

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: PR 166/15

In the matter between:

NATIONAL UNION METALWORKERS OF SOUTH AFRICA

Obo MZWANDILE JAMA

Applicant

and

TRANSNET ENGINEERING UITENHAGE

First Respondent

COMMISSION FOR CONCILIATION

Second Respondent

AND ARBITRATION

GERALDINE MASUNUNGURE

Third Respondent

Delivered: 15 December 2017

JUDGMENT

MAHOSI AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("LRA") for an order to review and set aside a jurisdictional ruling ("the ruling") issued by the third respondent ("the commissioner") dated 12th of August 2015, under case number ECPE 153-15 in which she ruled that the second respondent ("the CCMA")

lacked jurisdiction to entertain the dispute concerning the dismissal of Mr. Jama ("the employee") by the first respondent.

Background

[2] The first respondent employed the employee from March 2012 as a welder and his salary was R13 036 per month. On the 12th of December 2014, the employee was dismissed after being found guilty of the following charges:

'Gross insubordination:

1. That you in your capacity as the employee of TE on 17 November 2014 at approximately 10:00 you defied a verbal reasonable and lawful instruction from management not to wear your NUMSA T-shirt upon return from the strike as it is not allowed.
2. That you in your capacity as an employee of TE on 13 November 2014 while signing an undertaking with Transnet, you tampered with an official document lay-out by scratching out clauses 1 and 3 of the undertaking, certain clauses without Transnet's permission to do so.
3. That in your capacity as an employee of TE on 26 November 2014 at approximately 10:00 despite being warned several times, you again defied a verbal reasonable and lawful instruction from management not to wear your NUMSA t-shirt upon return from the strike as it is not allowed.¹

[3] Subsequent to his dismissal, the employee referred a dismissal dispute to the CCMA. The dispute was conciliated unsuccessfully and, as a result, a certificate of non-resolution was issued. On the certificate of non-resolution, the conciliating commissioner classified the dispute as an unfair dismissal relating to misconduct and further indicated that the dispute could be referred to the CCMA for arbitration. The matter was duly referred for arbitration with the issue in dispute being described as *"alleged gross insubordination, defied a verbal reasonable and lawful instruction not to wear NUMSA T-shirt upon return from strike. Dismissal while on legitimate sick leave. Dismissal for strike-related undertaking"*² The relief sought was retrospective reinstatement.

[4] The matter was set down for arbitration and after hearing evidence from both parties, the commissioner issued a jurisdictional ruling in which she found that the CCMA lacked jurisdiction to entertain the dispute. The commissioner directed the applicants to refer the matter to the Labour Court for adjudication. It is this ruling that the applicant seeks to review.

Arbitration proceedings and the ruling

[5] In her ruling, the commissioner stated the reasons she decided to determine the CCMA's jurisdiction. The basis for the commissioner's decision is encapsulated in the following passages of her award:³

'3. It is necessary to note that this matter-was set down for arbitration. The applicant referred an unfair dismissal dispute on the basis of alleged *"Gross insubordination in that he defied a reasonable and*

¹ Index-Record (Part 2), Arbitration Bundle, page 145.

² Index-Record (Part1), Arbitration Bundle page 11.

³ Index: Pleadings pages 10-11.

lawful instruction from management not to wear NUMSA T-shirt on return from strike." The matter was initially sent down on 18 May 2015 at which at the onset of the proceedings the arguments led had been with regard to the discriminatory practices of the Respondent, however they had been retracted by the union confining themselves primarily to the issue of misconduct as the underlying reason for dismissal.

4. Despite the numerous efforts of the parties to restrict the scope of the dispute to s186(1) of the LRA, the applicant submitted evidence that the underlying reason for the dismissal was not because of gross insubordination but because of the fact of his union affiliation. The applicant further submitted that the respondent had treated him differently from other employees. The applicant contends there was in actual fact no misconduct that took place but this was pure case of discrimination.

5. On this basis I now tend to the question of whether CCMA has jurisdiction to entertain this dispute.'

[6] In her analysis, the commissioner noted that it was common cause that the applicant was dismissed for refusing to remove a NUMSA T-shirt though other employees could wear their T-Shirts, that the applicant belonged to NUMSA and that NUMSA and the respondent had a strained relationship. The commissioner found that the applicant's dispute falls within the ambit of section 187(1)(f) on the basis of the applicant's submission that his union affiliation was the primary reason for his dismissal. The commissioner further found that the applicant pleaded that he was treated differently from other employees by the respondent due to his union affiliation. It was for this

reason that the commissioner concluded that the CCMA lacks jurisdiction to hear the dispute. Dissatisfied with the ruling, the applicant launched a review application.

Grounds of Review

[7] The applicant's ground of, review is that the commissioner's ruling is not justified by facts before her and further that it is not in accordance with the law. It is the applicant's submission that the proximate cause and reason for the employee's dismissal is the alleged breach of a workplace rule and further that the dispute related to misconduct in terms of section 191(5)(a)(i) and not an automatically unfair dismissal in terms of section 187(1)(f) as held by the commissioner in her award.

[8] The first respondent contended that the commissioner's findings were supported by evidence led at the arbitration hearing as the employee testified that he was dismissed for wearing a NUMSA T-shirt and that this was discriminatory.

The test for review and evaluation

[9] The test for review applications based on jurisdictional error is well established and has been stated in numerous cases of this Court and the Labour Appeal Court as correctness. In *SA Rugby Players' Association v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*,⁴ the LAC held as follows:

'...The issue was simply whether, objectively speaking, the facts which

would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contract.'

[10] The applicant has to establish that the commissioner's decision was objectively wrong. In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others*,⁵ the court held as follows:

'In my view where the power to be exercised is statutory, the answer to the question of what the jurisdictional fact(s) is'(are) which must exist before such power can be exercised lies within the four corners of the statute providing for such power. Accordingly the provisions of such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are). In the light of this I consider it necessary to have regard to the provisions of the Act to determine what the necessary jurisdictional fact(s) is (are) which must exist in a case such as this one before it can be arbitrated or adjudicated in terms of the Act.'

[11] In this case, the applicant referred an unfair dismissal dispute related to misconduct.' The referral of dismissal disputes to arbitration or adjudication is regulated by Section 191 of the LRA, which provides as follows:

'(1)(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 within to-

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

⁴ [2008] 9 BLLR 845 (LAC) at para 41.

⁵ [2000] 12 BLLR 1389 (LAC) at para 7.

- (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.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer

(4) The council or Commission must attempt to resolve the dispute through conciliation.

(5) 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 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 197 A, 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...'

[12] It is a now a set rule that the council or the commission must attempt to resolve the dispute through conciliation. 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, the council or the commission must arbitrate the

dispute. For the CCMA to have jurisdiction to arbitrate the dispute relating to dismissal, at least the following facts must be established:

- a) reason for dismissal relates to the employee's conduct or capacity.
- b) 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.
- c) the reason for dismissal is unknown.
- d) the dispute concerns an unfair labour practice.

[13] It follows that the CCMA will have jurisdiction to arbitrate the dismissal disputes where the above listed facts are present provided the conciliation period has elapsed or the certificate was issued and the referral was valid and timeous. In *Solid Doors (Pty) Ltd v Commissioner Theron and Others*,⁶ the court stated that "a tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that the state of affairs does exist." This was confirmed in *SA Rugby Players Association (SARPA) and Others v SA Rugby (Pty) Ltd and Another*⁷ where it was stated as follows:

'The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA a jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.'⁸

⁶ (2004) 25 ILJ 2337 (LAC) at para 29.

⁷ [2008] 9 BLLR 845 (LAC).

⁸ At para 33

[14] In essence, the jurisdictional facts must be in existence for the CCMA to have jurisdiction. I will now assess whether the CCMA, through the commissioner, exercised the powers provided to it by the LRA.

Error of fact and law

[15] It is common cause that when the applicant referred the dispute to the CCMA, it described the dispute as being about unfair dismissal due to alleged misconduct. The certificate of non-resolution in respect of the conciliation also described the dispute as such. At the beginning of the arbitration hearing, the applicant through its official Mr. Kosane, submitted the following opening statement:⁹

'OPENING STATEMENT: Thank you Madam Commissioner. The applicant was dismissed for the alleged gross insubordination in that it is alleged that he refused or defied a verbal, reasonable and lawful instruction and it is the Applicant's case that he never refused any reasonable and lawful instruction and the Applicant's will further testify that he had no knowledge of the existence of a rule or policy that gave rise to such allegation. Further to that he will testify that the time of his dismissal he was on legitimate sick leave and the company has been notified. He will further testify that she had good intentions when he scratched off the clause that he did not agree with the undertaking of the strike. He will further testify that company acted inconsistently in that regard. The applicant will also testify that he made the request numerous times to request the policy that prohibits him from wearing a NUMSA T-shirt and such was never provided to him. Applicant will lastly testify that he was victimised as he was not the only one wearing NUMSA T-shirts of an unrecognised trade union. The relief sought Madam Commissioner is

retrospectively reinstatement.'

[16] Mr. Kosana submitted that the only reason it was mentioned that the employee was wearing NUMSA t-shirt was that the shirt was identified in those terms in the charges. In its opening statement, the first respondent through its representative Mr. Louw, submitted that it would lead evidence to show that the employee was sufficiently notified about the hearing, that they were not aware about the employee's sick leave and that the employee refused to comply with a reasonable instruction on two occasions. Mr, Louw concluded by submitting that the employee was not victimised and that he was singled out for discipline because he was the only employee who refused to remove his NUMSA t-shirt after the strike.¹⁰ Mr. Louw further submitted that the first respondent was consistent in applying its rules, as there was a certain employee who was dismissed for wearing a NUMSA t-shirt.¹¹ From the first respondent's perspective, the reason for the employee's dismissal was that he refused to comply with the first respondent's health and safety policy by wearing non-regulation apparel.¹²

[17] Although the applicant referred the dismissal dispute that related to misconduct, it also claimed the employee was victimised as he was not the only one who was wearing the NUMSA t-shirt. After the reference to victimisation, the commissioner immediately sought clarity from the parties on the nature of the dispute. This is evident from the record where the commissioner stated as follow:¹³

'COMMISSIONER: Right, thanks so much the Respondent. Before I

⁹ Page 5 of the transcribed record, line 5 -24

¹⁰ Transcript pages 201-21

¹¹ Page 6 - 7 of the transcribed record,

¹² Transcript 137 -138

¹³ Page 7 of the transcribed record, line 3-19

proceed, (indistinct) for both parties, when we delve into the realm of victimisation we will basically delving into a discrimination dispute, so just to understand, are you saying the dismissal is linked to discrimination, or are you saying it is purely a misconduct case? Why I ask is the mote it is linked to discrimination then it becomes AUD, which is an Automatically Unfair Dismissal, then we talk about (indistinct) for the record and asking on record, since if you lead evidence on it then I will have to make a ruling to the Labour Court, if it is a [dramatically] unfair dismissal.

MR LOUW: Madam Commissioner, with that noted, the dispute relates to misconduct.

[18]. It is trite that the commission was not bound by the parties' description of the dispute. The commissioner was obliged to examine all the facts to ascertain the real dispute between the parties.¹⁴ Rule 22 of the Rules of CCMA provides as follows:

'If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the Commissioner must require the referring party to prove that the Commissioner has jurisdiction to arbitrate the dispute'

[19] In this case, the commissioner allowed the parties to lead their evidence after confirmation from Mr. Louw that the dispute related to misconduct.¹⁵ In *Wardlaw v Supreme Moulding (Pty) Limited*¹⁶ the LAC held as follows:

..'[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(S)(b) and the Court does not at any stage

¹⁴ Zeuna-Starker BOP (Pty) Ltd v NUMSA [1998] 11 BLLR 1110 (LAC) at para 6.

¹⁵ Page 7 of the transcribed record, line 15 -16

¹⁶ 2007] 6 BLLR 487 (LAC).

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 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.' [own emphasis]

[20]. This approach was subsequently confirmed by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*¹⁷ where the court stated as follows:

‘Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The

informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.¹⁸[Footnotes omitted]

[21]. Mr. Strydom, the first respondent's operational manager, testified that he gave an instruction to the employee to put a jacket over his t-shirt. The employee allegedly questioned Mr. Strydom's authority by asking him who he was to give him such an instruction.¹⁹ Mr. Strydom further testified on the existence of the uniform and protective clothing policy which requires the employees to wear the protective clothes at all times. To demonstrate the importance of the rule, Mr Strydom stated as follows:

'MR STRYDOM: If you, if you are a welder and you (are) welding without an overall jacket and gloves, (the) sparks and pieces of melting metal can fall on your arms. You can (get) severe burns.'²⁰

[22]. Under cross-examination, Mr Strydom stated that he had instructed a number of employees who were wearing different kinds of t-shirts to put overalls over their t-shirts, because they were flame cutting. Mr. Strydom testified that only the employee refused to take his instruction.²¹

[23]. Mr. Arnold Raiden, the acting operations manager, testified that the first respondent did not take issue with NUMSA t-shirt but all employees were required to wear the Transnet clothing.²² Mr. Khosoni, who testified for the applicant, did not testify that the employee was victimised because

¹⁸ At para 64-65.

¹⁹ Transcript page 220 line 19-25

²⁰ Transcript page 226 line 4-6

²¹ Transcript page 338 line 14 to page 339 line 1

²² Transcript page 414 line 16-24

he was a NUMSA's member and this proposition was not put to him during cross-examination.²³

[24]. The employee testified that he was unaware of any policy that prohibited the wearing of NUMSA t-shirt.²⁴ During the cross-examination, Mr Louw questioned the employee on the relevance of photos that formed part of the documents submitted at the beginning of the arbitration. Mr Kosani objected on the basis that the employee knew nothing about the pictures as they were taken after he was dismissed and further that he did not give evidence on the said pictures. The commissioner dismissed the objection and allowed Mr Louw to continue with cross-examination. The cross-examination focussed on the relevance of the pictures of employees wearing other t-shirts and whether the employee was dismissed for not wearing protective clothing or for wearing NUMSA t-shirt. The employee was then asked the following questions:

'MR LOUW: Now, what... [Laughter]. Now what I also want to determine with you Sir, is then when - when you fi... These documents were... When B1 was then introduced when you saw it, and you say you knew the intention why it was - it was brought here.

MR. JAMA: I was shown the pictures and I was told that there are still people that are wearing the-the-the t-shirts. That shows to me that I was not dismissed for protective clothing. I was wearing for... I was dismissed for NUMSA t-shirt, like it's written on the charge sheet.

MR LOUW: And you believe that... because your evidence is this that shows that: "I was dismissed for... I was-I was not dismissed for not wearing protective

²³ Commissioner's typed handwritten notes at pages 78-90

²⁴ Commissioner's typed handwritten notes at pages 98

clothing, but for wearing a NUMSA t-shirt”?

MR JAMA: Yes. Yes.

MR LOUW: And do you... Did... Is it your evidence or do you believe then because you were dismissed, according to your evidence now, because you were dismissed for wearing a NUMSA t-shirt, it is grossly unfair?

MR JAMA: Yes, it is.

MR LOUW: And you don't believe that you were dismissed for not wearing or complying with protective clothing. You don't believe that?

MR JAMA: Yes, it is.

MR LOUW: Now since your answer is yes Mr Jama, would you then also feel that the Employer discriminated against you for wearing -for being dismissed for wearing a NUMSA t-shirt, whereas others are not dismissed?

MR JAMA: Yes, it is

MR Louw: You see, so Mr Jama can confirm that's your defence basically? I can confirm that's your defence to say "I feel, number one, that I was dismissed for wearing NUMSA t-shirt, which is unfair; number two, I was discriminated upon". So that's your defence?

MR JAMA: Yes.

[25]. Immediately after the above exchange, the commissioner made the following remarks:

'COMMISSIONER: You see, with this . . . Let me just interject. You see with this evidence, the moment you lead this evidence and I am not interjecting to say that the evidence is wrong or anything like that. But the moment an applicant submits evidence on record that the primary reason for dismissal is discrimination, then it becomes an AUD. Then it goes on CCMA jurisdiction because then it is an unfair dismissal based on discrimination.'

MR LOUW: Because it - it... I primarily rely on – on the real nature of the dispute. So if the main argument of the Applicant is: "My real reason for dismissal is not because of the gross insubordination but it is because of differential treatment based... This one will be on a listed ground. We can say Union affiliation. Then it becomes automatically unfair dismissal.²⁵

[26]. It was at this point when Mr. Louw made a submission that the commissioner should adjourn the arbitration hearing to allow the parties to argue the jurisdictional issue. The commissioner then switched off the record and he switched it on again to give the following ruling:

'COMMISSIONER:...Gentlemen, based on the evidence that the Applicant has just given us on record, that he believes that the real reason for his dismissal is not concerning the issue of misconduct but it is primarily in relation to the fact there's differential treatment between him and other employees, based on a listed ground, which is union affiliation and that being the primary reason for dismissal.

Then that means his submissions are that there's been discrimination. So that falls under automatically unfair dismissal in terms of section 187 of the Labour Relations Act. Therefore the CCMA lacks jurisdiction to deal with this dismissal. The matter must then be referred to the correct forum, which is the Labour Court. You will have the ruling from me within the next fourteen days. even sooner, so that the applicant can refer the matter timeously to the Labour Court.' ²⁶

[27] Having read the record, I agree with the applicant's submission that drawing from the exchange above, as the commissioner did, the conclusion that the true reason for the employee's dismissal was alleged victimisation, flies in the face of the evidence from the witnesses of both parties. The evidence before the commissioner was that the employee was dismissed for disobeying an instruction and for tampering with an official form. By stating that he believed that he was discriminated against, the employee was expressing his opinion. The commissioner was not bound by this opinion. Instead, the commissioner was required to ascertain the real dispute between the parties taking all the facts into consideration, including the description of the nature of the dispute, the outcome requested by the applicant and the evidence presented during the arbitration.

[28] In *NUMSA obo Sinuku v Powertech Transformers*,²⁷ the LAC overturned the judgment of this Court in which it was found that a theme running through the employee's evidence was that he had been victimised because he and the supervisor belonged to different unions. The LAC found that there is no absolute rule that arbitrators must halt arbitration proceedings the moment a possibility arises that the dispute might concern a matter that should be

²⁵ Transcribed record vol. 2 page 22 line 5-21.

²⁶ Transcribed record vol. 2 page 23 line 17 to page 24 line 1-7.

²⁷ [2014] 2 BLLR 133 (LAC).

referred to the Labour Court. In the above judgment, the LAC clarified the Labour Court 's jurisdiction as dealt with in *Wardlaw* and stated as follows:

[20] What is clear from *Wardlaw* is that a two stage process in the adjudication before the Labour Court was not necessarily being advocated. The Labour Court assumes jurisdiction on the basis of what the employee alleges the reason for the dismissal to be - but if it later becomes 'apparent' to the court that the reason for the dismissal is a different one and one in respect of which it does not have jurisdiction, the Labour Court should not adjudicate the merits of the dispute, but allow the matter to be referred to the right forum with jurisdiction in order for that forum to determine the merits of the dispute. In *Wardlaw*, this Court did not exclude the possibility that the true nature of the dispute may only become apparent once all the evidence has been led and the court has considered it. Generally, this is the time when the court will become aware of the true nature of the dispute. However, in *Wardlaw*, this Court also did not exclude the possibility that the true nature of the dispute may also become apparent earlier, i.e. before all the evidence is led. An example that readily comes to mind is if the issue of jurisdiction and the true nature of the dispute is separated from the merits of the dispute and raised at the outset of the proceedings, requiring the court to determine those issues on the evidential material available, or presented during that phase of the proceedings.

[21] There is no valid reason why the procedure that applies in the Labour Court does not also apply in arbitrations conducted in terms of, or under the Act. In my view, the court *a quo* erred insofar as it implied that the second respondent should have stopped the proceedings the minute when statements were made during the cross-examination of Sinuko

suggesting that he was being victimised because of his union affiliation. This most certainly cannot be said to have been the moment when the true nature of the dispute became 'apparent'. At no stage before the statement was made during the cross-examination did either the appellant, or Sinuko, or the first (or any of the respondents) allege, or suggest, that the reason for the dismissal was victimisation, neither did any of them raise an issue concerning the jurisdiction of the second, or third, respondent.'

[29] In this case, right at the beginning of the arbitration, the commissioner sought clarity from the parties on the true nature of the dispute. It was the first respondent; through Mr. Louw, who confirmed that the dispute related to misconduct. It is vital to mention that the description of the nature of the dispute was not in dispute at the conciliation and arbitration hearings. In addition, both parties did not raise the issue of jurisdiction. It was only after the employee's cross-examination that Mr. Louw requested that the matter be adjourned for the parties to argue the jurisdictional issue.

[30] It is my view that there is merit in the applicant's submission that the first respondent acted opportunistically by seizing on the employee's opinion to claim that the CCMA lacked jurisdiction. It is clear from the first respondent's evidence that had the applicant referred the dispute to the Labour Court, as directed by the commissioner, the first respondent would dispute that it victimised the employee. This could result in the employee having no choice but to shop from one forum to the other for his dispute to be resolved, resulting in an outcome that defeats the purpose of the LRA.

[31] The applicant submitted that its claim that the employee was dismissed for wearing a NUMSA T-shirt while no disciplinary action was taken against members of other unions, could serve as a basis for the contention that the

first respondent had applied discipline selectively and inconsistently. This is a fair supposition. The commissioner attached more significance in the employee's reference to victimisation and in so doing he committed an error. It is apparent that the employee was not merely dismissed for wearing a NUMSA T-shirt. The reason for his dismissal was that he twice refused to take an instruction to change into his protective clothing.

[32] The applicant further submitted that the commissioner erred by assuming that the claim for victimisation brought the dispute within the scope of section 187(1)(f) and section 191(5)(b){l} because the wearing of union apparel is not in itself a right contemplated by section 5 of the LRA. In his analysis, the commissioner found that the employee's dismissal falls within the ambit of section 187(1)(f). The basis for his finding was the applicant's submission that the employee's union affiliation was the primary reason for his dismissal and further that it resulted in him being treated differently from other employees.

[33] Section 187(1)(f) provides that a dismissal is automatically unfair if an employer, in dismissing the employee, acts contrary to section 5 of the LRA or, if the reason for dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. Section 5 of the LRA provides as follows:

'5. Protection of employees and persons seeking employment

(1). No person may discriminate against an employee for exercising any right conferred by this Act.

(2). Without limiting the general protection conferred (1), no person may do, or threaten to do, any of the following -

- (a) require an employee or a person seeking employment
 - (i) not to be a member of a trade union or workplace forum;
 - (ii) not to become member of a trade union or workplace forum; or
- (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
- (c) prejudice an employee or a person seeking employment because of ~~past~~ present or anticipated-
 - (i) membership of a trade union or workplace forum;
 - (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum
 - (iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
 - (iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
 - (v) disclosure of information that the employee is lawfully entitled required to give to another person;
 - (vi) exercise of any right conferred by this Act; or

(vii)

participation in any proceedings in terms of this

Act.

(3). No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

(4). A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid unless the contractual provision is permitted by this Act.'

[34] The employee's refusal to obey a reasonable and law instruction is an act of insubordination. Similarly, an authorised alteration of an official document is an act of misconduct that has nothing to do with union affiliation. It is evident from the record that the employee was not dismissed for wearing a NUMSA t-shirt or for participating in the activities of the union. There is further no evidence that the employee was singled out for dismissal solely because he was a union member. It is clear from the record that none of the acts prescribed by section 5 applies in this case. This matter could, therefore, not have been brought within the scope of this section.

[35] Although the word victimisation was mentioned by the applicant, the commissioner should have established whether the facts which would give the CCMA jurisdiction' to entertain the dispute existed. The commissioner

should not have stopped the proceedings after the employee gave his opinion during cross-examination. In this case, the true nature of the dispute became "apparent" at the beginning of the arbitration hearing when the parties both confirmed to the commissioner that the dispute related to a dismissal for an alleged misconduct, not during the employee's cross-examination. As such, the commissioner erred in failing to ascertain the true nature of the dispute before her and in finding that the CCMA lacked jurisdiction to arbitrate the employee's dismissal dispute.

[36] In view of the fact that there was no decision made on the merits of the dismissal dispute, it is appropriate to remit the matter to the second respondent to be heard by a commissioner other than the third respondent to determine whether the employee's dismissal was substantively and procedurally unfair.²⁸ I have considered the issue of costs and I am of the opinion that the requirement of fairness dictates that there should be no order as to costs.

Order

[37] In the premise, I make the following order:

- a). The jurisdictional ruling issued by the third respondent ("the commissioner") dated 12 August 2015, under case, number ECPE 153-15 is reviewed and set aside.
- b). The second respondent is directed to set down the unfair dismissal dispute referred by the applicant for arbitration to be heard by a commissioner other than the third respondent to determine whether or not the dismissal of the employee was fair.
- c.) There is no order as to costs.

²⁸ See *Builders Warehouse (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (PA 1/14) [2015] ZALAC 13 (5 May 2015) at para 20.

Appearances:

For the Applicant:: Advocate J.G Grogan

Instructed by: Gray Moodliar Attorneys

For the Respondent: Advocate Msizi

Instructed by: Maserumule Inc