IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN BRAAMFONTEIN

CASE NO JR 2911/07

Reportable

In matter between

EOH ABANTU PTY LTD	**APPLICANT**
And	
COMMISSION FOR CONCILATIOM MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
NAIDOO, RAVI R NO	**SECOND RESPONDENT**
MOSTERT, JOHANNES FREDERKIK GERHARDUS	**THIRD RESPONDENT**

JUDGMENT

CELE J

Introduction

[1] An unfair dismissal dispute was referred by the third respondent for conciliation. At the conciliation meeting, the applicant raised a jurisdictional *point in limine* by stating that the third respondent was not an employee but an independent contractor. The second respondent declined to entertain the point *in limine* but instead issued a certificate of non resolution. It is sought to have that certificate reviewed and set aside and that it be substituted with a finding that the first respondent lacks jurisdiction to arbitrate on the dispute.

The application is opposed by the first and third respondent. At the commencement of the hearing of this application, the first respondent was granted condonation for the late filling of its answering affidavit.

Background facts

[2] On or about 7 August 2007 the applicant and the third respondent signed a contract they called a "standard agreement". In terms of that agreement the service of the third respondent was retained on behalf of the applicant's client System Application Products (South Africa) (Pty) Ltd.

[3] On or about 10 October 2007 the third respondent filed a referral to the first respondent in which he alleged that he was:

- employed by the applicant and
- constructively dismissed by the applicant in failing to pay him for the months of August and September 2007.

[4] According to the applicant, during conciliation its representative advised the second respondent that the third respondent was not an employee of the applicant but an independent contractor. Despite that submission, the second respondent proceeded to issue the certificate of non resolution, without considering the point *in limine* to determine whether or not the first respondent actually had

jurisdiction to hear the matter. The third respondent thereafter referred the dispute to arbitration. The proceedings appear to have been stayed pending the out come of this application.

Submission by the parties

Applicant's submissions

[5] The second respondent committed a gross irregularity, alternatively a misconduct in the performance of his duties in issuing the certificate in the circumstances where the jurisdiction to arbitrate the dispute was brought into question. When the allegation that the third respondent was not an employee but an independent contractor was made, the second respondent was joined to establish whether the first respondent had the necessary jurisdiction to entertain the third respondent's referral. Once the certificate is issued, the first respondent is only deprived of jurisdiction if it is reviewed and set aside. The second respondent has forced, through issuing a certificate, the applicant to answer a case which, in law, is not required to meet until the first respondent has confirmed its jurisdiction

[6] The second respondent arrived at a conclusion that no other commissioner could reasonably arrive at based on the facts before him and based on proper interpretation of the rules of

the first respondent. Rule 14 of the rules of the first respondent provides that:

"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 commissioner has jurisdiction to conciliate the dispute through conciliation" (own emphasis)

Rule 14 is therefore peremptory and not discretional as evidence by the use of the word "must". The conciliation commissioner is enjoined to determine this point. He is not provided with any discretion to defer this decision to arbitration hearing

[7] The second respondent forced, through an issuing of the certificate, the applicant to answer a case which, in law, it is not required to meet. It is submitted that the interest of the first respondent would be better served should the first respondent apply its rules and determine jurisdictional points when raised at conciliation rather than unnecessary defer the determination of the same to the arbitration proceedings. On reading the answering affidavit it would appear that the opposition of the first respondent is primarily based on a view that all jurisdictional matters should be disposed off at arbitration and that conciliation should be exclusively used to see if the matter could be settled and thus reduce the number of matters which get referred to arbitration.

[8] The first respondent makes a further submission that any jurisdictional ruling which is issued at conciliation would not bind the arbitrating commissioner. The reasoning does not stand up to any form of scrutiny. Should the conciliating commissioner find that no jurisdiction exists then that is the end of the matter and the conciliating commissioner is barred from referring the dispute any further. That would be the end of the matter. The conciliating commissioner may find that one of the factors present in section 200A of the LRA may be present which creates a presumption of an employment relationship and that presumption would entitle a referral to arbitration or the Labour Court, but it could be rebutted by the employer during the subsequent proceedings. If an unequivocal finding is made on an employment relationship existing then that would bind any subsequent commissioner arbitrating the dispute and the first respondent would in effect be *functus officio* in relation to that point.

[9] Ms Kahn's submissions that many litigants request a stay of arbitration are not supported by any facts other than her own submissions. To this extent it is pertinent to point out that it has been the practice of the first respondent not to oppose such applications, nor postpone matters of its own accord, but to insist that such applications are made. Thus her submissions that the first respondent believes that Court is being prejudiced ring hollow when it is the first respondent who insists that such applications are brought, rather than allowing for postponement applications to be brought before it.

[10] Ms Kahn makes a further submission that the parties should be attempting to settle disputes through conciliation and then raise issues relating to jurisdiction at the arbitration proceedings, should conciliation not be successful. This view cannot be the correct one. If Ms Kahn's submissions are to be accepted then it would render the conciliation proceedings too little more than a bargaining forum and render the certificate of outcome as little more than a recordal that the parties were unable to resolve the dispute. Conciliation would then not determine whether the first respondent has the necessary jurisdiction to entertain the referral in the first instance and would burden the first respondent and Court with the determination of jurisdictional points which could and should be dealt with at conciliation.

[11] It would seem that what Ms Kahn would prefer to see happen at conciliation is the resolution of the maximum number of disputes, which in itself is part of the conciliation process, without dealing any further with the matter at that stage. This would go against the direction given by the Labour Appeal Court in the matter of *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others [2000 21 ILJ 2382 (LAC)].* Ms Kahn then makes the submission that neither party would suffer prejudice if this was the case. This submission is erroneous. If parties are dragged to arbitration when there is no need to, as the matter could have been disposed of at conciliation then there will be prejudice in terms of further time taken up by the attendance at the

arbitration and the costs associated with it. What Ms Kahn seeks to do is debate issues of public policy which should be the role of the legislature or the first respondent's Rules Board and asks this Court to act as both.

[12] The question is a crisp one, did the second respondent comply with the rules of the first respondent, and whether that would constitute a reviewable irregularity. The arguments raised by Ms Kahn relating to how she wishes the first respondent to operate and the statistics of the first respondent should, simply have no persuasive effect on this Court. The submission that the applicant's application is opposed in the public interest cannot be accepted. Given all of Ms Kahn's submissions, it would seem that the application is opposed as it might have some negative effect on the statistics of the first respondent.

[13] The terms of the standard agreement make it abundantly clear it created not an employment relationship which would clothe the first respondent with the necessary jurisdiction to hear the referral. Instead, it is respectfully submitted that it, instead creates an independent contractor's agreement which ousts the jurisdiction of the first respondent. The third respondent is left merely with a contractual dispute with the applicant which should be heard by the civil courts. The third respondent issued an invoice to the applicant. The afore-going evidences that the third respondent was not expecting to be paid a salary but that he would render an invoice in terms of the standard agreement.

First Respondent's submissions

[14] Ms Nerine Beverlee Kahn, the Director of the first respondent, deposed to a comprehensive affidavit in which she sets out the procedure followed at a conciliation stage by the first respondent, the difficulties encountered and further submissions. It is expedient to refer to the affidavit.

15] The applicant sees an order setting aside the certificate of out come issued by the second respondent under case no GAJB34137/07, and substituting it with a finding that the first respondent lacks jurisdiction to arbitrate the dispute. Pending this discussion the first respondent has been interdicted from arbitrating this matter. The basis of the applicant's argument is that the second respondent allegedly committed a gross irregularity in that he failed to consider whether the first respondent had the necessary jurisdiction to entertain the dispute referred by the third respondent for conciliation. The second respondent declined to issue a ruling on the jurisdictional objection raised at conciliation and instead informed the parties that the objection would be dealt with art the arbitration proceedings. The purpose of the first respondent to oppose this application is to consider three issues.

- Firstly, with regard to the obligation of commissioners to make rulings on jurisdiction at the time of

conciliation, where the jurisdictional issue is closely bound up with the merits of the dispute, or would otherwise require the hearing of oral evidence, the first respondent's position is that forcing commissioners to make such ruling would be contrary to the very nature of conciliation proceedings and would result in an inefficient use of the first respondent limited resource.

- Secondly, the application should be dismissed as the decision by the second respondent is not administrative action or capable of review in terms of the LRA. for twofold reasons:

    - The decision in issue (a failure to decide upon the jurisdiction) has no direct, external legal effect on any party and so it is not subject to review. This is because, regardless of the decision of the second respondent, the applicant has the right to refer the matter to arbitration, once the 30 days period has passed since he referred the matter to the first respondent. Even if the issue of jurisdiction has been decided, this would not have prevented the third respondent from referring the matter to arbitration where this decision could be decided afresh. Accordingly, the decision not being capable of determining (let alone affecting) rights, it should be reviewed.

- ❖ Secondly, the decision in issue is not a function provided for in terms of the LRA. It therefore should not be reviewed.

[16] Thirdly, even if court finds that the decision of the first respondent is one which could be reviewed, the appropriate remedy is to discharge the interdict against the first respondent, because:

- ➢ the expeditious resolution of labour dispute is not served by a peace meal approach such as the one adopted by the applicant in this matter. Had the issue of jurisdiction properly been considered by the arbitrator after the benefit of hearing oral evidence on both the merits and the jurisdictional issue, then the Labour Court would have been saved on two occasions. Importantly the first respondent has been interdicted in circumstances where no legal basis exists for an interdict. The decision is incapable of enforcement against any party (including the first respondent) and the Labour Court should not be over burdened with such matters.

- ➢ the applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issue it would like to, and a commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is

linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it will be able to seek to review the award in accordance with the LRA. This will mean the Labour Court will have the benefit of the CCMA'S decision and will not become involved prematurely in matters. This will prevent a flood of similar applications.

- the third respondent and the first respondent however do suffer the prejudice. The third respondent's dispute has been delayed due to these applications despite having the right in terms of the LRA to refer the matter to the first respondent for arbitration. Should this precedent be confirmed then the first respondent's efficient resolution of dispute will be compromised.

The process of conciliation at the CCMA

[17] The process of conciliation involves a meaningful attempt by the parties to reach consensus on the dispute between them with the assistance of a trained conciliator. In the conciliation process, the parties try to find a solution to the dispute among themselves. The commissioner's intervention extends only as far as is necessary to assist the parties in reaching such a solution. The commissioner plays the role of facilitator and does not make any assessment as to which of the parties is "correct" on the merits. Conciliation is not by its nature a process of adjudication.

[18] The conciliation process is designed for efficient and cost-effective resolution of disputes with as few legal formalities as possible. As a general rule, and save to the extent that an informal evaluation of the merits may assist in resolving the dispute, the conciliating commissioner will not attempt to evaluate the dispute on the merits. If the parties are unable to resolve the matter through the informal process of conciliation, then the matter is referred to arbitration. In conciliation proceedings, parties are not entitled to be legally represented. In the ordinary course no evidence is given under oath, and conciliators are frequently not trained to determine disputes of fact. At arbitration, by contrast, the parties may, depending on the nature of the dispute and a range of considerations set out in the rules, be legally represented. They are specifically given the opportunity to bring oral evidence under oath to be evaluated by the commissioner, and a final and binding award is imposed on them as the outcome of the arbitration proceedings.

[19] In line with the informal process of conciliation, the LRA provides for short time periods within which attempts should be made to resolve disputes. Section 191 (5) of the LRA provides that if a certificate of non-resolution is issued by a commissioner of the first respondent or if 30 days have expired since the referral of the dispute, the employee may refer the dispute to arbitration. Commissioners of the first respondent are therefore given 30 days from the referral of

the dispute within which to conduct and conclude the conciliation process.

[20] The first respondent would not be able to comply with the 30-day time period if its commissioners were required to hear oral evidence on all jurisdictional issues raised, in particular those that are closely bound up with the merits of the dispute, and then to issue rulings on these technical issues raised. At present, the first respondent makes all reasonable attempts to comply with 30-day time period for conciliation. The average time between the referral of disputes and the issue of certificates of outcome is currently 26 days.

[21] The conciliation process is highly effective in resolving disputes without needing to resort to adducing evidence at arbitration and requiring an arbitrator to make an award on that basis. In the 2007/08 financial year, 132 868 new referrals were received by the first respondent. During this period, 84 577 cases were finalised using the conciliation process (includes pre-conciliation, conciliation and con-arb). A total of 48 983 cases were settled, 33% of which were settled at con-arb and 18% settled at conciliation. These statistics are taken from the information which is used to compile the 2007/08 annual report for the first respondent. This report is not yet available. A confirmatory affidavit of Nersan Govender, confirming these statistics, will be filed.

[22] The first respondent is concerned that the high rate of settlement at conciliation, without the need to proceed to arbitration, would be compromised by imposing an obligation on it to resolve at the conciliation stage all jurisdictional issues which have a bearing on the merits. An obligation on the first respondent to make formal legal findings on all jurisdictional issues at conciliation stage is a way that will serve to delay dispute resolution. This is in effect what has occurred in the present matter. This would also increase the need at conciliation to lead and test evidence formally. This is not what was intended by the drafters of the LRA and constitutes a significant departure from the dispute resolution procedure specified in section 191.

[23] The first respondent believes that if the parties are encouraged on jurisdictional issues closely bound up with the merits at conciliation, this would reduce the chances of negotiating settlement between the parties. A successful conciliating meeting depends on the willingness of the parties to resolve the dispute. Encouraging parties to technical points will detract from this, and will, it is believed, result in a lower rate of settlement at conciliation. As well as frustrating the dispute resolution process. It is believed that this will contribute to the first respondent's case load and place a heavy stain on already limited resources. On the other hand, no delay will occur if jurisdictional issues of this kind are determined at arbitration.

[24] Whether a person is an employee or an independent contractor is not a “jurisdiction question” in the true sense that is beyond the powers of a conciliating commissioner to determine the issue. It is a question that falls within the powers of a commissioner to determine in the course of determining whether or not a case has been made out for relief sought in arbitration proceedings (at the adjudication stage of the matter) in relation a dispute properly before it . It is not therefore a question that must be determined prior to conciliation taking place. And is not a jurisdictional question contemplated by rule 14 of the commissioner’s rules.

[25] In the alternative, even if it is a jurisdictional issue in the true sense, the performance of the function that is attacked by the applicant in these proceedings does not constitute administrative action, or action that is otherwise susceptible to review in terms of the provisions of the LRA.

- First the conciliation commissioner’s failure to determine whether or not the third respondent was an employee or an independent contractor does not constitute administrative action under the Promotion of Administration of Justice Act 3 of 2000(“PAJA”).

- The performance of the commissioner’s function at the conciliation stage is not susceptible of review on the grounds of legality.

[26] In the further alternative, the court should decline to review a certificate of outcome because, as explained by court in *Seeff Residential Properties V Mbhele no & Others (2006) 27 ILJ 1940 (LC)*, the issuing of certificate and its review have no legal consequences for the further determination of the matter by the commission and for that reason, to granted relief that has no consequences.

[27] In the further alternative, and even if the decision in *Seeff Residential* properties is not followed in this regard, the court should decline to exercise its discretion to grant relief because these proceedings are brought prematurely and intervention at this stage would undermine the primary objects of the LRA and an expeditious resolution of labour disputes. It would be inappropriate for this court to decide, at this stage of these the proceedings, the question whether or not the third respondent was an employee.

[28] The question whether or not an employment relationship existed is one which, like the question whether or not an employee was in fact dismissed, falls within the jurisdiction of the commission to determine in the course of its adjudication functions. The significance of this distinction is most evident when the role of reviewing court is considered. The commission has power to determine the question whether or not a party to a dispute referred to it is an employee or an independent contractor. This means that the question does not raise a jurisdictional issue in the sense contemplated in rule 14 of the rules, and that a conciliation commissioner is

under no duty to determine the question at the conciliation stage of the proceedings.

[30] Where the jurisdictional issue in question requires the resolution of factual dispute, the leading of oral evidence and a determination of difficult question of mixed law and fact, on matters that are intimately bound up with the substantive merits of the dispute may legitimately be deferred to the arbitration stage of the proceedings.

[31] The conciliation function of the commission is materially different from the arbitration function. The commission, in conducting arbitration proceedings, has been described by the Constitutional Court as an administrative body exercising a quasi judicial function. A commissioner conducting an arbitration process is therefore performing an administrative function. A commissioner's performance of the conciliation function is not reviewable on the principle of legality. In this regard, respectfully submitted the decision of the honourable court in *Seeff Residential Properties* (supra) is clearly wrong

EVALUATION

The commission

[32] The commission is an independent body created by statute ss 112-114 of the Act. Section 115 of the Act outlines the functions of the commission, *inter alia*, thus:

> "1. The commission must-
>
> (a) attempt to resolve, through conciliation, any dispute referred to it in terms of the Act;
> (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-
> (i) this act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
> (ii) all parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the commission.
>
> (2) The commission may-
>
> a
>
> b
>
> cA make rules-

(i) to regulate, subject to Schedule (3), the proceedings at its meetings and at the meetings of any committee of the Commission.

(iii) regulating the practice and procedure-

(aa) for any process to resolve a dispute through conciliation;

(bb) at arbitration proceedings;"

2A The commission may make rules regulating –

(a) the practice and procedure in connection with the resolution of a dispute through conciliation or arbitration;
(b) the process by which conciliation is initiated, and the form, content and use of the process,
(c) the process by which arbitration or arbitration proceedings are initiated, and the form, content and use of that process;"

[33] Further, section 135 of the Act provides for the resolution of disputes through conciliation. To the extent here relevant it reads:

"(1) when a dispute has been referred to the commission, the commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral. However the parties may agree to extend the 30 day period.

(3) The commissioner must determine a process to attempt to resolve the dispute which may include:

(a) mediating the dispute;
(b) concluding a fact finding exercise; and
(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

(4)

(5) When conciliation has failed, or at the end of the 30 day period or any further period agreed between the parties-

(a) The commissioner must issue a certificate stating whether or not the dispute has been resolved;"

[34] Further still, Section 191 of the Act deals with disputes about unfair labour practices. A dispute is to be referred within the time frames stipulated in S191 (1) of the Act. In terms of Section 191 (4) of the Act, the council or the commission must attempt to resolve the dispute through conciliation. If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved, either the council or the commission must arbitrate the dispute at the request of the employee or the dispute must be adjudicated upon by this court, if it is referred to it, depending whether the applicable subsection of S191 is either 5 (a), 5 (b), 5A or 6.

[35] In order to regulate its practices and procedures, the commission made various rules. One such is rule 14 which, as already indicated reads:

> "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 commissioner has jurisdiction to conciliate the dispute through conciliation"

[36] Rule 16 of the commission then reads:

> "1. Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.
>
> 2. No person, including a commissioner, may be called as a witness during any subsequent proceedings in the commission or in any court to give evidence about what transpired during conciliation"

[37] The current rules of the commission, made in terms of S 115 (6) of the Act were published under the Government Notice R 961 of 25 July 2002 as published in GN R 1448 in GG 25515 of 10 October 2003. The precursor to rule 14 was rule 6 which was promulgated as part of sub legislation, on 31 March 2000. It deals with the question of jurisdiction to conciliate in the following terms:

> ‘6.1 The commissioner appointed to conciliate the dispute may only conciliate the dispute and thereafter issue a certificate in terms of section 135 (5) of the Act if the commission has jurisdiction to conciliate the dispute.
>
> 6.2 If at any stage during the conciliation proceedings it becomes apparent that there is a jurisdictional issue which has not been determined, the commissioner must require the referring party to prove that the commission has the necessary jurisdiction to resolve the dispute through conciliation.”

[38] When drafting rule 14, the commission decided against the retention of the provisions of rule 6.1 as it prior existed. Instead, it was decided to retain a provision which was almost identical to rule 6.2 and to make it rule 14. The determination of jurisdiction in terms of rule 14 appears to have been narrowed from what it was in terms of the predecessor to rule 14. All that is necessary for the determination of the jurisdictional issue, for conciliation purposes, is that, the referring party ought to prove that the commissioner has jurisdiction to conciliate the dispute.

[39] Section 135 (3) of the Act authorizes a conciliating commissioner to determine a process to attempt to resolve the dispute. Such a process includes mediating the dispute, concluding a fact-finding exercise and making a recommendation to the parties, which may be in the form of an advisory arbitration award. Conciliation proceedings are

private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceeding (my emphasis) during any subsequent proceedings, unless the parties agree in writing. Again, no person may be called as a witness during any subsequent proceedings in the Commission or in any Court to give evidence about what transpired during conciliation- Rule 16. Such evidence must be inclusive of sworn statements constituting evidence in application proceedings, such as an application to review and set aside a certification of outcome.

[40] There is another consideration. As was the position in this case, the arbitration proceedings are often stayed by means of an interdict pending the outcome of the review application to set aside a certificate of outcome or a jurisdictional ruling issued by a conciliating commissioner. The applicant for an interdict must show either a *prima facie* right though open to doubt or a clear right. After a period of 30 days since the dispute was referred to conciliation, the referring party would be entitled *ex lege* to refer the dispute to arbitration. The granting of an interdict against a person who has an *ex lege* right is in itself contradictory to a fair administration of justice. In my view such practice should desist.

[41] A number of submissions made by Ms Kahn have been persuasive. They are that:

- in the conciliation process, the parties try to find a solution to the dispute among themselves. The commissioner's intervention extends only as far as is necessary to assist the parties in reaching such a solution. The commissioner plays a role of a facilitator and does not make any assessment as to which of the parties is correct on the merits. Conciliation is not by its very nature a process of adjudication.

- parties are not entitled to legal representation in conciliation proceedings.

- the Act provides for a short time period of 30 days within which attempts should be made to resolve a dispute by conciliation. After 30 days have expired since the referral date, the referring party may ask that the dispute be arbitrated upon. The determination of jurisdiction by hearing oral and documentary evidence may take longer than 30 days where the jurisdictional issue may be closely bound up with the merits of the dispute.

- the issuing of the certificate of outcome and its review have no legal consequence for the further determination of the matter by the commission after 30 days have expired, since the date of referral. The commission may grant appropriate relief.

- the reviewing of the certificate of outcome delays the expeditious resolution of a labour dispute by possibly introducing numerous litigation processes.

[42] I have not been persuaded by the statistical concerns of the first respondent. I have had to assume, without having to decide it that, there are less probabilities of a litigant who denies being an employer, settling the dispute by recapitulating to the demands of the "employee". In any event no statistics relevant to this consideration were given.

[43] I conclude therefore that, the "ruling" on jurisdiction by a conciliating commissioner as contemplated by rule 14 is in the form of an advisory arbitration award provided for in section 135 (3) (c) of the Act and therefore has no binding legal effect.

[44] The application at hand is similar to one which this court had to consider in *Seef Residential Properties v Mbhele No & Others 2006 27 ILJ 1940 (LC)* where Freud AJ in paragraph 15 said:

> "In my view, 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. See in this regard *SA Broadcasting Corporation v Commission for Conciliation Mediation & Arbitration & Others (2003) 24 ILJ 211 LC at para 199 and 20; Etschmaier V Commission for Conciliation Mediation & Arbitration & Others (1991) 20 ILJ 44 (LC) at para 40-48; Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs No & Others 1994 15 ILJ 801 (LAC) at 803 H- 804H; Wyeth SA (Pty) Ltd v Mangele & Others 2005 26 ILJ 749 LAC at paras 6."*

[45] The facts of this case are similar to those in the *Seef Residential property* case but are similarly distinguishable, as Freud AJ found, from those in *Fidelity Guards Holdings (Pty) Ltd v Epstein No & Others (2000) 21 ILJ 2382 (LAC)*. In the present matter the referral of the dispute to conciliation was not out of time and therefore no condonation application was necessary to perfect the referral.

[46] There are a number of decisions of this court in which it was held that the referring party must be an "employee" and therefore that no jurisdiction existed to conciliate the dispute if the referring party was not an employee. See *Tier Hoek v CCMA [1999] 1 BLLR 63 (LC); Virgin Active Pty Ltd v Mathole No & Others (2002) 23 ILJ 984 (LC); Sapakoe Tea Estates v Commissioner Maake & Others (2002) 23 ILJ 1603 LC.* To the extent that these cases were decided before the current rule 14 was published, they are distinguishable.

[47] In my view, the provision in rule 14 that the commissioner must require the referring party to prove that the commissioner has jurisdiction to conciliate the dispute means no more than that the commissioner should determine whether or not the referral alleges that the respondent in those proceedings is an employer, who has dismissed an employee referring the dispute or on whose behalf it is referred. Where no such allegation is made, the conciliating commissioner should issue an advisory jurisdictional ruling that he or she has no jurisdiction to conciliate the dispute. The referring party retains then the right to refer the matter further to arbitration. The arbitrating commissioner will be able to determine the jurisdictional issue, assisted by evidence and will be better positioned to draw a difference between form and substance of the referral.

[48] In the case where such an allegation is properly made, but the respondent counters the allegation by alleging that the "employee" was never employed at the material times or was an "independent contractor", the conciliating commissioner must find that there exists, between the parties, a dispute of facts which must be resolved through the leading of evidence. He or she must then issue a certificate of outcome to the effect that the dispute could not be resolved through conciliation.

[49] The applicant has alleged that the conciliating commissioner has forced it, through the issue of the certificate, to answer a case which in law it is not required to meet until the first

respondent has confirmed it jurisdiction. Further it says that such an approach has delayed the finalisation of this matter by failing to make a legally binding finding that the applicant is not an employer and that there is no jurisdiction to conciliate the dispute. I disagree for the reasons that have already been stated. The delay in proceedings alleged by the applicant can easily be obviated if the “alleged employer” timeously requests for the scheduling of the con/arb instead of conciliation, once served with a referral for conciliation, where the “employer” seeks to challenge jurisdiction on the basis that the “employee” was an “independent constructor”. Where a notice of set down has been served to the parties, it should be possible to request the holding of a con/arb instead, provided that the request is delivered not less than 7 days from the date of hearing.

[50] I am not persuaded that the ruling issued by the second respondent is legally capable of being reviewed and set aside. It is devoid of any legal binding effect. As consequence, the following order will issue:

1. The application is dismissed.
2. The interdict preventing the first respondent from holding arbitration proceedings in this matter is discharged.
3. The third respondent has 30 days from the date hereof within which to refer the dispute to arbitration, if he had not yet done so. If he had, this matter is remitted to the first respondent for the arbitration hearing.

4. The applicant is to pay costs of this application.

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Cele J

Date of Hearing: 31 July 2009

Date of Judgment: 02 October 2009

Appearances

For the applicant: Malcolm Lennox- Botoulas Krause Inco

For the Respondent: C Todd- Bowman Gilfillian