IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C59/2000

DATE: 2-6-2000

In the matter between:

COUNTY FAIR FOODS	Applicant
and	
OIL CHEMICAL GENERAL AND ALLIED WORKERS UNION	First Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
THE COMMISSIONER	Third Respondent

J U D G M E N T

BASSON, J:

[1] This is an application for reviewing and setting aside the decision made by the third respondent, a commissioner of the Commission for Conciliation, Mediation and Arbitration (the "CCMA" - the second respondent) on 22 November 1999. The said decision was that a wage deadlock had arisen between the applicant, County Fair Foods (Pty) Ltd, and the first respondent, the Oil Chemical General and Allied Workers Union ("the union"), and that the second respondent (the CCMA) had jurisdiction over the dispute and was empowered

to conciliate same. The commissioner therefore dismissed the applicant's point *in limine* in regard to jurisdiction, raised at the commencement of the said CCMA proceedings.

[2] Second, the applicant seeks an order that the issue of whether or not the second respondent (the CCMA), had jurisdiction to conciliate the alleged dispute between the applicant and the first respondent be resolved by the Court to the effect that no such jurisdiction vested, after hearing argument and evidence on such terms as it may direct.

[3] The applicant also seeks an order reviewing and setting aside the granting of the certificate of outcome by the third respondent on 20 December 1999.

[4] The argument before the commissioner of the CCMA (the third respondent) on 22 November 1999, was that the second respondent (the CCMA) had no jurisdiction to conciliate the matter referred to it in that no dispute existed at that stage. This argument is summarised at page 91 of the papers where the written decision of the commissioner is reflected.

[5] Another question raised in the CCMA proceedings before the third respondent was whether the applicant had refused to bargain. It was argued that, if the dispute was about a refusal to bargain on the part of the applicant, the referral of such dispute was invalid as it was prematurely referred.

[6] The commissioner (the third respondent) found in regard to this dispute that there was no refusal to bargain on the facts before her and accordingly that no such dispute existed. The applicant accordingly does not challenge this finding of the commissioner.

[7] The applicant contended that the dispute between the parties which was referred to the CCMA was, in essence, a dispute about wages. The applicant further argued that the referral of such dispute did not comply with the requirements for referring a dispute to conciliation in terms of the provisions of section 115 (1)(a) of the Labour Relations Act, No.

66 of 1995 (the "LRA") because the wage negotiations had not reached impasse or deadlock. Section 115 (1)(a) of the LRA is quoted at paragraph [23] below.

[8] In this regard the applicant set out the history to the wage dispute which appeared to have been protracted, but at the same time clearly had not deadlocked.

[9] This negotiating position as at that point in time, that is, 22 November 1999, was set out in a letter by the union, dated 27 October 1999 (at pages 79-80 of the papers at paragraphs 1-4):

"1. The union stands by its position that the company is bargaining in bad faith. We will not allow the company to dictate the terms of the negotiations to us. We believe that it is too early to come up with final negotiating positions. The union's door remains open. By attempting to short-circuit the negotiations at this juncture shows to us that the company is not interested in bargaining at all.

2. The union rejects the company's contention that its previous move did not amount to much, this is a lie, the union moved considerably, it is the company that has not moved once.

3. The union hereby lowers its demand for a wage increase to R100 per week across the board. Once again, we have made a considerable move. Our other demands remain as per our previous correspondence.

4. We want to continue negotiating. It is our view that by sitting down in good faith we can come closer to each other" (emphasis supplied).

[10] The applicant's legal representative argued on the basis of this letter and on the status of the negotiations described therein that there was no deadlock or impasse in the negotiations.

[11] This contention appears to be correct on the facts presented to me as the parties were at this stage still open to negotiations on the issue of wages. However, I do believe that there was a wage dispute between the parties, or, put differently, a dispute about wages.

[12] In this regard I believe that a “dispute”, also in terms of the LRA, should be defined

as it was set out in the case of *Durban City Council v Minister of Labour* 1953(3) SA 708 (D):

"It must, at the minimum, so to speak, postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims and contentions".

[13] This definition of a “dispute”, also in terms of the LRA, was accepted in the case of *Michael Louw & Another v Golden Arrow Bus Services (Pty) Ltd* [2000] 3 BLLR 311 (LC) at paragraph [23], as well as in the case of *SACCAWU v Edgars Stores Limited* [1997] 10 BLLR 1342 (LC).

[14] It is clear in terms of, *inter alia*, the letter quoted above (at paragraph [9]) that the union was making a demand for its lowered wage counter-offer of R100 across the board to be accepted, as well as making the other demands that it had made in the course of the negotiating process.

[15] I believe, therefore, that the parties were at this stage opposing each other in controversy, of conflicting views, claims and contentions in regard to the wage dispute.

[16] I was referred by the applicant's legal representative to the book Du Toit et al *The Labour Relations Act of 1995: A Comprehensive Guide* 2nd ed., at 361 where the authors refer to the definition of a dispute in terms of the LRA, and state the following:

"It is submitted that a dispute is more than a statement of opposing views about an employment issue; it is also more than a claim or demand. The term 'dispute' denotes a situation in which the parties to an alleged dispute not only have competing claims but have reached impasse. Although the Act does not expressly require a formal declaration

of deadlock, it is not in our view open to a party to declare a dispute or refer it to the CCMA without at the very least having issued a demand and giving the opposing party an offer to settle. *SACCAWU v Edgars*".

[17] If what the learned authors are stating is that an impasse or deadlock must be reached before an interest dispute such as a wage dispute may be referred to the CCMA or, for that matter, that any other dispute must first reach deadlock, I do not agree with this contention.

[18] “Dispute” is defined in the LRA in section 213 thereof:
"In this Act, unless the context otherwise indicates, dispute includes an alleged dispute"(emphasis supplied).

[19] See also section 213 of the LRA in regard to the definition of "strike":
"Strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory" (emphasis supplied).

[20] In this regard I believe that one can, in the light of the definition of “dispute” (*supra* paragraph [18]), also read into the definition of strike: for the purpose of remedying a grievance or resolving an alleged dispute, in respect of any matter of mutual interest.

[21] In my view, it clearly appears from the definition of strike above that even a grievance can legitimately give rise to a strike and therefore such “issue in dispute”, as referred to in section 64(1)(a) of the LRA would, in my view, include an alleged dispute or

a grievance. Section 64(1)(a) of the LRA reads as follows:
"Every employee has the right to strike and every employer has recourse to lock out if -

(a) the issue in dispute has been referred to a council or the Commission (the CCMA)

as required by this Act" (emphasis supplied).

[22] There is nothing in the context that would indicate that “issue in dispute” would not include an (alleged) dispute or a grievance, as indicated in the definition of "strike" (see paragraph [19] above). I believe that the provisions in regard to the right to strike (section 64(1)(a) of the LRA) must therefore be read together with the definition of "strike" (quoted above at paragraph [19]).

[23] Section 115 (1)(a) of the LRA reads as follows:
"The Commission must -

(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act"

(emphasis supplied).

[24] Again, in the context, I do not believe that the words “any dispute” would not include an alleged dispute or a grievance.

[25] In the light of the above provisions, especially in view of the fact that there is no requirement at all that a wage dispute must have reached a deadlock or impasse before it may be referred to the CCMA for conciliation, and that even a grievance or an alleged dispute may thus be referred to the CCMA, I believe that there is no merit in the argument that the dispute must reach deadlock before the CCMA will have the necessary jurisdiction under section 115 (1) (a) of the LRA to conciliate such dispute.

[26] It is clear on the facts of the present matter that the union has lowered its demand for a wage increase and also put other demands to the employer. (See paragraphs [14] and [15] above). This, in my view, was a wage dispute and a dispute that was capable of being referred to the CCMA for conciliation in terms of section 115(1)(a) of the LRA.

[27] The commissioner, in addressing this issue, stated the following (at pages 91-92 of her written decision contained in the papers):
"The issue referred to in the alternative regarding the deadlock on wages is, however, a

matter in which the CCMA has jurisdiction. The 7:11 allows for matters to be referred

vaguely, in the alternative or even incorrectly. It is the commissioner's responsibility to

assist the parties with the terms of reference. It is clear that the parties have been engaged in wage talks for a protracted period and that no settlement has been reached. I find accordingly that the CCMA has jurisdiction to conciliate the wage deadlock" (emphasis supplied).

[28] In my view, there may have been a mistake in the finding of the commissioner by stating that there was jurisdiction to conciliate a wage “deadlock”.

[29] However, in view of the fact that the commissioner clearly took into account that settlement had not been reached and, on an objective conspectus of the facts, was satisfied that the CCMA indeed had jurisdiction to conciliate the wage dispute, I do not believe that this finding of the commissioner of the CCMA stands to be reviewed. The CCMA indeed had the necessary jurisdiction to entertain this dispute in terms of section 115(1)(a) of the LRA, for all the reasons set out above. (See especially paragraphs [14], [15] and [26]).

[30] The commissioner (the second respondent), however, went one step further on 20 December 1999 when she issued a certificate of outcome of dispute referred for conciliation. This document is contained at page 99 of the papers.

[31] In terms of this certificate the commissioner indicated that the dispute remained unresolved as at 20 December 1999.

[32] It is clear therefore that the commissioner took a decision on 20 December 1999, which is also the date of the certificate, to indicate that the dispute remained unresolved. This was done in pursuance of section 64(1)(a)(i) of the LRA in that a certificate stating that the dispute remained unresolved had been issued. This is, of course, one of the prerequisites for a matter to be properly referred to conciliation before embarking upon a strike.

[33] The applicant's legal representative argued that the commissioner did not give the applicant a further opportunity to address her on the issue of the dispute as it stood at 20

December 1999. Further, that the commissioner did not have the necessary material available to her to make such decision as at 20 December 1999.

[34] In terms of the notice of motion, the commissioner (the second respondent) was called upon to provide reasons for the decision to issue the certificate (at page 99 of the papers). However, the second respondent has failed to do so.

[35] In the event, and in the absence of any reasons given, it would appear that the decision was taken without the necessary material being available to the second respondent as to the position in regard to the dispute as at 20 December 1999. Further, in making such decision, the commissioner did not provide an opportunity for the parties to again address her on this issue.

[36] As an aside, and this may be irrelevant to these proceedings in view of the conclusions that I have come to above, the applicant's legal representative also argued that the commissioner did not allow the applicant's representative a proper hearing at the previous proceedings in November 1999 (referred to above at paragraph [4]).

[37] I have, however, scrutinised the affidavit of the second respondent in this regard and it would appear that at least the written arguments were, albeit for a short period, considered. I am therefore not satisfied on the papers that there was no proper opportunity given for the *audi alteram partem* at that stage.

[38] However, clearly no such opportunity was granted on 20 December 1999. For both these reasons (set out at paragraph [35] above) the certificate therefore falls to be set aside on review.

[39] As this matter was unopposed I have not been asked to grant an order as to costs and I am not inclined to grant such order as the applicant has only been partially successful.

[39] I make the following order:

1. The application for reviewing and setting aside the decision of the third respondent on 22 November 1999, that is, the issue of whether the second respondent had jurisdiction to conciliate the alleged dispute between the applicant and the first respondent, is dismissed. The CCMA has the necessary jurisdiction to entertain such dispute in terms of section 115 (1)(a) of the LRA.

2. The certificate of outcome granted by the third respondent on 20 December 1999 is

reviewed and set aside.
3. There is no order as to costs.

BASSON, J

Date of hearing: 2 June 2000
Date of Judgment: 2 June 2000 (*ex tempore*)

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