

SOUTH AFRICA / JUDGMENT

Van Wyk v Fibrewound (Pty) Ltd (D117/2000) [2001] ZALC 27 (20 February 2001) [2001] ZALC 27

COURT
Labour Court

BEFORE
Pillay

CASE / FILE NUMBER
D117/2000

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IN

THE LABOUR COURT OF SOUTH AFRICA

SITTING

IN DURBAN

CASE NO

D117/2000

DATE

2001/02/20

In

the matter between:

JOHANN
VAN WYK Applicant
and
FIBREWOUND
(PTY) LTD Respondent

JUDGMENT

DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

ON 20 FEBRUARY 2001

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J U D G M E N T

PILLAY J

- [1] Section 147(2) and (3) of the Labour Relations Act 66 of 1995 (the LRA) allows the Commission for Conciliation Mediation and Arbitration (the CCMA) to accept jurisdiction to resolve disputes even though a council may have jurisdiction to do so. It may also refer disputes to the council having jurisdiction. Whether the CCMA accepts the dispute or refers it to a council is entirely at the discretion of the CCMA.
- [2] The purpose of sections 147(2) and (3) is to dispense as far as possible with technical objections to the CCMA as a dispute resolution forum and to have disputes dealt with substantively. In this way one of the primary objectives of the LRA, namely to promote effective dispute resolution, can be achieved.
- [3] The respondent in this matter has objected in limine to the jurisdiction of the Court to try a matter for alleged unfair retrenchment on the grounds that the CCMA conciliated a dispute which should have been conciliated by a bargaining council. The applicant had referred the dispute to the CCMA for conciliation. Both parties attended the conciliation. There was no objection during the conciliation to the jurisdiction of the CCMA. The dispute remained unresolved and the commissioner issued a certificate accordingly.
- [4] The mere fact that a valid certificate was issued is sufficient compliance with the jurisdictional prerequisite for referring the dispute to this Court. [*Fidelity Guards Holdings (Pty) Ltd v Epstein N.O. and Others* [LAC] 2000(21) ILJ 2382.] For this reason alone the point in limine falls to be dismissed.
- [5] It was further submitted for the respondent that section 191(1) of the LRA vested jurisdiction in either a council or the CCMA exclusively.
- [6] Section 191(1) provides the procedure for employees to challenge a dismissal. Section 147 deals with the functions of the CCMA.

Subsections (2) and (3) of section 147 are not qualified in any way by section 191(1) or any other provision. Furthermore, one of the “exceptional circumstances” referred to in the heading of section 147 must be the fact that the dispute was incorrectly referred to the CCMA. [7] A further submission for the respondent was that the CCMA should have exercised a legal discretion as to whether to accept or refer the dispute to the bargaining council.

- [8] The Notice of Guidelines on Conciliation Proceedings, Notice No 896 of 1998, provides in paragraph 5.1:
- [4] The mere fact that a valid certificate was issued is sufficient compliance with the jurisdictional prerequisite for referring the dispute to this Court. [Fidelity Guards Holdings (Pty) Ltd v Epstein N.O. and Others [LAC] 2000(21) ILJ 2382.] For this reason alone the point in limine falls to be dismissed.
- [5] It was further submitted for the respondent that section 191(1) of the LRA vested jurisdiction in either a council or the CCMA exclusively.
- [6] Section 191(1) provides the procedure for employees to challenge a dismissal. Section 147 deals with the functions of the CCMA.

Subsections (2) and (3) of section 147 are not qualified in any way by section 191(1) or any other provision. Furthermore, one of the “exceptional circumstances” referred to in the heading of section 147 must be the fact that the dispute was incorrectly referred to the CCMA.

- [7] A further submission for the respondent was that the CCMA

should have exercised a legal discretion as to whether to accept or refer the dispute to the bargaining council.

- [8] The Notice of Guidelines on Conciliation Proceedings, Notice No 896 of 1998, provides in paragraph 5.1:

"The policy of the CCMA is to discourage legal technicalities and to promote the resolution of disputes in the interests of social justice and labour peace. Accordingly its policy is not to determine jurisdictional disputes at the conciliation stage of the resolution of a dispute unless it has no other option."

- [9] If a party objects to the jurisdiction of the CCMA then paragraph 5.2 provides guidelines as to how to deal with the matter. Clearly the policy of the CCMA is to attempt to resolve disputes substantively as far as possible. That is the brief on which commissioners approach conciliation. Consequently, if neither of the parties raises any objections the commissioners must endeavour to resolve the dispute substantively.
- [10] I accept for the purposes of argument in this case that the CCMA conciliated the dispute inadvertently. The commissioner may also not have applied his mind to the question as to whether there was a bargaining council having jurisdiction. In the absence of any objection the commissioner was not obliged to do so. It is not a situation where the CCMA is absolutely

barred from conciliating the dispute that should be before a bargaining council. Furthermore, even if the commissioner had considered the question and concluded that there was a bargaining council having jurisdiction, nothing in law precluded the commissioner from conciliating the dispute.

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[` 11] Finally, the description that my brother PILLEMER AJ attaches to the practice of participating in proceedings without demur and contesting jurisdiction thereafter as "unconscionable and bordering on fraud" is apt in the circumstances of this case. [Fidelity Guards Holdings (Pty) Limited v Epstein and Others 2000[21] ILJ 2009 [LC] at 2014I.]

[12] In the circumstances the point in limine is dismissed with costs. JUDGE PILLAY For the Applicant: Advocate P. Schumann Instructed by: E. Jamieson & Company For the Respondent: Mr M S Omar Instructed by: M S Omar & Associates

[` 11] Finally, the description that my brother PILLEMER AJ attaches to the practice of participating in proceedings without demur and contesting jurisdiction thereafter as "unconscionable and bordering on fraud" is apt in the circumstances of this case. [Fidelity Guards Holdings (Pty) Limited v Epstein and Others 2000[21] ILJ 2009 [LC] at 2014I.]

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JUDGE PILLAY

For the Applicant: Advocate P. Schumann

Instructed by: E. Jamieson & Company

For the Respondent: Mr M S Omar

Instructed by: M S Omar & Associates

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