IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J496/97

In the matter between

Naomi Nidia van Heerden Applicant

and

Spes Bona Financial Administrators (Pty) Ltd Respondent

JUDGMENT

JALI AJ

[1] This matter came before me as a referral in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act") for me to adjudicate on the fairness of the Applicant's dismissal by the Respondent based on the Respondent's operational requirements.

[2] At the beginning of the proceedings the Respondent raised a point *in limine* stating that the court does not have jurisdiction because the dispute before this court, as alleged by the Applicant, is one which should be arbitrated by the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

[3] The facts of the matter, briefly, are as follows. The Applicant's services with the Respondent were terminated on 15 January 1997. She was paid up until the end of

February 1997. She referred the dispute in relation to her dismissal to the CCMA on 6 February 1997. Conciliation failed to resolve the dispute and a certificate of outcome was issued on 5 May 1997.

4] The Applicant then referred the dispute to the CCMA for arbitration and a Commissioner, Professor Basson, heard both parties on 13 June 1997. Professor Basson found that she had no jurisdiction to arbitrate on the issue on the basis that the dispute referred to her involved retrenchment. No record exists of the proceedings before Professor Basson except for a computer printout which formed part of the Respondent's bundle. It was apparent that the said computer printout was obtained from the CCMA administration offices. It could not be said to be either an award or a ruling by Professor Basson. For one reason or the other, which remains unclear to this Court, the Commissioner either advised or directed the parties to come to the Labour Court instead of arbitrating the dispute herself.

[5] At the time when the matter was referred to the CCMA, according to the facts which have been put before me, the Applicant did not know the reason for the dismissal. In her referral form to the CCMA (Form LRA 7.11), the Applicant couched the dispute as follows: “Unfair dismissal of Applicant on 16/01/97". In her statement of case the Applicant also stated that on 16 January 1997 she received a letter of the termination of her employment without any prior notification. The said letter of termination did not specify any reasons for the termination.

[6] In response to the Applicant’s statement of claim the Respondent filed a statement

of defence in which it alleged that the Applicant had been retrenched. In response to that, the Applicant filed a reply to the statement of defence in which she stated: "the Applicant denies that she was retrenched as alleged and puts the Respondent to the proof thereof". Furthermore, she alleged that she was told by a certain Mr Grabe that due to her negative behaviour she had the option either to resign or to leave. That is the case which is before me, according to the papers.

[7] I enquired from the representatives of both parties as to the nature of the dispute, and the Applicant's representative confirmed from the Bar that this is an unfair dismissal case, and not a dismissal based on operational requirements or an automatically unfair dismissal as defined in the Act.

[8] I turn now to the law. Section 191(5) of the Labour Relations Act 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 the dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) ...

(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 the dismissal is -

(I) automatically unfair;

(ii) based on the employer's operational requirements; ...

(my own emphasis)

[9] I will only refer to two subsections because those are the only ones which may be

relevant to this particular case. In both those subsections, (a) and (b) of section 191(5), the Court appears to be to directed to consider what the employee has alleged the dispute to be. The jurisdiction to adjudicate a dispute is derived by this Court from what the employee(s) allege to be the reason for the dismissal. In this regard I would also like to make reference to a case which is exactly in point, decided by Zondo J in the matter of *NEHAWU v Pressing Metal Industries* [1998] 10 BLLR 1035 (LC). The dispute referral in terms of s191(5) is employee driven. In other words, the employee, effectively, has the option of choosing the forum by the manner in which he or she frames his or her dispute. See also *Dempster v Kahn NO & Others* (1998) 19 ILJ 1475 (LC) at 1476D.

[10] I have also come across a judgment of Revelas J in the matter of *Future Mining (Pty) Ltd v CCMA & Others* [1998] 11 BLLR 1127 (LC), in which the Court, whilst considering the provisions of s191(5) of the Act, held that a Commissioner is obliged to attempt to determine the "real issue" in dispute when considering his or her jurisdiction. With respect, I cannot agree with Judge Revelas in this regard, for reasons set out below.

[11] The language of s191(5) is clear in this regard. The use of the phrase "the employee has alleged" by the legislature clearly indicates that the matter is employee driven, and that what has been alleged by the employee, the Applicant in the matter, should decide the issue of jurisdiction. Any other interpretation of the section ignores the unambiguous language of the statute. It is trite that in interpreting statutes the Court may not ignore the plain meaning of the words before it. See *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied workers Union (2)* (1997) 18 ILJ 671 (LAC) *per* Froneman DJP.

[12] I do believe that there may be a number of situations in which the Commissioner will not be in a position to establish the real reason for the dismissal. In

conducting the said preliminary enquiry, three scenarios might emerge: (1) there might be a meeting of the minds between the parties as to the real reason; (2) the employee might insist that he or she still does not know the real reason (perhaps even despite the allegations of the employer); or (3) there may be mutually incompatible allegations as to the real reason.

[13] In my opinion, the view expressed in *Future Mining (Pty) Ltd v CCMA & Others*, **supra**, is correct insofar as the real reason for the dismissal is apparent or can be established in the preliminary enquiry conducted by the Commissioner into the matter. Furthermore, the facts in the *Future Mining* case are distinguishable from the facts before me, as *in casu* the reason is not apparent from the CCMA records and the views of the parties are still divergent.

[14] It is incorrect for the Commissioner to take the reason given by the Respondent where the Applicant says he doesn't know the reason for the dismissal. Under these circumstances he should arbitrate the dispute in terms of section 191(5)(a)(iii). It is equally incorrect for the Commissioner to prefer the reason given by the Respondent over that of the Applicant where these are conflicting views as to the "real reason" for the dismissal. In this case, the Respondent submitted that the Applicant had been dismissed for operational reasons. The Applicant was adamant that she was not and that operational reasons were never mentioned when she was dismissed. Obviously these are two mutually incompatible arguments.

[15] I am of the opinion that in a situation where there has been no meeting of the minds after the Commissioner has conducted a preliminary enquiry to establish his or her jurisdiction, s191(5) of the Act directs the Commissioner to be guided by what the employee has alleged as the reason for dismissal. The situation where there is no meeting of the minds, in my view, falls directly within the ambit of s191(5).

[16] In her CCMA form LRA 7.11 the Applicant, in dealing with the special features of the dispute, referred to having had to go on leave to undergo two operations and wasn't sure whether she was being discriminated against because of that. This, in my opinion, is another indication that the employee did not know the reason for the dismissal. This should have rung alarm bells for the Commissioner, and she should not simply have accepted the Respondent's allegations as the real reasons behind the dismissal , if she did. There is no indication that the Commissioner in this case made such an enquiry before referring the matter to the Labour Court. Accordingly, the allegation by the employee that she does not know the reason for her dismissal must form the basis for any determination of jurisdiction.

[17] I have also considered the judgment in *Zeuna-Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC) in which Myburgh JP, while considering the provisions of Item 21 Part E to Schedule 7 of the Act (at 1112D-G), held that a Commissioner is obliged to attempt to determine the real issue in dispute when considering his or her jurisdiction.

[18] I am of the opinion that this judgment is distinguishable from the case before me, as it deals with a totally different provision of the Act. The language of the statute in Item 21, Part E, of Schedule 7 differs from that employed in s191(5), in that the word "alleged" is absent from the former provision. Accordingly, any Commissioner discharging his duties in terms of the former section should endeavour to establish the real dispute before him or her.

[19] On the papers before me the dispute before me relates to an unfair dismissal, with no further particularity, as the Applicant alleges that she

was not told of the reason for her dismissal. She does, however, speculate in her papers what the reason might have been, which still leaves the matter as an unfair dismissal case. This then brings me to the jurisdiction of the Court to deal with such a matter.

[20] This court derives its jurisdiction from the Labour Relations Act. Section 157(1) thereof stipulates the following:

Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

[21] Section 157(5) states that:

Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through **arbitration**.
(My emphasis)

[22] This court does not have jurisdiction to hear an unfair dismissal dispute. It is clear from s191(5)(a) of the Act that disputes relating to misconduct or capacity or where the Applicant alleges that he or she is unaware of the reason for the dispute (unfair dismissal dispute) should be arbitrated by the CCMA. In this regard see *Avroy Shlain Cosmetics (Pty) Ltd v Kok & Another* [1997] 12 BLLR 1556 (LC).
[1]

[23] It is clear to me that the Applicant did not refer this matter to the correct forum, if one takes into consideration what the Applicant has alleged in her statement of case to be the reason for dismissal or her lack of knowledge of the actual reason.

[24] The Respondent's Counsel submitted that the matter should be dismissed with costs. Counsel for the Applicant, on the other hand, argued that I should proceed to hear the matter, as the parties had been referred to this Court by the CCMA. Section 158(2) states that:

if at any stage a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may -

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

[25] Subsection (b) makes provision for a judge of this Court to sit as an arbitrator with the consent of the parties. I do not intend seeking such consent from the parties and exercising that power. However subsection (a) states that I am entitled stay the proceedings and refer the matter back to the CCMA for arbitration. This seems the appropriate course of action to follow in these circumstances.

[26] I accordingly order that:

22.1 the proceedings in this matter be stayed;

22.2 the matter is to be referred back to the CCMA for arbitration;

22.3 costs of today are reserved.

T. JALI

Acting Judge of the Labour Court

DATE OF HEARING: 10 May 1999

DATE OF JUDGMENT: 10 May 1999

DATE OF FULL REASONS: 24 May 1999

For the Applicant: Adv M Upton instructed by Peet van Zyl

For the Respondent: Adv P Ellis instructed by Laas, Doman & Partners