SNELLER VERBATUM/JHB/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 30 November 2000 CASE NO. J2525/98

In the matter between:

CHEMICAL WORKERS INDUSTRIAL UNION Applicant

and

POLIFIN LIMITED Respondent

J U D G M E N T

SUTHERLAND, AJ:

[1] In this case five individual workers, represented by their union, Chemical Workers Industrial Union, have referred to this court a case in which they plead an unfair dismissal for want of compliance with the retrenchment procedures provided for in section 189 of the Labour Relations Act.

[2] A challenge has been raised to the propriety of that dispute by these five individuals being heard by this

court. To this end the parties settled a statement of preliminary issues to be resolved prior to entering into the principal case.

[3] The parties formulated a draft document entitled "Separate Adjudication of Issues" which was later refined. I have had regard to both drafts. I am of the view that there is no difference of substance and in the revised draft the points are somewhat better expressed. The issues are:-

"1. Whether or not the dispute that the court is called upon to adjudicate upon in terms of the applicant's statement of case, read with the contents of the pretrial minute, was referred for conciliation as intended by section 191 of the Labour Relations Act of 1995.

2. If the dispute had not been referred for conciliation in terms of section 191, whether or not the court has jurisdiction to determine the dispute.

3. Whether or not an attempt had been made to resolve the dispute through conciliation as intended by section 157(4)(a) of the Labour Relations Act, 1995.

4. If an attempt had not been made to resolve the dispute through conciliation as contemplated by section 157(4)(a), whether or not the court should determine the dispute or in terms of section 157(4)(a) of the Labour Relations Act refuse to do so.

5. Whether or not the settlement of a severance pay dispute on the 3rd June 1998 was a final settlement between the respondent and the individual five applicants regarding their retrenchment which was effective on 15 September 1997."

[4] It emerged from the hearing that the critical question of fact is whether or not the dispute concerning the five individual applicants was ever referred to the CCMA for conciliation, and in this regard a debate

ensued concerning the implications of the judgment which was handed down in the Labour Appeal Court in The *National Union of Metal Workers of South Africa and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142. The bench consisted of Zondo JP, Conradie JA and Mogoeng AJA. There are two judgments, the majority given by the Judge-President and Mogoeng

AJA and minority judgment in which a dissenting view on the application of section 157(4) was given. Section 157 provides extensively for the jurisdiction of the Labour Court and deals with various aspects in which it enjoys exclusive or concurrent jurisdiction with the civil courts, and in section 157(4)(a) provides that:- "The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt had been made to resolve the dispute through conciliation".

[5] Conradie JA took the view that this provision authorised the Labour Court to entertain matters notwithstanding the absence of conciliation, where, nevertheless, provisions elsewhere in the Labour Relations Act prescribed conciliation. That view was not shared by the majority.

[6]/..

[6] At page 158I of the judgment, the Judge President observed that:-

"The Act does contemplate that the Labour Court will have jurisdiction to adjudicate a dispute even when there is no meaningful conciliation in

respect of such a dispute. This is supported by the fact that section 191(5) of the Act contemplates, amongst others, that a dispute may be referred to arbitration or adjudication if the dispute remains unresolved after a period of 30 days have elapsed since the council or

the CCMA received the referral of such dispute to conciliation.

[7] The learned judge then deals with various other aspects of the debate and then at page 160 he stated:

"To me it is as clear as daylight that the wording of section 191(5) *imposes the referral of a dismissal dispute to conciliation as a pre-condition before such a dispute can either be arbitrated or be referred to the Labour Court* for adjudication. I cannot see what clearer language the Legislature could have used other than the language it chose to use in section 191(5)... In section 191(5) the Legislature used the wording:

'If a council or commissioner certified that or if 30 days have expired since and the dispute remains unresolved –

(a) the counsel or the commissioner may arbitrate the dispute;

(b) the employee may refer the dispute to the Labour Court for adjudication."

[8] He then, at page 161E says the following:

"The long and the short of the above is, therefore, that in my view section 137(4)(a) provides no basis for the proposition that the Labour Court has jurisdiction to adjudicate a dismissal dispute which has <u>not been referred to conciliation</u>. It is only a basis for the proposition that in a case where no certificate of outcome stating a dispute remains unresolved has been issued but the dispute was referred to conciliation but no attempt was made to conciliate the dispute, the Labour Court may in its discretion refuse to determine the dispute."

[9] The submission was made in this court that the remarks both of the Judge-President and of Conradie JA were *obiter* for purposes of the decision in the <u>Driveline</u> case. It seems to me that this is an apposite submission to advance. However, in my view, whether it is *obiter* or

not, I am inclined to adopt the view articulated by the Judge-President.

[10] In my view the Labour Relations Act as a whole is intended to, and must be understood to, create an exclusive dispute resolution system. One of the

fundamental tenets of that system is that disputes are to be submitted to a process of conciliation. Only when that process is exhausted is it envisaged that adjudication either in the CCMA, by way of arbitration, or in the Labour Court by way of trial, may occur. The only instances in the Act of judicial intervention without the prior exhaustion of the conciliation process, are those instances where the Labour Relations Act expressly authorises the Labour Court to grant relief which is intended to support the consensus seeking objectives of the dispute resolution procedures provided for in the Act. The classic example of this sort of intervention is where a Labour Court is approached in order to obtain an interdict in respect of industrial action which is on-going. Such relief is not required to be preceded by conciliation.

1] A rare example of the exercise of a discretion in terms of section 157(4) is that which is offered in the judgment of Landman J in *Lomati Mill Barberton v Paper Printing Wood and Allied Workers Union and Others* (1997) 18 ILJ 178. In that case the court was approached on urgency to determine a dispute which had arisen in regard to picketing rules. Picketing is governed by section 69. It is incumbent upon

parties who are in dispute concerning the content or the application of such rules, to approach the CCMA and have it conciliated. That did not happen in this case. The learned judge, for reasons of urgency, excused the absence of conciliation, relying on the provisions of section 157(4)

in order to assume jurisdiction to grant the appropriate urgent relief.

2] This is a significant example in relation to the remarks I have already made because it indicates that the role of the court in adjudicating disputes of different classes, proceeds from the premise that where the process requires to be protected, conciliation anterior to adjudication by this court is unnecessary or may be excused. In contra- disctinction to those matters, the present dismissal dispute does not give rise to a need to protect the process. The only point in issue now is whether or not the individual applicants have or have not been visited with an unfair dismissal.

3] I am therefore of the view that a referral of a dispute for a conciliation, either to the CCMA or a Bargaining Council is indeed a jurisdictional precondition for a dismissal matter to be adjudicated

in this court.

4] The respondents, in challenging the propriety of the dispute being before the court, advanced two independent arguments. The first was that the dispute which had been referred to the court and upon which reliance is made now in order to advance a claim was different to the case which has been pleaded. The second argument was that the dispute referred to the CCMA upon which reliance is made to conduct this case, was not a dispute, however valid it may have been, which encapsulates the case of the five individual applicants. I shall deal with these two arguments in turn.

5] It is appropriate to look first of all at the referral which was lodged with the CCMA on 21 June 1997. That dispute, lodged on the prescribed

form, LR 7.11, described the nature of the dispute as:-

"unilateral restructuring of the PVC Division without proper consultations which affected our members' employment".

And in regard to the relief sought, the referral articulated the following prayer:

"Company to consult *bona fide* before embarking onto this programme as already done and also indicated the

date for implementation being 31 July 1997."

6] The contention of the respondent was that that dispute is so distant from the one which is before this court that the differences cannot be reconciled. It is clear that what is in issue before the court is whether or not the individual applicants were unfairly dismissed. It is of course made plain that the foundation for the complaint of unfairness has its root in non-compliance with the provisions of section 189 of the Labour Relations Act.

7] In addition to what appears from the record as such, the evidence revealed what had transpired at the conciliation meeting before the commissioner of the CCMA on 18 August 1997. The evidence of Mrs Strydom, a human resources practitioner engaged by the respondent, who had made a contemporaneous note was indeed the only meaningful information on what did transpire on that day. The evidence of the trade union official, Ngcana, did not in any material respect challenge or contradict what was recorded there. When regard is had to what was included in her notes, one sees once again a fair reflection of the dispute which was articulated on the Form 7.11.

8] Various complaints were raised. One seemed to focus on the role which Mr Kobotwane, an employee representative and member of the union, played in certain meetings which were convened. There were also complaints concerning the non-involvement of the
union or its individual members in the consultations. Ultimately the meeting ended inconclusively. One thing that is odd when one has regard to the evidence of what took place is the decision of the commissioner in his certificate which he issued on that same day, to describe what had taken place as a dispute concerning unfair dismissal, with reference to section 189. It is common cause that the five applicants were not, as at 18 August dismissed. Their dismissal in fact took place only on 15 September. To the extent to which a debate could have been conducted on 18 August it could not have been premised on the basis that they had been dismissed. It is plain when one examines what was referred to the CCMA at that time and what is pleaded in this court that a different dispute has in fact been placed before this court.

9] However, if one adopted a generous approach to what is articulated as having been referred it may bear a

different interpretation. I entertain this thought because there is some support for a generous view in a judgment of the Judge-President in the Driveline decision to which I have already referred. In that particular decision a party had referred a dispute alleging an unfair dismissal for want of compliance with section 189 and it sought at the trial stage to amend its pleadings to include an allegation based on an automatically unfair dismissal. This was challenged on the basis that it was a wholly different dispute. The Judge-President found that in his view it was not that different that it could not be encapsulated by

the dispute which had been referred. If one takes that generous view, I suppose it is possible to conclude that the nature of the dispute referred to conciliation and deliberated upon on 18 August, could, conceptually, have contemplated the imminent dismissal of the individuals and on that basis the day may well be saved from the applicants' point of view. That approach, if adopted, would dispose of the respondent's point. I shall assume, without deciding so, that the referral and the pleaded case are on common ground.

0] The key controversy in this case relates to the question of whether or not it can be found that the five applicants were party to the dispute which was indeed referred to the CCMA on 21 June 1997.

1] The respondent company was at the time a gargantuan organisation with plants in several places in South Africa. One such place was in the vicinity of Sasolburg where, so the evidence disclosed, several plants or factories or business units, as the case may be, were situated, geographically distinct from each other on a tract of land some 12 square kilometres in extent, known as 'Midlands'. Amongst the business units which are situated on the site was one factory known as the PVC Division and another known as the Polyethylene Division. These are the two divisions that are central to the controversy. In addition to that, a central head office

establishment was also in existence, geographically distinct from all other factories. At that head office was situated the industrial relations department where Steenkamp and Slier, who are mentioned in the evidence, had their offices.

2] The five applicants worked at the polyethylene plant. They did not work at the PVC plant but certain other

workers, including one Mkwanazi, worked there. They were all members of the union. During 1997 restructuring took place within the respondent's concerns. At more or less the same time restructuring of a radical nature took place in both the PVC Division and in the Polyethylene Division. The places are about half a kilometre apart. In each case the company furnished notices to the respective workers informing them of the risk of retrenchment. Workers in the polyethylene factory, including the five applicants, received a notice dated 13 March 1997. Workers in the PVC Division received notices dated 1 April 1997.

2] In the respondent's operations three principal unions were active, the South African Chemical Workers Union, the Mine Workers Union and the first applicant, the Chemical Workers Industrial Union. The company applied a principle of giving recognition to any union that had members in excess of a 15% proportion of employees on a site. The Chemical Workers Industrial Union enjoyed recognition at various sites where they exceeded that threshold but did not enjoy recognition at the Midlands site. At
Midlands it was the South African Chemical Workers

Union and the Mine Workers Union which enjoyed such recognition. This is a significant fact because it explains why, although consultations occurred with certain unions, the Chemical Workers Industrial Union was not notified. As a result, when its members in both the PVC plant and in the polyethylene plant received notices telling them of their jobs being in jeopardy, the union was not itself at the same time notified.

4] When exactly the first applicant trade union became aware of these events is not clear but the union announced its awareness in a letter which it sent to the Group Industrial Relations Department on 29 May 1997. This correspondence is central to the controversy and it is necessary to look closely at what passed between the parties. On 29 May Ngcana, the union official who dealt with these matters throughout the course of events, wrote a letter to the respondent for the attention of Steenkamp, the then Group Industrial Relations Manager, as follows:

"Dear Sir

Re: Retrenchment

It came to our attention that the company has issued notification letters with an intention to

carry out illegal retrenchments in the warehouse section. We want to bring to your attention that the company has not complied with the provisions of the LRA, section 189 thereof, as we are by no means party to your retrenchment policy. We therefore demand that this action be stopped at once and proper consultation process takes its course, failing which we shall refer this dispute to the CCMA for legal recourse."

What is significant, of course, is that this letter gives no indication of who is involved, where they work or, indeed, what had been communicated by individuals to the union in regard to the plans of the company which might lead to retrenchment.

5] This letter was received by the respondent and dealt with by Slier, the Industrial Relations specialist. On 6 June he responded to the union's letter saying the following:

"Could you please provide the company with more specific information regarding the above. On receipt of your response the company will be in a more favourable position to investigate and reply according to your specific concerns."

The company in requesting better and further particulars acted properly. There may be some question mark about whether or not this letter was carefully composed so as not to disclose any information to the union and that may indeed be a warrantable inference. It is not necessary for me to decide on it, but in so far as Ngcana gave voice to the fact that he regarded the response as a delaying tactic, it is not hard to realise why he did not take this letter at face value.

6] What then happened was that on 12 June Ngcana wrote a further letter in which he said the following:

"Retrenchment

Further to your response dated the 6th June 1997 we hereby wish to send you a copy sent to one of our members. We must further add that should this company intend to continue with this unfair labour practices, we shall be compelled to obtain an order from the court restraining the company not to continue, including an order for costs.

We thus demand an undertaking by yourselves by return fax not later than the close of business, 20 June 1997, that the action will be postponed pending proper consultation as outlined in the Act."

Attached to that letter is a document critical to the case. It was a letter sent to T A Mkwanazi. It is dated 1 April. It was signed by Mr E Roper who described himself as the operations manager, PVC Division. The document is on a letterhead of 'Polifin, PVC Division' and Mkwanazi

is addressed as being in the "Warehouse Section, PVC Operations Department, PVC Division".

7] On receipt of this communication Slier, on behalf of the respondent, addressed a letter dated 13 June in which he described the subject he was dealing with as "Restructuring at the PVC Warehouse Section" and he invited a meeting with the union.

8] On 16 June the union responded and at this stage entitled its correspondence "Retrenchment at the PVC Warehouse". Thereafter further correspondence passed in which some reference in one way or another to the PVC Warehouse was maintained.

9] A meeting was held on 17 June. It was not fruitful. It is not common cause as to what exactly passed. The respondent contends that it broke down on the basis of the union demanding that it be involved in the retrenchment consultations, something which was

contrary to the recognition policy of the company. The union's version is that it demanded that either the union or its individual members must be properly consulted.

0] What followed shortly thereafter on 21 June was the referral to the CCMA, and on 18 August the consequent fruitless conciliation meeting took place.

1] What is possible to deduce from that record and from the testimony in relation thereto is that only the PVC Division (to the exclusion of the Polyethylene Division) was referred to. Respondent's representatives say, in their testimony, that they had no idea throughout this period

that the grievances of individuals in the Polyethylene Division were in the least degree part and parcel of what was being complained about. There is indeed not as much as a hint of evidence that they did become aware at any relevant time.

2] The only source for the idea that the complaints articulated in the correspondence and the reference of a dispute on 21 June to the CCMA, were intended to include the polyethylene warehouse and its workers, including the five applicants, is the testimony of

the union organiser, Ngcana. Other than his evidence there is no other source from where that idea emerges.

0] Ngcana testified that he was ignorant at the relevant time of the significance of the divisional set up within the respondent's organisation. The absence of recognition of his union rendered it unnecessary, and perhaps inappropriate, for him to visit the site. It was not disputed that he had never been to the site although it was suggested to him that any casual observation would have indicated the geographic distinctness of the various divisions. I am satisfied that I can accept that Ngcana was ignorant of the divisional set up at the relevant time and that there was nothing from the respondent's correspondence that would have alerted him to its significance at the point at which it would have made any difference.

4] He explains his references to the PVC Division as having been unconscious and inspired by the correspondence which had come to hand. The testimony indicates that the earliest correspondence to hand would have been the letter of Mkwanazi which, as alluded to above, referred to the

PVC Division. Clearly when that was furnished to Slier, Slier in his correspondence, picked up on it and wrote back to Ngcana in like fashion. The plausibility of an innocent misunderstanding arising is manifest and it is not improbable that the references made by Ngcana to the PVC Division were not necessarily, in his mind, limited to the PVC Division and that he did so from ignorance. This is the perspective which is consistent with the documentary record.

5] What needs to be further examined is Ngcana's evidence that he was conscious at the relevant time of the problems and grievances of the five applicants in the polyethylene division. According to him, prior to him sending his letter of 29 May to the respondent, various workers came into the union office in Sasolburg to complain about retrenchments. Amongst the workers who came in to complain were some of the five applicants. These complainants gave him letters, some in the cast of the letter sent to Mkwanazi and others in the cast of a letter dated 13 March which had been given to the five applicants. What appears on the letters given to the five applicants is a matter of some significance. They received letters dated 13 March 1997 on a letterhead upon which the legend is inscribed 'Polifin,

Polythene Division'. They were addressed as being at the 'Warehousing Section, Consumer Services Department, Polythene Division'. The letter was signed by J Doherty, Distribution Manager, Polythene Division. If Ngcana had had these letters prior to 29 May and had troubled to read them, he would have been under no illusion that different letters had been sent to individuals in the two divisions, giving not only an indication of a divisionalisation but also, significantly, indicating that the date at which their potential retrenchment would take place was different. The date of 31 August was designated in the applicants'

letters of 13 March 1997 whereas Mkwanazi was told that he was at risk from 31 July 1997.

6] Ngcana explains his failure to respond to this information by saying that he did not read all the letters. His evidence is that he received a batch of letters and when he wrote to Slier in June 1997 he simply picked Mkwanazi's letter from the top and did not apply his mind to any of the others.

7] There is, however plausible that explanation may be on its own terms, reason to suspect the veracity of this evidence. Indeed, there is reason to suspect

the veracity of his evidence in regard to his very possession of a letter of 13 March at any relevant time and in consequence, the veracity of his evidence that he was conscious of the complaints of those individuals.

8] Three grounds exist for the suspicions. The first is that he claims, somewhat oddly, never to have read the letters. I have allowed in the evaluation of his evidence for the prospect that for reasons of slackness or pressure of other work (a consideration not unknown to trade union organisations), that that may in fact have happened.

9] The second consideration is, however, not capable of being excused. When this case was pleaded in this court, not only did the claim refer exclusively to the PVC Division, but the letters of 13 March 1997, self-evidently critical letters in the case of the applicants, were conspicuous by their absence from the schedule of documents which is required to be annexed to the statement of claim. What made their

absence all the more astonishing was the inclusion of two letters addressed to individuals in the PVC
Division of which Mkwanazi was one. If Ngcana indeed was in possession of letters of both kinds from as

early as 29 May 1997, it is inexplicable why all of them were not included with the pleadings. If the attorneys who drafted the pleadings were in possession of such documentation, they could not have drafted the pleadings as they initially read, to refer exclusively to the PVC Division. No explanation has been advanced at all and the appropriate inference is an adverse one.

0] The third reason for suspecting the veracity of Ngcana's evidence derives from what happened in the polyethylene division during the course of late 1997. As alluded to earlier, the effective date of retrenchment was 15 September 1997. It is common cause that a group of individuals in the Polyethylene Division, including members of both SACWU and the CWIU and including the applicants, referred a dispute concerning the calculation of their severance pay to the CCMA. This was lodged on 6th November 1997. Because of various difficulties, including a mix-up in regard to management being represented, the conciliation meeting did not in fact proceed and the commissioner referred the matter immediately to arbitration. That arbitration eventually was heard on 6 June 1998. At that time the fact of no

conciliation was apprehended and the matter was resolved by way of a conclusion of an agreement that the question of the calculation would be revisited. The dispute was resolved on that footing.

1] The question which arises from that set of circumstances is why the applicants should have made themselves party to a further, and indeed individually initiated, dispute about the calculation of the severance pay, when they already were the subject matter of a dispute concerning the whole of their retrenchment which had been referred on 21 June 1997. No satisfactory explanation emerges either from the record or from the testimony. It is strange, to say the least, if they had just emerged from an encounter with their employer, having been represented by their union, in regard to the unfairness of the way they had been treated, they would then not return to the union with their complaint about a further aggravating feature of their retrenchment in the form of concerning the alleged miscalculation of their retrenchment package.

2] The inference which is warranted from these circumstances is that the workers in fact had not

been in any way involved in the earlier dispute and in fact had only approached the union after the issue concerning their severance pay had been resolved, ostensibly not to their satisfaction, whereupon an endeavour had been made to facilitate an opportunity for this court to consider their retrenchment complaints by piggy-backing on the referral of 21 June which indeed, as all the other evidence points to convincingly, dealt only with the restructuring and the complaints within in the PVC Division.

3] In my view, the evidence is convincing that the five applicants were never part of the dispute which was referred to the CCMA on 21 June 1997. However, even if I were to reach a favourable point of view in regard to the credibility of Ngcana, his own evidence does not go far enough to

help his case. It seems to me to be manifestly obvious that in the absence of any hint that anyone other than himself at the relevant time had the polyethylene plant in mind, it cannot be said that any referral of the dispute could have been achieved, the very least to be expected of a person referring a dispute, being to articulate, objectively speaking, a dispute which is capable of being understood to encapsulate the persons and
issues subjectively contemplated by him. If I were to set a threshold any lower than that, it would have the absurd result that notwithstanding what words or gestures or conduct of a person referring a dispute, the nature and scope of the dispute would be whatever that person wanted it to be regardless of whether or not it was capable of being understood in that way by any reasonable person. Self-evidently such an approach will not serve the interests of sound industrial relations.

4] I may add, reverting once again to the debate concerning section 157(4) of the Act, which refers to an attempt to conciliate. Even under the generous terms of that section, an "attempt" must be more than just a subjective intention and it must at least achieve the result of calling the attention of the
other party to the existence of the dispute. There must be, in my view, at very least proven facts which support the conclusion that a reasonable person would have understood that the scope of the dispute submitted to the conciliation process, encapsulated the issues or persons concerned.

5] As a result, on one or other footing, I am satisfied that Ngcana did either not refer or did not succeed

in referring a dispute encapsulating the five applicants to the CCMA on 21 June when that dispute was referred. The absence of such a refusal is fatal for the reasons which have already been dealt with above. In the circumstances the appropriate order is for the application to be dismissed.

6] In regard to costs, as a general rule the court has declined to make costs orders where an on-going relationship exists between an employer and a union. The union, albeit not recognised at the Midlands site, has an on-going relationship at other places and it seems to me that that would not be a distinction which would be appropriate to make in regard to the way in which this discretion has usually been exercised. However, given the reasons supporting the judgment, I am of the view that the policy reasons in regard to the non-award of costs must be dependent, not simply on an on-going relationship, but also have some bearing in relation to the way in which the particular *causa* has been prosecuted. I have expressed views concerning the way in which the union dealt with this matter, which
understandably leads to the conclusion that much is left to be desired in its approach. The pursuit of

this matter, was ill-advised and, in my view, these considerations make it appropriate that this is not a case where I should decline to allow costs to follow the result.

7] In the circumstances the order I make is that the application is dismissed together with an order for costs.

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ROLAND SUTHERLAND

Acting Judge of the Labour Court

: ADV J G RAUTENBACH

: Cheadle, Thompson & Haysom

: ADV F G BARRIE

: Deneys Reitz

30 NOVEMBER 2000