IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

REPORTABLE

CASE NO: C450/2004

LIONEL BLANCH JOHNSON Applicant

and

CCMA First Respondent

COMMISSIONER S. FLOWERS Second Respondent

CREDA COMMUNICATIONS Third Respondent

JUDGMENT

MURPHY AJ,

1. The applicant has brought application in terms of section 145 of the Labour Relations Act ("the LRA") to review and set aside the ruling of the second respondent, a commissioner of the CCMA. The ruling in contention is to the effect that the CCMA lacked jurisdiction to conciliate the dispute. As such, section 145 dealing with the review of arbitration awards has no application.

Section 158(1)(g), on the other hand, permits the review of the performance of any function provided for in the Act on any grounds that are permissible in law. The applicant has not had the benefit of legal representation and therefore I am prepared to condone his mistaken reliance on section 145 and to treat his application as a review under section 158(1)(g).

2. The applicant's primary dispute with his employer concerns an alleged unfair labour practice regarding the employer's policy in relation to long service awards. When the matter came before the second respondent on 7 July 2004 for conciliation the employer raised a point *in limine* that the CCMA lacked jurisdiction because the dispute had already been arbitrated, in effect a plea of *res judicata*. The commissioner's reasoning and the evidence upon which it was based are lacking in detail. Her brief ruling reads:

> "Mr. Damane raised a point *in limine* that the CCMA did not have jurisdiction to listen to the matter since the parties are bound by an arbitration agreement and have already attended such hearing. I have received a letter dated 9 July 2004 from Mr. DA Fredericks, the Regional Secretary Organizer of the applicant's union, SATU, that an agreed "documented" internal third party arbitration was held on the employment record of the applicant. SATU is not representing the

> applicant in this matter. I am satisfied that the parties are bound by a private agreement to arbitrate and that the parties are to resolve their dispute in terms thereof".

3. On this basis the second respondent ruled that the CCMA had no jurisdiction to deal with the matter.

4. The letter from SATU dated 9 July 2004 on which the commissioner relied and addressed to her reads:

> " It was agreed to by the parties to have documented internal third party arbitration on the employment record of Mr. Lionel Johnson. The arbitration award did not deal with determining the service of the employee however dealt with the company policy".

5. No written arbitration agreement or collective agreement appears to have been attached to the letter. The private arbitration took place on 10 May 2004 without the parties being in attendance and it would seem was conducted exclusively on the basis of documentary evidence. The arbitrator was Mr. Andrew Breetzke of Management Solutions of Stellenbosch. His award dated 12 May reads as follows:

"**Brief:**

By agreement between Creda and the South African Typographical Union (SATU), I have been requested to provide a finding on the issues relating to the non-payment of specific benefits to Mr. Lionel Johnson (LJ), which benefits are linked to long service in Creda.

Facts:

LJ was employed by Creda in August 1980. He commenced working as apprentice in April 1987 and took two years seven months to complete the training. The policy of Creda at the time was that the period of time during which an employee worked as an apprentice, was not regarded as part of the years of service for calculation of long service benefits.

As from November 1989 LJ was employed in the Litho department of Creda. On the 17 July 2003, he resigned from the employ of Creda. LJ had been employed with Creda for a period of over 20 years; however, as the apprenticeship period was not regarded as years of service for purposes of benefits, his years of service are less than 20 years.

In terms of Creda policy, on reaching 20 years of service an employee receives 20 days extra leave, and a R2000 long service award. LJ did not receive this benefit due to the operation of the above policy.

In November 200, the policy was changed. SATU highlighted that the policy was unfair

to employees who had taken up the option of improving their qualifications through an apprenticeship. Creda therefore changed the policy to include apprenticeship years as years of service when calculating benefits. The implementation of this policy was not done retrospectively and operated as from November 2000.

LJ has stated that he has been prejudiced by the pre-2000 rule and as such is seeking payment of the benefits as if his period of apprenticeship was part of his years of service.

Finding:

There is no argument that the policy as it stood was unfair- it is for this reason that it was changed. There is also no dispute that the implementation of the change was not retrospective.

LJ resigned from his employment a few months short of the 20 year anniversary (excluding apprenticeship period). The termination of employment was at his own volition, and not due to a termination at the instance of Creda i.e. operational requirements termination etc. As such, there is no argument to be made that Creda is acting in bad faith.

It is common cause that the implementation of the policy was not retrospective. There does not appear to have been any dispute on this point at the time of implementation. As such, it was evident at the time of implementation of the amended policy that there may, in future, be individuals who could be affected

> negatively by the non-retrospective nature of the policy. For LJ now to request Creda to indulge in allowing him to have the benefit, would in affect result in a change in the policy to allow retrospective operation.
>
> In light of the above, I find that LJ is not entitled to the long service benefits. He voluntarily terminated his services, whilst being aware of the implications this would have on his service record. If he was not aware, he should have investigated the issue as the information was freely available".

6. Although the applicant in his notice of motion seeks to review the decision of the commissioner, in his founding affidavit he focuses much of his attack on the alleged partiality of the arbitrator, the absence of a hearing and other alleged factual misdirections by the arbitrator. Unfortunately he neglected to cite or join the arbitrator and limited his prayer for relief to a setting aside of the ruling of the commissioner. Accordingly no relief can be granted against the arbitrator.

7. The issue for determination therefore is whether the commissioner's ruling that she lacked jurisdiction to conciliate the alleged unfair labour practice was mistaken in law as to render her decision reviewable.

8. Section 133(1)(b) of the LRA obliges the CCMA to appoint a commissioner to attempt to resolve through conciliation any rights dispute that is referred to

it in terms of the LRA. Section 191(1)(a) grants employees the right to refer disputes about an unfair labour practice to the CCMA, where no bargaining council with jurisdiction exists.

9. No provision in the LRA explicitly provides that an agreement to submit a dispute to private arbitration ousts the CCMA's jurisdiction to attempt to resolve through conciliation any unfair labour practice dispute referred to it. However, it is common practice for parties to refer labour matters to private arbitration in terms of the Arbitration Act 42 of 1965. Likewise, *Mthimkulu v CCMA and Another* (199) 20 ILJ 620 (LC) is authority for the proposition that where a collective agreement exists and includes an arbitration clause an employee may be bound by such a clause by virtue of the operation of section 23 of the LRA, even if not a member of the trade union party to the collective agreement. In that matter Basson J held that the LRA gives precedence to the products of collective bargaining and where a collective agreement provides for private arbitration, the jurisdiction of the CCMA would normally be ousted unless the agreement is *contra bonos mores*. While the legal basis for binding non-members to such a collective agreement is clear, the learned judge did not elaborate on why such agreements operate to oust the CCMA's

jurisdiction. As I have said, there is nothing expressly contained in the LRA to that effect.

10. An arbitration agreement concluded in terms of the Arbitration Act of 1965 has certain consequences. An arbitration agreement is defined to mean a *written* agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not. Arbitration proceedings are defined to mean proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute, which has been referred to arbitration in terms of an arbitration agreement. In terms of section 28 of the Arbitration Act of 1965 arbitration awards are normally final and binding and not subject to appeal. Section 33 of the Arbitration Act permits review of the award on grounds of misconduct, gross irregularity, exceeding of powers or improper obtaining of the award. The Arbitration Act does not automatically oust the jurisdiction of the ordinary courts. Rather, in terms of section 6, legal proceedings in respect of the subject matter of an arbitration agreement may be stayed on application, or perhaps by means of a special plea, by any party to the agreement. However, the right to seek a stay is restricted to proceedings brought in the

High Court or in magistrates' courts. Hence it may not be possible in terms of the Arbitration Act to seek a stay of proceedings in an administrative tribunal such as the CCMA. Nevertheless, at common law, once an arbitration award has in fact been made the dispute is equivalent to *lis funita,* and as between the parties the matter is *res judicata* (*Schoeman v van Rensburg* 1942 TPD 175@ 177; *Verhogen v Abramowitz* 1960 (4) 951 (C) @ 950, *Zygos Corporation v Salen Rederierna AB* 1984 (4) 444 (C) @ 456A and *Voet* 44.2.1). Accordingly, it follows that an award made pursuant to a reference to private arbitration in terms of a written arbitration agreement (including a collective agreement which in terms of section 213 of the LRA is required to be in writing) would give rise to the defence of *exceptio rei judicatae* before the ordinary courts.

11. There is nothing in principle to bar a similar defence in proceedings before the CCMA. Within the specific context of sections 133(1)(b) and 191(1)(a) of the LRA, the contention would be that the provisions confer jurisdiction upon the CCMA to resolve a *dispute* about an unfair labour practice. A matter involving the same parties regarding the same thing and the same cause in respect of which a final arbitration award on the merits exists is *res judicata* and hence not a dispute as

contemplated by the Act, with the result that the CCMA would indeed lack jurisdiction.

12. In the present matter counsel for the third respondent was unable to furnish the court with any written agreement (collective or individual) in terms of which the unfair labour practice dispute was allegedly referred to arbitration before Mr. Breetzke. Reference is made in the award to an agreement between the employer and the union, but it is not clear whether such an agreement was a collective agreement, or whether the union was acting as the agent of the applicant in concluding an individual arbitration agreement. Moreover, there is no indication whether any such agreement was in writing, as required by the Arbitration Act of 1965. As explained earlier, an arbitrator can only acquire jurisdiction to render a final award in terms of a written arbitration agreement referring the dispute to arbitration.

13. In response to a query from the bench, counsel conceded that his efforts to locate a written arbitration agreement had proved fruitless. Absent a written reference to arbitration it is not possible to determine the terms of reference and no proper arbitration proceedings can be conducted. Hence the respondent

has failed to prove that the arbitrator had jurisdiction to make an award. Without a final arbitration award the plea of *res judicata* cannot succeed. It must follow that the jurisdiction of the CCMA in terms of sections 133(1)(b) and 191(1)(a) has not been ousted.

14. Some argument was advanced to the effect that the applicant through his attempts to persuade Mr. Breetzke to render a decision timeously thereby consented to the reference to arbitration. To my mind, his awareness of the union's submission of the dispute to Mr. Breetzke for decision did not of itself amount to compliance with the requirements of the Arbitration Act sufficient to justify the plea of *res judicata.*

15. Accordingly, the commissioner has erred in finding that she lacked jurisdiction and thus mistakenly declined to assume authority to perform a function she was legally obliged to perform. It follows that her ruling should be set aside and that the dispute be referred back to the first respondent for processing in accordance with the LRA.

16. The following orders are accordingly made:

16.1. The ruling of the second respondent dated 8 July 2004 under case number WE 6602-04 is hereby reviewed and set aside.

16.2. It is declared that the first respondent has jurisdiction in terms of section 191(1)(a) read with section 133(1)(b) of the Labour Relations Act of 1995 to attempt to resolve through conciliation the dispute referred to it by the applicant on 4 June 2004.

16.3. The first respondent is directed to appoint, within 15 days of the date of this order, a senior commissioner, other than the second respondent, in terms of section 133(1) to attempt to resolve the applicant's dispute.

16.4. There is no order as to costs.

_____

Murphy AJ
Date of hearing: 6 May 2005
Date of judgment: 24 May 2005

Applicant appeared in person

Respondent represented by Adv J Loots instructed by Marleen Potgieter Attorneys