IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

CASE NUMBER: P 88

/ 05

In the matter between:

Henry Diamond & 57 others

Applicant

and

Daimler Chrysler SA (Pty) Ltd **First**

Respondent

Ikhwezi Trucktech **Second**

Respondent

JUDGMENT

CELE AJ

Introduction

[1] There are two applications before me. The first is an application to

amend the statement of claim. The second is an application for condonation for the late referral of a dispute about, *inter alia*, information disclosure and interpretation and application of a collective agreement. The application is opposed by both respondents who in turn, have raised some points *in limine*, the upholding of any of which is intended to have the claim dismissed. It was agreed between the parties that both the opposition to the applications and the points *in limine* would be argued at the same time after the applicants would have moved and argued their applications. That appeared to me to be expedient and so the parties were allowed so to do. For a better understanding of the pertinent issues, it is necessary and expedient to set out the factual background to the dispute between the parties. In the process, I will be mindful of the fact that the respondents have not dealt with the merits of the applicants' claim in their statements of response as they took points *in limine*. The facts alleged by the applicants will accordingly be presumed, to the extent that this is prudent, to constitute the background facts.

Background Facts

[2] The applicants were all employees of the first respondent up to January 2002. Some members of the staff component of the first respondent were members of the National Union of Metal Workers of South Africa ("NUMSA") while others were not.

[3] The first respondent is a company which operated, *inter alia*, a commercial vehicle manufacturing division up until February 2002. Towards the end of 2001, the first respondent took a strategic

decision that it would stop operating this division. In that context, it took part in discussions with NUMSA in terms of which there was an understanding that:

3.1 part of the first respondent's business, namely the commercial vehicle operation, would be transferred from the first respondent to the second respondent, as a going concern, and

3.2 it was envisaged that the applicants would be transferred from the first respondent to the second respondent.

[4] Sometime in February 2002 a collective agreement or an agreement was concluded between the first respondent and NUMSA which governed the basis on which the applicants' services would be transferred from the first respondent. The memorandum of agreement drawn up by the parties recorded, *inter alia,* that,

> "Now therefore it is agreed that:
>
> 1. All hourly paid employees presently employed in the Commercial Vehicle Division, other than those who qualify for voluntary early retirement, will transfer to the new company on terms and conditions of employment that are, on the whole, not less favourable to those employees than their existing terms and conditions of employment with DCSA.
>
> 2. Leave accrued to the date of transfer will be transferred to the new employer.
>
> 3. Retirement Fund benefits accrued to the date of transfer will be

transferred to a similar fund to be established by the new company.

4. DCSA will pay all such transferred employees a severance benefit of the equivalent of the three months basic pay.

5. The transfer referred to herein will take place as soon as practically possible after 31 January 2002."

[4] Still in February 2002, the first respondent issued a company notice to its employees including the applicants recording that:

4.1 "Negotiations with NUMSA and consultations with staff with regard to the management of the man power implications have now been concluded and the following course of action will take place for the current C V employees.

The Commercial Vehicle Operation will be transferred to the new CV Company as a going concern. This means that the current salaried and hourly paid DCSA employees (other than those who qualify for voluntary early retirement) will transfer to the new company on terms and conditions of employment that are, on the whole, not less favourable than their existing terms and conditions of employment with DCSA. Whilst DCSA is not obliged to pay a severance benefit, employees will be paid an extra gratia payment equivalent to three month's (sic) salary. This will be paid with employees' final pay from DCSA. As the effective date of transfer has not been finalised, employees will remain on the DCSA payroll until further notice.

[5] The copies of the memorandum of agreement and of the company notice do not bear signatures of the representatives of the parties therein identified.

[6] In March 2002 that part of the first respondent's business encompassing the operation of the production of commercial vehicles was transferred from the first respondent to the second respondent as a going concern. That similarly entailed the transfer of the services of the applicants.

[7] Sometime in 2002, the applicants and some of their colleagues who were not members of NUMSA but were then employees of the second respondent, perceived that their terms and conditions of employment with the second respondent were not the same as or were less favourable to them than those they previously enjoyed with the first respondent. From 2002 and 2003 NUMSA engaged the respondents into discussions in an attempt to resolve the perceived concern. When the dispute could not be resolved *inter partes*, the applicants and some of their colleagues, 94 in all, referred a dispute, *inter alia*, about information disclosure and interpretation and application of a collective agreement to the Commission for Conciliation, Arbitration and Mediation ("the CCMA") for conciliation. It does not appear though, that the dispute was eloquently described in the referral to the CCMA. The applicants cited both respondents in their papers but before the matter was heard, they abandoned the matter against the second respondent. The first respondent took some points *in limine* whereafter the matter was scheduled for the hearing of the submissions by the parties on such points.

[8] The submissions by the first respondent, through Mr Knoesen, were briefly that:

- The conditions of employment of the first and second respondent were similar.

- Of the 94 applicants involved in the case only 48 employees transferred from the first respondent while 46 employees were never employed by the first respondent.

- The dispute contained in the referral failed to tell the respondents the issues they were called to answer as they were vague and embarrassing.

- The transfer took place before August 2002 and therefore before the Labour Relations Amendment Act 12 of 2002 came into effect.

- The first respondent was not the employer of the applicants.

- The transferred employees accepted the new terms and conditions of employment.

[9] The applicants declined to testify in rebuttal of the submissions made by Mr Knoesen. Commissioner Ndulwana, who presided in the hearing, upheld all the points raised *in limine* and on 26 August 2003 issued a ruling in which he found, *inter alia*, that the CCMA had no jurisdiction in the matter for want of employer/employee relationship and alleged dispute. He dismissed the referral of the dispute.

[10] Further discussions ensued between NUMSA and the respondents, in particular the first respondent. On 18 June 2004 the first respondent issued a letter to NUMSA headed "*Transfer of Workers as a Going Concern"*. Part of this letter reads:

> "It is in this spirit that the Company has asked NUMSA to specifically articulate those respects in which those employees transferred from this Company to Ikhwezi Trucktech are prejudiced. We have for example, through the representations of your good offices, come to the realisation that irrespective of the transfer agreement between us, in the interest of justice and fairness, transferred employees should not lose out on the recognition of prior service to DCSA for the purpose of determining any continuing benefit which existed with the DCSA at the time of transfer. We have therefore communicated with Ikhwezi Trucktech Management that "DSCS will fund to Ikhwezi Trucktech the cost of any service related benefits which existed at the time of transfer, to the extent that such benefits are determined by prior length of service with DCSA". You will notice that this position reflects a major change from that reflected in our previous letter to Ikhwezi Trucktech management dated 10 September 2003, to which you have referred."

[11] The applicants instructed attorneys to pursue the matter. The attorneys worked in conjunction with NUMSA in a number of deliberations which continued between them and the respondents through correspondence. When the respondents indicated in February 2005 that they were not prepared to settle the matter on the applicants' proposed terms, the applicants referred the present dispute by way of a statement of claim to this Court.

The applications

(a)The amendment to the statement of claim

[12] I need to deal firstly, with some of those portions of the statement of claim which it is sought to amend. I will refer to paragraphs 8; 10; 13; 14 and 15, which read:

> "8. On or about February 2002 a collective agreement was concluded between the First Respondent and NUMSA (representing the applicants), which collective agreement governed the basis on which the Applicants would be transferred from the First Respondent to the Second Respondent and which collective agreement specifically provided as follows:
>
> > "1. *All hourly paid employees presently employed in the commercial vehicle division, other than those who qualify for voluntary early retirement, will transfer to the new company on terms and conditions of employment that are, on the whole, not less favourable to those employees and the existing terms and conditions of employment with DCSA*."
>
> A copy of the collective agreement is annexed marked "B"
>
> 9. Thereafter and on or about February 2002, the First Respondent issued a company notice to its employees including the Applicants recording that:
>
> 9.1 negotiations with NUMSA had been concluded;

9.2 the commercial vehicle operation will be transferred to the new company (the Second Respondent) as a going concern; and

9.3 the employees who fell to be transferred to the new company (the Second Respondent) would be transferred on terms and conditions of employment that were, on the whole, not less favourable than their existing terms and conditions of employment with the First Respondent.

A copy of the company notice is annexed marked "C".

10. It was on the strength of the collective agreement and the representation contained in paragraph 7 above, that the Applicants accepted that they would be transferred to the Second Respondent.

13. The Second Respondent accepted that:

13.1 it was bound by the collective agreement; and

13.2 it would be legally obliged to employ the Applicants on the terms and conditions as contained in the collective agreement.

14. In the premises, the Applicants were transferred from the First Respondent to the Second Respondent by agreement on terms and conditions of employment which were, on the whole, not less favourable than the terms and conditions of employment which the Applicants previously enjoyed with the First Respondent.

15. In the alternative, and in the event of this Honourable Court finding that the Applicants were not transferred from the First Respondent to the Second Respondent by agreement,

then the Applicants were transferred to the Second Respondent in terms of Section 197 (2) (a) of the Labour Relations Act, No. 66 of 1995 (as it existed on March 2002) and on the same terms and conditions of employment which they enjoyed with the First Respondent.

[13] The applicants seek to amend the statement of claim by:

1. Replacing the phrase *"a collective agreement"* with *"an agreement"* where it appears in Applicants' Statement of Claim;

2. Replacing the phrase *"a collective agreement"* with *"the agreement concluded between the Applicants and First Respondent*" wherever it appears in the Applicants' Statement of Claim;

3. By amending paragraph 14 of the statement of claim to replace the phrase *"by agreement"* with *"by agreement between the applicants, First Respondent and Second Respondent"*.

4. By amending paragraph 14 of the Statement of Claim to replace the phrase *"by agreement"* with *"by agreement between the Applicants, first Respondent and Second Respondent"*.

5. By the insertion of a new paragraph 21A to the following effect:

"*21A.1 Applicants firstly seek to enforce the terms of*

agreement concluded between NUMSA (on behalf of Applicants), First and Second Respondent, which agreement is not a collective agreement as defined in section 213 of the Act since this tripartite agreement is not evidenced by a written document concluded and/or signed by all three parties thereto.

21A.2 *In terms of section 77(3) of Basic Conditions of Employment Act, 75 of 1997, this Honourable Court has jurisdiction to hear this part of Applicants' claim since it pertains to matters concerning their contracts of employment with both First and Second Respondents.*

21.A3 *In the alternative, and in the event of this tripartite agreement not being prove or not applying to all of the Applicants, Applicants (alternatively those of the Applicants who are not bound by the tripartite agreement between NUMSA, First Respondent and Second Respondent) rely on the provisions of section 197 of the Labour Relations Act, 66 of 1995, prior to its amendment in 2002, and the powers of this Honourable Court in terms of section 158 (1)(a)(iii), (iv), (v), (vi), (vii), 158(1)(b) for the relief set out hereinafter".*

[14] In terms of section 24 of the Labour Relations Act 66 of 1995 ("the Act"), a dispute about the interpretation or application of a collective agreement has to be referred to the CCMA for

conciliation. If conciliation fails to resolve it, the interested party may refer it to arbitration. In the present case, the applicants chose not to challenge the ruling, which challenge might have opened an avenue to the dispute being arbitrated upon.

(b) **The condonation application**

[15] The transfer of the applicants from the first to the second respondents took place on 1 March 2002. The transfer forms the subject matter of this application which was launched with this Court on 28 February 2005. In its response to the statement of claim, the second respondent, submitted in one of it's *in limine* points taken, that the applicants failed to apply for condonation and to give an exculpatory explanation for the unreasonable delay of about 3 years. The applicants then filed a notice of application for an order, *inter alia,* granting the condonation, in so far as it might be necessary, in respect of the late referral of the matter to this Court.

[16] In support of the condonation application the applicants submitted, among others, that the matter was complicated by the fact that to the best of their knowledge, the question of the period within which to bring a claim such as the present is not regulated by the Act.

[17] Even before I examine the submissions for and against the two applications, I need to consider firstly the points *in limine*, the upholding of which may make it unnecessary to revert to the applications. However, it is necessary that I should set out the declarator which the applicants seek to have issued in their main

application as appears in the statement of claim. Paragraphs 22 and 23 of the statement of claim read:

> "22. In the premises, the Applicants pray for an order in the following terms:
>
> 22.1 Declaring that as of March 2002 the Applicants were employed by the Second Respondent on the same terms and conditions of employment, alternatively, on terms and conditions of employment that are on the whole not less favourable to them than those previously enjoyed by them with the Second Respondent.
>
> 22.2 Declaring that the First Respondent be jointly liable for non-compliance with the obligations to employ the Applicants on the terms set out in paragraph 22.1 above.
>
> 22.3 That the First Respondent and the Second Respondent compensate the Applicants financially or otherwise in a manner which the Honourable Court may deem fit for failing to comply with their obligations as set out in paragraph 22.1 above and particularly those detailed in paragraph 16 above.
>
> 22.4Granting such further and or alternative relief."

[18] Reference has been made to paragraph 16, which reads:

> "16. Having been transferred from the First Respondent to the Second Respondent, the Applicants were not employed on terms and conditions that were on the whole not less favourable to them than

those on which they were employed by the Second Respondent in that, *inter alia*:

16.1 the Second Respondent failed and/or refused to recognise the length of the service which the Applicants had with the First Respondent;

16.2 the Applicants were financially prejudiced on their transfer from the First Respondent to the Second Respondent in that:

16.2.1 the value of the prizes in the incentivised attendance *"lucky draws"* was unilaterally and substantially reduced (purportedly on the basis of the difference in the employee numbers between the two companies);

16.2.2 whilst employed by the First Respondent the Applicant had access to free medical treatment by qualified doctors and nurses, which treatment was not available to them at the Second Respondent;

16.2.3 the First Respondent provided far superior funeral cover and benefits to the Applicants when compared to that provided by the Second Respondent;

16.2.4 the Applicants enjoyed certain subsidised canteen facilities with the First Respondent and which were not available to them whilst in the employ of the Second Respondent; and

16.2.5 opportunities for the Applicants to work

overtime whilst in the employ of the Second Respondent were inferior to the opportunities which they enjoyed whilst employed by the First Respondent.

16.3 The career opportunities enjoyed by the Applicants at the First Respondent were far superior to those enjoyed by the Applicants whilst at the employ of the Second Respondent having regard to:

16.3.1 a comparison between the skills development and training programmes provided by the First and Second Respondent;

16.3.2 comparison between the affirmative action and empowerment policies utilised by the First and Second Respondent; and

16.3.3 a comparison between the financial assistance programmes provided by the First and Second Respondents.

Submissions by the respondents

[19] The respondents' submissions are contained in the points *in limine* and in the grounds they raised to oppose the amendment of the statement of claim. The following are points *in limine* raised by the first respondent:

19.1 As the main claim is based on the collective agreement, this Court lacks jurisdiction to hear the matter as a result of the provisions of section 24 of the Act.

19.2 The applicants who were transferred from the first

respondent, voluntarily transferred to the second respondent. By operation of law, therefore the second respondent was substituted as an employer of the relevant applicants. Consequently, they are not entitled to any relief whatsoever as against the first respondent.

19.3.1 The declarator claimed in paragraph 22.1 of the statement of claim is contradictory to facts pleaded in paragraph 14 of the statement of claim and does not concern the first respondent.

19.3.2 The relief claimed in paragraph 22.2 is incompetent in law, as there is no joint liability of employers in the position of the first and second respondents.

19.3.3 The declarator as set out in paragraph 22.1 affords no basis for the declarator as set out in paragraph 22.2 as against the first respondent. The relief claimed in paragraph 22.2 therefore does not flow from any relief set out in paragraph 22.1 and constitutes a *non sequitur*.

19.3.4 The declarator as set out in paragraph 22.1 affords no basis for any relief against the first respondent as claimed for in paragraph 22.3. No obligation is placed on the first respondent by the declarator in paragraph 22.1 and the relief claimed in 22.3, like wise

constitutes a *non sequitur*. The relief claimed in paragraph 22.3 is undefined, uncertain and so vague that it is bad in law.

19.3.5 The applicants' prayers for relief as set out in paragraphs 22.1 - 22.3 and the applicants' claims against the first respondent should be dismissed with costs.

[20] The second respondent raised the following points *in limine*:

20.1 The position taken by the first respondent in its second point was confirmed and similarly adopted.

20.2 The referral of the dispute to this Court suffers from a defect of unreasonable delay, even though no time limits were set for an application of this nature.

20.3.1 The applicants' claim is based on a claim to the effect that the applicants would transfer to the second respondent "on terms and conditions of employment that are, on the whole not less favourable than the existing terms and conditions with the first respondent"

20.3.2 Under the circumstances the provisions of section 197 of the Act, as it was at the time of the transfer **(pre amendment)** are, on the applicants' own version not of application. Accordingly, the applicants' claim is based solely on an interpretation or application of a collective agreement. By virtue of section 24 of the Act, this Court has no jurisdiction to hear this matter.

First alternative to S 24:

In the event it is found that the applicants made out a case for contravention of section 197 of the Act, this Court lacks jurisdiction by virtue of the provisions of section 191 (5) (a) (ii) of the Act.

Second alternative to S 24:

In the event of it being found that this Court does have jurisdiction, the Court should, in accordance with the provisions of section 157 (4) (a) of the Act, refuse to determine the dispute, by virtue of the applicants' failure to refer the dispute to conciliation.

20.4 The second respondent prays for the dismissal of the application with costs.

[21] In opposition to the amendment of the statement of claim, both respondents raised the following grounds:

21.1 the amendment constitutes a withdrawal of an admission that annexure "B" is a collective agreement, and, in the absence of an acceptable explanation under oath, the application should be dismissed **("first ground of opposition");**

21.2 the amendment introduces a new cause of action based on a common law contract which has prescribed **("second ground of opposition")**

21.3 there was an unreasonable delay (3 ½ years) in introducing the new cause of action **("third ground of opposition"**);

21.4 the amendment is in conflict with the fact that annexure ("B") clearly constitutes a collective agreement with the result that the amendment is excipiable **("fourth ground of opposition"**);

21.5 as annexure ("B") is a collective agreement, the dispute must be resolved in terms of section 24 of the LRA and this cannot be avoided by styling the dispute as being one under section 77 (3) of the BCEA, with the claim thus being bad in law and excipiable **(" fifth ground of opposition");**

21.6in terms the provisions of section 197 of the LRA, no claim lies against the first respondent and the reliance thereon by the applicants is bad in law and excipiable **("sixth ground of opposition"**).

Analysis

[22] The determination of whether this Court has jurisdiction to make a declaratory order regarding the subject matter set out in the prayers, is very fundamental to the resolution of any other issues raised by the parties. As already indicated, both respondents submitted that I do not have the jurisdiction. In my view, the applicants have correctly not taken issue with the submissions made by the respondents on the question of absence of jurisdiction over a dispute involving the interpretation on application of a collective agreement. The provisions of section 24 (2) (3); (4); (5)

of the Act are very clear and read:

> "24 (2): if there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if -
>
> (a) the *collective agreement* does not provide for a procedure as required by subsection (1);
>
> (b) the procedure provided for in a *collective agreement* is not operative; or
>
> (c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of a *collective agreement*.
>
> (3) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on the other parties to the *dispute*.
>
> (4) The Commission must attempt to resolve the *dispute* through conciliation.
>
> (5) if the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration."

[23] The steps to be traversed by a party who alleges the existence of a dispute about the interpretation or application of a collective agreement are consequently well articulated by section 24 of the Act.

[24] In the present matter, the applicants referred a dispute, *inter alia*, about the interpretation and application of a *collective agreement* to the CCMA for conciliation. They cited both respondents but later abandoned the matter against the second respondent. A jurisdictional ruling was issued against them on 28 August 2003. They were left with the option of applying for a review and setting

aside of the ruling so that, if they succeeded, they would proceed to the arbitration stage. They chose not to exercise that option but instead, later referred the dispute to this Court through a statement of claim. The procedure followed by the applicants consequently denied this Court of the jurisdiction to be properly seized with this matter and in particular, against the first respondent. The second respondent was excluded at the conciliation stage and was denied access to the adjudication process at the CCMA level.

[25] I entertain no doubt that this Court could have the power to make a declaratory order in appropriate circumstances as envisaged in section 158 (1) (a) (iv) of the Act. Such power can be exercised if this Court has jurisdiction over the subject matter. The Act makes a clear distinction between adjudication and arbitration. This Court may not, unless it is expedient to do so, and with the consent of the parties, which is lacking here, arbitrate a dispute. I am mindful of at least one exception in this respect, which pertains to a dispute that is purely about severance pay – See in this respect, the decision in **SA Chemical Workers Union v Engen Petroleum Ltd & Another (1998) 19 ILJ 1568 (LC)**.

[26] In anticipation of a predicament in which the applicants realised they were likely to find themselves, they have sought to amend the statement of claim so that the document they initially referred to as the **"collective agreement**" should be construed as an **"agreement**". This is premised on the fact that the document in question was not signed either by the first respondent or NUMSA. The second submission, in this respect, is that *ex facie* the

document, the second respondent is not a party thereto. They submitted that if the amendment sought is granted, this Court will have jurisdiction on the basis of section 77 (3) of the Basic Condition of Employment Act 75 of 1997 ("the BCEA"). The applicants submitted that an **"agreement"** must not only be in writing but it must also be signed by the parties to qualify as a **"collective agreement".** They have placed reliance on their submission to two CCMA arbitration awards in: **Communication Workers Union v Telkom SA LTD (1998) 19 ILJ 389 CCMA and CEPPWAWU v Lithosaver Pinetown (Pty) Ltd (2000) 5 LLD 256 CCMA**.

[27] In opposition to the submissions by the applicants, the second respondent has correctly referred me to two decisions of this Court. In **NUMSA & others v Hendor Mining Suppliers (2003) 10 BLLR 1057 (LC) at paragraph 30** Jammy AJ found the letter from the National Organiser of the union to the company purporting to confirm the terms of agreement reached by parties to constitute a collective agreement. In **Samancor Ltd v NUMSA & others (2000) 21 ILJ 2305 (LC)** at paragraph 30, Jammy AJ found that even if the union official was theoretically unauthorised, the agreement was subsequently ratified through the conduct of properly authorised union official and was thus a binding collective agreement. It must follow therefore, that an agreement does not have to be signed by all parties to it, for it to satisfy the requirements set out in section 213 of the Act as a collective agreement. *In casu*, NUMSA and the first respondent agreed on the

transfer of services of the applicants to the second respondent. By its conduct, the second respondent has ratified the agreement. In my view therefore, the agreement is indeed a collective agreement and this Court does not have jurisdiction to adjudicate on the merits of this matter. The declaration sought could not therefore be granted. This makes it unnecessary to explore the rest of the issues raised by the parties.

[28] The applicants couched the terms of a declarator they sought such that the order if granted, with the exception of the compensatory relief, would not affect the first respondent. As the first respondent correctly pointed out, the compensatory relief sought does not flow from the first two orders sought. I am left with a difficulty of appreciating the *rationale* there was in bringing the first respondent to this Court, after the applicants lost their case against the first respondent at the CCMA.

[29] In their notice of motion, the applicants sought a costs order against both respondents. During the hearing of the matter they submitted that a costs order was to stand over for trial, if they succeeded. With their papers as they stand, I do not see the applicants succeeding in bringing the first respondent to this Court, in which event this may be a culmination of the *lis* between them. The applicants have submitted that there is an ongoing relationship between them and the second respondent and therefore, that they should not be punished with a costs order. It seems to me that this is a case where law and fairness require that costs should necessary follow the results between the applicants and the second

respondent as well.

[30] Accordingly, the applications are dismissed and the applicants are all ordered to pay costs of both respondents, jointly and severally, one paying the other to be absolved.

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CELE AJ

Date of hearing : 15 March 2006

Date of Judgment: 08 September 2006

Appearances

For the Applicant : Advocate RGL Stelnzner

Instructed by : WESLEY PRETORIUS & ASSOCIATES

For the 1st Respondent : Advocate PJ De Bruyn S.C

Instructed by : SMITH TABAT ATTORNEYS

For the 2nd Respondent: Advocate A Mybugh

Instructed by : KISCHMANNS INC