

IN THE LABOUR COURT OF SOUTH AFRICA
CASE NO:P680/99

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD
UNION First Applicant

ONONO Second Applicant

D Third Applicant

and

COMMISSION FOR CONCILIATION MEDIATION
First Respondent

Second Respondent

Third Respondent

JUDGMENT

FRANCIS A J

Parties

- 1.The first applicant is Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPAWU), a trade union registered in terms of the laws of South Africa. The second and third applicants are Nkrismesi Tsonono and Nomandithini Khethelo, adult female members of CEPPAWU, who were both employees of the third respondent.
- 2.The first respondent is the Commission for Conciliation, Mediation and Arbitration (the CCMA). The second respondent is commissioner Con Jooste N.O., and adult male who is cited in his capacity as a commissioner of the first respondent. The third respondent is CJ Rance Timber (Pty) Limited, a company duly incorporated in terms of the company laws of the Republic of South Africa.

The Review Applications

3. There are two applications that came before me when the matter was heard. The first application is a review application in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act). The applicants are applying for the following relief:
- 3.1 that the award of the second respondent under case number EC6191 dated 4 August 1999 in which he found that the CCMA did not have jurisdiction to entertain such a matter and therefore dismissed the matter, be reviewed and set aside;
 - 3.2 that the matter be referred back to the CCMA for arbitration on its merits by a commissioner other than the second respondent, alternatively;
 - 3.3 the applicants be given leave to refer the matter to the Labour Court for adjudication in terms of section 191(5)(b)(i) of the Act.
4. The second application was brought in terms of section 158(1)(g) of the Act, under case P142/2000 where the following relief was sought:
- 4.1 that the order/ruling made by the second respondent under case no AC6191 dated 4 August 1999 when he found that the CCMA had no jurisdiction to entertain such a matter and dismissed it, be reviewed and set aside;
 - 4.2 that the applicants be granted leave to refer the matter to the Labour Court for adjudication in terms of section 158(1)(g) of the Act.
5. The second application was brought after the third applicant had opposed the section 145 review application on the basis that the second respondent had not made an award but a ruling which could only be set aside in terms of section 158(1)(g) of the Act.
6. The second respondent made an award at the arbitration hearing dated 4 August 1999. The issue that had to be decided by the second respondent was whether the dismissal of the second and third applicants was fair or unfair. In the award, the second respondent found, inter alia, that the CCMA had “no jurisdiction to

arbitrate” and dismissed the matter.

7. I do not deem it necessary for the purposes of this judgment to decide whether the second respondent made a ruling or an award. It is trite that review applications made in terms of section 145 of the Act must be brought within six weeks from the date when the award was served by the commissioner on the applicant. It was unclear when the commissioner served the award on the applicant. I will assume in the applicants favour that the section 145 application was brought within the six-week period.

8. Review applications made in terms of section 158(1)(g) must be brought within a reasonable period after the ruling/award was served on the applicant.

9. The review application that was brought in terms of section 158(1)(g) was only brought to this court on 5 June 2000 which was some ten months after the ruling/ award had been served. The second review application was not brought within a reasonable period and is therefore dismissed.

Background Information

10. It was common cause that on 27 January 1998, employees of the third respondent travelled home on a bus when a physical altercation occurred.

11. The applicants’ case was that one Ntombiyakhe attacked the second applicant, and that other employees, including the third applicant intervened to protect the second applicant. The third respondent’s case was that the second and third applicants were the aggressors.

12. The second and third applicants were dismissed the next day following a disciplinary hearing although they maintained the assault had not taken place.

13. The dispute regarding the dismissal of the second and third applicants was referred to the CCMA for conciliation and thereafter to arbitration. The first applicant recorded the dispute as relating to section 191(1) of the Act.
14. During the course of the arbitration proceedings, the second respondent sought clarity from the first applicant as to why only the second and third applicants had been dismissed in light of the applicants case that other persons had been involved. The explanation tendered by the first applicant was that the second and third applicants were union members and that, in keeping with anti union sentiments, the third respondent had used the opportunity to reduce the number of union members.
15. In response to a question by the first applicant's representative, Rotya, during her evidence in chief, the second applicant denied the charge of assault and alleged that the third respondent had dismissed her and the third applicant to reduce the number of union members. It is to be noted that the second respondent did not obtain this answer by questioning the witness, as alleged by Rotya in his affidavit. The second respondent allowed the second applicant to complete her evidence in chief without adjourning the proceedings. During cross examination of the second applicant, she repeatedly confirmed that the reason for her dismissal was that the third respondent wanted to reduce the number of union members. While the third respondent's representative, Rance, cross examined the second applicant on her allegation, Rotya objected. The second respondent overruled the objection and allowed Rance to continue with the cross examination of the second applicant. At the end of cross examination of the second applicant on her allegation that the reason for her dismissal was her union membership, the second respondent asked Rotya whether the third applicant would also testify that the reason for dismissal was that the third respondent wanted to reduce the number of union members. Rotya twice confirmed that this was the case.
16. Upon hearing this explanation, the second respondent sought an adjournment, and, on returning ruled that he lacked jurisdiction, since the applicants maintained that the dismissals occurred because of their union

membership of the first applicant. He ruled that the dispute should be dealt within terms of section 191(5)

(b)(i). He proceeded to dismiss the matter. The second respondent stated the following in his award:

“At the commencement of the case the parties indicated that the dispute arose from an incident of alleged misconduct. I clarified this issue in order to ensure jurisdiction of the CCMA and the only response from the union was that they disputed the alleged incident. The hearing then proceeded and evidence was presented by the employer dealing with the alleged misconduct. On hearing the evidence for the employees I was told under oath that the only reasons for dismissal were that it was strategy by the employer to reduce union members at the company. At this stage I clarified the issue with the union representative and it was confirmed that this was the union’s primary contention and would also be confirmed by the other applicant in the matter.

After a short adjournment, during which I considered the matter, a ruling was made on the jurisdiction of the CCMA. After the ruling, which is attached below, I asked the parties to consider reaching agreement in terms of section 141 of the LRA. This did not materialise and the proceedings were then halted as the case was dismissed due to lack of jurisdiction by the CCMA.

RULING:

The applicant parties on their own version, which was not put to the respondent, alleged that the primary reasons for dismissal was the reduction of unionised employees of the company. This clearly falls under the ambit of an automatically unfair dismissal.

In terms of the LRA section 191(5) the employee party determines the forum in which it wishes to pursue its dispute. Furthermore, the implications are that it must choose the correct forum because it as the employee party brings the allegation and the matter of the allegation determines the forum. It is clear that the CCMA cannot automatically hear matters reserved for the Labour Court which directs parties to reach consensus on arbitration before the CCMA may entertain such an arbitration. In the absence of an agreement, I had no jurisdiction to arbitrate and therefore dismissed the case-”

17.The applicants contend that the arbitration proceedings were defective in that the second respondent:

- 17.1 Committed misconduct in relation to his duties as an arbitrator;
- 17.2 committed a gross irregularity in the conduct of the arbitration proceedings; and
- 17.3 exceeded his powers.

The Submissions

18.The applicants contended that the dispute was not referred to the CCMA as one involving an automatic unfair dismissal. It required determination on the basis that it was a dismissal for misconduct contemplated by section 188(1)(a)(i). The applicants contended further that the second respondent was seized with the matter and was required to determine the matter on its merits. Alternatively, if the second respondent was of the view that he did not have jurisdiction, he had the power to dismiss the case.

19. It was further submitted by the applicants that the second respondent committed a gross misdirection in dismissing the matter, thereby precluding the applicants from referring the matter to a forum which would on the second respondent's analysis, have jurisdiction. Further that the award fell to be reviewed and set aside having regard to the provisions of section 145(2)(a)(i)(ii) and (iii) of the Act.
20. The third respondent opposed the application and stated that the second respondent correctly ruled that he and the first respondent lacked jurisdiction to arbitrate in the dispute.
21. The third respondent contended that section 187(1) of the Act makes a dismissal unfair if the employer, in dismissing the employee, acts contrary to section 5, which protects employees against prejudice because of membership of a trade union. It was contended further that section 191(5)(b)(i) of the Act bestows the Court with jurisdiction to adjudicate a dispute if the employees have alleged that the reason for their dismissal is automatically unfair.
22. It was contended further by the third respondent that the applicants denied specifically that the reason for their dismissal related to their conduct or capacity. The third respondent submitted that section 191(5)(a)(i) did not apply and the second respondent consequently had no jurisdiction to arbitrate in the dispute.

Analysis of the facts and arguments raised

23. It is to be noted that there are no pleadings filed in arbitration proceedings unlike in this court. The applicants decided to couch the referral in the manner that they deemed fit. There is a duty on the second respondent to ascertain whether he has jurisdiction to determine a dispute that is referred to him. The second respondent attempted to ascertain what the nature of the dispute was at the commencement of the arbitration proceedings. It was the third respondent's case that it dismissed the second and third respondent because it found them guilty at a disciplinary enquiry of assault of another employee. The applicants' defence to the charge of assault was that

they did not take part in it but it was a ploy used by the third respondent to get rid of the second and third applicants. They consistently maintained that the third respondent's dismissed them because of their union membership. They specifically denied that the reason for their dismissal was related to their conduct or capacity.

24. During the arbitration proceedings, the second applicant specifically alleged that the

third respondent dismissed them for one reason only:

"They were trying to reduce the number of the members of the union."

25. The second respondent asked the representative of the first applicant, Mr Rotya, whether the third applicant would also allege that the reason for her dismissal was the reduction of union members by the third respondent. Mr Rotya confirmed it.

26. Section 187(1) of the act makes a dismissal automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, which protects employees against prejudice because of membership of a trade union. The current dispute falls squarely under an automatic unfair dismissal. The merits of the dispute will have to be proved at a hearing.

27. Section 191(5)(b) of the Act bestows the labour Court with jurisdiction to adjudicate a dispute if the employees have alleged that the reason for their dismissal is automatically unfair.

28. Mr Zondi who appeared for the applicants argued that the second respondent had committed an irregularity when he had failed to advise the applicants after dismissing their referral that they could apply to the director of the CCMA to refer the dispute to this court in terms of section 191(6) of the Act. He argued that once the CCMA was seized with a matter, a party could not unilaterally refer the matter to this court. He relied on a decision of Jali AJ in *Magubane & Others vs Mint Road Sawmills (Pty) Ltd 1998 (2) BLLR 143 LC*. Jali AJ at page 145, he expressed the following view:

“Needless to say that it is possible that the description which may be given by an employee of the nature of the dispute might lead to a matter going to an incorrect forum when it should have been in another forum. However, the Act does make provision for dealing with that eventuality. The relevant sections of the Act are sections 191(6) and 158(2). Section 158(2) deals with a situation where the matter was at the Labour Court when it ought to have been heard before the CCMA and section 191(6) deals with a situation where the matter is at the CCMA when it should have been at the Labour Court.

The section which concerns this particular case is section 191(6). What is apparent in both sections is that there is a set procedure for transferring the matter from one forum to other. A party cannot, merely because he or she has decided that the matter should have been in the other forum, just transfer the matter without following an appropriate procedure....”

29. After setting out the terms of section 191(6), Jali Aj went on to say:

“The subsection sets out the procedure a litigant has to follow if he wishes to take the matter with which the CCMA is seized to the Labour Court.

The procedure as set out in terms of the said subsection is clearly that if the applicants felt that the reasons (sic) for the dismissal was because of operational requirements they should have moved an application with the director of the CCMA for the transfer of the matter to the Labour Court. This would have been an application which would have been appropriately considered in terms of section 191(6)(a). In the circumstances, it is clear that the applicants were obliged to follow this procedure if the applicants sought to take the matter away from the CCMA.”

30. I deem it necessary to quote the provisions of section 191(5) and (6) in full:

- “(5) If a council or commission 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)*
 - (iii)*
 - (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)*
 - (iii)*
 - (iv)*
 - (6) Despite subsections (5)(a), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering -*
 - (a) the reason for dismissal;*
 - (b) whether there are questions of law raised by the dispute;*
 - (c) the complexity of the dispute;*
 - (d) whether there are conflicting arbitration award that need to be resolved;*
 - (e) the public interest.”*

31. I cannot with due respect agree with the *Magubane and Others vs Mintwood Saw Mills (Pty) Ltd* decision. In

my view, section 191(6) applies only where a dispute relating to an employee’s conduct or capacity or an alleged constructive dismissal or where the reason for the dismissal is not known which are those disputes

set out in section 191(5)(a)(i), (ii) or (iii). To hold otherwise would be tantamount to clothing a referring party with the power to confer jurisdiction on the CCMA in respect of a matter for which it would not normally have jurisdiction. Section 191(6) further provides that the director, in appropriate circumstances, must have regard to the following factors in addition to the reason for dismissal, namely whether there are questions of law raised by the dispute; the complexity of the dispute; whether there are conflicting arbitration awards that need to be resolved and the public interest. There exists no reason why such factors should have a bearing on whether or not this Court should adjudicate a matter such as the present one. Section 141(1) of the Act is the only section which provides for the conferring of jurisdiction onto the CCMA in respect of dismissals that are automatically unfair.

32. I am therefore not bound to follow the *Magubane & Others* decision which was clearly wrongly decided. The present case involves an automatic unfair dismissal dispute. The CCMA had already found that it did not have the requisite jurisdiction to adjudicate on the matter and that the matter should have been referred to this Court for adjudication. The applicants are free to approach this court in terms of section 191(5)(b) of the Act. They do not have to seek either the director of the CCMA's consent or the permission of this court to refer the dispute to this court for adjudication. The applicants will however still have to apply for condonation when referring it to this court for adjudication.

33. It would appear that this matter was not referred to this Court by the applicants due to a misinterpretation of the provisions of section 191(6) of the Act. Section 191(6) does not prevent a party from referring a dispute to the court where the CCMA has no jurisdiction.

34. In the circumstances I find that the arbitration proceedings were not defective. The second respondent did not exceed his powers when he dismissed the matter. He did not direct the applicants to a proper forum. Further the second respondent did not commit a gross misdirection in dismissing the matter, thereby precluding the applicants from referring the matter to a forum which would on the second respondent's

analysis, have jurisdiction.

35.I accordingly make the following order:

34.The applications in terms of section 145 and 158(1)(g) are dismissed with costs.

FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 17 OCTOBER 2000

: 8 DECEMBER 2000

: Mr ZONDI OF CHENNELS ALBERTYN & TANNER

: ADVOCATE BOTHA
INSTRUCTED BY ELLIOTS STUTTERHEIM ATTORNEYS