IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR363/04

In the matter between:

TOIT'S MENLYN AUTO TRADERS (PTY) LTD	**Applicant**

And

H S VAN JAARVELD N O	**1st Respondent**
P H KIRSTEIN N O	**2nd Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL	**3rd Respondent**
ILZE CORNè VAN STADEN	**4th Respondent**

JUDGEMENT

VAN ZYL J:

INTRODUCTION:

[1] The 4th respondent was employed by the applicant as a finance and insurance manager until 1 September 2003 when she tendered her resignation. After the termination of her services the 4th respondent referred a dispute to the dispute resolution centre of the motor industry bargaining council (the 3rd respondent) for

conciliation. The conciliating commissioner issued a certificate recording that the dispute had been resolved. The dispute was thereafter referred for arbitration. The employers' organisation, representing the applicant, placed the jurisdiction of the arbitrator (the 1st respondent) to arbitrate the dispute in issue submitting that the certificate, recording that the dispute had been resolved, brought an end to the matter and that the 4th respondent could not pursue the matter any further unless the certificate is set aside on review by the Labour Court. The 1st respondent dismissed the applicant's point in **limine** and ruled that the dispute must be determined by arbitration.

[2] Arbitration on the merits of the dispute took place before the 2nd respondent. He found in favour of the 4th respondent that she was constructively dismissed and the applicant was ordered to pay her compensation in the sum of R52 000.00 within 30 days of the date of the award. The applicant now seeks to review and set aside the award of the 2nd respondent.

THE GROUNDS OF REVIEW

[3] In its founding affidavit the applicant placed reliance on three grounds for the setting aside of the award. Two of the grounds raise issues relating to the jurisdiction of the 2nd respondent to arbitrate the dispute. The third ground deals with the justifiability

of the amount of the compensation which the 4th respondent was awarded. It is only necessary to refer to the first two of these grounds since the applicant, at the hearing of the matter, indicated that it was no longer pursuing the third ground of review. The two remaining grounds of review were formulated as follows:-

a) The certificate of outcome (the certificate) issued by the conciliating commissioner stated that the dispute had been resolved. The effect of this is that the 2nd respondent was only competent to arbitrate the dispute if there was a certificate indicating that the dispute was unresolved or, if 30 days had elapsed from the time the matter was referred for conciliation and no certificate had been issued. By reason of the fact that a certificate had been issued, the 30 day provision was inapplicable.

b) In the prescribed document (the notice of referral) completed by the 4th respondent, and wherein she referred a dispute for conciliation, she made reference to discrimination based on her pregnancy. This, according to the applicant, constituted an automatic unfair dismissal with the result that the arbitrator had no jurisdiction to arbitrate the dispute and that it should have been referred to the Labour Court for adjudication.

[4] The applicant did not otherwise dispute the correctness of the award of the arbitrator on the merits thereof.

THE VALIDITY OF THE CERTIFICATE OF OUTCOME

[5] It is common cause that the dispute referred by the 4th respondent to the 3rd respondent was about the fairness of a dismissal and an unfair labour practice. The referral of such disputes is regulated by section 191 (1) to (5) which reads as follows:

"**(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-**

i) a council, if the parties to the dispute fall within the registered scope of that council; or

ii) the Commission, if no council has jurisdiction.

(b)A referral in terms of paragraph (a) must be made within-

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

4) The council or the Commission must attempt to resolve the dispute through conciliation.

(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-

a) 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) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially les favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop

agreement.

(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns-

(a) the dismissal of an employee for any reason relating to probation;

(b) any unfair labour practice relating to probation;

(c) any other dispute contemplated in subsection (5) (a) in respect of which no party has objected to the matter being dealt with in terms of this subsection."

[6] The applicant's submission is that, on a reading of sub-section (5), once the appointed conciliating commissioner had issued a certificate that a settlement of the dispute was effected, it is the end of the matter and neither party can pursue it any further. The matter had then reached finality and unless the said commissioner had acted irregularly, and the certificate of outcome is set aside on review, the matter cannot progress to the next step, which is arbitration. Accordingly, the 1st and 2nd respondents acted outside the scope of their powers (**ultra vires)** when they arbitrated over the dispute. The 4th respondent's argument on the other hand is that the decision of the 1st respondent to dismiss the applicant's preliminary point at the first arbitration hearing is correct and final, and that the applicant is precluded from raising this issue again without first having sought a review of, and the setting aside of, the decision of the first respondent.

[7] It is clear from the provisions of sub-sections (1) to (5) of section 191 above that, when there is a dispute about the fairness of a dismissal, a certain process must be followed. In **Fidelity Guards Holdings (Pty) Ltd v Epstein & Others** [2000] 12 BLLR 1389 (LAC) Zondo JP explained this process as follows:

> "**The first step in that process is the referral of the dispute to a council or the CCMA for conciliation. The second is that the applicant must satisfy the CCMA or the council that a copy of the referral has been served on the other party to the dispute. Subject to section 191 (5) the third step is that the council or the CCMA must attempt to resolve the dispute through conciliation. In terms of section 191 (5) the commissioner must then issue a certificate of outcome to the effect that the dispute remains unresolved or a period of 30 days must expire after the council or the CCMA received the referral. Thereafter comes the arbitration of the dispute by the council or the CCMA or the adjudication of the dispute by the Labour Court, as the case may be. The dispute is required to be referred to either a council or the CCMA within 30 days of the date of dismissal. However, if it is not referred within that period, the council or the CCMA has power to permit a late referral on good cause shown."**

[8] The powers of the conciliating commissioner and his or her functions are clearly statutory. In terms of sub-section (4) the function of the commissioner is limited to attempt to resolve the dispute through conciliation. Conciliation effectively amounts to a

settlement negotiation. If settlement is effected, the conciliating commissioner should assist the parties in drafting a deed of settlement, which will end the dispute. If the parties cannot settle, the said commissioner will issue a certificate to this effect, usually specifying the nature of the dispute and the forum to which the dispute should be referred to if the employee decides to take the matter further (See Grogan **Dismissal Discrimination and Unfair Labour Practices** at page 477-479). Save to state that the conciliating commissioner must certify that the dispute remain unresolved, section 191 does not prescribe the form which the certificate must take. Once a settlement of the dispute is achieved and a certificate to that effect was issued, the matter has reached finality and the employee cannot seek any further relief against the employer relating to the dispute referred for conciliation, as the matter had become **res iudicata** (**Naidu v Ackermans (Pty) Ltd** (2000) 21 ILJ 1830 (LC) and **Fry v Grasshopper** [1999] 4 BALR 406 (CCMA)).

[9] Because the conciliating commissioner, by attempting to effect a settlement of the dispute between the parties and deciding whether to issue a certificate, exercises a public power or performs a public function in terms of an empowering section, his or her actions constitute an administrative act which is subject to review by a body or tribunal having powers of review. Although the administrative act performed by the said commissioner may be invalid for whatever reason and open to review, it remains valid until such time as it is set aside on review. It is therefore not open

to an aggrieved party to simply ignore an invalid administrative act. (See **Awumey and Others vs Fort Cox Agricultural College and** Others 2003 (8) BLLR 861 (CK) at 875 D-I**; Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at 242 A-B; **Fidelity Guards Holdings (Pty) Ltd v Epstein & others** (2000) 21 ILJ 2009 (LC) at 2015 F-I and **Fidelity Guards Holdings (Pty) Ltd v Epstein N O & Others** (2000) 21 ILJ 2382 (LAC) at 2387.)

[10] The applicant's submissions are therefore in principle correct and in accordance with the accepted legal position. I am however of the view that on the facts the aforementioned principle does not find application in the present matter. In support of the submission that the 1st and 2nd respondents lacked jurisdiction to entertain the dispute, counsel for the applicant, Mr Beaton, in particular placed reliance on the **Fidelity Guards** decision referred to above. Because I am of the view that the present matter is distinguishable, it is necessary to have regard to the facts of that decision. The facts were that the employee concerned was dismissed for misconduct. The employee lodged a claim with the Commission for Conciliation, Mediation and Arbitration (the CCMA) outside the 30-day period prescribed by section 191 (1). The employer did not raise any complaint thereto. Conciliation proceedings before the CCMA were unsuccessful and a certificate that the dispute remained unresolved was issued by the conciliating commissioner. The matter proceeded to arbitration. The arbitrator found that the

employee's dismissal had been unfair and awarded her compensation. The employer sought to review the award contending that the arbitrator had no jurisdiction in the first place because it was dependant upon a timeous referral of the dispute for conciliation. The court dismissed this argument holding that the certificate of the conciliating commissioner was the jurisdictional fact necessary to give the arbitrator the power to arbitrate the dispute, and that remained the position until such time as the certificate was set aside on review. This finding was upheld on appeal.

[11] The reasoning of the court in the **Fidelity Guards** matter is quite clearly correct. As stated earlier, once the conciliating commissioner has decided to issue a certificate, the administrative act is complete and will remain valid and capable of producing legally consequences for as long as it is not set aside in proceedings for judicial review. The issue raised in the **Fidelity Guards** matter could, as I will indicate hereinunder, also have been decided on a different basis. Mr Beaton submitted that although the **Fidelity Guards** matter was concerned with the validity of a certificate that indicated that the dispute had **not** been resolved, the **ratio** thereof, namely that a certificate stands until it is set aside, is equally applicable to the present matter.

[12] Turning to the present matter, the facts are common cause. The dispute was conciliated under the auspices of the 3rd respondent, a bargaining council accredited in terms of the Act. At the

conciliation proceedings the parties were unable to reach a settlement of the dispute. The conciliating commissioner, Mr Edwards, however erroneously and inadvertently recorded that the matter was resolved. He made use of a **pro forma** certificate which provides a space wherein he must indicate if the matter **"Was resolved"** or **"Remains unresolved."** It would appear that he inadvertently ticked the box stating that the matter was resolved, whilst in fact, that was not the case. The said commissioner also filed an affidavit to that effect. That the true factual position was made known to and placed before the 1st respondent when the matter was first referred for arbitration and the applicant raised the preliminary issue of jurisdiction, is also common cause. The 1st respondent dismissed the issue raised finding that, because the 30-day period envisaged in sub-section (5) of the section 191 had expired and the dispute factually remained unresolved, the matter should proceed to arbitration.

[13] Otherwise than was the position in the **Fidelity Guards** judgment, the conciliating commissioner in the present matter did not make the decision that was recorded in the certificate. The conclusion he arrived at was that the parties could not reach a settlement of the dispute. However, his decision was accidentally and mistakenly recorded as reflecting that the dispute was resolved. There is authority to the effect that where a relevant functionary has simply expressed itself incorrectly it may correct the false impression. (See Baxter **Administrative Law** at page 376 and the authorities

referred to. See also Wade & Forsyth **Administrative Law** 7th ed at page 262). I do not find it necessary to decide this question. In my view the answer to the issue raised rather lies in the nature of the functions and the powers of the arbitration tribunal.

[14] Whenever it acts, a public authority must determine the scope of its own powers. It must, subject to subsequent review by a court of law, ascertain whether the prescribed jurisdictional preconditions for acting exist and must determine the limits of its own authority. (See **Avroy Shlain Cosmetics (Pty) Ltd v Kok & Another** [1997] BLLR 1566 (CC) at 1566 C-D and 1567 A-D; **Numsa v Driveline Technologies (Pty) Ltd & Another** [2000] 1 BLLR 20 (LAC) at 38F – 39A and the remarks of Zondo JP in the decision of the Labour Appeal Court in the **Fidelity Guards** matter at 1391J – 1392B.) Where the power to be exercised is statutory, such as in the present matter, the question of what the preconditions are that must exist before such power can be exercised, lies within the four corners of the statute providing for such power. Whether or not a precondition exists may be a matter of law or fact, and where the existence thereof is disputed, the public authority must necessarily decide it. These preconditions or jurisdictional facts are collateral issues and must be contrasted with the actual matter which the authority is called upon to decide. This was explained as follows by Lord Goddard CJ in **R v Fulham** etc. **Rent Tribunal ex p Zerek** [1951] 2 KB 1 at 6:

> "**if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide**

> **whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide."**

(See also **Bunbury v Fuller** (1853) 9 Ex 111; **R v Special Commissioners of Income Tax** (1888) 21 QBD 313 at 319; Baxter **supra** at page 452-453 and Wade **supra** at page 288 – 289.)

[15] The preconditions or jurisdictional facts that must exist before an arbitrator may validly exercise his or her functions, are to be found in sub-section (5) section 191 of the Act. Not only must the dispute relate to a reason as prescribed in paragraph (a) of that sub-section, but the arbitrator may only arbitrate the dispute if it was first referred for conciliation and the conciliating commissioner has decided that the dispute remains unresolved and has issued a certificate to that effect, or, where a period of 30 days has lapsed since the CCMA or the council received the referral for conciliation, and the dispute remains unresolved.(**NUMSA v Driveline Technologies (Pty) Ltd & Another supra** at 38J to 39A.) Whether or not the dispute was first referred for conciliation and the conciliating commissioner had decided that the dispute remains unresolved, or, the 30 day period has expired, are quite clearly factual matters that must be determined by the arbitrator when his or her jurisdiction to determine the dispute is placed in issue. It should be the first enquiry which the arbitrator will have

to make before it proceeds to determine whether the dismissal of an employee was fair or unfair. It must be stressed that the arbitrator is not called upon, and is not empowered, to decide whether the conciliating commissioner correctly concluded that the dispute was resolved or that it remained unresolved. The conduct of the conciliating commissioner and the validity of his decisions are matters to be considered by a review tribunal. (Grogan **supra** at page 478.)

[16] Similarly, the conciliating commissioner may only validly conciliate a dispute if an employer/employee relationship exists and if the employee referred a dispute in writing to the CCMA or to a council having jurisdiction, within the time limits prescribed by sub-section (1) of section 191, or failing which, condonation was granted for the failure to comply with the said time limits. The question whether or not these jurisdictional facts are present must be raised before and be decided by the conciliating commissioner. The decision of the conciliating commissioner or the arbitrator relating to jurisdiction is a preliminary matter and may be set aside by this court on review, usually after the conclusion of the arbitration proceedings. I say usually because there is generally a reluctance by the courts to a piecemeal determination of issues (See **Liberty Life Association of Africa Ltd v Niselow** (1996) 17 ILJ 673 (LAC) at 680D-J and **Avroy Shlain Cosmetics (Pty) Ltd v Kok & another supra** at 1567A-D. See also the remarks of Zondo JP in this regard in the appeal judgment in the **Fidelity Guards** matter at 1395 H-J.) The importance however is that a

party who wishes to raise a jurisdictional question, must do so before the functionary concerned. A failure to do so where the jurisdictional fact relates to a procedural rather than a substantive issue and the party affected knows the facts and raises no objection at the outset, he or she may be taken to have waived it and cannot raise it later. (See Wade **supra** at page 272 to 274 and Wiechers Administrative Law at page 76 fn 90.) The **Fidelity Guards** matter could have been decided on the basis that the failure of the employer to raise a complaint before the conciliating commissioner about the failure of the employee to lodge a claim within the prescribed 30-day period, resulted in a waiver of its right to raise the objection at a later stage. The time period introduced by section 191 (1) (b) is to the benefit of the employer, and although couched in peremptory form, may be waived by the employer. (**quilibet potest renuntiare iuri pro se introducto)** In the case of **Buzuidenhout v A.A. Mutual Insurance Association Ltd** 1978 (1) SA 703 (A) at 709H- 710A it was held that **"…even a peremptory statutory provision may be renounced by a person for whose benefit is has been introduced…" (S**ee also **Govender v Sona Development Co (Pty) Ltd** 1980 (1) SA 602 (D) at 604H – 605E.) The employer was, having been served with the notice of referral (section 191 (3) of the Act), aware that the employee did not comply with the said procedural requirement. The failure of the employer to raise this issue at the outset caused the employee not to apply for condonation as he had the right to do in terms of section 191 (2) of the Act.

[17] Was it necessary for the 4th respondent to first have sought a review and setting aside of the certificate issued by the 1st respondent before the matter could proceed to arbitration? In my view it was not. Whether or not a dispute was resolved during the conciliation process is a factual issue. The certificate which the conciliating commissioner issues is proof of that fact. Support for this proposition is to be found in section 157 (4)(b) of the Act which reads as follows:-

> **"(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation."**

This provision raises the question whether "sufficient proof" is to be construed as "conclusive proof" of the decision of the conciliating commissioner, in other words, that the mere production of the certificate serves as final proof of the fact that the dispute was resolved or that it remains unresolved. The **Shorter Oxford English Dictionary** defines the word "certify" as follows:

> "**To make (a thing) certain; to guarantee as certain; to give certain information of. 2. To declare or attest by a formal or legal certificate 1461. 3. To make (a person) certain (of) ; to assure; to give (a person) legal or formal attestation (of) ME. 4. intr. To testify to, vouch for 1625."**

[18] The certificate issued by a conciliating commissioner attest to the existence of two facts, namely that the parties attempted conciliation as prescribed by section 191 of the Act, and more

importantly for purposes of this matter, that they have been able, or have not been able, to settle the dispute. In my view it has probative value amounting to at least **prima facie** proof of the act performed by the conciliating commissioner and it is open to be disproved by cogent evidence to the contrary, such as in the present matter, where it is common cause that the parties did not resolve the dispute during conciliation. In **S v Moroney** 1978 (4) SA 389 (A) the Appeal Court (per Van Winsen AJA) dealt with the distinction between "sufficient proof" and "conclusive proof" and stated the following at page 406E to 407A of the judgment:-

> "'**sufficient proof' of a fact connotes proof which in the absence of countervailing evidence may be accepted by a court as establishing such fact. "Conclusive proof" of a fact connotes proof which a court is obliged to accept, to the exclusion of all countervailing evidence, as establishing such fact. When a statutory enactment prescribes that a document or a certificate by its production to a court constitutes "sufficient proof" of some stated fact or conclusion the effect of such enactment is that such document or certificate can in the absence of countervailing evidence constitute proof of such fact. "sufficient proof", unless the context in which it is used compels another conclusion, is equivalent to prima facie proof. However, where the enactment provides that a document or certificate will on production constitute conclusive proof of some stated fact then the effect of the enactment is to create a presumptio juris et de jure that the document or certificate establishes incontrovertibly the truth of that fact. No evidence may be led to contradict it. The distinction between "sufficient" and "conclusive" in relation to "proof" or to "evidence" is well**

established. See for instance Halsbury Law of England 4th ed vol 17 paras 28, 158; Kerr v John Mottram 1940 Ch 657 at 660; In re Hadleigh Castle Gold Mines Ltd (1900) 2 Ch at 422; In re Horbury Bridge Coal Iron and Waggon Company 11 Ch D 109 at 114; Re Duce and Boots Cash Chemists (Southern) Ltd's Contract (1937) 3 ALL ER 788 at 794. As to the South African cases see, inter alia, Registrar of Asiatics v Salajee [1924 TPD 400 and 1925 TPD 71; Glenfield and Others v Zebediela Employees' Co-operative Trading Society Ltd and Another 1950 (2) SA 155 (T) at 164-5; SA Army Fund v Umdloti Beach Health Committee 1974 (4) SA 948 (N) at 954C-H; cf African and European Investments Co Ltd v Warren and Others 1924 AD 308 at 325."

Conclusive proof is not the plain and ordinary meaning of the phrase "sufficient proof" and in my view the contextual setting of the latter phrase in section 157 (4) (b) or section 191 (5) provides no compelling reasons pointing to a conclusion that is should be construed as "conclusive proof".

[19] As stated earlier, it is important to draw a distinction between, on the one hand, the administrative act performed by the conciliating commissioner and his conclusion that the dispute remains unresolved, and on the other hand, the publication of that conclusion by the issuing of a certificate. The obvious purpose of the certificate is to create certainty. It enables the arbitrator or the Labour Court to establish that the parties have attempted conciliation and that the dispute remains unresolved as prescribed by section 191 (5). To hold otherwise would be absurd as it would,

on the facts of the present matter, require this court to review the obvious.

THE NATURE OF DISPUTE RAISED IN THE REFERRAL DOCUMENT.

[20] In deciding the applicant's second ground of review, it is necessary to consider the document in terms of which the applicant referred the dispute for conciliation to the 3rd respondent. Under the heading "**NATURE OF THE DISPUTE"** the applicant stated in the notice of referral that the dispute is about an unfair dismissal and an unfair labour practice. In the space provided for "**other**" the applicant wrote "**Constructive Dismissal"**. Under the heading **"UNFAIR LABOUR PRACTICE"** the 4th respondent was requested to summarise the facts of the dispute she was referring for conciliation. She wrote "**Automatic Unfair Dismissal"**. In part B of the form the applicant indicated that she resigned. Asked to state why she was dismissed she stated **"constructive**" and next to the word "**other**" she wrote "**Discrimination – Pregnancy."** She was further asked to state why the reason for her dismissal was unfair and she wrote "**constructive."**

[21] The applicant's submission is that the 4th respondent's reference in the prescribed form to an automatically unfair dismissal and her claim for compensation equal to twenty four months salary (the

maximum compensation which may be granted for automatically unfair dismissals), determined the dispute as one falling within the provisions of section 191 (5) (b) (i) of the Act. That being the position, the dispute was to be adjudicated by this court and the first and second respondent lacked jurisdiction to arbitrate the dispute.

[22] If conciliation fails, section 191(5) of the Act requires some disputes to be referred for arbitration, and others to adjudication by the Labour Court. Subject to referrals to the Labour Court, which the director of the CCMA has the power to make under section 191 (6), it depends on the reason for the dismissal as alleged by the employee whether a dispute should be referred to arbitration or adjudication. If the employee alleges reasons specified in section 191 (5) (a) for his or her dismissal or if he or she does not know the reason for the dismissal, the dispute goes to arbitration. If the employee alleges reasons specified in section 191 (5) (b), the dispute goes to adjudication by this Court (See **NEHAWU v Pressing Metal Industries** [1998] 10 BLLR 1035 (LC) at 1036I to 1037A; **Magubane & Others v Mintroad Saw Mills (Pty) Ltd** [1998] 2 BLLR 143 (LC); **Walters & Others v Goldfields (Ltd) Libanon Mine & Another** [2001] 7 BLLR 847 (LC) at 849G-H and **NUMSA v Driveline Technologies (Pty) Ltd & Another** supra at 30 F-H.)

[23] It is clear from the notice of referral that the 4th respondent alleged two reasons for the dispute that was referred for conciliation,

namely constructive dismissal and a reason related to her pregnancy. The first reason falls within the ambit of sub-section (5) (a) whilst the second reason constitutes an automatically unfair dismissal in terms of sub-section 5 (b). That this is the case is confirmed by a reading of the provisions of sections 186 (1) (e) and 187 (1) (e) of the Act. A feature of a dismissal in terms of section 186 (1) (e), generally known as "constructive dismissal", is that it is the employee rather than the employer, that terminates the contract with or without notice. Employees, who formally resign, such as the 4th respondent in the present matter, can nevertheless claim to have been dismissed if they can prove that the employer made continued employment intolerable for them (Grogan **supra** at page 157) Section 187 (e) renders automatically unfair the dismissal of an employee for any reason related to her pregnancy or intended pregnancy. It is the counterpart of section 186 (1) (c) that refers to the refusal of an employer to allow an employee to resume work after maternity leave.

[24] On the facts of the present matter the 4th respondent was in my view justified to have alleged as reasons for her "dismissal" that the applicant made her continued employment intolerable (constructive dismissal) or that it was related to her pregnancy and therefore automatically unfair. The circumstances surrounding her resignation were such that the 4th respondent may have been left with the impression that the applicant wanted to force her to resign and that it may have had something to do with the fact that she

went on maternity leave. The facts found to be proved were that before the 4th respondent went on maternity leave the applicant employed a temporary employee in her position. When the 4th respondent returned from leave the applicant informed her that another person had been appointed permanently in her position and that she would be placed in the position of a stock controller. This position carried a lower remuneration factor with no commission and a lower status within the business of the applicant. The 4th respondent expressed her displeasure with this state of affairs and when she informed a Mr Swart that this would leave her with no option but to resign, he answered that he knows. The 4th respondent resigned stating that she could not accept the lower position of stock controller due to the loss in remuneration.

[25] Support for the applicant's contention that the 2nd respondent lacked jurisdiction to arbitrate the dispute is to be found in the decision in **Mawisa v CCMA & Others supra.** In that case the court held that an unfair dismissal dispute had to be adjudicated by the Labour Court where the case of the applicant was founded upon one of the reasons contained in section 191 (5) (b) (1) of the Act despite the fact that the employee also alleged a reason in sub-section (5) (a) (i) which would give the CCMA jurisdiction to arbitrate the dispute. Basson J held at 1199 C-D that:

> **"The fact that the applicant has also alleged that the reason for the (allegedly unfair) dismissal is related to his (mis) conduct does not mean that the CCMA now also has jurisdiction in regard to this**

> **unfair dismissal dispute (in terms of s191(5)a)(i) of the Act). The very same unfair dismissal dispute namely stands to be adjudicated (also) by the Labour Court and, in the absence of a clear and unequivocal election on the part of the applicant, the CCMA therefore does not acquire the necessary jurisdiction to arbitrate this dispute."**

The court however held that it was open to the employee during the arbitration proceedings or in the papers before the Labour Court to state clearly and unequivocally that he or she had abandoned an aspect of an unfair dismissal dispute which does not fall with the jurisdiction of the CCMA. In that matter the employee however did not do so and instead persisted in his allegation that the dismissal was also due to victimization, that is, an automatically unfair dismissal.

[26] A similar approach was adopted in the case of **Maarten & Others v Rubin NO & Others** [2001] 2 BLLR 102 (CC). Relying **inter alia** on the **Mawisa** judgment **supra** the court stated the following at 170 E-H:-

> "**...I am satisfied that when the applicants initially referred their dispute to the CCMA they were, on the fact of it at least, relying on at least two (possibly three, in the case of certain applicants) causes of action, namely, unfair dismissal arising out of the operational requirements of the second respondent, alleged automatically unfair dismissal and alleged unfair constructive dismissal. These causes of action all arose out of the same set of facts and circumstances as is apparent from the various statements annexed**

> **to the various referral forms. Had the applicants been seeking to proceed at the arbitration stage with a dispute involving alleged unfair dismissal for operational requirements or alleged automatically unfair dismissal, the first respondent would have been correct in holding that the CCMA had no jurisdiction to entertain such dispute. However, at the hearing of the matter the applicants, through their authorised legal representative, indicated, in my view, unequivocally that they were no longer relying on those causes of action but had exercised an election to proceed on the basis of constructive dismissal alone..."**

[27] What seems to be suggested in the aforementioned cases is that an employee is bound by the reasons alleged for an unfair dismissal dispute in the document in terms of which the dispute was initially referred to the CCMA for conciliation and that the alleged reason determines which tribunal after conciliation has jurisdiction to hear the matter. Therefore, if the employee alleges reasons falling within the jurisdiction of both the arbitration tribunal and the Labour Court, the employee can only bring the dispute within the jurisdiction of the arbitration tribunal if he or she during the arbitration proceedings or in papers before the Labour Court abandons the other **"cause of action"** that falls within the provisions of section 191 (5) (b) of the Act.

[28] A more preferable approach in my view is one where, all that matters for purposes of establishing jurisdiction, is the true nature of the dispute. Support for this is to be found in the decision of the Labour Appeal Court in the **Driveline Technologies** case **supra**

where it was concluded that it is always open to a party in a dispute about the fairness of a dismissal in section 191 (1) of the Act to apply for an amendment of the reason for dismissal. The court held that the amendment of an employee's statement of claim, to the effect that the dismissal is an automatically unfair dismissal, will not introduce a new dispute but will simply be an allegation of another reason for the dismissal. The dispute remains the same dispute that was referred for conciliation in terms of section 191 (1), namely a dispute about the fairness of the dismissal. At 35C-D of the judgment Zondo AJP (as he then was) said the following:-

> "**Applying the same reasoning to the case before us, I would say that a dispute about the fairness of a dismissal remains the same dispute whether or not the reason alleged as the reason for dismissal is changed, withdrawn or added to. The mere allegation of another or an additional reason for dismissal or the mere allegation of another ground of alleged unfairness does not change one dismissal dispute into as many dismissal disputes as there are alleged reasons for the dismissal or into as many disputes as there are grounds of alleged unfairness. If this was not the case, an employer could frustrate the entire processing of such a dispute by the mere device of keeping on changing the alleged reasons for dismissal."**

> And further at page 35G-I

> "**In so far as the Labour Court may have intended to suggest in NUMSA and others v Cementation Africa Contracts (Pty) Ltd (1998) 19 ILJ 1208 (LC) at 1214I-1215A that, when a party refers**

> **a dismissal dispute to conciliation, it is a requirement of the Act that he states whether the dismissal relates to operational requirements or misconduct or incapacity or an automatically unfair reason, this is not correct. I must say that, despite what the Labour Court said at 1214I-1215J, its statements at 1213H-1214H appear to support the view that there is no such requirement. While it would be better and preferable if a party which referred a dismissal dispute to conciliation stated whether the dismissal was a dismissal for operational requirements or a dismissal for misconduct or for incapacity, the fact that that is not made clear in the referral to conciliation would not make the referral defective in terms of the Act. This must be so because, even when the employee does not know whether his is a dismissal for misconduct, incapacity, operational requirements or dismissal for an automatically unfair reason, he is still able to refer his dismissal dispute to conciliation."**

(See also **Walters & Others v Goldfields (Ltd) Libanon Mine & Another supra** at 850A-D.)

[29] To force an employee to proceed to the wrong forum simply because of being bound to the reason alleged for the dismissal in the notice of referral and then to request that forum to transfer the matter to another forum, appears to me to be too formalistic an approach. It could never have been the intention of the legislature that the notice of referral should be treated in the same way as pleadings in a court of law and that the jurisdiction of the relevant forum must be determined by the label given to the dispute in the

notice of referral. Section 191 (1) does not prescribe that the referral of a dispute for conciliation must be in a certain form. It must simply be in writing. It should also be noted that the court in the **Driveline Technologies** case **supra** did not attach any significance to the words **"if he has alleged"** in section 191 (5) of the Act (at 34C-D). More often than not a dispute would be referred in terms of section 191 by a lay person who is not equipped to deal with, or anticipate legal niceties, that may arise at a later stage. Such an approach further negates the role played by the conciliating commissioner in identifying the true nature of the dispute between the parties during the conciliation process where both the employee and employer are given an opportunity to give details of their cases and the true reason for a dismissal may become clear for the first time. It elevates form above substance and is inconsistent with the purpose of the Act, namely to ensure the expeditious resolution of disputes arising from the employer-employee relationship and to provide for simple and cost-effective procedures for the resolution of such disputes.

[30] If an employee can amend his or her statement of claim in the Labour Court by alleging another reason for dismissal, there can in principle be no reason why the employee cannot do the same when he or she requests the CCMA to arbitrate the dispute. The only requirement is that the dispute remains the same dispute that was referred for conciliation in terms of section 191 (1) of the Act, namely, a dispute about the fairness of the dismissal. Applying the reasoning of the Labour Appeal Court in the **Driveline**

Technologies case **supra**, a more preferred and pragmatic approach to the question would in my view be the following: After conciliation the employee would have had an opportunity to hear the employer's case and is placed in a better position, with the assistance of the conciliating commissioner who often specifies the nature of the dispute in the certificate and the relevant forum, to determine the true nature of the dispute between the parties. The right to choose a reason for the dismissal and whether to request the CCMA to arbitrate the dispute or to refer the dispute to the Labour Court vests in the employee (see the **Driveline Technologies** case **supra** at 34G). In deciding whether to request arbitration or to refer the matter for adjudication, the employee is confined to the reasons for dismissal as contemplated by section 191 (5) (a) or (b) of the Act and not to the reasons in the notice of referral. Should the issue of jurisdiction arise, the relevant forum would determine the true nature of the dispute and would either assume or refuse to assume jurisdiction. I refer in this regard to what I have said in paragraphs [14] and [15] of this judgment. Should the real dispute between the parties fall outside the jurisdiction of the particular forum or the Labour Court decides that the matter should rather have been referred to arbitration, the parties, or for that matter the said court, may act in terms of section 191 (6) or 158 (2) of the Act.

[31] In the present matter the reason that crystallised during the conciliation of the dismissal dispute raised by the applicant in the notice of referral, was that of constructive dismissal. That was the

reason indicated by the conciliating commissioner in the certificate issued by him. It is further clear from the record of the arbitration proceedings and the 2nd respondent's award that this was the only reason the 4th respondent decided to pursue and rely upon when she requested the matter to be referred for arbitration. The 4th respondent confirmed that to be the position in her answering affidavit filed in this matter. The applicant did not object thereto and the 2nd respondent then arbitrated the dispute on the 4th respondent's allegation that she was constructively dismissed. In the circumstances I am satisfied that the 2nd respondent had jurisdiction to determine the dispute.

[32] Even if I am wrong in my reasoning I am satisfied that the application cannot succeed. As stated earlier, the only issue placed before the 2nd respondent and whereon he made the award was that of constructive dismissal. I agree with Mr Thompson's submission that the 4th respondent, in all the circumstances, effectively abandoned any reliance on an alleged automatically unfair dismissal.

CONCLUSION:

[32] I accordingly hold that there is not merit in the grounds of review raised by the applicant and that the application should be dismissed. There is further no reason, and none has been

suggested, why costs should not follow the result.

[34] In the result I make the following order:-

"The review application is dismissed with costs."

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D VAN ZYL J

Counsel for the applicant	**Advocate R G Beaton**
Instructed attorneys	**Edward Hobbs Attorneys** Roban Building, First Floor 178 Erasmus Street **MEYERSPARK**
Counsel for the Respondents	**Mr M Thompson**
Instructed attorneys	**Thompsons Attorneys** Ground Floor, Block 7 Albury Park Cnr Jan Smuts & Magalieszicht Avenue **HYDE PARK**

Date of judgment: 23 June 2006