IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE JR 685/02

In the matter between

NATIONAL ENTITLED WORKERS' UNION	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First respondent
NANA KEISHO NO (Case Management of the CCMA)	Second respondent
GEORGE LALETA MANGANYI	Third respondent
THE MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT, REPUBLIC OF SOUTH AFRICA	Fourth respondent
THE MINISTER: JUSTICE AND CONSTITUTIONAL DEVELOPMENT, REPUBLIC OF SOUTH AFRICA (HOUNOURABLE MINISTER P MADUNA)	Fifth respondent

MINISTRY: LABOUR, REPUBLIC OF SOUTH AFRICA Sixth respondent

THE MINISTER OF LABOUR, REPUBLIC OF SOUTH AFRICA
(HONOURABLE MINISTER MEMBATHISI MDLANA) Seventh respondent

JUDGMENT

LANDMAN J:

This is an application to review a decision of a case management officer (CMO) of the Commissioner for Conciliation, Mediation and Arbitration. The CMO declined to accept a referral of an alleged unfair practice dispute referred to the CCMA by the National Entitled Workers' Union (NEWU). It is also an application for an order of the invalidity of the LRA and the Employment Equity Act 55 of 1998 consequential relief.

NEWU is a trade union that is registered in terms of s 96(7)(a) of the Labour Relations Act 66 of 1995. It employed Mr G L Manganyi, the third respondent, as a union official on 1 February 2001. Mr Manganyi was elected to the executive council and became the deputy president of the union on 21 March 2001. The appointment is for a two year period. He resigned from the union on 6 April 2002. His letter of resignation states:

"Due to the manner/way in which this Organization is being run I feel that it is impossible for me to continue working and serving on the Board of this Organization, as such kindly be advised my services at NEWU are being terminated with immediate effect."

Mr Manganyi did not, as an employee, give the three month's notice required by clause 11(2) of NEWU's constitution. Neither did he give the three month's notice required from a member of the executive committee by clause 10(4)(c) of the constitution. He did not tender to pay any amount in lieu of notice. He was earning R3036 at the date of his resignation.

On the day of his resignation, Mr Manganyi commenced employment with SANWU, presumably a trade union.

NEWU was distressed about the resignation and decided to refer the matter to the CCMA as an unfair labour practice. On 16 April 2002 a notice of referral was delivered to the CCMA and Mr Maganyi. On 18 April the CMO advised NEWU that:

"We are in receipt of the above referral for conciliation. However, the case has been closed due to the fact that the CCMA lacks jurisdiction to entertain the matter as it does not amount to [an] unfair labour practice in terms of the LRA 66 of 1995."

NEWU seeks to review this decision on the grounds that:

(a) it was made without affording NEWU an opportunity to be heard; and
(b) it is invalid as it is inconsistent with ss 9, 23(1) and 34 of the Constitution of the Republic of South Africa of 1996.

At the time NEWU referred its dispute to the CCMA, "residual unfair labour practices" were regulated by item 2(1) of part B of Schedule 7 to the LRA as amended. This item read:

"For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving –

(a)….

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;

(c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employer;

(d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement."

See also item 2(3) and (4) of the 7th Schedule regarding the procedure for processing an unfair labour practice dispute and remedies.

Item 2 has itself been repealed by the Labour Relations Amendment Act 12 of 2002. Unfair labour practices are now regulated by ss 185, 191, 193 and 194 of the LRA.

The concept of an unfair labour practice contemplated by item 2 does not embrace a labour practice committed by an employee vis-a-vis an employer. The CMO (and by implication the CCMA) correctly refused to accept NEWU's referral. NEWU knew that the concept of an unfair labour practice did not embrace its complaint. No purpose would have been served by affording NEWU a hearing. In the result the application to review and set aside the decision of the CMO must be dismissed.

This brings me to the constitutional issues raised by NEWU. In brief NEWU seeks an order declaring that the LRA and the Employment Equity Act 55 of 1998 infringe NEWU's and other employers' constitutional rights and are invalid (or at least partially so). It is submitted that these Acts infringe employer's rights to equality and equal protection and benefit of these laws and their right to have a dispute about the fairness of the resignation of an employee from service resolved by the application of law in a fair public hearing before the CCMA, Labour Court or another independent and impartial tribunal. Other relief consequent on this is also sought.

I have stated earlier that an unfair labour practice in item 2(1) of the 7th Schedule restricts this concept to an act or omission by an employer. The EEA does not use the concept of an "unfair labour practice".

Section 23(1) of the Constitution provides that:

"Everyone has the right to fair labour practices."

What is a fair labour practice as contemplated by the Constitution? The Constitution does not contain a definition of the concept. It is not capable of precise definition. See National Union of Health and Allied Works v University of Cape Town and Others (2003) 24 ILJ 95 (CC) at para 33. Of course, the converse of a fair labour practice is an unfair labour practice and this is what is prohibited. For the purposes of this matter it is sufficient to limit a discussion of the meaning of a fair labour practice to the following:

(a) The concept of a fair labour practice, as it was understood in our law from its introduction in the Labour Relations Act 28 of 1956 (including successive definitions), recognizes the rightful place of equity and fairness in the workplace. In particular the concept recognizes that what is

lawful may be unfair. T Poolman neatly summarises the strength and nature of the concept. He says in Principles of Unfair Labour Practice (Juta) at 11:

"The concept `unfair labour practice' is an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance.

Labour practices draw their strength from the inherent flexibility of the concept `fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of `fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid."

It seem to me clear that the concept of a fair labour practice, as contemplated in s 23 of the Constitution, is concerned that labour practices should not only be lawful but also fair.

(b) The notion of parity between the rights of employers and employees is not an absolute one. But it has an important place in labour law. An employee may, in limited circumstances, commit conduct vis-à-vis an employer that may be lawful but unfair. An employer has the right to expect that in certain circumstances an employee will not merely comply with his or her rights in regard to the employer but will also act fairly. This conduct may, in my view, qualify as an unfair labour practice, ie a practice that is contrary to that contemplated by s 23 of the Constitution. A lawful resignation that is also, in the circumstances, unfair may constitute an unfair labour practice. Cf

Penrose Holdings (Pty) Ltd v Clark (1993) 14 ILJ 1558 (LC) which dealt with the definition of an unfair labour practice contained in s 1(1) of the Labour Relations Act 28 of 1956.

(c) Apart from an intention to accommodate fairness and equity in a flexible way, the concept, as contemplated by the Constitution, envisages the conventional use of the law to regulate labour practices broadly defined ie the inter action between employers and employees (and their agents) regarding workplace relations. The regulation of labour relations and practices by means of conventional statutes (which conform to the goals expressed in the Constitution) are, in my view, contemplated by the terms of s 23(1) of the Constitution.

(d) Rules of common law and in particular the contract of employment, to the extent that they are compatible with constitutional goals and values, are I consider, are embraced by the concept. The contract of employment gives rise to rights and duties that can be construed as a fair labour practice (to the extent that it does conform with the requirements mentioned above). A breach of the contract of employment, which is unfair to an employer, may give rise to an unfair labour practice.

Although item 2 of the 7th Schedule does not embrace the commission of an unfair labour practice by an employee against an employer this does not mean that the item, which has been repealed, is unconstitutional. In my opinion it means no more than that the LRA, in this instance, does not give effect to s 23 of the Constitution. Logically the LRA should be the home of the prohibition on an unfair labour practice committed by an employee. A principal purpose of the LRA is "to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution". See s 1 of the LRA. The reference to s 27 of the Constitution of the Republic of South Africa of 1993 is to be read as a reference to s 23 of the present Constitution. The LRA is not intended to regulate exhaustively the entire concept of a fair labour practice as contemplated

in the Constitution of 1993 nor the present Constitution. The field is far too wide for to be contemplated by single statute.

NEWU did not need to rely on the broad, flexible, equity basis of an unfair labour discussed above. NEWU had a number of remedies available to it in order to address the consequences of the resignation of Mr Manganyi, the labour practice which NEWU regarded as unfair. It could have sought an interdict in the form of a mandamus compelling him to adhere to the terms of the contract. See Santos Professional Football Club (Pty) Ltd v Igesund and Another (2002) 23 ILJ 2001 (C). NEWU could have sued him for three month's salary in lieu of notice.

Should NEWU wish to prohibit a labour practice which is unfair and which is not regulated by a conventional statute NEWU may approach a court of competent jurisdiction relying on s 23 of the Constitution to grant the relief which it seeks. This would not contribute to two parallel streams of labour law which as remarked in NAPTOSA and Others v Minister of Education, Western Cape and Others 2001 (2) SA 112 (C) be "singularly inappropriate". I express no opinion whether it would be successful on its particular facts or not.

NEWU has prayed for alternative relief but this is not a matter where alternative relief should be considered.

In the result the application is dismissed.

SIGNED AND DATED AT MAFIKENG THIS 6TH DAY OF OCTOBER 2003.

A A Landman

Judge of the Labour Court