IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Port Elizabeth)

Case No: P 42/98
REPORTABLE

In the matter between :

CHEMICAL WORKERS INDUSTRIAL UNION Applicant

and

DARMAG INDUSTRIES (PTY) LTD Respondent

REASONS FOR JUDGMENT

REVELAS J :

[1] The applicant in this matter represents thirty nine of its members, all former employees of the respondent, who were dismissed for operational requirements by the applicant. The applicant challenged the fairness of their dismissal.

[2] The applicant brought an application in terms of section 191 (5)(b) of the Labour Relations Act, 66 of 1995 ("the LRA") seeking reinstatement for all of the above employees, together with compensation with costs. According to the applicant's statement of case which was served on 1 April 1998, a certificate was issued by the Commission for Conciliation, Mediation and Arbitration ("CCMA"), confirming that the matter could not be resolved between the parties on 27 November 1997.

[3] The respondent has raised certain points *in limine.* Certain common cause facts between the parties, appear from an affidavit in support of the points *in limine,* deposed to Mr Kevin Marlow, the respondent's Human Resources Manager. At the onset of the hearing, I was informed by both parties that they agreed on the contents of Mr Marlow's affidavit. The following common cause facts appear from Mr Marlow's affidavit.

[4] A dispute was referred for conciliation on 19 March 1997 by the applicant which, concerned the respondent's alleged refusal to consider alternatives in an endeavour to reduce the number of retrenchees to be affected by future retrenchment and it also concerned the respondent's alleged refusal to negotiate in good faith over the severance package involved. In respect of this dispute the CCMA issued a case number, EC 920 . On 27 March 1997, the respondent retrenched twenty-two employees.

[5] On 27 June 1997 a further retrenchment took place in respect of seventeen of the thirty nine employees in question. The dismissal dispute which ensued as result of this dismissal was referred to the CCMA on 27 June 1997. Case number EC 4024 was allocated to this matter by the CCMA, ("the second referral").

[6] In respect of the first referral, the CCMA determined on 25 March 1997 that it had no jurisdiction to conciliate this dispute as it pertained to a "refusal to bargain" and the file was closed in this matter.

[7] When the second referral was referred to the CCMA dated 30 June 1997, the applicant, in the relevant LRA 7.11 form, recorded that the second referral did not constitute a new referral.

[8] The applicant, when it learnt that the CCMA had closed its file in terms of the first referral, requested that the two retrenchments be dealt with in terms of the referral, referred in June 1997. The CCMA agreed to link the two disputes so that both retrenchments would be dealt with together. The respondent ,in August 1997, wrote a letter to the CCMA, asserting that the first and second referrals were not related to one another, and that in relation to the twenty-two employees who were retrenched in March 1997, the second CCMA conciliation referral was completely out of time.

[9] Section 191(1)(b) of the LRA provides that a dispute about the fairness of a dismissal should be referred to the CCMA for conciliation within thirty days of the date of dismissal. The respondent argues that since the twenty- two employees who were retrenched on 27 March 1997, a referral ought to have been made to the CCMA towards the end of April and instead the referral was only made on 30 June 1997, more than two months late.

[10] On 6 August 1997, the CCMA notified the respondent that it would have the opportunity to raise the issue of late referral at the start of the conciliation, on the date as notified and that a final decision will be made by the Commissioner with regard to the date of dispute. Further, the CCMA advised that if the finding was to be that that the matter is condoned, then the conciliation would proceed.

[11] On 19 August 1997 a meeting was held before Commissioner Hempe of the CCMA and the circumstances surrounding the two referrals was debated. This was not a conciliation meeting and only pertained to discussions. The parties then agreed, in terms of section 135(2)

of the LRA, to extend the thirty day period provided for in that section ("the time period within which conciliations are to be conducted") until 26 September 1997.

[12] On 12 September 1997, Commissioner Hempe advised that :

1. The CCMA had closed its file in respect of the first CCMA conciliation referral on 25 March 1997 for want of jurisdiction.
2.

1. In regard to the second CCMA conciliation referral :

"the CCMA has jurisdiction to conciliate on the matter because it was three days after the dismissal of seventeen employees of the company. There was a telephonic discussion between the CCMA and the CWIU wherein the union was linking the two cases. The CCMA through its personnel in good faith, linked the two cases. Linking a case we have no jurisdiction over (EC 920) with a case we have jurisdiction over (EC 2042), is the fault of the CCMA... my decision above corrects this linkage. The union therefore should confine this conciliation to the last dismissal (i.e of the 27 June). This investigation took me rather long to respond to the parties. We will thus schedule the case before 26 September 1997."

[13] The parties did not meet before 26 September 1997, being the date of expiry of the thirty day period to which the parties agreed. No further extension was agreed to. It is the case for the respondent that in terms of section 135 (5)(a) of the LRA, Commissioner Hempe ought to have issued a certificate of outcome of a dispute referred for conciliation on 26 September 1997. Nevertheless in terms of section 191 of the LRA, the applicant was at liberty to refer the matter to the Labour Court on that day but only did so one hundred and eighty seven days later, which the respondent strongly contends, is an unreasonable delay.

[14] On 13 November 1997, after the conciliation mechanisms had run their course, the applicant addressed a telefax to the Senior Commissioner of the CCMA, Eastern Cape, explaining its displeasure of the state of affairs. The telefax records that Commissioner Hempe's decision meant that the twenty- two employees retrenched in March 1997, had been denied their right to challenge their retrenchment and that "special provision" must be made for this dispute to be conciliated. This telefax also makes reference to the discussion held between

the representative of the applicant and the CCMA referred to.

[15] The CCMA directed that both disputes be conciliated simultaneously at a meeting scheduled for 27 November 1997, which meeting was not held as the respondent's attitude was that the conciliation mechanisms had been exhausted on 26 September 1997 by virtue of the provisions of section 135(5)(a) of the LRA. A Certificate of the Outcome of a Dispute Referred for Conciliation (LRA form 7.12) was issued on that day by Commissioner Hempe. The certificate recorded that it (the certificate) was issued in relation only to the **second** CCMA conciliation referral under case number EC 2042 and that it was received by the applicant on 10 December 1997.

[16] On 7 January 1998 the applicant made a request for arbitration at the CCMA by filing the requisite LRA for 7.13. The dispute referred to arbitration emanated from the second referral. It is difficult to understand why it was referred to arbitration since it relates to a dismissal for operational reasons. In the absence of an agreement, it should have been referred to the Labour Court (section 191(5) of the LRA).

[17] The applicant applied for a case number from the Registrar of this Court, on 11 February 1998 in respect of the dismissals and the applicant served its Statement of Claim on the respondent during April 1998.

[18] The points *in limine* raised by the applicant are the following:

2. The dispute relating to the twenty two employees dismissed in March 1997, has not been referred for conciliation nor has it been conciliated as envisaged by section 135 of the LRA and accordingly the Labour Court lacks the jurisdiction to entertain this application in relation to the twenty- two employees.

3. The applicant unreasonably delayed the filing of its Statement of Claim, and, accordingly in the absence of an application for condonation being made and granted the present application stands to be dismissed.

4. Given that the applicant originally referred the dispute in question to the CCMA for arbitration, and as it has not been properly transferred to the Court, the dispute is not

properly before this Court and the application stands to be dismissed on that basis alone.

[19] The first referral, dated 19 March 1997, is dated before the employees were retrenched. This referral refers to a dispute about a refusal to bargain. Specific reference to section 64 (1)(a) of the LRA is made in this referral form.

[20] The first referral, in my opinion, is not a referral about the dismissal of the twenty- two employees. No dismissal had been effected when the matter was referred for conciliation. Insofar as it may be argued that it was intended to later, incorporate a dismissal dispute, the referral in respect of the dismissal for operational requirements was premature and a nullity.

[21] I also cannot accept that the second referral is capable of being construed as one involving the twenty-two employees.

[22] Commissioner Hempe ruled on 12 September 1997 that the conciliation on that day was to be restricted to the employees who were retrenched on 27 June 1997. In other words, the conciliation meeting was only in respect of the seventeen employees and not the twenty-two employees. The twenty-two employees dismissed were therefore not a party to the referral in question and no dispute about their retrenchment was conciliated.

[23] Further, the Certificate of Outcome of Dispute Referred for Conciliation issued by Commissioner Hempe on 27 November 1997, relates only to the second referral and consequently only involves the seventeen employees who were retrenched on 27 June 1997 and not the twenty two employees.

[24] Since there was no referral concerning the dismissal of the twenty- two employees, and since there was no conciliation of such a dismissal dispute, this court lacks the necessary jurisdiction to hear this application, unless the dispute in question is properly conciliated and condonation is granted by the CCMA.

[25] The second point *in limine* concerns the time delay between the conciliation of the dispute contained in the second referral and the day upon which the applicant filed its Statement of Claim.

[26] The parties agreed to extend the period within which the conciliation of the seventeen employees was to be conducted, until 27 September 1997 in terms of section 135(2) of the LRA

[27] In terms of section 191(5) of the LRA, the applicant was at liberty to refer the dispute to the Labour Court on that day, but elected to do so by filing its Statement of Claim on 1 April 1998, which is 187 days later.

[28] Section 191(5) of the LRA does not prescribe the period within which a dispute is to be referred to the Labour Court. However, in my opinion, even in the absence of a specified time period, a party referring a dispute to the Labour Court, after conciliation has failed, should do so within a reasonable

time.

[29] Section 3 of the LRA provides that the Labour Court should give effect to the primary object of the Act. Section 1 (d)(iv) of the LRA provides that one of the primary purposes of the Act is to ensure effective dispute resolution of Labour disputes. Effective resolution, particularly in the field of labour relations, is an expeditious resolution of a dispute.

[30] Section 138(1) of the LRA directs commissioners to determine disputes "fairly and quickly". The importance of the principle expressed in this section was emphasized in the matter of ***Carephone (Pty)(Ltd) v Marcus N.O & Others [1998] 11 BLLR 1093 (LAC).***

[31] The Act has been designed by those involved in its drafting, to avoid repeating the problems which existed under the previous Labour Relations Act, No 28 of 1956. The statutory dispute resolution procedures was widely regarded as lengthy and overtechnical. Whereas the former Labour Relations Act made provision for the service of a notice of bar on its opponent to expedite matters, there is no such procedure available to an employer or respondent under the current LRA.

[32] Where employees have referred a matter to the CCMA for conciliation of a dispute following their dismissal, for the sake of fairness towards the employer, such employees should be expected to refer their unresolved dispute to the Labour Court within a reasonable time. An employer is entitled to finality of a dispute which has been initiated. It would be unfair to expect the employer to have a sword over its head for an indefinite period.

[33] There are several guidelines in the Act which indicate what a reasonable time would be.
[34] Section 191(1) of the LRA provides that the period for the referral to conciliation, after a dismissal, is thirty days. If a referral is not made within that thirty days, an application for condonation is necessary.

[35] The period within which a conciliation must be conducted in the absence of an agreement to extend that period, is also thirty days in terms of sections 191(5) and 135(5)(5) of the LRA. Section 145 of the LRA, applicable to review applications, imposes a six week time limit on the launching of such proceedings.

[36] When parties apply for a case number they are required by the rules of the Labour Court (Rule 3(1)) to advise the registrar in writing if proceedings are not initiated within thirty days of application for a case number.

[37] Notwithstanding the fact that section 191(5) does not make provision for a time period within which a dismissal dispute is to be referred to the Labour Court, Flow Diagrams 13 and 14, relating to Unfair Dismissals, which are in Schedule 4 of the LRA, makes provision for a thirty day period to refer such a dispute. Of course, the flow charts are not authorative in this regard. However the presence of the thirty day time limit in the charts, tends to give strength to the argument that the absence of such a time limit was perhaps an oversight.

[38] The Labour Court won't entertain matters which are referred to it after long periods of time, unless an application for condonation is brought. Although the Labour Court is not in a position to prescribe that disputes should be referred to the Labour Court in terms of section 191(5)(b) of the LRA within thirty days, this period should serve as a yardstick.

[39] Parties should be expected to prosecute their claims expeditiously. On the facts before me, the applicant unreasonably delayed the referral of this matter to the Labour Court. Consequently, an application for condonation has to be made in respect of the referral of the dispute relating to the seventeen employees. The twenty-two other employees would first have to conciliate their dispute as stated above.

[40] The third point *in limine* is that on 7 January 1998 and by way of filing the requisite LRA forms 7.13 the applicant requested the CCMA to arbitrate this matter and has now referred the same dispute to this Court for adjudication. It is not clear to me why the dispute was referred to arbitration or what route it followed from there to come before the Labour Court. However, I do not believe that the application stands to be dismissed on this basis, at this stage. The applicants are required though, to explain what has transpired in this regard and what route was followed to bring that dispute to the Labour Court.

[41] Consequently, the points *in limine* were upheld as set out in the order granted hereinbefore.

E REVELAS

For the Applicant

Ms A Simon of the Chemical Workers Industrial Union

For the Respondent

Mr C Kirchmann of Linde Dorrington & Kirschmann

Date of Hearing: 25 September 1998

Date of Order: 1 October 1998