**REPUBLIC OF SOUTH AFRICA**

**LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGEMENT**

Reportable

Case No: JR 738/16

In the matter between:

**FAMOUS BRANDS MANAGEMENT**

**COMPANY (PTY) LTD** **Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION** **First Respondent**

**RICHARD BYRNE** **Second Respondent**

**SCMAWU obo MAGOLEGO & 632 OTHERS** **Third Respondent**

**Heard:** **12 July 2016**

**Delivered:** **29 July 2016**

**Summary: Review of jurisdictional ruling – test of correctness – section 10(6)(aA) of EEA allows CCMA to arbitrate an unfair discrimination dispute concerning equal pay for equal work involving more than one applicant, where they earn less than the amount determined by the Minister.**

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**JUDGEMENT**

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VAN DER MERWE, AJ

[1] This is an application for the reviewing and setting aside of a ruling of a commissioner of the CCMA that had dismissed the employer's point *in limine* on the issue of jurisdiction.

[2] Although it came before this Court as unopposed, the issue raised is important and as far as counsel for the applicant and the Court could tell a new one.

[3] The point originally raised by the employer before the CCMA was that the CCMA did not have jurisdiction, as the dispute in question was a collective dispute that could not be heard by the CCMA in terms of section 10(6)(aA) of the Employment Equity Act 1998 ("EEA").

[4] The employer contended and maintains that the aforementioned provision allows only individual disputes to be arbitrated before the CCMA and that "collective" disputes have to be referred to this Court for adjudication. In other words, that "employee" as found in the aforementioned section means singular only and does not allow more than one employee to together approach the CCMA for arbitration.

[5] The matter originally before the CCMA was a complaint of unfair discrimination in regard to equal pay for equal work as contemplated in the EEA.

[6] The nub of the employer's case appears to be that the arbitrator's conclusion that the CCMA did have jurisdiction to hear the complaint or complaints of the

632 individual employees involved was a conclusion which a reasonable arbitrator could not have reached alternatively, was a gross irregularity and/or overstepping of powers.

[7] For purposes of this application, I shall accept that the Applicant is entitled to pursue a review on a jurisdictional point despite the existence of the recently added section 10(8) of the EEA, namely, that a person effected by an award made by a CCMA commissioner may appeal against that award to this Court. In any event, the test would be the similar.

[8] I am mindful of section 158(1)(B) of the Labour Relations Act 1995 ("LRA") which indicates that this Court may not review any decision or ruling made during arbitration proceedings conducted under the auspices of the CCMA before the issue in dispute has been finally determined. The provision, however, does allow this Court to deal with a review before final outcome of the arbitration, where the Court is of the opinion that it is just and equitable to do so. I exercise my discretion to hear this matter at this point because of the large number of persons involved (the size of the case) and because the point raised, as far as I could determine, is yet untested in our law.

[9] In as far as the Applicant is relying on a jurisdictional issue and/or an error of law pertaining to jurisdiction, the applicable review test is that of correctness.[1] Does the CCMA, objectively speaking, have the power to arbitrate this matter?[2]

[10] More specifically: Does the CCMA have jurisdiction to, after failed conciliation, arbitrate a dispute concerning alleged unfair discrimination involving so-called equal pay for equal work where more than one complaining employee are involved?



[1] *Mashego v Cellier NO and Others* (2016) 37 *ILJ* 994 (LC) at para 14. *SARS v Ntshintshi and Others* (2014) 35 *ILJ* 255 (LC).
[2] *SA Rugby Players Association v SA Rugby (Pty) Ltd and Others* (2008) 29 *ILJ* 2218 (LAC) at para 41.

[11] In this case, I shall assume that the dispute referred to the CCMA was one contemplated in section 6(4) read together with 6(1) of the EEA and that the persons involved or at least more than one of them earned less than the amount referred to in section 10(6)(aA)(ii).

[12] The employer argues that section 10(6)(A) must be read as it stands, in the singular, and should not be interpreted or applied to include the plural:

> 'If the dispute remains unresolved after conciliation … an employee may refer the dispute to the CCMA for arbitration if … or … in any other case than sexual harassment … that employee…' ([own emphasis].

[13] The employer relies on the wording used, the preamble of the Employment Equity Amendment Act 2013 ("EEAA"), the broader policy guidelines of the EEA, the Labour Relations Act 1995 and authorities which suggested there was a reason behind labour law reforms, such as to take most of the less important individual disputes out of the courts and to entrust them to quasi-judicial bodies which could deal with such disputes swiftly and relatively informally (and less costly). In this regard, the employer relied, on *inter alia*, *Department of Justice v CCMA and Others*[3] and authorities referred to therein.

[14] At the time of the most recent amendments to the EEA, the legislature must have been aware of the already existing division between matters for arbitration in the CCMA and matters for adjudication in the Labour Court, and intentionally chose to import the option for all unfair discrimination claims, by persons earning less than the prescribed amount, to be arbitrated before the CCMA. Some of these matters may be more complex and others less. Our unfair discrimination law is relatively undeveloped. An equal pay for equal work type claim by one individual may be just as complex as a claim by more than one individual. On the other hand, more than one person and even hundreds of persons could conceivably be involved in a relatively

[3] [2001] 11 BLLR 1229 (LC).

uncomplicated dispute. The fact that more than one individual are involved does not necessarily mean that a dispute is potentially more complex even if there may be more administrative or logistical challenges in dealing with a dispute involving many people.

[15] In as far as the recent amendment may also be aimed at assisting lower income employees in having their disputes adjudicated in a cost effective manner which will protect vulnerable, powerless and exploited employees,[4] nothing suggests that more than one of these persons should not be able to require of the CCMA to arbitrate their unfair discrimination dispute.

[16] I am unconvinced that either the preamble of the EEAA[5] or the broader policy guidelines of other employment legislation such as the EEA or Labour Relations Act 1995 ("LRA") inform or require an interpretation and application of the singular in section 10(6)(aA) to exclude the plural.

[17] Section 6(b) of the Interpretation Act 1957 states that in every law, unless the contrary intention appears, words in the singular number include the plural. In this particular case, I am unconvinced that there is a contrary intention.

[18] The fact that "party" is used in section 10(2) to 10(6)(a) does not necessarily support the interpretation favoured by the Applicant in this matter.

[19] I am unconvinced that section 191(12) of the LRA is of assistance to the employer. The pre-amended wording led to conflicting views concerning whether one or more persons had been contemplated.[6] The amended wording in certain circumstances allow more than one retrenched employee (arguably up to 9) to pursue a complaint of unfair dismissal in arbitration before the CCMA.



[4] See D du Toit "Protection against unfair discrimination: Cleaning up the Act?" (2014) 35 *ILJ* 2623.
[5] At best the preamble to the EEAA refers to provision for the referral of certain disputes for arbitration to the CCMA. The explanatory memorandum to the EE Amendment Bill 2012 in para 2 mentions the enhancing of the effectiveness of primary labour market institutions such as the CCMA, and in par 3.5.1 states that section 10(6) should allow for "parties" the option of referring any unfair discrimination claim to the CCMA for arbitration in the circumstances of lower paid "employees".
[6] *Bracks NO and Another v Rand Water and Another* (2010) 31 *ILJ* 897 (LAC) para 12.

[20] Elsewhere in our labour legislation, for example in sections 191(1), 191(5)(a) and (b), and 186(1) and (2) of the LRA, there is reference to "employee" complaining about an unfair labour practice or an unfair dismissal but traditionally, these provisions have been interpreted and applied to include plural. Thus, it is not unusual for more than one person to be applicants in an unfair dismissal or unfair labour practice arbitration before the CCMA. The number of such applicants can potentially be large. Some of these disputes can be complex.

[21] On an overall conspectus and in the absence of any binding authority to the contrary,[7] I am unconvinced that more than one person earning below the determined income threshold cannot pursue an unfair discrimination case based on equal pay for equal work in an arbitration before the CCMA. (This would be a so-called collective rights dispute).

[22] I am unconvinced that in this case, the arbitrator was either wrong, committed a gross irregularity or came to an unreasonable result (whether by making a material error of law, exceeding his powers or misconceiving his jurisdiction).

[23] The arbitrator's dismissal of the point *in limine* must stand.

[24] There is no attack before me aimed at the last paragraph of the ruling, where the arbitrator expressed the view that a large number of complainants in an unfair discrimination dispute could consist of groups or classes with different grounds of discrimination and comparators, each with own facts attracting different arguments and defences. This view appears to be one more of convenience, practicality or logistics. These issues could arise in any dispute that finds its way to arbitration at the CCMA irrespective of whether a few or many employees are involved. There is also no ground to interfere with this part of the ruling.

[7] PAK le Roux Contemporary Labour Law Vol 25 No 2 September 2015 at p 18-19 states that "an employee…the employee…that employee…" in the section under discussion is one of 3 exceptions where the CCMA can arbitrate, but suggests that "an individual" employee should make the referral – he concedes that such an interpretation could be easily circumvented by each employee making a separate referral and then applying for consolidation.

Order

[25] The review application is dismissed.

[26] There is no order as to costs.

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van der Merwe, AJ

Acting Judge of Labour Court of South Africa



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Appearances:

Appearance for Applicant: Advocate D Whittington

Instructed by: Fluxmans Inc

For the Third Respondent: None