DETERMINING JURISDICTION AT CONCILIATION AND ARBITRATION

By

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DECLARATION

I, CHANEL SNYMAN, declare that the work presented in this treatise has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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Chanel Snyman
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“Education is not the filling of a pail, but the lighting of a fire.” – William Butler Yeats
CONTENTS

SUMMARY.......................................................................................................................... iii

CHAPTER 1: INTRODUCTION ............................................................................................... 1

CHAPTER 2: CONCEPT OF JURISDICTION IN THE LEGAL FRAMEWORK ....................... 5
  2.1 Introduction...................................................................................................................... 5
  2.2 Interpretation of the concept of jurisdiction ................................................................. 5
  2.3 Administrative nature of CCMA arbitrations............................................................... 7
  2.4 The relevant test on review of a jurisdictional ruling .................................................. 8
  2.5 The jurisdiction of the CCMA ..................................................................................... 9
  2.5.1 Conciliation ........................................................................................................... 13
  2.5.2 Arbitration ............................................................................................................ 14
  2.6 Conclusion .................................................................................................................. 15

CHAPTER 3: BOMBARDIER TRANSPORTATION (PTY) LTD V MTIYA ......................... 17
  3.1 Introduction .................................................................................................................. 17
  3.2 The factual background .............................................................................................. 17
  3.3 The various approaches to a jurisdictional challenge adopted by our courts as set out in Bombardier .............................................................................................................. 18
    3.3.1 The first approach ................................................................................................. 18
    3.3.2 The second approach ........................................................................................... 20
    3.3.3 The third approach ............................................................................................... 23
  3.4 The status of a certificate of outcome as set out in Bombardier .................................. 24
  3.5 Conclusion .................................................................................................................. 26

CHAPTER 4: POST BOMBARDIER .................................................................................. 28
  4.1 Introduction .................................................................................................................. 28
  4.2 The status of a certificate of outcome post Bombardier .............................................. 28
  4.3 When should a jurisdictional issue be dealt with post Bombardier .............................. 30
  4.4 Conclusion .................................................................................................................. 34
CHAPTER 5: SALIENT ASPECTS REGARDING JURISDICTION OF THE CCMA

5.1 Introduction......................................................................................................................... 36
5.2 Condonation ......................................................................................................................... 36
5.3 Defective referrals ............................................................................................................... 38
5.4 Where a bargaining council has jurisdiction................................................................. 40
5.5 Legal representation where a jurisdictional question is raised at conciliation
.............................................................................................................................................. 41
5.6 Joinder ................................................................................................................................ 42
5.7 The correct approach if the CCMA lacks jurisdiction .................................................... 43
5.8 Conclusion ............................................................................................................................ 45

CHAPTER 6: CONCLUSION ........................................................................................................... 46

BIBLIOGRAPHY ......................................................................................................................... 49
Books ...................................................................................................................................... 49
Journals, articles and papers .................................................................................................. 49
Table of Cases ......................................................................................................................... 50
Table of Statutes ..................................................................................................................... 55
SUMMARY

Jurisdiction is the power or competence of a Court to hear and determine an issue between parties, as well as the power to compel the parties to give effect to a judgment. The approach of a CCMA commissioner faced with a jurisdictional challenge is therefore an important issue that requires legal certainty. Unfortunately, our case law has not been uniform with regard to the various issues surrounding jurisdiction of the CCMA, for example: what facts need to be established in order for the CCMA to have jurisdiction and at what stage of the process should a commissioner deal with the issue of jurisdiction.

The purpose of this treatise is to consider the various approaches of our courts to the issue of the jurisdiction of the CCMA and to determine what approach is practically best suited for CCMA commissioners when the issue of jurisdiction is in dispute. The research methodology is based on the various approaches of our courts to the jurisdiction of the CCMA as set out in Bombardier Transportation v Mtiya [2010] 8 BLLR 840 (LC). The more practical “third” approach as proposed by van Niekerk J, in Bombardier Transportation v Mtiya [2010] 8 BLLR 840 (LC), has been favoured by the Labour Court and the CCMA following the judgment. The correct approach of a commissioner when dealing with specific jurisdictional facts such as condonation and the jurisdiction of a bargaining council will further be considered. However, the predicament that commissioners face is that the Labour Appeal Court’s approach to jurisdiction is in conflict with that of the Labour Court’s approach. In conclusion, it is submitted that the Labour Appeal Court must pronounce on the issue of jurisdiction, taking into consideration the approach of the Labour Court as to create certainty regarding the correct approach of a commissioner when faced with a jurisdictional challenge.
CHAPTER 1
INTRODUCTION

The Commission for Conciliation, Mediation and Arbitration\(^1\) is an organ of state that was created in terms of the Labour Relations Act\(^2\) to effectively resolve labour disputes.\(^3\) The jurisdiction of the CCMA is provided for by the LRA and thus it may only perform the functions as set out in the LRA, which includes the power or competence to conciliate or, should conciliation fail, arbitrate a dispute.\(^4\)

In terms of the LRA, the CCMA issued Rules for the Conduct of Proceedings before the CCMA.\(^5\) The Rules of the CCMA regulate the practice and procedure regarding the resolution of disputes through conciliation and arbitration and addresses, amongst others, the following issues: the referral of a dispute for conciliation, postponements, joinder of parties, representation, the consolidation of disputes and the disclosure of documents.\(^6\) A dispute concerning the fairness of a dismissal or an unfair labour practice will be referred by the employee to the bargaining council or CCMA if no bargaining council has jurisdiction.\(^7\) The commissioner must then attempt to resolve the dispute through conciliation.\(^8\) If a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the CCMA received the referral and the dispute remains unresolved, the CCMA must arbitrate disputes listed in section 191(5)(a) of the LRA at the request of the employee.\(^9\) Section 135(5) of the LRA states that when conciliation fails, or at the end of the 30-day period, the commissioner must issue a certificate of outcome stating whether or not the dispute has been resolved.\(^10\)

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\(^1\) Hereinafter referred to as “the CCMA”.
\(^2\) 66 of 1995 (Hereinafter referred to as “the LRA”).
\(^3\) Section 1(d)(iv) of the LRA.
\(^4\) EOH Abantu (Pty) Ltd v CCMA [2010] 2 BLLR 172 (LC) par [31]. Aside from its conciliation and arbitration functions, the LRA authorises the CCMA to, amongst others, assist in establishing workplace forums, facilitate an agreement regarding picketing rules and appoint a facilitator to assist parties engaged in consultations on dismissals for operational reasons.
\(^5\) Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (Hereinafter referred to as “the Rules of the CCMA”).
\(^6\) Section 115(2)(cA)(iii) and section 115(2A)(a) of the LRA.
\(^7\) Section 191(1)(a) of the LRA.
\(^8\) Section 191(4) of the LRA.
\(^9\) Section 191(5) of the LRA.
\(^10\) Section 135(5) of the LRA.
of section 136(1) a dispute may only be resolved through arbitration if, a commissioner has issued a certificate stating that the dispute remains unresolved and within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration.\footnote{Section 136(1) of the LRA.}

Rule 14 of the Rules of the CCMA, however, states that “[i]f 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, provided that all jurisdictional issues requiring evidence may be deferred to arbitration.”

A party to the dispute may challenge the jurisdiction of the CCMA or bargaining council to hear the dispute. Such a jurisdictional challenge is a preliminary matter or point \textit{in limine} that is dealt with by way of application.\footnote{Grogan \textit{Labour Litigation and Dispute Resolution} 2ed (2014) 128.} A point \textit{in limine} has been defined as “one that does not bear on the merits of the case, but may, if successful, dispose of it as a whole or in part.”\footnote{Grogan \textit{Labour Litigation and Dispute Resolution} 186.} Points \textit{in limine} are usually raised at the start of proceedings; however, this is not always possible as a point \textit{in limine} may require evidence to be led, which may relate to the merits of the matter. In such a case, the commissioners may decide to hear all the evidence before making a ruling on the point \textit{in limine}.\footnote{Ibid.} In determining when to deal with a point \textit{in limine}, the commissioner should base his decision on which option will assist parties in disposing of the matter as expeditiously as possible.\footnote{Ibid.}

When examining the jurisdiction of the CCMA, it is important to consider jurisdiction in the legal framework and how our courts have interpreted the concept of jurisdiction. It has been held that jurisdictional challenges may be dealt with by the commissioner at any stage of the proceedings.\footnote{Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamp \textit{Labour Relations Law: A Comprehensive Guide} 6ed (2015) 136.} He or she may of their own accord determine whether a matter falls within the commission’s jurisdiction, and must give a ruling on the
jurisdictional challenge should a party to the proceedings raise such a point *in limine*.\(^{17}\) When commissioners rule on a point *in limine*, the rulings “may be interlocutory or final.”\(^{18}\) If the ruling is final, the proceedings are suspended and the ruling may be taken on review immediately. An interlocutory point, on the other hand, may only be reviewed immediately if the ruling disposes of the matter. Where a commissioner dismisses a matter for want of jurisdiction, for example, such a ruling will dispose of the matter until said ruling is set aside on review by the Labour Court.\(^{19}\)

According to Du Toit, the following jurisdictional facts must be present for the dispute to be referred to conciliation:

(i) there must be a dispute;
(ii) the dispute must arise within an employment relationship;
(iii) the dispute must fall within the jurisdiction of the CCMA;
(iv) the issue in dispute must not be subject to a collective agreement;
(v) the parties must not be subject to a council with jurisdiction; and
(vi) the referral must be made within the time frames given.\(^{20}\)

Once it is determined what facts must exist for the CCMA to have jurisdiction, the next question that needs to be considered is when must a commissioner consider the issue of jurisdiction of the CCMA or bargaining council?

Three main approaches have been developed by the courts to deal with jurisdictional challenges at the CCMA. In terms of the first approach, the CCMA must consider whether it has jurisdiction before conciliation takes place. Once a commissioner issues a certificate of outcome, jurisdiction is conferred on the CCMA to arbitrate a dispute and the certificate remains valid until it is set aside on review by the Labour Court.\(^{21}\) In terms of the second approach, the conciliating commissioner should determine whether the referral alleges that the party referring the dispute is an employee who has been dismissed and the respondent is the employer. If the referral fails to allege these facts, then the commissioner must issue an advisory jurisdictional

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\(^{18}\) Grogan *Labour Litigation and Dispute Resolution* 186.

\(^{19}\) Ibid.


\(^{21}\) *Bombardier Transportation v Mtiya* [2010] 8 BLLR 840 (LC) 843.
ruling that the CCMA or bargaining council does not have the requisite jurisdiction to conciliate the dispute.\textsuperscript{22}

At present, the CCMA follows a third approach as set out in \textit{Bombardier Transportation v Mtiya},\textsuperscript{23} which holds that not all jurisdictional issues raised by the parties are “true” jurisdictional questions that must necessarily be determined before conciliation takes place. This approach has been held to be better suited to the structure of the CCMA as it promotes the goal of “expeditious and efficient dispute resolution.”\textsuperscript{24} The focus of this treatise will therefore be on the judgment of Van Niekerk J, in \textit{Bombardier}. To fully appreciate the judgment in \textit{Bombardier} and the issues surrounding the jurisdiction of the CCMA, it is important to examine the case law prior to the decision of \textit{Bombardier} with specific reference to the CCMA’s powers of conciliation and arbitration. The judgment of Van Niekerk J, in \textit{Bombardier} will be critically studied in determining the current legal position regarding the jurisdiction of the CCMA.

Jurisdiction continues to be a complex issue for a commissioner to determine and in considering the way forward it is interesting to observe how our courts have interpreted and applied the law regarding the various jurisdictional challenges following the decision of \textit{Bombardier}. Other aspects concerning jurisdiction such as the CCMA’s approach to condonation, legal representation, joinder and redirection of disputes to other forums will also be considered.

\begin{footnotesize}
\bibitem{footnote22} \textit{Bombardier Transportation v Mtiya} 844.
\bibitem{footnote23} Hereinafter referred to as “\textit{Bombardier}”.
\bibitem{footnote24} \textit{Bombardier Transportation v Mtiya} 845.
\end{footnotesize}
CHAPTER 2
CONCEPT OF JURISDICTION IN THE LEGAL FRAMEWORK

2 1  INTRODUCTION

Jurisdiction has been defined as “the power or competence of a Court to hear and determine an issue between parties.”

However, jurisdiction is not only the power to determine an issue between parties; it is also the lawful power to compel the parties to give effect to the judgment. This power or competence may be limited by enforcing restrictions in relation to the region, the parties, as well as the issue and the amount in dispute.

2 2  INTERPRETATION OF THE CONCEPT OF JURISDICTION

The Supreme Court of Appeal in *Makhanya v University of Zululand* held that in order to determine whether a court has the judicial authority to consider a claim, one must not have regard to whether or not the claim is good or bad in law, but whether the court has the authority to uphold or dismiss the claim before it.

Langa CJ, held in *Chirwa v Transnet Ltd* that “[i]t seems to me to be axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.” The fact that a valid defence in law exists does not render the court without the jurisdiction to hear it, even if the court can only dismiss the claim.

Authority for this approach can be found in *National Union of Metalworkers of SA v Intervale (Pty) Ltd*, where the Constitutional Court was tasked with determining, amongst other issues, whether an unfair dismissal dispute first had to be referred for conciliation before the Labour Court will have jurisdiction or the authority to hear the matter. In this case, NUMSA brought an application to join a further two employers, BHR and Intervale, as respondents to

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25 *Graaf-Reinet Municipality v Van Rynweld's Pass Irrigation Board* [1950] 2 ALL SA 448 (A) 452.
26 *Wright v Stuttaford, & Co* 1929 EDL 10 42.
27 *Graaf-Reinet Municipality v Van Rynweld's Pass Irrigation Board* 452.
29 *Makhanya v University of Zululand* 159.
30 [2008] JOL 21166 (CC).
31 *Chirwa v Transnet Ltd* 82.
32 *Makhanya v University of Zululand* 159.
34 *National Union of Metalworkers of SA v Intervale (Pty) Ltd* 364.
the proceedings in the Labour Court.\textsuperscript{35} The Labour Court granted NUMSA’s application, however it was set aside on appeal to the Labour Appeal Court. The Constitutional Court considered the application for joinder and held that “[a] referral for conciliation is indispensable”\textsuperscript{36} and as a result of the two employers not being included in the referral for conciliation, the Labour Court does not have jurisdiction to entertain the unfair dismissal dispute against the respondents, BHR and Intervalve.\textsuperscript{37} In terms of this Constitutional Court decision, an unfair dismissal dispute must be referred for conciliation before the CCMA or bargaining council and in turn the Labour Court, will have the jurisdiction to arbitrate or adjudicate the dispute.

The Supreme Court of Appeal in \textit{South African Maritime Safety Association v McKenzie}\textsuperscript{38} held that should a jurisdictional challenge arise, the court should dispose of such a claim before proceeding with the matter.\textsuperscript{39} In this case, the respondent an employee of the appellant, claimed that his dismissal was substantively and procedurally unfair. The respondent pursued his rights in terms of the LRA and the parties had reached a settlement which was equivalent to twelve month’s salary. The respondent however pursued the matter further and in an attempt to circumvent the LRA, instituted a claim for damages in the High Court against the appellant claiming breach of contract on the basis that the contract of employment was terminated “without just cause”.\textsuperscript{40} The appellant, on the other hand, pleaded that our civil courts do not have jurisdiction to determine the claim since the LRA is the exclusive source of remedies in the case of an unfair dismissal dispute. Wallis AJA held that when a point \textit{in limine} is raised, challenging the jurisdiction of the court, the focus should not be on the facts of the case, but rather on what grounds the applicant based his claim regarding jurisdiction as expressed in the pleadings.\textsuperscript{41} The Supreme Court of Appeal had regard to the Constitutional Court’s decision in \textit{Gcaba v Minister of Safety and Security}\textsuperscript{42} where it was held that “the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other

\textsuperscript{35} \textit{National Union of Metalworkers of SA v Intervalve (Pty) Ltd} 367.
\textsuperscript{36} \textit{National Union of Metalworkers of SA v Intervalve (Pty) Ltd} 377.
\textsuperscript{37} \textit{National Union of Metalworkers of SA v Intervalve (Pty) Ltd} 378.
\textsuperscript{38} [2010] 3 ALL SA 1 (SCA).
\textsuperscript{39} \textit{South African Maritime Safety Association v McKenzie} par [6].
\textsuperscript{40} \textit{South African Maritime Safety Association v McKenzie} par [1].
\textsuperscript{41} \textit{Gcaba v Minister of Safety and Security} par [75].
\textsuperscript{42} 2010 (1) BCLR 35 (CC).
claim that has not been pleaded but could possibly arise from the same facts." It was clear that the respondent’s claim was for breach of contract and on this basis the appellant’s challenge that the LRA is the exclusive source of remedies in unfair dismissal disputes was not a jurisdictional challenge at all, but rather a challenge to the validity of the respondent’s claim. The Supreme Court of Appeal confirmed that the LRA provides sufficient protection for employees who fall within its scope and a claim instituted in the High Court based on a right in terms of the LRA will be unsuccessful on the basis that the claim is not valid in law.

2.3 ADMINISTRATIVE NATURE OF CCMA ARBITRATIONS

One of the questions that the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* was tasked with determining, was whether arbitrations conducted by the CCMA in terms the LRA can be classified as administrative action in terms of the Promotion of Administrative Justice Act and if so, whether it will be subject to the “standard of review” in terms of PAJA or the LRA. The Constitutional Court held that a commissioner conducting an arbitration at the CCMA is exercising a public power which amounts to administrative action. In reaching this conclusion, Navsa AJ, considered commentary by authors such as Brassey, which held that:

“Unlike the Labour Court, it enjoys none of the status of a court of law and so has no judicial authority within the contemplation of the Constitution. It is an administrative tribunal in the same way as the industrial court was and, being an organ of state under s 239 of the Constitution, is directly bound by the Bill of Rights. It is also subject to the basic values and principles governing public administration.”

The Constitutional Court went further and held that section 145 of the LRA, which makes provision for the review of arbitration awards on application to the Labour Court, must be intertwined with the constitutional standard of reasonableness and the

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43 South African Maritime Safety Association v McKenzie par [7].
44 South African Maritime Safety Association v McKenzie par [8].
45 South African Maritime Safety Association v McKenzie par [58].
46 (2007) 28 ILJ 2405 (CC) hereinafter referred to as “Sidumo”.
47 3 of 2000 (hereinafter referred to as “PAJA”).
48 Sidumo v Rustenburg Platinum Mines Ltd par [1].
49 Sidumo v Rustenburg Platinum Mines Ltd par [94].
question that must be answered on review is whether “the decision reached by the commissioner is one that a reasonable decision-maker could not reach?” Applying this standard of review of arbitration awards, will not only ensure that the rights in terms of the LRA are given effect to, but will also ensure administrative action which is lawful, reasonable and procedurally fair.

2.4 THE RELEVANT TEST ON REVIEW OF A JURISDICTIONAL RULING

As mentioned above, the relevant test on review, to determine whether arbitration awards issued by commissioners are reasonable, is whether “the decision reached by the commissioner is one that a reasonable decision-maker could not reach?” When discussing the issue of jurisdiction, it is important to consider the test that the court must rely on when a jurisdictional ruling is on review. The Labour Court in *Madondo v Safety and Security Sectoral Bargaining Council* was tasked with, amongst other things, to determine the relevant test on review of a jurisdictional issue. The Labour Court held that whether or not a dismissal took place, is a jurisdictional issue and if no dismissal took place, then the CCMA does not have the requisite jurisdiction to hear the matter. On these grounds, the Labour Court confirmed the court’s previous decision in *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abraham Mongatane* where it was held that the reasonableness test, as set out above, does not apply to the review of a jurisdictional issue.

In determining the relevant test on review of a jurisdictional issue, the Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration*, held as follows:

“Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration
award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise."

In the context of a constructive dismissal dispute, the Labour Court in Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen, also had regard to its previous decision in Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and held that the Labour Court is bound by the decision of the Labour Appeal Court in SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association, which held that the question that needs to be answered, is whether a dismissal had taken place? The question was not whether the dismissal was reasonable, justifiable or rational, but rather, whether the commissioner was correct in ruling that a dismissal had taken place.

In summary, the relevant test on review of a jurisdictional issue is correctness. In other words, whether the commissioner was right or wrong in determining if the CCMA has the requisite jurisdiction to hear the dispute, instead of the test based on reasonableness as enunciated in Sidumo.

### 2.5 JURISDICTION OF THE CCMA

The CCMA is an autonomous, juristic body established in terms of the LRA with jurisdiction is all nine provinces of the Republic of South Africa. It is an organ of state, in that it resolves disputes in terms of the LRA through the exercise of a public power, without obtaining the consent of the parties.

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59 (2012) 33 ILJ 363 (LC).
60 (2009) 30 ILJ 2093 (LC).
62 SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association par [41].
63 Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen par [23].
64 Madondo v Safety and Security Sectoral Bargaining Council par [48].
65 Section 112 of the LRA.
66 Section 114(1) of the LRA.
67 Carephone (Pty) Ltd v Marcus NO [1998] 11 BLLR 1093 (LAC) 1098.
The Labour Appeal Court in *South African Rugby Players Association v SA Rugby (Pty) Limited*[^68] confirmed that the CCMA is not a court of law and its jurisdiction to resolve disputes is solely determined by statute.[^69] The court in this case further held that the Labour Court may be required to determine whether the CCMA has jurisdiction in a matter because the CCMA is unable to make a ruling on its own jurisdiction and is limited to only making a jurisdictional ruling for the sake of convenience.[^70] The court stated the following with regard to jurisdiction of the CCMA:

“[T]he CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties.”[^71]

Jurisdiction of the CCMA is only dependent upon the existence of objective facts and therefore a jurisdictional ruling by the CCMA does not affect the validity of the proceedings before the Commission.[^72] In *Kimberley Junior School v The Head of the Northern Cape Education Department*[^73] the Supreme Court of Appeal had to determine whether the Head of the Department had any discretion, to make an appointment in terms of the Employment of Educators Act[^74][^75]. In reaching its conclusion, the court had regard to the Constitutional Court’s judgment of the *President of the RSA v SARFU*[^76] where the court in this case confirmed that the leading authority on “jurisdictional facts” was the decision of Corbett J in *South African Defence and Aid Fund v Minister of Justice*.[^77] In this case, two types of jurisdictional facts were recognised. The first category is defined as objective jurisdictional facts and they include those facts that must objectively exist in order for the authority to have the power to act. If a court decides that the requisite jurisdictional facts are not present, the exercise of that power will be declared invalid.[^78] The second category is

[^69]: *South African Rugby Players Association v SA Rugby (Pty) Limited* par [44].
[^70]: Ibid.
[^71]: *South African Rugby Players Association v SA Rugby (Pty) Limited* par [40].
[^72]: *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO* [1994] 9 BLLR 1 (LAC) 4.
[^74]: 76 of 1998.
[^75]: *Kimberley Junior School v The Head of the Northern Cape Education Department* par [10].
[^76]: 1999 (10) BCLR 1059 (CC).
[^77]: 1967 (1) SA 31 (C).
[^78]: *Kimberley Junior School v The Head of the Northern Cape Education Department* par [13].
referred to as subjective jurisdictional facts and they relate to the person who determines whether the requisite jurisdictional facts are present. In this case, the question that needs to be answered is whether the person failed to apply its mind when determining whether particular set of jurisdictional facts existed. In relation to the Industrial Court, the court in *Pinetown Town Council v President of the Industrial Court* held that “jurisdictional facts” are conditions that must be present in order for the tribunal to have the power to act. Consequently, a jurisdictional ruling based on jurisdictional facts must be able to be taken on review by the courts, because in theory, such a ruling does not form part of the “exercise of the jurisdiction, but logically, takes place prior to it.” The Appellate Division in *Minister of Public Works v Haffejee NO* confirmed that a statutory body, such as the compensation court in this case, cannot confer jurisdiction on itself which it does not in law possess. Even though a creature of statute can rule on its own jurisdiction, such a ruling is justiciable and may be set aside on review by a court of law.

In *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* the Constitutional Court held that “[j]urisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of power, and the procedures to be followed when exercising that power.” The question the Constitutional Court had to answer in this case was: what effect does the failure to comply with the requisite jurisdictional facts have on the status of the administrative decision? In determining this issue, Cameron, J had regard to the decision of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town* which held as follows:

> “Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.

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79 *Kimberley Junior School v The Head of the Northern Cape Education Department* par [12].
80 [1984] 2 All SA 18 (N).
81 *Pinetown Town Council v President of the Industrial Court* 23.
82 *Theron en Andere v Ring Van Wellington Van die NG Sendingkerk in SA* [1974] 1 All SA 73 (C) 88.
83 1996 (3) SA 745 (A).
84 *Minister of Public Works v Haffejee NO* 11.
85 2014 (5) BCLR 547 (CC).
86 *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* par [98].
87 2004 (6) SA 222 (SCA).
proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."  

This confirms a deeply-rooted principle in our law that our courts are the guardians of legality. The conduct of public officials, amounting to administrative action, has legal consequences until it is set aside on review by a court of law. Arbitrations conducted under the auspices of the CCMA amounts to administrative action and therefore it is important to consider the issue of the jurisdiction of the CCMA.

Section 115 of the LRA lists the various functions or issues over which the CCMA has jurisdiction. The CCMA has jurisdiction, amongst other things, to appoint a facilitator to assist parties engaged in consultation regarding dismissals based on operational requirements and to establish workplace forums on application by a representative trade union. However, one of the main functions of the CCMA is to attempt to resolve disputes referred to it, through conciliation. Should the dispute remain unresolved after conciliation, the CCMA must arbitrate the dispute, firstly, if required to do so in terms of the LRA and if any party to the dispute has requested that the dispute be resolved through arbitration or, secondly, if all the parties consent to arbitration in respect of a dispute over which the Labour Court has jurisdiction. Before considering the correct approach of the CCMA when a jurisdictional challenge is raised, it is necessary to first discuss the process of conciliation as well as arbitration in terms of the LRA.

88 Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) par [26].
89 Section 189A of the LRA.
90 Section 80(2) of the LRA.
91 Section 115(1)(a) of the LRA.
92 Section 115(1)(b) of the LRA.
25.1 CONCILIATION

If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to the CCMA, if no bargaining council has jurisdiction.93 Such a referral must be made within 30 days of the date of dismissal or 90 days of the date of the act or omission, which allegedly constitutes the unfair labour practice.94 The CCMA or bargaining council, may at any time, on good cause shown, permit the employee to refer the dispute after the relevant time period has expired.95 Once a dispute has been referred, the CCMA must appoint a commissioner to resolve the dispute through conciliation.96 The appointed commissioner must attempt to resolve the dispute within 30 days of the CCMA or bargaining council receiving the referral: However, the 30-day period may be extended with the consent of the parties.97

Conciliation is a process with few legal formalities, the parties are not legally represented and they attempt to reach consensus with the assistance of a commissioner.98 “Conciliation proceedings are private and confidential and are conducted on a without prejudice basis.”99 Parties may not disclose anything said at conciliation, nor may they be called as a witness during subsequent proceedings, unless called to do so by a court of law.100 During conciliation, parties are encouraged, where possible, to resolve the dispute amongst themselves “rather than enforcing the law”.101 This is, however, easier said than done, and the outcome of conciliation is often affected by the parties as well as the commissioner’s view of the legal framework.102

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93 Section 191(1)(a) of the LRA.
94 Section 191(1)(b) of the LRA.
95 Section 191(2) of the LRA.
96 Section 135(1) of the LRA.
97 Section 135(2) of the LRA.
98 EOH Abantu (Pty) Ltd v CCMA [2010] 2 BLLR 172 (LC) par [17].
99 Rule 16(1) of the Rules of the CCMA.
100 Rule 16(2) of the Rules of the CCMA.
102 Ibid.
The role of a commissioner during conciliation is to remain impartial, whilst guiding the parties to an amicable resolution of the dispute. The commissioner must determine a suitable process when assisting the parties to resolve the dispute, which may include: mediation, fact-finding, and making a recommendation to the parties, which may be in the form of an advisory award. If the dispute cannot be resolved through conciliation, or a 30-day period or any further period has lapsed from the date of referral, the commissioner must issue a certificate of outcome stating that the dispute remains unresolved. Furthermore, the Labour Court may refuse, except in the case of review or appeal, to determine a dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. The certificate of outcome will be considered sufficient proof that the parties attempted to resolve the dispute through conciliation.

Section 135(5) of the LRA only makes it peremptory to issue a certificate at the end of the 30-day period and does not provide a time period within which the certificate of outcome is to be issued. In *Louw v Micor Shipping* the Labour Court held that the certificate may be issued at any time after the 30-day period and any delay in issuing the certificate may have an effect on the compensation awarded, but does not affect the jurisdiction of the court. The status of the certificate of outcome has been the subject of debate by our courts and the issue that must be determined is, whether the issuing of the certificate of outcome establishes the jurisdiction of the CCMA, or whether it only functions to confirm that the dispute remains unresolved and that conciliation was unsuccessful.

### 2.5.2 ARBITRATION

If the CCMA or bargaining council has certified that the dispute remains unresolved, or if the 30 days or any further period as agreed between the parties have expired

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103 *Kasipersad v CCMA* [2003] 2 BLLR 187 (LC) 189.
104 Section 135(3) of the LRA.
105 Section 135(5)(a) of the LRA.
106 Section 157(4)(a) of the LRA.
107 Section 157(4)(b) of the LRA.
109 *Louw v Micor Shipping* par [8].
since receipt of the referral, the CCMA or bargaining council with jurisdiction must arbitrate the dispute at the request of the employee.\textsuperscript{111} Section 136(1) of the LRA holds that the CCMA must appoint a commissioner to arbitrate the dispute if a commissioner has issued a certificate stating that the dispute remains unresolved and the dispute has been referred to arbitration within 90 days after the date on which the certificate was issued.\textsuperscript{112} Arbitration can be defined as “a process in which a neutral person makes a decision on a specified range of disputed issues.”\textsuperscript{113} A commissioner may determine the dispute in the manner the commissioner considers appropriate, provided that he attempts to resolve the dispute fairly and quickly, with minimum legal formalities, while still dealing with the substantial merits of the dispute.\textsuperscript{114}

In practice, commissioners are often called upon to make \textit{in limine} rulings at conciliation on issues that arise in terms of the aforementioned sections of the LRA. Such issues include, but are not limited to:

- a) whether the party referring the dispute falls within the definition of employee as per the LRA;
- b) whether the dispute falls within the jurisdiction of a bargaining council;
- c) time periods and applications for condonation; and
- d) the true nature of the dispute, for example, in dismissal disputes, whether the existence of a dismissal has been established.

2.6 CONCLUSION

Case law has not been uniform with regard to what issues need to be determined before the CCMA has jurisdiction to resolve a dispute. It is therefore necessary to determine what issues are considered to go to the heart of the CCMA’s jurisdiction. Once we have considered what qualifies as a jurisdictional issue, the next step will be to determine when these issues should be considered. A question that it is often raised is whether the arbitrating commissioner is best suited to rule on a point \textit{in limine} after hearing the evidence, or whether the process of conciliation, is more appropriate to

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\textsuperscript{111} Section 191(5)(a) of the LRA.
\textsuperscript{112} Section 136(1) of the LRA.
\textsuperscript{114} Section 138(1) of the LRA.
determine a point in *limine?* When taking the above into consideration, another question that needs to be answered is what effect, if any, a certificate of outcome, indicating that the dispute remains unresolved, has on the jurisdiction of the CCMA?
CHAPTER 3

BOMBARDIER TRANSPORTATION (PTY) LTD V MTIYA

3 1 INTRODUCTION

In *Bombardier*, Van Niekerk, J heard an application to have a certificate of outcome issued by the commissioner reviewed and set aside on the basis that the commissioner had failed to deal with the jurisdictional challenge before her and in so doing had exceeded her powers and committed misconduct in the form of a material error of law.\(^{115}\)

3 2 THE FACTUAL BACKGROUND

The third respondent, who was named Johannes, was employed in terms of a fixed-term contract by Bombardier China to work on the Gautrain Project. The contract was originally due to expire in June 2008, but was extended to 18 September 2008. Johannes was then advised that the contract would be extended again for a further, final, period of six months. Johannes was a resident of Hong Kong and the terms of the contract stated that his remuneration would be paid into his Hong Kong bank account and that the laws of Hong Kong would apply when interpreting and enforcing the terms of the contract. It was the submission of the applicant that Johannes precipitately terminated the contract on 31 October 2008 and left its employ.\(^{116}\)

Johannes subsequently referred an unfair dismissal dispute to the CCMA on 10 November 2008. On 2 February 2009, the applicant filed an application in terms of Rule 14 of the Rules of the CCMA, challenging the jurisdiction of the CCMA to resolve the dispute on various grounds. They included the contention that the laws of Hong Kong applied to the dispute and that Johannes had not been dismissed, but had terminated the contract out of his own accord.\(^{117}\) A conciliation hearing took place on

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\(^{115}\) *Bombardier Transportation (Pty) Ltd v Mtiya* 842.

\(^{116}\) *Ibid*.

\(^{117}\) *Bombardier Transportation (Pty) Ltd v Mtiya* 842.
13 February 2009, even though no explanation has been provided for a delay of over two months in setting the matter down for conciliation. At conciliation, the parties had agreed that Johannes would file an answering affidavit in reply to the applicant’s application and that the matter would be set down for argument on 14 April 2009. In terms of section 135(5) of the LRA, the commissioner proceeded to issue a certificate of outcome stating that the dispute remained unresolved on the expiry of the 30-day period for conciliation and on 16 February 2009, drafted an explanatory note which was sent to the parties. The note confirmed that the certificate of outcome was issued and parties would be allowed to raise their jurisdictional issues at arbitration. The applicant thereafter attended to file an application to review and set aside the certificate of outcome and prayed that the Labour Court should substitute the certificate of outcome with an order that the CCMA lacked jurisdiction to consider an unfair dismissal dispute.  

3.3 THE VARIOUS APPROACHES TO A JURISDICTIONAL CHALLENGE ADOPTED BY OUR COURTS AS SET OUT IN BOMBARDIER

A couple of approaches relating to a jurisdictional challenge had developed prior to the decision of the court in Bombardier and there was uncertainty regarding the manner in which a commissioner should approach a jurisdictional challenge at conciliation and what the significance was of the certificate of outcome issued when the dispute remained unresolved.  

3.3.1 THE FIRST APPROACH

The first approach considered by Van Niekerk, J in Bombardier was that of the Labour Court in EOH Abantu (Pty) Ltd v CCMA A point in limine, challenging the jurisdiction of the CCMA, was raised at conciliation. The commissioner did not deal with the jurisdictional challenge, stating that the point should be dealt with at arbitration and issued a certificate of outcome. An application was brought in the Labour Court

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118 Bombardier Transportation (Pty) Ltd v Mtiya 843.
119 Ibid.
121 Bombardier Transportation (Pty) Ltd v Mtiya 843.
122 EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2592.
to review and have the certificate of outcome set aside on the grounds that the commissioner was obliged to consider the point *in limine* and did not have the authority to issue a certificate of outcome without first having determined whether the CCMA had the required jurisdiction to resolve the dispute.\textsuperscript{123} The Court in this case held that a conciliating commissioner is obliged to deal with a jurisdictional issue, where such an issue is raised by a party to the dispute or where it is clear from proceedings that jurisdiction is in question.\textsuperscript{124} The Court further held that the failure by a conciliating commissioner to deal with the issue of jurisdiction prior to issuing a certificate of outcome will be considered a reviewable irregularity.\textsuperscript{125} It was further held that this approach was in line with Rule 14 of the Rules of the CCMA, which read as follows: “If it appears during conciliation that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commissioner has the jurisdiction to conciliate the dispute through conciliation.”\textsuperscript{126} In terms of this approach, Rule 22 of the Rules of the CCMA\textsuperscript{127} only allows an arbitrating commissioner to determine a jurisdictional issue where such an issue had not been dealt with at conciliation, for example, where the respondent failed to attend and this approach will not apply where a party intentionally fails to raise a jurisdictional concern at conciliation.\textsuperscript{128} Rule 22 will not apply where the conciliating commissioner has already made a jurisdictional ruling.\textsuperscript{129}

The approach of this Court confirmed the position in *Fidelity Guard Holdings (Pty) Ltd v Epstein NO*,\textsuperscript{130} in which a certificate of outcome has the effect of conferring jurisdiction on the CCMA to arbitrate a dispute. Once a certificate of outcome has been issued, an arbitrating commissioner faced with a jurisdictional challenge may not dismiss a dispute on jurisdictional grounds until such time the certificate of outcome is reviewed and set aside.\textsuperscript{131} In drawing this conclusion, the Court had regard to the

\begin{enumerate}
\item\textsuperscript{123} Ibid.
\item\textsuperscript{124} EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2601.
\item\textsuperscript{125} Ibid.
\item\textsuperscript{126} Rule 14 of the Rules of the CCMA.
\item\textsuperscript{127} Rule 22 of the Rules of the CCMA reads as follows: “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.”
\item\textsuperscript{128} EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2603.
\item\textsuperscript{129} Ibid.
\item\textsuperscript{130} [2000] 12 BLLR 1389 (LAC).
\item\textsuperscript{131} EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2597.
\end{enumerate}
Supreme Court of Appeals judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town*\(^{132}\) where it held as follows with regard to administrative law principles:

“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* 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.’”

In *Avgold-Target Division v CCMA*\(^{133}\) this approach was also followed and the Court held that as a general rule, a certificate of outcome confers jurisdiction on the arbitrating commissioner to arbitrate a dispute before him and the validity of the certificate of outcome has no effect on the jurisdiction of the arbitrating commissioner given that the certificate will remain valid until it is set aside on review.\(^{134}\) The Court, however, held that this approach will only apply where a conciliating commissioner has ruled on the specific jurisdictional issue that was raised at conciliation. Consequently, the above approach will not apply where the specific jurisdictional issue was not determined at conciliation and the arbitrating commissioner, in that case, will be compelled to rule on the jurisdictional issue.\(^{135}\)

### 3.3.2 THE SECOND APPROACH

A different approach to the status of a certificate of outcome and the manner in which conciliating commissioners should approach jurisdictional issues was followed in *EOH Abantu (Pty) Ltd v CCMA*.\(^{136}\) During conciliation, the respondent raised the issue that the applicant was not an employee, but rather an independent contractor.\(^{137}\) Despite the jurisdictional challenge, the conciliating commissioner did not rule on the point *in limine* and issued a certificate of outcome stating the dispute remained unresolved.\(^{138}\)

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\(^{132}\) 2004 (6) SA 222 (SCA).
\(^{133}\) (2009) JOL 24478 (LC).
\(^{134}\) *Avgold-Target Division v CCMA* 17.
\(^{135}\) *Avgold-Target Division v CCMA* 18.
\(^{136}\) [2010] 2 BLLR 172 (LC).
\(^{137}\) *EOH Abantu (Pty) Ltd v CCMA* 173.
\(^{138}\) *EOH Abantu (Pty) Ltd v CCMA* 174.
The Court in this case held that Rule 14 of the Rules of the CCMA should be interpreted to mean that a commissioner should simply determine whether the referral alleges that the applicant as the employee was dismissed by the employer who is the respondent as per the referral.\textsuperscript{139} If no such allegations are made, then the conciliating commissioner should issue an advisory jurisdictional ruling that the CCMA does not have the requisite jurisdiction to determine the dispute. This advisory ruling, however, is not binding on the arbitrating commissioner, and he may consider the jurisdictional issue once evidence has been led by the parties.\textsuperscript{140} Where the averments as mentioned above are properly made, but the jurisdiction of the CCMA is later challenged, the conciliating commissioner must then issue a certificate of outcome stating that the dispute could not be resolved through conciliation as a dispute of fact exists and will require evidence to be led.\textsuperscript{141} The Court further held that the certificate of outcome has no legal effect on the arbitrating commissioner to arbitrate the dispute.\textsuperscript{142} With regard to a number of previous decisions of the Labour Court, in which it was held that the conciliating commissioner does not have jurisdiction to conciliate if the referring party is not an employee,\textsuperscript{143} Cele J, held that they can be distinguished from the present case as they were decided prior to the publishing of Rule 14 of the Rules of the CCMA.\textsuperscript{144}

The Court also confirmed the decision of Freund AJ, in the case of \textit{Seeff Residential Properties v Commissioner N Mbhele NO},\textsuperscript{145} where it was held that an arbitrating commissioner has the jurisdiction to determine a dispute once the 30 day period from the date the employee refers the dispute expires, even if no certificate of outcome has been issued.\textsuperscript{146}

An arbitrating commissioner will then not be bound by the views of the conciliating commissioner regarding jurisdiction and will be in a better position to consider the

\textsuperscript{139} \textit{EOH Abantu (Pty) Ltd v CCMA} 184.
\textsuperscript{140} \textit{Ibid.}
\textsuperscript{141} \textit{Ibid.}
\textsuperscript{142} \textit{EOH Abantu (Pty) Ltd v CCMA} 185.
\textsuperscript{143} See \textit{Tier Hoek v CCMA} [1999] 1 BLLR 63 (LC); \textit{Virgin Active (Pty) Ltd v Mathole NO} (2002) 23 ILJ 948 (LC); \textit{Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake} [2002] 10 BLLR 1004 (LC).
\textsuperscript{144} \textit{EOH Abantu (Pty) Ltd v CCMA} 184.
\textsuperscript{145} [2006] JOL 17555 (LC).
\textsuperscript{146} \textit{Seeff Residential Properties v Commissioner N Mbhele NO} 8.
jurisdictional question afresh.\textsuperscript{147} The Court had regard to the Labour Appeal Court’s decision in \textit{Fidelity Guards Holdings (Pty) Ltd v Epstein NO}\textsuperscript{148} but held that it is distinguishable from the present case because the Labour Appeal Court had to consider a jurisdictional issue regarding condonation for a late referral. The Court held that should condonation not be granted, the CCMA would lack jurisdiction to conciliate the dispute in such a case.\textsuperscript{149} In terms of the second approach, the question of jurisdiction is best dealt with by the arbitrating commissioner, through the leading of evidence.\textsuperscript{150}

There are, however, a number of concerns regarding the second approach to jurisdictional challenges. The first difficulty arises in a situation where a conciliating commissioner is faced with a dispute regarding the legal principles to be applied. In terms of the second approach, once a dispute of fact arises, for example, the respondent alleges that the applicant is not an employee; the conciliating commissioner must issue a certificate of outcome.\textsuperscript{151} This approach does not cater for the situation where the parties agree on the facts, but disagree on the legal principles to be applied.\textsuperscript{152} For example, as in the case of \textit{Bombardier}, determining which country has jurisdiction to determine the dispute in terms of the contract of employment. The main concern with this approach is that once a jurisdictional challenge arises, a conciliating commissioner must defer the challenge to be dealt with at arbitration. In many instances this will unnecessarily protract the dispute between the parties as certain jurisdictional issues are well suited to be determined by a conciliating commissioner.\textsuperscript{153}

\textsuperscript{147} Ibid. (See also \textit{SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration} (2003) 24 ILJ 211 (LC) [19]-[20]; \textit{Etschmaier v Commission for Conciliation, Mediation and Arbitration} (1999) 20 ILJ 144 (LC) [40]-[48]; \textit{Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO} (1994) 15 ILJ 801 (LAC) at 803H-804H; \textit{Wyeth SA (Pty) Ltd v Mangete} (2005) 20 ILJ 749 (LAC) [6]-[7].

\textsuperscript{148} [2000] 12 BLLR 1389 (LAC).

\textsuperscript{149} Seeff Residential Properties v Commissioner N Mbhele NO 11.

\textsuperscript{150} \textit{Bombardier Transportation (Pty) Ltd v Mtiya} 844.

\textsuperscript{151} \textit{Bombardier Transportation (Pty) Ltd v Mtiya} 845.

\textsuperscript{152} Ibid.

\textsuperscript{153} Ibid.
3 3 3 THE THIRD APPROACH

The Court in *Bombardier*, proposed a third and more realistic approach to deal with jurisdictional challenges. In terms of this approach, certain issues regarding the jurisdiction of the CCMA are not proper jurisdictional questions. For instance, questions relating to whether an applicant is an employee or an independent contractor or whether the applicant was in fact dismissed are issues which are best determined through the leading of evidence during arbitration proceedings. The Court further held that the only jurisdictional questions in the true sense, that are likely to arise at conciliation are firstly, whether the party who referred the matter complied with the time limits as set out in section 191(1)(b) of the LRA, secondly, whether the bargaining council, to the exclusion of the CCMA, has jurisdiction to resolve a dispute on the basis that the parties fall within the registered scope of the bargaining council, and thirdly, whether the dispute relates to employment at all, for example, a mutual interest dispute between the parties.

The third approach differs to the other approaches in that it is dependent on “facts that the Legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power)...”, while the first two approaches are based on “facts that the Legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers.” Arbitrating commissioners, in determining the fairness of a dismissal or labour practice, are in a better position than conciliating commissioners, to answer questions such as: whether the applicant is an employee or whether the applicant was dismissed.

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154 Ibid.
155 Ibid.
156 Ibid.
157 *Bombardier Transportation (Pty) Ltd v Mtiya* 846.
3.4 THE STATUS OF A CERTIFICATE OF OUTCOME AS SET OUT IN BOMBARDIER

Van Niekerk J, in determining the status of a certificate of outcome in Bombardier, discussed his previous decision of Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers. In this case, the issue in dispute was the reason for the dismissal. The Court had to determine whether the CCMA could arbitrate the matter or if it needed to be adjudicated by the Labour Court and to do so, the Court had to first determine the reason for the dismissal. Even though legislation is not clear in how to resolve such a dispute, two approaches to determine the reason for a dismissal have emerged.

In terms of the first approach, the issue regarding the reason for the dismissal is considered a jurisdictional question and a conciliating commissioner must determine the dispute about the reason for the dismissal at conciliation. The conciliating commissioner will then issue a certificate of outcome, representing a jurisdictional ruling, in that it will state the nature of the dispute as well as the forum which will have jurisdiction to determine the dispute. Van Niekerk J, in Bombardier, had regard to the Labour Appeal Court’s judgment of Fidelity Guards Holdings (Pty) Ltd v Epstein NO and held that this case is concerned “with the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law…even though the act is invalid and unlawful” and does not mean that a certificate of outcome gives the CCMA the jurisdiction to arbitrate a dispute. The second approach, however, attaches no jurisdictional importance to the certificate of outcome and the classification of the dispute on the certificate of outcome has no bearing on future proceedings. The forum that will deal with the subsequent proceedings will be determined by what the referring party alleges the dispute to be and is not reliant on how the dispute is classified on the certificate of outcome. The Court then had to

159 Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers par [11].
160 Ibid.
161 Ibid.
162 Ibid.
164 Bombardier Transportation (Pty) Ltd v Mtiya 844.
165 Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers par [12].
166 Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers par [11].
consider what approach the LRA favours and in doing so, had regard to section 135(5) of the LRA which states the following:

“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;
(b) the commissioner must serve a copy of that certificate on each party to the dispute or person who represented a party in the conciliation proceedings; and
(c) the commissioner must file the original of that certificate with the Commission.”¹⁶⁷

The section makes provision for the following scenarios: Firstly, conciliation takes place within 30 days from the date of the referral, but the commissioner is unable to assist the parties in resolving the dispute. In this case, the commissioner must issue a certificate of outcome stating that the dispute remains unresolved.¹⁶⁸ The second scenario requires the commissioner to issue the certificate at the expiry of the 30-day period (or further agreed period) with no conciliation taking place or just the expiry of the 30-day period (or further agreed period).¹⁶⁹ The issuing of a certificate of outcome is therefore compulsory in terms of section 135(5) of the LRA. The difficulty that arises is that section 135(5) is not supported by section 191(5) of the LRA, which deals with disputes regarding unfair dismissals.¹⁷⁰ Section 191(5) reads as follows:

“If a council or a commissioner has certified that the dispute referred remains unresolved, or if 30 days have expired since the council or the commissioner received the referral and the dispute remains unresolved –

(a) the council or commission must arbitrate the dispute at the request of the employee...”¹⁷¹

In terms of this section, a certificate of outcome is not compulsory and a dispute may be referred to arbitration or to the Labour Court for adjudication without a certificate of

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¹⁶⁷ Section 135 of the LRA.
¹⁶⁸ Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers par [13].
¹⁶⁹ Ibid.
¹⁷⁰ Gold Fields Mining South Africa (Kloof Mine) v National Union of Mineworkers par [14].
¹⁷¹ Section 191(5) of the LRA.
outcome once the 30-day period has lapsed.\textsuperscript{172} This approach to a certificate of outcome was followed in \textit{Seeff Residential Properties v Mbhele NO}\textsuperscript{173} where the court held “that even if a certificate of outcome has been issued, arbitration remains mandatory if 30 days have expired since the council or the Commission received the referral and if the employee requires this.”\textsuperscript{174} Consequently, a certificate of outcome has no impact on the question of jurisdiction, which exists as a fact and cannot come about through the issuing of a certificate of outcome.\textsuperscript{175}

\section*{3.5 CONCLUSION}

In terms of the first approach of as set out in \textit{Bombardier}, a conciliating commissioner is obliged to deal with a jurisdictional issue once it is raised and a failure to do so, will be considered a reviewable irregularity. The effect of this approach is that the certificate of outcome confers jurisdiction on the CCMA, until such time as it is set aside on review. This approach is however, not suitable where the jurisdictional question was raised for the first time at arbitration. The conciliating commissioner in terms of the second approach is to issue an advisory jurisdictional ruling confirming the CCMA’s jurisdiction if the referral alleges that the applicant, as the employee, was dismissed by the respondent/employer. Yet, this advisory ruling is not binding on the arbitrating commissioner as he or she is in a better position to deal with any jurisdictional issue that is raised by the parties and he must consider the issue in light of the evidence that has been led.

The third, and more practical approach, set out by Van Niekerk J, is that arbitrating commissioners are typically in a better position than a conciliating commissioner to determine issues such as whether an applicant is an employee. Therefore, conciliating commissioners should only consider issues that can be considered true jurisdictional issues, such as: whether the referral complies with the time periods as set out in the LRA and whether the bargaining council has jurisdiction to hear the dispute. In terms of this approach, a certificate of outcome has no effect on the issue

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\textsuperscript{172} \textit{Bombardier Transportation (Pty) Ltd v Mtiya} 847.
\textsuperscript{173} [2006] JOL 17555 (LC).
\textsuperscript{174} \textit{Seeff Residential Properties v Mbhele NO} par [14].
\textsuperscript{175} \textit{Bombardier Transportation (Pty) Ltd v Mtiya} 847.
\end{flushleft}
of jurisdiction and merely confirms that conciliation took place on a specific date and the matter remains unresolved. Van Niekerk J, in *Bombardier* did not rule on the issue of jurisdiction, and held that the CCMA had not yet had an opportunity to deal with the jurisdictional dispute and therefore the dispute was referred back to the CCMA, for a commissioner to consider the question of jurisdiction. What is interesting and important to consider is how the judgment of *Bombardier* has been interpreted and practically applied by the CCMA and the courts.

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176 *Bombardier Transportation (Pty) Ltd v Mtiya* 850.
CHAPTER 4
POST BOMBARDIER

4 1  INTRODUCTION

Jurisdiction at the CCMA or bargaining council remains an important question that must be determined by the commissioner in each dispute referred to the CCMA or bargaining council. Following the decision of Van Niekerk J, in Bombardier, it is interesting to note the approach of our courts regarding the status of a certificate of outcome and there have been several occasions where our courts have pronounced on when a commissioner should determine the question of jurisdiction. What is further interesting to note is how the CCMA Rules have been developed to align itself with the more practical and flexible, third approach as set out in Bombardier.

4 2  THE STATUS OF A CERTIFICATE OF OUTCOME POST BOMBARDIER

The Labour Appeal Court in Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Members had to consider an appeal for an order declaring that the union’s members were not entitled to embark on strike action in respect of their demand for transport allowance, together with an order for the setting aside of a certificate of outcome issued by the bargaining council. The Labour Appeal Court held that even though the appellant was entitled to the relief sought, it was misconceived in praying for the certificate of outcome to be set aside. The Court concluded that the validity of the certificate of outcome does not affect the legality of a strike. In terms of section 64(1)(a)(i) and (ii) of the LRA, a strike will be protected even where the certificate of outcome has not been issued, as long as a period of 30 days, or any extension agreed upon, has elapsed since the referral was received by the CCMA or bargaining council and all the other requirements in terms of the LRA have been met. The above was confirmed by Landman AJA, in BMW

178 Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Member 2557.
179 Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Member 2558.
These decisions by the Labour Appeal Court confirm the status of the certificate of outcome as having no significance other than to confirm that a dispute was referred and that it remains unresolved.

In *SA Post Office Ltd v Moloi NO* the applicant brought an application to have the certificate of outcome set aside in terms of section 145 of the LRA. Furthermore, the applicant prayed that the industrial action that may be embarked upon on the strength of the certificate of outcome be unprotected on the grounds that the certificate incorrectly set out the dispute between the parties and therefore the commissioner had failed to apply his mind to the true nature of the dispute. The Court held that the principles regarding the certificate of outcome as set out in *Bombardier* also apply to disputes of mutual interest and there is no provision in section 145 of the LRA that limits the right to strike. Based on the evidence led, the respondent had complied with the procedural and substantive requirements to proceed with strike action, in that the dispute was referred for conciliation, conciliation failed and the commissioner issued a certificate of outcome indicating that the dispute remained unresolved. The respondent thereafter issued a notice of its intention to embark on strike action.

In the case of *Pienaar v Stellenbosch University* the unfair dismissal dispute remained unresolved following conciliation and the conciliating commissioner issued a certificate of outcome. He mistakenly indicated that the dispute should be referred to the Labour Court, whereas it was an unfair dismissal dispute and should have been referred to arbitration. The Court had regard to the previous decision of Van Niekerk J, in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* and held that the certificate of outcome is only an indication that an attempt was made to conciliate the dispute and as in this case, that the dispute remained unresolved. The Court further confirmed that the indication on the certificate of the appropriate forum, be it the Labour

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180 (2012) 33 ILJ 140 (LAC).
181 *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members* 148.
183 *SA Post Office Ltd v Moloi NO* 719.
184 *SA Post Office Ltd v Moloi NO* 726.
185 (2012) 33 ILJ 2445 (LC).
186 *Pienaar v Stellenbosch University par [1].
188 *Pienaar v Stellenbosch University par [17].
Court or the CCMA, is not binding on the parties and cannot be seen as confirmation of jurisdiction of any forum to arbitrate or adjudicate a dispute.\textsuperscript{189} The Court \textit{in casu} further held that a referring party is not bound by the commissioner’s categorisation of the dispute and a commissioner should not issue a jurisdictional ruling based on the reason for the dismissal as set out in the referral since a referring party is entitled to describe the unfair dismissal dispute in any way he or she wishes and it is not up to the commissioner or the employer to determine which forum should hear the dispute.\textsuperscript{190}

4.3 WHEN SHOULD A JURISDICTIONAL ISSUE BE DEALT WITH POST BOMBARDIER?

In \textit{Mickelet v Tray International (Pty) Ltd},\textsuperscript{191} the employer challenged the jurisdiction of the National Bargaining Council for the Road Freight Industry at conciliation. The commissioner declined to issue a jurisdictional ruling at conciliation and since the employee was dismissed for operational requirements deferred the dispute to the Labour Court for adjudication.\textsuperscript{192} Steenkamp J confirmed the principles regarding jurisdiction as set out in \textit{Bombardier} and held that a conciliating commissioner is not bound to issue a jurisdictional ruling at conciliation and may defer the jurisdictional challenge to arbitration or adjudication by the Labour Court.\textsuperscript{193}

The interpretation of Rule 14 of the Rules of the CCMA was brought into question again in \textit{Siemens Ltd v Commission for Conciliation, Mediation and Arbitration}.\textsuperscript{194} The question the Court had to determine was whether a conciliating commissioner is obliged to consider a jurisdictional challenge prior to issuing the certificate of outcome? The issue in dispute was whether an employment relationship existed between the parties and the Court held that because the issue in dispute was not a true jurisdictional question, as set out in \textit{Bombardier}, the conciliating commissioner did not

\textsuperscript{189} Ibid.
\textsuperscript{190} Pienaar v Stellenbosch University par [19].
\textsuperscript{191} (2012) 33 ILJ 661 (LC).
\textsuperscript{192} Mickelet v Tray International (Pty) Ltd par [18].
\textsuperscript{193} Mickelet v Tray International (Pty) Ltd par [17].
\textsuperscript{194} (2012) 33 ILJ 1476 (LC).
commit a reviewable irregularity in issuing the certificate of outcome and referring the jurisdictional challenge to arbitration.\textsuperscript{195}

The Labour Court in \textit{Cook4lifeCC v Commission for Conciliation, Mediation and Arbitration}\textsuperscript{196} also relied on the principles as set out in \textit{Bombardier} and applied in subsequent cases.\textsuperscript{197} In this case, the Applicant approached the court for an order to firstly set aside the jurisdictional ruling of the conciliating commissioner, deferring the jurisdictional challenge to the arbitration phase, and secondly to set aside the certificate of outcome issued by the commissioner following his ruling.\textsuperscript{198} With regard to the certificate of outcome, the Court held that a certificate of outcome is not an appropriate subject for a review application as it holds no legal significance other than to confirm that a dispute that has been referred to the CCMA remains unresolved.\textsuperscript{199} The Labour Court further confirmed Rule 14 should not be interpreted to mean that all jurisdictional questions should be dealt with at conciliation and that a failure to do so will be considered a reviewable irregularity, but rather the conciliating commissioner should have regard to the nature of the jurisdictional challenge and whether evidence will need to be led in order to determine questions of law and fact.\textsuperscript{200}

It is important to note that with the 2015 amendments to the Rules of the CCMA, Rule 14 was amended to state that “[i]f 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, provided that all jurisdictional issues requiring evidence may be deferred to arbitration.” This added provision is a clear attempt by the CCMA to align the Rules of the CCMA with the recent developments in our jurisprudence. More recently, the Labour Court in \textit{Mbele v Chainpack (Pty) Ltd}\textsuperscript{201} referred with approval to Justice Rabkin-Naicker’s decision in \textit{Helderberg International Importers (Pty) Ltd v McGahey NO}\textsuperscript{202} where he held as follows:

\textsuperscript{195} \textit{Siemens Ltd v Commission for Conciliation, Mediation and Arbitration} 1480.\textsuperscript{196} \textit{Cook4lifeCC v Commission for Conciliation, Mediation and Arbitration} 2019.\textsuperscript{197} \textit{Cook4lifeCC v Commission for Conciliation, Mediation and Arbitration} 2021.\textsuperscript{198} \textit{Cook4lifeCC v Commission for Conciliation, Mediation and Arbitration} 2022.\textsuperscript{199} \textit{Ibid.}\textsuperscript{200} \textit{Ibid.}\textsuperscript{201} \textit{37 ILJ 2107 (LC)}.\textsuperscript{202} \textit{36 ILJ 1586 (LC)}.
“I align myself with the conclusions reached in the Bombardier judgment, as have a number of other decisions in this court, that a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be. Further, in the absence of any relevant and prior jurisdictional ruling made by a conciliating commissioner, any party to a dispute referred to arbitration may raise any challenge to the CCMA’s jurisdiction at that stage, and the challenge must be dealt with by the arbitrating commissioner in terms of s 138(1).”

The 2015 and the latest 2016 CCMA Practice and Procedure Manual broadened the list of jurisdictional objections that may be raised at conciliation to bring it in line with the recent Labour Court and Labour Appeal Court decisions. It states that the only true jurisdictional objections, including those as set out in Bombardier, relate to the following:

“a failure to refer the dispute to conciliation within the prescribed time period (where there is no application for condonation of late referral or where condonation was refused); or a premature referral (e.g. where a dismissal dispute is referred before a dismissal occurred); whether a bargaining council has jurisdiction over the parties to the dispute (in the absence of any exercise of discretion conferred by s 147); whether the dispute ought to have been referred to private dispute resolution, in terms of an agreement between the parties (in the absence of any exercise of a discretion conferred by s 147). In terms of section 147(6A) of the LRA the CCMA must arbitrate if an employee who earns below the threshold is required to pay any part of the costs of private arbitration, or if the person appointed to arbitrate is not independent of the employer; whether, on the face of the referral, the dispute referred for conciliation is not one that is contemplated by the LRA, i.e. that the dispute concerns a matter other than a matter of mutual interest between employer and employee; whether the referral was effected in accordance with the rules.”

The CCMA Practice and Procedural Manual went further and considered the approach of a conciliating commissioner when a jurisdictional objection is raised relating to firstly, whether an employment relationship existed; secondly, whether a dismissal took place; and thirdly, whether the dispute has already been settled. When one of the above jurisdictional objections is raised, the commissioner should assume

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jurisdiction to conciliate\textsuperscript{206} and attempt to reach an agreement whereby the parties agree that the jurisdictional objection raised is to be decided by the arbitrating commissioner. If the parties are unable to agree, the conciliating commissioner may defer the jurisdictional challenge to arbitration.\textsuperscript{207} Where a conciliating commissioner has issued a ruling stating that the CCMA does not have jurisdiction to conciliate the dispute, the dispute cannot validly be set down for arbitration. The party wishing to request arbitration must approach the Labour Court to have the jurisdictional ruling set aside on review and one will only be successful if grounds of review exist to have the ruling set aside.\textsuperscript{208}

The Labour Appeal Court, prior to the decision of Van Niekerk J in \textit{Bombardier}, regarded issues such as whether a dismissal had taken place or whether an employment relationship existed\textsuperscript{209}, as issues regarding jurisdiction. In \textit{SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association},\textsuperscript{210} three professional rugby players were employed on limited duration contracts of employment. Following the dismal performance of the national team in 2003, SA Rugby dispensed with the contracts and decided to remunerate the players per match. The players referred a dispute to the CCMA, on the basis that they had been constructively dismissed as they had a reasonable expectation that their contracts would be renewed for the following year. The applicants were successful at arbitration. The award was taken on review to the Labour Court where it was held that only the one applicant had a reasonable expectation of permanent employment. The arbitration award regarding the other two applicants was set aside on review.\textsuperscript{211} On appeal, the Labour Appeal Court held that the issue that the arbitrating commissioner had to determine was whether the applicants had been dismissed or not. The court further held that the issue of whether a dismissal had taken place or not, is an issue affecting the jurisdiction of the CCMA and without the applicants being able to prove that they were dismissed, the CCMA

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\textsuperscript{206}Smythe “The Taking of Jurisdictional Points in the CCMA” 2016 37 \textit{ILJ} 1583 1592.
\textsuperscript{208}CCMA Practice and Procedure Manual par 8.15.1.
\textsuperscript{210}(2008) 29 \textit{ILJ} 2218 (LAC).
\textsuperscript{211}SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association par [3].
\end{flushleft}
did not have jurisdiction to entertain the dispute and their appeal failed. This decision of the Labour Appeal Court is clearly in conflict with the judgment of Van Niekerk J in Bombardier and it renders uncertain whether issues such as the existence of a dismissal or whether an applicant is an employee, are in fact jurisdictional facts that must exists before the CCMA will have the jurisdiction to arbitrate the dispute. Considering the arguments set out in Bombardier, the Labour Appeal Court must create legal certainty by pronouncing on whether the existence of an employment relationship and whether a dismissal had taken place are jurisdictional issues. Even though section 191(1)(a) mentions that a “dismissed employee” may refer a dispute to the CCMA, it is submitted that the issue of whether a dismissal had taken place, should not be considered a jurisdictional issue that must be established before the CCMA will have the requisite jurisdiction to arbitrate the dispute. Section 192 of the LRA deals with the onus in dismissal disputes and states that “[i]n any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.” Once “the existence of the dismissal is established, the employer must prove that the dismissal is fair.” This section proposes that the two segments take place in the same process which must be arbitration as it is at arbitration that the employer can prove the dismissal was fair through the leading of evidence. Consequently, the CCMA does have jurisdiction to arbitrate the dispute as it is only at arbitration that the applicant is able to prove, based on the merits, that he was dismissed. If he fails to discharge the onus as set out in section 192 of the LRA, it only means that he was not dismissed, it does not mean that the CCMA does not have jurisdiction to arbitrate the dispute.

4.4 CONCLUSION

Following the decision of Bombardier, our courts have on numerous occasions confirmed that the certificate of outcome does not confer jurisdiction and its only function is to confirm that a dispute referred to the CCMA or bargaining council remains unresolved. Parties are further not bound by any indication on the certificate of the

212 SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association par [39].


214 Bosch “Abantu Badidekile’: When Must an Applicant Prove that He is an Employee?” 2010 31 ILJ 809 821.
appropriate forum. The amendment of Rule 14 of the Rules of the CCMA further gave effect to the approach of Van Niekerk J, in *Bombardier*, in that conciliating commissioners may now defer to arbitration, any jurisdictional challenge which may require evidence to be led. In practice, commissioners are also guided by the CCMA Practice and Procedure Manual which makes provision for “true” jurisdictional issues, best dealt with by the conciliating commissioner. The current approach of the CCMA in dealing with jurisdictional objections allows for conciliating commissioners to ensure that during conciliation, the emphasis remains focused on attempting to reach an amicable settlement between the parties. To create legal certainty, following the Labour Court’s decision of *Bombardier*, the Labour Appeal Court must pronounce on whether the existence of a dismissal or whether an applicant is an employee, are in fact jurisdictional issues that must exists before the CCMA will have the jurisdiction to arbitrate the dispute.
CHAPTER 5
SALIENT ASPECTS REGARDING JURISDICTION OF THE CCMA

5.1 INTRODUCTION

It is also necessary to consider some of the challenges surrounding the various aspects of jurisdiction that may arise during proceedings. The correct approach of the commissioner faced with specific issues such as condonation, joinder or where a bargaining council has jurisdiction, will be considered. Where the CCMA lacks jurisdiction, the correct approach to be followed by a commissioner is also discussed.

5.2 CONDONATION

The LRA prescribes strict time periods in which disputes must be referred to the CCMA or bargaining council having jurisdiction. Section 191(1)(b) of the LRA reads as follows:

“A referral...must be made within–
   (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
   (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.”

It is often the case that an employee refers the dispute outside of the time periods as set out above. The LRA has made provision for this and the CCMA or bargaining council may at any time, on good cause shown, permit the employee to refer the dispute after the time periods stated above. It is clear from the LRA that the commissioner’s discretion to condone the late filing is a juristic act and condonation should be granted before the CCMA or bargaining council will have the requisite jurisdiction to hear the dispute. This was confirmed in Van Rooy v Nedcor Bank...

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215 Section 191(2) of the LRA.
where the Labour Court held that the 30 day period as set out in section 191 is an unconditional requirement and should the applicant refer a dispute after the 30 day period, he must apply for condonation before conciliation can take place. The CCMA therefore has no jurisdiction to conciliate, unless condonation is applied for and granted. This decision was overturned by the Labour Appeal court in Fidelity Guards Holdings (Pty) Ltd v Epstein NO. In this case the appellant brought a review application in the Labour Court and one of the grounds of review related to the question of jurisdiction and whether the arbitrating commissioner had the requisite jurisdiction to hear the dispute since the applicant at the time had referred the dispute after the 30 day period as set out in section 191 of the LRA and without applying for condonation of the late referral. The Labour Court, however, dismissed the review application. Thereafter, the matter was referred to the Labour Appeal Court, where the appellant argued, with regard to jurisdiction, that the failure of the applicant to apply for condonation of the late referral rendered the arbitrating commissioner without the jurisdiction to hear the dispute. The Labour Appeal Court held that if the power to act arises from statute, then to determine what jurisdictional facts must exist before one has the power to act; one must look to the statute which sets out that power.

Section 191 of the LRA as a whole, in dealing with dismissal disputes, was considered by the Labour Appeal Court and the court held that where a dispute regarding the fairness of a dismissal was referred to the CCMA or bargaining council for conciliation and a commissioner issued a certificate of outcome stating that the dispute remains unresolved or if 30 days have lapsed since the referral was received by the CCMA or bargaining council and the dispute still remains unresolved, the CCMA or bargaining council will still have the requisite jurisdiction to arbitrate the dispute. The effect of this judgement is that even if the dispute was referred outside the 30 day period as provided for in the LRA, as long as the certificate of outcome has not been set aside, the CCMA or bargaining council will have the jurisdiction to arbitrate the dispute.
Labour Court in *Bombardier*, however, held that the Labour Appeal Court's judgement in *Fidelity Guards Holdings (Pty) Ltd v Epstein* cannot be seen as authority for the allegation that a certificate of outcome affords the CCMA or bargaining council with jurisdiction to arbitrate. Instead, the judgment "is concerned only with the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law (in the sense that it will not be susceptible to review) even though the act is invalid and unlawful."\(^{228}\)

In practice, an arbitrating commissioner must require the referring party to prove that the CCMA has jurisdiction to arbitrate the dispute if it appears that jurisdiction has not been determined.\(^{229}\) Where a conciliating commissioner failed to deal with the issue of condonation, the arbitrating commissioner will be entitled to do so.\(^{230}\) Rule 31(8) of the Rules of the CCMA, allows a party to bring an urgent application for condonation where the commissioner may dispense with the formal requirements for applications, but the commissioner may only grant an order against a party that has had reasonable notice of the application or, in other words, been given the opportunity to be heard.\(^{231}\)

### 5.3 DEFECTIVE REFERRALS

In terms of section 191(1)(a) of the LRA, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to either the CCMA or bargaining council. The validity of the referral to conciliation has been challenged on the basis that it was not personally signed by the referring party which rendered the CCMA or bargaining council without jurisdiction to determine the dispute.\(^{232}\) In *ABC Telesales v Pasmans*\(^{233}\) a candidate attorney had completed and signed the referral form on behalf of the party referring the dispute. Both the applicant and the respondent participated in the conciliation and the arbitration proceedings. The arbitrating commissioner found that the dismissal of the applicant was unfair and awarded

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\(^{228}\) *Bombardier Transportation (Pty) Ltd v Mtiya NO* 844.

\(^{229}\) Rule 22 of the Rules of the CCMA.


\(^{231}\) *Ibid*.


\(^{233}\) (2001) 22 ILJ 624 (LAC).
compensation. The Labour Appeal Court confirmed that there was non-compliance with the Rules of the CCMA, but held that both parties had subsequently participated in the conciliation proceedings without objecting to the defective referral, which meant that the defective referral could be seen to be ratified.234 The Labour Appeal Court further confirmed the Labour Court erred in *Rustenburg Platinum Mines (Pty) Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*235 in stating that a referral not signed by the referring party remains defective even after the conciliation process.236 It is submitted that in terms of the approach in *ABC Telesales v Pasmans*,237 a party through his or her mere presence or participation in the conciliation process consents to the jurisdiction of the CCMA.238 This approach will, however, severely restrict the objectives of conciliation, being mediation and settlement, as parties will not be as willing to take part in the process, especially in light of the fact that legal representation is severely restricted at conciliation.239

However, contrary to the above, the Labour Court in *Oosthuizen v Imperial Logistics CC*240 held that the personal signature by the referring party of the referral form (7.11) is a jurisdictional fact which must exist in order for the CCMA or bargaining council to have jurisdiction.241 In this matter the applicant completed the referral form with the assistance of an employee of a legal insurance firm, yet the referral was submitted unsigned.242 It may seem over technical and therefore not in line with the objects of the LRA, but section 191(1)(a) of the LRA is clear and only allows for the dismissed employee or the employee alleging the unfair labour practice to refer a dispute.

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234 *ABC Telesales v Pasmans* 626.
236 *ABC Telesales v Pasmans* 627.
239 Rule 25 of the Rules of the CCMA.
240 (2013) 34 ILJ 683 (LC).
241 *Oosthuizen v Imperial Logistics CC* 686.
242 *Oosthuizen v Imperial Logistics CC* 685.
54 WHERE A BARGAINING COUNCIL HAS JURISDICTION

One of the functions of a bargaining council is the resolution of disputes. A question that often arises is: what is the approach of the CCMA when a dispute which falls within the jurisdiction of the bargaining council has been referred to the CCMA? In terms of the CCMA Practice and Procedure Manual, a dispute, where the parties fall within the registered scope of the bargaining council, must be referred to the relevant bargaining council and the CCMA will not have jurisdiction to hear the matter. However, in exceptional circumstances the CCMA may perform dispute resolution functions, for instance, where a dispute was erroneously referred to the CCMA instead of the bargaining council, and where either of the parties to the dispute are parties to a bargaining council, or where the parties to the dispute fall within the registered scope of the bargaining council and one or more of the parties are not parties to the bargaining council. The CCMA may at any stage of the process, refer the dispute to the relevant bargaining council for resolution or it may appoint a commissioner or confirm his or her appointment to resolve the dispute in terms of the LRA. The CCMA will have the requisite jurisdiction to perform the dispute resolution functions of the bargaining council in the case where the bargaining council fails to perform this statutory function. The commissioner in Molomo and Royalserve (Pty) Ltd further confirmed that where an objection to the jurisdiction of the CCMA on the basis that the bargaining council has jurisdiction is raised when the arbitration is part heard, a CCMA commissioner does have the jurisdiction to continue with the part heard arbitration.

In the case of Pankana CC t/a R & W Transport Components v Dreyer NO the CCMA’s jurisdiction was only challenged during review proceedings in the Labour Court. There was no proof that the company had deliberately failed to raise the jurisdictional challenge at either conciliation or arbitration and the Labour Court in this

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243 Section 51 of the LRA.
245 CCMA Practice and Procedure Manual par 2.11.9.
246 Section 147(2) and (3) of the LRA.
247 Section 147(8) of the LRA.
248 (2011) 32 ILJ 2032 (CCMA).
249 Molomo and Royalserve (Pty) Ltd par [5].
case confirmed that the company was able to raise a jurisdictional challenge during review proceedings in the Labour Court.\textsuperscript{251}

The Labour Appeal Court in *National Education Health \\ & Allied Workers Union on behalf of Kgekwane v Department of Development Planning \\ & Local Government, Gauteng*\textsuperscript{252} held that where an employee elects to refer a dispute to the relevant bargaining council having jurisdiction, any dispute which may have previously been referred to the CCMA lapses and the CCMA will not have jurisdiction to hear that matter.\textsuperscript{253} The judgment further confirmed that section 147 “makes provision for the performance of dispute-resolution functions by the CCMA in exceptional circumstances in order to avoid delays that might otherwise be caused by jurisdictional disputes.”\textsuperscript{254} Therefore, where a dispute was erroneously referred to the CCMA because the bargaining council has jurisdiction, the CCMA has a choice in terms of section 147 to either resolve the dispute or refer it to the appropriate council.\textsuperscript{255}

\section*{5.5 Legal Representation Where a Jurisdictional Question is Raised at Conciliation}

A challenge to the jurisdiction of the CCMA or bargaining council to arbitrate a dispute is raised as a point \textit{in limine} and a question that needs to be determined is whether legal representation must be allowed in order to argue the point \textit{in limine}?\textsuperscript{256}

In the case of *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry*\textsuperscript{257} the Labour Appeal Court was called on to determine whether the Labour Court erred in finding that the proceedings in which a jurisdictional objection was raised before the bargaining council, constituted a conciliation hearing, thus preventing

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\begin{itemize}
\item \textsuperscript{251} Pankana CC t/a R \\ & W Transport Components v Dreyer NO 692.
\item \textsuperscript{252} (2015) 36 ILJ 1247 (LAC).
\item \textsuperscript{253} *National Education Health \\ & Allied Workers Union on behalf of Kgekwane v Department of \\ Development Planning \\ & Local Government, Gauteng* 1248.
\item \textsuperscript{254} Ibid.
\item \textsuperscript{255} *National Education Health \\ & Allied Workers Union on behalf of Kgekwane v Department of \\ Development Planning \\ & Local Government, Gauteng* 1255.
\item \textsuperscript{256} Van Kerken “Some Jurisdictional Issues Concerning the Arbitration of Labour Disputes by the CCMA” (2000) 21 ILJ 39 40.
\item \textsuperscript{257} (2013) 34 ILJ 1490 (LAC).
\end{itemize}
legal representation and the presentation of oral evidence to establish whether an employment relationship existed. Molemela AJA, held as follows:

“a point in limine raised at conciliation proceedings disputing the existence of an employer-employee relationship necessitates a decision on the issue before the dispute is conciliated. In effect, the determination of this issue of necessity precedes the conciliation process.”

The Court, further held that the commissioner committed a material irregularity by only relying on documents not properly admitted into evidence and refusing to allow the appellant to lead oral evidence and be legally represented. The above judgement of the Labour Appeal Court supersedes the Labour Court’s decision in *EOH Abantu (Pty) Ltd v CCMA* which held that the ruling on jurisdiction made by a conciliating commissioner is in the form of an advisory award, with no binding effect on the arbitrating commissioner.

5.6 JOINDER

In the context of an application for joinder of two employers to an unfair dismissal dispute, the Constitutional Court, in the recent decision of *National Union of Metalworkers of SA v Intervalle (Pty) Ltd*, had to determine whether a referral for conciliation is a precondition to the Labour Court’s jurisdiction. The Constitutional Court considered that in terms of the LRA, a dispute regarding an unfair dismissal must be referred in writing to the CCMA if no bargaining council has jurisdiction. The dispute must be referred to the CCMA or bargaining council within 30-days, but the late filing of the referral may be condoned if the employee is able to show good cause for the late filing. The employee must further be able to satisfy the CCMA or bargaining council that a copy of the referral has been served on the employer.

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261 [2010] 2 BLLR 172 (LC).
262 *EOH Abantu (Pty) Ltd v CCMA* 183.
264 Section 191(1)(a) of the LRA.
265 Section 191(1)(b) of the LRA.
266 Section 191(2) of the LRA.
267 Section 191(3) of the LRA.
CCMA or bargaining council must then attempt to conciliate the dispute and if the dispute remains unresolved and the commissioner has issued a certificate of outcome to that effect, or if 30 days have expired since the referral was received by the CCMA or bargaining council and the dispute remains unresolved, the dispute must be referred to arbitration or adjudication at the Labour Court, depending on the nature of the dispute.268 The Constitutional Court agreed with the reasoning of the Labour Appeal Court’s decision in National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd,269 which held that there are one of two actions which must take place for the CCMA, bargaining council or Labour Court to have the jurisdiction to arbitrate or adjudicate a dispute referred to it. The one action is that the CCMA or bargaining council must issue a certificate certifying that the dispute remains unresolved and the other action is that 30-day period must have expired since the referral was received by the CCMA or bargaining council.270

The Constitutional Court confirmed that a referral of a dispute to conciliation is a jurisdictional prerequisite that must be complied with for the unfair dismissal dispute to be arbitrated or adjudicated by the Labour Court. The concern with this approach is that it could result in the process becoming too technical and formal. However, this should be weighed against the fact that referring a dispute for conciliation is a simple process, especially since the formalities have been reduced regarding the characterisation of the dispute at conciliation271 and the methods of service provided in the Rules of the CCMA are now more readily accessible to the public.272

5 7 THE CORRECT APPROACH IF THE CCMA LACKS JURISDICTION

In Commercial Workers Union of SA v Tao Ying Metal Industries273 the Constitutional Court held that the role of commissioners is to:

“deal with the substantial merits of the dispute’. This can only be done by ascertaining the real dispute between the parties. In deciding what the real

268 Section 191(5) of the LRA.
270 National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd par [74].
271 National Union of Metalworkers of SA v Intervalse (Pty) Ltd par [37].
272 National Union of Metalworkers of SA v Intervalse (Pty) Ltd par [39].
dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.\textsuperscript{274}

Once the commissioner has, however, determined that the real dispute between the parties is one that must be adjudicated by the Labour Court, and consequently, the CCMA lacks jurisdiction to hear the dispute, the commissioner may not in terms of the LRA, refer the matter to the Labour Court. If the CCMA does not have jurisdiction, the arbitrating commissioner may only make a ruling to the effect that the CCMA lacks jurisdiction to arbitrate the dispute.\textsuperscript{275} The correct approach of a commissioner regarding jurisdiction was also discussed in \textit{Ngobe v JP Morgan Chase Bank}.\textsuperscript{276} In this case, the applicant was legally represented and elected to rely on a cause of action whereby the CCMA had jurisdiction to determine the dispute and not rely on a cause of action based on an automatically unfair dismissal relating to pregnancy in terms of which the Labour Court had jurisdiction to adjudicate. The applicant failed to raise a jurisdictional challenge, even when the commissioner gave the applicant the opportunity to do so. In such a case, the Labour Court held that the parties are bound by the merits of the dispute and an arbitrating commissioner should not intervene and abandon the proceedings based on what he or she thinks the real issue in dispute is.\textsuperscript{277} The Labour Court confirmed that “[a] party referring a dispute to the CCMA must stand and fall on the merits of that dispute.”\textsuperscript{278}

Where an arbitrating commissioner is faced with a challenge based on whether the applicant is an employee or whether a dismissal had taken place, it is submitted that

\textsuperscript{274} \textit{Commercial Workers Union of SA v Tao Ying Metal Industries} par [66].
\textsuperscript{275} Van Kerken “Some Jurisdictional Issues Concerning the Arbitration of Labour Disputes by the CCMA” (2000) 21 ILJ 52.
\textsuperscript{276} (2015) 36 ILJ 3137 (LC).
\textsuperscript{277} \textit{Ngobe v J P Morgan Chase Bank} par 12.
\textsuperscript{278} Ibid.
the arbitrating commissioner must allow parties to lead all their evidence regarding the challenge as set out above and the unfair dismissal dispute. The arbitrating commissioner’s decision should first deal with the question of whether the applicant is an employee and whether a dismissal had taken place and then only deal with whether the dismissal had been fair. It is further submitted that the decision of the arbitrating commissioner must be in the form of an arbitration award and not a jurisdictional ruling.

5.8 CONCLUSION

The various issues as discussed above have an impact on the manner in which commissioners approach the concept of jurisdiction. A commissioner must issue a jurisdictional ruling where it is determined that the CCMA or bargaining council lacks jurisdiction to hear the matter at any stage of the proceedings. Condonation, in terms of the LRA, allows for a commissioner on good cause shown to permit an employee to refer the dispute outside of the timeframes as set out in the LRA. Only once condonation is granted will the CCMA have the requisite jurisdiction to hear the dispute. With regard to the issue of joinder, parties must remember that a referral to conciliate is a jurisdictional prerequisite that must be complied with and where a bargaining council has jurisdiction, the CCMA, in exceptional circumstances (to prevent unduly delays) can hear the dispute, however most disputes will be referred to the relevant bargaining council having jurisdiction.


280 Ibid.
CHAPTER 6
CONCLUSION

Determining the jurisdiction of the CCMA as well as the question relating to when a commissioner must deal with a jurisdictional challenge, remains a critical part of the dispute resolution process as provided for by the LRA. Various approaches relating to jurisdictional challenges have been proffered by our courts and the problem that commissioners face is the lack of certainty regarding which approach to follow when a party raises a jurisdictional challenge. In terms of the first approach, the failure of a conciliating commissioner to deal with a jurisdictional challenge is considered a reviewable irregularity. The practical effect of this approach is that the certificate of outcome confers jurisdiction on the CCMA to arbitrate the dispute and parties cannot raise a jurisdictional challenge at arbitration until the certificate of outcome is set aside on review. The second approach as discussed in Bombardier is rife with its own challenges as a commissioner must defer a jurisdictional challenge to be dealt with at arbitration. This is not practical as it will unnecessarily protract the process because certain jurisdictional issues can effectively be dealt with at conciliation.

Considering the fact that the abovementioned approaches were polar opposites from each other, commissioners had a daunting task when faced with jurisdictional issues. Van Niekerk, J in Bombardier, presented a more practically suitable approach when the jurisdiction of the CCMA was in question. In terms of this approach, only the following issues are considered true jurisdictional issues, that are appropriate to be dealt with at conciliation: whether the applicant referred the dispute within the time frames as set out in the LRA, whether the bargaining council has jurisdiction to hear the dispute and lastly whether the dispute is related to employment. The purpose of conciliation is to attempt to resolve the dispute and it often happens that during conciliation these issues are not considered. The practical benefit of this third approach is that a conciliating commissioner is not bound to rule on a jurisdictional

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281 EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2601.
282 EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration 2597.
283 Ibid.
issue and party may raise any jurisdictional point at arbitration.\textsuperscript{284} It was further put forward that the certificate of outcome does not determine the jurisdiction of the CCMA and merely confirms that conciliation took place on a specific date and that the dispute remains unresolved. Section 191(5) of the LRA supports this approach in that a dispute may be referred for arbitration or to the Labour Court if a commissioner has certified that the dispute remains unresolved, or if the 30-day period since the CCMA received the referral expired. It is submitted that a certificate of outcome does not confer jurisdiction on the CCMA or Labour Court to arbitrate or adjudicate a dispute. It further holds no legal significance and therefore cannot be the subject of a review application.\textsuperscript{285}

The main focus of the conciliation process must be to attempt to settle the dispute prior to arbitration. It is submitted that the CCMA does not have the capacity to arbitrate every dispute that is referred for conciliation and conciliating commissioners are under significant pressure to settle disputes amicably. The third approach as set out in \textit{Bombardier}, allows commissioners to solely focus on the challenge of settling the dispute at conciliation and not be bound to deal with a jurisdictional challenge raised by a party to the dispute. The proper approach should always be for parties to raise a jurisdictional issue as soon as one becomes aware of same, however, it is submitted that the conciliating commissioner should not be bound to determine a jurisdictional issue if it requires evidence to be led and may defer the issue to be decided at arbitration. Where an employee refers a dispute outside the time periods provided for in the LRA, the CCMA does not have the requisite jurisdiction until the commissioner condones the late filing of the referral. This application for condonation may brought at any stage of the proceedings. The Labour Appeal Court’s decision in \textit{Fidelity Guards Holdings (Pty) Ltd v Epstein},\textsuperscript{286} and as discussed in \textit{Bombardier}, does not mean that the failure of a conciliating commissioner to deal with the issue of condonation is a reviewable irregularity. The Labour Appeal Court’s decision is authority for the proposition that a failure to review an administrative act timeously may result in that act acquiring the force of law (in the sense that it will not be susceptible

\textsuperscript{284} Govindjee and Van der Walt “‘True’ Jurisdictional Questions and the Irrelevance of a Certificate of Outcome: \textit{Bombardier Transportation (Pty) Ltd v Mtiya NO} [2010] 8 BLLR 840 (LC)” Obiter 2010 493.

\textsuperscript{285} \textit{Cook4lifeCC v Commission for Conciliation, Mediation and Arbitration} 2022.

\textsuperscript{286} (2000) 21 ILJ 2382 (LAC).
to review) even though the act is invalid and unlawful.”287 The various other aspects of the jurisdiction of the CCMA relating to defective referrals and where the bargaining council has jurisdiction are issues that are best dealt with at conciliation. It, however, does not mean that the arbitrating commissioner does not have the jurisdiction to deal with these issues should they only arise at arbitration. When pronouncing on these issues, the commissioner’s decision should be in the form of a jurisdictional ruling. It is submitted that issues such the existence of an employment relationship or whether the employee was dismissed are not jurisdictional issues in the true sense, as they relate to the merits of the dispute and require evidence to be led in proving these claims. Following the judgment of Bombardier, both the Rules of the CCMA as well as the CCMA Practice and Procedure Manual have been amended to accommodate the recent developments in our jurisprudence. The fact remains, however, that the Labour Appeal Court’s approach to jurisdiction differs significantly to the approach of the Labour Court. It is submitted that the Labour Appeal Court must pronounce on the issue of jurisdiction to create certainty regarding the correct approach of a commissioner when faced with a jurisdictional challenge.

287 Bombardier Transportation (Pty) Ltd v Mtiya NO 844.
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<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ABC Telesales v Pasmans</strong> (2001) 22 ILJ 624 (LAC)</td>
</tr>
<tr>
<td><strong>Asara Wine Estate &amp; Hotel (Pty) Ltd v Van Rooyen</strong> (2012) 33 ILJ 363 (LC)</td>
</tr>
<tr>
<td><strong>Avgold-Target Division v CCMA</strong> (2009) JOL 24478 (LC)</td>
</tr>
<tr>
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</tr>
<tr>
<td><strong>BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members</strong> (2012) 33 ILJ 140 (LC)</td>
</tr>
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</tr>
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