



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA37/2022

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

Appellant

and

MOTOR INDUSTRY BARGAINING COUNCIL

First Respondent

MOTOR INDUSTRY STAFF ASSOCIATION

Second Respondent

RETAIL MOTOR INDUSTRY ORGANISATION

Third Respondent

FUEL RETAILERS ASSOCIATION OF SOUTH AFRICA

Fourth Respondent

**NATIONAL EMPLOYERS ASSOCIATION
OF SOUTH AFRICA**

Fifth Respondent

**MOTOR INDUSTRY SICK, ACCIDENT AND
MATERNITY PAY FUND**

Sixth Respondent

Heard: 18 May 2023

Delivered: 24 August 2023

Coram: Sutherland JA et Musi JA et Savage AJA

Summary: Dispute concerning the interpretation or application of collective agreement not conciliated before referred to Labour Court – LRA prescribes pathways to be followed in the resolution of disputes – Labour Court does not

have the power to permit a pathway which is specifically prohibited by the Act – Conciliation is a jurisdictional fact and must occur before a dispute is referred to arbitration – Where a dispute has not been conciliated, the Labour Court is not empowered to refer it to arbitration or continue with the proceedings in terms of s 158 (2) and the court will have no other option but to strike the matter off the roll – A court is obliged to raise a lack of jurisdiction *mero motu* and require the parties to deal with same but must forewarn the parties and require them to address it on the point of law – Deciding a case on an issue not properly ventilated by the parties may be unfair and prejudicial and the consequences thereof will depend on the facts and the issue on which the decision rests – Appeal is dismissed

JUDGMENT

MUSI JA

Introduction

- [1] This is an appeal against an order of the Labour Court. It found that it did not have jurisdiction to adjudicate a dispute, because it was not referred to conciliation. The appeal is with the leave of the court *a quo*.

Background

- [2] The appellant, National Union of Metalworkers of South Africa (NUMSA) and the second respondent, Motor Industry Staff Association (MISA) are registered trade unions. The third respondent, Retail Motor Industry Organisation (RMI), the fourth respondent, Fuel Retailers Association of South Africa (FRA), the fifth respondent, National Employers Association of South Africa (NEASA) are registered employers' organisations. The sixth respondent, Motor Industry Sick, Accident and Maternity Pay Fund (Fund) is a Fund established in terms of a

collective agreement. The first respondent is the Motor Industry Bargaining Council (MIBCO) a bargaining council established in terms of s 27 of the Labour Relations Act (LRA)¹. The appellant, MISA, RMI, FRA and NEASA are parties to MIBCO. MIBCO also administers the Fund. Only the second and third respondents opposed the appeal. They are henceforth referred to as the respondents.

- [3] On or about 28 August 2019, the appellant approached the court *a quo* seeking the following relief against MIBCO, MISA, RMI and the Fund:

1. It is declared that the Resolution taken at the Annual General Meeting (AGM) of the Motor Industry Bargaining Council (MIBCO), on 9 November 2017, to suspend the payment of any administration fees by the Sick, Accident and Maternity Pay Fund (the Fund) to MIBCO, is invalid and of no force and effect.
2. The Resolution taken at the AGM of MIBCO on 9 November 2017 to suspend the payment of any administration fees by the Fund to MIBCO is hereby set aside.
3. It is declared that MIBCO was, at all material times up to 9 November 2017 obligated, and remains obligated, to charge administration fees to the Fund for its administration of the Fund.
4. It is declared that the Fund is liable to pay to MIBCO the administration fees that ought to have been charged by MIBCO for its administration of the Fund for the period 9 November 2017 to date of payment.
5. It is declared that clause 14 of the Motor Industry Sick, Accident and Maternity Pay Fund Agreement, concluded on 5 November 2015 between the Retail Motor Industry Organisation (RMI) and the Motor Industry Staff Association (MISA), (the 2015 Fund Agreement) is invalid and of no force and effect.

¹ Act 66 of 1995, as amended. Section 27(1) reads: 'One or more registered *trade unions* and one or more registered *employers' organisations* may establish a *bargaining council* for a sector and area by

(a) adopting a constitution that meets the requirements of section 30; and
(b) obtaining registration of the *bargaining council* in terms of section 29.'

6. Clause 14 of the 2015 Fund Agreement is hereby set aside.
7. It is declared that clause 14 of the Motor Industry Sick, Accident and Maternity Pay Fund Agreement, concluded on 5 December 2017 between RMI and MISA, (the 2017 Fund Agreement) is invalid and of no force and effect.
8. Clause 14 of the 2017 Fund Agreement is hereby set aside.
9. It is declared that Rules 5 and 6 of the Motor Industry Sick, Accident and Maternity Fund Rules, adopted in January 2019, (the 2019 Rules) are invalid and of no force and effect.
10. Rules 5 and 6 of the 2019 Rules are hereby set aside.

Facts

- [4] The relief sought was predicated on the following factual matrix. On 30 July 1982, the Minister of Manpower published the Fund agreement, which had been concluded by the employers and trade unions who were members of the National Industrial Council for the Motor Industry, in the Government Gazette.² The Fund was established in terms of clause 4 of the agreement. Clause 4 states:

- (1) There is hereby established a Fund known as the "Motor Industry Sick and Accident Pay Fund.
- (2) The Fund shall consist of –
 - (a) the moneys as at the date of coming into operation of this Agreement, standing to the credit of the "Misa Sick and Accident Pay Fund" established in terms of Government Notice R. 626 of 18 April 1969 and continued heretofore in terms of a joint Fund established by Government Notice R. 350 of 3 March 1978;
 - (b) contributions prescribed in this Agreement;
 - (c) interest on investments; and
 - (d) any other moneys to which the Fund may become entitled.

² The agreement was published in terms of s 48(1)(a) of the Labour Relations Act, 1956.

- (3) The objects of the Fund shall be, in accordance with the rules of the Fund as determined from time to time, to assist members of the Fund who suffer losses of wages or salary through absenteeism resulting from incapacity owing to accident or sickness.'

- [5] Only employers contributed to the fund. Clauses 13(1) and 14 of the Fund agreement state that:

'13(1) In the event of the expiration of this agreement, and unless within a period of 12 months after such expiration, either a new agreement is negotiated in terms of which the Fund is continued, or the Fund is transferred by the Council to any other fund constituted for a similar purpose to that for which the Fund was originally established, the Fund shall be liquidated.'

...

14 Upon liquidation of the Fund in terms of clause 13(1) hereof, the moneys remaining to the credit of the Fund after payment of all claims, including administration and liquidation expenses, shall be paid into the general funds of the Council.'

- [6] MIBCO's constitution, which is a collective agreement, states that its objects are, inter alia –

'3.1.1 to conclude collective agreements, and to enforce collective agreements in terms of all applicable legislation and in any appropriate forum including in a Court of law;

...

3.1.3 to prevent and resolve labour disputes;

3.1.4 to perform dispute resolution functions;

...

3.1.8 to establish and administer pension, provident, medical aid, sick pay holiday, unemployment, training or similar schemes of funds for the benefit of any of the parties to the Council or their members...'

- [7] The constitution also regulates, the collection of MIBCO funds, the conduct of meetings, the passing of resolutions at meetings and dispute resolution procedures. From 1982, the Fund agreement was renewed annually. In 2004, MISA and FRA withdrew from the Fund, therefore only NUMSA and RMI remained parties to the Fund until 2013. In January 2013, NUMSA and RMI entered into the Motor Industry Sick, Accident and Maternity Pay Fund Agreement of 2012 (2012 Fund Agreement). The 2012 Fund Agreement contained similar clauses as the original Fund agreement. Significantly, clauses 13(1) and 14 of the 2012 Fund were the same as those in the Fund. At a bilateral meeting between NUMSA and RMI, the former gave notice of its intention to withdraw from the 2012 Fund Agreement and subsequently withdrew.
- [8] On 6 October 2015, at a MIBCO Governing Board (MGB) meeting, clarity was sought on how to deal with Sick, Accident and Maternity Pay since NUMSA withdrew from the 2012 Fund Agreement and there was no subsequent collective agreement. The MGB resolved that the 2012 Fund Agreement would remain in force until the funds are liquidated by 31 March 2016, because there were workers who were still benefiting from the funds. On 5 November 2015, however, MISA and RMI concluded the Motor Industry Sick, Accident and Maternity Pay Fund Agreement (2015 Fund Agreement). On the same day, the agreement was adopted at MIBCO's Annual General Meeting (AGM).
- [9] Cause 14 of the 2015 Fund agreement contained a far-reaching change, it states that:
- 'Upon liquidation of the Fund in terms of clause 13(1) hereof, moneys remaining to the credit of the Fund after payment of all claims, including administration and liquidation expenses, shall be transferred into a Fund administered by the RMI for the purposes of providing benefits to its members.'
- [10] On 9 November 2017, at an AGM, NUMSA objected to the manner in which the 2015 Fund Agreement was adopted because its adoption was not on the 5 November 2015 AGM's agenda and that it was not given a copy of the 2015 Fund Agreement 14 days before the AGM as required by MIBCO's constitution. It pointed out that it only had sight of the 2015 Fund Agreement during February 2016. It particularly objected to clause 14 of the 2015 Fund Agreement because

it provided that all excess funds, after liquidation, should go to RMI for the benefit of its members rather than to MIBCO.

[11] Despite NUMSA's protestations the AGM, *inter alia*, resolved:

- (i) to immediately suspend the payment of any administration fees by the Fund to MIBCO; and
- (ii) to change the Fund Rules in order to permit payment of the full period sick leave claimed by MISA members only.

[12] On 5 December 2017, RMI and MISA concluded the 2017 Fund Agreement and retained clause 14 of the 2015 Fund Agreement.

[13] The Fund Rules, dated 31 January 2016, made provision for compulsory members (MISA members) and voluntary members (NUMSA and non-union members). MISA members who qualified for benefits in terms of Rules may be paid 100 percent of the member's ordinary daily remuneration by the Fund, in respect of any working day on which she or he was prevented from working by sickness. However, qualifying NUMSA and non-union members, may only be paid 75 percent of a member's ordinary daily remuneration. Clauses 6.2 and 6.3 of the Rules read:

'Claims for sick, accident and maternity benefits for members of the Motor Industry Staff Association, shall be disbursed directly to the member, by the employer, on the first day date following the date on which the claim was submitted, whereupon the employer shall remit and recover the claim from the Fund thereafter.

Claims for sick, accident and maternity benefits for Voluntary members shall be submitted by the beneficiaries of the Fund, directly to the Fund and shall not be entitled to be paid directly by their employer in terms of clause 6.2 herein; provided that the employer may, at his/her sole discretion, apply the provisions of clause 6.2 herein, to Voluntary members without such and indulgence constituting the establishment of any right or entitlement in favour of such Voluntary member in relation to future claims.'

The Fund Rules, dated 1 January 2018, had similar provisions.

The October 2017 referral

- [14] On 2 October 2017 NUMSA referred a dispute to MIBCO's Dispute Resolution Centre. It classified the dispute as the interpretation or application of the Sick, Accident, and Maternity Pay Fund Agreement (5 November 2015) regarding NUMSA members and its implications for MIBCO. It indicated that the dispute arose on 13 June 2017 alternatively 29 September 2017.
- [15] It alleged that its members were not entitled to be members of the 2015 Fund Agreement and that they were involuntarily and unilaterally joined as members of the 2015 Fund Agreement. It also alleged that in so far as its members may be admitted as voluntary members of the Fund and have validly joined as members, the Rules 5 is unlawful. It further alleged Rule 6 is unlawful because it creates different ways in which compulsory and voluntary members are required to claim and monies disbursed to the claimants. is unlawful. It finally alleged that clause 14 of the 2015 Fund Agreement is unlawful because the parties thereto were not empowered by the previous Fund Agreements to divest MIBCO of the proceeds of the Fund after liquidation.

In the court a quo

- [16] In the court *a quo* NUMSA contended that the resolution taken at the AGM held on 9 November 2017, relating to the suspension of the administration fee payable to MIBCO by the Fund was taken contrary to MIBCO's constitution. It pointed out that the constitution contained peremptory requirements with regard to the notice of the AGM. Cause 10 states that the notice of the AGM must set forth the business that will be transacted at the meeting. The notice of the 9 November 2017 meeting did not state that the business to be transacted included the adoption of a new Fund Agreement or the suspension of administration fees payable to MIBCO. That being the case, the discussions and decisions relating to those issues were impermissible.
- [17] It further contended that all the Fund Agreements were a continuation of the 1982 Fund. The Fund was an Industry Fund and MISA and RMI therefore could not lawfully amend clause 14 to divest MIBCO of any funds post liquidation. It argued that the 2015 Fund Agreement was adopted contrary to MIBCO's

constitution because it was not presented to all MIBCO members prior to its adoption.

- [18] With regard to the impugned Rules, it argued that they are unlawful because they unfairly discriminate against NUMSA members.
- [19] MISA and RMI vehemently opposed the application and raised numerous points *in limine* against the granting of the relief. The direction which this matter took renders it superfluous to deal with the points *in limine*. With regard to the impugned Rules, they argued that the disputes were not referred to conciliation and that the court *a quo* therefore did not have jurisdiction to determine the application.
- [20] The court *a quo* found that it did not have jurisdiction to determine the constitutional disputes because they concerned the interpretation or application of a collective agreement. It further found that the unfair discrimination disputes under s 5 of the LRA had to be referred to conciliation in terms of s 9 of the LRA. In the absence of any conciliation, it had no jurisdiction to determine the dispute. Additionally, it found that the Rules are part of a collective agreement and that the same considerations regarding the interpretation or application of a collective agreement would apply. It therefore struck the matter off the roll for want of jurisdiction. Aggrieved by that order, the appellant approached this Court.

In this court

- [21] In this Court the appellant contended that the court *a quo* erred:
- (i) in finding that it did not have jurisdiction to adjudicate the dispute because it related to the interpretation or application of MIBCO's constitution;
 - (ii) in relying on s 157(5) of the LRA when it had not been pleaded by the respondents or raised by the court during the proceedings;

- (iii) in failing to apply its discretion in terms of s 158(2) either by staying the proceedings and referring the matter to arbitration or by continuing with the proceedings, as it would have been expedient for it to do so;
- (iv) in finding that it did not have jurisdiction in respect of the 2019 Fund Rules because the appellant did not attempt to resolve the discrimination dispute through conciliation; and
- (v) in failing to have regard to the fact that the appellant had referred the unfair discrimination dispute for conciliation on 2 October 2017 and that a certificate of non-resolution was issued on 24 October 2017.

[22] The respondents conceded that they did not pertinently raise the jurisdiction point with regard to the interpretation or application of MIBCO's constitution, but argued that the fact that the court *a quo* considered it *mero motu* was not fatal. Additionally, they argued that the court *a quo* exercised its discretion to strike the matter off the roll propitiously. Apropos the 2019 Fund Rules, the respondents argued that the appellant did not refer the dispute for conciliation because the October 2017 referral did not pertain to a dispute about the 2019 Fund Rules. They further contended that, in as far as the appellant relied on that referral during argument, it was being opportunistic because it abandoned that process.

[23] The court *a quo* disaggregated the dispute into two parts, namely, the constitutional disputes and the Fund Rules dispute. I propose to follow the same pragmatic approach. I now turn to discuss the constitutional interpretation or application point.

Constitutional disputes

[24] The parties were correctly in agreement that MIBCO's constitution is a collective agreement as provided for in s 213 of the LRA.³ Section 24 of the

³ Section 213 reads:

"**collective agreement**" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade unions*, on the one hand and, on the other hand –

(a) one or more employers;

(b) one or more registered *employers' organisations*; or

LRA prescribes that a collective agreement must provide for a dispute resolution procedure in disputes about the interpretation or application of the collective agreement. It further prescribes that the procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.⁴ The collective agreement generally binds all the parties to the collective agreement and their members.⁵

(c) one or more employers and one or more registered employers' organisations...

See *SA Clothing and Textile Workers' Union and Others v Yantex (Pty) Ltd t/a Bertrand Group* (2013) 34 ILJ 2199 (LAC) at para 64.

- ⁴ (1) Every *collective agreement* excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration.
- (2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if –
- (a) the *collective agreement* does not provide for a procedure as required by subsection (1);
 - (b) the procedure provided for in the *collective agreement* is not operative; or
 - (c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement*.
- (3) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the *dispute*.
- (4) The Commission must attempt to resolve the *dispute* through conciliation.
- (5) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration.

See also section 30 of the LRA which provides:

- (1) The constitution of every *bargaining council* must at least provide for –
- (a) the appointment of representatives of the parties to the *bargaining council*, of whom half must be appointed by the *trade unions* that are party to the *bargaining council* and the other half by the *employers' organisations* that are party to the *bargaining council*, and the appointment of alternates to the representatives...
 - (d) rules for the convening and conducting of meetings of representatives, including the quorum required for, and the minutes to be kept of, those meetings;
 - (e) the manner in which decisions are to be made...
 - (h) the determination through arbitration of any *dispute* arising between the parties to the *bargaining council* about the interpretation or application of the *bargaining council's* constitution;
 - (i) the procedure to be followed if a *dispute* arises between the parties to the *bargaining council*;
 - (j) the procedure to be followed if a *dispute* arises between a registered *trade union* that is a party to the *bargaining council*, or its members, or both, on the one hand, and employers who belong to a registered *employers' organisation* that is a party to the *bargaining council*, on the other hand...

⁵ Section 23 provides:

- (1) A *collective agreement* binds –
- (a) the parties to the *collective agreement*;
 - (b) each party to the *collective agreement* and the members of every other party to the *collective agreement*, in so far as the provisions are applicable between them;
 - (c) the members of a registered *trade union* and the employers who are members of a registered *employers' organisation* that are party to the *collective agreement* if the *collective agreement* regulates –
 - (i) terms and conditions of employment; or

[25] Clause 16.1 of MIBCO's constitution enjoins the parties subject to and bound by it to resolve any dispute about its interpretation or application by referring the dispute to a mediator and, if the matter is not settled, to an arbitrator approved by MIBCO.

[26] The disputes between the parties related to resolutions that had been taken contrary to the prescripts of MIBCO's constitution. The appellant's case was that the notice of the Annual General Meeting held on 9 November 2017 did not comply with the provisions of the constitution, specifically clause 10.3 thereof which reads:

'Notice of any meeting of the Council or any committee showing the business to be transacted shall be given to representatives by the General Secretary or his/her duly authorised agent in writing at least two weeks before the date of such meeting, provided that for the purposes of special meetings the Chairperson of the Council or of the committee concerned may authorise the convening of such meetings at shorter notice.'

[27] The appellant's primary complaint is that the majority (RMI and MISA) introduced and presented motions at the meeting, which resulted in the resolutions which form the subject matter of the litigation being taken. The appellant averred that the impugned motions were deliberated upon while they were not properly placed on the agenda.

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- (ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers;
 - (d) *employees* who are not members of the registered *trade union* or *trade unions* party to the agreement if –
 - (i) the *employees* are identified in the agreement;
 - (ii) the agreement expressly binds the *employees*; and
 - (iii) that *trade union* or those *trade unions* have as their members the majority of *employees* employed by the employer in the *workplace*.
 - (2) A *collective agreement* binds for the whole period of the *collective agreement* every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered *trade union* or registered *employers' organisation* for the duration of the *collective agreement*.
 - (3) Where applicable, a *collective agreement* varies any contract of employment between an *employee* and employer who are both bound by the *collective agreement*.
 - (4) Unless the *collective agreement* provides otherwise, any party to a *collective agreement* that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.'

- [28] It is common cause that the constitutional dispute was not referred for conciliation before the declaratory orders were sought in the court *a quo*. Section 157 (5) of the LRA states:

'Except as provided for in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved *dispute* if this Act or any employment law requires the *dispute* to be resolved through arbitration.'

- [29] The court *a quo* correctly characterized the constitutional dispute as one that concerns the interpretation or application of MIBCO's constitution. In order to determine whether the impugned resolutions were taken in terms of MIBCO's constitution a process of interpreting or applying of the constitution will have to be embarked upon. The LRA and MIBCO's constitution makes it manifestly plain that such disputes should be referred to mediation and if it remains unresolved, or a period of thirty days expired after the dispute had been properly referred, it must be referred to arbitration. The conclusion of the court *a quo* that it did not have jurisdiction to adjudicate the dispute is unassailable. Should, the court *a quo*, have invoked the provisions of s 158 (2)?

The section 158 (2) argument

- [30] Section 158 (2) states:

'If at any stage after a *dispute* has been referred to the Labour Court, it becomes apparent that the *dispute* ought to have been referred to arbitration, the Court may –

- (a) stay the proceedings and refer the *dispute* to arbitration; or
- (b) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable.'

- [31] The appellant argued that the moment the court *a quo* found that it had no jurisdiction to adjudicate the dispute, it had no option but to either stay the proceedings and refer the dispute to arbitration or to continue with the

proceedings. I now pass to consider this binary approach to s 157 (5) read with s 158 (2) of the LRA.

The binary approach

[32] The jurisdiction and powers of the Labour Court are statutorily constraint. The LRA prescribes pathways to follow to the resolution of labour disputes. The Labour Court does not have the power to permit a pathway which is specifically prohibited by the LRA. The prescribed pathway to resolve disputes about the interpretation or application of collective agreements is first conciliation and if it fails then and only then, does the pathway to arbitration open.

[33] The conciliation process is crucial in the resolution of labour disputes. This is so because litigants in labour disputes are not like typical litigants in civil courts. Unlike most other litigants the parties have to go back and engage each other regularly. A dispute that is mediated or conciliated and the outcome is seen as right or reasonable by the parties to the dispute enhances industrial harmony. The parties in effect settle their own dispute with the assistance of a mediator. A winner-loser outcome mostly achieves the opposite. It is for that reason that labour disputes must be referred to conciliation before arbitration or adjudication. Conciliation is a jurisdictional fact that must occur before a dispute such as the present is referred to arbitration. Absent conciliation, a dispute about the interpretation or application of a collective agreement may not be referred to arbitration.

[34] In *September v CMI Business Enterprise CC*⁶ (*September v CMI Business*), the minority judgment lucidly explained when section 158 (2) may be invoked. It stated:

‘... In any event, section 158 (2) cannot be resorted to in the case of a dispute that was not referred to conciliation. It is only available in respect of a dispute that was referred to conciliation and either the commissioner issued a certificate that the dispute remained unresolved or a period of 30 days expired after the dispute had been received by the CCMA.’

⁶ [2018] ZACC 4; 2018 (4) BCLR 483 (CC) at para 105.

- [35] The majority did not take issue with this exposition of s 158 (2). The binary approach, suggested by the appellant, is rendered senseless by what was said in *September v CMI Business* and the importance of conciliation. When confronted with a dispute that was not referred for conciliation, the court would be confronted with a stalemate situation. It would not be empowered to refer the dispute to arbitration or to continue with the proceedings, even if it might be expedient to do so. What is the court to do under such circumstances? In order to break the deadlock, the only option is to strike the matter off the roll. In my judgment, the court *a quo* was correct in striking the matter off the roll.

Failure to hear the parties

- [36] The appellant argued that the case pleaded by the respondents was not that the Labour Court did not have jurisdiction to adjudicate the dispute because the LRA or any other law required the dispute to be referred for conciliation and the arbitration. It asserted that the court *a quo* erred in deciding the matter on the lack of jurisdiction issue. It contended that none of the parties were forewarned that the court *a quo* was inclined to decide the matter on this basis. It further contended that, in failing to give the parties an opportunity to address it on the jurisdiction point, it committed a fundamental error, because the effect of the order granted was to non-suit the appellant in circumstances where it was not afforded a hearing on the point that determined the case.
- [37] The lack of jurisdiction to adjudicate a matter is a point of law. It is common cause that the parties were not requested to address the court *a quo* on the point. In *CUSA v Tao Ying Metal Industries and Others*⁷ it was held that:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith.'

- [38] It has been said that "*an intolerable situation would be created if a Court were to be precluded from giving the right decision on accepted facts, merely*

⁷ [2008] ZACC 15; 2009 (2) SA 204 (CC) at para 67.

because a party failed to raise a legal point, as a result of an error of law on his part..."⁸

- [39] I agree with the appellant that the court *a quo* was supposed to forewarn the parties and require them to address it on the point. It is desirable to do so in order to avoid surprising the parties and to adhere to the long standing practice and convention that cases should be decided on the issues presented by the parties. Deciding a case on an issue not properly ventilated by the parties may be unfair and prejudicial, especially to the party against whom the decision is taken.
- [40] The appellant did not argue that it was prejudiced by the course taken by the court *a quo*. Except for alleging that the omission to hear it was a fundamental error, the appellant did not allege that the court *a quo*'s decision against it involved any unfairness. The appellant did not make any submission on what the consequences of the omission should be.
- [41] In my view, the consequences to be visited upon such an omission would depend on the facts and the issue (point of law) on which the decision rests. An approach akin to the approach taken when a point of law is raised for the first time on appeal should be followed. We should therefore consider whether the point utilized by the court *a quo* to determine the case involved any unfairness to the appellant and whether any other or further evidence would have been produced or adduced had the court *a quo* brought its inclination to the attention of the parties and required them to address it.
- [42] As already indicated, the appellant did not argue that it was prejudiced or that the decision involved unfairness to it. It also did not argue that any further evidence could have shown that the court *a quo* had jurisdiction to adjudicate the dispute. Jurisdiction either exists or it does not. In the absence of conciliation, there can be no arbitration in disputes relating to the interpretation or application of collective agreements. Therefore, the court *a quo* did not have jurisdiction to deal with the matter. The parties cannot give the Labour Court

⁸ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 at 23F-G.

jurisdiction, it must, as a matter of law, have jurisdiction. Referring the matter to the court *a quo* to hear the parties on the issue will produce the same result.

Discrimination of the Fund Rules

- [43] The court *a quo* found that the appellant did not refer a discrimination in contravention of s 5⁹ dispute for conciliation in terms of s 9¹⁰ of the LRA. It further found that the impugned Rules 5 and 6 of the Fund Rules are part of a collective agreement and that the dispute is therefore about the interpretation or application of a collective agreement.
- [44] The appellant contended that the court *a quo* erred in finding that it did not refer a dispute as contemplated in s 9 of the LRA. It argued that it did refer a dispute in October 2017 in which it alleged that the “*differences in benefits between compulsory and voluntary members as set out in paragraph 5 of the Rules are unlawful*” and additionally that the different ways in which the different categories of fund members are required to claim in terms of Rule 6 is unlawful.
- [45] The appellant’s argument is at odds with its case. The appellant did not mention the October 2017 referral in its founding affidavit. It was only when the respondents in their answering affidavit pointed out that the appellant previously referred a similar dispute as an interpretation or application dispute to MIBCO that the October 2017 referral was mentioned for the first time. The respondents went further and stated that the appellant abandoned the October 2017 referral. In its replying affidavit, the appellant did not deny that it abandoned the referral. In fact, in its replying affidavit it categorically states the following:

⁹ Section 5(1) reads:

‘No person may discriminate against an employee for exercising any right conferred by this Act.’

¹⁰ Section 9 reads:

‘(1) If there is a *dispute* about the interpretation or application of any provision of this Chapter, any party to the *dispute* may refer the *dispute* in writing to –
 (a) a *council*, if the parties to the *dispute* fall within the *registered scope* of that *council*; or
 (b) the Commission, if no *council* has jurisdiction.
 (2) The party who refers the *dispute* must satisfy the *council* or the Commission that a copy of the referral has been *served* on all the other parties to the *dispute*.
 (3) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.
 (4) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.’

'NUMSA seeks to invoke the protections afforded to employees by section 5 of the LRA. There is no dispute regarding the interpretation or application of section 5 and there was therefore no duty upon NUMSA to refer this dispute to the Bargaining Council or the CCMA.'

[46] It must be emphasised that the appellant described its dispute in the October 2017 referral as: *"interpretation or application of the Sick, Accident, and Maternity Pay Fund Agreement (5 November 2015) regarding NUMSA members and its implications for MIBCO"*.

[47] In the referral the appellant stated that the dispute arose on 13 June 2017, alternatively 29 September 2017. The relief that the appellant sought was consequential monetary compensation and a finding that its members may be validly admitted as members of the SAF.

[48] It is clear that the dispute that was referred was an interpretation or application of the 2017 Fund Rules, which is a collective agreement. There was no dispute referred in terms of s 9 of the LRA. There is another twist in the appellant's contorted case. In the relief sought in the court *a quo*, the appellant attacked Rules 5 and 6 of the 2019 Fund Rules only and wanted them declared unlawful. A dispute about the 2019 Rules was never conciliated. It could not have been conciliated before it came into existence. Every collective agreement about the Fund makes it clear that it is a new agreement that states that the Fund is continued in terms thereof. Clause 13 (1) of all the agreements from 1982 to 2019 states that:

'In the event of the expiration of this agreement, and unless within a period of 12 months after such expiration, either a new agreement is negotiated in terms of which the Fund is continued...'

[49] The respondent's case with regard to the Rules is that the differentiation does not amount to discrimination because there is a commercial rationale behind the differentiation: the appellant's members take far more sick leave than those of MISA. The respondents referred us to statistical proof of this assertion. They further argued that voluntary joining a sick, accident or maternity fund is not a right in terms of the LRA.

[50] It is manifestly clear that there is a dispute about the interpretation or application of s 5 of the LRA and therefore the dispute was supposed to be referred for conciliation and if it remained unresolved to adjudication by the Labour Court, in terms of s 9 (4) of the LRA. The respondents took the lack of jurisdiction point with regard to the Fund Rules issue and the appellant's response was that there was no need to refer the dispute for conciliation. In its pleadings, the appellant did not rely on s 9 or the October 2017 referral, at all.

[51] The appellant blew hot and cold. It wanted to ride two horses at the same time. The appellant must be held to its election firstly, not to refer the dispute for conciliation in terms of s 9 and secondly, to abandon the conciliation process by not referring the dispute to arbitration. I am convinced that it conceived of the stratagem of approaching the court *a quo* seeking declaratory relief as a way to circumvent the clearly defined pathways in the LRA. A party should not be allowed to ingeniously or ingenuously bypass the LRA in circumstances where it creates a clear pathway for the resolution of a dispute.

Ruling

[52] The appeal ought to be dismissed. In my view, the dictates of the law and fairness militate against a costs order in this matter.

Order

[53] I accordingly make the following order:

The appeal is dismissed with no order as to costs.

CJ Musi JA

Sutherland JA *et* Savage AJA concur in the judgment of Musi JA

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LABOUR APPEAL COURT