

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO 374/89

DA GAMA TEXTILE COMPANY LIMITED

APPELLANT

AND

PENROSE NTLONTI AND EIGHTY-SIX OTHERS

RESPONDENTS

CORAM: HOEXTER, HEFER, FRIEDMAN, GOLDSTONE JJA, et

PREISS AJA.

DATE HEARD: 3 May 1991

DATE DELIVERED: 17 May 1991

J U D G M E N T

GOLDSTONE JA

The eighty-seven respondents were employees of the appellant, Da Gama Textile Company Limited ("Da Gama"). Between 1 and 10 October 1985 the appellants together with other co-employees were dismissed by Da Gama. The reason for their dismissals was their participation in a work stay-away on 26 and 27 September 1985. The respondents declared a dispute with Da Gama and on 29 November 1985 they applied to the Minister of Manpower and of Public Works ("the Minister") under section 35 of the Labour Relations Act 28

of 1956 ("the Act") for the establishment of a conciliation board. The application was refused by the Minister at the end of February 1986. One of the reasons for the refusal was that the Minister regarded the application as having been made only by an individual employee, Mr Penrose Ntlonti (the first respondent). Although Ntlonti had intended to make the application on behalf of all of the respondents, the statutory form of application inadvertently reflected him as the sole applicant. It was consequently decided to file another application in which all of the respondents were reflected as applicants for the establishment of a conciliation board. That application was filed with the Minister on 6 May 1986. On 4 May 1987 the Minister refused it.

By notice of motion dated 10 August 1987 the respondents approached the Court a quo, in terms of Rule 53 of the Uniform Rules of Court, for the review of the

Minister's decision. The Minister was cited as the first respondent and Da Gama as the second respondent. The Court a quo was requested to set aside the decision of the Minister and to substitute for it a decision establishing a conciliation board or, alternatively, to grant an order referring the application back to the Minister to be considered by him afresh. The Minister did not oppose the application. In compliance with the provisions of Rule 53 he dispatched to the Registrar of the Court a quo the record of the application under section 35 of the Act together with the reasons for his decision. In a short affidavit the Minister stated that he would abide the decision of the Court. The application was opposed by Da Gama. In due course the review application came before Mullins and Kroon JJ in the Eastern Cape Division. They found in favour of the respondents and issued the following order:

- "(a) The decision of first respondent refusing applicants' application for the establishment of a conciliation board is set aside.
- (b) There is substituted for the first respondent's decision an order approving the establishment of a conciliation board in respect of the disputes raised in the application dated 13 April 1986.
- (c) The matter is remitted to the first respondent to cause any further necessary steps to be taken in terms of section 35 of Act 28 of 1956.
- (d) Second respondent is ordered to pay such costs as were occasioned by its opposition to these proceedings."

With leave of the Court a quo Da Gama appealed to this Court against that order.

In his reasons the Minister referred to eight formal defects in the respondents' application under section 35 of the Act. These notwithstanding, the Minister proceeded to consider the merits of the application. He found that the six alleged unfair labour practices relied

upon by the respondents in having declared their dispute with Da Gama had not been established. He also held that it was not expedient to establish a conciliation board.

In the Court a quo there were also a number of technical points relied on by Da Gama. They were dismissed and wisely not pressed upon us in this Court. On behalf of Da Gama only one issue was raised, viz the nature of the enquiry which the Minister was enjoined to make in considering an application under section 35 of the Act and, in particular, where unfair labour practices were relied upon. That section was substantially amended by the provisions of section 9 of Act 83 of 1988. In this appeal, however, we are concerned with the provisions of the Act as they read prior to their amendment. The provisions of subsection (4) of section 35 are relevant for present purposes and in particular the following portion thereof:

"(4) If after considering the application and any representations submitted to him by the other party or parties to the dispute ... and any other matters which he considers relevant, the Minister is satisfied -

(a) that, except in the case of an alleged unfair labour practice, a dispute exists in regard to any matter concerning the relationship between employer and employee; ...

he may, if he deems it expedient to do so ... or in the case of a dispute concerning, in the Minister's opinion, an unfair labour practice, he shall, subject to the provisions of this section, approve of the establishment of a conciliation board and cause the necessary steps thereto to be taken."

It follows from those provisions that if in the Minister's opinion the dispute concerns an unfair labour

practice he has no discretion and is obliged to establish a conciliation board. Where he is of opinion that the dispute does not concern an unfair labour practice he has a discretion. He may establish a conciliation board if he deems it expedient to do so.

It appears from the reasons furnished by the Minister that he understood the provisions of section 35(4) as entitling and obliging him to resolve factual disputes relating to the proof of the labour practices alleged by the respondents. Only if he made a finding in their favour was he required to determine whether those practices amounted to "unfair labour practices" as defined in section 1 of the Act. The Minister, in his reasons, said:

"Consequently I have to be of the opinion that an unfair labour practice is in fact being followed by the employer and not merely an alleged unfair labour practice as is the case when the Industrial Court grants a status quo order in terms of section 43."

After considering the representations of the respondents and Da Gama respectively the Minister concluded that:

"The various allegations of unfair labour practices which were made by the applicant were considered by me and after considering the statements made by both parties I concluded that none of the Company's actions could be regarded as unfair labour practices. In view of my conclusion in this regard I was not obliged to approve of the establishment of a conciliation board but had to consider whether or not the establishment of such a board would be expedient."

In deciding whether it was expedient to establish a conciliation board the Minister again made findings of fact against the respondents. For example, he held that:

"In my opinion therefore the employees had acted in an improper manner which had to a great extent contributed to the confrontation between the

parties. In my opinion it is not expedient to establish a conciliation board in respect of a dispute which resulted largely from the improper actions of an employee."

In delivering the judgment of the Court a quo, Mullins J held that the Minister had misdirected himself in making factual findings on issues which were in dispute and then deciding, on the facts found by him, that the respondents had not established that there were disputes concerning unfair labour practices. He said that:

"Had he not erred, he would, in my view, in the light of the subject matter of the dispute, and the definition in the Act of 'unfair labour practice', inevitably have formed the opinion that the disputes raised on the papers concerned unfair labour practices, which finding would have required him to grant the application for the establishment of a conciliation board."

In this Court, counsel for Da Gama supported the

approach of the Minister, ie that the provisions of section 35(4) obliged him to determine conflicts of fact in order to form an opinion as to whether a dispute concerned an unfair labour practice. He submitted that the legislature could not have intended that a Cabinet Minister be required merely to form an opinion on so simple an issue as to whether or not the subject matter of a dispute relates to an unfair labour practice as defined in section 1 of the Act.

In deciding what is meant by the words "a dispute concerning, in the Minister's opinion, an unfair labour practice", regard should be had to the scheme of the Act and the place of section 35 in that scheme. The clear intention of the legislature is that labour disputes concerning unfair labour practices should, if possible, be settled by agreement between the parties in dispute. Where there is an industrial council having jurisdiction in respect of the dispute that is the body which, in the first

instance, is obliged to endeavour to settle it. If there is no industrial council having jurisdiction, the Minister may establish a conciliation board and that body is obliged to endeavour to settle the dispute. If the industrial council or the conciliation board, as the case may be, fails to settle the dispute, then the industrial court must be approached to do so. Section 46(9) of the Act, (prior to its substitution by section 17(g) of Act 83 of 1988) provided that a dispute concerning an unfair labour practice was to be referred to the industrial court for determination if an industrial council had jurisdiction in respect thereof and failed to settle it within the time specified, or if the dispute was referred to a conciliation board and it failed to settle it within the time specified.

It follows that the first stage in the process of settling a dispute concerning an unfair labour practice is the reference thereof to an industrial council and, if there

is not one having jurisdiction, to a conciliation board. Only if that reference fails to bring about a settlement, is the dispute to be referred for determination by the industrial court.

It is in section 35 of the Act that there are to be found the provisions governing the Minister's approval for the establishment of a conciliation board. As one would expect, he may only so approve where there is no industrial council having jurisdiction in respect of the matter in dispute: section 35(4)(b). If the Minister is satisfied that a dispute exists in regard to any matter concerning the relationship between employer and employee and it is not a dispute concerning an alleged unfair labour practice, he may approve of the establishment of a conciliation board if he deems it expedient to do so. In the case of a dispute concerning, in the Minister's opinion, an unfair labour practice he shall approve of the

conciliation board.

In the context of those provisions it would be quite purposeless for the Minister to determine the merits of a dispute concerning an unfair labour practice. In the express words of section 46(9), that is the function of the industrial court. Furthermore, such a determination by the Minister would be particularly inappropriate, if in favour of an applicant, prior to the conciliation process by a conciliation board. And, if adverse to an applicant, that would for ever preclude the industrial court from becoming seized of the matter. Then, too, there would be the anomaly that if an industrial council has jurisdiction the Minister would not be called upon to determine such a dispute: yet, where there is no such industrial council, the Minister would be called upon to determine the dispute prior to approving the establishment of a conciliation board. That anomaly could not have been contemplated by

the legislature.

It follows, in my judgment, that the opinion which the Minister is called upon to form, in terms of section 35(4), concerns the existence of a dispute, the subject-matter of which is an unfair labour practice as defined in section 1 of the Act. He is not called upon or entitled, in forming that opinion, to consider or determine factual or legal disputes between the parties. This conclusion, in harmony with the scheme of the Act, is also consistent with the language of the section.

Counsel for Da Gama accepted that in the present case the disputes, or at least some of them, concerned or related to unfair labour practices; and he conceded that if the Minister was not entitled to determine the merits of the disputes the order of the Court a quo should stand.

In the result the appeal is dismissed with costs.

A handwritten signature in dark ink, appearing to read "R. J. Goldstone", is written over a horizontal line.

R J GOLDSTONE

JUDGE OF APPEAL

HOEXTER	JA)	
HEFER	JA)	
FRIEDMAN	JA)	CONCUR
PREISS	AJA)	