IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

Case nr: JR592-05

In the matter between:

AVGOLD – TARGET DIVISION	**Applicant**
V	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1st Respondent**
COMMISSIONER MKOSANA NO	**2nd Respondent**
COMISSIONER MVUMBI NO	**3rd Respondent**
MARIUS W KOTZE	**4th Respondent**

JUDGMENT

AC BASSON

[1] This was an application to review and set aside a certificate issued in terms of section 135(5)(a) of the Labour Relations Act 66 of 1995 ("the LRA") by the Second Respondent (Commissioner Mkhosana) dated 30

April 2003 ("the certificate") and the ruling made by the 3rd Respondent (Commissioner Mvumbi) on 3 February 2005 in terms of section 158(1)(g) of the LRA and the award (by the Third Respondent - Commissioner Mvumbi) under case number FS1960/03. The Applicant also sought an order suspending the certification by the director of the CCMA in terms of section 143(3) of the LRA for the enforcement of the arbitration award issued by the Third Respondent (Commissioner Mkosana).

Brief exposition of the facts

[2] The Applicant (Harmony-Target Mine) employed the Fourth Respondent (Mr. Kotze – hereinafter referred to as "the Respondent") as a store manager until his alleged unfair dismissal, either on 31 May 2003 or 10 March 2003. What exactly was the date of his dismissal will be considered in the paragraphs hereinbelow. At that time of his appointment the Applicant was of the view that the post (of store manager) will have to be described, profiled and weighted whereafter the post would be advertised for an appointment. It was therefore decided to fill the post in the interim until the aforesaid process was completed. The Respondent was then appointed and it was common cause that the Respondent, an attorney by profession, had signed four consecutive fixed term contracts.

The first contract 15 July 2002 – 11 October 2002

[3] The Respondent was appointed as a stores manager with effect 15 July 2002 for a fixed period until 11 October 2002. The main task of the

Respondent was to profile and describe the specific position of store manager.

[4] The agreement specifically stated that the contract was for a specific period and that the contract "*will be terminated on 11 October 2002*". The contract further stated that this "*contract does not create the expectation that such contract will continue after expiry of the above mentioned period".* This contract also stated that the Respondent was an independent contractor and that the LRA therefore did not apply. The contract, however, also referred to annual leave and to the fact that "*the employee*" had a certain amount of leave. Also significant is the fact that the contract contained an express non-variation clause.

The second contract 12 October 2002 – 31 December 2002

[5] A further fixed term contract was concluded for the period 12 October 2002 until 31 December 2002. This contract was signed on 18 October 2002. This contract was similar to the previous contract save for clause 3.1 which stated that –

> "…*the need for the temporary position exist in order for Target [the Applicant] to complete the process of describing profiling and recruiting a suitable incumbent to fill the intended permanent position".*

[6] Apart from the fact that this agreement clearly stated that the contract was of a limited duration (until 31 December 2002), it further specifically stated that the Respondent's position was a *"temporary position*" and that the

Applicant was in the process of describing, profiling and recruiting a suitable candidate for the intended permanent position. This contract also contained a non-variation clause and the same provision in respect of leave and sick leave to which "*the employee"* will be entitled to. It is therefore clear from a reading of this contract that:

(i) The contract was of a limited duration;

(ii) The position of the Respondent was temporary;

(iii) The Applicant was in the process of profiling a position and recruiting a suitable position for the intended permanent position.

The position filled by the Respondent was therefore, in terms of the express terms of the contract, clearly not permanent. The contract also clearly stated that a process will be followed before a suitable candidate will be employed in a *permanent* position.

The third contract: 2 January 2003 – 28 February 2003

[7] A further fixed term contract was concluded for the period 2 January 2003 until 28 February 2003. This agreement was exactly the same as the previous contract and in terms of clause 3.1 it was reiterated that the contract was for a temporary position until a suitable incumbent was recruited for the permanent position.

Advertisement: Procurement and material manager

[8] In November 2003 the Applicant advertised the post of procurement and material manager. The Respondent applied for the position and submitted his curriculum vitae. The position of procurement and material manager

had the following requirements: (i) A degree or diploma in Material Management or related field; (ii) 5 - 7 years procurement and material handling experience; (iii) experience in the mining industry (will be advantageous); (iv) good interpersonal communication and negotiation skills, physical fitness and computer literacy (amongst others).

[9] In terms of the Applicant's recruitment policy, which was attached to the papers, an appointment will be preceded with an advertisement and an interviewing process by a panel who will then interview the finalist selected from those who applied.

[10] It was common cause that the Respondent was not successful with his application and was informed thereof by his immediate supervisor Mr. Peter Crankshaw on 13 February 2003. The new manager was to start on 1 March 2003. The Respondent was informed that he will be offered a further contract for the period 1 March 2003 until 31 May 2003 to help with the hand over of the store functions and to assist with certain outstanding contracts.

[11] The Respondent was informed on 17 March 2003 that he was not successful in his application for this post.

Letter dated 27 February 2003

[12] On 27 February 2003, before signing the fourth contract, the Respondent in a letter with heading "*RENEWAL OF CONTRACT*" demanded to know whether the Applicant intended renewing the newly offered contract (which

was for the period 1 March 2003 until 31 March 2003). This letter is significant for various reasons:

(i) Firstly, in the letter the Respondent specifically referred to the fact that he had signed a *fixed term contract*. This statement, in my view, indicates that the Respondent was fully aware of the nature of the contract that he had signed. The Respondent must have known that he was not a permanent employee and that his continued employment depended upon the signing of another or further contract. Why else would he ask whether the Applicant intended renewing the contract? (The relevance of this fact will become clear in the discussion hereinbelow.)

(ii) Secondly, the Respondent specifically asked for a confirmation that the contract will be renewed. This again, in my view, clearly confirms the fact that the Respondent knew exactly what he was signing. It is also significant to point out that the letter is headed "*RENEWAL OF CONTRACT*". In light of the fact that the Respondent is not a lay person but an attorney by profession, it can be accepted that the Respondent knew what the nature of the contract was.

[13] The Applicant responded on ***7 March 2003*** in a letter headed "*Re. RENEWAL OF CONTRACT*" and informed the Respondent that the Applicant has *not* yet taken a final decision and stated that it will respond on Monday 10 March 2003.

The letter of 10 March 2003

[14] The Applicant responded on ***10 March 2003*** with a letter headed "*Re. RENEWAL OF CONTRACT*". In this letter the Applicant specifically referred the Respondent to the relevant provisions in the contract and reiterated that the Respondent could not have been under a reasonable impression or expectation that the contract will renewed. The Respondent's attention was further specifically drawn to the fact that, on each occasion, a specific termination date of the contract had been agreed upon. Lastly, the Applicant stated that it was ***not*** in a position to confirm whether or not the fixed term contract will be renewed. It is thus, for purposes of this dispute, important to stress that nowhere in this letter was the Respondent informed of a decision that the contract will ***not*** be renewed.

The letter of 25 March 2003

[15] On 25 March 2003 the Respondent's attorney wrote a letter stating that -

> "*when our client was requested to sign a contract of temporary nature he was also assured that his employment was permanent and that he was therefore brought under a reasonable expectation as envisaged in terms of Section 186(1)(b) of the LRA…"*

It is difficult to understand precisely what is conveyed by this letter. Is it conveyed that the Respondent was a permanent employee or is it conveyed that the Respondent had a reasonable expectation as

envisaged in section 186(1)(b) of the LRA that his contract will be renewed?

[16] The letter further stated the following:

> *"Contrary to your suggestion that our client was employed in terms of a fixed term contract which was renewed without creating an expectation it is clear that prior to our client's employment, no suggestion was ever made that our client's employment was of a temporary nature."*

[17] The Respondent's attorneys further stated in this letter that they were of the view that the Respondent was "dismissed" on ***10 March 2003***. The relevant paragraph reads as follows:

> *"Under the circumstances, it is quite clear that the termination of our client's services as indicated in your letter dated 10 March 2003 constitutes an unfair dismissal. You therefore leave our client with no alternative but to immediately refer the matter to the CCMA. To this extent, we enclose under cover hereof form 7.11, being our client's referral of his unfair dismissal to the CCMA for conciliation."*

The fourth agreement: 1 March 2003 – 31 May 2003

[18] On 27 February the Respondent signed the fourth and last contract which was exactly the same as the previous three contracts. The Respondent signed this contract despite the fact that he knew he was not appointed to the position that he had applied for.

Referral to the CCMA

[19] On 25 March 2003 the Respondent referred a dispute in terms of section 186(1)(b) of the LRA to the CCMA. In the referral it is stated that - "*the employee was appointed for an indefinite period despite terms of contract indicating temporary".* In the referral the Respondent thus averred that he was appointed for an indefinite period (notwithstanding the fact that he had signed four fixed term contracts) and that the dispute arose on ***10 March 2003***.

[20] The dispute was set down for conciliation on 30 April 2003. The point was raised by the Applicant that the Respondent was not an employee but an independent contractor. Commissioner Mkhosana (the Second Respondent) held that the Respondent was an employee. The Applicant decided not to pursue this issue any further. The certificate of non-resolution was thereafter issued. It is important to stress that the issue of a premature referral was not raised before the conciliating commissioner.

Pre-arbitration agreement

[21] The parties held a pre-arbitration meeting on 3 February 2004. The Applicant informed the Respondent that a point *in limine* will be taken at the commencement of the proceedings on 3 February regarding the date of referral of the dispute. I will return to this point hereinbelow.

[22] In the pre-trail minutes the following is reflected as being in dispute:

> "*That the employee reasonably expected the employer to renew the aforesaid fixed term contract of employment*".

The Commissioner was required to decide the following:

> *"Whether the employer created a reasonable expectation of renewal of the fixed term contract of employment.*"

[23] What is confusing about these minutes is the fact that it is now seemed to be the case of the Respondent that he was dismissed because his contract was not renewed in circumstances where he had a reasonable expectation of renewal. This dispute falls squarely within the ambit of section 186(1)(b) of the LRA. The dispute that was referred to arbitration in terms of the LRA 7.13 is also described as one which falls within the ambit of section 186(1)(b) of the LRA.

[24] The arbitration commenced on 3 February 2004. The issue referred to the arbitration was whether the Respondent had reasonably expected the Applicant to renew his fixed term contract; whether that expectation was reasonable and whether the failure by the Applicant to renew the fixed term contract constituted an unfair dismissal as contemplated in section 186(1)(b) of the LRA.

[25] Before turning to the *in limine* proceedings, I must point out that a further version surfaced during the arbitration hearing. This version is also repeated in the answering affidavit. In paragraph [25] of the answering affidavit the Respondent stated that: "*I had perceived myself to have been permanently employed and that the fixed term contract was simply an administrative formality to ensure payment of my salary.*" However, further at paragraph 33 of the answering affidavit the Respondent appears to

acknowledge that he was employed in terms of a fixed term contract. The following is stated: "*In respect of the point in limine I testified that I was appointed in July 2002 and I expected my fixed term contract to be renewed until my permanent position was confirmed.*" Later in paragraph [39] the Respondent again reverted back to the first version and that is that he was employed permanently: "*I testified that I expected my fixed term contract to be repeatedly renewed in that from the start of my services my perception was that I was appointed in the position on a permanent basis ant that the contracts were merely administrative*."

[26] *To summarise*: In terms of the arbitration award and in terms of the pre-arbitration minutes, the Respondent's case appeared to be a dispute in terms of *section 186(1)(b) of the LRA* in that he was dismissed in circumstances where he reasonable expected the employer to renew a fixed term contract. I have already referred to the fact that it was common cause that the Respondent had signed four consecutive fixed term contracts. Each contract clearly stipulated that the contract was for a specific period only and that the contract will terminate at a specific time. The Respondent's evidence regarding the written contracts was that he merely signed these (fixed term) contracts from time to time and that he merely regarded these contracts as an administrative formality for purposes of obtaining a salary. If regard is had to the answering affidavit, it is stated there that the Respondent regarded his position to be regulated by the fixed term contracts with an expectation that it would be renewed

until he was made permanent.[1] There appears to be two (conflicting) versions. If the Respondent's case is one of a reasonable expectation of renewal, it is clear that the date of the dismissal will be the date on which the employer notified the employee of the intention ***not*** to review the contract (see section 190(2)(a) of the LRA).

[27] The other version (which appears to be the principle version if regard is had to the evidence at arbitration and the answering affidavit) is that the Respondent was actually appointed for an indefinite period (in other words permanently) despite the fact that four contracts (which he signed) clearly and unambiguously stated that his appointment was merely temporary and despite the fact that each of the four contracts clearly stated that he will be appointed for a specific period of time. A further version was that the Respondent was merely on probation during the time when his employment was regulated by the fixed-term contracts. In his evidence, however, the Respondent stated that he never regarded his employment simply for a fixed period and insisted that he was a ***permanent*** employee. I find this version to be improbable. As already point out, the Respondent was a qualified attorney and I find it extremely unlikely and improbable that an attorney (who admitted that one of his tasks was to draft contracts for the Applicant) would not understand what he was signing, namely four consecutive fixed term contracts.

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[1] Paragraph 81 of the answering affidavit.

[28] What is even more problematic for the Respondent is the fact that each of the contracts contained an express non-variation clause. Be it as it may, I have decided to consider what the *date of dismissal* was having regard to both versions.

Section 190 of the LRA

[29] Section 190 of the LRA states the following in respect of the date of the dismissal:

"190 Date of dismissal

(1) The date of dismissal is the earlier of-

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer.

(2) Despite subsection (1)-

(a) if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;

(b) if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;

(c) if an employer refused to reinstate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee."

Date of dismissal in terms of the first version

[30] Returning to the point at issue: If the Respondent's version is to be accepted (which I do not accept) that he was permanently employed, then the date of his dismissal will be determined with reference to section 190(1) (a) and (b) of the LRA which provides that the date of the dismissal is the earlier of the date on which the contract of employment terminated or the date on which the employee left the services of the employer. It was common cause that the contract came to an end on 31 May 2003. It was also common cause that the Respondent left the Applicant in the middle of May 2003 which is some weeks *after* the dispute had been referred to the CCMA.[2] On this version the dispute was therefore referred to the CCMA *before* the Respondent was actually "*dismissed*" as contemplated by the LRA. The referral to the CCMA was therefore clearly premature and the CCMA did not have jurisdiction to conciliate (and/or arbitrate) the dispute.

Date of dismissal in terms of the second version

[31] What is the date of dismissal if the dispute was one which was referred to the CCMA in terms of section 190(2)(a) of the LRA (the non-renewal of the fixed term contract)? The Respondent alleged that he was informed on *10 March 2003* that his contract was not to be renewed (this is also borne out

[2] The LRA 7.11 was signed 25 March 2003.

by the letter from his attorney). There is simply no factual basis for this allegation. The letter from the Applicant clearly stated that a decision has *not* yet been taken. Taking into account these facts clearly the referral to the CCMA was premature as there has not yet been a "*dismissal*" as contemplated by the CCMA at the time of the referral.

[32] In passing it must also be pointed out that the Respondent also stated during the *in limine* hearing that he was informed on 13 February 2003 that the contract would not be renewed after 31 May 2003. It must be pointed out that this is not in accordance with his attorney's letter which clearly stated that the Respondent was informed on 10 March that the contract would not be renewed. The Respondent must therefore stand and fall by this letter.

The in limine argument

[33] To recap: The referral to the CCMA was made on 25 March 2003. In terms of the referral to conciliation (the LRA 7.11), it is stated that the date of the dismissal was *10 March 2003*.

[34] An *in limine* point was raised at the commencement of the arbitration hearing namely that the referral to conciliation was premature.

[35] As part of the *in limine* point, the Respondent gave evidence. I have already referred to his evidence in the aforegoing paragraphs.

[36] The arbitration was postponed in order to allow Commissioner Mvumbi to make a decision. The ruling was made on 31 March 2004. The Commissioner referred to section 190(1) of the LRA and held as follows:

"I am not persuaded by the Respondent's view that his matter was nullity (sic) because the Respondent was not bona fide in launching the Point in Limine instead he had become technical and formalistic in approach so as to frustrate the expeditious resolution of this dispute (sic)."

[37] It is unclear what the Commissioner is trying to convey in this paragraph. What is, however, clear from the ruling, is the fact that the Commissioner was of the view that he may proceed with the arbitration because the certificate (of non-resolution) has not been challenged.

Review of the ruling

[38] Should this Court review the ruling? Before I make a finding on this point it is necessary to briefly restate the law. It is trite that a Commissioner (being a statutory organ with no inherent powers) must make a ruling as to its own jurisdiction when a jurisdictional point is raised.[3] One of the issues that will determine whether or not the CCMA has jurisdiction is whether or

[3]The Court in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Another* (2008) 29 *ILJ* 2588 (LC) held as follows: *" [7]The CCMA is a creature of statute and hence it only has jurisdiction over those disputes referred to it in terms of the LRA. See in this regard s 115(4) of the LRA which reads as follows: 'The Commission must perform any other duties imposed and may exercise any other powers conferred on it by or in terms of this Act and is committed to perform any other functions entrusted to it by any other law.' (Emphasis added.)*
[8]The CCMA's main statutory function is to resolve disputes through conciliation and to arbitrate those disputes referred to it 'in terms' of the powers conferred upon it by the LRA and the rules. The CCMA (as a creature of statute) will therefore act ultra vires should it assume jurisdiction over disputes not referred to it in terms of the LRA. The jurisdiction of the CCMA (and of any other statutory tribunal) is dependent upon the existence of certain objectively predetermined conditions as set out in the LRA from which it derives its existence. Although a statutory tribunal (such as the CCMA) will (for practical reasons) rule on its jurisdiction, it cannot by virtue of the fact that it is a statutory authority, confer the necessary jurisdiction upon itself. Any pronouncement on jurisdiction remains subject to the review powers of the Labour Court..
[9] Although a tribunal (such as the CCMA) cannot rule on its own jurisdiction, it will do so for practicality considerations and will do so subject to review by the Labour Court….

not a dispute has been referred to the CCMA within the statutory prescribed time limits. Where the dispute has been referred out of time, application for condonation must be made simultaneously with the referral of the dispute to the CCMA (Rule 9(2) of the CCMA Rules). It is likewise a jurisdictional issue whether or not an alleged dismissal dispute was referred prematurely or not. Simply put: The CCMA cannot conciliate a "dismissal" dispute when no dismissal has taken place.

[39] It is clear from the Ruling of Commissioner Mvumbi that he was of the view that he had jurisdiction to hear the matter simply because a certificate of non-resolution has been issued by the conciliating commissioner. In general, the issuing of a certificate of non-resolution will be the jurisdictional precondition or jurisdictional fact that confers power on the arbitrating commissioner to arbitrate the referred dispute. In other words, as a general rule it is thus the factual existence of a certificate of non-resolution that enables the arbitrating commissioner to arbitrate the dispute referred to it. Whether the certificate of non-resolution is legally valid or invalid does not (as a general rule) affect the power of the arbitrating commissioner to arbitrate a dispute and the certificate of non-resolution will remain valid until reviewed and set aside by a competent court such as the Labour Court.[4] The general rule is, however, only applicable in circumstances where the conciliating commissioner has ruled on a specific jurisdictional issue.

[4] EHO Abantu (supra) at paragraph [14].

[40] It appears from the papers that the jurisdictional issue raised before Commissioner Mvumbi (the arbitrating commissioner) was not raised before Commissioner Mkhosana (the conciliating commissioner) who issued the certificate of non-resolution. The only jurisdictional issue that was raised before Commissioner Mkhosana was whether or not the Respondent was an employee or an independent contractor. As already pointed out, the issue of a premature referral was not raised before the conciliating commissioner.

[41] The pertinent question which arises in the present case is whether or not Commissioner Mvumbi was correct in deciding not to decide the jurisdictional issue of premature referral on the basis that the mere fact that a certificate of non-resolution has already been issued he therefore had the necessary power to proceed with the arbitration. Where a specific jurisdictional point has been raised before and decided by a conciliating commissioner, the subsequent arbitrating commissioner will have the necessary power to proceed with arbitration. Under those circumstances the CCMA commissioner at arbitration will not be able to decide a jurisdictional point afresh as it has already been decided by the conciliating commissioner.

[42] I have dealt with this issue at length in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Another* (2008) 29 *ILJ* 2588 (LC). In that matter I have indicated that a Commissioner at conciliation is obliged to deal with jurisdictional matter once it is raised

before him or her. In paragraph [16] of that judgment, it was pointed out that Rule 14 of the Rules of the CCMA confirms the principle that the CCMA (as a statutory authority) must determine the issue of jurisdiction as a prerequisite for exercising its powers in terms of the CCMA. This rule states as follows under the heading "*How to determine whether a commissioner may conciliate a dispute"*:

> *"If it appears during conciliation proceedings that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation*."

[43] I have also pointed out in the aforementioned decision that Rule 22[5] allows for an arbitrating commissioner to determine a jurisdictional point at arbitration provided that it (the jurisdictional point) has not been raised before the conciliating commissioner for some reason. In other words, if a jurisdictional point is raised at conciliation or if it becomes clear during the conciliation proceedings that a jurisdictional issue has arisen, the conciliation commissioner is compelled to deal with the issue and make a ruling (which is subject to review by the Labour Court). However, where a jurisdictional point has not been raised at conciliation, the arbitrating commissioner must entertain such a jurisdictional point despite the fact that a certificate has been issued:

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[5] Rule 22 reads as follows: *If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has jurisdiction to arbitrate the dispute*"

"[20] It appears from a reading of rule 22 that it is only in those circumstances where a jurisdictional issue has not been determined, that the arbitrating commissioner will be entitled to determine a jurisdictional issue despite the fact that the conciliating commissioner has already issued a certificate of non-resolution. To this end, rule 22 appears to be in conflict with administrative principles in terms of which a statutory authority is precluded to (review and) set aside an administrative act (such as a certificate of non-resolution) or decision as well as with the principle that an administrative act (such as a certificate of non-resolution) remains valid until reviewed and set aside by a competent court such as the Labour Court. Rule 22 clearly has as it purpose to assist parties to a labour dispute, most of whom are lay people and who may not have realized or known that a jurisdictional concern even existed or ought to have been raised at the conciliation phase, to raise such a jurisdictional concern at the arbitration phase notwithstanding the fact that a certificate of non-resolution has been issued. In Premier Gauteng & others v Ramabulana NO & others (2008) 29 ILJ 1099 (LAC) the Labour Appeal Court also confirmed that the CCMA may derive powers from the rules insofar as they do not conflict with the LRA. Rule 22 will also apply where the conciliating commissioner issues a certification of non-resolution in circumstances where the employer did not attend the conciliation hearing and only raises a

jurisdictional point at the commencement of the arbitration proceedings. Rule 22 is, in my view, not applicable to those instances where a party raises a jurisdictional point (such as for example that an applicant before the CCMA is not an employee) during the conciliation proceedings. In such circumstances the conciliating commissioner is, in my view, obliged to consider the point and a refusal to investigate the jurisdictional issue would, in my view, constitute a reviewable irregularity. This rule is also not applicable to those circumstances where the conciliating commissioner did in fact make a ruling on a jurisdictional point. In such circumstances the certificate of non-resolution will stand and subsequent arbitration proceedings will be lawful until such time the certificate is reviewed and set aside. Rule 22 is also, in my view, not applicable to those circumstances where a party (usually the employer party) is aware of a jurisdictional point but deliberately fails to raise it during conciliation but only raises it at arbitration. In such circumstances I am of the view that the employer party will have to launch proper review proceedings before the Labour Court to review the certificate of non-resolution. The decision to review a certificate under such circumstances will clearly be subject to the Labour Court's discretion and, in weighing this question, regard will be had, inter alia, to the extent to which the employer had abused the CCMA proceedings by deliberately not raising the jurisdictional

concern as well as the extent to which the disputing parties might have relied or acted on the certificate of non-resolution."[6]

[44] The Ruling of Commissioner Mvumbi is thus, in my view reviewable on the basis that he refused to entertain a jurisdictional point that was raised before him for the first time. On this basis alone the Ruling of Commissioner Mvumbi is reviewed and set aside.

[45] Despite the fact that it is not, in light of the aforegoing, necessary for this Court to then to evaluate the merits of the Ruling made by Commissioner Mvumbi, I will do so in any event in order to bring finality to this matter that has been dragging on for a number of years.

[46] I have already referred to the merits of the arguments raised as part of the point *in limine* proceedings before Commissioner Mvumbi. I will not repeat what I have already found and that is that the referral was premature. The CCMA did not have the necessary jurisdiction to hear the matter. As such the Commissioner acted *ultra vires* by proceeding with the arbitration. I can find no reason why costs should not follow the result.

[47] In the event the following order is made:

1. The Ruling made by the Third Respondent on 31 March 2004 is reviewed and set aside in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995.
2. As a consequence of the order in terms of paragraph 1, the award made by the 3rd Respondent on 3 February 2004 is reviewed and

[6] See *EOH Abantu (supra).*

set aside in terms of section 145 of the Labour Relations Act 66 of 1995.

3. The 4th Respondent is ordered to pay the costs.

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AC BASSON, J

6 October 2009

FOR THE APPLICANT:

PJ Greyling of Greyling & Associates

FOR THE RESPONDENT:

Adv GA Fourie. Instructed by Louw Maree Inc.