REVISED AND REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR197/2001

Delivered on 2001-07-27

Revised on 2001-08-22

In the matter between

BADER (BOP) (PTY) LIMITED AND ANOTHER Applicant

and

THE NATIONAL BARGAINING COUNCIL First Respondent

THE NATIONAL UNION OF LEATHER AND

ALLIED WORKERS UNION (NULAW) Second Respondent

JACOB RAMATHLO & 426 OTHERS Third and Further Respondents

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Fourth Respondent

J U D G M E N T

PILLAY, J: The fourth and further respondents were dismissed on 30 January 2001. On 5 February 2001 the second respondent, The National Union of Leather and Allied Workers Union (NULAW), referred their dismissal as a dispute to the first respondent, The National Bargaining Council or The Leather Industry of South Africa. The Bargaining Council notified

the parties on 7 February 2001 that the conciliation was scheduled for 8 February 2001.

The applicants informed the Bargaining Council that they were not able to attend the conciliation at such short notice and proposed alternative dates a week later. They also expressed reservations about the jurisdiction of the Bargaining Council to conciliate the dispute. Although none of the parties attended the conciliation on 8 February 2001, the Bargaining Council issued a certificate confirming that the dispute remained unresolved.

This is an application to set aside the certificate issued by the Bargaining Council and certain other relief. There is also a counter application which I will deal with later.

While there is a duty on all parties to process labour disputes expeditiously, an application for time to prepare for a conciliation involving 408 employees, should not be refused unreasonably. By issuing the certificate the Bargaining Council effectively refused the applicants' request for a rescheduling of the conciliation without further consideration. This was unreasonable.

On its own it is not a basis to set aside a certificate. Parties who seriously desire an opportunity to conciliate a dispute will find the means to do so. They will not allow the formality of a certificate to stand in their way. It may well be that the Bargaining Council was *fuctus officio* after the certificate was issued. However, nothing prevented the parties from approaching this court for an order by consent to set aside the certificate. If the applicants valued the opportunity to conciliate the dispute, as they would have the court to believe, it is surprising that they did not follow this course of action.

It was submitted that when the Labour Appeal Court in *NUMSA v Driveline* 2000 (1) (LAC) BLLR 20 at pages 23-24 paragraph 7 to 9, accepted jurisdiction despite the flaws in the conciliation process, it did not cover the situation where a party was willing to attend conciliation. I do not agree for the reason discussed above. Furthermore, the Labour Appeal

Court distinguished between a court's jurisdiction and the right of a party to be heard. (Paragraph 8 of the *Driveline* decision). The Labour Court would not be deprived of jurisdiction as it always retains the discretion to hear matters despite defects in the conciliation process.

However, it was common cause that the Bargaining Council was not registered at the time for the area in which the dispute arose, that is the former Republic of Bophuthatswana. Its registration was extended to that area only on 9 February 2001. That being the case the Bargaining Council had no jurisdiction over the dispute prior to 9 February 2001.

It was common cause that before 9 February 2001 the dispute should have been referred to the Commission for Conciliation Mediation and Arbitration (CCMA). The correct course of action that should have been followed by the Bargaining Council was to refer the dispute to the CCMA in terms of section 51(4) of the Labour Relations Act No 66 of 1995 (the LRA).

Today, the CCMA no longer has jurisdiction to conciliate the dispute as the Bargaining Council has such jurisdiction. By assuming jurisdiction when it had none over the dispute on 8 February 2001 the Bargaining Council acted *ultra vires*. The certificate falls to be set aside. But, this is not the end of the matter.

The second and third respondents have lodged a counter application for a declarator as to the validity of the referral for conciliation and certain other relief that might lead to the dispute being addressed substantively. Irrespective of the counter application the court is bound in terms of section 1(d) read with sections 158(1)(a)(iii)(b) and (j) of the LRA to channel the dispute in a way that it avoids a spiralling of the dispute in an abyss of technicalities.

In making the order that I do, and without denying the parties such rights as they may have in law, the court prevails on the parties, including the Bargaining Council, to address the

dispute effectively and substantively. It is common cause that the proper forum to have conciliated the dispute a day later was the Bargaining Council. The Bargaining Council is not entirely blameless in the way it conducted this process. A bargaining council is required to exercise its discretion fairly, impartially and independently. To say that it acted under pressure when issuing the certificate, is no excuse to acting *ultra vires*.

The second and third respondents made a fresh application for conciliation. Insofar as such application may be late an application for condonation can be and is dispensed with in these proceedings. The reasons for the delay are obviously connected with this application. The Bargaining Council would not have been able to act on the fresh referral until this application was finalised. Furthermore, for reasons discussed above, the Bargaining Council has been co-responsible for triggering this application.

In considering the costs of both applications the court also takes into account the following. The second and third respondents find themselves in this predicament partly because of their unreasonable insistence on the certificate being issued on 8 February 2001. They also persisted in opposing the application when it was clear that the Bargaining Council had no jurisdiction.

The applicants on the other hand ought to have consented to obtaining an order from this court to set aside the certificate as it would have recreated an opportunity to conciliate the dispute. It is not necessary for me to deal with all the relief claimed by the applicants and second and third respondents in their respective applications in view of the order that I am about to make.

1. The certificate issued by the first respondent on 8 February 2001 purporting to certify that the dispute between the applicant and the second and third respondents had been conciliated and remained unresolved is invalid and of no force and effect and is accordingly set aside.

2. The Bargaining Council is directed to conciliate the dispute on the basis of the fresh referral for conciliation within 30 days.

3. The applicants are awarded costs of their application on an unopposed basis.

4. There is no order as to costs in regard to the counter application.

PILLAY, J