

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: JS

432/05

MOSSAWU Obo BALOYI

APPLICANT

and

TRADE NOW No 12 CC

RESPONDENT

JUDGMENT

MOLAHLEHI AJ

Introduction

1] The applicant trade union referred a dispute concerning the dismissal of its members to this court for adjudication by way of motion and a statement of case. The applicant prayed for the reinstatement of its members.

2] While the referral to the court concerns the dismissal of the members of the trade union, the issue that was conciliated by the Commission for Conciliation Mediation and Arbitration (the CCMA), concerns the refusal to bargain by the respondent.

3] The certificate of non resolution issued by the CCMA, further to the failure of the conciliation, entitled the applicant to embark on a protected industrial action in terms of section 64 (2) of the Labour Relations Act 66 of 1995 (“the LRA”).

Background facts

4] Subsequent to receiving the 48 (forty-eight) hours notice that the applicant intended going on a strike, the respondent also served the applicant with notice of a lock-out. The lock-out commenced on the 22nd April 2004.

5] The facts in dispute are summarized in the 7-11 referral form as follows:

“Refusal to bargain in terms of section 64(2) read with section 134 of the Labour Relations Act No 66 of 1995 as amended.”

6] The certificate of outcome issued by the CCMA on 13th April 2005 categorized the dispute as *“mutual interest and concerning refusal to bargain.”* Therefore, the process to follow thereafter in terms of the classification in the certificate was either a strike or lock-out.

7] In its founding papers the applicant categorized the issue to be decided by the court as:

“6.1 Whether the lock-out dismissal to [sic] applicants was fair on [sic] unfair.

6.2 Whether there was a rational connection between the handing of the support, [sic] and the conclusion, which the respondent had reached.

6.3 Whether the respondent had complied with section 64 (2) (A) when making the dismissal [sic] to the applicant or not.”

8] The respondent raised a *point in limine* concerning the failure to comply with s157 (4) of the LRA. The essence of the *point in limine* is that the referral to the court was premature in that the dispute concerning the alleged unfair dismissal was never referred to the CCMA for the conciliation.

9] In support of its *point in limine* the respondent relied on the provisions of s157 (4) (a) of the Labour Relations Act (“the LRA”). S157 (4) (a) reads as follows:

“The Labour Court may refuse to determine any dispute, other than an appeal or review before the court, if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation.”

10] It is common cause that the certificate of outcome which the applicant relies on in referring this matter to the court classified the dispute as that concerning refusal to bargain by the respondent.

11] It is well established in law that once issued, a certificate of an outcome determines the course of action that the parties to a dispute may follow thereafter. The dispute for which the applicant sought this court to adjudicate upon is not the one mentioned in the certificate of outcome.

12] Thus the dispute which the commissioner conciliated was not a dismissal dispute but a dispute of mutual interest. It therefore means that the unfair dismissal dispute which the applicant referred to this court was never conciliated by the CCMA.

13] The issue that needs to be considered in this matter therefore, is whether this court has jurisdiction to adjudicate over a dispute where there was no attempt to conciliate.

14] It is only in exceptional circumstances involving urgency that this court would be prepared to dispense with the need for conciliation. See *Lomati Mill Barberton v PPWAWU & others* (1997) 18 ILJ 178 (LC).

15] It is clear from the reading of s157 (4) that conciliation of a dispute is the preferred method for resolving disputes. Adjudication in this court or other dispute resolution bodies is acceptable only in instances where conciliation has failed and a certificate of non resolution to that effect has been issued.

16] In *Molemi & Others v Hellman Parcel Systems (Pty) Limited* (1999) 20 ILJ 2082 (LC), the court held that the applicant's failure to refer their dispute to the bargaining council after their dismissal deprived the court of the necessary jurisdiction to adjudicate the dispute.

17] The same approach was adopted by the court in *Chemical Workers Industrial Union v Dagmay Industries (Pty) Limited* P 42/98 and *Steel Mining & Commercial Workers Union & Others v Tiger Plastic (Pty) Limited* (1999) 20 ILJ 2112 (LC). In the *Dagmay Industries* case, Revelas J ordered that a prematurely conciliated dispute had to be referred back to the CCMA.

18] By virtue of the requirements of s191 of the LRA, it was a

jurisdictional prerequisite for the applicants to have referred their dispute to the CCMA for conciliation in order for the court to have jurisdiction to adjudicate it. See *NUMSA v Driveline Technologies (Pty) Ltd and others* (200) 21 ILJ 142 (LAC).

19] In my view and following the above judgments, the court should not indulge litigants who do not follow the procedures laid down in the law. These procedures are key and critical to the system of dispute resolution in the LRA. Compromising the procedures could lead to undermining the dispute resolution system which may lead to its breakdown. The court should in dealing with parties that do not follow the procedures take a firm stand and send a clear message of non tolerance to such behaviour.

20] In this case, the notice of motion, the statement of case and the heads of argument, indicate clearly that the dispute which was referred to the CCMA did not concern an unfair dismissal. It is evidently clear from the papers that applicant referred to the court a dispute which was never referred for conciliation.

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21] In the circumstances of the case, I see no reason why costs should

not follow the course.

22] In the premises, the *point in limine* raised by the respondent is upheld and the case of the applicant is dismissed for the lack of jurisdiction.

23] The applicants' are to pay the respondents' costs.

MOLAHLEHI AJ

DATE OF HEARING : 01 FEBRUARY 2007

DATE OF JUDGMENT : 11 MAY 2007

Appearances

For the Applicant: UNION OFFICIAL FOR MOSSAWU

For the Respondent: ADV R G BEATON

Instructed by : EDWARD HOBBS ATTORNEYS