

**NEW CHALLENGES:  
SHIFTING POWER IN  
UNCERTAIN TIMES**  
12-14 August 2009



22<sup>nd</sup> ANNUAL LABOUR LAW CONFERENCE

# Jurisdictional issues at the CCMA

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# When must an applicant be an 'employee'?

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- Should this be determined at the conciliation of unfair dismissal disputes?
- No, because evidence ought to be led and binding decisions taken only at arbitration and there is no provision for legal representation at conciliation – *Dempster v Kahn NO & others* (1998) 19 ILJ 1475 (LC)

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- BUT:
  - Jurisdictional decisions are made *in limine*
  - Lack of provision for legal representation does not necessarily indicate that legal issues should not be determined
  - False assumption that decisions taken at conciliation cannot bind an arbitrator

# When must an applicant be an employee?

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- No, because the CCMA is a ‘creature of statute’ and the LRA does not give commissioners the power to determine whether an applicant is an employee at the conciliation stage.
- BUT commissioners must determine whether they have jurisdiction. Implicit nor inherent in that is the power to determine whether the required jurisdictional facts are present - *Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake & others* (2002) 23 ILJ 1603 (LC)

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- No, because it is not a jurisdictional requirement that an applicant be an 'employee' at conciliation – *BHT Water Treatment (LC)*?
- BUT: can only conciliate disputes falling within the purview of the LRA i.e. disputes between employers and employees - *Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake & others*
- AND: s191 speaks of the 'dismissed employee' referring a dismissal dispute. If you are not an employee you may not do so - *Virgin Active SA (Pty) Ltd v Mathole NO & others (2002) 23 ILJ 948 (LC)*

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- No, because the conciliating commissioner cannot make a decision that binds the arbitrator - *Seeff Residential Properties v Mbhele NO & others* (LC)

‘the fact that a conciliating commissioner has declined to issue a certificate of outcome because he or she is of the view that the CCMA lacks jurisdiction on the basis that the referring party was not an 'employee' or was not 'dismissed' is a matter of no consequence to the commissioner appointed to arbitrate the dispute, who is entitled to consider the same jurisdictional question afresh.’

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- BUT: commissioners must consider whether they have jurisdiction
- AND this would not apply to other jurisdictional issues like late referrals so why distinguish them?
- AND: a ruling on jurisdiction is an administrative act which is binding until rescinded or set aside on review

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- But if an issue which has a bearing on the jurisdiction of the arbitrator has not been dealt with at the conciliation stage it must be dealt with by the arbitrator. That is the effect of Rule 22 of the CCMA Rules – *EOH Abantu (Pty) Ltd CCMA (LC)*

# The CCMA and contracts

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- *First National Bank Ltd (Wesbank division) v Faizel Mooi NO & others*, case no. JR1018/07, 24 July 2008
- ‘The powers of the commissioners of the CCMA to rule on the interpretation and application of agreements is (sic). . . confined to collective agreements in terms of s24 of the [LRA]. In order to have the agreement set aside the [employee] ought to have approach (sic) either the Civil Court (sic) or this Court in terms of S77 of the BCEA.

In my view the commissioner committed a gross irregularity and exceeded his powers in finding that the agreement was invalid or the termination of the employment relationship was not by mutual agreement between the parties. The ruling stands to be reviewed for this reason alone.’

# The CCMA and contracts

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- Settlement agreements
  - s24(8): disputes about the interpretation and application of settlement agreements contemplated in s142A or s158(1)(c) may be referred to a council or the CCMA for conciliation and, if necessary, arbitration.
  - s142A specifies agreements in disputes which have been referred to the CCMA and that a party has the right to refer to arbitration or the Labour Court
  - s158(1A) states that agreements for the purposes of s158(1)(c) are those that have settled disputes that a party has the right to refer to arbitration or the LC

# The CCMA and contracts

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- Contracts in general
  - CCMA has power to make decisions relating to its jurisdiction
  - If a party alleges an agreement that is a barrier to the CCMA's jurisdiction that must be proven on a balance of probabilities
  - Cannot be that the matter must be adjourned in order that the existence of an agreement be determined by a court
  - Can a commissioner declare an agreement invalid based on its being contrary to public policy?

# s191(12)

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- ‘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.’

# s191(12)

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- *Rand Water v Bracks NO & others* (2007) 28 ILJ 2310 (LC)
  - ‘following a consultation procedure in terms of section 189’ = ‘subsequent to or after a consultation procedure in conformity with section 189’
  - If the procedural fairness of a single retrenchment is being contested the CCMA lacks jurisdiction to arbitrate that dispute

# s191(12)

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- Then *Rowmoor Investment (Pty) Ltd v Wilson & others* (2008) 29 ILJ 2275 (LC)
- ‘the CCMA 's jurisdiction is ousted in an individual dismissal for operational reasons where the facts reveal that the dismissal was 'following a consultation procedure in terms of section 189' of the LRA .
- ‘if the *Rand Water* decision was to be regarded as authority, then the CCMA would lack jurisdiction in a case where the facts reveal that the dismissal was after the employer had followed the procedure as required by s189 of the LRA

# s191(12)

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- Then *Scheme Data Services (Pty) Ltd v Myhill NO and Others* (2009) 30 ILJ 399 (LC)
  - ‘the plain wording of the section is clear and it is this: an employee who is dismissed for operational reasons is free to refer the dispute - whether founded on procedural fairness or substantive fairness or both - either to the CCMA or to the Labour Court. This option is given force also by s 191(5) (b) (ii) of the LRA to the same effect.’

# s191(12)

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- Does s191(12) give the CCMA jurisdiction to arbitrate if the consultation process involved more than one employee, but only one employee as ultimately dismissed?
- *Austen and Sans Souci Girls High School (2007) 28 ILJ 2098 (CCMA)*
- *Telesure Investment Holdings (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (LC)*

# s191(12)

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- The future of s191(12)?