

**IN THE LABOUR COURT OF SOUTH AFRICA
CASE NO J1417/99**

In the matter between:

HI ALLOY CASTINGS (PTY) LTD

Applicant

and

LEON NICK SMITH

First Respondent

MR AP BURGER

Second Respondent

**METAL & ENGINEERING INDUSTRIES
BARGAINING COUNCIL (TVL REGION)**

Third Respondent

ADV NORMAN DAVIS

Fourth Respondent

THE DIRECTOR OF THE CCMA

Fifth Respondent

JUDGMENT

JAMMY AJ

1. On 16 March 1999 the First Respondent in this matter launched an application in this Court under Case No J1063/99 against the Applicant (Respondent in that matter) in which he sought an order that the arbitration award dated 5 March 1999 and issued by Commissioner Norman N Davis of the Commission for Conciliation Mediation and Arbitration, and which, it was alleged, had not been complied with by the Respondent, be made an Order of Court.

2. On 16 April 1999 the Applicant in this matter (the Respondent in the earlier application referred to above), served and filed Notice of Application for an order reviewing, correcting, and setting aside a Certificate of Outcome issued by the Second and Third Respondents on the basis of a contention that

the Third Respondent lacked jurisdiction to conciliate the dispute between the Applicant and the First Respondent, and for a further order reviewing, correcting and setting aside the arbitration proceedings held and the award made under the auspices of the Fifth Respondent on similar grounds, namely that the Fourth and Fifth Respondents lacked jurisdiction to arbitrate the dispute between the Applicant and the First Respondent.

3. On 11 June 1999 the Applicant in the first application, No J1063/99 applied to this Court for an order consolidating the two applications referred to. That order was duly granted by consent and this matter has proceeded on that basis.

4. The first issue for determination therefore, in logical sequence, is the second application, by the Applicant in this matter, for the review, correction and setting aside of the conciliation proceedings between the Applicant and the First Respondent, conducted under the auspices of the Third Respondent and of the Certificate of Outcome issued by the Second and Third Respondents. If the allegation supporting that application is valid, namely that the Third Respondent lacked jurisdiction to conciliate and the Fourth and Fifth Respondents to arbitrate, the dispute, the application to have the award in question made an Order of Court must accordingly be without foundation.

5. At the time of the termination of his employment, the First Respondent was employed by the Applicant, which carried on business as a foundry, in the capacity of Production Manager. It is common cause that on 17 June 1998, in circumstances which the First Respondent contends constituted his dismissal by the Applicant, but which the Applicant, in the person of its Managing Director, Mr R W Verweij, characterised as his "desertion", the First Respondent ceased to work for the Applicant.

6. Believing that he had been unfairly dismissed, the First Respondent, he avers, immediately communicated with the Third Respondent, the Bargaining

Council, by which he was instructed to call at their offices the following week - "..... on approximately 22 June 1998." On that date however, he decided to return to the Applicant in order, he says, "..... to see whether I could get my job back." Determining however "that there were no prospects of my getting my former position with the Applicant back" he obtained, the same day, the statutory form for referral of his dispute to the Bargaining Council for conciliation (Form LR7.11) which, having been unable to obtain assistance from the Bargaining Council in its completion, he filled out himself "a few days later."

7. In completing the form, the First Respondent indicated the date of the dispute as being 21 June 1998, an error subsequently acknowledged by him in the context that that was a Sunday and that his meeting with Mr Verweij had in fact been on 22 June 1998.

8. Whilst the date of the eventual receipt of the referral form by the Applicant is in dispute, the Applicant alleging that it received it for the first time on 27 July 1998 and the First Respondent contending that it was some time before 21 July, it is common cause that in the form in which it was eventually telefaxed to the Applicant, reflecting as stated, the date of the dispute as 21 June 1998, the referral was neither dated nor signed.

9. It is also not in dispute that on 28 July 1998, the First Respondent returned to the Bargaining Council where he was apparently instructed to amend the form to the effect that the dispute arose on 21 July 1998, the date of his final abortive meeting with Mr Verweij. The date on the original form, 21 June 1998 was accordingly crossed out and the words "correct date 21/07/98" inserted thereunder over the initials of the First Respondent and a date, 28 July 1998. It is not disputed that the referral form, as now amended, was never served on the Applicant.

10. The First Respondent contends that the alteration of the date of dispute was made in the context that, having informed the Bargaining Council of his

allegedly final but unsuccessful attempt, "to settle the matter" with the Applicant on 21 July 1998, he was informed that, on the basis of that unsuccessful approach, 21 July 1998 "was the correct date of the dispute arising" and that the original date, 21 June 1998, should be deleted and amended.

11. On 19 August 1998 the Third Respondent notified the parties of a conciliation meeting scheduled for 31 August 1998, a meeting which, notwithstanding notification by the Applicant of its inability to attend it, was pursued in the absence of any representative of the Applicant, under the chairmanship of the Second Respondent by whom, on 31 August 1998, a "Certificate of Outcome of Dispute referred for Conciliation" was issued and signed by the Second Respondent as Conciliator, to the effect that the dispute remained unresolved as at that date.

12. Pursuant thereto, and on the same date, the First Respondent filed a request for arbitration with the Fifth Respondent, leading in due course to the arbitration proceedings before the Fourth Respondent and the eventual issue by him of the Arbitration Award which is the subject matter of the consolidated review application.

13. The Applicant's challenge to the jurisdiction of the Fifth Respondent to have conciliated, and the Fourth Respondent to have arbitrated, the dispute between the parties is sourced in Section 191 of the Labour Relations Act 1995 ("the Act"). The relevant provisions of that section are the following:

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."

14. The **date of dismissal** is defined in Section 190(1) of the Act as the earlier of -

"(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer."

15. Section 51(2)(c), moreover, requires the party referring the dispute to the Council to satisfy it that a copy of the referral has been served on all the other parties to the dispute.

16. What is remarkable about the dispute between the Applicant and the First Respondent as to the date of his dismissal, is that each of them, on the papers, appears to be a protagonist of the opposite cause. In more than one instance, Mr Verweij avers that he did not regard the First Respondent as having been dismissed either on 17 June 1998 or thereafter. His initial view that the First Respondent had apparently resigned from his employment on 17 June, was subsequently altered to suggest that he had in fact deserted. The First Respondent on the other hand, is consistent in his averments that his meetings with Mr Verweij, subsequent to the events of 17 June 1998, were designed to assess whether or not there was any possibility of his "getting his job back", indicating what I perceive to have been the unreserved perception on his part that he had lost it.

17. Those views however, are in my opinion irrelevant. Regard can be had solely to the facts of the matter and their assessment in the context of Section 190 of the Act. The date of dismissal is defined by statute as the earlier of the date upon which the contract of employment terminated or the employee left the service of the employer.

18. It is common cause that the First Respondent left the Applicant's premises on 17 June 1998 and, other than to engage in further discussion with Mr Verweij "in order to see whether I could get my job back" or "in order to attempt to settle the matter", did not return to work. What he did do, having realised "that there were no prospects of my getting my former position with the Applicant back" was, immediately thereafter, to refer the matter to the Bargaining Council in the circumstances which I have reviewed earlier in this judgment.

19. The date of dismissal, as defined in the Act, was therefore 17 June 1998. The date on which, on the First Respondent's submissions, the matter was referred to the Bargaining Council, was 28 July 1998. The dispute in that referral is defined as one relating to "unfair dismissal." The "correct date" upon which that dispute is alleged to have arisen, is reflected therein as 21 July 1998. That, as indicated, was clearly not the case.

20. The letter from the Bargaining Council to the Applicant's Attorneys of 8 April 1999 to the effect that the dispute "was timeously referred to the Council" is, for the reasons which I have stated, without substance. It is patently based upon the amended dispute date reflected in the referral form and, as submitted by Counsel for the Applicant, is unsupported by any substantiating affidavit clarifying or explaining the basis of that statement. The author of that letter is identified and the Bargaining Council must undoubtedly have maintained some record of the matter referred to it. The contention in question is critical to the First Respondent's case and the failure to procure extraneous evidence to support it has not, in my view, been adequately explained.

21. The reference by the Fourth Respondent of the dispute to the Bargaining Council on 28 July 1998 was therefore out of time in terms of Section 191(1)(a) of the Act, a period in excess of 30 days having elapsed since the date of dismissal, 17 June 1998. It is common cause that no application in terms of Section 191(2) was at any time made to the Council for condonation of that late filing or extension of the prescribed 30 day period. Quite clearly, in the perception of both the Council and the First Respondent, there was no necessity to do so if, indeed, the dispute arose on 21 July 1998.

22. It was the inherent duty of the Second Respondent, in his capacity as Conciliator under the auspices of the Third Respondent to have made a factual enquiry, as to whether the referral of the dispute to the Third Respondent had been timeously made or not. He should, in my view, have been alerted to the

necessity for such enquiry by the referral document which, on the face of it, was irregular. The date of the dispute had been altered, the document was irregularly signed and there was no proof of its service, in its amended form, on the Applicant. Had he responsibly done so, some question must inevitably have arisen, necessitating at least a contingent application by the First Respondent for condonation in terms of Section 191(2) of the Act, in the event that it was found that the referral was either late or for some other reason irregular.

23. In these circumstances the Third Respondent had no jurisdiction to conciliate the matter and it follows that the Fourth Respondent, acting as Arbitrator under the auspices of the Fifth Respondent, similarly lacked jurisdiction to deal with it. See **Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & others (1998) 19 ILJ 892 (LC)**.

24. In the result, I make the following Order:

24.1 The conciliation proceedings conducted under the auspices of the Third Respondent and the Certificate of Outcome dated 31 August 1998 issued pursuant thereto by the Second Respondent, are reviewed and set aside.

24.2 The arbitration proceedings held under the auspices of the Fifth Respondent and the Arbitration Award handed down by the Fourth Respondent under Case No GA32107/98 are reviewed and set aside.

24.3 In the context that, notwithstanding his apparent opposition to this application and his prayer, in his Answering Affidavit in these proceedings, that the application be dismissed with costs, no order for costs is sought by the Applicant against the Fourth Respondent, no such order is made.

24.4 The First Respondent is ordered to pay the Applicant's costs of this consolidated application.

B M JAMMY AJ

Date of hearing : 25 November 1999

Date of judgment : 6 December 1999

Appearance for applicant : Adv. Peter Buirski instructed by Dorkin & Verster Attorneys

Appearance for respondents : Adv. Warren Bank instructed by Leppan, Beech Attorneys