REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 119/13

In the matter between:

HAPPY QIBE	**Applicant**
and	
JOY GLOBAL AFRICA (PTY) LTD	**Respondent**
In re:	
JOY GLOBAL AFRICA (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
NICHOLUS SONO *N.O*	**Second Respondent**
HAPPY QIBE	**Third Respondent**

Date heard: **20 November 2014**

Date delivered: **15 January 2015**

Summary: Review of a rescission application- employer seeking rescission of a default award granted against it- employer contending that it belongs to a

bargaining council and CCMA not having jurisdiction - commissioner dismissing rescission application – Appeal – commissioner assuming jurisdiction and failing to request the CCMA management to make a ruling on whether to refer the dispute to the relevant bargaining council for resolution, or whether he could continue to determine the dispute in terms of s 147 of the LRA – CCMA lacking jurisdiction – Labour Court's judgment upheld – appeal dismissed. CORAM: MUSI JA, MURPHY *ET* SETILOANE AJJA

JUDGMENT

SETILOANE AJA

[1] The appellant appeals against the decision of the Labour Court (Benjamin AJ) in which it set aside on review an arbitration award made by the Commissioner acting under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), on 14 May 2013, in which it dismissed an application by the respondent to rescind a default arbitration award which was made on 28 March 2013, in the absence of the respondent.

[2] The appellant was dismissed by the respondent on 9 December 2011. He referred an unfair dismissal dispute to the CCMA. The matter was set down for arbitration on 26 March 2012. The parties were notified by the CCMA of the date of set down by facsimile. On receipt of the notice of set down, on 17 February 2012, the respondent's Group Human Resource Manager, Mr S Skosana, addressed an e-mail to Ms J Modiba of the CCMA's case management division, informing her that the CCMA did not have jurisdiction to arbitrate the dispute as the respondent is a member of the Metal and Engineering Industries Bargaining Council (MEIBC).[1] The respondent did not receive a response from the CCMA.

[1] The deponent to respondent's founding affidavit in the review application states that the respondent is a fully paid up member of the MEIBC and all its employees are covered by the MEIBC scope as well as its associated wage determination.

[3] The Commissioner who was assigned the arbitration was presumably unaware of the respondent's e-mail of 17 February 2012, and made a default arbitration award on 28 March 2012, in which he found that the appellant was unfairly dismissed and ordered his retrospective reinstatement. On 13 April 2012, the respondent brought an application for the rescission of the default award on *inter alia* the grounds that the CCMA had no jurisdiction to arbitrate the dispute as it should have been referred to the MEIBC under whose jurisdiction it fell. With reference to the respondent's e-mail of 17 February 2012, the Commissioner found as follows in his award in the rescission application:

> 'The CCMA's failure to respond to the e-mail did not exempt the employer from attending the hearing on 26 March 2012. Further the employer did not provide any proof of registration with the MEIBC. The CCMA can assume jurisdiction to any dispute that falls under the jurisdiction of any Bargaining Council if the jurisdiction issue is not or was not raised at the beginning of the arbitration.'

The Commissioner found that the respondent had failed to provide a reasonable and justifiable explanation for its default and was in wilful default. He accordingly dismissed the application for rescission. On review, the Labour Court set aside the award of the Commissioner in the rescission application on, *inter alia*, the grounds that that the CCMA had no jurisdiction to deal with the dispute, as the parties were members of a bargaining council. The primary issue for determination in this appeal is whether the CCMA is entitled to assume jurisdiction in an unfair dismissal dispute, where the parties are members of a bargaining council or fall within the registered scope of a bargaining council, and one of them is a member of a bargaining council. Since a decision in favour of the respondent on this ground of appeal will be dispositive of the appeal, I turn to deal with it first.

[4] A core function of the CCMA is to resolve disputes, referred to it in terms of the LRA, through conciliation and arbitration. As a statutory body, the CCMA is obliged to act within the bounds of the LRA. Its assumption of jurisdiction over a dispute that is not referred to it in terms of the LRA will, therefore, infringe upon

the principle of legality.[2] The CCMA cannot, however, decide upon its own jurisdiction. In *South African Rugby Players Association,*[3] this Court held that:

> 'As a general rule [the CCMA] cannot decide its own jurisdiction. I can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.
>
> …
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> This means that...., the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction when it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that its decision on such an issue is not binding in law on the parties.'[4]

[5] The decision of a CCMA commissioner relating to the question of its jurisdiction is, consequently, a preliminary matter that may be set aside by the Labour Court on review. The question as to whether the CCMA has jurisdiction is contingent upon the existence of certain objectively pre-determined conditions as set out in the LRA, from which it derives its existence.[5] In order for a party to succeed in a challenge to the jurisdiction of the CCMA on review, it is required to demonstrate objectively that the jurisdictional facts necessary for the exercise of the CCMA's powers are absent.[6] In determining, on review, whether the CCMA had jurisdiction to deal with a dispute, the Labour Court must determine the issue de *novo*.[7]

[6] Section 147 of the LRA provides a statutory exception to the rule that the CCMA may not pronounce upon its own jurisdiction. Where the disputing parties fall

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[2] *EOH Abantu (Pty) Ltd v CCMA* (2008) 29 ILJ 2588 (LC) at para 9.
[3] *South African Rugby Players Association (SARPA); SA Rugby (Pty) Limited and Others; v South African Rugby Players Union and Another* [2008] 9 BLLR 845 (LAC) at para 40.
[4] *SA Rugby Players Association* at para 40.
[5] *EOH Abantu* at para
[6] *Benicon Earthworks and Mining Services (Edms) Bpk v Jacobs and Others* (1994) 15 ILJ 801 (LAC) at 803H-804A.
[7] *Fidelity Cash Management Services v Commission for Conciliation Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 101, *Ruan Kukard v GDK Delkor (Pty) Ltd,* Case No JA 52/2013, 7 October (LAC) at para 12*, Phaka and 19 Others v Commissioner Banks and Others*, Case No 3/2014, 18 December 2014 (LAC) at para 29.

under the jurisdiction of a bargaining council,[8] the CCMA will not have jurisdiction unless jurisdiction has been conferred on the CCMA in terms of the provisions of s 147 of the LRA.[9] Section 147 of the LRA provides in relevant part:

> '(2) (a) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* are parties to a *council*, the Commission may –
>
> (i) refer the *dispute* to the *council* for resolution; or
> (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of *this Act*.
>
> (b)... . '
>
> (3) (a) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* fall within the *registered scope of a council* and that one or more parties to the *dispute* are not parties to the *council*, the Commission may –
>
> (i) refer the *dispute* to the *council* for resolution; or

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[8] Section 191(1) of the LRA gives jurisdiction to a bargaining council to resolve unfair dismissal and unfair labour practice disputes if the parties to the dispute fall within the registered scope of that bargaining council. It provides

'(1)(a) if there is a *dispute* about the fairness of a dismissal, or a *dispute* about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the *dispute* in writing to−

(i) a *council*, if the parties to the *dispute* fall within the registered scope of that *council*; or
(ii) the Commission, if no *council* has jurisdiction.'

Subsections (3) and (4) of s 51 of the LRA, which make provision for the dispute resolution functions of bargaining councils provide:

'(3) If a *dispute* is referred to a *council* in terms of this *Act* [footnote 11 omitted] and any party to that *dispute* is not a party to that *council*, the *council* must attempt to resolve the *dispute*−

(a) through conciliation; and
(b) if the *dispute* remains unresolved after conciliation, the *council* must arbitrate the *dispute* if−
  (i) This *Act* requires arbitration and any party to the *dispute* has requested that it be resolved through arbitration; or
  (ii) all the parties to the *dispute* consent to the arbitration under the auspices of the *council*.

(4) If one or more of the parties to a *dispute* that has been referred to the *council* do not fall within the registered scope of that *council* it must, refer the *dispute* to the Commission.'

Footnote 11 to subsection 3 of s 51 of the LRA provides in relevant part:

'The following disputes contemplated by subsection (3) must be referred to a council: disputes about the interpretation or application of the provisions of Chapter II (see section 9); disputes that form the subject matter of a proposed statutory council or lock-out (see section 64(1); disputes in essential services (see section 74); disputes about unfair dismissals (see section 191); disputes about severance pay (see section 196); and disputes about unfair labour practices (see item 2 in Schedule 7).'

[9] *EOH Abantu* at para 11.

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of this Act.

(b) … .'

[7] As recently held by this Court in *Kgekwane*[10]:

> 'Section 147 of the LRA makes provision for the performance of dispute resolution functions by the CCMA in exceptional circumstances, in order to avoid delays that might otherwise be caused by jurisdictional disputes. The section, accordingly, confers a choice on the CCMA whether to resolve a dispute that has been erroneously referred to it or whether to re-direct it to the proper forum.[11]'

In terms of subsections (2) and (3) of s 147 of the LRA respectively, if at any stage after a dispute has been referred to the CCMA, it becomes apparent (or evident) that the parties to the dispute are parties to a bargaining council or that the parties to a dispute fall within the registered scope of a bargaining council but one or more of the parties are not parties to that council, the CCMA may either refer the dispute to that bargaining council for resolution or appoint a commissioner, or if one has already been appointed, confirm the appointment of such commissioner to resolve the dispute.[12]

[8] The Labour Court found s 147(2)(a) of the LRA to be applicable to the jurisdictional question in this dispute on the basis that both the appellant and respondent are parties to the MEIBC. It seems to me, however, from a perusal of the review application that while both parties fall within the registered scope of the MEIBC, only the respondent is a member thereof.[13] I, accordingly, consider subsection (3)(a) of s 147 of the LRA to have application, and not subsection (2)(a) thereof. Regardless, however, of which of the two subsections of s 147 is applicable, once it becomes apparent or evident that the parties to the dispute are parties to a bargaining council, or fall within the registered scope of a

[10] *Nehawu obo Kgekwane v Department of Developmental Planning* Case No: JA 68/13, 15 January 2015 (LAC) at paras 16-17.
[11] Footnote omitted.
[12] *Kgekwane* at para 18
[13] See footnote 1 above.

bargaining council, and one or more of them are not parties to the bargaining council, a commissioner can only continue to hear the matter if his or her appointment is confirmed by the CCMA as provided for in subsection 2(a)(ii) or 3(a)(ii) of s 147 of the LRA.[14] Thus, as held by this Court in *Kgekwane*:[15]

> '[W]here a dispute is referred to the CCMA, the matter may not proceed before the CCMA once it is ascertained that the parties are parties to a bargaining council or fall within the registered scope of a bargaining council, until the options set out in s 147(2) and (3) have been exercised by the CCMA.[16]
>
> …[O]nce that is ascertained, it is then for the CCMA or its delegate (and not the commissioner hearing the matter when this was ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or if one has already been appointed, to confirm his or her appointment[17]

This Court in *Kgekwane* went on to hold that where the CCMA elects to appoint a commissioner to arbitrate the dispute or to confirm the appointment of one who has already been appointed, the matter may then proceed as the CCMA has jurisdiction to determine that dispute. Accordingly, I consider the Labour Court not to have erred in interpreting s 147(2(a)(ii) as follows:

> 'In terms of section 147(2)(a), once it becomes apparent that the parties to the dispute are parties to a council, a Commissioner can only continue to hear the matter if his or her appointment is confirmed by the Commissioner. This requires that someone other than the presiding Commissioner, presumably the Senior Regional Commissioner or another official to whom this responsibility has been delegated , consider the matter and decide whether or not to confirm the arbitrator's appointment. This procedure was not followed in the present matter.'

[9] I am, however, of the view, that the Labour Court erred in interpreting subsection (2)(a)(i) of s 147 of the LRA as empowering a commissioner to refer a dispute to a bargaining council, once it becomes apparent to him or her that the parties to the dispute are parties to a bargaining council. To reiterate, s 147(2) and (3) of

[14] *Kgekwane* at para 18
[15] At paras 18 and 19.
[16] Footnote omitted.
[17] Footnote omitted.

the LRA properly interpreted mean that if at any stage after a dispute is referred to the CCMA, it becomes apparent to the CCMA or its delegate (or the commissioner hearing the matter), that the parties to the dispute are parties to a bargaining council or fall within the registered scope of a bargaining council, but one or more of them are not parties to the council, it is then for the CCMA or its delegate (and not the commissioner hearing the matter when this is ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or if one has already been appointed, to confirm his or her appointment. Thus, in the current matter, once the respondent had placed its founding affidavit before the Commissioner, in the rescission application, contending that the it was a member of the MEIBC and that the appellant fell within its registered scope, he was required in terms of s 147(3)(a) of the LRA to request the CCMA management to make a ruling on whether to refer the dispute to the MEIBC for resolution, or whether he could continue to determine the dispute. This was not a decision for the Commissioner to make.

[10] The appellant contends that the provisions of s 147(2) and (3) of the LRA apply only from the time that the dispute is first referred to the CCMA until the arbitration award is made. The contention thus advanced is that once an arbitration award is made (whether by default or opposed) the provisions of s 147(2)(a) or 3(a) are no longer applicable. This contention, in my view, is misconceived for two basic reasons: Firstly a default arbitration award made by an arbitrator in the absence of one of the parties is not final in effect, as it may be rescinded or revisited by the arbitrator who made the award.[18] Therefore, although a default arbitration award will have full effect until set aside, it is not final for purposes of a review, as contemplated in the LRA, because the proceedings are not complete and the award may be revisited or rescinded by the arbitrator who made the default award. It follows that only the decision of the arbitrator dismissing the rescission application may be reviewed − and not the default arbitration award itself – as it is not a final decision.

[18] Similarly, a judgment granted in default by a court in the absence of one of the parties is not final in effect for purposes of an appeal as it may be rescinded by the court that granted it. See in this regard: *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J and *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) at para 25.

[11] Secondly, the appellant's contention is inconsistent with the plain meaning of both subsections (2)(a) and (3)(a) of s 147, each of which commences with the words "[i]f at any stage after a dispute has been referred to the Commission…". The import of these words read in the context of the section as a whole is that, if at any stage after a dispute has been referred to the CCMA until it makes a final award (which brings the proceedings before it to completion), it becomes apparent that the parties to the dispute are parties to a bargaining council, or fall within the registered scope of a bargaining council, and that one or all the parties are not parties to the bargaining council, the CCMA may elect to refer the dispute to the bargaining council for resolution or appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of the LRA.

[12] I accept that, at the commencement of the arbitration proceedings in this matter, the Commissioner may not have been aware of the respondent's challenge to the CCMA's jurisdiction to deal with the dispute. However, when he was presented with the respondent's unchallenged version in the rescission application that, the MEIBC enjoyed jurisdiction over the matter to the exclusion of the CCMA, and that all similar matters had been referred to the MEIBC for resolution, the Commissioner ought, at that stage, to have recognised this as an apparent challenge to its jurisdiction, requiring the decision of the CCMA in terms of s 147 of the LRA. Instead he dismissed the challenge to the CCMA's jurisdiction by erroneously assuming that he was entitled to continue dealing with the matter. Thus, once a challenge to the CCMA's jurisdiction was raised, the Commissioner was required to refer it to the appropriate CCMA official for a decision in terms of s 147 of the LRA. This he erroneously failed to do. Accordingly, the Labour Court did not err in finding that:

> 'The arbitrator's assumption that the CCMA is entitled to exercise jurisdiction in respect of a dispute under the jurisdiction of a bargaining council if not raised at the beginning of the arbitration is not a correct reflection of the law. While it is correct that there are circumstances in which the CCMA may deal with a dispute otherwise falling within the jurisdiction of a Bargaining Council, these provisions are not consistent with the arbitrator's view of his jurisdiction.'

[13] The Commissioner, in my view, clearly misconstrued his powers under the LRA in assuming that he was entitled to continue dealing with the matter, when he clearly had no jurisdiction in terms of s 147(3)(a) to do. There is accordingly no basis to interfere with the finding of the Labour Court that the CCMA lacked jurisdiction to arbitrate the dispute. The appeal accordingly falls to be dismissed on this ground alone. I see no reason in law or equity why costs should not follow the result.

[14] In the result, I make the following order:

The appeal is dismissed with costs.

F Kathree-Setiloane

Acting Judge of the Labour Appeal Court

of South Africa, Johannesburg

Musi JA and Murphy AJA concurring

APPEARANCES:

For the Appellant: Mr D Mantsha

Instructed by Lungisani Mantsha Inc.

For the Respondent: Mr W.B Bank

Instructed by Webber Wentzel