REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

CASE NO **J4807/2000**

DATE 2001/07/30

REVISED 2001/08/06

In the matter between:

THE UNIVERSITY OF THE WITWATERSRAND JOHANNESBURG Applicant

and

COMMISSIONER W HUTCHINSON First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION & OTHERS Third and Further Respondent

---

JUDGMENT DELIVERED BY THE HONOURABLE JUSTICE PILLAY ON 30 JULY 2001

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

PILLAY J

This is a review of a ruling by the first respondent commissioner dismissing a point *in limine* raised by the applicant that disputes in terms of section 197 of the Labour Relations Act No 66 of 1995 [The LRA] cannot be referred to the Commission for Conciliation Mediation and Arbitration [the CCMA] for concilation.

The principal basis of the challenge is that the commissioner and the CCMA lacked the jurisdiction to conciliate the dispute.

Consequently the ruling was *ultra vires*. Nowhere in the LRA, the Rules and Regulations of the CCMA and of the Labour Court is it expressly stated that disputes in terms of section 197 must be referred for conciliation. By applying the principle *inclusio unius exclusio alterius* rule it was submitted for the applicant that the ruling of the commissioner should be declared *ultra vires*. It could also not have been the intention of the Legislature to require section 197 disputes to be referred for conciliation, firstly because a failed conciliation anticipates trial proceedings. The Legislature could not have intended to subject these disputes, which involve contracts with third parties, to the delays of a trial. Secondly, the rules of the Labour Court make no provision for the referral of these disputes for trial or for a declarator. The only remedy is for the third and further respondents to obtain an interdict while the process is under way or soon thereafter by way of motion proceedings. Thirdly, as section 197(1)(a) read with subsection (2)(a) did not allow the parties to alter the employer's continuity of service by agreement, there was nothing about which there could be conciliation. So submitted Mr **du Plessis** for the applicant.

Mr **Brassey** resisted the application firstly on the grounds that the ruling caused no material impact or prejudice to the applicant. Secondly, the powers of the CCMA and the commissioner to conciliate a dispute in terms of section 197 should be implied from various provisions of the LRA and its explanatory memorandum. Therefore, although a party is not compelled to conciliate before having such disputes adjudicated, it was also not prohibited from doing so. The referral of section 197 disputes is also desirable, especially in this case

where the dispute in terms of section 189 was also referred simultaneously for conciliation. So it was argued for the third and further respondents.

I dismissed the application with costs, including the costs of two counsel. My reasons follow.

It is an obligatory function of the CCMA to resolve, through conciliation, any dispute referred to it in terms of the LRA [section 115]. Although no express provision exists for the referral of disputes in terms of section 197, section 133(1) compels the CCMA to appoint a commissioner to attempt to resolve, through conciliation, any dispute about a matter of mutual interest in terms of section 134.

Is a dispute in terms of section 197 a matter of mutual interest? The term "mutual interest" is not defined in the LRA. The words must, therefore, be given their ordinary meaning. It has been associated with interest disputes. However, there is no basis to construe the term restrictively. (*Sithole v Magwaza NO and Others* 1999(12) BLLR 1348 [LC] at paragraph 51-52. See also *De Beers Consolidated Mines Limited v CCMA and Others* 2000[5] BLLR 578 [LC] at 16-18.)

The transfer of employees is as much a matter of mutual interest as bargaining collectively is to secure rights or to protect them when they are threatened by dismissal for operational reasons. Whereas some matters of mutual interest are channeled for resolution through industrial action, others are resolved through adjudication.

A dispute in terms of section 189 must be referred first for conciliation [section 191(1)]. No similar provision exists for section 197 disputes. However, dismissals for operational reasons [section 189] and transfers of contracts of employment [section 197] are interconnected, falling as they do under the chapter on Unfair Dismissals.

The inference to be drawn from the structure of the legislation is fortified by the substance of the disputes. The dismissals could be unfair either because section 189 or 197, or both, were not complied with. The interconnectedness of the disputes prompts the question as to what

would be the most effective way of resolving them as required by section 1(d)(iv).

A starting point in a multi-faceted and multi-party dispute is to identify the needs and interests of each stakeholder.

Section 135(3) allows a commissioner to determine the process to be applied when attempting to resolve disputes through conciliation. This would include facilitation which is better suited for the resolution of complex disputes. Through such a process the extent of the conflict and the convergence of interests of all the stakeholders can be assessed. Section 197 does not prohibit parties from altering by agreement the continuity of employment. Even if Mr **du Plessis** is correct in this submission, continuity of employment is not the only issue that may need conciliation.

As the outcome of such a process is entirely consensual no party can be prejudiced. Prejudice, if any, is outweighed by the real prospect of the dispute being resolved partially or entirely. To restrict the conciliation to only the section 189 dispute, as suggested by Mr **du Plessis**, would be mechanical, artificial and shortsighted. The contractors may well offer a solution to the other parties at conciliation.

For these reasons I accept Mr **Brassy's** submission that conciliation of section 197 disputes is authorised by the LRA. Such conciliations are, however, not prescribed but permissive. Consequently, a failure to conciliate such disputes is not a bar to adjudication by the Labour Court.

The Labour Court derives its power to adjudicate disputes in terms of section 197 from section 158(1)(a)(iii) and (iv). Mr **du Plessis** accepted that the Labour Court would have the power to hear the dispute in terms of section 197 if it is brought by motion proceedings while the process is pending or shortly thereafter. There is no reason why the Court would lose that power if the proceedings are instituted later or by way of action. The form and timing of the proceedings may affect the remedy, not the power, of the Court.

As pre-adjudication conciliation is not prescribed, the Labour Court would be able to hear the dispute without any prior referral to conciliation. In any event, it retains the discretion to hear

disputes despite flaws in the conciliation phase. (*Numsa v Driveline Technologies* 2000[4] SA645 LAC at paragraph 8.) Insofar as the applicant seeks, through this review, to bar the 197 dispute from being heard by the Labour Court, it must fail.

The applicant contended that the legislation conceived section 197 disputes as requiring speedy resolution. Therefore conciliation was omitted. All labour disputes must be processed expeditiously. However, there is no guarantee that section 197 disputes brought by way of motion would be processed more expeditiously than other disputes. Apart from the logistics of the Labour Court, the matter will have to proceed to trial if, for example, disputes of fact cannot be resolved on the papers. A referral to conciliation could delay the adjudication of the dispute. However, the question of the delay would arise only if the conciliation is unsuccessful.

If I am wrong in concluding that the conciliation of section 197 disputes by the CCMA is permitted though not prescribed, there is a further ground on which the review must fail. The review has no material impact on the resolution of the dispute. Based on the underlying principle that a Court is disinterested in academic situations that cause no prejudice, the application falls to be dismissed. In *Jockey Club of South Africa and Others v Veldman* 1942(AD) 340 at 359 Tindall JA said :

"I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled."

Similarly, in *Rajah and Rajah Limited v Ventersdorp Municipality* 1961(4) AD 402 at 408A Hoexter ACJ refused to review and cancel a certificate for a trading licence that had been issued erroneously. The respondent in that case had been under the impression that the licence was being issued to a company that had already been formed when that was not the case.

It was submitted that the cases of *Jockey Club* and *Rajah* above are distinguishable from the facts of this case. Those cases were about the review of irregularities. Here, the issue is about the *ultra vires* conduct of the commissioner. I do not agree that these cases relied upon by Mr **Brassey** have no application to the facts of this case. The principle common to all the cases, including this one, is that the review must not be academic; it must have a material impact and it must be necessary to eliminate prejudice caused by unauthorised conduct. The applicant has not shown what impact the ruling on conciliation has in fact had on the further resolution of the dispute. If the only impact is the ensuing delay, then this application simply exacerbates the situation. Prejudice has also not been established.

In *Rajah* above, the jurisdictional prerequisite of a company having been formed had not been met when the licence was issued. In that sense, Mr Brassey's submission that the issuing of the licence is similar to acts that are *ultra vires,* also has merit.

The applicant has not shown what prejudice it would suffer if the ruling were allowed to stand. If the real intention is to bar the adjudication of the section 197 dispute by the Labour Court, I have already said above that the Labour Court derives its jurisdiction independently of the conciliation process.

For these reasons, the application was dismissed with costs, including the costs of two counsel.

THE APPPLICANT: MR A.W. DU PLESSIS

HLATSWHAYO, DU PLESSIS VAN DER MERWE

FOR THE RESPONDENTS: MSM BRASSEY SC

TRUCTED BY: CHEADLE THOMPSON & HAYSOM