IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 568/09

In the matter between:

JAMES PHERA	APPLICANT
AND	
EDUCATION LABOUR RELATIONS COUNCIL	**1ST RESPONDENT**
LESLEY RAMULIFHO	2ND RESPONDENT
GAUTENG DEPARTMENT OF EDUCATION	3RD RESPONDENT
THE MEC FOR EDUCATION: GAUTENG	4TH RESPONDENT
THE METROPOLITAN RAUCAL SCHOOL	5TH RESPONDENT

JUDGMENT

N**YATHELA** AJ

Introduction 1

[1] This is an application for review of a ruling in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA). The ruling was issued by the second respondent under case number PSES 375-05/06 and is undated. In terms of the ruling, second respondent found as follows: "*With the above analysis I make rulings as follows:*

(1) That the Education Relation Council has no jurisdiction to entertain this matter as there is no issue of unfair labour practice since applicant was never an employee of the respondent;

(2) The applicant can either approach the CCMA or the Labour Court for alternative relief;

(3) There is no order as to costs".

[2] The application is opposed by the third, fourth and fifth respondents.

The parties

[3] The applicant is James Phera, a former educator who applied for a temporary educator's post advertised by the third respondent.

[4] The first respondent is the Education Labour Relations Council (ELRC), a statutory Council established in terms of the LRA.

[5] The second respondent is Lesley Ramulifho, a Panellist of the first respondent. The second respondent is cited herein in his capacity as the Panellist who presided at the arbitration proceedings under case No: PSES 375-05/06.

[6] The third respondent is the Gauteng Department of Education, a government department in the Gauteng Province.

[7] The fourth respondent is the MEC of Education cited in her official capacity as the person responsible for the Gauteng Department of Education.

[8] The fifth respondent is the Metropolitan Raucall School is a public school under the control of the third respondent.

The facts

[9] The applicant in response to an advert by the Gauteng Department of Education applied for a position of a teacher in English First Language to Grade 9 and 10 pupils at the Metropolitan Raucall School. The advert indicated that the post was based at Metropolitan Raucall School but it was a Department of Education appointment.

[10] Applicant attended an interview for the above position on 11 August 2005 and was advised by fifth respondent that his interview was successful.

[11] On 15 August 2005, applicant completed an application for a temporary appointment as educator form and a notice of temporary appointment form. On the last page of the notice of appointment form below the applicant's signature there is a note reading as follows: "*Urgent: Educators are not allowed to assume duty without the written permission of the district manager"*.

[12] In terms of the advert, the period of employment was to start from 15 August 2005 to 31 December 2005.

[13] Applicant commenced employment at Metropolitan Raucall School on 22 August 2005. On 26 August 2005, the headmaster informed him that the Gauteng Department of Education had declined to approve his appointment in that he was previously dismissed by the Department as an educator and that as a result of the dismissal, he was blacklisted.

[14] According to the respondents, the offer of employment was conditional

upon approval of appointment by the third respondent.

[15] Applicant referred a dispute of unfair labour practice relating to "refusal to appoint" to the Education Labour Relations Council (ELRC) on 19 September 2005. The dispute was conciliated on 21 October 2005 and remained unresolved. An arbitration was scheduled to take place on 16 November 2005.

[16] At the arbitration hearing, third respondent raised a *point in limine* and stated that the ELRC had no jurisdiction to hear the matter as no employment relationship existed between the applicant and the respondent. The finding by the second respondent was that the ELRC "*has no jurisdiction to entertain this matter as there is no issue of unfair labour practice since the applicant was never an employee of the respondent and that applicant was blacklisted on the persal system".*

[17] It is this ruling of the second respondent which applicant seeks to review and have it set aside.

Grounds for review

[18] In the founding affidavit the applicant contended amongst others that:

18.1 The second respondent was to decide on the fairness of his dismissal or the Department's refusal to appoint him. The reasons for the dispute, which did not constitute the dispute was incorrectly made an issue.

18.2 The finding of the ELRC on the point in limine deprived him of his right to challenge his unfair dismissal dispute and was therefore prejudiced.
18.3 There is no rational connectional between the decision reached by the commissioner and the material which was properly placed before him.

Legal position

[19] Rule 14 of the Rules of the CCMA provides that: *"If it appears during conciliation proceedings that a jurisdiction 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".*

[20] Rule 22 of the Rules of the CCMA provides that: *"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 Commissioner has jurisdiction to arbitrate the dispute".*

[21] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)*, the court held that in reviewing an arbitration award, the test should be whether *"...having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach."*

Analysis

[22] According to applicant, the second respondent should not have dealt with the question whether applicant was an employee or not but should have confined himself to the fairness of applicant's alleged dismissal or non-appointment. As pointed out above, Rule 14 and 22 of the Rules of the CCMA which deal with conciliation and arbitration proceedings respectively require that if a jurisdictional point is raised during conciliation or arbitration proceedings, or if the commissioner on his own accord realises that a jurisdictional issue has not

been dealt with, he should require a party alleging that the commission has jurisdiction to prove the said jurisdiction. These rules apply equally to proceedings before the ELRC.

[23] It is settled law that Labour Law and the Labour Relations Act only apply to the relationship between employer and employee. It follows therefore that the question whether a person is an employee or not, is a jurisdictional issue. I am satisfied that the arbitrator acted correctly by dealing with the jurisdictional issue which had been raised before him. It would have been improper for the arbitrator to proceed and deal with the merits of the case before dealing with the jurisdictional issue.

[24] However, the court has to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach given the materials before him at the time of making the decision.

[25] In this matter, applicant signed the Notice of Appointment Form which clearly stated that he should not commence employment until he obtained written permission from the District Manager i.e third respondent. Applicant was therefore fully aware that his employment would be conditional on the third respondent granting him written permission to commence teaching. Third respondent did not grant applicant permission and thus the conditional employment terminated due to the non-fulfilment of the condition. Since the offer of employment was conditional, and the condition not having been fulfilled, applicant cannot be regarded as an employee.

[26] This case is distinguishable from the case of *Wyeth SA (Pty) Ltd v Manqele & others (2005) 26 ILJ 749 (LAC), Discovery Health Limited v CCMA & (2008) 7 BLLR 633 (LC) and Kylie v Commission for Conciliation Mediation and Arbitration & others 9 BLLR 870 (LC)* in that in all the above cases, the offer of employment was not conditional unlike in the present matter. These cases are therefore not relevant to the present matter.

[27] The other grounds for review deal more with the merits of the case. These grounds would only become relevant if there was a finding that the conclusion reached by the second respondent on the issue of jurisdiction was improper. However, in view of my finding that the second respondent was correct in making his finding on jurisdiction, the other grounds inevitably fall off.

[28] I therefore find that the conclusion reached by the second respondent in the circumstances is not one which a reasonable decision maker could not have reached.

Order

In the light of the above analysis, I make the following order:

[29] The panellist's ruling that the ELRC has no jurisdiction stands.

[30] I dismiss the application for review with costs.

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Nyathela AJ

Date of Hearing : 28 April 2009

Date of Judgment : 22 September 2009

Appearances

For the Applicant : Mr I.I Mohamed

(Routeledge Modise Attorneys)
For the Respondent: Adv. Baloyi
Instructed by : State Attorney