Reportable

Delivered 3 August 2010

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO P250/09

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo M SIYO Applicant

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL First Respondent

M FOUCHE N.O. Second Respondent

DONKIN FANS (PTY) LTD Third Respondent

JUDGMENT

VAN NIEKERK J

Introduction

[1] Like ancient Gaul, this application is divided into three parts. First, the applicant (the union) seeks to review and set aside a ruling made by the second respondent (the arbitrator) on 8 April 2009 in which she dismissed an application to rescind a prior jurisdictional ruling made by her on 15 August 2008. Secondly, to the extent that it is necessary, the applicant seeks to review and set aside the jurisdictional ruling. Finally, in the further alternative, the applicant seeks an order declaring that it is are entitled, at its election, to pursue an unfair dismissal dispute in arbitration proceedings before the first respondent (the bargaining council).

The facts

[2] On 1 October 2007, the third respondent dismissed Siyo, the member on whose behalf the union acts in these proceedings. Siyo was dismissed for gross insubordination/insolence. On 2 October 2007 the applicant referred a dispute to the bargaining council, claiming that Siyo had been unfairly dismissed. There was no indication in the referral of any contention that the dismissal was automatically unfair. In his opening statement at the arbitration hearing, the third respondent's legal representative remarked *en passant* that at Siyo's disciplinary enquiry, he had claimed that his dismissal was an act of retaliation, specifically in response to a grievance that Siyo had lodged against the third respondent's managing director. The following exchange appears from the record:

> *COMMISSIONER Because there is something that comes up in my mind now. The union says, help me, do I understand correctly. The union says it is because the employee lodged a grievance that he was disciplined in this matter.*
>
> *MS QOBO Yes.*
>
> *COMMISSIONER Is that so?*
>
> *MS QOBO Yes.*

COMMISSIONER *Recently a few months ago I had a similar claim, if I can say that. And I issued a ruling at the time that if that is the case then we are dealing with an automatically unfair dismissal because Section 187.*

MR WILCOCK *Exercise rights.*

COMMISSIONER *Yes round subsection E or D. If an employee says it is because I have exercised my rights that I was dismissed then there is an automatically unfair dismissal. And this is clearly what the union is now saying.*

MS QOBO *Yes.*

COMMISSIONER *He exercised his right by lodging a grievance and he was dismissed because of that.*

MS QOBO *Yes that is what we are saying.*

MR WILCOCK *Then it belongs in the labour court Madam Commissioner.*

COMMISSIONER *It must go to the labour court....*

...HEARING ADJOURNS

MS QOBO *I spoke to the applicant and explained what has taken place and what is going on. So he says we must take the matter to the labour court.*

COMMISSIONER *Okay so that is the end of the matter here at arbitration.*

QOBO *Yes.*

[3] After an exchange between the parties' representatives on the issue of costs, the transcript concludes with the following remark by the arbitrator:

> *Thanks. I will do a written ruling on jurisdictional aspect and include the cost issue in the same ruling. Thank you. Then that is it for the arbitration. Perhaps the parties will see each other in future in the Labour Court.*

[4] The arbitrator subsequently issued a ruling, with comprehensively stated reasons, in which she held the following:

> *1. As the Applicant is alleging an automatically unfair dismissal, the MEIBC lacks jurisdiction to arbitrate this matter.*
>
> *2. No order as to costs is made.*

The application for rescission

[5] On 23 October 2007, the union, now represented by counsel, brought an application for the rescission of the jurisdictional ruling together with an application for condonation for the late filing of the application, and a directive to the effect that the dispute concerning Siyo's dismissal could be arbitrated by the bargaining council if it wished to pursue the dispute on the basis of the reason for dismissal specified by the respondent. It is common cause that the application was filed some two months late. The application for rescission had as its foundation the claim that Siyo, now having obtained legal advice, wished to assert that his dismissal was no more than an 'ordinary' dismissal for misconduct, i.e. he no longer claimed that his dismissal was automatically unfair, and wished to conduct the proceedings on the basis of the reasons for dismissal specified by the third respondent. The application for condonation was dismissed. For this reason, the arbitrator ruled that the application 'cannot succeed', because there were no grounds for rescission. The arbitrator nevertheless continued, at some length and for reasons that are not apparent, to express her views on the merits of the application for rescission and the request for a directive.

[6] The arbitrator held *inter alia* that the applicant had failed to establish any of the grounds that would have justified a rescission of the jurisdictional ruling. In relation to the submission that the applicants in the arbitration proceedings had laboured under a misunderstanding as to the true nature of the dispute, the arbitrator concluded:

> *I am satisfied that, on the facts before me, the Applicants did not labour under a misunderstanding. It is clear that they were certain of what their case was, how they wanted to approach it and they elected to approach the Labour Court. Clearly they had a change of mind once they realised that they would*

experience difficulties in the Labour Court in pursuing an automatically unfair dismissal.

I investigated the true nature of the dispute and the Applicants were adamant that the Second Applicant was dismissed because of having lodged a grievance. In consequence I made the ruling that is now under consideration. Said ruling was not made because of an error or misunderstanding on the part of the commissioner. It was based entirely on the facts provided by the Applicants.

In the circumstances I find no obvious error on the part of any of the parties or on the part of the commissioner and it goes without saying that there was patently no error common to the parties.

[7] In relation to what the arbitrator termed the applicant's 'cause of action', she proceeded to say the following:

> *I agree with the Applicants in that an employee (or referring party) is entitled to frame a dispute in the manner he or she wishes. He or she is the author of his dispute and the manner in which the dispute is described will, generally, determine jurisdiction. At the same time a commissioner is enjoined to establish the true nature of the dispute in an exercise to satisfy him-or herself that he or she has jurisdiction over the matter…*
>
> *It is exactly because of the Applicants, the authors of this dispute, describing the dispute as a dismissal resulting from a grievance and my resultant investigation into the nature of the dispute that the jurisdictional ruling was made. The ruling is clearly not wrong; it is based on the dispute as it was described by the Applicants…*
>
> *The Applicants evidently then had a change of mind and now wish to pursue an "ordinary" dismissal, realizing that the route of an automatically fair dismissal presented difficulties. They are now renouncing their claim of an automatically unfair dismissal and are prepared to accept the reason for the Second Applicant's dismissal, as specified by the Respondent, at face value….*

In any event and accepting that a cause of action may be amended, the Applicants find themselves in what hey called a predicament, one created by themselves no less, because they are faced with a ruling that cannot be rescinded as no grounds for rescission exist…

I agree with the Applicants that it is possible to approach the Labour Court on the basis of an automatically unfair dismissal and plead and (sic) *ordinary dismissal in the alternative…however, sight should not be lost of the fact that a ruling is in existence which, on the Applicants' version and election, necessitate Labour Court adjudication. Until such time as said ruling is set aside, it stands and the applicants must approach the Labour Court…*

Nothing prevents the Applicants in casu *to refer their (original) automatically unfair dismissal dispute to the Labour Court and plead an ordinary dismissal in the alternative. It is for the Labour Court, in accordance with the case law referred to, to decide whether the MEIBC should arbitrate the matter (*Wardlaw*) or whether the Labour Court will assume jurisdiction (*McInnes and Jamela*). The fact remains that a ruling binds the parties, a ruling based on the description of the dispute by the Applicants, and my hands are tied because I cannot rescind a ruling unless a ground for rescission, as enumerated in s 144 of the Act, has been established.*

The application for review

[8] In regard to the application for rescission, it should be recalled that the only substantive ruling made by the arbitrator is the ruling to refuse condonation for the late filing of the application. In the absence of any other substantive ruling, this court's intervention is limited to a decision as to whether the decision to refuse condonation represents a decision to which no reasonable decision-maker could come on the available material. I did not understand the union seriously to contend that the arbitrator's ruling fell into this category – the parties may at the time not have considered the issue to be of much significance, but the point having been raised,

the arbitrator was obliged to deal with it. She dealt with it by referring to the applicable test, and by applying the facts to the relevant requirements. Not all reasonable people may have come to the same conclusion as the arbitrator did, but that does not necessarily imply that her decision fell outside of the band of decisions to which they could come. In short, in my view, there is no basis for this court to interfere with the discretion that the arbitrator exercised in relation to the application for condonation.

[9] In so far as it is appropriate to say anything about the ruling on the rescission application, I would say that if all that the union sought to achieve by bringing the application for rescission was an acknowledgment by the arbitrator that if Siyo abandoned any reliance upon an alleged automatically unfair dismissal he was entitled to pursue an ordinary unfair dismissal dispute in arbitration proceedings, this begs the question of why that acknowledgment was necessary, and why an application for the rescission of the jurisdictional ruling was considered the appropriate means to secure it. Indeed, when this application was argued, Mr Wade, who appeared for the applicant, acknowledged that the application for rescission was not the appropriate vehicle through which Siyo's interests were best advanced.

[10] Turning to the so-called 'jurisdictional ruling', it is clear from the terms of the ruling that the arbitrator decided no more than what the parties had in any event agreed, i.e. that given the characterisation of the dispute at the relevant time, the bargaining council was not empowered to arbitrate the dispute. Whether it was necessary for the arbitrator to issue a formal ruling on whether the bargaining council had jurisdiction is debatable - the record indicates that the union had accepted that given that its claim was one of an automatically unfairly dismissal and that it had, in effect, withdrawn its claim. It was certainly unnecessary for the arbitrator to address this issue in her rescission ruling, not least given her decision on the application for condonation. Given that the expansive elaboration of the nature and extent of the jurisdictional ruling in the reasons for the condonation decision is *obiter*, it is not necessary for me to make any definitive finding in this regard, except to say that the arbitrator clearly had no powers to grant the declaratory order sought by the union, and that she was correct not to have accede to the request to grant such an order. I have my doubts though whether the views expressed by the arbitrator on the effect of jurisdictional ruling are correct. To the extent that the arbitrator considered that

once the union had exercised an election to categorise the dispute as one concerning an automatically unfair dismissal the bargaining council was forever divested of jurisdiction, this imports a substantive element into the jurisdictional ruling that is simply not present. The arbitrator did not hear evidence on the reason for dismissal before making her ruling, nor was she called on to decide between any contested positions in this regard. The ruling meant no more than that to the extent that the union persisted with a claim of an automatically unfair dismissal, the bargaining council was not empowered to arbitrate the claim. It did not necessarily follow that if the union abandoned that claim and sought to pursue a claim that the bargaining council is clearly empowered to arbitrate (in this case, a dismissal for insubordination), that the 'jurisdictional ruling' barred it from doing so. In summary: the 'jurisdictional ruling' amounted to no more than a statement to the effect that for so long as the union claimed that Soyo's dismissal was automatically unfair, only this court had the jurisdiction to entertain the claim. The ruling did not amount to a substantive ruling that precluded the union from amending its claim to one of an unfair dismissal for the reasons specified by the respondent, a dispute that the bargaining council was empowered to arbitrate. The application for the rescission of that ruling was misguided, as was the application for a declaratory order brought before the arbitrator. The arbitrator decided to refuse the application for condonation of the late filing of the application for rescission on a basis that is reasonable, with the result that the ruling should be upheld. It follows that the application for review stands to be dismissed.

The application for a declaratory order

[11] Before the hearing of this application, the union filed an amended notice of motion in which the following relief was sought:

> "*3. Alternatively to paragraphs 1 and 2 above, and only in the event that it is determined either that the review is unnecessary or that there is no basis for a review, declaring that the Applicants are at their election entitled to pursue an ordinary unfair dismissal dispute in arbitration proceedings before the First Respondent"*

[12] The procedural issues raised by the filing of the notice of amendment aside, as a matter of general principle, the courts will not deal with abstract, hypothetical or

academic questions in proceedings for a declaratory order. The primary function of a court is to adjudicate competing claims between parties, not to give legal advice (see *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441, *Putco Ltd v TV and Radio Guarantee Co.* 1984 (1) SA 443 (W) at 455 and *PE Batiss & another v EL Centre Group Holdings Ltd* 1993 (4) SA 69 (W) at 75).

[13] In the present instance, there is no pending dispute before the bargaining council nor is there any indication whether the union intends to pursue a dispute in that forum. The union may elect to pursue its claim in this court or in the bargaining council, or abandon the claim in its entirety. The relief sought in effect requires this court to tell the union what legal avenues are open to it, and implies that once in possession of this advice, only then will the union decide how to further prosecute the matter. It is not appropriate in these circumstances for the court to issue a declaratory order. However, it follows from what I have said above that in my view, the arbitrator's jurisdictional ruling and her ruling on the rescission application did not necessarily preclude the union from reformulating its claim in terms that accepted the reason for dismissal specified by the respondent nor does it preclude the union from re-enrolling the matter for an arbitration hearing on that basis.

Costs

[14] Finally, in relation to costs, and in the exercise of the court's discretion in this regard, it would not be in the interest of fairness and justice for costs to follow the result. The parties have an ongoing relationship, and there is the prospect of further litigation in this matter. In these circumstances, I consider it appropriate that there should be no order as to costs.

I accordingly make the following order:

1. The application is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application 20 May 2010

Date of judgment 3 August 2010

Appearances:

For the applicant: Adv R Wade, instructed by Gray Moodliar Attorneys

For the respondent: Adv P Kroon, instructed by Joubert Galpin Searle