IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO. JS 1424/01

CEPPAWU AND 40 OTHERS **APPLICANT**

AND

GET FRESH COSMETICS SA (PTY) LIMITED **RESPONDENT**

JUDGMENT

PAKADE .J

[1] This matter came to me for trial on a statement of claim filed in the Labour Court by the applicant on behalf of its members. The applicant is a Trade Union.

[2] Members of the applicant were in the employment of the respondent, a registered company until their dismissal on 30 July 2001.

[3] Upon their dismissal aforesaid, the members individually referred the matter to the CCMA for conciliation on allegation of unfair dismissal. The reason for dismissal was misconduct arising from their unprotected strike action. The CCMA issued a certificate of outcome of the dispute and on that basis the matter came to this Court.

[4] At the commencement of the hearing, the respondent argued two *points in limine* and urged me to dismiss the action on those points. The first point is that this Court has no jurisdiction to entertain this matter because the selective re-employment on which this Court has been approached was not referred to

the CCMA for conciliation as it should have been in terms of Section 191(1) (a) of the Labour Relations Act No. 66 of 1995. The referral was only in respect of unfair dismissal which is separate from selective re-employment, so goes the argument.

The second point is that the actual parties who are litigating in the present matter have not been disclosed by the applicant. This point is based on the premise that out of the members, who were dismissed, some were re-employed and others have since passed away.

[5] I will deal with these points in turn. I deal first with the jurisdiction point and thereafter with non-disclosure of litigants.

JURISDICTION

The applicant's contention in its member's statement of claim is that the dismissal of its members was substantively and procedurally unfair for two reasons. Firstly the respondent did not give its employees a fair and reasonable ultimatum to consider the consequences of their strike action. The second reason is that there was no fair reason for selective non re-employment of the litigants.

[6] The strike action arose from a dispute about an annual wage increase. It would appear that there had been some negotiations between the employees and the respondent over the wage issue. That issue was not resolved. The respondent was however, of the view that the issue had been resolved by the employees' acceptance of the incentive scheme that was offered by the company to them that there would be no annual wage increase. It so happened that the employees had not accepted the incentive scheme and were simply expecting their annual wage increase. This dispute resulted in the employees engaging in a strike action on 30 July 2001. The respondent who was taken by surprise by the strike, gave them ten minutes within which to resume work. The employees showed their willingness to resume work only if the dispute was resolved. No attempt whatsoever was made by the respondent to resolve the wage dispute on being aware that there was in fact no agreement. Instead he reacted by dismissing all the members. Subsequently the respondent reinstated all the dismissed employees for the purpose of instituting disciplinary enquiry against them. After the disciplinary inquiry, he dismissed them but later re-employed others.

[7] The selective non re-employment was not referred to the CCMA for conciliation separately from the

dismissal. Mr. Buirski, counsel for the respondent, strongly argued that the selective non re-employment is a separate dispute and should also have been referred for conciliation by the CCMA. This submission is in *pari passu* with the submission that was made and dealt with adequately by Zondo AJP in **NATIONAL UNION OF METAL WORKERS OF SA AND OTHERS v DRIVELINE TECHNOLOGIES (PTY) LTD & ANOTHER (2000) 21 ILJ 142 (LAC).** There the dispute was referred to conciliation on the basis that the dismissal was for operational requirements. When the matter was already before the Labour Court the applicants brought an application to amend their statement of claim so as to allege that the dismissal was an automatically unfair dismissal. The Labour Appeal Court dismissed the respondent's argument that the Labour Court had no jurisdiction simply because the dispute about automatically unfair dismissal had not been referred to the CCMA for conciliation. Zondo AJP viewed this argument as fallacious. The learned AJP had this to say in this respect at151 par [35]:

" I am of the view that it is a fallacy to regard the proposed amendment as introducing a new dispute. To my mind, this approach is a result of a failure to appreciate the nature of the dispute between the parties, the event giving rise to the dispute and the cause of, or the event giving rise to the dispute and the grounds of each party's case to the dispute"

These words are relevant in the argument before me in the same manner as they were apposite to the argument in the **DRIVELINE** case *supra* when they were uttered by Zondo AJP. The dispute in casu is about unfair dismissal. The dismissal is rendered unfair by two reasons, namely that the ultimatum for the employees to resume work was unreasonable and unfairly short to enable the employees to reconsider their strike action and, secondly there was no fair reason for selective non re-employment of the applicant's members.

[8] Referrals of disputes are regulated by section 191 (5) (a) and (b) of the Act which provide as follows:

"If a council or 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 the 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 less favourable conditions or circumstances at work after transfer in terms of section 197 or 197 A ,

unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the employer does not know the reason for the dismissal or

(iv) the dispute concerns an unfair labour practice.

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."

[9] In interpreting section 191 (1)- (5) of the Act Zondo AJP came to the finding that the phrases "operational requirements" and "automatically unfair" as used in the Act are reasons given for unfairness of the dismissal. No doubt this interpretation applies to all the phrases that appear under section 191 (5) (a) and (b). The employees' participation in a strike that does not comply with the provisions of Chapter V is a reason given for the dismissal. It is not a dispute in itself.

[10] Selective non re-employment is a dismissal in terms of section 186 (1) (d) but is not separate and distinct from the dismissal for the same or similar reason. It is one package of dismissal which has to be referred to conciliation. There would have been no basis for referring the same dismissal twice for the same certificate of outcome to be issued twice.

[11] In my view therefore the first *point in limine* cannot succeed. There is equally no substance in the second *point in limine* as well. I agree with Mr. Vuso's submission, attorney for the applicant that the points were simply raised as delaying tactic. The names of the litigants were furnished to the respondent's attorney on 9 April 2003 by letter which reads as follows:

" Trevor Swart Attorneys

1st Floor Cinetech Center

Milpark

Johannesburg

Per Fax: (011) 726-1228

Dear Sir

Re: CEPPWAWU o.b.o 40 Others / Get Fresh Cosmetics

1. We refer to the above matter, as well as previous correspondence.
2. We enclose herewith a list of all the applicants in this matter. We hope that your *point in limine* has been properly addressed.
3. We hope you will find the above in order.

Yours Faithfully

SIHLALI MOLEFE ATTORNEYS
Per, Mr. Vuza"

A copy of the letter was placed in the court file. On 11 November 2003 a list of employees who were selectively re-employed was again sent to respondent's attorneys by fax. It is in the circumstances surprising to find that this point was still raised and pursued by the respondent in the hearing.

[12] In the circumstances both *points in limine* are dismissed with costs and it is ordered that the matter be set down for trial on the merits.

_____

L.P PAKADE
JUDGE OF THE LABOUR COURT

APPEARRANCES

FOR THE APPLICANT : MR VUSO KINI
SIHLALI MOLEFE ATTORNEYS

FOR THE RESPONDENT : ADV. BUIRSKI Instructed by;

TREVOR SWART ATTORNEYS

DATE OF HEARING : 09 FEBRAUARY 2004

DATE OF JUDGMENT : 24 FEBRUARY 2004