IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **CASE NO: C 245/97**

In the matter between:

SISA MAWISA Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

DAVID WILSON N.O. Second Respondent

IRVIN AND JOHNSON LIMITED Third Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

BASSON J

1 This is an opposed application for leave to appeal against the judgment of the Court in the abovementioned matter. The applicant in the abovementioned matter wishes to appeal and argues that the finding of the Court that the Commission for Conciliation, Mediation and Arbitration ("the CCMA") does not have the necessary jurisdiction to arbitrate the unfair dismissal dispute *in casu* is wrong.

2 In his heads of argument, the applicant's legal representative appears to

agree with the finding of the Court that the dismissal dispute is but **one** dispute about the fairness of the dismissal of the applicant by the third respondent.

3 Further, the applicant appears not to attack the finding of the Court that it would lead to intolerable results and could never have been the intention of the legislature in promulgating the Labour Relations Act, 66 of 1995 ("the Act") if such dispute stands to be determined in two separate *fora*. In any event, there is no prospect that another Court will reach a different conclusion on this aspect as the Act clearly creates two separate and independent jurisdictions in the case of unfair dismissal disputes, depending on the allegation of the employee concerning the reason for the dismissal (section 191(5) of the Act as discussed in the judgment at paragraphs [5] to [7]).

4 Further, it is clear from the applicant's own papers (at paragraph 35 of the founding affidavit) that he alleges that he was dismissed not only for misconduct (refusal to obey an instruction) but **also** for exercising his rights under the Act (defined as an "automatically unfair dismissal for alleged victimisation" in the applicant's own words). The applicant was thus persisting in his allegation that both of these reasons were the reason(s) for the dismissal and this allegation would, in effect, grant both the CCMA and the Labour Court jurisdiction in regard to the one unfair dismissal dispute (in terms of section 191(5)(a)(i) and section 191(5)(b)(i), respectively - paragraphs [8] to [18] of the judgment).

5 The Court (in keeping with the abovementioned reasoning) held that the applicant- employee must (in terms of section 191(5) of the Act) make an unequivocal allegation as to the reason for the dismissal. It is accordingly not possible to present a virtual shopping list of allegations as to the reason

for the dismissal which would result in both the CCMA and the Labour Court having jurisdiction over the same dispute at the same time or to hold an allegation in regard to the reason for the dismissal in abeyance until the one *forum* has (finally) determined the dispute and to then revive the same dispute on the basis of this allegation in the other *forum*. In my view, there is no reasonable prospect that another Court would come to the conclusion that such result would be tenable because (as is explained above at paragraph [3]) such result would be legally intolerable.

6 I do not agree with the applicant's contention that this conclusion will be harmful to the interests of an unrepresented employee. The employee is given the important competence to determine the *forum* for the determination of the unfair dismissal dispute and this clearly puts the employee in a more powerful position than that of the employer. In fact, it is precisely because the employee's allegation is determinative in regard to jurisdiction that it is incumbent upon the employee to make an election from the possibilities contained in section 191(5) of the Act. The employee may even allege that he or she "does not know the reason for dismissal" (section 191(5)(a)(iii) of the Act). Further, the Act provides for remedies to deal with the position where the dispute is wrongly referred to the CCMA or the Labour Court (section 191(6) and section 158(2), respectively - discussed at paragraphs [39] to [41] of the judgment).

7 As is pointed out above, the applicant *in casu* who alleged that the reason for the dismissal was related to his (mis)conduct did not abandon the allegation that the reason for the dismissal was "automatically unfair" and, in fact, kept this allegation alive or in abeyance. This was true not only at the conciliation stage of the dispute but also at the arbitration stage of the dispute (see the judgment at paragraphs [15] to [23]).

8 In this regard, the transcription of the arbitration proceedings (Annexure "TEB 5.6" at page 190 of the papers) shows the commissioner stating the following: "DW: ... So I think to me it is clear from that referral document that there was an allegation of substantive unfairness, going onto the request for arbitration which followed from that, that said unfair dismissal ... enquiry which indicates procedural unfairness and secondly agreements of unfair labour, victimisation was lodged against the complainant prior to the enquiry. Again to me that appears to me that there is an allegation of substantive unfairness, and in fact **the dismissal took place as a result of the grievance being lodged**. So I don't think the company is allowed to say ... expected applicant today to proceed on the basis of procedural unfairness, now clearly have the right to call witnesses to refute allegation of substantive unfairness and trust" (Court's underlining).

9 It is thus abundantly clear that the commissioner (the second respondent) was proceeding on the basis that the alleged **reason** for the dismissal was that a grievance (of victimisation) was lodged by the applicant, that is, "a dismissal for victimisation" (in the applicant's own words - quoted above at paragraph [4]). In other words, the commissioner wrongly assumed jurisdiction in spite of this allegation in regard to the substantive unfairness of the dismissal as this alleged reason clearly constituted an automatically unfair dismissal in terms of section 187(1)(d)(i) of the Act (discussed at paragraph [8] of the judgment).

10 The applicant then responded as follows to this statement by the commissioner: "SM: ... I am not here to talk about procedural unfairness, quite a lot of things have happened and if those things ... my part is substantive unfairness then Mr Commissioner ... it is there but ... that took

place prior to that ... **I did lodge a grievance of victimisation** ..." (Annexure "TEB5.7" at page 191 of the papers - Court's underlining).

11 The applicant accordingly did **not** say that the alleged reason for his dismissal was for (mis)conduct **only** but he clearly accepted the commissioner's reasoning that the alleged reason for the dismissal was (also) because he had lodged a grievance against his employer for alleged victimisation (which amounts to an automatically unfair dismissal). It can be reiterated that such unfair dismissal dispute falls under the jurisdiction of the Labour Court (and **not** the CCMA) in terms of the provisions of section 187(1)(d)(i) read together with the provisions of section 191(5)(b)(i).

12 Such allegation therefore places the (one) unfair dismissal dispute under the jurisdiction of the Labour Court in terms of section 191(5)(b)(i) of the Act. At the very best for the applicant, he was equivocal when, in keeping with his referral to conciliation (discussed above at paragraph [7]), he alleged that he was dismissed not only for misconduct but **also** for exercising his rights conferred by the Act.

13 In the event, on the facts presented to Court, the employee failed to make a clear election in regard to his allegation concerning the reason for the dismissal. The commissioner of the CCMA could therefore not assume jurisdiction in terms of section 191(5)(a) of the Act until the applicant-employee had made an unequivocal allegation as to the reason for his dismissal. This was, of course, easy to do - the applicant could even have made the allegation that he did not know what the reason for dismissal was (in terms of section 191(5)(a)(iii)). Further, the Act clearly envisages that any uncertainty about such allegation should be dealt with already at

conciliation stage when any party can make an application to the director of the CCMA to have the unfair dismissal dispute adjudicated by the Labour Court in terms of section 191(6) of the Act.

14 In the event, I am of the view that there is no reasonable prospect that another Court would come to the conclusion that the CCMA had the necessary jurisdiction to arbitrate the unfair dismissal dispute. The application for leave to appeal is accordingly dismissed with costs.

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Basson

J

Date of judgment: 4 August 1998

On behalf of the applicant: Mr M Mgudlwa of Sonnenberg Hoffmann & Galombik Inc

On behalf of the third respondent: Adv A Oosthuizen instructed by Findlay & Tait Inc