VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 26 JULY 1999 CASE NO. J548/97

In the matter between:

CONSTRUCTION & ALLIED WORKERS UNION Applicant

and

BECKER CRUSHERS CC Respondent

J U D G M E N T

NGWENYA, AJ: This is a referral matter on alleged unfair dismissal in terms of section 191 of the Labour Relations Act. Apparently the matter was referred to conciliation and conciliation failed to help to resolve the matter. The matter was then subsequently referred to arbitration.

During arbitration or at arbitration the parties signed a document in which they agreed that the CCMA has no jurisdiction over the matter. It is not clear whether the matter was formally withdrawn before the CCMA or what

actually happened, but nevertheless it was referred to this court for hearing.

I do not propose to give an exhaustive judgment but briefly this is what I intend saying. According to the referral statement by the applicant, this was a referral in terms of section 191(1) of the Labour Relations Act, I propose to read that section. Section 191 of the Labour Relations Act provide as follows – I will only confine myself to subsection (1) which deals with dispute about unfair dismissal. Subsection (1) says:

"If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing in 30 days within the date of dismissal to a council if the party's dispute do fall within the registered scope of that council or the commission, if no council has jurisdiction."

I want to assume that in this particular instance there was no council which had jurisdiction over the dispute between the parties.

I have at the commencement of these proceedings invited argument from both parties why is it that this court has jurisdiction to hear the matter. But before I deal with their argument, something needs to be said about the status of the file here. There was a directive given by the Judge that before this matter be set down for hearing the file must be properly paginated and indexed.

This has not been done, and that is not acceptable. It is a directive of the court which must be complied with and in the normal course of events a Judge will not read the file and therefore not proceed with the matter where the court's directives were not followed. But for the reasons that I have arrived at, I have nevertheless read the file so that I could give a proper direction in this matter. But I must impress on those who appeared before this court and who make use of this court that the rules and orders of this court need to be properly complied with and I am sure that the time has come for this Court to express its dissatisfaction for non-compliance with its directives with punitive orders. Vide Naidoo v Dulus (pty) Ltd C335/98, un unreported Judgment at paragraph 23.

On papers it would appear that the parties are from opposing poles as to the actual cause of the dismissal. Respondent's paper suggests a retrenchment. It is not proper for the parties to try their luck before this court where they are doubtful whether the CCMA does have jurisdiction or not. It is for the parties beforehand to identify exactly which forum is seized with the matter as this court is flooded with a number of referrals which, in the first instance, should not have been referred to it. Secondly, more time is wasted instead of attending to deserving matters.

Mr Jibishi, for the applicant, has referred me to two cases in which he says that the court has dealt with matters in his view of similar nature. And the first case he refers me to is the case of SAMRI v Toyota South Africa Motors (Pty) Ltd (1998) 6 BLR 616. In short, this was a declaratory order sought by the applicants interdicting the respondent from introducing change or varied conditions of employment. That was basically dealt with the motor vehicle benefit policy for the sake of clarity and, in my view, his argument does not turn on this case at all.

The second case he referred me to was SACWU and Others v Afrox Ltd (1998) 2 BLR 171. This deals with dismissal for operational requirements during the course of a strike. Again his case does not turn on this.

If one has sight of his referral statement, he says the following when he deals with the dispute: The dispute concerns the dismissal of Mr George Galamore and 56 others by the respondent and he says the dispute further concerns the unilateral change of terms and conditions of employment of the employees by the respondent.

The dispute at this stage deals with the dismissal.

In terms of section 191(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

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 dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii)/..

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable; or

(iii) the employee does not know the reason for dismissal; or

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

and these are the instances under which this court will be approached in terms of section 191. If the employee has alleged, again I emphasise the employee alleges, that the reason for dismissal is automatically unfair based on the employer's operational requirements, the employee's participation in a strike that does not comply with the provisions of chapter 4 or because the employee refused to join or was refused membership of or was compelled from a trade union party to a close shop agreement.

In the case before me these four instances under which

this court will be approached, none of them is contained in the applicant's referral document. It may well be that in the course of the hearing during arbitration proceedings it transpires that the CCMA has no jurisdiction, then the proceedings will be halted and the matter referred to this Court. In such event Applicant may bear the brunt of having to pay costs or otherwise, for failing to identify the correct forum from the outset. Vide Magubane and Others v Main Road Saw Mills (Pty) Ltd (1998) 2 BLR 143. The court specifically sets out, I just want to read the headnote without discussing the case:

"The court cannot adjudicate a dispute over dismissal for operational requirements once an employee has chosen arbitration unless the matter is referred to it by the director of the CCMA. Employees unilaterally

withdrawing/..

withdrawing from arbitration on learning of the employer's reason for dismissal. The matter was improperly referred and remitted to CCMA."

I am of the opinion that I can deal with the case on the basis of what the applicants have alleged in their papers, namely that they were dismissed without reasons, without a hearing. The 57 applicants state that they were dismissed after a wage proposal was put to the employer and the employer decided to pay them via the bank so that they

cannot refuse payment and therefore to avoid dealing with the question of wage negotiations at the time. The view I take in this matter is that this matter should have not been referred to this court in the first instance. I am of the view that I am entitled to stay these proceedings, among others, in terms of section 158(2), -

"If at any stage after this dispute has been referred to the Labour Court it becomes apparent that the dispute ought to have been referred to arbitration, the court may stay the proceedings and refer the dispute to arbitration 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 an order that a commission or arbitrator would have been entitled to make."

I am of the view that it is not expedient in this case that I deal with it as an arbitrator and I am accordingly referring this case to arbitration and I am making no order as to costs.

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S.J NGWENYA A.J.

ACTING JUDGE OF THE LABOUR COURT

ON BEHALF OF APPLICANTS : MR JIBISHI

Instructed by : C A W U

ON BEHALF OF RESPONDENT	:	MR J Y CLAASEN
Instructed by	:	Haarhofs Ing.
DATE OF JUDGMENT	:	26 JULY 1999