

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

Case no:

JA13/01

In the appeal between:-

**NATIONAL UNION OF MINE WORKERS
APPELLANT**

and

HERNIC EXPLORATION (PTY)Ltd

RESPONDENT

JUDGEMENT

ZONDO JP

Introduction

[1] The Labour Court gave a judgement upholding a point in limine taken by the respondent that the appellant, being a trade union, had no right to refer a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, (**“the CCMA”**) or the Labour Court unless it cited the dismissed employees as its co-applicants in such referral or proceedings. There was another point in limine that the Labour Court dealt with. That point in limine was this: The CCMA is required by statute to attempt to conciliate a dismissal dispute within 30 days from the date on which the dispute was referred to it unless that period has been extended by agreement between the parties. If the dispute remains unresolved, the dispute must be referred the Labour Court, if it is a dispute falling within the jurisdiction of the Labour Court, within 90 days for adjudication failing which the Labour Court will have no jurisdiction. In this matter, so went the point in limine, the Labour Court had no jurisdiction because the dispute was referred to the Labour Court after the expiry of 90 days from the expiry of the 30 day period. The Labour Court dismissed this point in limine. The Labour Court refused leave to appeal against

its judgement. The appellant later successfully petitioned this Court for leave to appeal. The appellant then noted an appeal against the judgement of the Labour Court. The respondent noted a cross-appeal against the dismissal of the point in limine referred to above. The appeal and cross-appeal now come before us.

Brief background

[2] On 1 December 1998 the respondent gave all its employees notices of retrenchment with effect from the 31st December 1998. Some of the employees were members of the appellant which is a registered trade union. A dispute then arose about the dismissal of the employees. On or about the 16th December 1998 the appellant referred the dispute to the CCMA for conciliation. No names of employees or members of the appellant were given in the referral form. In par 3 of the referral form it was stated that the dispute was about **“unfair retrenchments”**. It was also stated: **“The retrenchment will be effective as from 31-12-98.”** In par 5 it was stated that the dispute had arisen on the 30th November 1998. The desired results of conciliation were said to be that: **“all workers should be recall(sic) and company to follow retrenchment procedure as per signed agreement.”**

[3] The respondent did not attend the conciliation meeting on the date scheduled for it. The statutory 30 day period within which the CCMA was required to conciliate the dispute expired on the 15th January 1999. By the expiry of that period, the certificate of outcome had not been signed or issued. On the 18th February 1999 the commissioner of the CCMA who was assigned to conciliate the dispute signed and issued a certificate of outcome to the effect that the dispute remained unresolved. In the certificate the commissioner reflected the dispute as being between the appellant, as the employee party, and, the respondent, as the employer party. The commissioner referred to the dispute in the certificate as one **“concerning alleged unfair dismissals.”**

Proceedings in the Labour Court

[4] On the 28th April 1999 the dispute was referred to the Labour Court by way of a statement of claim. In its heading the statement of claim reflected the appellant and the respondent as the applicant and respondent respectively. Paragraph 1 thereof is important. It read as follows:.

“1 The applicant is the National Union of Mine Workers (“the union”), a trade union registered in terms of the Labour Relations Act, 66 of 1995 (“the Act”), with its head office situated at 7 Rissik Street, Johannesburg. The union acts on its own behalf and on behalf of its members dismissed by the respondent on 31 December 1998.”

[5] In par 3 of the statement of claim more was said about the dispute. Par 3 read:

“The dispute arising out of the dismissal of union members was referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) **on 23 December 1998. On 18 February 1999 the CCMA issued a certificate of outcome confirming that the dispute remains unresolved. The dispute is hereby referred to the above court for adjudication.**”

[6] In due course the respondent delivered a response to the statement of claim and later an amendment to the response. The respondent took three points in limine. The first one was to the effect that the dispute had not been referred to the CCMA for conciliation and, that, for that reason, the Labour Court lacked jurisdiction to adjudicate the dispute. In due course the Labour Court dismissed this point. The second objection in limine was taken in paragraphs 2.3 -2.7 of the respondent’s response. Those paragraphs read thus:.

“2.3 The respondent states that in terms of the provisions of Section 191(1) of the Labour Relations Act, only the dismissed employees may refer the dispute to conciliation in terms of the Act. It is submitted that such referral contemplates that the referral must be brought in the name of the dismissed employees with the dismissed employees actually being parties to the dispute. In addition, the referral has to

reflect the full name, address and particulars of each of the dismissed employees who are parties to the dispute, and the referral must be signed by such employees. Legal argument in this regard will be addressed to the above Honourable Court at the hearing of this matter;

2.4 In this instance, as appears from the referral document in the respondent's possession, the dispute was referred in the name of "National Union of Mineworkers", and does not reflect the names, addresses or particulars of any of the individual employees who were dismissed by the respondent. The document has also not been signed by any of the said employees concerned. In no way whatsoever are any of the said employees identified or is it indicated which of such employees mandated or authorised the referral of the dispute, or are in fact a party to the dispute;

2.5 Of even greater concern is the fact that a list of employees have been identified in the referral of this dispute to the above Honourable Court as being parties to the dispute without such employees in any way being identified as being a party of the referral of the dispute, initially, to conciliation. The respondent is accordingly unable to ascertain or establish that such employees were indeed a party to the referral of the dispute for conciliation and mandated and authorised the referral of the dispute to conciliation by the National Union of Mineworkers;

2.6 As a result, the referral of this dispute to the CCMA for conciliation in terms of Section 191(1) of the Act, is defective, incompetent, and null and void in the circumstances. As a result, there exists no valid referral of this dispute for conciliation in terms of Section 191(1) of the Act. Accordingly, the CCMA had no jurisdiction to conciliate this matter in the first

instance, there being no valid referral of the dispute before the CCMA for conciliation;

2.7 As a result, it is submitted that the above Honourable Court has no jurisdiction to entertain this matter, this matter not having been properly and validly referred for conciliation and conciliated in terms of the Act. It is accordingly prayed that the applicant's application be dismissed with costs, on this basis alone."

In due course the Labour Court upheld this point. The third objection in limine was the one that has been explained in the first paragraph of this judgement. As already stated above, the Labour Court dismissed that objection in limine. On the basis of the point in limine that it upheld, the Labour Court dismissed the referral of the dispute with costs.

[7] As already stated above the Labour Court upheld the point in limine that a trade union could not be a party to a referral of a dismissal dispute to the CCMA for conciliation or to the Labour Court for adjudication unless its dismissed members were also cited as co-applicants in such referral or proceedings. For this conclusion it relied, inter alia, on the provisions of sec 200(2) of the Act as well as the judgement of Tip AJ in **Librapac CC v Moletsane NO and others (1998) 19 ILJ 1159 (LC)** especially par 43 of that judgement.

[8] In par 39 of his judgement the learned Judge in the Court a quo referred to the certificate of outcome and remarked that:.

(a) the certificate **"was only issued between two parties being the respondent and the applicant union."**

(b) **"none of the individual employees are even referred to or identified in such certificate."**

(c) **(w)hen the matter was referred to [the Labour Court], it was also only referred with the trade union**

being the only applicant party, and none of the individual employees being cited, described or joined as parties to the dispute . There was not even a list of individual applicants accompanying the applicant's statement of case, nor were any individual applicants even referred to or identified in such statement of case." He went on to say at the end of par 39 of the judgement: **"In par 1 of the statement of claim the applicant is cited as the "National Union of Mineworkers, as duly registered trade union, which acts on its own behalf and on behalf of its members dismissed by the respondent on 31 December 1998."**

[9] In par 41 of his judgement the learned Judge said: **" In this instance [none] of the members of the applicant were cited, identified or joined as parties to the proceedings, both before the CCMA and before [the Labour Court]. Therefore, although the trade union may represent its members and be a party to any such proceedings in terms of section 200 of the Act, it may only do so if its members are a party to the proceedings. The applicant union does not have locus standi to bring these proceedings, as none of its members have been a party to the proceedings."**

[10] The Court a quo was of the view that, if a trade union instituted such proceedings without the employees also being cited, the proceedings would be defective. In par 41 of its judgment the Court a quo regarded this as meaning that a trade union had no locus standi. I do not think that, on a proper analysis of the matter, this is a question of locus standi. It is a question of non-joinder. If it was a question of locus standi, the contention would not entail that the union can also be an applicant when employees are also applicants in such proceedings.

The appeal

[11] For some time during argument on appeal there was uncertainty about what the point in limine was that Mr Snyman, who appeared for the respondent, had argued in the Court a quo

which was upheld and what the point was that he meant to argue on appeal in defence of the judgement of the Court a quo. In answer to a question from the Bench, Mr Snyman stated that his contention was that the appellant had no right to refer a dismissal dispute - which this one is - to the CCMA or the Labour Court on its own without citing or joining the dismissed employees as co-applicants in the referral or in the proceedings. This makes this contention a complaint of non-joinder. He also submitted that this meant that there had never been a referral in respect of the dismissed employees.

[12] Apart from relying on sec 200(2) of the Act in support of its finding, the Court a quo also relied on Rule 6(1)(b) of the Rules of the Labour Court and the Librapark decision referred to earlier. Let me quickly dispose of the reliance on Rule 6(1)(b). Rule 6(1)(b) deals with what should be contained in a statement of claim. This includes the names, addresses and descriptions of parties. It has nothing to do with the question of who has a right to institute proceedings in the Labour Court. In this case the union as appellant gave its name, described itself as a registered trade union and gave its address. It did not give the names and other particulars of the employees but its failure to do so cannot deprive it of a right it otherwise has, if it has such a right, to initiate or institute court proceedings in regard to a matter. I shall deal with the Librapac decision later herein.

[13] The respondent has conceded in its heads of argument that the referral of the dismissal dispute to the CCMA for conciliation was valid. That has not always been the respondent's attitude. Its attitude in the Court a quo was that the referral of the dispute to the CCMA was defective, invalid, and null and void and, because of that, the Court a quo lacked jurisdiction to adjudicate the dispute. In fact the second objection in limine was precisely about the validity of the referral of the dispute to the CCMA for conciliation.

[14] As I have already indicated above, the Court a quo relied on sec 200(2) of the Act to support its finding that a trade union cannot refer, or, institute proceedings in, a dismissal dispute

unless its dismissed members are also party to such proceedings or to such referral. The respondent also relies on those provisions to defend the decision of the Court a quo. Neither the Court a quo nor the respondent appears to have given proper attention to the question whether the provisions of sec 200(1) are not an answer to the respondent's objection. It is necessary to quote sec 200 in full. It reads thus:

“Representation of employees or employers-

(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party:

- (a) in its own interests;**
- (b) on behalf of any of its members;**
- (c) in the interest of any of its members.**

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.”

[15] Although the Court a quo referred to both subsections (1) and (2) of sec 200 in its judgement, its focus was on ss (2) and it failed to analyse the two subsections in order to understand their relationship to each other and the different situations to which each one applies. In par 33 of its judgement the Court a quo said:

“In terms of section 200(1) of the Act, a registered trade union may act in any dispute to which any of its members are a party, in its own interests, [or] on behalf of its members.”

Thus far, that was right. However, it said in the following sentence:- **“However, in terms of section 200(2), a registered trade union is only entitled to be a party to any proceedings in terms of this Act if one or more of its members are a party to those proceedings.”** The Court a quo introduced the word **“only”** just before the word **“entitled”** in sec 200(2) when sec 200(2) does not have that word. Furthermore it introduced that word in a manner that suggested that sec 200(2) is prohibitory when in fact it is permissive. In par 35 of its judgement the Court a quo said:

“Section 200(2) does not assist the applicant in the predicament that it finds itself in. The subsection permits the applicant union to be a party to the proceedings if one or [more of] its members are a party to those proceedings. It is patently clear from paragraph 1 of the statement of claim, that the only parties to the proceedings are the applicant trade union and the respondent. None of its members have either been cited or joined as parties to these proceedings.”

[16] It is not clear why the Court a quo only focussed on sec 200(2) in considering the appellant's answer to the respondent's contention because there is no indication in its judgement that the appellant had relied only on subsection (2) and not on subsection (1) as well. On the contrary, the Court a quo, itself, had stated earlier on in par 32 of its judgement that Mr Khumalo, who had appeared on behalf of the appellant in that Court, had relied on sec 200 of the Act. He had not confined his reliance on subsection (2).

[17] The provisions of sec 200(2) could not be relied upon as an answer to the respondent's objection because they relate to a case where the union's members are party to the proceedings and it is sought to join the union in the proceedings. In this case the union's members were not party to the referral of the dispute to the CCMA. Could sec 200(1) be relied upon as an answer to the respondent's objection? I think so, provided that the union's members were party to the dispute. They had to be party to the dispute because that is the condition that ss(1) prescribes should exist in order for a trade union to be able to act in one or more of the capacities therein set out. Accordingly it becomes necessary to establish whether the appellant's members were party to the dispute. This raises the question of how one determines when it can be said that union members are party to a dispute especially when the capacity in which their union is acting in initiating the statutory dispute resolution machinery in regard to such dispute has not been articulated. However, as will be seen below, this is not a new question in the history of our labour law. Our courts

have had occasions to deal with this question within the context of previous Acts dealing with labour relations. I deal below with some of the cases in which the question was considered.

[18] In **Town Council of Benoni v Minister of Labour 1930(1) TPD 324** the dispute was about salaries and conditions of employment of certain employees of the Town Council of Benoni. It is not apparent from that decision whether it was the Association of Municipal Employees which applied for the appointment of a conciliation board. It is stated in the decision that there was no information in the papers before the Court indicating whether the Association of Municipal Employees was a trade union or not. What does appear, however, is that the Association of Municipal Employees had written to the Divisional Inspector of the Department of Labour suggesting a conference to consider the salaries and conditions of various employees of the Town Council of Benoni. A conference was held and an agreement was reached on many of the issues. However, no agreement was reached on the salary and conditions of employment of certain employees.

[19] The dispute was about the salary and conditions of employment of those employees then referred to arbitration to be conducted by an arbitrator appointed by the Minister of Labour. It was argued in subsequent court proceedings that the dispute was between the Association of Municipal Employees and the Town Council of Benoni and not between the employees of the Council and the Council. Tindall J, who heard the matter, rejected this argument. He said at 327: “ **In the first place I do not think it correct to say that the dispute is between the association and the local authority. The employees are represented by the Association but the “*parties concerned*”, to use the language found in sec 4(2), are the employees themselves and the local authority.**”

[20] In **O.K Bazaars (1929) Ltd v Madeley N.O and Another 1943 TPD 392** a trade union called the National Union of Distributive Workers had concluded a closed shop agreement with O.K Bazaars (1929) Ltd and certain companies associated with

O.K Bazaars. Subsequently a dispute arose whether the company continued to be bound by the closed shop agreement.

In correspondence between the union and the company the union referred to the dispute as being between itself and the company. The union also stated in its correspondence that it would avail itself of sec 64(1) of the Industrial Conciliation Act, 1937 and apply for the appointment of a conciliation board to try and resolve the dispute. Sec 64(1) of the Act applied to disputes between a trade union and a local authority employer. It did not apply to cases where the dispute was between employees and their local authority employer. The conciliation board application form - whether the application was made under sec 35 or 64 - required to be **"suitably modified"** according to the circumstances when individual employers or employees are the applicants.

[21] The trade union applied for the establishment of a conciliation board. The application form was not **"suitably modified"**. The completed application form reflected the union as the applicant. It was stated in the form that five persons, who were described as **"employees of the respondent company, being members of the N.U.D.W and also of the shop committee in the Eloff Street store of the said company"**, were joined with the union. There was said to be a dispute in the commercial distributive trade between those applicants and O.K Bazaars (1929) Ltd and associated companies. Paragraph 6 of the application form called for certain information and was required to be completed **"only when applicant is a trade union."** In that case paragraph 6 of the form was completed by showing that the number of employees who were members of the union was over 10 000 and that the number of the classes of employees catered for **"by the union and involved in the dispute was about 3000 all of whom were members of the union."**

[22] In its concise statement of the dispute the union referred to the dispute as being one between itself and O.K Bazaar (1929) and associated companies. The Minister appointed the conciliation board under sec 64. He gave the board terms of reference to the effect that the dispute was between the union and O.K Bazaar and

associated companies. He did not make any reference to the employees who were said to have been joined as applicants as well.

[23] In dealing with a subsequent application by O.K. Bazaars (1929) Ltd to set aside the appointment of the conciliation board, Millin J found that there was nothing in the documents from which it could be inferred that the union had made the application for a conciliation board otherwise than as principal. He also said that the joinder of the employees in the application for a conciliation board was wholly inconsistent with the idea that the union represented, for the purposes of the application to the Minister, all the company's employees who were its members. Millin J held that, on the evidence before him, he had no hesitation in holding that the union had applied as a principal and, therefore, not as an agent to the Minister for the appointment of a conciliation board. He noted, too, that the union had referred to the dispute in correspondence as being between itself and the employer. He held that the union's resort to sec 64(1) as opposed to sec 35 when applying for a conciliation board had been deliberate. He concluded that the dispute was one between the trade union and the employer.

[24] Another case is that of **Durban City Council v Minister of Labour and Another 1948(1) SA 220 (N)**. In that case a dispute arose regarding a library that the City Council of Durban had built on the recommendation of a conciliation board appointed by the Minister of Labour. The library was to be used by the residents of the Magazine Barracks situated in Magazine Road, Durban. The residents of the Barracks were mostly, if not exclusively, Indian and most were employees' of the Durban City Council and members of the Durban Indian Municipal Employees' Society, which was a trade union. There was also a dispute about relating to a Provident Fund. The City Council wanted the trade union to assume responsibility for conducting the affairs of the library and was willing to help financially to a limited extent and in other ways. The trade union wanted the Council to conduct the affairs of the library and to employ a librarian and was willing to do this itself if the Council was prepared to give it a certain grant

per year.

[25] The trade union made an application for the appointment of a conciliation board in terms of sec 35 of the Industrial Conciliation Act, 1937 to determine the dispute relating to the library and the Provident Fund. The Minister appointed a conciliation board. Later he appointed an arbitrator to arbitrate the two disputes. The Durban City Council subsequently brought an application to the Natal Provincial Division of the then Supreme Court to set aside the appointment of the arbitrator. In regard to the dispute relating to the Provident Fund, the Court, through Hathorn JP (with Broome J concurring) held that the compulsory arbitration provisions of sec 64(1) were only applicable to disputes between an employer who was a local authority and its employees engaged in any of its essential services and not to a dispute between a trade union and a local authority employer. The Court held that, on a reading of the correspondence between the union and the Durban City Council as well as the conciliation board application itself, the dispute was between the trade union and the City Council and was not between the City Council and its employees.

[26] In **Amalgamated Engineering Union v Minister of Labour 1948 (4) SA 876(N)** a dispute had arisen in the Transport Department of the Durban City Council whether the employees in that department should have a five day working week or not. The Amalgamated Engineering Union made an application to the Minister of Labour for the appointment of a conciliation board for the consideration of what it called **“a dispute existing in the Transport Department of the Durban City Council”**. The Amalgamated Engineering Union alleged in the application for the establishment of a conciliation board that **“the number of employees of the class catered for by the union involved in the dispute is 270 of whom 225 are members”**. The union did not cite its members as co-applicants in the conciliation board application. The union’s application for the appointment of a conciliation board was in the form contemplated by sec 35 of Act 36 of 1937 which preceded Act 28 of 1956. In the conciliation board application the union

referred to the dispute as **“a dispute which exists in the Transport Department----- between the applicant [which was the union] and the Durban City Council in respect of its failure to grant the engineering artisans, members of the A.E.U (the applicant) employed in the Transport Department a 5-day working week.”**

[27] The Minister of Labour approved the appointment of a conciliation board. In due course the conciliation board reported that it had failed to settle the dispute and agreed that the dispute be referred to a single arbitrator for a decision. The Minister appointed an arbitrator to arbitrate the dispute but subsequently withdrew that appointment on the basis that the compulsory arbitration provisions of the relevant Act under which he had purported to appoint the arbitrator were only applicable if the dispute was between a local authority and its employees and not if it was between a local authority and a trade union. In this regard the Minister took the view that the dispute in respect of which the union had applied for the appointment of a conciliation board was between a local authority, (the Durban City Council), and, the Amalgamated Engineering Union, a trade union. This view was based on the judgement of the Natal Provincial Division in **Durban City Council v Minister of Labour and Another 1948(1) SA 220(N)**, already referred to above.

[28] The union then brought an application to the Natal Provincial Division of the then Supreme Court for an order declaring that the appointment of the arbitrator to arbitrate the dispute had been valid or alternatively directing the Minister to appoint an arbitrator to arbitrate the dispute. That application came before Broome and De Wet JJ. They held that they were bound by the decision of that Division that had been given earlier by Hathorn JP (with Broome J concurring). The Court was urged to find that the matter was distinguishable from the one decided by Hathorn JP and Broome J earlier. The basis for the distinction contended for was that the dispute was in substance between the Durban City Council, on the one hand, and, on the other, the individual members of the applicant union who were employees of the Council engaged upon essential services. The suggestion was that

the union had been acting throughout as the agent of the employees who were its members and not as principal.

[29] Broome J stated that he did not regard the fact that it was the union that had applied for the establishment of a conciliation board and that had instituted the court proceedings as establishing conclusively that the dispute in question was one between the union and the Durban City Council and not one between the employees and the Durban City Council. He expressed an inclination towards the view that the dispute was one between the union and the Durban City Council but held that there were not enough facts before him to make a definite conclusion. The union's application was dismissed.

[30] An appeal was then noted to the Appellate Division. The decision of the Appellate Division is reported as **Amalgamated Engineering Union v Minister of Labour 1949(4)SA908(A)**.

At 910 Centlivres JA, inter alia, observed :

“Neither in the case of [Durban City Council v Minister of Labour and Another 1948(1)SA 220(N)] nor in the present case did the Trade Union seek to obtain any benefit for itself: it sought to obtain a benefit for employees who were its members. A dispute may arise between a trade union and employers: for instance, there may be a dispute in regard to the question whether employers should observe the “closed shop” principle and whether they should deduct from the wages of their employees subscriptions due to the trade union and pay those subscriptions to the union direct. Such a dispute would, in my view, be properly regarded as a dispute between a trade union and employers, for it affects the interests of the union directly. This is the position even although the dispute is at the same time one between employees and employers, for the application or the non-application of the “closed shop” principle would also affect the contract of employment entered

into by employer and employee. But where the dispute is in regard to the wages, hours and other conditions of employment it is in essence a dispute between employers and employees. The mere fact that the trade union of which the employees concerned are members is a separate legal entity and sets the statutory machinery in motion to settle the dispute cannot mean that the dispute is not one between employers and employees.”

[31] Then from the last paragraph of 911 to about the end of the first half of 912 the learned Judge of Appeal continued thus:

“I have already expressed the view that the fact that there existed a dispute in the Transport Department shows that there was a dispute between the employer and employees: to describe that dispute, as the application for the appointment of a Conciliation Board did, as being a dispute in the Transport Department between the trade union of which the employees are members and the employer does not mean that the dispute is not a dispute between employer and employees. In a matter such as this regard should be had to substance rather than form. A reasonable construction to be placed upon the application read in the light of sec. 35 which I shall deal with presently is that there existed a dispute between the employer and employees and that the trade union of which the employees are members makes the application on behalf of such of its members as are employed by the employer between whom and them there is a dispute as to the hours of employment.”

[32] The Appellate Division concluded that in substance the dispute was between the employees concerned who were members of the union and the Durban City Council and not between the union and the Durban City Council. It held that the

union was acting as the spokesman of the employees who were its members. The result of this conclusion was that the compulsory arbitration provisions of the relevant Act were applicable and the appeal succeeded and the Minister was ordered to appoint an arbitrator to arbitrate the dispute.

[33] In **Marievale Consolidated Mines v President, Industrial Court 1986(2) SA 485 (W)** one of the contentions that was raised was that a trade union had no locus standi to bring an application under sec 43 of the Labour Relations Act, 1956 (Act No 28 of 1956) (“**the old Act**”) if the relief sought was that of the reinstatement of its members. The Court, through Goldstone J, rejected this argument. At 493J-494A Goldstone J rejected the submission and, inter alia, said that “**if indeed the applicant’s employees or some of them were “bussed out of the Republic or even to their homes in the Republic, to demand of each one that he personally apply to the industrial court for such relief would be tantamount to a denial thereof.”**

[34] In **General Industries Workers Union of SA & others v LC van Aardt (TVL) (Pty)Ltd (1991) 12 ILJ 122 (LAC)** a dismissal dispute was the subject of an application that was brought by the General Industries Workers Union in its own name and on behalf of the dismissed employees whose names were listed in an annexure to the statement of case. One of the issues on appeal related to an application to join the dismissed employees in the application in terms of sec 46(9) of the old Act. At 123 Goldstone J expressed the view that it was appropriate for the union itself to litigate for the benefit of its members - the individual workers - subject to the relief being qualified in the manner suggested in **Consolidated Mines Ltd v President of the Industrial Court & others 1986 (2) SA 485 (W) at 493 H-I**. The qualification proposed in that case was that the reinstatement order could apply only to those employees who tendered their services within a certain period of time after the granting of the order. He held that there had been no real need for the application for the joinder of the union members in the proceedings. The respondent’s contention in this matter is clearly

in conflict with that decision. Although that decision was under the old Act, this makes no difference because the new Act has not placed unions and employers' organisations in a worse position than they were under the old Act. In fact it has sought to improve their position.

[35] The views expressed by Goldstone J in the *Marievale* case and by Goldstein J in the *General Industries Workers Union of SA* case referred to above are in line with what Centlivres JA, writing for a unanimous Appellate Division, said at 912 in the *Amalgamated Engineering Union* case. There the learned Judge of Appeal said:.

“The whole idea underlying the trade union system, which system is recognised by the Industrial Conciliation Act, is that the trade union concerned should act as the spokesman of its members whenever a dispute arises between employers and employees. The Act encourages collective bargaining: hence the provisions for the registration not only of trade unions but also of employers' organisations. To insist that whenever a dispute arises between employers and employees, an individual employer or employee should set the statutory machinery in motion for the purpose of settling the dispute, would tend to defeat the object which the legislature had in mind, viz. to facilitate the settlement of disputes, for it is obvious that what the legislature had in mind was that employees should use the services of the trade union of which they are members and that employers should use the services of the employers' organisations to which they belong.”

[36] In this matter the appellant did not seek any benefit for itself out of the conciliation and adjudication of the dispute. Any relief obtained through the dispute resolution mechanism of the Act would go to the dismissed employees and not to the appellant. There was also no suggestion that the union had not complied in

any way with the requirements of the referral form that it filled in to refer the dispute to the CCMA. At 910 in Amalgamated Engineering Union (above) the Appellate Division said that **“where the dispute is in regard to the wages, hours and other conditions of employment, it is in essence a dispute between employers and employees.”** If that could be said in respect of a dispute about wages, hours and other conditions of employment, it can also be said that in a dismissal dispute the dismissed employee or employees will generally be party to a dispute even if the union is the one processing the dispute. This, of course, does not mean that the union cannot also be a party to such a dispute.

[37] The conclusion that the dismissed employees were party to the dispute does not necessarily mean that the appellant was not also a party to the dispute. A dismissal dispute can have as parties thereto a trade union and its members, on the one hand, and, the employer (who dismissed the employees) on the other. This is a clear case where this could happen because from the CCMA referral form it appears that the respondent had a collective agreement with the appellant regulating retrenchments in breach of which, on the respondent’s version, the respondent retrenched the appellant’s members.

[38] In the scenario dealt with in the preceding paragraph the dismissed employees are party to the dismissal dispute. The union would not only be party to the dismissal dispute but would also have a direct and legal interest in the enforcement of the agreement through appropriate legal action if it was breached. The dismissal dispute in such a case would be a dispute in which both the union and its dismissed members would be equally interested. In the Amalgamated Engineering Union case the Appellate Division further said that **“(t)he mere fact that the trade union of which the employees concerned are members is a separate legal entity and sets the statutory machinery in motion to settle the dispute cannot mean that the dispute is not one between the employers and employees.”**

[39] In the light of the above it seems to me that in substance the dispute in this matter is a dispute between the members of the union that were dismissed by the respondent on the 31st December 1998 and the respondent. That does not mean that the appellant was not itself also a party to the dispute but, even if it was not a party to the dispute, it could still have been entitled to initiate and facilitate the dispute resolution mechanism of the Act so as to ensure a resolution of the dispute. Once it is accepted that the dispute was in substance between the appellant's dismissed members and the respondent, sec 200(1) of the Act becomes applicable because the appellant would, accordingly, be entitled to act in any one or more of the three capacities provided for in sec 200(1) in referring the dispute to the CCMA for conciliation and in referring it to the Labour Court for adjudication.

[40] In fact the respondent's contention is even weaker in relation to the appellant's referral of the dispute to the Labour Court because in par 1 of the appellant's statement of claim, the appellant stated that it was acting **"on its own behalf and on behalf of its members dismissed by the respondent on 31 December 1998."** The fact that the appellant did not furnish the names of the dismissed employees did not affect the jurisdiction either of the CCMA or the Labour Court. Of course, the best practice is for the union to give the names of the employees concerned so that the employer knows which employees the proceedings relate to. However, in certain circumstances it is possible for the employer to know which employees are concerned in proceedings or in a referral even though the union has not furnished the names of the employees. For example, where an employer dismissed all its employees on a certain date, he would know which employees the union was referring to if it referred to **"all employees dismissed"** on that date by the employer. A failure by the union to give the names of the employees concerned would not affect the jurisdiction of the CCMA nor that of the Labour Court but may affect issues such as relief because, for example, in defending the unfair dismissal claim the employer may well wish to put up specific facts relating to specific individuals which he cannot do if he does not know who the dismissed employees are. I conclude in the end that on the

basis of sec 200(1) of the Act a trade union has a right to refer a dismissal dispute relating to its members to the CCMA for conciliation and to the Labour Court for adjudication as the referring party or as applicant without citing its dismissed members as co-applicants.

[41] Apart from sec 200(1) another reason why the respondent's contention cannot be sustained lies in the primary function of a trade union. The primary function of a trade union is to act as the representative of its members. Without that capacity it is doubtful whether a trade union can survive. The ordinary meaning of the concept of representing somebody is that you act in that person's place and stead. If that is correct a trade union must be able to act in the place and stead of its members. Strictly speaking it cannot act in the place and stead of its members if its members also occupy the same place and stead. That must mean that in most cases it is when its members are not applicants that a union finds it necessary to act in their place and stead by being the applicant in such proceedings itself. In fact, where union members are cited as applicants, there is little, if any, need for the union to be cited as an applicant as well, especially in dismissal cases because the union does not usually seek any relief for itself in such proceedings and there is also little need, if any, for the union members to be joined as applicants as well where the union is already an applicant and is acting either on behalf of its members or in the interest of its members. See sec 200(1) of the Act. That is why in the General Industries Workers Union Goldstein J dismissed the appeal in regard to an application to join the employees, when their union was already an applicant in the proceedings and was acting for the benefit of its members.

[42] Earlier on in this judgement I alluded to the fact that the Court a quo also relied on the judgement of the Labour Court in **Librapac CC v Moletsane (1998)19 ILJ 1159(LC)** for its conclusion. The observation to be made in regard to the Court a quo's reliance on that case is that the question that the Court had to deal with in Librapac was not whether a trade union had a right to refer a dismissal dispute to the CCMA for conciliation or to the Labour Court for adjudication without citing the dismissed

employees as co-applicants. What the Court was called upon to consider in Librapac was a contention that not all the 23 employees in whose favour an arbitrator had made had been properly before the arbitrator. There it was not even a trade union that had referred the dispute to arbitration. There the referring party was reflected as having been **“Herbert Mdladlamba & others”**. A list of 16 names with addresses of each person was given but only one of the employees had signed the referral form. These facts show that whatever remarks the Court in that case made which the Court a quo regarded as supporting its conclusion were not part of the ratio of the judgement and actually did not relate to the question which has been raised here. Of course the respondent also did refer to the absence of names, addresses and other particulars of the dismissed employees but, quite clearly, the absence of names and addresses does not deprive the court of jurisdiction in respect of a dispute if it otherwise has jurisdiction.

[43] Accordingly the appeal must succeed.

The cross - appeal

[44] In this case the CCMA received the referral of the dispute for conciliation on the 16th December 1998. The 30 day period within which the CCMA was required to conciliate the dispute expired on the 15th January 1999. The respondent did not attend the conciliation meeting. On the 18th February 1999 the commissioner certified that the dispute remained unresolved. No agreement had been reached between the parties to extend the period of 30 days. Sec 191(5)(b) makes provision for the circumstances in which a dismissal dispute is required to be referred to the Labour Court for adjudication. Sec 191(11)(a) reads:

“The referral, in terms of subsection (5)(b), of the dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.”

[45] On behalf of the respondent it was contended that a commissioner is required to certify that the dispute remains unresolved on or before the 30th day (or on or before the last day of the extended period where the 30 day period has been extended) and that he is not entitled to so certify once the 30 day period or the extended period (where there has been an extension) has expired. It was submitted that, where he so certifies outside the 30 day period or the extended period, the statutory 90 days within which the dispute must be referred to the Labour Court runs from the expiry of the 30 day period and not from the date when or after the commissioner certifies or has certified that the dispute remains unresolved. I am unable to agree with this contention. Sec 191(11)(a) is clear in its provision that the referral of a dismissal dispute to the Labour Court for adjudication in terms of sec 191(5)(b) must be made within 90 days after the council or the commissioner **“has certified that the dispute remains unresolved.”** In any event sec 191 which deals with the referral of dismissal disputes to conciliation, arbitration and adjudication does not anywhere provide for such disputes to be referred to the Labour Court for adjudication within 90 days from the expiry of the 30 day period or any extended period.

[46] If the legal position is that, once the 30 day period or the extended period, if there has been an extension, has expired, the commissioner has no power to certify that the dispute remains unresolved, but a commissioner certifies after the expiry of that period, then the position would be that, until the certificate has been set aside by a court of competent jurisdiction, it stands and must be treated as valid and all concerned can act upon it. **(Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC))**. The provisions of sec 191(11)(a) would apply as soon as the commissioner has certified that the dispute remains unresolved.

[47] Accordingly, the cross-appeal must fail.

[48] With regard to costs both Counsel submitted that costs should follow the result. I propose to make an order of costs on

that basis.

[49] In the result I make the following order:-

1. The appeal is allowed with costs.
2. The order made by the Labour Court upholding the respondent's objection in limine that the appellant had no right to refer the dispute to the CCMA or to the Labour Court without citing the dismissed employees as co-applicants is hereby set aside and replaced with the following order:-
"(a) the respondent's objection in limine is dismissed with costs."
3. The cross-appeal is dismissed with costs.

Zondo JP

I agree.

Nicholson JA

I agree.

Mogoeng JA

Appearance:

For the Appellant: Adv. T. Bruinders
Instructed by: Maserumule Inc

For Respondent: Mr S. Snyman

Instructed by: Snyman Van Der Heever Heyns

Date of judgement: 6 March 2003