



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 111/2014

CMI BUSINESS ENTERPRISES CC

Appellant

and

THEO SEPTEMBER

First Respondent

DEAN SEPTEMBER

Second Respondent

ROLAND PAULSON

Third Respondent

Heard: 22 November 2015

Delivered: 26 October 2016

Summary: Rescission of judgement – section 165 of the Labour Relations Act – whether order granted erroneously for want of jurisdiction.

Jurisdiction of the Labour Court – dispute referred for conciliation different from one alleged in the statement of case – whether the real dispute conciliated – whether Labour Court had jurisdiction to determine a dispute under circumstances in which it is not clear whether it was conciliated – question a factual one to be determined only with reference to the referral form and certificate of outcome.

Coram: Tlaetsi DJP, Musi JA et Makgoka AJA

JUDGMENT

MAKGOKA AJA

- [1] This is an appeal against the whole judgment and order of the Labour Court, Johannesburg (Gush J) handed down on 26 June 2014. In terms of the judgment, the Labour Court dismissed with costs, the appellant's application for rescission of an order of that court made on 15 August 2012, as well as a default judgment granted against the appellant in favour of the respondents on 12 February 2013. The appeal is with leave of the Labour Court, which was granted on 29 October 2014.
- [2] The issue in the appeal is whether the dispute, which served before the Labour Court, had been subject to conciliation. If it had not been, the Labour Court did not have jurisdiction to determine the dispute. The Labour Court found that the issue had been conciliated, and had been properly referred to it for determination, and that it therefore, had jurisdiction.

The facts

- [3] The appellant, a close corporation, conducts business of maintenance and mechanical field services in the mining sector in South Africa and on the continent. Its majority shareholder and the controlling mind is Mr Johannes Gerhadus Cronjé (Cronjé). The respondents were all initially employed by the appellant during August 2009 as technician's assistants. They worked for the appellant until 13 September 2011. The circumstances of their departure from the appellant's employment are controversial, and form the very essence of the dispute between the parties. According to the respondents, they were constructively dismissed by the appellant by being subjected to racial discrimination. On the other hand, the appellant denies those allegations and insists that the respondents absconded from duty for no apparent reason.

The conciliation

- [4] On 14 September 2011, the respondents referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) by completing and submitting the LRA 7.11 form. The nature of the dispute was identified to be unfair discrimination in terms of s 10 of the Employment Equity Act 55 of 1998 (EEA). The summary of the facts of the dispute was stated to be “Racial Discrimination, verbal abuse.” As to the outcome, they desired from the conciliation, the respondents said that they required “the employer to stop discriminating against [them].” A conciliation meeting took place under the auspices of the CCMA on 1 November 2011 in the unfair discrimination dispute. The appellant was represented by Mr Andrew Lewis (Lewis) an official of an employer organisation to which the appellant belonged. The issue could not be resolved, and a certificate of outcome was issued by the CCMA commissioner on 1 November 2011, indicating that an “unfair discrimination” dispute remained unresolved after conciliation.

Respondents’ statement of case in the Labour Court

- [5] On 12 January 2012, the respondents served and filed their statement of case in the Labour Court, seeking the following relief against the appellant:
1. That their resignations amount to automatic unfair dismissals;
 2. In the alternative, that their resignations amount to unfair dismissals;
 3. In the event that their’ dismissals are automatically unfair, that the appellant should compensate them with an amount equivalent to 24 months remuneration;
 4. In the alternative, and in the event that their dismissals are unfair but not automatically unfair, that the appellant should compensate them with an amount equivalent to their 12 months’ remuneration;
 5. That the appellant be ordered to return their academic and professional certificates;

6. That the appellant pays the costs of the suit.

- [6] In their statement of case, the respondents stated that the nature of the referral was in respect of “automatically unfair dismissal and/or unfair dismissal”. They stated that they were employed by the appellant as general workers in August 2009 which required them to perform various duties (primarily technical and mechanical) on mining-related projects throughout the African continent. The respondents further alleged that they were never given any job description or written contract but acted on the instruction of Cronjé.
- [7] According to the respondents, Cronje made their working conditions intolerable and subjected them to racial discrimination. The respondents stated at length, the incidents of the alleged racial discrimination, which included: being referred to in derogatory terms such as kaffirs and animals; being forced to sleep in toilets while on assignments away from home; physical assault and abuse; being assigned menial and lower-level tasks; and being denied training opportunities.
- [8] The respondents further stated that Cronjé often wore to work a T-shirt with the so-called “Vierkleur” - a flag of the old Transvaal Boer Republic - and the words “100 Boer” emblazoned on the chest. Cronjé is said to have often encouraged white employees to also wear similar T-shirts at work and even informed them where such apparels could be purchased. The respondents further alleged that due to the above conditions, they attempted at various points to terminate their employment with the appellant, but were unable to do so as Cronjé was in possession of their written profiles and qualification certificates, of which they did not have copies. However, by September 2011 their working conditions had become so intolerable that on 13 September 2011 they sent Cronjé a cellular phone text message informing him that they were resigning as they could no longer tolerate the working conditions.

The appellants’ statement of defence

- [9] The appellant filed its statement of defence on 20 January 2012, in the form of an affidavit deposed to by Lewis, who, as stated earlier, had represented the appellant during the conciliation at the CCMA. The affidavit was clearly drafted

without legal assistance, as it is clumsily worded, with a lot of spelling errors. Generally, it is a very inelegant document. However, the essence of its contents is clear: Lewis denied, in broad terms, the allegations of discrimination against the respondents, and pointed out that:

'No racial discrimination existed in the work place, the applicant submissions (sic) is a fabricated (sic). The respondent is a member of a none-white (sic) employers organisation (sic), this bring the conclusion that if he was racist he could associate him with a none white organisation (sic). Never did the respondent utter (sic) any remarks, of black and white. The respondent employed 22 none-white employees and all are treated in a fair manner'

[10] As to the allegation of intolerable working conditions, Lewis similarly painted them with a broad brush of denial as follows:

'This is denied, if those conditions as alledges (sic) by the applicants were as terrible (sic) as they claim, why did they stick so long with the respondent. There's no substance to they (sic) claim. The applicants still owes (sic) the respondent moneies (sic) and look for an easy way out, with their misleading application.'

[11] In conclusion, Lewis contended that "the application does not qualify with (sic) section 187 of the Act or section 186E of the Act of the LRA (sic) of 1995" and prayed for the application to be dismissed with cost (sic).

The appellant's failure to attend a pre-trial conference

[12] In terms of rule 6(4) of the Labour Court Rules, the parties were required to hold a pre-trial conference within 10 days of the delivery of the appellant's statement of defence. On 25 January 2012, the respondents' attorneys sent a letter to Lewis, care of Ad Finem (the employer organisation to which the appellant is a member), requesting the holding of a pre-trial conference. There was no response to that letter, which was followed by another one on 30 January 2012. On 1 February 2012, Lewis responded, and proposed that the pre-trial conference be held on a date to be allocated by the registrar of the Labour Court. This was conveyed to the registrar by the respondents'

attorneys in a letter dated 6 February 2012, in which the registrar was requested to set down a pre-trial conference.

- [13] The registrar set the pre-trial conference down for 15 August 2012 at 10h00. The registrar sent the notice of set down to the employer organisation by way of facsimile on 22 May 2012, informing it that the matter had been enrolled for a pre-trial conference before a judge on 15 August 2012. Despite this, there was no representation on behalf of the appellant at the pre-trial conference, as a result of which the presiding judge granted an order that the matter had become unopposed due to the appellant having failed to attend the pre-trial conference. During October 2012, the respondents' attorneys applied for default judgment. On 22 January 2013, the registrar, by facsimile, informed the employer organisation and the respondents' attorneys that the matter had been enrolled for default judgment on 8 February 2013 at 10h00.

Default judgment and its aftermath

- [14] On 8 February 2013, the application for default judgment came before the Labour Court (Lagrange J) who reserved judgment and delivered it on 12 February 2013, in which he made the following remarks:

'I am satisfied that the applicants were constructively dismissed by the respondent when they resigned on 13 September 2011 after being required to work under intolerable working conditions which entailed racial abuse, and racially discriminatory treatment in a variety of forms including disparate treatment when it came to accommodation, food and the like. The extent of abuse is reminiscent of an era of white supremacy whose traces should long have vanished...[I] find that the applicants were dismissed for an automatically unfair reason based on their race, in terms of section 187(1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA'). On the question of relief, given the facts of the matter, there is no reason not to award the maximum compensation the LRA permits...'

- [15] The Labour Court accordingly granted default judgment in favour of the respondents against the appellant in terms of which the appellant was ordered to pay each of the respondents compensation equivalent to 24 months

remuneration. Both the first and second respondents were each to be paid R240 000, while the third respondent was to receive R192 000. The payment of the above amounts was ordered to be made within 15 days of the date of the judgment. The appellant was also ordered to pay the respondents' costs.

- [16] On the same day the judgment was handed down, 12 February 2013, the respondents' attorneys wrote to Lewis informing him of the judgment, and demanding payment of the total sum of R672 000 before 27 February 2013, on the pain of a writ of execution. There was no response to that letter, nor was any payment made as demanded. On 5 March 2013, the respondents' attorneys forwarded another letter to Lewis, again demanding that payment be made by no later than 11 March 2013, failing which a writ of execution would be issued. Again, there was no response, either in the form of a letter or payment. On 14 March 2013, the respondents' attorneys obtained a writ of execution against the appellant and handed it over to the sheriff of Springs for execution. It is not clear on the papers why the warrant was not executed.

Application for rescission

- [17] On 24 April 2013, the appellant launched the application to rescind the order granted against it on 15 August 2012, as well as the judgment granted against it on 12 February 2013. In both instances, the appellant relied on s 165(a) of the Labour Relations Act 65 of 1995 (the LRA), alternatively rule 16A(1)(a)(i) of the Labour Court's Rules, or the common law. The affidavit in support of the rescission application was deposed to by Cronjé, who explained that the matter had been entrusted to Lewis, in his capacity as an official of the employer organisation to which the appellant belonged. Lewis had, from the time the matter was entrusted to him, continuously assured him that all was on track for the appellant to defend the respondents' claims against it. On 12 March 2013, Lewis telephonically informed the appellant's administrative secretary that the respondents demanded R672 000 and that he had to consult an advocate about it. Still, Lewis assured the secretary that everything was under control and that he would inform the appellant of any further developments. Lewis never informed the secretary during that telephone

conversation of the default judgment granted against the appellant on 12 February 2013.

[18] On 3 April 2013, the appellant received, by facsimile, the writ of execution issued against it, from the local sheriff. This was the first time he, Cronjé, obtained knowledge of the default judgement granted against the appellant. The secretary contacted Lewis telephonically and expressed unhappiness about how the matter had being handled, leading to default judgment being obtained against the appellant. On the same day, 3 April 2013, he instructed the appellants' former attorneys to propose a settlement by way of an offer, which the attorneys did on 8 April 2013. On 10 April 2013, the respondents made a counter-offer, thereby rejecting the appellant's offer. On 19 April 2013, the appellant terminated the mandate of its attorneys and instructed its current attorneys of record. It was only on perusal of the Labour Court file that it became clear as to how judgment was granted by default against the appellant. On 22 April 2013, the appellant instructed its attorneys to proceed with the rescission application, which was launched on 2 May 2013.

[19] With regard to the allegations made by the respondents against the appellant, and him in particular, Cronjé denied the thrust of those allegations. He dealt at length with the relationship between him and the respondents. Of relevance is what he says are the events leading to the respondents leaving the employ of the appellant on 13 September 2011. He says that on 12 September 2011, the respondents each borrowed R200 from him to buy cigarettes. On 13 September 2011, he noticed that the respondents were absent from work. He received a text message later that day from one of the respondents, which he perceived as a threat against him. He responded it, accordingly. There was nothing in the text message that the respondents were resigning. At no stage prior to 12 September 2011 did the respondents inform him of any complaints concerning working conditions.

[20] It was submitted on behalf of the appellant that the default judgment was erroneously granted as the Labour Court lacked jurisdiction to determine an unfair dismissal dispute on the basis that the respondents never referred an unfair dismissal dispute to the CCMA and that the nature of the dispute that

had been referred to conciliation had changed from unfair discrimination to an unfair and/or automatically unfair dismissal dispute before the Labour Court. The appellant complained therefore that the respondents introduced a dispute in the Labour Court which had never been referred to the CCMA for conciliation. In view thereof, it was argued on behalf of the appellant that the Labour Court did not have jurisdiction to grant either the order of 15 August 2012 or the default judgment on 12 February 2013. For those reasons, the appellant argued that the order and the judgment referred to above, fell to be rescinded in terms of s 165 as having been erroneously sought and granted.

- [21] In their answering affidavit, the respondents stated that during the conciliation, it became apparent that the “true nature” of the dispute was primarily one of constructive dismissal due to unfair discrimination. According to the respondents, the issue was extensively canvassed after the commissioner had specifically brought it to the attention of the parties. As such, so said the respondents, the Labour Court was competent and clothed with the necessary jurisdiction to determine the issue and grant the orders it did. Thus, according to the respondents, the order could not be said to have been erroneously granted.

Judgment of the Labour Court

- [22] The matter was heard by the Labour Court on 30 May 2014 and judgment was handed down on 26 June 2014. The Labour Court dismissed the application with costs based on the following findings:

- (a) Neither the order granted by default on 15 August 2012 nor the default judgment granted on 12 February 2013 were granted erroneously;
- (b) The appellant has failed to provide a reasonable and acceptable explanation for its default or that it has a *bona fide* defence and good prospects of succeeding in its defence should the order be rescinded.

- [23] In reaching the above conclusions and dismissing the appellant’s application, the Labour Court accepted the respondents’ argument, and concluded that during the conciliation the automatically unfair dismissal based on racial

discrimination was brought up and conciliated, such that the real dispute was conciliated and referred to the Labour Court. In coming to that conclusion, the Labour Court relied on para 8 of the minority judgment in *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another*;¹ (*Driveline*) in which Conradie JA stated that the factual matrix should be considered to determine whether the real dispute between the parties had been referred for conciliation. I shall comment on the *Driveline* judgment later. Furthermore, the Court relied on rule 15 of the rules for the conduct of proceedings before the CCMA which provides that the nature of the dispute must be identified “as described in the referral document or as identified by the commissioner during the conciliation process.”

- [24] The learned judge proceeded from that premise that the commissioner would have determined the nature of the dispute to include an automatically unfair dismissal on the grounds that the appellant had unfairly discriminated against the respondents. The learned judge reasoned that to “strictly interpret the nature and description of the dispute in the referral would frustrate the function of the commissioner tasked with conciliating the dispute.” The learned judge went on to say the following:

‘In this matter it is abundantly clear that during the course of the conciliation the dispute that was referred to conciliation was determined to be a dispute based on unfair discrimination that warranted referral to the Labour Court. Lewis attended the conciliation and it is inconceivable that he did not report back to the applicant as to what had transpired during the conciliation. In the statement of opposition Lewis states that the respondents had absconded and that the court had no jurisdiction. This convincingly suggests that Lewis was aware of the nature of the respondents’ dispute that was conciliated, viz that it involved an allegation that they had been dismissed.

The commissioner identified the dispute as one pertaining to unfair discrimination and albeit gratuitously, advised the parties that the dispute could be referred to the Labour Court. There can be no doubt that the respondents’ cause of action embodied in their referral namely that they were constructively dismissed is based on unfair discrimination... [I]n this matter it

¹ 2000 1 BLLR 20 LAC; (2000) 21 ILJ 142 (LAC).

is abundantly clear that the dispute between the applicant and the respondents **was** referred to conciliation and that **a certificate of outcome recording that the dispute had not been resolved was issued**. On the strength of this alone there can be no doubt that the court had jurisdiction to consider the matter.’ (Emphasis in the original text.)

This Court

The parties’ main contentions

[25] In this Court, the appellant persisted in its argument that the Labour Court lacked jurisdiction to determine the matter as the dispute set out in the appellants’ statement of case was not one conciliated in the CCMA. On that basis, the appellant relied primarily on s 165 of the LRA for the rescission of the order and judgment of the Labour Court, made on 15 August 2012 and 12 February 2013, respectively, on the basis that both were erroneously granted. The respondents, on the other hand, contend that the facts demonstrate that constructive dismissal was considered during conciliation. Before I consider the parties’ respective arguments, I set out first, the legal framework in terms of which applications are to be considered.

Legislative and legal framework for rescission applications

[26] Section 165 of the LRA provides that the Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. Rule 16 A of the Labour Court’s Rules , on the other hand, provides for the same relief as s 165, except that in terms of rule 16A(1)(b) read with sub-rule 2(b) the applicant is required to show “good cause” for rescission for an order granted in his or her absence. What is more, if the application is brought in terms of rule 16A(1)(b), it must be brought within 15 days after the party had acquired knowledge of an order of judgment granted in the absence of that party.

[27] In the present case, the appellant based its application, in the main, on s 165, contending that the judgment of 12 February 2013 was erroneously granted in

its absence because the Labour Court did not have jurisdiction to adjudicate the matter. It is worth mentioning at this stage that in terms of s 165, the applicant for rescission does not have to show good cause or that he or she was not in wilful default. Once the court holds that an order or judgment was erroneously granted, it should rescind it without further enquiry into the latter considerations. See *Superb Meat Supplies CC v Maritz*² and *Lumka and Associates v Maqubela*³ where this Court confirmed that position.

- [28] It is generally accepted that a judgment is erroneously granted if there existed at the time of its issue, a fact which the judge was unaware of and which would have precluded its granting and which would have induced the judge, if aware of it, not to grant judgment. It is further accepted that an order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for a court to make that order.⁴

The issue in dispute

- [29] In the present case, the issue forming the basis of the alleged irregularity is whether the dispute which served before the Labour Court had been conciliated. Differently put, and more pointedly, whether the constructive dismissal based on unfair discrimination had been conciliated before referral to the Labour Court. If the issue had been conciliated, the Labour Court had jurisdiction to determine the dispute and its order of 15 August 2012 and its judgment of 12 February 2013, were accordingly, granted validly and competently, and not erroneously. Before I consider the issue, I analyse the framework for referral of disputes conciliated in the CCMA or in a bargaining council with jurisdiction.

² (2004) 25 ILJ 96 (LAC) at para 15.

³ (2004) 25 ILJ 2326 (LAC) at para 26.

⁴ See *Nyingwa v Moolman NO 1993 (2) SA 508 (Tk)* and *Stander v Absa Bank 1997 (4) SA 873 (E)*; *Lezimin 2557 t/a BG Construction and Sheriff of the High Court and Another (J1469/07) [2008] ZALC 95 (16 July 2008)* at para 23; *Naidoo v Matlala NO 2012 (1) SA 143 (GNP)* at 153C; Cilliers, Loots and Nel *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed (2009) Juta Cape Town at 933.

Framework for referral of disputes from CCMA to the Labour Court

[30] Referral of disputes from the CCMA to the Labour Court is governed by s 191 of the LRA, in particular, s 191(1)⁵ and 191(5).⁶ In *Driveline*, this Court considered those provisions. There, a dispute was referred for adjudication to the Labour Court after unsuccessful conciliation. The question was whether the employees' statement of case in the Labour Court could be amended to broaden the dispute's characterisation. At issue was whether the dispute referred for conciliation, namely an unfair retrenchment, could be amended to encompass an automatically unfair dismissal. This Court held unanimously that it could.

⁵ Section 191(1) of the LRA provides:

- '(a) 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—
 - (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.
- (b) A referral in terms of paragraph (a) 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.'

⁶ Section 191(5) reads:

'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains 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;
 - (iii) the employee does not know the reason for dismissal; or
 - (iv) the dispute concerns an unfair labour practice; or
- (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.'

[31] However, on the question whether the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all, there was disagreement. Hendricks JA, in a minority judgment, concluded that such a dispute could still be adjudicated by the Labour Court. However, the majority (Zondo AJP and Mogoeng AJA) held that the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication.⁷ The reasoning of the *Driveline* majority on this issue received the imprimatur of the Constitutional Court in *National Union of Metalworkers of South Africa v Intervale (Pty) Ltd and Others*.⁸

[32] The upshot of *Driveline* is, therefore, two-fold. First, that where the real issue was conciliated, the employee's statement of case can be amended to broaden the issue's characterisation. However, where the issue was never referred to conciliation at all, the Labour Court does not have jurisdiction to determine the dispute. In short, it is now settled that referral for conciliation is a precondition to Labour Court jurisdiction. Obviously, where a dispute arises as to whether the real dispute was conciliated, that is a factual enquiry which must be determined with reference to the facts of a particular case. Such an enquiry, however, falls within a very narrow compass, in my view. It can only be determined with reference to two aspects, namely, the characterisation of the dispute on the referral form and the contents of the certificate of outcome. The contents of the certificate of outcome are especially important in this regard, for they mirror the nature of the real dispute identified in the conciliation.

Was the dispute of unfair dismissal conciliated?

[33] It is common cause that the dispute which the respondents had referred for conciliation was for unfair discrimination. The referral form makes no mention of unfair dismissal, even though that is one of the options available on the form. Part "B" of the referral form, which is to be completed for dismissal disputes only, was not only left uncompleted, but it was crossed out with the

⁷ At para 73.

⁸ [2015] 3 BLLR 205 (CC); (2015) 36 IJL 363 (CC) at para 32.

words “cancelled” in between two lines. The nature of the dispute was stated to be an unfair discrimination in terms of s 10 of the EEA. Under paragraph 6 of the form, the respondents were required to state the outcome they desired from conciliation, to which they answered: “Employer to stop discriminating us”. As to the contents of the certificate of outcome of the dispute, the dispute which remained unresolved and to be referred to the Labour Court was one of unfair discrimination.

[34] As stated earlier, the Labour Court started from a premise that the respondents had been constructively dismissed on the basis of racial discrimination. With respect to the learned Judge, the evidence distilled from the referral form and the certificate of outcome does not support this premise. If anything, those two documents point to the opposite direction, namely, that the dispute referred for conciliation was one of unfair discrimination, and that this is the dispute which the commissioner certified to have been unresolved. It was nowhere stated in the referral form that dismissal was part of the dispute. The Labour Court seems to have acknowledged this fact when it observed, correctly in my respectful view, that “during the course of the conciliation the dispute that was referred to conciliation was determined to be a dispute based on unfair discrimination that warranted referral to the Labour Court.”

[35] What is more, it does not seem that the respondents considered themselves to have been dismissed (whether automatically unfairly or simply unfairly) when they approached the CCMA. I am fortified in this conclusion by their own answer as to what they sought as the outcome of the conciliation. As stated above, they sought the appellant to “stop discriminating” against them. Clearly, this is not a mind-set of an employee who considered his or her relationship with an employer to have been terminated. If the contrary was true, the respondents would surely have indicated compensation as the desired outcome of the conciliation. It is therefore by no means clear that the respondents were dismissed. As explained in *State Information Technology Agency Ltd v Sekgobela*,⁹ with regard to whether a dismissal had occurred:

⁹ [2012] 10 BLLR 1001 (LAC) at para 13.

'It is clear that section 192 provides for a two-stage process in dismissal disputes. First the employee who alleges that he/she was dismissed must prove that there was in fact dismissal and once the existence of the dismissal is established then the employer must prove that the dismissal was fair. It is clear therefore that the *onus* to prove the existence of the dismissal lies first on the employee. The word "must" in Section 192 means that the provisions of the section are peremptory. The employee must set out the facts and legal issues which substantiate his assertion that the dismissal occurred. Once the employee has proved that dismissal did take place, the *onus* is shifted to the employer who must prove that the dismissal was for a fair reason such as for instance misconduct.' (Footnote omitted.)

- [36] The remarks in the preceding paragraphs should, however, not be construed as a definitive finding by this Court that the respondents were not dismissed. It is not for this Court to make that finding. Those remarks are *obiter*, made in the context of determining whether the issue of unfair dismissal was properly conciliated by the commissioner at the CCMA, to clothe the Labour Court with the necessary jurisdiction.
- [37] In coming to the conclusion that an unfair dismissal dispute had been conciliated, the Labour Court misdirected itself in two respects. First, by relying on the inadmissible evidence of the respondents as to what supposedly transpired during the conciliation. That is impermissible. By adopting that approach, the Labour Court went against its own jurisprudence in which it has, correctly in my respectful view, held that evidence relating to conciliation discussions is not admissible in the subsequent Labour Court proceedings.¹⁰ Second, the Labour Court seems to have been influenced in its finding (that the unfair dismissal was conciliated) by the fact that the commissioner advised the parties to refer the matter to the Labour Court. That is irrelevant. The Labour Court's jurisdiction to determine a dispute cannot be founded on an erroneous referral of a dispute to it. That question is dependent on legal considerations, and in particular, the legislative framework governing a particular situation.

¹⁰ See, for example, *Van Metzinger and Another v Conservation Corporation t/a CC Africa* (2013) 34 ILJ 1309 (LC).

[38] Unfair discrimination and automatically unfair dismissal, though related, remain different claims and have different resolution procedures. The former is claimed under the EEA while the latter is claimed under the LRA. Section 10 of the EEA makes plain that discrimination disputes must be distinguished from dismissal disputes. It provides that a dispute in the context of the section excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VII of the LRA. On the other hand, s 187(1)(f) of the LRA deals with dismissals. It provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to Section 5 or, if the reason for dismissal is that the employer unfairly discriminated against an employee directly or indirectly on any arbitrary ground, including, among others, race.

[39] In *Wardlaw v Supreme Mouldings (Pty) Ltd*,¹¹ this Court made the following apposite remarks in the context of ss 157(5) and 158(2):

‘[Section] 157(5), read with s 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 section 191(5)(a). In such a case s 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 s 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 provisions of s 157(5) and 158(2) of the Act.¹²

[40] In my view, the facts in the present matter are analogous to those in *F&J Electrical CC v MEWUSA*.¹³ There, the dismissed employees’ case during arbitration was that they had been dismissed for a reason unknown to them, while the employer’s stance was that they were dismissed for operational requirements. The commissioner accepted the employer’s explanation and

¹¹ (2007) 28 ILJ 1042 (LAC).

¹² At para 21.

¹³ *F&J Electrical CC v MEWUSA obo E Mashatola and Others* (2015) 36 ILJ 1189 (CC).

the employees referred the dispute to the Labour Court. They again alleged that the reason for their dismissal was unknown to them. The employer did not file a statement of defence, and in the application for default judgment the union and the employees filed affidavits in which, for the first time, they alleged that the reason for the dismissal was their union membership. The affidavits were not served on the employer. The Labour Court granted default judgment for compensation on a heightened scale. The employer's application for rescission was dismissed, and its application for leave to appeal was refused by both the Labour Court and this Court. The employer turned to the Constitutional Court, which granted the rescission application, because the employees' cause of action was different to the one referred to the CCMA.

Summary

[41] To sum up, I conclude that the Labour Court's conclusion that the unfair dismissal dispute was conciliated, is not supported by any admissible evidence. The Labour Court was not entitled to venture beyond the referral form and the certificate of outcome in an endeavour to determine what dispute was conciliated. Therefore, the Labour Court should have found that it did not have jurisdiction to make either the order of 15 August 2012 or judgment of 12 February 2013. It follows in the result that the order and the judgment, were respectively, sought and granted erroneously, as envisaged in s 165 of the LRA. They therefore fall to be rescinded on that basis. Given this conclusion, it becomes unnecessary for me to consider whether the appellant has demonstrated good cause.

Costs

[42] Finally, the issue of costs. The awarding of costs in the Labour Court is governed by s 162 of the LRA, which provides that in making orders for payment of costs, the Court has to have regard to the requirements of law and fairness. The rule of practice that costs follow the result does not govern the making of costs orders in labour disputes. Such orders are made in accordance with the requirements of law and fairness. See in this regard *MEC*

for Finance, Kwazulu-Natal and Another v Dorkin N.O. and Another.¹⁴ The requirements of law and fairness are on equal footing, and none is secondary to the other. See in this regard *Callguard Security Services (Pty) Ltd v Transport and General Workers Union and Others*¹⁵ and *Xaba v Portnet Ltd*.¹⁶ In the present case, the successful appellant is a corporate entity against individual employees who are not supported by a trade union. In my view, therefore, the requirements of law and fairness dictate that no order should be made regarding the costs of appeal.

Concluding remarks

[43] Before I conclude, there is a related issue which deserves comment. In concluding that the order and the judgment were erroneously sought and granted and that the Labour Court lacked jurisdiction, this Court by no means condones any of the racism alleged against the appellant and in particular, its main member, Cronjé. Most of the allegations are untested. However, two aspects of those allegations are common cause. First, that Cronjé often referred to the respondents in derogatory terms. In these proceedings, there are instances where Black people are referred to as “non-white”. I find this deeply offensive. Black people are not a negative or an appendage of whites. They are a people in their own right, and do not owe their existence to, and are not negatives of whites. Second, that Cronje often came to work wearing a T-shirt emblazoned with the old Transvaal Republic “*Vierkleur*” flag and the words “100% Boer”. During argument, counsel for the appellant sought to explain that by suggesting that Cronjé was simply displaying his “culture”.

[44] That submission was unfortunate. There is nothing “cultural” about this. It is a display of one’s political beliefs. In the South African context, that flag, for many in our country, conjures up very painful memories of a brutal system of colonialism and institutionalised racism. It is offensive to the majority of people of our country, who have made a ringing rejection of that ugly and racist episode in our history. The ideology behind that flag is indubitably racist and

¹⁴ (2008) 29 ILJ 1707 (LAC); [2008] 6 BLLR 540 (LAC) at para 17.

¹⁵ (1997) 18 ILJ 380 (LC).

¹⁶ (2000) 21 IJL 1739 (LAC).

bigoted. It certainly has no place in an open and democratic society like ours, premised on the foundational values of human dignity, equality and human rights.

Order

[45] In the result the order that I make is the following:

1. The appeal succeeds;
2. The order of the Labour Court is set aside and its stead the following is substituted:
 - '1. The order made by this Court on 15 August 2012, and the judgment handed down by this Court on 12 February 2013, are hereby, respectively rescinded in terms of section 165 of the Labour Relations Act 66 of 1995;
 2. There is no order as to the costs of the application.'
3. There is no costs order with regard to the costs of appeal.

T.M. Makgoka AJA

Tlaletsi DJP and Musi JA concur in the judgment of Makgoka AJA

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