IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JS409/08

In the matter between:

BALY MAHLANGU & 130 OTHERS **Applicant**

and

ALLSERVE CONSULTANCY **Respondent**

JUDGMENT

LAGRANGE, AJ:

INTRODUCTION

1. The applicants in the matter have brought an application for condonation for the late filing of their statement of case and for the joinder of other individuals as applicants in the matter.

CONDONATION APPLICATION

2. The sequence of events leading up to the applicant' 'referral of their dismissal to this Court on 30 June 2008 began on 22 May 2006 when their services with the respondent were terminated.

3. An unfair dismissal dispute was referred to the CCMA on 31 May 2006.

4. On 23 June 2006 the conciliating commissioner issued a certificate that the dispute remained unresolved and indicating that the matter concerned a dismissal based on operational requirements which could be referred to the Labour Court.

5. On 26 July 2006 the respondent launched an application to review the certificate which was issued apparently on the basis that the description of the dispute as a dismissal based on operational requirements was inaccurate as some of the applicants had been dismissed because they have been involved in illegal strike action. The applicants who were not members of any union approached the Legal Aid Board for assistance.

6. Relying on the advice of their legal representatives, the individual applicants believed that they could not serve a statement of case because of the review application launched by the respondent. It appears that no further steps were taken to pursue the review application until it was finally withdrawn by the respondents on 22 May 2008.

7. On 30 June 2008 the individual applicants were advised by their legal representatives that they could serve a statement of claim

which they did on that day. Thereafter the main dispute was set down for a pre-trial conference before a Judge of this Court on two occasions but according to the applicants could not proceed because the attorney who represented them could not attend court for reasons unknown to them, a fact which the respondent does not dispute.

8. In early November 2009 having appointed Mabaso Attorneys as their attorneys of record in early September that year, the applicants filed their condonation application.

The length of delay and the reasons for delay

9. The length of delay is excessive. It should be noted that in June 2009 the applicants had previously appointed M M Baloyi Attorneys as their attorneys of record in the matter. This followed an order handed down on 20 May 2009 by this Court postponing the matter *sine die* in order to allow the applicants an opportunity to seek legal advice.

10. Had the applicants referred the matter to the Labour Court within the 90 day period from the date following the issue of the certificate of outcome the referral ought to have been made by 30 August 2006. Instead the referral was only made some 22 months later. However, this was little over a month after the respondent withdrew

the review application. The respondent had contended that this delay was excessive and contended that notwithstanding its application to review the conciliation certificate nothing prevented the applicants from referring their statement of case to this Court.

11. It is trite law that the description of a dispute by a commissioner on a certificate of outcome is not determinative of the nature of the real dispute that came before that commissioner. The description of the dispute on the certificate does not constitute a finding which is binding on the parties to the dispute. In this respect I agree with the views expressed by Van Niekerk AJ in ***Ingo Strautmann*** **and** ***Silver Meadows Trading 99 (Pty) Ltd t/a Mugg and Bean Suncoast and others D412/07****,* dated 9 June 2009 (unreported), in which he states:

> "[8] …A certificate of outcome requires only that the commissioner states that, as at a particular date, the dispute referred to the CCMA remains unresolved. I am aware that Form 7.12 provides for a classification of the dispute and an indication as to what further rights of recourse might be open to an applicant should the dispute remain unresolved. But any classification that is made or indication that is given as to which forum or courses of action might be open to an applicant wishing to pursue a dispute has no legal significance other than to certify that on a particular date a particular dispute referred to the CCMA for conciliation remained unresolved. Any other views expressed by a commissioner, even if cast in directory language, amount to little more than gratuitous advice. In *National Union of Metal Workers of SA & others v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC), Zondo AJP (as he then was) held:

> 'A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or another view on certain aspects of the dispute but, for his purposes, whether the dismissal is due to operational requirements or to misconduct or incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner to whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee. (See s191 (5) (b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour Court, why then should the employee be bound by the commissioner's description of the dispute?"

I am aware that the *Driveline* case concerned a retrenchment dispute referred to this court in which the referring party sought to "upgrade" to a dispute concerning an automatically unfair dismissal. In that sense, no matter what the nature of the dispute, it was always going to be adjudicated by this court. The present dispute, of course, concerns a dismissal dispute that the applicant contends is arbitrable but which the commissioner obviously regarded as justiciable. But I don't think that this distinction affects the principle. The principle is that a referring party is not bound by a commissioner's classification of a dispute or any directive as to its destiny. If this were not so and if some legal significance were to be attached to a commissioner's categorisation of a dispute in a certificate of outcome, then by electing the forum in which the dispute is to be determined, the commissioner denies the referring party the freedom to pursue her rights as she deems fit. Certificates of outcome are issued at the conclusion of the conciliation phase more often perhaps than not in circumstances where no evidence would have been led as to the nature of the dispute. The conciliating commissioner is not always well placed to make judgments, based as they would be only on the say-so of one or both parties during conciliation, as to what the true nature of the dispute might be. Even less, for the reasons stated above, should those judgments be binding on a referring party.

[9] It follows that when a commissioner completes Form 7.12 and categorises the dispute referred to the CCMA by ticking one of the boxes provided, the commissioner does not make a jurisdictional ruling. Nor does the ticking of any of the boxes marked "CCMA arbitration", "Labour Court" "None" or "Strike/Lockout" amount to a ruling on which of those

> courses of action must be pursued by a referring party. Consistent with the principle established in the *Driveline* case, it is not for commissioners, by means of certificates of outcome or otherwise, to dictate to litigants either how they should frame the disputes that they might wish to pursue or which forum they are obliged to approach to have those disputes determined. Litigants must stand and fall by the claims that they bring to arbitration."

12. However, this is a case in which the respondent did bring such an application. The certificate of outcome had stated that the dispute concerned unfair dismissals for operational reasons. The point in question for the employer was whether some of the applicants had been dismissed for unprotected strike action rather than for operational reasons. According the case advanced by the applicants they also do not rely on the description of the dispute in the certificate of outcome. Instead, they claim they were all dismissed for supposed participation in unprotected strike action.

13. Even if the employer is correct that some applicants were dismissed for operational reasons and others for participation in unprotected strike action, both reasons for dismissal fall within the jurisdiction of the labour court. These differences have now come to light in the pleadings and are better dealt with in the pre-trial process than in an application to review the certificate of outcome.

14. At the hearing of the condonation application, Ms Strijdom who appeared for the respondent agreed that the period of delay

between the time the review application was launched and the time it was withdrawn was not a delay that the applicants could be held responsible for. In any event, it cannot lie in the mouth of the respondent, which brings an application to set aside the certificate of outcome, to say the applicants themselves ought to have known that the correctness of the description of the dispute on the certificate had no bearing on their ability to refer the matter to the next stage of the statutory resolution process.

15. If one then takes out of consideration the period during which the review application was pending in calculating the relevant time period between the issuing of the certificate and the referral of the statement of claim to the Labour Court, the number of days is reduced to 72, which is less than the 90 day period for making a referral permitted by sections 191(5)(ii) and (iii) for disputes over operational dismissals involving more than one employee and over dismissals for participation in unprotected strike action, respectively.

16. In the circumstances, such delay as there was is almost wholly attributable to the respondent and the fact that a relatively large group of individual applicants, without the co-ordinating capacities of a union, were only able to file and serve their referral 40 days after the respondent withdrew the review application is an insignificant period when compared with the delay attributable to

the employer. Accordingly, I believe that the explanation for the delay is an unacceptable one.

Merits of the dispute

17. The applicants statement of case was outlined in scant detail in a statement of claim set out on a printed version of Form 2 of the Labour Court rules. The applicants allege that on 22 May 2006 until 26 May 2006 they were locked out of the employer's premises for no reason and that they were not striking. They further claim that on 26 May 2006 they were told to leave and the respondent threatened to call the police.

18. At the time of filing the statement of case, the other individual applicants besides Mr Mahlangu were not identified. When the respondent filed its answering statement in July 2006, it assumed that the applicants referred to in the statement of case were part of a group of employees who were either dismissed for disciplinary reasons or retrenched for operational reasons in May 2006. Accordingly, the respondent alleged they were either fairly retrenched or fairly dismissed for participating in unprotected strike action. It iwas only in August 2008 that the applicants filed an affidavit (incorrectly styled as a 'supporting' affidavit) in which they identified the 130 applicants as the employees who had apparently been parties to the original referral of the dispute to the CCMA.

19. On the respondent's version of events, a retrenchment process was undertaken which the employees attempted to frustrate. Nevertheless 68 employees were retrenched. According to the employer's statement of defence, the remaining employees embarked on unprotected strike action in protest against the retrenchment of the others.

20. An ultimatum was issued which was allegedly ignored and the Respondent convened disciplinary hearings in which only two employees decided to participate. Consequently, the remaining alleged strikers were disciplined in *absentia* and dismissed.

21. In its statement of defence, the employer understandably reserved its right to respond more fully to the allegations in the applicant's statement of claim at a later stage.

22. In the founding affidavit to the condonation application, in which the applicants flesh out their substantive case in greater detail, the applicants allege that they were approached by a Mr Hanekom of the respondent whilst they were standing outside the employer's premises. He told them that they were dismissed because they were involved in industrial action..

23. The employer initially brought the application to set aside the certificate of outcome on the basis that the applicants were not all

dismissed for the same reason, namely that some were dismissed for operational reasons after a consultative process, and other were dismissed for participating in unprotected strike action.

24. In pursuing this contention, the respondent included as an attachment to its answering affidavit what it claims are extracts from its payroll which demonstrates which of the employees received severance pay.

25. Before addressing this issue it is necessary to digress a little. At the hearing of this matter, I requested the parties' representatives to try and reach agreement on the identity of the existing applicants and those whom the applicants sought to join as additional individual applicants.

26. The respondent had no objection to the joinder of those persons on annexure "A" whose names did not appear on the original list of applicants, and likewise the applicants confirmed that only those individuals who were named in annexure "A" would constitute the individual applicants, once the joinder of those not previously mentioned had been effected.

27. In the result, it was agreed that a list of 28 applicants whose names appeared on Annexure "A' to the applicants' combined condonation and joinder application included all those original applicants who

were still party to the matter and those who now sought to be joined. Accordingly, the joinder application was not opposed and the complete list of applicants after the successful joinder of additional applicants are the 28 individuals whose names appear in annexure “A” to the combined condonation and joinder application filed on 23 July 2009 .

28. At the court’s request, the parties also compared the names of the applicants appearing on annexure “A” with the payroll extracts previously above. They found that six of the names appearing on annexure “A” also appear to have been recipients of severance pay, on the basis of the purported payroll extracts. Whilst the applicants would not admit that these six individuals had been retrenched, it is obviously a real possibility that they might have been, rather than having been dismissed for striking.

29. If this *prima facie* position turns out to be correct, applicants who were retrenched rather than dismissed for striking will not obtain relief on the basis that they were unfairly dismissed for participating in an unprotected strike, as claimed by the applicants. Whether this might result in an attempt to amend the applicant’s statement of claim is not an issue that concerns this court.

30. What does emerge from the above is that 22 of the 28 applicants appearing on annexure “A” might well have had their services

terminated for participation in alleged unprotected strike action, even on the employer's version,. To this extent, it seems it is not improbable that the majority of the applicants appearing on annexure "A" were in fact dismissed for participation in the industrial action and did not have their services terminated for operational reasons.

31. However, in it's answering affidavit in this condonation application, the employer emphatically asserted that the applicants had not been dismissed for participation in unprotected strike action but had been fairly dismissed for operational reasons, even though other employees had been dismissed for this reason. On the analysis above of the current list of applicants when compared with those who appear to have received severance pay there is a reasonable possibility this contention might well turn out to be incorrect.

32. The essence of the case set out by the applicants in their statement of case and expanded slightly in their founding affidavit in the condonation application is that while negotiations regarding the possible transfer of their employment to another employer were still proceeding they were locked out by the company on 22 May 2006 and were subsequently advised that they had been dismissed because they were involved in industrial action.

33. The employer's version by contrast is that those who were dismissed for embarking on unprotected strike action had been protesting against the retrenchment of others and failed to obey an ultimatum to return to work,. Thereafter disciplinary enquiries were convened, which most of the affected employees boycotted, and they were then dismissed *in absentia.*

34. Both parties have outlined their version of events surrounding the dismissal of striking workers in sketchy detail. Even if I take at face value the employer's contrary version that workers were dismissed after an ultimatum was issued and disciplinary enquiries were convened, there is insufficient information before me to conclude on that basis alone that the dismissals would have been fair. There is no information about the duration of the strike or the time between the issuing of the ultimatum and its expiry, just to mention a few of the important considerations that may play a part in determining the fairness of any dismissal in those circumstances, which are outlined in the guidelines for fair dismissal in the case of unprotected strikes in Item 6, Schedule 8 of the LRA.

35. In the light of this, I cannot say with confidence that the applicants have no reasonable prospects of success. Unlike in the case of ***Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)**, the court in this instance also does not have the advantage of being able to consider the prospects of success on the merits against the

backdrop of a prior decision by an independent adjudicator, but must do so on the limited details provided by the parties.

Prejudice

36. The employer cites the prejudice it suffers as a result of this matter having dragged on so long even after it withdrew the rescission application. The prejudice cited by the employer consists of the costs incurred in opposing the application and repeated frustration by the representatives of the applicants in attempting to get the matter ripe for trial including non-attendance of scheduled meetings and court appearances. The applicants also complain about the failure of their legal representatives at least at one occasion to attend pre-trial conferences.

37. However, even if that dilatoriness can be attributed to the applicants and their legal representatives, there is nothing to indicate it played a part in the delay that was under consideration in this condonation application. If some of the applicants are ultimately successful in establishing a claim of unfair dismissal, the court making an order could have regard to any excessive delays in the progress of the litigation occasioned by the applicants after the referral of their statement of claim.

38. The other prejudice complained of by the employer relates to the departure of staff and also its former attorney who had gone overseas. However, it is not apparent on the papers that these departures did not take place during the twenty-two month delay occasioned by the employer's review of the certificate of outcome, so I cannot assume this prejudice was not self-inflicted.

Conclusion

39. Despite the extent of the delay, given the explanation for it, I believe this compensates for the relatively weak prospects of success. Moreover, there is no evidence that any prejudice which cannot be cured was occasioned by the applicants. In the circumstances, I believe is fair to condone late referral of the matter.

JOINDER APPLICATION

40. Insofar as the joinder application is concerned, with reference to the names appearing on annexure "A" it would appear that a mere eight new names appear on that list which were previously not on annexure "BM2". The names of those additional applicants are Emmanuel Mthombeni, Joseph Maloi, Themba Hlongoane, John

Shando, Lucas Yangaphi, Commissioner Napo, John Malepe and Thabisile Amos Mthimunye.

41. As stated above, the opposition to the joinder of applicants was not pursued by the respondent and accordingly these applicants should be joined in the referral of the unfair dismissal dispute to this court.

Order

42. Accordingly, it is ordered that:

(a) Emmanuel Mthombeni, Joseph Maloi, Themba Hlongoane, John Shando, Lucas Yangaphi, Commissioner Napo, John Malepe and Thabisile Amos Mthimunye are joined as parties to the referral of this dispute on 30 June 2008, and the complete list of applicants appears in annexure “A” to the applicants’ founding affidavit in the joint condonation and joinder application;

(b) The applicants late referral of their unfair dismissal dispute to this Court is condoned;

(c) No order is made as to costs.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of Hearing: 28 January 2010

Date of Judgment: 13 April 2010.

Appearances:

For the Applicants : Mr S Mabaso of Mabaso Attorneys

For the Respondents: Ms H Strijdom of Helena Strijdom Attorneys