid the difference between their present salaries and the salaries they earned before the reduction.

[7] In a letter received by the applicant on 23 July 2013, Unilever gave the applicant notice in writing of the termination of the whole service agreement with the applicant.

[8] The applicant took the view that, as the service agreement between the applicant and Unilever formed the basis of the employment of the respondents, their employment with the applicant also automatically terminated.

[9] On 24 July 2013, the applicant gave the respondents notice that their contracts of employment had terminated in terms of the specific provision referred to above. The notice recorded that termination took place on the basis as provided for in the employment contracts, and was thus an automatic termination based on contract completion.

[10] The respondents lodged an unfair dismissal dispute at the CCMA.

<u>The CCMA award</u>

[11] At the CCMA, the applicant contended that the respondents were not dismissed by it at all but rather that their contracts of employment expired when Unilever cancelled its service contract with the applicant.

[12] The commissioner found that the respondents were dismissed by the applicant. The commissioner accepted that such dismissal was substantively fair. But, because the dismissal was not preceded by any kind of process, the commissioner found the dismissal to be procedurally unfair, and awarded compensation.

The review test on jurisdictional rulings

[13] The applicant's case is based on two issues, the first being whether the respondents were indeed dismissed, and the second being whether the CCMA, even if these respondents were dismissed, had jurisdiction to entertain any dispute about the fairness of such dismissals. Both of these issues concern the jurisdiction of the CCMA.

[14] Where it comes to the issue of jurisdiction of the CCMA, the Labour Appeal Court in *Fidelity Cash Management Service v CCMA and Others*[1] held that if the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise.

[15] In *Trio Glass t/a The Glass Group v Molapo NO and Others*[2], and where considering a review based on the issue of the existence of a dismissal, the Court held:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue *de novo* in order to decide whether the determination by the commissioner is right or wrong.'

[1] (2008) 29 ILJ 964 (LAC) at para 101.

[2] (2013) 34 *ILJ* 2662 (LC) at para 22. This dictum was referred to with approval *in Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12 footnote 2.

[16] Consequently, I must determine this matter *de novo*, deciding whether the commissioner's findings are objectively correct and not whether her decision was one that no reasonable decision maker would have taken.

The existence of a dismissal

[17] The commissioner made the following factual determinations:

a. The respondents concluded an employment contract with the applicant containing the specific term as set out above;
b. The respondents embarked upon an unprotected strike in July 2013, but the employment of the respondents did not terminate because of the unprotected strike. However, they did carry some fault as a result for what happened to them;
c. Unilever terminated the service agreement with the applicant and this was the actual reason for the termination of the employment of the respondents;
d. Unilever was the applicant's only customer and the only place where the applicant could provide work to employees.
e. The notices of termination of employment presented to the respondents specifically stated that employment purportedly automatically terminated in terms of contract completion, with specific reference to the employment contract itself.

[18] The applicant contends that the only basis for the commissioner's finding that the respondents were dismissed was a conclusion of law, to the effect that a contract of employment can only be terminated in terms of the LRA and, further, that an employer cannot contract out of the LRA or the liability to pay notice pay or severance pay. The applicant further argues that this legal conclusion is wrong and constitutes a misdirection. It argues that an employment contract may

lawfully terminate in ways other than dismissal, such as the expiry of a fixed term contract.

[19] The relevant portion of the definition of dismissal in the LRA is Section 186(1)(a). It states that: 'Dismissal means that an employer has terminated employment with or without notice'. Dismissal is thus an employer-driven termination of a contract of employment. However, a contract of employment may lawfully terminate in ways other than the employer undertaking some action that leads to the termination. A fixed term contract may, for instance, expire by effluxion of time, the completion of a particular task or the happening of a specific event. The applicant is correct that the enactment of s186 of the LRA did not, as a general rule, prevent the continued enforceability of fixed terms contracts in terms of which employment may be automatically terminated (see *Fedlife Assurance Ltd v Wolfaardt*[3]).

[20] I do not understand the commissioner, though, to have stated that automatic terminations of fixed-term contracts are necessarily unlawful. The applicant overstates the extent of her possible error. When, in the award, the commissioner says: "The law in this respect is plain. Contracts of employment must *be terminated* in terms of the Labour Relations Act and an employer cannot contract out of its terms or the liability to give notice or pay retrenchment pay" (emphasis added), implicit in this formulation is that the employer indeed performed the termination.

[21] On a plain reading of the respondents' contracts, the commissioner may well have made an error by assuming that the applicant performed any terminations. This is since the contracts provided for automatic termination should Unilever cancel the underlying service contract. When this event happened, the fixed term contracts were apt to expire and the employer did not have to do anything other than inform the respondents of this legal fact. On the other hand, if there

[3] (2001) 22 ILJ 2407 (SCA) at para 17 – 18

was a reason in law for the commissioner declining to enforce the termination clause relied upon by the applicant, then the terminations could only have been dismissals, by definition, *effected by* the applicant. In this case, the commissioner would have had jurisdiction to pronounce on the substantive and procedural fairness of the employer-driven terminations.

[22] In my view, therefore, the only potentially sustainable complaint against the commissioner is her ruling that the automatic termination clause was an attempt to contract out of the applicant's retrenchment obligations in terms of the LRA. It seems clear that because she adopted this view she declined to enforce the automatic termination clause and thus assumed jurisdiction over the dispute as a dismissal matter.

[23] There are three classes of automatic termination clauses in fixed-term contracts: those providing for the expiry of the contract on a set date, the completion of a set task or the happening of an event. The clause most open to abuse, in the sense of 'contracting out' of an employee's LRA right not to be unfairly dismissed, is the happening of an event. These clauses should rightly attract the scrutiny of the CCMA and courts to ensure that, however craftily they are drafted, temporary employment service employees' rights under the LRA are not circumvented and public morality is not offended by their enforcement.

[24] The LRA anticipates that some employers, exploiting their superior bargaining position at the time a contract is concluded, may attempt, in contract form, to prevail upon employees not to exercise some of their rights in terms of the LRA. Relevant portions of section 5 of the LRA read as follows:

> 5. Protection of employees and persons seeking employment
> (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act."

[25] In *Mahlamu v CCMA and Others*[4], the Court dealt with an automatic termination clause in an employment contract that provided for automatic termination in the event of a particular customer of the employer no longer requiring the services of the particular employee, or the customer no longer wishing to deal with the particular employee. The Court held as follows in this regard:[5]

> 'In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s 188 of the LRA, is precisely the mischief that s 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in s 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.'

[26] The applicant submitted that the reasoning of the commissioner, to the extent that it flowed from the *ratio* in *Mahlamu,* was, in essence, that all termination provisions in fixed term contracts linked to the specific event of a loss of customer contracts by an employer fell foul of Section 5 of the LRA. The applicant submitted that this reasoning cannot be correct, even in terms of the judgment in *Mahlamu*. This is because the Court in *Mahlamu* went on to hold:[6]

[4] (2011) 32 ILJ 1122 (LC)
[5] Id at para 22
[6] Id at para 23

> ‘This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of *Sindane* to be - that ordinarily, there is no dismissal when the agreed and anticipated event materializes (to use the example in *Sindane*, the completion of a project or building project), subject to the employee's right in terms of s 186(1)*(b)* to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed-term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed-term, the end of the term being defined by the happening of a specified event, there is no conversion of a right not to be unfairly dismissed into a conditional right. Without wishing to identify all of the events the occurrence of which might have the effect of unacceptably converting a substantive right into a conditional one, it seems to me that these might include, for example, a defined act of misconduct or incapacity, or, as in the present instance, a decision by a third party that has the consequence of a termination of employment.’

[27] I have already found that the commissioner’s brief summation of the law is best understood to have already, impliedly, discounted the enforceability of the automatic termination clause in question because, in her view, it impermissably contracted out of the LRA. Thus the commissioner did not fail to appreciate that fixed term contracts may terminate in ways other than dismissal and, specifically, that they may lawfully terminate by the coming into being of an event. The contention that she misdirected herself on this fundamental legal point is a red-herring. It seems that because the commissioner found that the automatic termination clause ought not to be enforced, the subsequent termination became a dismissal at the applicant’s instance. If the commissioner committed any jurisdictional error it was to find that the automatic termination clauses impermissibly sought to contract out of the LRA. It is this question I will proceed to examine.

[28] The court in *Mahlamu* found that enforcement of a contractual term that provided for the termination of a temporary employment service employee's contract at the whim of a client was at variance with Section 5 of the LRA:[7]

> 'In the present instance, the upshot of the commissioner's award is that the applicant's security of employment was entirely dependent on the will (and the whim) of the client. The client could at any time, for any reason, simply state that the applicant's services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the applicant with no right of recourse. For the reasons that follow, and to the extent that the commissioner regarded this proposition to be the applicable law, he committed a material error of law that must necessarily have the result that his ruling is reviewed and set aside.'

[29] The applicant seeks to distinguish the termination clause invoked in the present case from the clause found to be impermissible in *Mahlamu* on the basis that the latter applied where the event of a fixed term employment contract was defined with reference to actual conduct of the employer itself, either of its own accord or as a result of the whims and demands of its customer, in respect of a particular employee.

[30] The Court in *Mahlamu* referred with approval to *Sindane v Prestige Cleaning Services*[8], where the court said the following:

> 'It is accepted that apart from a resignation by an employee (unless constructive dismissal is claimed consequent to resignation), an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA, and more particularly, in terms of s 186(1)*(a)*. These circumstances include the following: (i) the death of the employee; (ii) the natural expiry of a fixed-term employment contract entered into for a specific period, or upon the happening of a particular event, e.g. the conclusion of a project or

[7] Id at para 10
[8] (2010) 31 ILJ 733 (LC) 16

contract between an employer and a third party. In the first instance, if the fixed-term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed-term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) (subject to what is stated below in respect of the remedies provided for by the LRA to an employee who has signed such a contract) constitute a 'dismissal', as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. The same holds true for a fixed-term employment contract linked to the completion of a project or building contract. These fixed-term employment contracts are typical in circumstances where it is not possible to agree on a fixed time period of employment, i.e. a definitive start and end date, as it is not certain on what exact date the project or building contract will be completed, and hence, the termination date is stipulated to be the completion date of the project or building contract. Similarly as in a fixed-term employment contract with a stipulated time period, when a fixed-term employment contract linked to the completion of a project or building contract terminates, such termination will not (necessarily) be construed to be a dismissal as contemplated in s 186(1)*(a)*. Thus, the contract terminates automatically when the termination date arrives, otherwise, it is no longer a fixed-term contract ….'

[31] The applicant argued that central to the reasoning by the Court in *Sindane* was the fact that a fixed term contract is not terminated because of an act by the employer.

[32] Summarising the law, the applicant contends that what the Courts have determined in the case of terminations of fixed contracts based on an event, is that where the event is orchestrated by the employer, or where it could have been avoided, or where the true cause of the termination is not the lapse or completion of the contract, or where the termination is directly linked to the whims of a customer of the employer vis-à-vis that particular employee, the employer's reliance on the fixed-term contract would still be deemed a dismissal of the

employee. It argues that none of these apply *in casu* as the client terminated the contract. Specifically, the employer itself did not initiate the action or event that gave rise to the termination and the third party conduct that gave rise to the termination was not aimed at the particular employee himself or herself.

[33] I can appreciate the distinction the applicant draws between the client in *Mahlamu* who targeted an individual while the underlying contract with the temporary employment service (TES) remained in place and the client in this matter who cancelled the entire service contract, essentially targeting every employee as well as the temporary employment service (TES). However, to quote the legal mischief identified in *Mahlamu* fully, the automatic termination clauses in both matters left the employees' security of employment "entirely dependent on *the will* (and the whim) of the client" (emphasis added).

[34] It seems to me that asking whether the 'true cause' of the termination is the lapse or completion of a contract begs the question of whether, in the circumstances of each case, the termination clause is enforceable given section 5 of the LRA.

[35] I further do not see how the employer in *Mahlamu* could be said to have initiated the termination of the employee's contract whereas the applicant herein did not. It is the fact that an automatic termination clause is deemed impermissible in law that causes the termination effected thereby to be at the instance of the employer, and thus a dismissal. It is not the other way around where an employer is deemed to have acted to terminate the contract and therefore the automatic termination clause is not permissibly invoked. The applicant in this matter had the same options open to it as the employer in *Mahlamu*. Faced with the will of its client that the applicant's TES employees would no longer provide services on the client's site, it could either dismiss them procedurally or invoke an automatic termination clause. The applicant's invocation of the automatic termination clause is, as in *Mahlamu*, the proximate action causing the

termination of employment contracts. At the risk of repeating myself, the real question is whether this clause was enforceable or not.

[36] I was referred to *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane and Others*[9] where Snyman AJ, (coincidentally also the attorney for the applicant in this matter) found that:

> 'where a client of the temporary employment service unilaterally and even without reason terminates the service agreement with the temporary employment service and/or demands the removal of employee(s) of the temporary employment service from its site and/or excludes such employees from its site, this cannot in itself and on its own constitute a deemed act of dismissal by the temporary employment service of its employees. It is what the temporary employment service itself does or does not do, about this, that could constitute an act of dismissal.'

[37] Snyman, AJ further held:[10]

> '….. It is often the case that in the temporary employment service environment, the employment contract of the employees would provide that the employment of the employee of the temporary employment service would automatically terminate upon the termination of the service agreement between the client and the temporary employment service or where the employee is removed from the client's site. What this means is that the occurrence of a particular event brings about the automatic termination of the employment of the employee of the temporary employment service. ….'

[9] [2014] JOL 31668 (LC) at para 58
[10] Id at para 60

[38] He concluded:[11]

> '…. in the case where the whole service agreement between the client and the temporary employment service is terminated or is completed or otherwise comes to an end, then it is not an issue of individual employees being dealt with whilst the underlying service agreement still continues to exist. In such a case, the exercise by a client of a contractual right to terminate the whole service agreement is an event that could legitimately constitute an event substantiating automatic termination of a fixed-term contract. It is in my view exactly the same situation as the completion of a project or contract. In such a case, the termination of the entire underlying service agreement between the client and the temporary employment service would automatically terminate the contract of employment of the employees of the temporary employment service along with it, provided the employment contracts of the employees make specific provision for this and properly define this.'

[39] In its heads of argument, the applicant provided an example of the application of the reasoning in *Twoline Trading*: "if the entire service contract between the employer and the customer is cancelled by the customer *per se*, this event would not constitute a dismissal but an automatic termination, but where the customer demands from the employer that a particular employee be removed from its site or the contract and this demand is then considered by the employer to be the termination event, this then would be a dismissal."

[40] The applicant further argued that a pertinent example of a circumstance of employer conduct forming the basis of a purported automatic termination (and thus dismissal) is where the employer removes an employee as a director and the automatic termination event is defined as the employee ceasing to be a director. In such a case, it is clear action by the employer that gives rise to the event, in other words a direct nexus between the conduct of the employer itself and the occurrence of the event exists. Examples of this can be found in the

[11] Id at para 63

judgments of *SA Post Office Ltd v Mampeule*[12] and *Chillibush Communications (Pty) Ltd v Johnston NO and Others*."[13]

[41] The applicant therefore argues that the present matter is not one of the instances of where the termination event of the fixed term contract would constitute a dismissal. The termination of the respondents' contracts was not conduct relating to or directed at a particular employee (namely the respondents) or an act of the employer. It flowed from the loss of a service agreement between the applicant as employer and its customer, Unilever, as a whole.

[42] This line of reasoning does not persuade. First, it strikes me as an artificial and arbitrary distinction between whether the security of employment of one or all employees is adversely affected by the will of a client. In this case, the client's will over the employees was just as unilaterally imposed as in *Mahlamu* even though its aim was less pointed. Second, as mentioned above, whether a termination of an employment contract is an act initiated by the employer depends on a prior legal determination of whether the automatic termination clause should or should not be enforced. This is perfectly in line with our legal regimen in which contracts of employment are enforced unless a statute or collective agreement provides otherwise.

[43] I prefer an approach that starts by examining, in all cases where the termination of TES contracts of employment are triggered by the will of a client, whether the underlying cause of the termination, *in relation to the TES employer*, is one for which employees typically are dismissed. These are reasons relating to misconduct, incapacity, operational requirements or no reason at all. In this determination, the courts should recognise the *content of the reason* for the termination over the *form* of the *contractual device* covering it. If the facts show that the reason for termination of the contract is one that typically constitutes a

[12] (2010) 31 ILJ 2051 (LAC) at para 21
[13] (2010) 31 ILJ 1358 (LC) at para 28 and 38 – 39

reason for a dismissal, then this is a clue that, as the commissioner succinctly put it, there may be an attempt to 'contract out' of section 188 of the LRA. In the absence of evidence to the contrary, the termination thus becomes a dismissal and the underlying reasons for it will be ventilated in forums the LRA has set aside for this purpose.

[44] Once the adjudicator of a dismissal dispute has a case before him or her in which an employer asserts the operation of an automatic termination clause in a fixed term contract but the facts of the matter disclose a reason relating primarily to the conduct or capacity of employees or the financial means of the TES, then such an adjudicator acquires jurisdiction over the matter as a dismissal dispute mainly because of the unenforceability of the contractual term.

[45] In this case, the reason for termination, in relation to the applicant, was financial. It had lost its only client and could no longer afford to retain its employees. Whether the employer acted to 'dismiss' them after losing the contract with Unilever is irrelevant. The automatic termination clause had the effect of depriving the employees of the right to have an operational requirements termination ventilated in court. Typically a termination for this reason would attract, at the very least, severance pay. In terms of section 5 of the LRA, this clause should not be enforced and the commissioner was correct to decline to do so.

[46] By contrast, an automatic termination clause based on an event, such as that a fixed term contract terminates when a permanent employee returns to work after absence, will not be affected by the rule above. First, there is no mischief of a client exercising its will against the employee whose fixed term contract is terminated. Second, the return of an absent employee is not a reason for termination plausibly situated within the realm of dismissal. What this means is that fixed term contracts relying on happenings other than the unilateral exercise of a client's will are in the clear. This approach is, in my view, necessary at a

policy level to cure the ill of TES providers constructing employment contracts that, while not inviting cancellation by a client in times of conflict with labour, certainly signal that the TES, and by extension the client, will not suffer significant legal and financial consequences should the client, for good reason or bad, turn its face against the workforce as a whole.

[47] The commissioner, in a succinct manner, made a perfectly correct decision. To the extent that her reasoning contradicted the ratio in *Two Line Trading,* supra, the latter judgment, is with respect, wrong. I associate myself in this regard with the reasoning of Mosime, AJ who after considering the logic, *inter alia,* of *Mahlamu* held:14

> "[51] Given the expressions about the decisions by this court in Mampeule, Nape and Mahlamu, supra, the view expressed in the Twoline Trading above cannot be correct. A contractual provision that provides for the automatic termination of the employment contract at the behest of a third party or external circumstances beyond the rights conferred to the employee in our labour laws undermines an employee's rights to fair labour practices, is disallowed by labour market policies. It is contrary to public policy, unconstitutional and unenforceable (Grogan "The Brokers Dilemma" 2010 Employment Law 6). This view is clear from all the decisions referred to above, and it is apparent from these that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. The freedom to contract cannot extend itself beyond the rights conferred in the constitution, as for instance, against slavery."

[48] This ground of review must accordingly fail.

14 *Satawu obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (JS 879/10 [2015] ZALCJHB 129).

Did the commissioner have jurisdiction to hear a retrenchment dispute?

[49] The commissioner accepted that the respondents had been dismissed by the applicant for operational requirements. The commissioner determined that the respondents should have been dismissed in terms of the procedural requirements of Section 189.

[50] The applicant submitted that if indeed there existed a dismissal, then the conclusion of the commissioner that this dismissal would be based on operational requirements would be undoubtedly correct.

[51] All the respondents were simultaneously dismissed for the exact same reason. They all pursued their dispute as an unfair dismissal dispute to the CCMA.

[52] In terms of Section 191(5)(b) of the LRA, disputes about the fairness of a mass dismissal for operational requirements can only be determined by the Labour Court, and the CCMA has no jurisdiction to entertain the same.

[53] The applicant correctly submitted that it does not matter whether the CCMA was seized with the matter. The moment the commissioner determined that there existed a dismissal for operational requirements, she had no power to decide on the fairness of that dismissal, and was compelled to have adjourned the arbitration so the dispute could be referred to the Labour Court for adjudication.

[54] In *Parliament of the Republic of SA v Charlton*[15] the LAC held as follows, with regard to the jurisdiction of the Labour Court, reasoning which applies just as well to the CCMA:

> 'Therefore, once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court may stay the proceedings and refer

[15] (2010) 31 ILJ 2353 (LAC)

the dispute to arbitration or it may, with the consent of the parties, and if it is expedient to do so, continue with the proceedings sitting as an arbitrator. It cannot deal with the dispute outside the ambit of these provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with the provisions of s 157(5) and s 158(2) of the LRA.

In resolving labour disputes a clear line must be drawn between the different fora that have been set up by the LRA.'

[55] The applicant correctly submits that it does not matter what the respondents may have classified the reason for their alleged dismissal to be. Once the commissioner determined what she considered to be the real reason for the dismissal, this moved the dispute to beyond her power to determine. In *Wardlaw v Supreme Mouldings (Pty) Ltd*[16], the LAC held:

'… it seems to us that the employee's allegation of the reason for dismissal as contemplated by s 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to resolve the dispute on the merits finally. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits.'

[56] Applying this ratio, the Court in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[17] held:

'…. An employee is entitled to refer a dispute to this court or require that a dispute be arbitrated on the basis of the reason for dismissal alleged by the employee. It is the referring party's categorization of the dispute (and nothing

[16] (2007) 28 *ILJ* 1042 (LAC) at para 23 – 24
[17] (2010) 31 ILJ 371 (LC) at para 15

more) that triggers either the arbitration or the adjudication of the dispute. To the extent that it can be said that an arbitrator or this court assumes jurisdiction upon the referral of a matter, the Labour Appeal Court has described this as a 'provisional assumption of jurisdiction.

Although the Wardlaw decision dealt with a matter referred to this court that the employer party contended ought to have been referred to arbitration (the converse is the case in the present instance), the principle to be applied is that jurisdiction is conferred on the CCMA, on a provisional basis, by the referring party's categorization of the reason for dismissal.'

[57] The applicant argued however that provisional jurisdiction cannot be final jurisdiction. Final jurisdiction is determined by the true reason for the dismissal, once established. And, *in casu*, with such reason being operational requirements, final jurisdiction only lay with the Labour Court to adjudicate the fairness of such dismissal. I endorse this view.

[58] This then only leaves Section 191(12), which provides:

'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' (emphasis added).

[59] Section 191(12) cannot apply as the dispute involves 206 employees.

[60] The commissioner thus had no jurisdiction to hear the retrenchment dispute. For this reason the award falls to be reviewed and set aside.

[61] The applicant had a measure of success so I do not believe a cost order would be appropriate.

Order

[62] Consequently, I make the following order:

(1) The arbitration award issued by the first respondent is reviewed and set aside on the basis that the first respondent lacked jurisdiction to hear a retrenchment dispute.
(2) The individual respondents may refer their dismissal for adjudication before the Labour Court.
(3) There is no order as to costs.

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Whitcher J
Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Snyman Attorneys
For the Third and Further Respondents:	Adv N S V Mfeka instructed by Maseko Mbatha Attorneys