IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. JA2/08

In the matter between:

ADVOCATE RAYNOLD BRACKS N.O. First Appellant
(First Respondent in the court *a quo)*

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION (CCMA) Second Appellant
(Second Respondent in the court *a quo)*

and

RAND WATER First Respondent
(Applicant in the court *a quo)*

MARTHA CHRISTINA SWART Second Respondent
(Third Respondent in the court *a quo)*

JUDGMENT

JAPPIE JA

[1] The appeal deals with the question whether the Commission for Conciliation, Mediation and Arbitration (CCMA) has jurisdiction in terms of s 191(12) of the Labour Relations Act 66 of 1995 (the LRA) to hear disputes about the procedural

fairness of dismissals for operational requirements involving a single employee. The appeal is unopposed.

[2] The First Appellant, Advocate Raynold Bracks is a commissioner at the CCMA. He was the designated arbitrator to arbitrate an unfair dismissal dispute between Rand Water and Martha Christina Swart (the First and Second Respondents). At the arbitration Swart contended that she had been unfairly retrenched in that Rand Water, *inter alia,* had failed to comply with the procedural requirements as set out in s 189 of the LRA.

[3] The First Appellant had found in favour of Swart and directed Rand Water to reinstate her in her employment. Rand Water launched an application in the Labour Court in which it sought the review and the setting aside of the First Appellants award. The review was sought on several grounds. One of the grounds upon which Rand Water relied for the setting aside of the award was that the CCMA lacked the requisite jurisdiction to hear a dispute which concerned the retrenchment of a single employee in circumstances where such a single employee alleges that the dismissal is unfair, *inter alia*, for want of proper compliance by the employer with the consultation requirements set out in s 189. S 189 requires an employer to consult with its employee/s or their representatives before embarking on a retrenchment program. Failure to comply with s 189 could render a dismissal both substantively as well as procedurally unfair.

[4] In the Labour Court, Rand Water had argued that on a proper construction and interpretation of s 191(12) the CCMA did not have jurisdiction to arbitrate the dispute between itself and Swart. At the arbitration, Swart had alleged that her retrenchment and subsequent dismissal was unfair because Rand Water had failed to properly consult with her as required by s 189. It was contended on behalf of Rand Water that because Swart had placed in issue non-compliance with s 189, s 191(12) precluded her from approaching the CCMA to arbitrate a dispute and that she was compelled to placed the dispute before the Labour Court for adjudication

[5] The Labour Court was persuaded by the argument advanced on behalf of Rand Water and concluded at paragraphs 41 and 42:

> "The court is enjoined, when interpreting a statutory instrument, to give effect to all the words in the statute. If it was the legislature's intention that if one employee only is dismissed by reason of an employer's operational requirements, then the CCMA will have jurisdiction, the relevant section clearly need not have contained the words 'following a consultation procedure in terms of section 189**.**' It must accordingly be determined what the legislature intended by the insertion of these words. Having regard to the fact that the word 'following' may mean either 'subsequent to' or 'after' as well as bearing in mind that the phrase 'in terms of' means 'in conformity with', it follows that the phrase "following a consultation procedure in terms of section 189" could be interpreted to mean subsequent to or after a consultation process in conformity with section 189'.

I am accordingly driven to the conclusion that the legislature intended that it only is in matters where only the substantive fairness of a dismissal by an employer by reason of its operational requirements involving a single employee is to be determined that the CCMA has jurisdiction to hear the matter. As soon as the procedural fairness of the dismissal is put in issue by a single employee, I am satisfied that section 191(12) of the LRA must be interpreted as meaning that such cases must still be referred to the Labour Court and that the CCMA will not have jurisdiction to hear them. I am satisfied that no absurdity will result from this interpretation. Employees are not denied any remedies. They may still take their cases to the Labour Court."

[6] In *Scheme Data Services (Pty) Ltd. v. Myhill N.O. and Others* [2009] 4 BLLR 381 (LC*)* Ngalwana AJ expressed the view that the judgment of the court *a quo* in this appeal is clearly wrong in law. After a careful analysis of the judgment of the court *a quo,* Ngalwana AJ concluded that s 191(12) did not exclude the jurisdiction of the CCMA to arbitrate an unfair dismissal dispute in circumstances where a single employee contends that the dismissal for operational requirements is unfair because the employer did not comply with the procedural requirements as set out in s 189.

[7] In my view, Ngalwana AJ's interpretation of s 191(12) in *Scheme Data Services* is to be preferred.

[8] Section 191(12) provides as follows "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 the employee only, the employee may elect to the further dispute either to Arbitration or to the Labour Court".

[9] S 191(12) does not expressly pronounce upon the jurisdiction of the CCMA. What the section provides is that when a single employee disputes the fairness of his/her dismissal for operational reasons, and where such a dispute remains unresolved after conciliation, the single employee has a choice either to refer the dispute to the CCMA for arbitration or to the Labour Court for adjudication.

[10] The court *a quo* took the view that the words "following a consultation procedure in terms of s 189" meant a consultation process that conformed with s 189 in all its requirements. That is to say a single employee who disputes his/her dismissal for operational requirements will have the election, as set out in the section, only if the single employee accepts that the consultation procedure in terms of s 189 had been duly complied with.

[11] To interpret s 191(12) as the court *a quo* did, in my view, is to defeat the very purpose of the section. The court *a quo* had pertinently raised the principle of purposive interpretation. It said at paragraph [40] of its judgment: "It is true that the LRA must be interpreted purposively to give effect to an expeditious resolution of labour disputes." Having expressed itself thus, the court *a quo* then embarked on a discourse to discover what the intent of the legislature was when it enacted s 191(12). As was pointed out in the *Scheme Data Services* the court *a quo* erred in its approach to the proper interpretation of the section.

[12] Section 191(12) was introduced by way of an amendment by s 46(i) of Act 12 of 2002. The explanatory memorandum to the amending act states at paragraph 2.46 that s 191 is to been amended "to provide that if only one employee is dismissed for operational requirements the employee is able to refer the dispute up after conciliation to the Labour Court or to Arbitration." There is no indication that it was the intention of the legislature to limit a single employee's election to dispute that can be referred to arbitration to cases where only the substantive fairness is placed in issue. My view is that the legislature intended to give a single retrenched employee, who may not be able to afford the legal costs of Labour Court litigation, the opportunity to have his/her unfair dismissal dispute resolved by arbitration. That appears to be the plain purpose of s 191(12). The court *a quo* therefore erred in placing upon s 191(12) a construction which limited a single employee's election to either approach the CCMA or the Labour Court where both the substantive and procedural fairness of his/her dismissal for operational reasons are placed in issue.

[13] In the result the appeal succeeds. The legal question raised in the appeal is answered with the finding that the CCMA does have jurisdiction in terms of s 191(12) to hear disputes about the procedural fairness of a dismissal for operational requirements involving a single employee.

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JAPPIE JA

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DAVIS JA

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LEEUW JA

Appearances

For the Appellant	Mr JG van der Riet SC
Instructed by	**Cheadle Thompson & Haysom**
Date of Judgment:	09 March 2010