

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

Case No: **J 437/98**

In the matter between:

ABEL MOLEMI & 48 OTHERS

First and Further Applicants

and

HELLMANN PARCEL SYSTEMS (PTY) LTD

Respondent

REASONS

Seady, AJ

[1] The Applicants have referred a dispute about the unfairness of their dismissal to the Labour Court. The Respondent, in its answering statement, raised a point *in limine* concerning this Court's jurisdiction to determine the unfair dismissal dispute. By agreement, the point *in limine* was argued prior to a trial of the merits.

[2] The Respondent submits that this Court has no jurisdiction to determine a dispute concerning the fairness of the dismissals because that dispute was never referred for conciliation as required by section 191 of the Labour Relations Act, 1995 ("the Act").

[3] Section 191(1) states -

"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."

[4] Section 191(5) states -

“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) (ii) applies;
- (ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued employment intolerable; or
- (iii) the *employee* does not know the reason for *dismissal*; 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”.

[5] It was common cause that The National Bargaining Council for the Road Transport Industry (Goods) had jurisdiction within the meaning of subparagraph (a) of section 191(1). Transport and General Workers Union (“the union”) referred a dispute to the Council on 27 January 1999. In the referral form the dispute was described to be about “the no (*sic*) of our members who are to be retrenched, outsourcing the depts (*sic*)

to be affected". The dispute was said to relate to section 64(1) and 134 of the Act. In paragraph 6 of the referral form, the union indicated the desired outcome of the conciliation in the following terms "maintenance of the depts (*sic*) to be outsourced by the respondent with the ultimate goal of avoiding the retrenchments". Paragraph 5 records that the dispute arose on 15 January 1997.

[6] The Council arranged a conciliation meeting for 27 February 1997. A representative of the union failed to attend the meeting. The Council issued a certificate indicating that the dispute remained unresolved on 27 February 1997. The certificate described the dispute as one relating to "unilateral change of conditions - section 64(1) and 134".

[7] On 28 February 1997 the Applicants were refused entry to the Respondent's premises. They perceived the Respondent to have engaged in an unprotected lock-out and on 28 February 1997 launched urgent proceedings to interdict that lock-out. After 28 February 1997 they no longer performed any work for the Respondent. The Respondent says that on 28 February 1997 each of the Applicants was given a letter notifying them of the termination of their employment with effect from 14 March 1997. The date of dismissal is not common cause and the Applicants' statement of case is not explicit although it suggests the dismissals took place on 28 February. Respondent argued that the dismissal took place on 28 February or 14 March 1997, depending on how section 190 of the Act is interpreted.

[8] Either way, contends Respondent, the dismissal occurred after the referral of a dispute to the Council (27 January 1997) and after the Council issued a certificate stating that the dispute was unresolved (27 February 1997). This sequence of events was not an issue for the parties in 1997. They continued to try to resolve their dispute. Their efforts led to an agreement that the union would withdraw the urgent proceedings concerning the lock-out and to have the unfair dismissal dispute arbitrated by the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), in terms of section 141 of the

Act. At that stage the parties shared the understanding that conciliation by the Council having failed the fairness of the dismissals (based on the Respondent's operational requirements) was to be adjudicated by the Labour Court, unless they agreed to have it arbitrated by the CCMA. It seems that the Council was not yet accredited to conduct arbitrations in terms of the Act. A copy of their agreement to refer the dispute to arbitration could not be located, but its existence was not in dispute.

[9] The Applicants referred the dispute to the CCMA for arbitration on 30 April 1997. An arbitration was scheduled, but prior to its commencement the CCMA advised the parties, in a letter dated 2 February 1998, that the CCMA had no jurisdiction to arbitrate because it was apparent from the Council's certificate that the dispute referred for conciliation concerned unilateral changes to conditions of employment. This, advised the CCMA, was a dispute of interest, not arbitrable in terms of the Act. The CCMA advised the union to review the certificate if it was unsatisfied with its description of the dispute.

[10] The parties continued to engage in efforts to resolve the unfair dismissal dispute. A mediation process came close to achieving resolution, but the dispute remained unresolved.

[11] On 4 March 1998 the Applicants applied to the Labour Court for a case number and initiated proceedings for retrospective reinstatement. In response to their statement of claim, the Respondent raised, as a point *in limine*, its objections to this Court's jurisdiction given that the dispute about the fairness of the dismissals had not been referred to the Council for conciliation.

[12] In determining whether or not the dispute before the Court is the same as the dispute that was referred for conciliation this Court should enquire into the real nature of the dispute. In so doing it must have regard to all the evidence and documents before it. It is not confined to the characterization of the dispute by either or both parties or by the

Bargaining Council or the CCMA. See in this regard -

Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & Others (1) (1998) 19 ILJ 260 (LAC);

Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2) (1997) 18 ILJ 671 (LAC);

Pick'n Pay (Pty) Ltd v SA Commercial Catering & Allied Workers Union & Others (1998) 19 ILJ 1546 (LC).

[13] I am aware that these decisions all involve a determination of the “issue in dispute” within the context of strike action. Even so, I am of the view that the same approach should be followed by this Court and the CCMA when enquiring into its jurisdiction to determine an unfair dismissal dispute. The enquiry may be directed at establishing the date of dismissal, the reasons for the dismissal or whether the dispute before Court or the CCMA has been referred for conciliation. I am not bound by the Council’s categorisation of the dispute as one concerning unilateral changes to conditions of employment. Neither must I adopt the literal formulation of the dispute by the union in its referral to the Council. In **Zeuna-Stärker Bop (Pty) Ltd v National Union of Metalworkers of SA (1999) 20 ILJ 108 (LAC)** the Labour Appeal Court found that a CCMA commissioner is obliged to enquire into the facts to decide whether he has jurisdiction to conciliate the dispute. He is not bound by the description and date of the dispute in the referral form. Rather, he must examine all the facts to ascertain the real dispute between the parties and then determine the actual dispute and the date it arose.

[14] For the reasons set out above I think the Respondent has adopted an approach that is too technical. Despite the literal formulation of the dispute in the Council’s referral form, I have little doubt, on the facts before me that the parties understood themselves to be in dispute about a range of things including the job losses consequent to the outsourcing of certain functions. If the referral had been made after the dismissal of

the Applicants I would not consider myself constrained by their formulation of the dispute in the referral forms in deciding whether the dispute referred to the Labour Court had been referred for conciliation.

This is not the case before me. There was only one referral to the Council. The referral form was completed by a union organiser, Nelson Lamityi, on 27 January 1997 and submitted to the Council on the same day or the next day (it is stamped 28 January 1997). Although the Applicants attempted to show that the dismissal took place on 15 January 1997, Mr Lamityi's evidence clearly confirmed that when the dispute was referred to the Council, the Applicants were still in the Respondent's employ. They had not yet been dismissed, although retrenchments were anticipated. The Applicants stopped working on 28 February 1998. That is the date of their dismissal within the meaning of section 190(1)(b). On the facts before me there is no basis for a finding that they were dismissed on a date prior to the referral of a dispute to the Council

[15] It is clear from the wording of section 191(1) that a dispute about the fairness of a dismissal can only be referred for conciliation after the dismissal has taken place -

“(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) ...

(b) ...”

(own emphasis).

[16] Conciliating a dispute about a dismissal that has occurred is not the same as conciliating a dispute about an impending dismissal. Even though they may depend on the same facts, there are different legal consequences if the parties fail to settle the dispute. These impact on the conciliation process and inform positions adopted by the parties and the conciliator. A dispute about a dismissal that has taken place is not the same as a dispute about an impending dismissal. All kinds of undesirable consequences

might flow from permitting a party to have a dismissal dispute adjudicated in terms of section 191(5) on the basis of a referral that predates the dismissal. For example, if the employer advises employees that their employment will be terminated after two months and the employees immediately refer a dispute to the CCMA and wait 30 days, they could request arbitration or refer the dispute to the Labour Court (depending on the reason for the dismissal) before the dismissal has even taken place. It is a simple enough process to refer a dispute for conciliation and employees can reasonably be expected to refer a dispute about their dismissal after it has taken place, even if they have already referred a dispute about their impending dismissal.

[17] The Applicants' failure to refer their dispute to the Council after they had been dismissed deprives this Court of the necessary jurisdiction to adjudicate that dispute.

[18] Although the Respondent has succeeded with its point *in limine* I have exercised a discretion, in terms of section 162, not to order the Applicants to pay the Respondents costs.

[19] On 26 May 1999, having heard argument and evidence for the Applicants, I ordered that the point *in limine* be upheld. I indicated that reasons for my order would follow in due cause. These are my reasons.

Seady, AJ

Date of hearing	:	26 May 1999
Date of judgment	:	<i>ex tempore</i> order
Date of reasons	:	4 June 1999
Appearing on behalf of the Applicant:		Mr Mohlosane, TGWU
Appearing on behalf of the Respondent	:	Mr N.T.G Redman,

instructed by Bowman Gilfillan Inc.