

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No. JA 31/04

In the matter between:

ANA LUISA WARDLAW

APPELLANT

And

SUPREME MOULDING (PTY) LTD

RESPONDENT

JUDGMENT

ZONDO JP and BASSON AJA

- [1] This is an appeal against a judgment and order of Jammy AJ sitting in the Labour Court. His judgment is reported as **Wardlaw v Supreme Mouldings (Pty) Ltd (2004) 25 ILJ 1094 (LC)**. The appellant had been employed by the respondent as a financial manager. She was dismissed from the respondent's employ. A dispute arose between the parties as to the fairness of the appellant's dismissal. The respondent said that it dismissed her because she had been guilty of misconduct. She did not accept that this was the reason for her dismissal and alleged that she was dismissed for pregnancy or for a reason related to her pregnancy. The respondent rejected this.

- [2] The reason for the appellant's dismissal as alleged by the appellant, namely, pregnancy or a reason related to pregnancy, is one of those contemplated in sec 191(5)(b) of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**"). Sec 191(5)(b) provides that, if an employee alleges as a reason for his or her dismissal a reason contemplated therein, the dispute concerning the fairness of his or her dismissal must be referred to the Labour Court for adjudication. Sec 191(5)(a) provides that, if an employee alleges as a reason for his or her dismissal a reason contemplated therein, the dispute should be referred to arbitration.
- [3] The reason alleged by the respondent in this case as the reason for the appellant's dismissal, namely, misconduct, is one of the reasons contemplated in sec 191(5)(a). If it had been alleged by the appellant, sec 191(5)(a) would have required that the dismissal dispute be referred to arbitration. However, it was alleged by the employer and the Act does not attribute to the employer's allegation in this regard the same effect as it does to an allegation by the employee. The appellant referred the dispute to the Labour Court for adjudication. The respondent took the point that the Labour Court did not have jurisdiction to adjudicate this dispute because, as far as it was concerned, the reason for the appellant's dismissal related to her conduct and fell under sec 191(5)(a) of the Act. The appellant insisted that the Labour Court had jurisdiction.
- [4] The Labour Court heard oral evidence in this matter in order to determine the reason for the appellant's dismissal and, therefore, to

also determine whether it had jurisdiction. In his judgment Jammy AJ analysed the evidence and came to the conclusion that the reason for the appellant's dismissal was not her pregnancy or a reason related to her pregnancy but it was her conduct. He held that the Labour Court had no jurisdiction to adjudicate the unresolved dismissal dispute relating to the appellant's conduct as that was required to be referred to arbitration. He awarded the respondent costs.

- [5] The appellant now appeals against the judgement of the Labour Court. Leave to appeal was granted by the Labour Court. On appeal the appellant attacked the decision of the Labour Court that it had no jurisdiction to adjudicate the dismissal dispute in so far as it related to her dismissal for misconduct. It was submitted on her behalf that sec 191(5) of the Act makes the employee's allegation as to what the reason for dismissal is the final determinant in regard to whether the dispute should be referred to arbitration or adjudication. It was submitted that, once the employee has alleged as a reason for his or her dismissal a reason that is contemplated in sec 191(5)(b), the Labour Court has jurisdiction to adjudicate the whole dispute and not just part of it. In other words, so went the argument, the Court cannot in such a case do what the Court a quo did in this case, namely, determine whether the reason for dismissal alleged by the employee is the reason for dismissal and, if it finds that such reason is not the reason for dismissal, stop the proceedings and decline to determine whether the dismissal was fair when regard is had to the true reason for dismissal.

- [6] The respondent contended that the scheme of the dispute resolution system of the Act is such that much importance is placed upon some disputes going to arbitration and others to adjudication. It was submitted that the Court should not lightly construe the Act as permitting the Labour Court to adjudicate a dispute that should go to arbitration. The respondent supported the approach adopted by the Labour Court. The appellant criticised the approach adopted by the Labour Court as undermining the expeditious resolution of disputes which is one of the primary objects of the Act, costly and creating a duplication of processes. We now turn to consider these contentions.

Jurisdiction of the Labour Court in dismissal disputes

- [7] The question that this appeal raises flows from the fact that in terms of sec 191(5)(a) and (b) of the Act what appears to determine whether a dismissal dispute should be referred to arbitration or to the Labour Court for adjudication is the allegation made by the employee as to what the reason for dismissal is. If the reason for dismissal alleged by the employee is one contemplated in sec 191(5)(a), or, if the employee doesn't know what the reason for the dismissal is or if it is a situation that falls under sec 191(5)(a)(ii) or if the dispute concerns an unfair labour practice, the dispute is required to be referred to arbitration. If the reason for the dismissal as alleged by the employee is one contemplated in sec 191(5)(b), the dispute is required to be referred to the Labour Court for

adjudication. This appeal raises the question of what should be done by the Labour Court when the reason for dismissal alleged by the employee falls under sec 191(5)(b) – which means that the dispute should be referred to the Labour Court for adjudication – and the reason for dismissal alleged by the employer is one that falls under sec 191(5)(a) – which means that, if it had been alleged by the employee, the dispute would have been required to be referred to arbitration.

- [8] In such a situation does the Court adopt the attitude that the Act requires the forum to be determined by the reason for dismissal that is alleged by the employee and that, once that allegation has been made, the Court has jurisdiction up to finality even if it later finds that the reason for dismissal alleged by the employee is not the true reason for the dismissal? For convenience we shall call this school of thought the “**formalistic school of thought**”. Is the position that the Court has jurisdiction only provisionally until it has made a finding as to what the true reason for the dismissal is? In terms of this school of thought, if an employee has alleged a reason for dismissal that falls under sec 191(5)(b) of the Act, the Labour Court assumes jurisdiction in respect of the dispute provisionally pending its decision whether the true reason for the dismissal is the one alleged by the employee or another reason which falls within sec 191(5)(b) or another reason that falls under sec 191(5)(a) of the Act. If at a later stage the Labour Court concludes that the true reason for dismissal is one contemplated in sec 191(5)(b), it proceeds to adjudicate the dispute to finality. If, however, it

concludes that the true reason for the dismissal is one that falls under sec 191(5)(a), the Court declines jurisdiction and either it or any interested party may then refer the dispute to the forum with jurisdiction for arbitration. For convenience we shall refer to this school of thought as “**the substantive school of thought**”. We now turn to discuss these schools of thought in greater detail. In the process we shall compare the pros and cons of the two schools of thought.

[9] Sec 191(5)(a) and (b) of the Act read as follows:

“(5) if a council or a commissioner certifies that the *dispute* remains unresolved, or if 30 days have expired since the *council* or the commission received the referral and the *dispute* remain unresolved –

(a) the *council* or the commission must arbitrate the *dispute* at the request of the *employee* if –

i) the *employee* has alleged that the reason for *dismissal* is related to the *employee’s* conduct or capacity, unless paragraph (b) (iii) applies;

(ii) the *employee* has alleged that the reason for dismissal is

that the
employer
made
continued
employment
intolerable or
the employer
provided the
employee with
substantially
less favourable
conditions or
circumstances
at work after a
transfer in
terms of
section 197 or
197A, unless
the *employee*
alleges that the
contract of
employment
was
terminated for
a reason

**contemplated
in section 187;**

[Sub-para. (ii) substituted by s. 46 (e) of the Act No. 12 of 2002.]

**(iii)the *employee* does not know the reason for
dismissal; or**

(iv)the *dispute* concerns an unfair labour practice; or

[Sub-para. (iv) added by s.46 (f) of Act No. 12 of 2002.]

**(b)the *employee* may refer the *dispute* to the
Labour Court for adjudication if the employee
has alleged that the reason for *dismissal* is –**

i) automatically unfair;

**(ii) based on the employer's *operational*
requirements;**

**(iii)the *employee's* participation in a *strike* that does not comply with
the provisions of Chapter IV; or**

**(iv)because the *employee* refused to join, was refused membership of
or was expelled from a *trade union* party to a closed shop
agreement.”**

[10] On the strength of the provisions of sec 191(5) one would be tempted to conclude that the formalistic school of thought is the one that should carry the day. However, sec 191(5) must not and cannot be read in isolation. There are also the provisions of sec 157(1) and (5) and those of sec 158(2) of the Act which have a bearing on the question before us. We shall deal with each one of these sections shortly.

The formalistic school of thought

[11.1] This school of thought entails that the employee would

allege what the reason for the dismissal is and the reason he would allege would be a reason that falls under sec 191(5)(b) of the Act. That would mean that the dispute should be referred to the Labour Court for adjudication. Once such an allegation has been made, the Labour Court would have jurisdiction to adjudicate the dispute upto the end even if during the adjudicatory process or trial the Court became convinced that the reason for dismissal is not the one alleged by the employee but is a different one and that reason falls under sec 191(5)(a) of the Act. Of course, a reason for dismissal alleged by the employee which falls under sec 191(5)(a) would in terms of those provisions have required that the dispute be referred to arbitration.

- [11.2] This school of thought is based on the notion that sec 191(5) of the Act represents a legislative choice that, for better or for worse, what will determine whether a dismissal dispute should go to arbitration or adjudication is what the employee alleges is the reason for dismissal; in this context this school of thought would emphasise that, quite obviously, the drafters of the Act had various options available to them to choose from with regard to what should determine whether a particular dismissal dispute goes to arbitration or adjudication; in this regard it could be said that one option would have been for the drafters to say what they ultimately said, namely, that the reason for dismissal as alleged by the employee will determine whether the dismissal dispute

should be referred to arbitration or to adjudication.

[11.3] Another option was for the drafters to provide that the determinant would be the reason for dismissal as alleged by the employer. Yet another option was for the drafters to provide that the determinant would be what the true reason for the dismissal is. Another one would have been what appears to the Court or CCMA or bargaining council at the commencement of the trial or arbitration to be the reason for dismissal.

[11.4] The reasoning in regard to this school of thought is that the drafters of the Act would have been alive to all of these options available to them and, in their wisdom, they chose one of these, namely, the one in terms of which the determinant of whether a dismissal dispute will be referred to arbitration or adjudication will be the reason for dismissal as alleged by the employee. The argument would be that that was a policy choice made by the drafters and it is not for the Courts in interpreting the statute to question the wisdom of that policy choice. It would be said that, firstly, that choice was for the legislative arm of government to make and, in terms of the doctrine of the separation of powers, the judiciary should respect that choice. In this regard it would be emphasised that different people, faced with the same options, could have made different choices.

- [11.5] This school of thought gives effect to the choice made by the legislative arm of government and avoids a situation where the judiciary, through the way it interpretes the statutory provisions, imposes on the statute what would have been its policy choice if it had been for it to make the choice.
- [11.6] The great advantage or benefit with this school of thought is that it promotes certainty because, to know whether a dispute should go to arbitration or adjudication, all that needs to be done is to establish what the employee alleges is the reason for the dismissal; that can be established quickly and without the court having to embark upon any kind of protracted inquiry into the true reason for the dismissal which may require the hearing of oral evidence.
- [11.7] It may also be said that another advantage or benefit with this school of thought is that it promotes the expeditious resolution of disputes which is one of the primary objects of the Act. It would be said to promote this objective because, once the Court assumes jurisdiction with regards to a dismissal dispute, it retains that jurisdiction right up to the end. At that stage it resolves the dispute by giving its judgment on the merits and does not at any stage decline to go into the merits of the dispute and cause the dispute to be diverted to arbitration when it forms the view that the reason for dismissal is different from the one alleged by the employee.

[11.8] Another advantage or benefit with this school of thought may be said to be that it is cost-effective in that, once there is a trial in a particular forum, it proceeds to finality and only the costs of that trial arise whereas, where the matter must be referred to another forum after some evidence has been led in the one forum, that results in higher costs or even a duplication of costs.

[11.9] This school of thought is convenient to witnesses because they are called to one forum where they give their evidence once and for all and will not later be called to give the same evidence in another forum if the Court declines to proceed to finality with the matter.

[12] This school of thought can be criticised on the bases that:

(a) by having as its foundation a mere allegation (as to the reason for the dismissal) which prevails even when, it is not the true reason for dismissal, it elevates form over substance – and that goes against a long line of cases in our law which are to the effect that courts should look at substance and not form to determine issues; the argument here would in part be that it is difficult to accept that the drafters of the Act deliberately chose form over substance to determine jurisdiction.

(b) The dispute resolution dispensation envisaged in the

Act creates different processes for the resolution of different disputes and different jurisdictions for arbitral tribunals such as the CCMA and bargaining councils, on the one hand, and, the Labour Court, on the other, which provides adjudication; this school of thought allows the Labour Court to usurp the jurisdiction of the CCMA and bargaining councils when it deals with the merits of dismissal disputes where it is clear that the true reason for the dismissal is misconduct or incapacity simply because the employee may earlier on have made an untrue allegation as to the reason for the dismissal. The argument in this regard would be that whatever happens with regard to the issue of jurisdiction, a clear line must be drawn between the roles of the CCMA and bargaining councils, on the one hand, and, the role of the Labour Court, on the other.

- (c) With regard to the argument that this approach may be said to promote the expeditious resolution of disputes, a possible answer could be that the significance thereof should not be exaggerated. This would be said on the basis that, once the Labour Court has adjudicated the merits of a dismissal dispute that ought to have gone to arbitration if the employee had alleged the true reason for dismissal, the appellate process which is available to the losing party in the Labour Court may, if he appeals, delay the ultimate

finalisation of the dispute whereas, if the Labour Court were to have referred the dispute to the CCMA for arbitration, that may well have delayed finality for the time being but, once the CCMA had arbitrated the dispute, such award would be final in terms of the Act and there would be no appeal process available to the losing party but only a review process.

(d) This school of thought may be said to encourage employees to by-pass the CCMA and bargaining councils when they prefer their dismissal disputes to be adjudicated by the Labour Court. Some answer to this argument would be that the Court would be able to discourage that by awarding appropriate punitive cost orders against employees who deliberately or without good cause make untrue allegations as to the reason for dismissal for the purpose of side-stepping the CCMA and bargaining councils.

The substantive school of thought

[13] The substantive school of thought entails that the Labour Court should only provisionally accept the employee's allegation as to the reason for dismissal until it makes a finding as to the true reason for dismissal. If the reason it finds is the same reason as the one that was alleged by the employee, no difficulty arises and the Court proceeds to adjudicate the dispute on the merits. If, however, the reason for dismissal that it finds is not the one alleged by the employee but a reason that falls under sec 191(5)(a), the Court

should refuse to adjudicate the dispute and let it be referred to arbitration by the CCMA or a bargaining council with jurisdiction, as the case may be. We refer to this school of thought as the substantive school of thought because in the final analysis it seeks to look at substance with regard to the reason for dismissal in determining whether a dispute should finally go to arbitration or adjudication and not simply at the employee's mere allegation as to the reason for dismissal. We appreciate that there may be reasons which may also have justified calling this school of thought the formalistic school of thought and the other one the substantive school of thought. The terminology is used purely for convenience – and nothing really turns on it.

[14] In favour of this school of thought it can be said that it gives effect to the different processes to which different disputes are subject in terms of the Act and does not blur the distinction between disputes that should go to different processes and fora. It can be criticised on the basis that it subjects disputes to a duplication of processes. It can also be said to be very costly. Indeed, it can also be said that it can unduly delay the finalisation of some disputes.

[15] It can also be said that this school of thought has the advantage that it prevents employees from bringing to the Labour Court dismissal disputes that do not deserve or are not required to be referred to the Labour Court. In addition to refusing to deal with the merits of the dismissal dispute where the Court takes the view that the reason for dismissal is one that falls under sec 191(5)(a), it can also award a

punitive cost order against the employee if it is satisfied that he had no grounds whatsoever to believe his allegation to be true and simply made it to circumvent the CCMA or a bargaining council. Of course, it is also true that in most cases it would be difficult for the employer to recover such costs from the employee as the latter might not have any assets that may be attached to satisfy such a cost order. However, there will be some where such cost orders may be satisfied.

Which school of thought is the correct one?

[16] To determine which school of thought is recognised by the Act, it is necessary to refer to certain provisions of the Act. Sec 157(1) of the Act provides as follows:-

“157 Jurisdiction of Labour Court. – (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.”

[17] It is clear from sec 157(1) that the Labour Court does not have **“exclusive jurisdiction where this Act provides otherwise.”** It has **“exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined”** by it. However, all of this is subject to the Constitution and sec 173 of the Act. Sec 173 of the Act deals with the jurisdiction of this Court and is of no relevance to the issue before us. Sec 157(5) is very important. It provides:

“(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration”.

This provision lays down a general rule to which there is only one exception. The general rule is that **“(t)he Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration”.**

This contemplates, for example, a dispute concerning the fairness of a dismissal where the reason for the dismissal as alleged by the employee is misconduct or alleged misconduct on the part of the employee. This means that as a general rule the Labour Court has no jurisdiction to adjudicate such a dispute.

[18] The exception to the general rule referred to above is the one provided for in sec 158(2). Sec 158(2) of the Act provides:

“(2) 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) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.”

[19] It seems to us that the effect of sec 157(5) read with sec 158(2) is in part that the only situation where the Labour Court has

jurisdiction to deal with a dispute that is otherwise required to be referred to arbitration in terms of this Act is a situation that falls within the ambit of sec 158(2). Leaving out sec 158(2)(a) which does not seem to contemplate the Labour Court adjudicating such a dispute, that scenario seems to be only the one contemplated by sec 158(2)(b) of the Act. Even if both parties to a dispute were to agree to ask the Labour Court to resolve a dispute which ought to have been referred to arbitration, for example, a dispute concerning a dismissal for misconduct, that would not be enough to confer jurisdiction on the Labour Court to resolve such a dispute. In addition to the consent of both parties, it would have to be shown that it is expedient for the Court to continue with the proceedings but, even then, it will not sit as a Court but its Judge will have to sit as an arbitrator.

[20] Strictly speaking, this suggests that sec 158(2)(b) is not a situation where the Labour Court has jurisdiction to adjudicate a dispute that ought to have been referred to arbitration because in terms of that provision it will not adjudicate the dispute but will arbitrate it. This demonstrates that the drafters of the Act placed much significance on the different dispute resolution processes and the different fora for the different disputes.

[21] In the light of all of the above the conclusion is inescapable that the formalistic school of thought is not one that enjoys the recognition of the Act. The substantive school of thought is the one that is very close to the school of thought that enjoys that recognition. We say

this because sec 157(5), read with sec 158(2), clearly envisages a situation where the Labour Court initially takes as correct the employee's allegation of what the reason for dismissal is and proceeds with the process of hearing the matter until it is **“apparent”** to it that the reason for dismissal is a different one and it is one falling under sec 191(5)(a). In such a case sec 158(2) is triggered. Once it is apparent to the Court that the dispute is one that ought to have been referred to arbitration, the Court deals with the matter in terms of either sec 158(2)(a) or (b). It cannot deal with it outside the ambit of those provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with the provisions of sec 157(5) and 158(2) of the Act.

- [22] A question that arises from sec 158(2) is: when does it become apparent to the Labour Court that a dispute is one that ought to have been referred to arbitration? To answer this question within the context of a dismissal dispute, it is necessary to bear in mind the provisions of sec 191(5)(a) and (b). In terms of those provisions the employee's allegation of what the reason for dismissal is provisionally channels the dispute to either arbitration or adjudication after conciliation has failed. Where the employee alleges that he does not know the reason for the dismissal, the dispute is channelled to arbitration. An unfair labour practice dispute is also required to be referred to arbitration.

- [23] The significance of sec 191(5)(a) and (b) seems to be this. What is

contemplated by the scheme of the Act is that, if the employee has alleged a certain reason as the reason for dismissal and that reason is one that falls within sec 191(5)(b) and the Court does not at any stage think that that reason is not the reason for dismissal, the Court proceeds to adjudicate the dispute and delivers a judgement. Where as a reason for dismissal, the employee has alleged a reason that falls within sec 191(5)(b), the Court provisionally assumes jurisdiction but, if the Court later takes the view or it later becomes “**apparent**” to the court that the reason for dismissal is one that falls under sec 191(5)(a), it then declines jurisdiction and follows the sec 158(2)(a) or (b) route.

- [24] In the light of the above it seems to us that the employee’s allegation of the reason for dismissal as contemplated in sec 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to finally resolve the dispute on the merits. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon it not later becoming “**apparent**” to the Court within the contemplation of sec 158(2) of the Act that the reason for the employee’s dismissal is one that falls within sec 191(5)(a) of the

Act. We say it is provisional or conditional because if it later becomes “apparent” that the dispute is one that ought to have been referred to arbitration, the Court will decline jurisdiction and have the dispute referred to arbitration.

- [25] In this case the Labour Court did not deal with the matter on the basis that at a certain stage of the proceedings it became “**apparent**” to it as contemplated by sec 158(2) that the dispute ought to have been referred to arbitration and invoked either sec 158(2)(a) or (b) of the Act. In fact the Court a quo did not refer to sec 157(5) and 158(2) of the Act at all. The provisions were probably not drawn to the Court a quo’s attention. The Court a quo heard oral evidence and examined the evidence to establish whether the reason for dismissal alleged by the employee was the reason for the dismissal. In terms of sec 158(2) of the Act it seems that it is not necessary to go that far. If “**it becomes apparent [to the Labour Court] that the dispute ought to have been referred to arbitration**”, this will suffice for the purpose of the invocation of sec 157(2)(a) or (b). Probably, the drafters of the Act wanted to avoid, as far as possible, that the Court should go too much into the matter to establish the true reason before invoking sec 158(2) because that would not be cost-effective, could undermine the objective of an expeditious resolution of disputes and could also result in a duplication of proceedings.

- [26] The Court a quo ought to have invoked the provisions of sec 158(2)(a) and stayed the proceedings and referred the dispute

arbitration.

[27] In the premises we make the following order:

1. Subject to 2 below, the appeal is dismissed with costs.
2. The order of the Labour Court is amended so as to delete par 11.2.2 thereof and to replace it with the following order:

“11.2.2. The proceedings are hereby stayed in terms of sec 158(2)(a) of the Labour Relations Act, 1995 and the dispute is hereby referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration.”

Zondo JP and Basson AJA

I agree.

Musi AJA

Appearances

For the appellant	:	Mr A.G. Heyns
Instructed by	:	Viljoen Incorporated
For the respondent:		Mr R.B. Wade
Instructed by	:	Snyman Van der Heever Heyns Inc

Date of judgment : 10 January 2007