IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D412/07

In the matter between:

INGO STRAUTMANN	**Applicant**
and	
SILVER MEADOWS TRADING 99 (PTY) LTD t/a MUGG AND BEAN SUNCOAST	**First respondent**
COMMISSIONER B PILLEMER	**Second respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Third respondent**

REASONS FOR JUDGMENT

VAN NIEKERK J

[1] On 5 June 2009, I made the following order:

1. The second respondent's ruling dated 3 June 2007 is reviewed and set aside.
2. The matter is remitted back to the CCMA for an arbitration hearing *de novo* before a different commissioner.
3. The first respondent is to pay the costs of this application.

These are my reasons.

[2] The applicant sought in terms of s 158 of the Labour Relations Act to review and set aside a ruling made by the second respondent on 3 June 2007, when she held that the CCMA had no jurisdiction to arbitrate the applicant's dismissal dispute.

[3] The applicant was employed by Kishara CC t/a Mugg and Bean Suncoast as a general manager. He was also a member of the close corporation that employed him. After a disagreement between the members of the close corporation, in June 2006, the business of Mugg and Bean Suncoast was sold as a going concern to the first respondent. The first respondent contends that prior to the sale of the business, the applicant had agreed to withdraw from the business and that it was a condition of the sale that the applicant would not in future be involved in the business. The applicant avers that he was dismissed in circumstances where no reason for his dismissal was given, and contends that his dismissal was not in any way related to the transfer of the business. On 5 October 2006, the applicant referred a dispute to the CCMA in which he alleged that he had been constructively dismissed by the first respondent on 14 September 2006, because the first respondent had declined to "offer (him) employment as before". At some point in the proceedings, the applicant appreciated that in the absence of a resignation, there was no constructive dismissal, and it is not disputed that the matter proceeded on the basis that the applicant was dismissed at the initiative of the first respondent.

[4] The dispute was set down for con-arb on 1 November 2006. Commissioner JD Vedan was appointed as the presiding commissioner. The first respondent did not attend the proceedings. On the same day, commissioner Vedan issued a certificate of outcome by completing Form 7.12.

[5] The certificate records that the matter was referred to conciliation on 5 October 2009 and that, as at 1 November 2009, the dispute between the applicant and the first respondent remained unresolved. The commissioner ticked the box provided to indicate the nature of the dispute that reads “unfair dismissal” and added, in handwriting, “section 197 transfer of company as a going concern”. The commissioner also recorded, in handwriting, that the matter related to “automatically unfair dismissal in terms of section 187(1) (g) of LRA.” Finally, in that part of the certificate that records the recourse available to a referring party if the dispute remains unresolved, the commissioner indicated, by marking the relevant box printed on the form, that the dispute could be referred to the Labour Court.

[6] The applicant had expected the commissioner to proceed with the arbitration hearing. After consulting his attorney, the applicant took the view that his dismissal had not been effected for a reason that is automatically unfair, and the matter was set down for arbitration on 27 May 2007 before the second respondent. At the hearing, the first respondent raised a number of points *in limine*. These included the absence of any employment relationship between the applicant and the first respondent, a contention that the applicant had not been dismissed and a submission to the effect that the applicant had been dismissed for a reason related to a transfer in terms of s 197 and that the dispute ought therefore to be adjudicated by this court. After hearing argument presented by the parties’ legal representatives, the second respondent issued what is termed a “ruling on jurisdiction”. In her ruling, the second respondent said the following:

> “*Con/arb is a process in terms of which the conciliation and arbitration elements are effectively joined in the sense that immediately following the failed conciliation the matter proceeds to*

arbitration. This matter was set down for Con/Arb before Commissioner Vedan. It proceeded with the Respondent in default. Conciliation was obviously impossible to achieve and the matter would have proceeded to arbitration there and then save that Commissioner Vedan, ***wearing his cap as arbitrator, found that CCMA did not have jurisdiction to arbitrate*** (my emphasis). *The Applicant anticipated receiving a default award and was surprised when instead he received a certificate of outcome indicating that the CCMA did not have jurisdiction to arbitrate the dismissal because it was an automatically unfair dismissal.*

The CCMA is accordingly functus officio. ***It has ruled that it does not have jurisdiction*** (my emphasis).

Ruling

I rule that the matter cannot proceed at the CCMA as an arbitration and, if the Applicant so elects, it maybe (sic) referred to the Labour Court."

[7] The second respondent's ruling was made on the basis only of the submissions made by the parties' representatives on the points *in limine* raised by the first respondent.

[8] In these proceedings, the applicant contends that to the extent that the second respondent relied on the content of the certificate as the basis for the jurisdictional ruling, she committed a reviewable irregularity in the form of a material error of law. If this is what the second respondent did, her ruling would stand to be reviewed and set aside. A certificate of outcome requires only that the commissioner states that, as at a particular date, the dispute referred to the CCMA remains unresolved. I am aware that Form

7.12 provides for a classification of the dispute and an indication as to what further rights of recourse might be open to an applicant should the dispute remain unresolved. But any classification that is made or indication that is given as to which forum or courses of action might be open to an applicant wishing to pursue a dispute has no legal significance other than to certify that on a particular date a particular dispute referred to the CCMA for conciliation remained unresolved. Any other views expressed by a commissioner, even if cast in directory language, amount to little more than gratuitous advice.[1] In *National Union of Metal Workers of SA & others v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC), Zondo AJP (as he then was) held:

> *"A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or another view on certain aspects of the dispute but, for his purposes, whether the dismissal is due to operational requirements or to misconduct or incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner to whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee. (See s191 (5) (b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour Court, why then should the employee be bound by the commissioner's description of the dispute?"*

I am aware that the *Driveline* case concerned a retrenchment dispute referred to this court in which the referring party sought to "upgrade" to a dispute concerning an automatically unfair dismissal. In that sense, no

[1] The governing body of the CCMA should give consideration to an amendment to the form of the certificate, if only to make it clear that the commissioner's categorisation of a dispute and the avenues or institutions through which the commissioner indicates that further recourse should be sought, are not binding on referring parties.

matter what the nature of the dispute, it was always going to be adjudicated by this court. The present dispute, of course, concerns a dismissal dispute that the applicant contends is arbitrable but which the commissioner obviously regarded as justiciable. But I don't think that this distinction affects the principle. The principle is that a referring party is not bound by a commissioner's classification of a dispute or any directive as to its destiny. If this were not so and if some legal significance were to be attached to a commissioner's categorisation of a dispute in a certificate of outcome, then by electing the forum in which the dispute is to be determined, the commissioner denies the referring party the freedom to pursue her rights as she deems fit. Certificates of outcome are issued at the conclusion of the conciliation phase more often perhaps than not in circumstances where no evidence would have been led as to the nature of the dispute. The conciliating commissioner is not always well placed to make judgments, based as they would be only on the say-so of one or both parties during conciliation, as to what the true nature of the dispute might be. Even less, for the reasons stated above, should those judgments be binding on a referring party.

[9] It follows that when a commissioner completes Form 7.12 and categorises the dispute referred to the CCMA by ticking one of the boxes provided, the commissioner does not make a jurisdictional ruling. Nor does the ticking of any of the boxes marked "CCMA arbitration", "Labour Court" "None" or "Strike/Lockout" amount to a ruling on which of those courses of action must be pursued by a referring party. Consistent with the principle established in the *Driveline* case, it is not for commissioners, by means of certificates of outcome or otherwise, to dictate to litigants either how they should frame the disputes that they might wish to pursue or which forum they are obliged to approach to have those disputes determined. Litigants must stand and fall by the claims that they bring to arbitration. They run the risk that during the arbitration proceedings, a commissioner might

decide, in terms of Rule 22 of the CCMA Rules, that a referring party should be required to prove that the commission has jurisdiction to arbitrate the dispute. (This assumes, of course, that the issue giving rise to the jurisdictional point has not previously been the subject of a ruling by a commissioner, either at the commencement of the conciliation phase or at any time thereafter.) If a referring party ought reasonably to have foreseen that the reason for the disputed dismissal or a reason that contributed significantly to it was such that the dispute ought to have been referred to this court, there is no reason why an order for costs should not be made in terms of Rule 39(1) of the CCMA Rules in respect of a jurisdictional ruling made against that party. If a referring party refers to arbitration a dismissal dispute in respect of which the CCMA, on the face of it, has jurisdiction but it transpires during the proceedings, for example, that the dismissal was effected for a reason that is automatically unfair, the arbitration proceedings might be stayed and the applicant advised to initiate proceedings in this court. Alternatively, the parties might agree to consent to the CCMA's jurisdiction and the continuation of the arbitration proceedings.[2]

[10] Ms Nel, who appeared in these proceedings for the first respondent, did not seek to rely on the certificate of outcome issued by commissioner Vedan as constituting a prior jurisdictional ruling *per se*. She submitted that the certificate of outcome aside, the second respondent reasonably concluded on the material before her that commissioner Vedan, as arbitrator, had made a jurisdictional ruling and that the CCMA was therefore *functus officio*. In the absence of a proper disclosure by the applicant of all of the factual circumstances, especially those relating to

[2] Section 158(2) envisages the converse situation - it provides that where after referral of a dispute to this court the matter ought to have been referred to arbitration, proceedings can be stayed to allow for the referral of the dispute to arbitration, alternatively, with the parties' consent, this court can sit as an arbitrator.

the con/arb process and any engagement between the applicant and commissioner Vedan, Ms Nel submitted that this application ought to fail.

[11] As I noted above, the first respondent raised a number of points *in limine*, all of which were argued before the second respondent. The first was that the applicant was not an employee of the first respondent, the second that he was never dismissed by the second respondent and the third that if the applicant was dismissed, the reason for dismissal (a breach of s 197) ought to be adjudicated by this court, that the applicant ought to have applied to this court to review and set aside the certificate of outcome. No evidence was led before the commissioner. The first respondent's representative made a statement from the bar, in which he *inter alia* outlined the circumstances of a disagreement amongst the members of the close corporation that was the seller of the business, the applicant's ceasing to work for the business prior to the sale, the sale of the business itself, and the condition of the sale to the effect that the applicant was not to be part of the business under the ownership of the first respondent. The applicant's representative, at the outset of his address, objected to the fact that jurisdictional points were being raised without the leading of evidence. He contended that the nature of the points raised by the first respondent's representative were such that their merits could be determined only after hearing evidence. That notwithstanding, the applicant's representative continued in the same fashion as the first respondent's representative, i.e. to make submissions from the bar, the effect of which was to create a significant dispute of fact. In relation to the certificate of outcome, the applicant's representative said the following:

> *"The third point, which I didn't address you on earlier, is that the matter has been conciliated, alleged breach of 197 etc, etc. We, we really don't know what the Commissioner was doing on, on the occasion that it came before this hearing, before the CCMA on the*

previous occasion. In fact the applicant would say that he went away on the basis that an award was supposed to have been granted. But he subsequently found that there was nothing, that there was certificate and also shockingly the certificate talks about the Labour Court. Now the submission, with respect, is that one doesn't have to review that certificate. You, you as the arbitrator, with respect, have an obligation to determine what the true nature of the dispute is in this matter and you're not bound by the certificate as it stands in terms of its content, in terms of its content or the classification of the dispute."

[12] With due respect to the second respondent, there was no factual basis on which to find, as she did, that commissioner Vedan had made a finding that the CCMA did not have jurisdiction to arbitrate. First, to the extent that she relied on the certificate of outcome as a jurisdictional ruling, for the reasons recorded above, the certificate does not constitute a ruling, and to have regarded it as such is a gross irregularity, leading to a conclusion to which no reasonable decision maker could come. Secondly, there was no evidence before her to establish the existence of a jurisdictional ruling made by commissioner Vedan.

[13] Ms Nel's further submission that the applicant's contention that he expected a default award to be issued necessarily implied that the merits of the dispute had been canvassed by commissioner Vedan prior to his jurisdictional ruling, is equally unpersuasive. The applicant's subjective expectation may well have been that he would obtain a default award. But it does not necessarily follow from the fact that he was denied an award that the merits of his claim were formally addressed as an element of any arbitration proceedings directed at establishing jurisdiction. Commissioner Vedan might just as easily have formed the view, after informal discussion with the applicant, that the real nature of his claim concerned a dismissal

related to the transfer of a business, completed the certificate of outcome on that basis, and simply declined to proceed further.

[14] Although, as Ms Nel contended, the applicant might be criticised for failing to lay a proper factual matrix as to precisely what transpired before commissioner Vedan, it should be recalled that in the proceedings under review, the primary argument presented by the applicant's representative was that evidence should be heard in relation to the points *in limine* being argued, and that for reasons unknown, the second respondent made a ruling based only on the respective representatives' submissions. The material properly before a commissioner on which the commissioner can base a decision is ordinarily limited to evidence under oath (whether this be introduced *viva voce* or by affidavit) or evidence introduced by agreement between the parties (see *DB Thermal (Pty) Ltd v CCMA & others* [2000] 10 BLLR 1163 (LC)). The fact that there was no proper evidentiary basis established before the second respondent on which to make a ruling in relation to the points *in limine* was not a function of the applicant's failure to adduce sufficient evidence so much as the second respondent's failure to require that evidence be led.

[15] In short, to the extent that the second respondent considered the certificate of outcome issued at the conclusion of the conciliation phase to constitute a jurisdictional ruling, this is a reviewable irregularity. To the extent that the second respondent's ruling is based not on the certificate of outcome but on the submissions made by the parties' respective legal representatives, there was no evidence before her and therefore no proper basis for her to make the factual finding that commissioner Vedan had made a jurisdictional ruling. The second respondent's ruling that the CCMA was *functus officio* therefore stands to be reviewed and set aside.

[16] For these reasons, I made the order reflected in paragraph 1.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of argument: 4 June 2009
Date of judgment: 9 June 2009

Appearances:

For the Applicant: Adv L Naidoo
Instructed by: Jay Reddy Attorneys

For the Respondent: Adv C Nel
Instructed by: Deneys Reitz