IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR633/02

In the matter between:

IDEAL PATTERNMAKERS AND TOOLING (PTY) LIMITED **Applicant**

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **First Respondent**

S E KOEKEMOER N.O. **Second Respondent**

MICHAEL J DE WEIJER **Third Respondent**

JUDGMENT

NDLOVU AJ

Introduction

[1] The second respondent, in his capacity as conciliator under the auspices of the first respondent ("the bargaining council") issued a ruling on 3 April 2002 under reference number 02-01-168 ("the Ruling") whereby the second respondent ruled that the bargaining council had the jurisdiction to conciliate the dispute between the third respondent ("the employee") and the applicant, his alleged erstwhile employer ("the employer"). It was against this ruling that the employer sought an order to have it reviewed and set aside.

Factual Background

[2] The employee commenced his employment with the employer on 1 January 1999 as its financial manager. His father was a partner in the employer's business. It would appear the employee's father at some point had problems with other shareholders including a Mr Hugo O'Doherty who was the major shareholder. The employer believed that the employee was the root cause of the problem. Certain meetings were convened and discussions held with a view to resolving the impasse.

On 2 April 2001 a meeting was called at which the employer suggested that the employee should resign which the employer thought could ameliorate the situation. However, the employee resisted this suggestion. The employee submitted that during the same meeting, which he had tape-recorded, O'Doherty had proceeded and terminated his services after he (the employee) had refused to resign. The employee further averred that the portion of the conversation at which O'Doherty would have been heard (on the tape) dismissing him from work was unfortunately not tape-recorded because the battery of the tape-recorder had gone flat. He claimed that his dismissal as such (on 2 April 2001) was unfair. He further alleged that O'Doherty had employed a Mr Willie Jansen as his replacement. O'Doherty denied the alleged dismissal and the alleged employment of Jansen as the employee's replacement.

[3] On 26 April 2001 the employee referred his dispute to the bargaining council for conciliation. The conciliation process failed and the matter was referred to the CCMA for arbitration, which was subsequently conducted on 29 November 2001. At the commencement of the arbitration proceedings the employee's legal representative Advocate Geldenhuys submitted that the employee's dispute was based on an alleged unfair dismissal by the employer in the manner as contemplated in section 186(a) of the the Labour Relations Act 66 of 1995 ("the LRA"), alternatively, an alleged constructive dismissal as envisaged in section 186(e). The employer objected to the employee's claim which it submitted was premised on two grounds which were mutually destructive. As a result of the objection, the employee decided not to proceed with the dispute on the basis of alleged constructive dismissal and proceeded with the allegation that his dismissal was substantively and procedurally unfair as envisaged in section 186(a) of the LRA.

[4] After due consideration of the arbitration on the merits, the CCMA Commissioner, Mapale Tsatsimpe, issued the award under Case No. GA11260-01 on 12 December 2001 whereby the employee's claim was dismissed on the ground that the employee had failed to prove that he was dismissed, as required of him to have done in terms of section 192(1). As a result, it was not necessary for the arbitrator to determine the fairness aspect of the alleged dismissal. This then marked the end of the employee's claim of his alleged unfair dismissal on 2 April 2001.

[5] Since 2 April 2001 the employee did not return to work for the purpose of tendering his services. According to him, when he returned on the following day (i.e.

3 April 2001) it was only to effect a smooth handing over to Jansen. Indeed, even after the CCMA's arbitration award of 12 December 2001 the employee still did not return to work. Instead, on 27 December 2001 he wrote a letter, which he delivered to the employer on 2 January 2002 whereby he tendered his resignation. The letter read as follows:

"Re: MYSELF/YOURSELF - EMPLOYMENT CONTRACT

I refer to the above matter and wish to inform you that it has come to my notice that the arbitrator of the CCMA, Mrs M Tsatsimpe, has ruled in her award dated 12 December 2001 that I have not been dismissed on 2 April 2001.

That leaves me still in the employ of yourself.

I hereby resign as employee of your services and shall be pleased if you can acknowledge receipt of this letter in the space provided for below".

[6] On 23 January 2002 the employee referred the dispute of alleged constructive dismissal to the bargaining council for conciliation, on the ground that the employer had rendered his continued employment intolerable, hence his resignation on 27 December 2001. He contended that in the light of the Commissioner's award (which determined that he was not dismissed) he was still employed by the employer. He further pointed out that the employer retained him as a member of its group life assurance and provident fund schemes, a fact which appeared in his "member investment summary" dated 31 December 2001. He also alleged that since his letter of resignation was delivered to the employer on 2 January 2002 then he reckoned this date as the date of his constructive dismissal and, therefore, the date when the dispute arose.

The Parties' Contentions

[7] At the commencement of the conciliation meeting the employer submitted that the bargaining council had no jurisdiction to entertain the dispute since the matter was a *res judicata,* in that it had been finally decided by the CCMA on 12 December 2001 under Case No. GA11260-01. The employer further contended that the dispute did not arise on 2 January 2002 as alleged by the employee but that it arose on 2 April 2001. On that basis, the employer submitted, in the alternative, that the bargaining council lacked jurisdiction by virtue of the fact that the referral was made out of time and no application for condonation was made by the employee and

granted by the bargaining council.

[8] On the other hand, the employee submitted that the dispute which was determined by the CCMA on 12 December 2001 related to an alleged unfair dismissal under section 186(a) of the LRA, which had allegedly taken place on 2 April 2001, whereas the dispute which he referred on 23 January 2002 related to his alleged constructive dismissal, in terms of section 186(e), which he alleged took place on 2 January 2002. In his submission, therefore, his referral of 23 January 2002 related to a new and separate dispute which he had made timeously.

Analysis and Assessment of the Application

[9] The employer's termination of the employment contract as envisaged in section 186(a) is, in my view, distinguished from the employee's termination of the employment contract as contemplated in section 186(e). The former relates to a dismissal of the employee by the employer, but which is not necessarily unfair. For the employee's claim to succeed the onus is on the employer to prove that the dismissal was fair (section 192(2)). The latter dismissal relates to the scenario where the employer has made the employment conditions so bad that the employee's continued employment is rendered intolerable, thus justifying his/her resignation. This is termed a constructive dismissal, which is *ipso facto* unfair. The two types of dismissals cannot, in my view, be claimed either jointly or alternatively, arising from the same set of alleged facts.

[10] It was therefore proper, in my view, for the CCMA (on 29 November 2001) to have allowed the employee to proceed with his claim only on the basis of either it be an alleged "direct" dismissal (in terms of section 186(a)) or an alleged constructive dismissal (in terms of section 186(e)) but not both. The employee had to make a choice, which he, indeed, made and proceeded with the claim of "direct" unfair dismissal. By making this election he thereby abandoned his claim for constructive dismissal. At that stage the dispute between the parties became a *res judicata* and the bargaining council became *functus officio* in terms of its dealing with the matter again.

[11] However, according to the employee, his current dispute was not the same dispute which was finalised by the CCMA on 12 December 2001, but a new one which he referred on 23 January 2002 based on the new dispute which arose on 2 January

2002. As stated already, the employer raised an objection *in limine* that the bargaining council lacked jurisdiction to deal with the matter. In his ruling the second respondent concluded as follows:

"**Decision**

The employer persisted that it did not dismiss the employee. The employer did not terminate the contract when the employee failed to render his services. It follows that the contract was still intact when the employee resigned on the 27 December 2001, which is the date of termination of employment. This is not a case where it can be inferred from the facts that both parties have agreed by implication that the employment contract had terminated, or that non-performance by both parties in terms of the contract terminated the contract. The only issue dealt with and decided by the arbitrator was whether the employer had dismissed the employee. This was prior to 27 December 2001.

The Council has jurisdiction to entertain the matter".

[12] It was common cause that since 2 April 2001 the employee never returned to work to tender his services. Despite the Commissioner having determined that the employee was not dismissed, the employee continued staying away from work. The second respondent found that the employee's perpetual absence from work after 2 April 2001 had, nonetheless, not resulted in the termination of the employment contract. In my view, however, the second respondent failed to consider properly the validity of the employer's defence of *res judicata*. As I indicated above, the claim of unfair dismissal cannot validly be made both under section 186(a) and 186(e), even in the alternative, for the reason already stated. Therefore, once the employee elected to refer his dispute under section 186(a) he thereby waived his right to claim for alleged constructive dismissal based on the same set of alleged facts. His purported resignation on 27 December 2001 was, in my view, simply a non-event. A constructive dismissal can only arise as a result of the employer having "made continued employment intolerable for the employee". Since the employee was last at work on 2 April 2001 it followed that the employer's alleged conduct which rendered the employee's continued employment intolerable could only have occurred or been committed by the employer before and up to 2 April 2001, which period fell within the ambit of the first dispute in respect whereof the employee made the election not to proceed on the basis of constructive dismissal. Only if the employee actually returned to work and resumed duties (after the Commissioner's decision of 27 December 2001) would he have had a valid claim of constructive dismissal on the basis of the employer's alleged wrongful conduct after his date of resumption of duty.

[13] Therefore, although the employee purported to rely on his "letter of resignation" dated 27 December 2001 as the basis of his claim for constructive dismissal, the second respondent ought not to have simplistically and naively accepted this contention, in the light of the material and information that was presented before him. He ought to have realised and, indeed, concluded that the current claim of constructive dismissal was, in reality, still founded on the alleged events and the employer's alleged wrongful conduct which occurred prior and up to 2 April 2001 when the employee finally left the employer's workplace, these being matters which constituted a dispute that was finally decided by the CCMA on 12 December 2001. In my view, the second Respondent's failure of judgment in this regard constituted a material misdirection and gross irregularity on his part, warranting the Ruling to be set aside.

[14] In my conclusion, the dispute between the employee and the employer was finally determined by the CCMA Commissioner in terms of the arbitration award issued on 12 December 2001 under case number GA11260-01. The matter was accordingly a *res judicata* and the bargaining council lacked the jurisdiction to deal with it.

Order

[15] Accordingly, I make the following order:

1) The decision issued by the second respondent on 3 April 2002 under reference number 02-01-168 whereby he ruled that the bargaining council had jurisdiction to conciliate the dispute between the applicant (the employer) and the third respondent (the employee) is hereby reviewed and set aside and is substituted with the following order:

"The bargaining council has no jurisdiction to entertain the dispute".

2) There is no order as to costs.

NDLOVU, AJ

Appearances:

For the Applicant	:	Mr F Wilke
Instructed by	:	A J Oberlechner Attorney Sandton Johannesburg
For the Third Respondent	:	Mr I G Geldenhuys
Instructed by	:	Du Plessis De Heus &Van Wyk Benoni
Date of Judgment	:	13 February 2004