IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J68/08

In the matter between:

EOH ABANTU (PTY) LTD **Applicant**

And

COMMISSIONER FOR CONCLIATION, MEDIATION AND ARBITRATION **First Respondent**

MOSTERT, JOHANNES FREDERIK **Second Respondent**

JUDGMENT

AC BASSON, J

[1] The following order was made on 17 January 2008.

> "Having read the papers and having considered the matter, the following order is made:
>
> *1. The Rules of this Court relating to the forms and manner of*

service are hereby dispensed with and this matter is dealt with as one of urgency;

2. The arbitration proceedings before the First Respondent under case number GAJB34137-07 and set down for 18 January 2008 is stayed pending the finalization of the review application brought by the Applicant under case number JR2911-07.

3. The First Respondent is ordered to file or dispatch within 10 days of the date of this order to the Registrar of this Court the record of the proceedings in the review under case number JR2911-07, including the tapes of the proceedings and all documents related to the matter, and the decision sought to be reviewed, together with such reasons as are required by law or desirable to be provided.

4. *The Second Respondent is ordered to pay the costs of this application."*

Herewith brief reasons for the order.

[2] This was an urgent application to stay further arbitration proceedings before the First Respondent (the Commissioner for Conciliation,

Mediation and Arbitration – hereinafter referred to as "the CCMA") set down for 18 January 2008 pending the outcome of a review application of the certificate of non-resolution of the dispute.

[3] It is common cause that the Second Respondent (Mr Johannes Mostert – hereinafter referred to as "Mostert") referred a dispute about his alleged unfair constructive dismissal by the Applicant (EOH Abantu (Pty) Ltd) to the CCMA. The matter was set down for a conciliation hearing on 6 November 2007. Mostert was present at the conciliation hearing and the Applicant (the employer) was represented by its Human Resources Manager (a one Ms Matheson – hereinafter referred to as "Matheson"). It is common cause that Matheson had raised a jurisdictional point and that she had submitted to the Commissioner presiding over the conciliation hearing (the "conciliating commissioner") that Mostert was not an employee of the Applicant but that the relationship was that of an independent contractor. It is further common cause that the conciliating commissioner declined to issue a ruling on the jurisdictional objection raised on behalf of the Applicant and that he had informed the parties that the jurisdictional objection would be dealt with at the arbitration proceedings. A certificate of non-resolution was forthwith issued.

[4] A review application was subsequently launched in the Labour Court to

review and set aside the certificate of non-resolution issued by the Commissioner at conciliation on the basis that the conciliation commissioner had no authority to issue a certificate of outcome in circumstances where he had declined to determine whether the CCMA had the necessary jurisdiction to entertain the referral.

Second Respondent's arguments

[5] On behalf of Mostert it was argued that the conciliating Commissioner was fully entitled to adopt this course of action for two reasons:

(i) Firstly, the CCMA often allocates limited time periods for conciliation and it therefore makes more sense that jurisdictional issue are dealt with at arbitration where the parties could present both oral and documentary evidence. At the outset I must point out that I do not accept this argument. The fact that the CCMA experiences administrative constraints which necessitate placing time constraints on commissioners cannot, in my view, be accepted as an excuse for not deciding a jurisdictional point properly raised before it. The CCMA is a creature of statute and is enjoined to rule (albeit subject to the review powers of the Labour Court) on its jurisdiction whenever a jurisdictional point is raised before it at the conciliation phase. I will return to this point hereinbelow. Furthermore, the CCMA

has, at least 30 days in which to conciliate the dispute – a period that may be extended by agreement (see section 135(2) of the Labour Relations Act 66 of 1995 (hereinafter "the LRA"). The conciliating commissioner could have postponed the conciliation hearing in order to allow the parties to argue the jurisdictional point fully.

(ii) Secondly, it was argued that Rule 22 of the Rules of Conduct of Proceedings before the CCMA[1] allows for jurisdictional issues not determined at conciliation, to be raised during the arbitration proceedings. I will return to the merits of this argument hereinbelow. It was further argued on behalf of Mostert that the proper procedure would therefore have been for the Applicant to have raised the jurisdictional issue at the arbitration proceedings as was pertinently advised by the Commissioner. It was further submitted that, even if the review application is successful, the Labour Court will simply order that the preliminary point must be dealt with by a Commissioner other than the Commissioner who issued the certificate presently under review. This, so it was argued, would in any event have taken place on 18 January 2008.

[1] GNR.1448 of 10 October 2003.

Applicant's arguments

[6] The case for the Applicant was crisp: The conciliating commissioner had no jurisdiction to issue the certificate of outcome without deciding the jurisdictional point pertinently raised at the commencement of the conciliation proceedings. More specifically it was argued that the Rules of the CCMA cannot be interpreted as allowing the issuing of a certificate of outcome subject to the proviso that the CCMA's jurisdiction will be established subsequently by the arbitrating commissioner. At this junction it must be pointed out that there is no indication on the papers that the conciliating commissioner did in fact direct the arbitrating commissioner to establish jurisdiction before hearing the merits of the referral which is, in any event, in my view, not proper.

General principles

[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 section 115(4) of the LRA which reads as follows:

> "*The Commissioner 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."[2]

[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. I will return to this point *infra*. See also *Pinetown Town Council v President, Industrial* Court 1984 (3) SA 173 (N) where the Court held as follows:

> *"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions*

[2] Own emphasis.

precedent to jurisdiction are known as "jurisdictional facts" (see Anisminic Ltd v Foreign Compensation Commission [1969e 2 AC 147 (HL) at 208 per Lord WILBERFORCE) which must objectively exist before the tribunal has power to act; consequently a determination on the jurisdictional facts is always reviewable by the Courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it. (See also Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (at 15).”

[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. See *SA Broadcasting Corporation v CCMA & Others* (2003) 24 *ILJ* 211 (LC) at par [17] and *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs & Others* (1994) 15 *ILJ* 801 (LAC) at 803H – 804A. Although the *Benicon*-case was decided with reference to the Industrial Court which was also established in terms of the now repealed LRA, the following principles apply equally to the CCMA as a statutory tribunal:

> “The powers of the Industrial Court do not extend to ruling upon its own jurisdiction. At best, it can make an assessment of whether a court reviewing its proceedings is likely to set them aside. Where the existence or otherwise of the jurisdictional fact is readily ascertainable, this precondition can usually be made with some confidence. However, where the jurisdictional fact is

> dependent upon the validity of the exercise of statutory powers, any enquiry would most often be futile. The enquiry may raise difficult issues, and in any event, as I have already indicated, any conclusion to which the Industrial Court may come will in any event not be decisive.
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> *In terms of the Act, this court is entitled to review proceedings of the Industrial Court for want of jurisdiction. In order to succeed, it is for the applicant to show objectively that the jurisdictional facts necessary for the exercise of its powers are absent."*

[10] Prior to commencing conciliation, as the first step in the dispute resolution procedures provided for by the LRA, the CCMA as a statutory tribunal must establish whether it has in fact the necessary jurisdiction to conciliate the dispute referred to it. See in this regard *Pine Town Council v President, Industrial Court* 1984 (3) SA 173 (N) at 179B – D (quoted in paragraph 8 *infra*). This principle has also been confirmed by the Labour Court in *Avroy Schlain Cosmetics (Pty) Ltd v Kok & Another* (1998) 19 *ILJ* 336 (LC) where the Court held as follows:

> "In my opinion the powers given to the commissioner to attempt to resolve the issue and to determine the process to try and resolve the

> issue, only kick in if the commissioner has the necessary jurisdiction. The legislature … found it too obvious to state that the commissioner should first investigate the jurisdictional facts before entering on the conciliation."

Further at 346 the Labour Court made it clear that this is the very first question that the CCMA must determine:

> "The CCMA or any tribunal for that matter can, on a preliminary basis, subject to subsequent review by a court, decide on its jurisdiction ie it should be the very first enquiry which the CCMA will have to make before it proceeds to determine whether the dismissal of an employee was fair or unfair."

See also *Toit's Menlyn Auto Traders (Pty) Ltd v Van Jaarsveld No & Others* (2006) 27 ILJ 2421 (LC) at paragraph [15] – [16]:

> *"[15] ……. Whether or not the dispute was first referred for conciliation and the conciliating commissioner had decided that the dispute remains unresolved, or the 30-day period has expired, are quite clearly factual matters that must be determined by the arbitrator when his or her jurisdiction to determine the dispute is placed in issue. It should be the first*

enquiry which the arbitrator will have to make before it proceeds to determine whether the dismissal of an employee was fair or unfair. It must be stressed that the arbitrator is not called upon, and is not empowered, to decide whether the conciliating commissioner correctly concluded that the dispute was resolved or that it remained unresolved. The conduct of the conciliating commissioner and the validity of his decisions are matters to be considered by a review tribunal (Grogan at 478).

[16] ***Similarly, the conciliating commissioner may only validly conciliate a dispute if an employer-employee relationship exists and if the employee referred a dispute in writing to the CCMA or to a council having jurisdiction, within the time-limits prescribed by subsection (1) of s 191, or failing which, condonation was granted for the failure to comply with the said time-limits. The question whether or not these jurisdictional facts are present must be raised before and be decided by the conciliating commissioner.*** *The decision of the conciliating commissioner or the arbitrator relating to jurisdiction is a preliminary matter and may be set aside by this court on review, usually after the conclusion of*

the arbitration proceedings."[3]

Commissioner at conciliation

[11] The following circumstances will typically affect the jurisdiction of the CCMA to conciliate[4] a dispute referred to it:

(i) The existence of an *employer – employee relationship*. It is trite that the CCMA only has jurisdiction in respect of a dispute that has arisen in the context of an employment relationship. Consequently the CCMA will not have jurisdiction to conciliate a dispute where the referring party is an independent contractor. See: *Avroy Schlain Cosmetics (Pty) Ltd v Kok & Another* (1998) 19 *ILJ* 336 (LC) at 345. See also *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others* (2000) 21 ILJ 2382 (LAC) at paragraph [16] and *Toit's Menlyn Auto Traders (Pty) Ltd v Van Jaarsveld No & Others* (2006) 27 ILJ 2421 (LC) at paragraph [16].

(ii) The existence of a *dispute in terms* of the LRA;

(iii) Where the disputing parties fall under the jurisdiction of a *bargaining council*, the CCMA will not have jurisdiction unless

[3] Own emphasis.

jurisdiction has been conferred on the CCMA in terms of the provisions of section 147 of the LRA;

(iv) Whether the dispute has been referred to the CCMA within the *statutory prescribed time limits*. Application for condonation must be made simultaneously with the referral of the dispute to the CCMA (Rule 9(2) of the CCMA Rules). Once the conciliating commissioner issues the certificate of non-resolution, the certificate will stand and the arbitrating commissioner will have jurisdiction to arbitrate notwithstanding the fact that the referral was out of time and notwithstanding the fact that condonation has not been granted until such a time the certificate is taken on review and set aside. See in this regard: *Fidelity Guards Holdings (Pty) Ltd v Epstein, NO, the CCMA and Sukhanan* (2000) 11 (2) SALLR 21 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others* (2000) 21 ILJ 2382 (LAC) at paragraph [7] and *Venlinov v University of Kwazulu-Natal & Others* (2006) 27 *ILJ* 177 (LC) at paragraph [8] where the Court confirmed the principle as set out in the *Fidelity Guard*-case).

Commissioner at arbitration

[4] This list is by no means intended to be exhaustive.

[12] The CCMA commissioner appointed to *arbitrate* a dispute may equally only do so if it has the necessary jurisdiction to do so. Does the issuing of a certificate of non-resolution confer the necessary jurisdiction upon the arbitrating commissioner to arbitrate the dispute referred to it? Also, can any of the referring parties raise an objection in respect of the issuing of the certificate of non-resolution at arbitration? It would appear from a reading of the *Fidelity Guards*-decision (*supra*) that the issuing of a certificate of non-resolution is sufficient to confer the necessary jurisdiction upon the arbitrating commissioner to arbitrate the dispute. Once a certificate of non-resolution has been issued, such a certificate will therefore satisfy the factual pre-condition necessary for the arbitrating commissioner to arbitrate the dispute referred to it. Furthermore, the conciliating commissioner, by issuing the certificate of non-resolution, performs an administrative act[5] that remains valid until set aside on review.

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[5] See: *Toit's Menlyn Auto Traders (Pty) Ltd v Van Jaarsveld No & Others* (2006) 27 ILJ 2421 (LC): ***"****[14]Whenever it acts, a public authority must determine the scope of its own powers. It must, subject to subsequent review by a court of law, ascertain whether the prescribed jurisdictional preconditions for acting exist and must determine the limits of its own authority. (See I Avroy Shlain Cosmetics (Pty) Ltd v Kok & another (1998) 19 ILJ 336 (LC); [1997] BLLR 1566 (LC) at 1566C-D and 1567A-D; NUMSA v Driveline Technologies (Pty) Ltd & another (2000) 21 ILJ 142 (LAC); [2001] 1 BLLR 20 (LAC) at 38F-39A and the remarks of Zondo JP in the decision of the Labour Appeal Court in the Fidelity Guards matter at 1391J-1392B.) Where the power to be exercised is statutory, such as in the present matter, the question of what the preconditions are that must exist before such power can be exercised, lies within the four corners of the statute providing for such power. Whether or not a precondition exists may be a matter of law or fact, and where the existence thereof is disputed, the public authority must necessarily decide it. These preconditions or jurisdictional facts are collateral issues and must be contrasted with the actual matter which the authority is called upon to decide. This was explained as follows B by Lord Goddard CJ in R v Fulham etc Rent Tribunal, ex parte Zerek [1951] 2 KB 1 at 6:*

> *'[I]f a certain state of facts has to exist before an inferior tribunal has jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by*

Whether such a certificate is valid or invalid will not affect the jurisdiction of the arbitrating commissioner to arbitrate and the certificate of non-resolution will remain valid until such a time it is set aside on review. This appears, at least, to be the position where the conciliating commissioner has issued a certificate of non-resolution in circumstances where it subsequently appears that the dispute has been referred to the CCMA out of time. In *Fidelity Guards* (*supra*) the Labour Appeal Court held that the certificate of non-resolution was the jurisdictional fact that gave the arbitrator in that case the necessary jurisdiction to arbitrate the matter until such a time the certificate has been set aside on review. Once the conciliating commissioner has therefore issued a certificate of non-resolution, the jurisdictional pre-condition contained in section 191(5) of the LRA will have been satisfied as far as the proceedings before the arbitrating commissioner are concerned.

[13] Although the *Fidelity Guards*-decision (*supra*) was decided in the context of a late referral (which is, of course, a jurisdictional issue), the principle remains, in my view, the same in respect of any other jurisdictional point: Once a certificate of non-resolution has been

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means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal has to decide.'
See also Bunbury v Fuller [1853] 9 Ex 111; R v Special Commissioners of Income Tax [1888] 21 QBD 313 at 319; Baxter at 452-3 and Wade at 288-9.''

issued, as far as the powers of the arbitrating commissioner are concerned, there will have been compliance with the factual jurisdictional requirements or factual precondition which are to be found in section 191(5) of the LRA. The arbitrating commissioner does not have the power to enquiry on the *validity* of such a certificate nor does it have the power to enquire into the *conduct* of the conciliating commissioner as these are matters that fall under the jurisdiction of the Labour Court (see also *Toit's Menlyn* –case *(supra*) at paragraph [15]). It would therefore follow that the arbitrating commissioner will not have the power to decide (reconsider) a jurisdictional point afresh in circumstances where the conciliating commissioner has already decided on jurisdiction at the conciliation phase and issued a certificate of non-resolution. I will return to the effect of Rule 22 of the Rules of the CCMA on the legal position as stated here.

[14] To summarize: The issuing of a certificate of non-resolution is the jurisdictional precondition or jurisdictional fact that confers the power on the arbitrating commissioner to arbitrate the referred dispute (see section 191). It is this *factual existence* (at least on the face of it) of the certificate of non-resolution that enables the arbitrating commissioner to arbitrate the dispute referred to it. Whether the certificate of

non-resolution (the administrative act performed by the conciliating commissioner in terms of the LRA) is legally valid or invalid does not affect the power of the arbitrating commissioner to arbitrate the dispute and such certificate, which is the necessary (factual) precondition for the validity of the subsequent arbitration, will remain valid until reviewed and set aside by a competent court such as the Labour Court. In coming to this conclusion, I had regard to the decision of the Supreme Court of Appeals in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA D 222 (SCA) where the Court with reference to administrative law principles, pointed out as follows:

> *"[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter Administrative Law at 355:*
>
> > *'There exists an evidential presumption of validity expressed by the maxim omnia praesumuntur rite esse acta; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful*

> *administrative acts are "voidable" because they have to be annulled.'*

At other times it has been explained on little more than pragmatic grounds. In Harnaker v Minister of the Interior 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) '(i)n a sense delay would . . . "validate" a nullity'. Or as Lord Radcliffe said in Smith v East Elloe Rural District Council [1956] F AC 736 (HL) at 769 - 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 888):

> *'An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'*

[28] That has led some writers to suggest that legal validity (or invalidity) in the context of administrative action is never absolute but can only be described in relative terms. In Wade Administrative Law 7th ed (by H W R Wade and Christopher Forsyth) at 342 - 4 that view is expressed as

follows:

> *'The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the "void" order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another. . . . "Void" is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the Court's willingness to grant relief in any particular situation.'*

[29] In our view, the apparent anomaly - which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' - is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between ***what exists in law*** *and* ***what exists in fact****.*

Forsyth points out that ***while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts****. In other words*

> *'. . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'*

It follows that

> *'(t)here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough.'*

The author concludes as follows:

> *'(I)t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the*

assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.'

…..

[30] Lord Hoffmann drew the same distinction in R v Wicks [1998] AC 92 (HL) ([1997] 2 All ER 801; [1997] 2 WLR 876) when he said the following at 117A - C (AC) (815h - j (All ER)):

'(T)he statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices.'

[31] ***Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts.***

If the validity of consequent acts is dependent on no more

than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court. "[6]

[15] Does the arbitrating commissioner have the power to decide jurisdiction where the issue of jurisdiction has been raised at conciliation but the conciliating commissioner has declined to do so (as was the case in the present matter)? Despite earlier decisions of the Labour Court in which the Court expressed doubt whether it was intended that the conciliating commissioner should decide whether or not the referring party is an employee as contemplated in terms of the LRA,[7] I am of the view that it is incumbent upon the conciliating commissioner to decide this (or any other) jurisdictional point raised before it. (I will return to the position if for some reason a jurisdiction point was not raised during conciliation and the effect of Rule 22 of the CCMA Rules in this scenario.) The Court in *SA Broadcasting Corporation v CCMA & Others* (2003) 24 *ILJ* 211 (LC) was of the view that the decision of the

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[6] Own emphasis.

[7] See: *SA Broadcasting Corporation v CCMA & Others* (2003) 24 *ILJ* 211 (LC). The Court in this case was of the view that it is not necessary for a commissioner appointed to conciliate a dismissal dispute to enquiry into and make a finding upon the question as to whether the referring party was indeed an employee. The Court reasoned that conciliation should take place with the minimum of legal formality to be followed and that jurisdictional points, which are normally substantial points, should be dealt with at the arbitration phase (at paragraph [8]). The Court, however, accepted that it is bound to find that a conciliating commissioner is "*at least entitled (if not obliged) to investigate*" whether or not a person who claims to be a dismissed employee is indeed an employee for purposes of the LRA (at paragraph [12]).

conciliating commissioner in respect of a jurisdictional point (such as whether or not there exists and employer-employee relationship) does not bind a commissioner subsequently appointed to arbitrate and that the arbitrating commissioner may thus reconsider the same jurisdictional question.[8] In coming to this conclusion the Court relied on the decision in *Benicon Earthworks*- case (*supra*) and that "*[t]he conciliating commissioner's finding on the issue constitutes nothing more than his or her opinion and binds no-one, including the arbitrating commissioner*". [9] Whilst it is true that the conciliating commissioner cannot determine its own jurisdiction and that the obligation to enquire into jurisdiction only arises from practical considerations, this fact does not mean that the certificate of non-resolution, which is an administrative act and a necessary factual precondition for the validity of consequent acts, does not bind the arbitrating commissioner. I am also of the view the decision in *Benicon* is not authority for the view that an arbitrating commissioner is not bound by the an earlier decision by an arbitrating commissioner. The decision in *Benicon* (*supra*) merely confirmed the principle that the Industrial Court (as a statutory tribunal) cannot rule on its own jurisdiction and that *"[a]t best, it* [the Industrial Court] *can make an assessment of whether a court reviewing its proceedings is likely to set them aside*". As already pointed out, the CCMA is a creature of

[8] At paragraph [19] – [20].

statute with its powers circumscribed and limited by the statute from which it derives its existence. The jurisdictional precondition or jurisdictional fact that must exist before the arbitrating commissioner may arbitrate a dispute is circumscribed by section 191(5) of the LRA and in terms of which it is a jurisdictional precondition that the dispute has been referred to conciliation and that the conciliating commissioner has certified by issuing a certificate of non-resolution that the dispute remained unresolved or where a period of 30 days has lapsed since the CCMA has received the referral for conciliation and the dispute remained unresolved (see *Toit's Menlyn* (*supra*) at paragraph [15]). The issuing of the certificate of non-resolution thus constitutes compliance with the jurisdictional fact necessary to empower the arbitrating commissioner to arbitrate the dispute referred to it. This will remain the position until such a time the certificate is set aside. This was also the view of the Labour Appeal Court in *Fidelity Guards* (*supra*) and accepted as correct by the Labour Court in *Toit's Menlyn* (*supra*) at paragraph [11] and *Velinov* (*supra*) at paragraph [8]. In the latter case the Court held as follows:

"[8] As far as the jurisdictional point is concerned, it is now settled

[9] At paragraph [19].

law that the commissioner acquires jurisdiction to arbitrate a dispute after a certificate of non-resolution has been issued (see Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC); [2000] 12 *1389 (LAC)). The court found in this case that even if the dispute is referred late, the commissioner retains jurisdiction provided a certificate of 'non-resolution' has been issued. It went on to find that the only way in which a defective certificate can be challenged is by way of review."*

"[12] In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of s 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the

certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate.

[13] In para [12] of his judgment, Pillemer AJ said:

'If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim omnia praesumuntur rite esse acta, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision. (Cf O'Reilly v Mackman [1983] 2 AC 237, 238 and Harnaker G v Minister of Interior 1965 (1) SA 372 (C) at 381.)'

I agree with this."

Rule 14 of the Rules of the CCMA

[16] 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."[10]

[17] It is, in my view, clear from this section that it is peremptory for a conciliating commissioner to deal with a jurisdictional issue if it appears during the conciliation proceedings that a jurisdictional issue has not been determined. In other words, where a party raises a jurisdictional point during conciliation or where it appears that there exists a jurisdictional reservation, such point *must* be determined by the conciliation commissioner. Where the conciliating commissioner fails to do so, such a refusal will constitute a reviewable irregularity. Having said this, I am mindful of the fact that the current application before this Court is not a review application in respect of the proceedings before the conciliating commissioner and the subsequent issuing of the certificate of non-resolution. It is, however, in assessing whether or not the Applicant has made out a case for the relief sought in the present application, necessary to have some regard to the prospects of success of the pending review application. In coming to this conclusion, I also had regard to the decision in *Sapekoe Tea*

[10] Own emphasis.

Estates (Pty) Ltd v Commissioner Maake & Others (2002) 23 ILJ 1603 (LC)[11] where the Labour Court reviewed and set aside a certificate of outcome of a dispute referred for conciliation on the basis that the conciliating commissioner had deliberately elected to bypass a fundamental preliminary question namely that of its own jurisdictional capacity. The Court held that this was a question that the conciliating commissioner was required to address and determine before he could entertain any other aspect of the dispute between the parties. Although this case dealt with the question of condonation, I am of the view that this is equally and if not, more so, applicable where parties raise a issue of jurisdiction such as the existence of an employer - employee relationship which, if decided in the favour of the applicant, may constitute an absolute bar to jurisdiction:

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[11] "[11] In the present case, the first respondent deliberately elected to bypass a fundamental preliminary question, that of his own jurisdictional capacity. It was a question that he was required to address and determine before he could entertain any other aspect of the dispute between the parties, including the dispute about condonation. His failure to deal with the jurisdiction dispute constitutes a clear irregularity, which must be set aside. It is for the CCMA to determine questions of its own jurisdiction in a particular dispute and not for this court. The matter must accordingly be referred back to the second respondent. The first respondent has already expressed views on the matter and it is undesirable that he should again be seized with this case.

Rule 22 of the Rules of the CCMA

[18] Rule 22 reads as follows under the heading "**How to determine whether a commissioner may arbitrate a dispute**":

> "*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.*"

[19] Do the provisions of Rule 22 allow an arbitrating commissioner to re-examine the same jurisdictional issue that has been raised before conciliating arbitrator? I am of the view that it does not. The content of Rule 14 and Rule 22 are, in my view clear: 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). I am in agreement

with the sentiments expressed by my learned brother Tip, AJ in the *Sapekoe*-matter that, by refusing to do so, such a refusal would constitute a "*deliberate election to bypass a fundamental preliminary question, that of his own jurisdictional capacity*" and would constitute a reviewable irregularity.

[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 N.O & Others* Case No JA 62/05 (21/12/2007) the Labour Appeal Court also confirmed that the CCMA may derive powers from the rules in so far as they do not conflict with the LRA.[12] 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 subsequently 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

[12] At paragraph [10]: "…. *And the CCMA is a creature of statute that, generally speaking, derives its powers from the Act. Of course, it can also derive some of its powers from its rules governing the dispute resolution process that it is empowered to undertake. Needless to say, its rules shold not be in conflict or inconsistent with provisions of the Act. Where they are, the Act will obviously*

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.

[21] Lastly, reference should also be made to the decision in *Seeff Residential Properties v Mbhele NO & Others* (2006) 27 *ILJ* 1940 (LC) where the Labour Court, in a review application to review a certificate of non-resolution issued by the conciliating commissioner in circumstances where the conciliating commissioner refused to consider a jurisdictional objection that the CCMA did not have jurisdiction because the applicant before the CCMA was not an employee, confirmed that such a refusal constitutes a reviewable irregularity. With reference to Rule 14 the Court concluded that this rule constitutes a form of delegated legislation which binds the commissioner. The Court held as follows:

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prevail and such rules would be ultra vires."

"[8] It is self-evident, on the facts outlined above, that during relevant conciliation proceedings it must have become apparent to the commissioner that a jurisdictional issue existed which had not been determined. In those circumstances the commissioner was bound in terms of the rule to require the referring party, in this case the third respondent, to prove that the commission had the jurisdiction to conciliate the dispute through conciliation. The commissioner failed to do so. By so doing she acted in breach of a law circumscribing her powers and her decision to issue the certificate of outcome without investigating the jurisdictional issue raised is therefore reviewable in terms of the constitutional principle of legality. (See Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others E 1999 (1) SA 374 (CC) at paras 58 and 59; President of the Republic of SA & others v SA Rugby Football Union & others 2000 (1) SA 1 (CC) at para 148; Gerber v Member of the Executive Council for Provincial Government, Development & another 2003 (2) SA 346 (SCA) at para 35; Pharmaceutical Society of SA & others v Tshabalala-Msimang & another NNO; New Clicks SA (Pty) Ltd v Minister of F Health & another 2005 (3) SA 238 (A) at para 41.)"

[22] In respect of the question whether or not a conciliating commissioner may

defer the jurisdictional objection to the arbitrating commissioner the Court (in that case) made it clear that the conciliating commissioner *must* decide the outcome of the question affects the jurisdiction of the conciliating commissioner to conciliate the matter:

> "[11] Second, I do not know why the commissioner refused to investigate the jurisdictional issue raised by the applicant for determination. None of the respondents have filed answering affidavits and the record filed in this matter comprises no more than the third respondent's referral form and the certificate of outcome issued by the commissioner. It may be, however, that the commissioner took the view that, if a respondent wanted to raise the point that the referring party had not been its 'employee', this was not a matter to be considered at the conciliation stage and that it was a matter only to be considered by the arbitrating commissioner in due course. Such an approach would be consistent with certain decisions of this court, eg Dempster v Kahn & others (1998) 19 ILJ 1475 (LC); BHT Water Treatment (A Division of Afchem (Pty) Ltd incorporating PWTSA) v CCMA & others (2002) 23 ILJ 141 (LC); AVBOB Mutual Assurance Society v Commission for Conciliation, Mediation & Arbitration, Bloemfontein & others (2003) 24 ILJ 535 (LC). There are two answers to this. First, even if the commissioner believed that her jurisdiction to conciliate did not turn on whether or not the referring party was in truth an 'employee', she was

nevertheless bound in terms of rule 14 of the CCMA Rules to enquire into the correctness of that very proposition. Second, there is weighty authority which contradicts the cases referred to above and which is to the effect that a conciliating commissioner has no jurisdiction even to conciliate unless the referring party is, in fact, an 'employee'. See eg Tier Hoek v CCMA [1999] 1 BLLR 63 (LC); Virgin Active (Pty) Ltd v Mathole NO & others (2002) 23 ILJ 948 (LC); Sapekoe Tea Estates v Commissioner Maake & others (2002) 23 ILJ 1603 (LC); Flexware (Pty) Ltd v CCMA & others (1998) 19 ILJ 1149 (LC). In my view it is clear from these cases and from s 191(1)(a) of the Act (which permits a 'dismissed employee' to refer an unfair dismissal dispute for conciliation) that the referring party must, in truth, be an 'employee' and therefore that no jurisdiction exists to conciliate the dispute if the referring party is not an 'employee'."

Is the pending review application premature?

[23] Although it is for the reviewing court to decide whether the review application is premature, I am if the view that in the circumstances of this particular case, there is sufficient authority to support the view that the review court will interfere and review and set aside a jurisdictional ruling in circumstances where the conciliating commissioner had refused to deal with a jurisdictional point raised during conciliation. Although the Court in *SA Broadcasting Corporation v CCMA &* Others (2003) 24 ILJ 211 (LC) was of the view that it is not advisable for the court to give a final ruling on a jurisdictional question where the facts are not entirely clear and where the possibility exists that the facts which may emerge during the course of the

arbitration may justify a different conclusion than a conclusion based purely on the facts disclosed during the conciliation proceedings (at paragraph [21]), the Court nonetheless accepted that there is no hard and fast rule and that it is for the court to decide whether a review application should be dismissed. This is also the view of the Labour Appeal Court in *Fidelity Guards*:

> *"[20] I think from the above it should be clear that whether or not a party should approach the court about jurisdictional objections before or after the completion of the processes before the CCMA or the council is not a simple question. I doubt that a hard and fast rule can be made about it. Considerations which this issue raises are not altogether dissimilar to some of the considerations which our courts have to deal with from time to time in different contexts (see Nugent J in Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 676G-680J; Nicholson J in Gordon Verhoef & Krause & another v Azanian Workers Union & others (1997) 18 ILJ 707 (LAC) and Galgut J in connection with the in medias res rule in Zondi & others v President Industrial Court & H others (1991) 12 ILJ 1295 (LAC) especially at 1300C-1303A)."*

[24] In light of the afoaregoing I am of the view that the Applicant has satisfied all the requirements for the urgent relief sought in the Notice of Motion. I can also find no reason why costs should not follow the result.

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AC BASSON, J

DATE OF PROCEEDINGS: 16 JANUARY 2008

DATE OR ORDER: 17 JANUARY 2008.
DATE OF REASONS: 27 March 2008
FOR THE APPLICANT:
Adv M Lennox. Instructed by Botoulas Krause Inc
FOR THE RESPONDENT:

Adv W Hutchinson: Instructed by Fluxmans Attorneys.