

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: D942/98

In the matter between:

**STEEL MINING AND COMMERCIAL
WORKERS UNION**

First Applicant

XULU MOSES AND 23 OTHERS Second and Further Applicants

and

TIGER PLASTICS (PTY) LTD

Respondent

JUDGMENT

JALI AJ

1. This was a referral in terms of section 191(5)(b)(ii) of the Labour Relations Act No 66 of 1995 ("the Act").
2. The respondent has filed a statement of defence in which a point in limine has been raised regarding the lack of jurisdiction of this Court because of the applicant's premature referral of the dispute to the Labour Court. The respondent contends that the matter was referred to the Labour Court before the dispute was conciliated by

the Commission for Conciliation, Mediation and Arbitration ("the CCMA). In the premises the respondent is seeking an order dismissing the application with costs.

3. The facts of the matter as set out in the respondent's statement of defence, which are common cause, are briefly as set out hereinafter. On or about the 15th of September 1998, the first applicant advised the respondent that certain of the respondent's employees had become members of the first applicant. The first applicant demanded that it be accorded organisational rights contained in section 12, 13, 15, 16, 20, 21 and 22 of the Act.
4. On the 15th of September 1998, the respondent advised the first applicant that he would grant the first applicant rights in accordance with the abovementioned sections of the Act.
5. On the 30th of September 1998, the first applicant, on behalf of the second and further applicants, referred a dispute to the CCMA for conciliation. The nature of this dispute was described as "refusal to bargain" and "interpretation or application of organisational rights."
6. On the 2nd of November 1998, a conciliation meeting was held at the CCMA concerning the respondent's alleged refusal to bargain. A certificate of outcome of the dispute referred for conciliation was issued on the 2nd of November 1998 under CCMA reference No KN22392, declaring the dispute unresolved. The issue, as described in the aforesaid certificate, which was to be decided was the refusal

to bargain.

7. On the 9th of November, the first applicant gave notice to the respondents of a pending strike action. (I am not going to go into details about that pending strike action as it is not relevant to this particular dispute before me.)
8. On the 9th of November 1998, the respondent advised the first applicant, amongst others, that as the first applicant had not specified when the strike action was to commence, the contemplated strike would be unprotected. That, subsequently, led to a dispute between the two parties, which dispute was later referred to the CCMA. On the same day, the second and further applicants embarked on a strike.
9. On the 11th of November 1998, the first applicant referred a dispute on behalf of the second and further applicants to the CCMA for conciliation, where the first applicant described the nature of the dispute as "(1) Unfair lock out and (2) Unfair dismissal".
10. In the section dealing with the special features of the dispute in the referral form, that is the LAR7.11, the applicant described its dispute as an unfair lock out, for participating in a legal and protected strike, which led to the dismissal of the employees.
11. On or about the 2nd of December 1998, the first applicant, on behalf of the second and further applicants, referred a dispute to

this Honourable Court, which was the very same dispute which had been referred to the CCMA on the 11th of November 1998.

12. The aforesaid dispute was conciliated by the CCMA on the 22nd of January 1999.

13. Now, I will turn to look at the legal position, Section 191 provides for the procedure in resolving disputes about unfair dismissal. Section 191 provides:

- (1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to:
 - (a) a council if the parties to the dispute fall within the registered scope of that council, or
 - (b) The Commission, if no council has jurisdiction.
- (2)
- (3)
- (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 Commission received the referral and the dispute remains unresolved:
 - (a).....
 - (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reasons for the dismissal is:
 - (i) Automatically unfair,
 - (ii).....
 - (iii) The employee participation in a strike that does not comply with the

provisions of Chapter IV."

14. It is clear from reading the above mentioned provisions that disputes must be referred to the CCMA or an industrial council (if there is one recognised for the industry) first before they are referred to this court. It is only after the CCMA or a council has failed to resolve the dispute and certified to that effect or a period of 30 days has expired since the referral that it can be referred to the Court. I agree with the applicant that the Labour Court can only adjudicate after a dispute has been conciliated by the CCMA or a council. The only other exception being where a period of 30 days had expired since the referral to the CCMA or council.
15. Section 1(d) of the Act states that the purpose of this Act is to advance a economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of this Act which are to promote, amongst others, orderly collective bargaining and the effective resolution of labour disputes. (See Section 1(d)(i)(iv)). In interpreting the Act, it is of significance to try and give effect to the primary objects of The Act. See section 3(a) of the Act.
16. In the interpretation of the Act, one should also avoid an overly technical approach, which would lead to an absurd situation. On the other hand, the Legislature, in promulgating the conciliation provisions in the Act, it anticipated that the parties would approach the CCMA and endeavour to resolve their disputes through

conciliation and not merely to go through the motions in doing so. Ignoring the provisions of the Act and coming straight to the Labour Court might make applicants ignore the CCMA, which is an integral and significant component of the dispute resolution mechanism which is set out in terms of the Act. This Court should not encourage such behaviour as it does have its own negative consequences. Section 1(d)(iv) refers to an effective dispute resolution. Effective dispute resolution does not mean that the procedural steps set out by the Act should be ignored for it to be effective, otherwise it would lead to an absurd situation, where other litigants would be following the procedures and others would not. I have no doubt in my mind that most, if not all, employees who refer their disputes to the CCMA would like to see them resolved as soon as possible. However they become patient, waiting for their turn in the queue before their disputes are before commissioners to be conciliated, thereafter are referred to the Labour Court or Arbitration, as the case might be. Under those circumstances, it is unacceptable for other employees to ignore all the above provisions of the Act and just come straight to the Labour Court.

17. The Labour Court has, previously, expressed unhappiness about people who fail to follow procedures in bringing matters to this court. In Chemical Workers Industrial Union v Darmag Industries (Pty) Ltd, case No P42/98, an unreported judgment of REVELAS J, the Labour Court held that a prematurely conciliated dispute had to be referred back to the CCMA. This matter also confirms the views of the Court with regard to litigants

who are not following the proper procedures in referring matters to this Court.

18. During argument, Mr Denny referred me to the Labour Relations Act of 1995, a comprehensive guide (2nd Edition) written by du Toit, Woolfrey and Others at page 354. I had an opportunity to look at page 354 which he said was the authority for the proposition that the Court has granted orders prior to the matter being conciliated or arbitrated in exceptional circumstances and upon proof of urgency. I do not believe that the paragraph set out therein bears any relevance to this particular matter, as it refers to a Court granting an order. In this case, we are not considering an order which is to be granted by this Court. The matter has not, as yet, reached that stage. In any event, the applicants have not submitted that they did it because of the urgency of the matter.
19. Mr Hlatswayo, in argument, submitted that they were advised to come to the Labour Court by the CCMA because the Respondent had refused to go to the CCMA.. That is the reason why they referred this matter to this court before conciliation. However, I do not agree with Mr Hlatswayo's submission as it is clear that the letter from the CCMA said they should proceed "*as they deem fit in terms of the Labour Relations Act*". They then choose to refer the matter to the Labour Court before conciliation. It is apparent to me, after perusing the court file, that the matter was referred to the CCMA on the 11th of November 1998. On the 19th of November 1998, the applicants applied for a case number to the Registrar of this Court. So I fail to understand how he connects, the CCMA

advice, pursuant upon the refusal by the applicant to attend conciliation, with referring the matter to this court. Conciliation was only held on 26 January 1999. The CCMA in its November letter merely advised the Applicants to exercise their rights in terms of the Act. This was their misguided choice.

20. Furthermore there are provisions within the Act which deal with employers who do not turn up for conciliation hearings. If the Commissioner had thought that the employer might not attend conciliation he would have known what remedy to give at the appropriate time of the conciliation.
21. I have thought about the matter and contemplated about whether any prejudice has been caused by the premature referral. However, what becomes paramount is that this Court has got to express its unhappiness about litigants who do not follow the procedures set out in the Act and the developing tendency amongst litigants of ignoring the CCMA. As I have already indicated, the CCMA is a very important part of the dispute resolution mechanism which is set out in terms of the Act.
22. I have also considered the provisions of Section 158(1) (f) of the Act which provides that “the Labour Court may, subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the court”. It is apparent to me that this particular provision, which is an all encompassing provision with regard to issues of condonation, only refers to the

condonation of a late filing of a document or a late referral to the court. It is accordingly not relevant to this particular case as in this case we are dealing with a premature referral of a dispute to the Labour Court. Accordingly this action cannot be condoned.

23. Now I will turn to consider the question of costs. The respondents have asked for costs, indicating that on more than two previous occasions, the applicants had an opportunity to decide whether to withdraw this matter or to proceed with it, but they chose to come to this court. It is apparent that the respondent's Statement of Defence was filed and served on the other side on or about about 20 January 1999. That should have immediately warned the applicants as there was a point in limine, indicating that the Court didn't have jurisdiction. If they had applied their minds to the matter minimal costs would have been incurred by the respondents if, at that stage, the matter had been withdrawn.
24. Mr Denny also referred to the fact that, subsequent to that, there was a pre-trial hearing in which the same point was, once again, raised but the applicants wanted to persist with this particular application. The applicants once again had an opportunity to reconsider their position. They did not.
25. On the other hand, Mr Hlatswayo submitted the Union was asked by the CCMA to come to the Labour Court. I have already expressed my doubts about the correctness of this statement because it is clear to me that a Commissioner would have known what route the

applicants had to follow. However, I do not intend making a finding as to whether that is correct or not, but I have got my doubts.

26. After considering the provisions of Section 162 of the Act, I am of the opinion this is one matter where the costs should follow the outcome of this matter. The order which I am going to give will be as follows. The special plea is upheld and the applicants claim is dismissed. The applicants are ordered to pay the costs.

JALI A.J.

ON BEHALF OF APPLICANT:

MR T HLATSHWAYO of STEMCWU, Durban

ON BEHALF OF RESPONDENT:

MR D DENNY of Deneys Reitz, Durban

DATE OF HEARING:

25 May 1999

DATE OF JUDGMENT

25 MAY 1999

PLACE OF PROCEEDINGS:

DURBAN