IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO.:J801/98**

In the matter between:

NATIONAL UNION OF MINEWORKERS **Applicant**

and

ELANDSFONTEIN COLLIERY (PTY) LTD **Respondent**

JUDGMENT

[1] On 12 May 1998 the applicants filed an application in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act") under case no. J801/98. The applicant alleged that the dismissals of its members by the respondent were unfair, and sought their reinstatement. When the matter was heard on 30 November 1998, the respondent raised the point in limine that the matter was res judicata. That plea was upheld by this Court, and the main application was dismissed with costs. The applicant now seeks leave to appeal against that judgment, which is now reported sub nom NUM v Elandsfontein Collieries [1999] 5 BLLR 511 (LC).

[2] It is not necessary for present purposes to repeat the reasoning in the judgment that is the subject matter of this application. Suffice it to say that the Court found that the matter before it was res judicata because the principal issue raised by the applicant – namely, whether the respondent had complied with the provisions of section 189 of the Act - had been decided upon and disposed of by the Court in an earlier application under section 158(1).

[3] The earlier judgment upon which the Court relied for its finding was handed down by Zondo J on 24 February 1998 in case no. J321/98. The applicant now contends that this judgment could not provide the basis for the application of the principle of res judicata in case no. J801/98 because the judgment was a null and void. If I have understood the applicant's submissions correctly, that is the only argument it intends to advance before the Labour Appeal Court if leave to appeal is granted.

[4] For purposes of this application, I accept that if the judgment in case no. J321/98 is null and void, the judgment in J801/98 cannot be sustained. The Court's duty in this application is accordingly to assess whether there is a reasonable possibility that another court could find that the Court lacked jurisdiction or exceeded its powers when it heard the matter under case no. J321/98.

[5] I understand the facts upon which the applicant relies to be common cause. They are as follows. The respondent gave notice of its intention to commence a retrenchment exercise in September 1997. On 16 February 1998 the applicant filed an urgent application for an interim order in the following terms:

> "2.1 Interdicting and restraining the respondent from retrenching union members;
>
> 2.2 Directing the respondent to enter into consultations with the applicant as required by section 189 of the Labour Relations Act No. 66 of 1995;
>
> 2.3 Directing the respondent to reinstate those employees, members of the applicant, who have already been retrenched."

[6] As it transpired, when the matter was heard on 18 February 1998 the respondent had in fact completed the retrenchment and all the employees on whose behalf the application had been brought had already been dismissed.

[7] The applicant now contends that the change in the factual circumstances between the time the application was filed (when only some of its affected members had been retrenched) and the time when the application was heard (when all its affected members had been retrenched) deprived the Court of jurisdiction to deal with the application. Hence, so it is argued, the ensuing judgment was null and void.

[8] The first question to be considered is whether the applicant can be permitted to seek relief by way of appeal against the judgment in case no. J801/98 when its attack is in reality against the judgment in case no. J321/98. The fact of the matter is that judgment has been handed down in the latter case, and in the normal course a judgment stands until such time as it is rescinded or set aside on appeal: see Dartprops (Pty) Ltd v CCMA & others [1999] 2 BLLR 137 (LC) at 139F-G.

[9] I must record that simultaneously with the present application the applicant filed an application for rescission of the judgment in case no. J321/98 or, alternatively, leave to appeal against it. That application was due to be heard by Zondo J on the day of this application, together with the necessary application for condonation. However, it was withdrawn with the apparent consent of the respondent, and the applicant proceeded only

with the present application. I accept, however, that if the applicant succeeds in satisfying this Court that another court might find that the judgment of Zondo J is null and void, this will provide sufficient basis to grant leave to appeal against the judgment in J801/98.

[10] The applicant has not approached this Court in an attempt to to rescind the judgment in case no. J321/98. There is thus no need for me to consider whether the judgment of Zondo J was issued as a result of a "mistake common to the parties", as is required by section 165(c). However, I must point out that I cannot accept the applicant's claim that neither it, the respondent nor the Court was aware that all of the applicant's affected members had been dismissed when the urgent application came before Court on 18 February 1998. The Court's judgment in case no. J321/98 leaves no doubt about this. Zondo J records at paragraph 6 that the applicant's counsel informed him that the respondent "had already implemented the retrenchment", and that the applicant was accordingly not pursuing prayer 2.1. The respondent could hardly have been unaware that the retrenchments had already been effected, as it had informed the applicant on 13 February that the affected members would be dismissed on 14 February. Any further doubt about the Court's understanding of the factual position is dispelled when Zondo J observes (at paragraph 9 of the judgment) that "the applicant comes to this Court to challenge the implementation of the retrenchment and the dismissal of its members". It is therefore apparent that the Court delivered its judgment well knowing that all the employees on whose behalf the application was brought had been dismissed when the application was heard. In my view, an application for rescission would have failed on that ground alone. However, this would not have precluded an appeal against the judgment, assuming that the Court would have been prepared to grant condonation for the late filing of the application for leave to appeal. Such an appeal would, however, have been a wasteful exercise, as in order to obtain relief the applicant would still have had to bring an application for leave to appeal, and if permitted to do so, appeal against the judgment in case no. 801/98. I am therefore satisfied that the applicant has adopted the correct procedure by bringing the application for leave to appeal in

respect of the latter judgment, and that it wisely abandoned its applications for rescission of the judgments in case no. J321/98 and of the judgment in this case.

[11] The applicant's case in this application stands or falls on the proposition that once employees have been dismissed, this Court lacks jurisdiction to entertain disputes concerning their dismissals under section 158(1) of the Act. That issue has been discussed in a number of reported judgments of this Court.

[12] In Fordham v O K Bazaars (1929) Ltd (1998) 19 ILJ 1156 (LC), the applicant sought variation of an order compelling the respondent to consult. After having been dismissed, the applicant sought inclusion of an order that the respondent reinstate the applicant pending the conclusion of consultation. Revelas J observed as follows at paragraphs 7 and 8 of her judgment:

> "I am firmly of the view that this Court cannot in any event make such an order because the applicant has an alternative remedy, namely, the process of conciliation at the CCMA. The nature of relief sought by the applicant is a status quo order. In terms of s 43 of the previous Labour Relations Act 28 of 1956 (the 1956 Act), parties could approach the Industrial Court on affidavit to obtain status quo orders pending adjudication of disputes in respect of their dismissals. The absence of this type of procedure under the 1995 Act is, in my view, not due to an oversight on the part of the drafters of the Act. I believe the exclusion to be deliberate. Parties to a labour dispute are obliged to follow a conciliation process and if they cannot resolve their differences in that process, their dispute is adjudicated or arbitrated depending on its nature…. I am convinced that I cannot introduce a

new procedure whereby status quo orders can be granted in urgent applications on affidavit under the guise of an application to compel an employer to consult."

[13] In SACCAWU v Shoprite Checkers (Pty) Ltd [1997] 10 BLLR 1360 (LC) the applicants sought orders declaring their dismissals to be unfair, and reinstating them retrospectively. Landman J was prepared to assume, for the purposes of his judgment, that the Court "does in fact have the necessary jurisdiction to grant interim relief pending the finalisation of a matter before another forum such as the CCMA" (see at 2362C-D). Since the learned judge dismissed the application, it cannot be assumed that he accepted the court in fact had jurisdiction.

[14] In University of the Western Cape Academic Staff Union & others v University of the Western Cape (1999) 20 ILJ 1300 (LC) the applicants also sought reinstatement pending the resolution of the dispute concerning their retrenchment. In his judgment (which came to hand only after this matter was argued) Mlambo J was prepared to state as a general proposition that the Labour Court has the power in terms of section 158(1) to grant relief akin to the old status quo orders. He said (at paragraphs 11 & 12 of the judgment):

"The fact that the Labour Court is established as a court of law equal in status to a provincial division of the High Court must mean that the power given to the Labour Court to grant urgent interim relief is not dissimilar to the power of the High Court to grant urgent interim relief. The absence in the Act of a provision similar to s 43 does not, in my view, mean that the Labour Court lacks the power to grant urgent interim relief in dissimilar cases.

In my view the Labour Court would be failing in its stated task if it were to deny such relief even in circumstances where the unfairness sought to be prevented is very glaring. Experience has taught us that even in this day and age one still encounters high handed and unilateral conduct that ignored relevant provisions and any semblance of fairness. In certain circumstances the detrimental consequences of such conduct cannot be addressed by an award after arbitration or adjudication has taken place."

[15] In SACWU & others v Sentrachem [1999] 6 BLLR 615 (LC), which also came to hand after this matter was argued, Revelas J considered the apparent conflict between the views she expressed in the OK Bazaars case supra and those expressed by Mlambo J in University of the Westen Cape. She concluded at 618E-F of the Sentrachem judgment:

> "I do not believe that there is any difference between the views held by Mlambo J and myself. The Fordham [v OK Bazaars] judgment does not have the result that interim relief can never be granted by the Labour Court, but emphasises the reluctance of the Labour Court to grant status quo relief in dismissal matters, in other words, reinstatement of dismissed employees, where there are alternative remedies available."

[16] The learned judge also referred to another Labour Court judgment Paledi & another v Botswana Broadcasting Corporation case no. J323-324/98 reported in 3,4 Labour Court Digest at 184, in which temporary relief was granted to dismissed employees.

[17] The weight of authority therefore favours the view that this Court can in appropriate circumstances come to the assistance of dismissed employees who seek interim reinstatement via section 158(1) pending the conciliation, adjudication or arbitration of the dispute in terms of the procedure laid down in section 191. In OK Bazaars, Revelas J regarded

as prime among the considerations militating against the use of section 158(1) by dismissed employees to be that section 191 provides for mandatory conciliation prior to the matter being adjudicated or arbitrated, whereas section 158(1) enables the parties to approach the Court without having gone through that process. Mlambo J, on the other hand, regarded as the prime consideration favouring the exercise of the Court's powers under section 158(1) to assist dismissed employees in appropriate cases to be the need to prevent them from incurring irreparable harm or loss through flagrant violations of the Act by employers.

[18] The considerations raised in both cases are clearly important. However, the problem at issue cannot be determined by choosing which is the more important. The considerations mentioned by Revelas and Mlambo JJ are relevant only in so far as they cast light on the intention of the legislature as reflected by the words of the statutory provision under consideration, as read in the light of its context, background and purpose. The task of the Court is to decide whether, properly interpreted, section 158(1) expressly or by necessary implication confers on this Court the power to make the various orders listed therein in circumstances where the relief sought is on behalf of employees who have been dismissed.

[19] In embarking on this exercise, one must commence with the words of the provision itself, interpreted in accordance with their ordinary meaning. The material parts of section 185(1) read:

1. Powers of the Labour Court

2. The Labour Court may –

(a) make any appropriate order, including –

(i) the grant of urgent interim relief;

an interdict;

an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

…

(b) order compliance with the provisions of this Act;

…

(c) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

[20] At first glance, the above provisions place no limitation on the Court's power to make orders of the kinds mentioned if the Court deems them to be "appropriate". This conclusion is fortified by the wording of sub-section (a)(iii), which contemplates that the orders envisaged therein may direct the performance of any act that will "remedy a wrong and give effect to the primary objects of the Act". Unfair dismissal is one of the wrongs that can be perpetrated against employees in terms of the Act. An order of temporary reinstatement is clearly a possible remedy for such a wrong. Circumstances can easily be imagined in which such a remedy will give effect to the primary objects of the Act, which include the protection of the subject's constitutional right not to be unfairly dismissed and the effective resolution of labour disputes (see section 1). Paledi v Botswana

Broadcasting Corporation supra provides one example – the loss of accommodation of workers who have been unfairly dismissed. That such relief can be afforded without prior recourse to conciliation does not in itself lead to the conclusion that the legislature intended to exclude dismissed employees from possible recipients of the relief envisaged in section 158(1).

[21] The only basis for concluding that the legislature intended the wording of sub-section (a)(iii) to be read restrictively to exclude reinstatement is to find some compelling indication elsewhere in the Act to warrant that inference. In OK Bazaars, Revelas J considered as an indication that the legislature did not intend to include reinstatement among the remedies contemplated by sub-section (a)(iii) the fact that no equivalent of section 43 of the 1956 LRA was included in the current Act. It is so that prior legislation in pari materia can serve as a legitimate guide to the interpretation of a statutory provision. But it does not follow that because the legislature omitted expressly to provide for "status quo" relief in the Act, it intended to strip the Labour Court of its power to grant such relief in appropriate circumstances. On the contrary, the legislature could well have considered it unnecessary to expressly provide for such relief because the wording of section 158(1) is wide enough to include it. Furthermore, the concern expressed by Revelas J about the possibility of parties "leap frogging" conciliation should be allayed by the fact that the Court retains its discretion to dismiss applications that are brought with that objective in mind (which the Court has frequently done in the past, and did so in the University of the Western Cape and Sentrachem cases supra). The Court is in fact expressly granted authority to refuse to entertain matters that have not been conciliated by section 157(4)(a). The discretionary nature of that provisions has led at least one commentator to conclude that the Court may assume jurisdiction over a dispute in cases

where the dispute has not been conciliated (see Du Toit et al The Labour Relations Act of 1995 (Butterworths 1996) p 333). And the Court's reluctance to accept that mere loss of income is a sufficient ground for the grant or urgent relief presents a significant obstacle to employees who wish to use section 158(1) merely to circumvent section 191.

[22] The only possible indication that the legislature intended 158(1) to be restrictively interpreted in the manner urged by the applicant is the fact that section 191 creates a special procedure for disputes concerning dismissals: expressio unius est exclusio alterius. It is not necessary for present purposes to repeat the provisions of section 191. Suffice it to say that it requires conciliation as a mandatory precondition to the adjudication or arbitration of such disputes. But again, it does not follow that the provision of a special remedy to resolve disputes concerning alleged unfair dismissals by trial or arbitration deprives or limits the power of this Court to grant interim relief pending the resolution of such disputes in the ordinary manner. On the contrary, one of the purposes of urgent relief is to protect the rights of parties pending litigation. The existence of section 191 therefore does not necessarily imply that the powers conferred by section 158(1) cannot be exercised in such disputes merely because the dismissal has been effected.

[23] I am therefore not persuaded on any principle of interpretation that this Court should disregard the literal meaning of section 158(1)(a)(iii).

[24] The exercise of the powers conferred on this Court by section 158 are, however, subject to the proviso that the Court has jurisdiction over the parties and the subject-matter of the dispute. It will have been noted that both Revelas and Mlambo JJ approached the matter by considering the extent of the Court's powers. The applicant's approach in this matter is

that dismissal of an employee deprives the Court of jurisdiction to entertain any claim concerning such dismissal under section 158(1). The jurisdiction of this Court is dealt with in section 157. That section, in summary, states that the Court has exclusive jurisdiction "over all matters that elsewhere in terms of this Act or any other law are to be determined by the Labour Court" (sub-section (1)), save that it has concurrent jurisdiction with the High Court in respect of certain matters (sub-section (2)). The only express limitation on the Court's jurisdiction is contained in sub-section (3), which deprives the Court of jurisdiction to adjudicate unresolved disputes that are reserved for arbitration, except when it acts as arbitrator with the consent of the parties.

[25] Sub-section (1) of section 157 does not assist in the interpretation of section 158(1). However, section 151(2) confers on this Court "authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the High Court has in relation to the matter under its jurisdiction". Were it not for the provisions of section 157(2) of the Act, the High Court would retain its jurisdiction over disputes between employers and employees. In terms of its inherent powers, the High Court could grant interim relief to dismissed employees. It must follow, in my view, that the Labour Court has jurisdiction to do so where it deems such relief to be appropriate.

[26] The above conclusion is fortified by the presumption that the legislature wishes to retain the jurisdiction of the Courts except where it provides to the contrary: see Devenish Interpretation of Statutes (Juta 1992) pp 195-200 and the authorities there cited.

[27] In my view, there is no prospect of another Court reaching a different conclusion on this issue. It follows, too, that since the applicants rest their

case solely on the proposition that the Court lacked jurisdiction to give judgment in case no. J321/98, leave to appeal on that ground must be refused.

[28] Even if the above conclusion is incorrect, there is another consideration that is in my opinion fatal to the applicant's prospects on appeal. This is that its application in case no. J321/98 was not in fact confined to the prayer for reinstatement. It will be recalled that the paragraph 2.2 of the notice of motion requested the Court to grant an order directing the respondent to "enter into consultations with the applicant as required by section 189". I did not understand the applicants to argue that such relief is beyond the powers of this Court. In any event, it is clearly is within the Court's power to grant such an order: see, for example, NEWU & others v Mintroad Saw Mills (Pty) Ltd [1998] 2 BLLR 159 (LC) at 169H-I; FAWU v Premier Foods Industries (Epic Foods Division) [1997] 6 BLLR 753 (LC); NUMSA v Comark Holdings (Pty) Ltd [1997] 5 BLLR 589 (LC); FAWU v Simba (Pty) Ltd [1997] 4 BLLR 589 (LC). The applicant's contention that the Court lost jurisdiction from the moment the employees were dismissed does not touch upon the Court's competence to consider prayer 2.2.

[29] The main focus of the judgment in case no. J321/98 was whether the applicant had conformed with the requirements of section 189. In the view of Zondo J, the applicant's main complaint was that the decision to retrench had been sprung upon them. The learned judge found that this claim was not supported by the evidence before him. He found further that the applicant's reply to the respondent's answering affidavit indicated that management had issued the notice of retrenchment in September 1997, and that the mediator's report of a meeting on 3 February 1998 indicated that "the basis on which the parties left the mediation was that it had been agreed that the only matters which were outstanding for the parties to

consult about were logistics and, as it is said there, final points, of the retrenchment package and that, therefore, it must be so that the union had accepted that there was a need to retrench and that there were no alternatives to the retrenchment which were viable". Zondo J found that by the end of the mediation exercise, the parties had agreed that the only remaining issue for consultation was severance pay. What was fatal to their case, according to the learned Judge, was that the shop stewards had refused to continue consulting over that issue and had belatedly sought to deny that there was a need to retrench, which issue, said the Court, "quite clearly had been settled if one has regard to what happened at the mediation". It was in the light of these findings that the Court concluded that the respondent had "discharged its obligations in terms of section 189 of the Act in this case". And it was in the light of that finding that the Court found in case no. J801/98 that the principles of res judicata applied to the application under section 191(5)(a)(iii).

[30] There is no indication in his judgment that Zondo J was concerned with one or other of the remaining two prayers that the applicant was pursuing, or with both. His focus was simply on whether the facts and allegations on the papers supported the applicant's contention that the respondent had failed to consult. That inquiry was as relevant to prayer 2.2 as it was to prayer 2.3. Had Zondo J found that the respondent had not complied with the Act, the Court might have granted prayer 2.2 or 2.3, or both. Had the respondent urged upon the Court the jurisdictional point now advanced by the applicant, the Court might have found that it could not grant prayer 2.3, but that it could grant prayer 2.2. The Court might have refused both prayers and granted some alternative form of relief. Or the Court might have resorted to the option afforded by section 157(2) and refused to grant relief until the parties had attempted conciliation. We will never know. But for present purposes the point is that any of these alternatives

would have fallen within the Court's powers if it had confined itself to considering only whether the respondent should be ordered to consult with the applicant.

[31] It may well have been that an order in terms of prayer 2.2 would have been brutem fulmen because the retrenchment had by that stage been completed. But this does not mean that the Court lacked jurisdiction to entertain that prayer which the applicant, as dominis litis, was pursuing. In any event, the relief sought in prayer 2.2 need not have been an exercise in futility. The application had been lodged in the name only of the applicant union. The applicant clearly had a continuing relationship with the respondent. If the retrenchment had not been completed, as the applicant now alleges the Court believed and was in fact the case when it drafted the notice of motion, it could nevertheless have wished to enter into consultation in respect of members who had already been dismissed. It might still have wished to do so in respect of its members even if they had all been dismissed with a view, perhaps, to persuading the respondent to relent and resume consultations, or to consult over the amount of severance pay or an undertaking to re-employ. Again, we will never know.

[32] Whatever the applicant intended by pursuing prayer 2.2, the relief sought therein was within the Court's jurisdiction. The Court declined that relief because, in its view, the respondent had already complied with section 189. The applicant returned to this Court with the claim that it had not. And this Court found that that issue had already been disposed of in case no. J321/98. The applicant has not advanced any ground to persuade me that the Court lacked jurisdiction to entertain at least prayer 2.2 in case no. J321/98. I do not believe that it has any reasonable prospect of persuading another court that it did not.

[33] There remains to consider whether there is any other ground on which the Labour Appeal Court might conceivably overturn the judgment in case no. J801/98. For the reasons set out in that judgment, I am of the view that the principle of res judicata was correctly applied. I am also of the view that the plea of res judicata can be raised in an application brought under section 191(5)(b) if the essence of the applicant's case, as disclosed by its statement of claim, had already dealt with in motion proceedings: see now also Dumisani & others v Mintroad Saw Mills (Pty) Ltd [1999] 5 BLLR 485 (LC).

[35] For the above reasons, the application for leave to appeal must fail.

[36] I accordingly make the following order:

The application for leave to appeal is dismissed with costs.

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J G GROGAN
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 14 June 1999

DATE OF JUDGMENT:

FOR THE APPLICANT: Mr K S Tip SC (with him Ms L P Nobanda) instructed by Maserumele & Partners.

FOR THE RESPONDENT: Mr F G Barrie, instructed by Brink, Cohen, Le Roux & Roodt Inc