IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J1091/99

In the matter between:

Applicant

and

Respondent

JUDGMENT

FRANCIS AJ

Parties

1.The applicant is the National Union of Mineworkers, a duly registered trade union, which purports to be acting on its own behalf and on behalf of its members dismissed by the respondent on 3o November 1998.

2.The respondent is Hernic Exploration (Pty) Ltd, a private company incorporated in terms of the company laws of the Republic of South Africa.

Background

3.The applicant referred a dispute for adjudication to this court in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 (the Act). The applicant contends that the dispute arising out of the dismissal of union members was referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 17 December 1998. On 18 February 1999, the CCMA issued a certificate of outcome confirming that the dispute remained unresolved. The said dispute was referred to this court for adjudication on 26 April 1999.

4.The respondent filed a notice to oppose and a statement of defence. It initially raised three points *in limine* which was reduced to two at the hearing of this matter.

Points in limine

5.The respondent contends that the applicant's referral of its statement of claim is ten days late in that the last date that conciliation should have taken place was 16 January 1999 instead of 18 February 1999 as reflected on the Certificate of outcome of dispute referred for conciliation (the Certificate) that was issued by the Commissioner. The referral should have been made to this court for adjudication within 90 days from 16 January 1999. The applicant had to apply for condonation for the late referral of the statement of claim which it did not do.

6.The second point *in limine* is that the applicant had failed to indicate in its referral to the CCMA who the employees in dispute were and did not indicate in the Statement of Claim who they are. In the circumstances the only applicant before this court is the applicant union who cannot claim any relief from the respondent.

The First Point In Limine

7.The respondent's argument in a nutshell is that the applicant's dispute was referred to conciliation on 17 December 1998. In terms of section 135(2) of the Act, conciliation had to take place within 30 days of the referral for conciliation. The parties did not agree to extend the 30-day period. The commissioner could not extend the 30-day period on his own. He was obliged in terms of section 135(5)(a) to issue a Certificate of failure to settle the dispute on 16 January 1999 which was the last day of conciliation. Beyond that date, the commissioner's functions in terms of section 135 of the Act had expired, the time for conciliation having expired. Conciliation could not take place on 18 February 1999 as indicated in the Certificate. The date reflected on the certificate must be ignored by me and I should accept the 16 January 1999 to be the date when conciliation had failed. The dispute had to be referred by the applicant within 90 days from the 17 January 1999 in terms of section

191(11)(a) of the Act. This meant that the referral that was made to this Court on 26 April 1999 was after 90 days. The applicant did not apply for condonation which meant that the dispute was referred late and could not now be condoned.

8.The Act is divided into different chapters. Chapter VII is headed: **Dispute Resolution from sections 112 - 184**. This chapter VII is divided into different parts. Part C is headed Resolution of Disputes Under Auspices of Commission. Chapter VIII is headed: **Unfair Dismissals (ss 185 - 197)**. It is clear that chapter VII deals with general disputes and chapter VIII with specific disputes which relate to unfair dismissals. Chapter VII lays down its own procedures about how its disputes should be dealt with. That procedure is found in section 135 of the Act. The Commission has exclusive jurisdiction over certain disputes. Those types of disputes can only be referred to the Commission for conciliation even where there are Councils that may have jurisdiction. Chapter VIII also lays down its own procedures which are to be found in section 191 of the Act.

9.It is necessary to quote the provisions of sections 135 and 191 for the purposes of this judgment.

"135 Resolution of disputes through conciliation

(1)When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2)The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period.

(3)The commissioner must determine a process to attempt to resolve the dispute, which may include -

(a)mediating the dispute;

(b)conducting a fact-finding exercise; and

(c)making a recommendation to the parties, which may be in the form of an advisory award.

(4).....

(5)When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties -

(a)the commissioner must issue a certificate stating whether or not the dispute has been resolved;

191 Disputes about unfair dismissals

(1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to -

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

(2) If the employee shows good cause at any time, the council or the commission may permit the employee to refer the dispute after the 30-day time limit has expired.

(3) .....

(4) The council or commission must attempt to resolve the dispute through conciliation.

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral and the dispute remains unresolved -

(a) .....

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for the 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 1V; 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.

(6 - 10) .....

The referral, in terms of subsection 5(b), of a dispute to the Labour Court must be made within 90 days after the council or the commissioner has certified that the dispute remains unresolved."

11. Section 191 of the Act clearly deals with disputes about unfair dismissals. These are specific disputes as opposed to disputes of a general nature. This section sets out the procedure that needs to be followed when the dispute is about an unfair dismissal. Section 191 states that if the *dispute is about the fairness of a dismissal*, the *dismissed employee* may refer the dispute within 30 days from the date of dismissal to the council or commission. Where a dismissed employee has shown good cause at any time, the council or commission may permit the employee to refer the dispute after the 30-day time limit has expired. The council or commission must attempt to resolve the dispute through conciliation. Once the council or commission has certified that the dispute remains unresolved, or if 30 days have expired since the council or commission received the referral of the dispute and the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication if the employee alleged that the reason for the dismissal is based on the operational requirements of the employer. Such a referral of the dispute to the Labour Court for adjudication must be made within 90 days after the council or commission has certified that the dispute remains unresolved. The only person who can refer a dispute in terms of the section 191 of the Act for conciliation or adjudication is a dismissed employee. No other procedure is prescribed in this section as to how the dispute should be resolved.

12. In terms of section 135(2) and (5) of the Act, a commissioner who has been appointed to resolve a dispute must through conciliation within 30 days of the date the commission received the referral and attempt to resolve it. The parties may agree to extend the 30-day period. When conciliation has failed, or at the end of the 30-day period or further period agreed between the parties, the commissioner must issue a certificate stating whether or not the dispute has been resolved. The commissioner cannot on his own accord extend the 30-day period. Only the parties could agree to do so. All that section 135(5) requires a commissioner after conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties to issue a certificate stating whether or not the dispute has been resolved. Section 135 does not indicate by what the date the certificate has to be issued. The certificate can be issued after the 30-day period has expired. All that the certificate must

indicate is whether or not the dispute has been resolved. Section 135 provides for a procedure that the commissioner should follow in attempting to resolve the dispute. These disputes can be referred to the Commission at any time. They need not be referred to the commission within 30 days from the date it arose. There is no condonation procedure laid down for a late referral as there can never be a late referral in terms of this section.

13. I need to emphasize that section 135 does not deal with disputes about unfair dismissals. This is so in that any party can refer a dispute in terms of this section to conciliation at any point in time. It is only once the dispute has been referred to conciliation that an attempt should be made to resolve within 30 days. Section 191 specifically states that it relates to disputes about unfair dismissals. Where the dispute relates to an unfair dismissal and there is a conflict between the provisions of section 135 and 191, the procedure laid down in section 191 should prevail. There is however not such conflict between the two sections. The sections relate to different disputes.

14. The procedure laid down in section 135 of the Act is different from that of a dispute relating to unfair dismissal. The only person who can refer a dispute relating to an unfair dismissal is a dismissed employee. It must be referred within 30 days from the date of dismissal. In the event that it is referred outside the 30-day period condonation must be sought. Once the dispute remains unresolved a dismissed employee may refer the dispute to this Court for adjudication within 90 days from the date when the commissioner has certified that the dispute remained unresolved. There is no time limit when such a certificate may be issued. No procedure is laid down how the commissioner should attempt to resolve the dispute during conciliation. No period is laid down when the said dispute must be resolved. The commissioner does not have to seek the permission of the parties to extend any deadlines.

15. Section 191(5) of the Act provides for two scenarios. The first is that if the council or a commission has certified that the dispute remains unresolved, it may be arbitrated upon. The second is if the 30 days have expired since

the council or the commission received the dispute and it remained unresolved may it also be referred to arbitration. This means that the dismissed employee may refer a dispute without a certificate to arbitration provided that 30 days have expired after it had been referred to conciliation. The other alternative is to wait until the dismissed employee is in possession of a certificate and then refer it to arbitration.

16.The position is somewhat different when it relates to dismissals that must be referred to this court for adjudication. Section 191(5)(b) provides that if a council or commission has certified that the dispute remains unresolved, or if the 30 days have expired since the council or commission received the referral may the employee refer the dispute to this court for adjudication. However section 191(11)(a) requires that the referral to this Court must be made within 90 days after the council or commission has certified that the dispute remains unresolved. The dismissed employee cannot refer his dispute to this court for adjudication without being in possession of a Certificate. Section 191(11)(a) is coached in peremptory terms. It prevents an employee from referring a dispute to this Court for adjudication before the commission or council has certified that the dispute remains unresolved. The dispute can only be referred to this Court once the council or commission has certified that the dispute remains unresolved. The Certificate can be issued at any time.

MA for conciliation on 17 December 1998, the parties had not agreed to extend the 30-day period, which meant that the 30-day period expired on 16 January 1999. The applicant should therefore have applied for condonation. This position would have been correct had the dispute not related to an unfair dismissal. But because it relates to an unfair dismissal, the decisive date would be the date when the commissioner certified that the dispute remained unresolved which in the present matter is 18 February 1999. Even if the provisions of section 135 were to apply to disputes about unfair dismissals, section 191(11)(a) prevents a dismissed employee from referring his dispute to this Court without a Certificate and must do so within 90 days of the certification.

18.Mr Snyman argued that the commissioner could not hold a conciliation after the 30-day period had expired without

the consent of the parties. This is true for disputes in terms of section 135 but not for disputes relating to unfair dismissals in terms of section 191. As pointed out earlier there is no deadline within which unfair dismissal disputes must be conciliated. There is no similar provision in section 191 like the one in section 135 where the parties can agree to extend the thirty-day period.

19. There was therefore no need for the applicant to have applied for condonation. The test is not to determine when the 30-day period for conciliation expired but when did the commissioner certify that the dispute remained unresolved. This court derives its jurisdiction in disputes of this nature only from certain factors and those factors are the referral of a dispute for conciliation on time and a referral to this Court for adjudication within 90-days from the date when the Certificate of non-resolution.

20. In the event that Mr Snyman is correct that section 135 should be read with section 191, the applicant's referral was still made within 90 days in terms of section 191(11)(a). However, I do not agree that section 135 of the Act should be read together with the provisions of section 191(5)(b) and (11)(a) when it relates to disputes about unfair dismissals. It is clear from the reading of section 191(11)(a) that a dispute can only be referred to this court within 90 days after the commission and council certified that the dispute remained unresolved. The language used is couched in peremptory terms. A Certificate is a pre-requisite for referring the dispute to this Court for adjudication.

21. Mr Snyman referred me to the matter of *Charles v Reshads Furnishers* (1994) 3 LCD 335 (IC) where the Industrial Court held that a unilateral extension of the 30-day time period in terms of Section 35 of the Labour Relations Act 1956 by the Department of Labour was invalid without agreement by the parties. That Court found that the applicable date of failure to settle was the date of the expiry of the 30-day limit and that the employee's referral of the dispute was outside the period of 90 days as prescribed by section 46(9) of such Act. That case is

distinguishable from the present case in that section 191 of the Act does not require the commissioner to attempt to resolve a dispute within 30 days nor is the consent of the parties required. All that the section 191 of the Act requires the commissioner to do is to attempt to conciliate and than issue a certificate. Once the certificate has been issued must the dismissed employee refer the dispute to this court for adjudication within 90 days.

22.The commissioner has in this matter certified that the dispute remained unresolved on 17 February 1999. The respondent did not challenge the validity of the certificate. The dispute was referred to this court well within the 90-day period. There was therefore no need for the applicant to apply for condonation.

23.The respondent's first point *in limine* is dismissed.

The Second point in limine

24.This brings me now to the second point *in limine*. The respondent is not disputing that the applicant can sign a referral on behalf of its members or refer a dispute to this court for adjudication in terms of section 191 of the Act. What the respondent contends is that the dismissed employees had to be cited as parties and their full names, addresses and particulars had to be provided.

25.The real issue that the second point *in limine* raises is whether the applicant has cited its dismissed members as a party to the proceedings before this court and during conciliation and whether they are indeed parties.

26.Mr Snyman submitted that from the referral document, 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 was not signed by any of the said employees concerned. The said employees are in no way whatsoever identified or is it indicated which of the employees mandated or authorized the referral of the dispute or in fact a party to the dispute.

27.Mr Snyman submitted further that of greater concern is the fact that a list of employees has been identified in the referral of the dispute to this Court as parties to the dispute without such employees in any way being identified as a parties to 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 authorized the referral of the dispute to conciliation by the applicant union.

28.Mr Snyman submitted that 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 voids 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. As a result this Court had no jurisdiction to entertain this matter, this matter not having been properly and validly referred for conciliation and conciliated in terms of the Act.

29.Mr Khumalo who appeared for the applicant conceded that when the dispute was referred to conciliation, no list of the individual employees was annexed or submitted.

30.Mr Khumalo submitted that the applicant was relying on the provisions of section 200 of the Act. He argued that it was obvious that the applicant was acting on behalf of its members. This was obvious from paragraph 1 of the applicant's statement of case. The employees numbered 157 in total. The employees had chosen the union's address for service of the documents.

31.Mr Khumalo argued further that the applicant was not aware of the matter of *Librapac CC vs Moletsane NO & Others (1998) 19 ILJ 1159 (LC)* which dealt with a similar situation where all the individual employees were not cited as parties to the proceedings. Mr Khumalo argued that there were other judgments which permit an applicant trade union to sign a referral on behalf of its members. He placed much emphasis on *NUM vs CCMA and Other,* a judgment by Landman J. He argued that should I find against the employees, it would lead to great hardship for the individual employees. He also relied on the following decisions of this court namely *Moolman Brothers vs Garylard NO & Others; Rustenburg Platinum Mines Ltd (Rustenburg) Section vs Commission for Conciliation Mediation and Others and Phillip Stander and 4 others vs Goldfields Trust (Pty) Ltd*. Those cases dealt with whether a trade union could sign a referral form on behalf of its members. The issue in the present case is different from the issue that was raised in the aforesaid cases. The said cases are distinguishable from the facts of this case. Mr Khumalo correctly also conceded that the said cases are distinguishable from the present case.

32.Mr Khumalo also relied on the provisions of section 200 of the Act. The section reads as follows:

"200 Representation of employees or employers

(1) A registered trade union or registered employers' organisation is entitled to be a party 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 interest;

(b) on behalf 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."

33. 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, on behalf of any of its members or in the interest of any of its members. 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.

34. Section 200(1) therefore permits the applicant union to be a party to the proceedings provided that its members are also a party to the dispute. Once the applicant trade union members are a party to the dispute, can the applicant trade union act in its own interest, on behalf of its members and in the interest of its members. It can only be a party if its members are a party to the dispute.

35. 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 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.

36. The applicant was required to indicate at the conciliation stage who its members were. It was also required to do so when this dispute was referred to this court for adjudication. It has not done so. The list that was submitted in Court is a list of the total workforce of the respondent's employees and does not indicate who the dismissed members of the applicant are.

37. Whilst it is true that in terms of section 191(1) of the Act, a dismissed employee may refer a dispute concerning his dismissal to the CCMA for conciliation, the section does not bar a registered trade union that acts on behalf of its members and cites its members as parties to the dispute, from referring their dispute to conciliation. The trade union would however have to indicate who those members are and cite them as a party. It could do so by

attaching the list of the names, addresses and particulars of its members to the referral in order to identify and determine such persons as a party to the dispute.

38.It is clear from the referral to conciliation and the statement of claim that none of the employees were cited as parties or are parties to the dispute in terms of section 191(1) of the Act. None of the individual employees have been identified, listed or joined as parties to the dispute. Neither the respondent nor the CCMA could have known who the parties to the dispute were. There was no list of names of employees attached, nor was there even any reference made in the referral itself that the dispute was being brought on behalf of the individual employees.

39.The above situation was reflected in the Certificate of failure to settle. This Certificate of failure to settle was only issued between two parties, being the respondent and the applicant union. None of the individual employees are even referred to or identified in such Certificate. When the matter was referred to this Court, it was also only referred with the trade union being the only applicant party, and none of the individual employees being cited, described, identified 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. In paragraph 1 of the statement of claim the applicant is cited as the "National Union of Mineworkers, a duly registered trade union, which acts on its own behalf and on behalf of its members dismissed by the respondent on 31 December 1998".

40.In terms of Rule 6(1)(b) of the Rules of this Court, a document initiating proceedings, known as a Statement of Claim must have a substantive part containing *inter alia* the names, description and addresses of the parties to the proceedings. The only parties whose names, addresses and descriptions are contained in the statement of case is that of the applicant union and the respondent.

41.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 this 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.

42.It is perhaps appropriate to conclude by referring to the *Librapac CC vs Moletsane NO and Others supra* at page 1167 at paragraph 43 where Tip AJ said the following:

"The new Act 66 of 1995, has a number of provisions which indicate that greater clarity in respect of the parties is now required (as opposed to the Labour Relations Act 28 of 1956). There is good reason for this. A dispute comprises not only a set of averments and submissions relating to the issues. It comprises also the persons who are parties to the dispute. Those who seek to be part of the dispute resolution possibilities contained in the Act, must identify themselves and declare their participation.

There are compelling practical considerations underlying this. Where, for instance, applicants are described merely as 'union A and X others', who are not otherwise properly identified as parties in the action, serious problems of locus standi emerge in the event of some individuals resigning from the union in the course of pre-litigation periods or, by way of further example, in the event of the union in its own right electing not to conduct the litigation to conclusion. That holds the potential prejudice for a respondent party, who may seek counter-relief against individuals or, ultimately, relief by way of costs against them".

44.I agree fully with the views expressed by Tip AJ in the *Librapac decision.*

45.The individual applicants should have been properly cited in the CCMA referral and in the referral to this court. The only party that was before the CCMA and before this Court is the applicant trade union. The applicant

trade union has not complied with the provisions of sections 191(1) read with 200 of the Act. All that was required of the applicant was a clear schedule containing each person's full names, his or her address, and a signature to record that person's wish to be party to the steps being taken. This is not an overly technical or legalistic obstacle.

46.In the circumstances I find that there is substance in the respondent's point *in limine.*

47.The respondent's second point *in limine* is upheld.

48.This is not a matter where the costs should follow the result.

49.In the circumstances I make the following order:

(a) The respondent's first point *in limine* is dismissed;

(b) The respondent's second point *in limine* is upheld;

(c) The applicant's referral is dismissed.

(d) No order as to cost is made.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 14 NOVEMBER 2000

: 16 NOVEMBER 2000

: ATTORNEY R KHUMALO OF MASERUMULE INCORPORATED

: ATTORNEY S SNYMAN OF SNYMAN VAN DER HEEVER HEYNS INC