CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/18

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	First Applicant
THE MEMBERS AS PER ANNEXURE "A"	Second to further Applicants

and

NGULULU BULK CARRIERS (PTY) LIMITED (IN LIQUIDATION)	First Respondent
VAN DEN HEEVER, THEODOR WILHELM N.O. (nomine officio in his capacity as liquidator of the First Respondent)	Second Respondent
MONYELA, KGASHANE CHRISTOPHER N.O. (nomine officio in his capacity as liquidator of the First Respondent)	Third Respondent
SULIMAN, SHAZIA N.O. (nomine officio in his capacity as liquidator of the First Respondent)	Fourth Respondent
SUTHERLAND, MARINDA CHRISTINA N.O. (nomine officio in her capacity as liquidator of the First Respondent)	Fifth Respondent
SYMES, MARNA ESTELLE N.O. (nomine officio in her capacity as liquidator of the First Respondent)	Sixth Respondent

DE WET, GERT LOUWRENS STEYN N.O.
(nomine officio in his capacity as liquidator of the First Respondent) Seventh Respondent

Neutral citation: *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others* [2020] ZACC 8

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt, J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ.

Judgments: Jafta J (unanimous)

Heard on: 6 February 2020

Decided on: 6 May 2020

Summary: [section 191 Labour Relations Act] — [jurisdiction] — [characterisation of dispute]

ORDER

On appeal from the Labour Court the following order is made:

1. It is declared that the liquidators of Ngululu Bulk Carriers (Pty) Limited have replaced it as respondents.
2. Leave to appeal is granted.
3. The order of the Labour Court is set aside.
4. The matter is remitted to the Labour Court for determination of the merits.
5. The liquidators of Ngululu Bulk Carriers (Pty) Limited are ordered to pay costs in the Labour Court and in this Court.

JUDGMENT

JAFTA J (Mogoeng CJ, Khampepe J, Madlanga J, Majiedt, J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This matter concerns two preliminary points on which the Labour Court ruled in favour of the first respondent, Ngululu Bulk Carriers (Pty) Limited (Ngululu). As a result, the claims by the Association of Mine Workers and Construction Union (AMCU) and its members were dismissed.

[2] The first ruling related to the question whether the Labour Court had jurisdiction to adjudicate the automatically unfair dismissal cause of action where the dispute that was referred to conciliation was an unfair dismissal dispute. The resolution of this question revolves on the proper interpretation of section 191 of the Labour Relations Act (LRA).[1] The second ruling was on the plea of *lis alibi pendens* (same action pending in other proceedings). This is a common law principle which prevents duplication of legal proceedings.

Facts

[3] The undisputed facts show that during January 2016, Ngululu employees, including members of AMCU, were engaged in an unprotected strike. When those workers failed to return to work, Ngululu dismissed them. 476 employees were dismissed as a result of their participation in the strike. An unfair dismissal dispute was immediately referred to the relevant bargaining council by AMCU. On 9 March 2016, the dispute was conciliated without success and a certificate of non-resolution was

[1] 66 of 1995.

issued by the relevant council. To avoid confusion this would be referred to as the first dispute.

[4] Meanwhile, Ngululu was re-employing some of the dismissed employees. But not a single member of AMCU was among those who were fortunate to be re-employed. AMCU and its members considered the selective re-employment to be a further dismissal to which AMCU members were subjected. On 5 April 2016, they referred that dismissal to the same bargaining council for conciliation. They contended that selective re-employment constitutes an unfair dismissal mentioned in section 186(1)(d) of the LRA. The latter dismissal will be referred to as the second dismissal.

[5] Ngululu disputed that the council concerned had jurisdiction to conciliate the second dispute. The council rejected the objection to its jurisdiction and conciliation proceeded. Again resolution evaded the parties and a certificate of non-resolution was issued.

[6] Unhappy with the ruling of the council on jurisdiction, Ngululu instituted a review application in the Labour Court. In those proceedings Ngululu impugned the ruling on jurisdiction and the validity of the certificate of non-resolution. That review was opposed by AMCU.

[7] On 7 June 2016 AMCU and its members initiated the claims for unfair dismissal in the Labour Court. The first claim pertained to the first dismissal. Details relating to it were set out in the statement of claim. It was alleged that members of AMCU were dismissed for their affiliation to that union and in terms of section 187(1)(f) of the LRA, that dismissal was automatically unfair.

[8] Ngululu defended the action. It raised two preliminary points. With regard to the first claim, Ngululu contended that since the claim was now based on the assertion that the dismissal was automatically unfair, the Labour Court lacked jurisdiction because an automatically unfair dispute had not been referred to conciliation. The

argument was that what was referred was an unfair dismissal dispute and not an automatically unfair dismissal dispute.

[9] Regarding the second claim, Ngululu raised the *lis alibi pendens* defence. It contended that the issues raised by the second claim were the subject-matter of its review application which was then pending before the Labour Court.

[10] Both points found favour with the Labour Court which upheld them and dismissed the claims. That Court refused to grant leave to appeal and subsequently the Labour Appeal Court dismissed AMCU's petition for leave to appeal, hence the approach to this Court.

In this Court

[11] Since the matter involves the interpretation and application of section 191 of the LRA, it raises a constitutional issue which founds the jurisdiction of this Court. Moreover, the interpretation preferred by the Labour Court had the effect of denying AMCU and its members the right of access to the Labour Court and to have their dispute resolved by application of the law. The resolution of the second claim too involves the application of section 187(1)(f) of the LRA.

[12] What remains for consideration under the rubric of leave to appeal is whether it is in the interests of justice to grant leave. In present circumstances, prospects of success justify the grant of leave. This is because having failed to obtain leave from the Labour Appeal Court, this Court is the only forum which AMCU may approach if it wishes to pursue an appeal against the Labour Court's decision.

[13] In the view I take of the merits, AMCU has good prospects of success. The interpretation assigned to section 191 by the Labour Court appears not only to be incorrect, but also to be at variance with the construction of the same provisions by courts above the Labour Court. In addition, the principle of *lis alibi pendens* was manifestly misapplied. Therefore leave to appeal must be granted.

Substitution

[14] After the matter was set down for hearing in this Court, Ngululu was placed in liquidation. Notice in terms of the Companies Act was duly served on its liquidators, who failed to respond and indicate if they were going to oppose the application. As a result of this inaction on the part of liquidators, AMCU lodged an application to replace Ngululu with the liquidators. The liquidators have not opposed the application. A proper case has been made out and as a result substitution should be granted.

[15] It is now convenient to address the preliminary points upheld by the Labour Court.

Jurisdiction of the Labour Court

[16] Although unfair dismissal disputes such as the ones we are concerned with here fall within the jurisdiction of the Labour Court,[2] the exercise of that jurisdiction is deferred until a dispute has been conciliated. The LRA is structured in a manner that obliges parties to disputes to first make use of non-litigation dispute resolution mechanisms, before approaching courts. Of importance in this regard is section 191, which requires dismissed employees to refer disputes about the "fairness of a dismissal to conciliation."[3]

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[2] Section 157(1) of the LRA provides:

> "Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

[3] Section 191(1) of the LRA reads:

> "(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within-
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

[17] Depending on the reason for the dismissal, once conciliation fails to resolve the dispute, the affected employee has two options if she wishes to pursue the matter further. If the employee has alleged that the reason for the dismissal is one of those listed in section 191(5)(b), then she may ask the relevant bargaining council or the Commission for Conciliation, Mediation and Arbitration to arbitrate the dispute. That is if the body asked to arbitrate is the one that conciliated the dispute. The other option is that the employee may refer the dispute to the Labour Court for adjudication.

[18] It is important to keep in mind that what is referred to conciliation is the dispute and not causes of action or claims which may arise from that dispute. Moreover, conciliation involves both sides to the dispute, that is the dismissed employee and the employer that dismissed her. Both parties are usually familiar with the dispute sought to be resolved through conciliation. However, while the reasons for a dismissal are always known to the employer, the employee may not know them at the time the referral is made. Those reasons may be revealed to the employee during conciliation.

[19] If the reasons so revealed include those mentioned in section 191(5)(b) and conciliation fails, the employee has a choice to pursue arbitration or adjudication in the Labour Court. But here the Labour Court read the relevant provisions differently. That Court held the view that a referral to conciliation of an unfair dismissal dispute does not include an automatically unfair dismissal. Proceeding from this premise, the Labour Court concluded that the claim of an automatically unfair dismissal needed to be conciliated first before that Court could entertain it. It took that stance despite the fact that an unfair dismissal dispute had been referred to conciliation and had been conciliated.

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

[20] To bolster its reasoning, the Labour Court called in aid section 157(4) of the LRA which empowers that Court to refuse to adjudicate a dispute if not satisfied that the dispute was conciliated.[4] This was incorrect and inconsistent with established authority. Section 157(4) did not apply here because there was sufficient proof that there was an attempt to resolve the dispute by conciliation. A certificate of non-resolution was furnished to the Court. In rejecting a similar argument in *Intervalve*[5] this Court said:

> "And the *Driveline* minority's approach to section 157(4) seems wrong to me. Section 157(4)(a) confers upon the Labour Court the power to refuse to determine a dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. Section 157(4)(b) then provides that a certificate issued by a commissioner that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation. This means that, in a case where a certificate of non-resolution has been issued at the end of the conciliation process, the Labour Court may not, on the strength of section 157(4)(a), decline to determine the dispute. This is because section 157(4)(b) says that the certificate is sufficient proof that an attempt was made."[6]

[21] The flaw in the Labour Court's reasoning stems from its characterisation of an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute that was referred to conciliation. That Court overlooked the fundamental issue which is that what was referred to conciliation was the unfairness of the dismissal, regardless of whether the unfairness concerned was automatic or otherwise. And that it is not

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[4] Section 157(4) of the LRA provides:

> "(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.
>
> (b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that *dispute* through conciliation."

[5] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervalve*).

[6] Id at para 33.

reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal.

[22] In this regard, *Driveline*[7] tells us that a reason for a dismissal does not itself constitute a dispute. In that matter the Labour Appeal Court declared:

> "In my view, a reading of section 191(1) - (5) leaves one in no doubt that the phrase 'operational requirements' as used in the Act does no more than give a reason for a dismissal the fairness of which may be in dispute between the parties as contemplated at the beginning of section 191(1) where the Act refers to 'a dispute about the fairness of a dismissal'. It does not itself constitute a dispute on its own. The same applies to a situation where an employee alleges or seeks to allege that his dismissal constitutes an automatically unfair dismissal. This refers simply to a reason for dismissal the fairness of which may be the subject of a dispute between the parties as contemplated in section 191(1) of the Act.
>
> It follows, therefore, from what I have said above in regard to a dismissal for operational requirements that also the reference to a dismissal as an automatically unfair dismissal is nothing more than giving a reason for the dismissal. That this is the case is confirmed by a reading of the provisions of section 187(1) which deal with automatically unfair dismissals. It is clear from section 187(1) that whether a dismissal is automatically unfair depends on the reason for the dismissal. Of course, once the reason for dismissal has been established, this may have various implications in terms of the Act which may differ from the implications which would flow from the establishment of another reason as the reason for dismissal."[8]

[23] This interpretation of section 191 was affirmed by this Court in *Intervalve*.[9] Therefore before the Labour Court had construed section 191 here, this Court and the Labour Appeal Court had already proclaimed what that provision means. Accordingly

[7] *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another* [1999] ZALC 157; 2000 (4) SA 645 (LAC).

[8] Id at paras 40-1.

[9] *Intervalve* above n 5 at para 32.

it was not open to the Labour Court to prefer a different meaning of the provision. The correct meaning had already been authoritatively settled.

[24] Judicial precedent is a principle of our law. It obliges lower courts to follow decisions of higher courts, for as long as those decisions remain in operation. In *Walters*[10] this Court observed:

> "High Courts are obliged to follow legal interpretations of the [Supreme Court of Appeal], whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the [Supreme Court of Appeal] itself decides otherwise or this Court does so in respect of a constitutional issue."[11]

[25] It follows that the Labour Court erred in holding that it had no jurisdiction to adjudicate the automatically unfair dismissal claim.

Lis alibi pendens

[26] The purpose of *lis pendens* is to prevent duplication of legal proceedings. As its requirements illustrate, once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a *lis pendens* defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century.[12]

[27] Having correctly noted the requirements of the defence, the Labour Court here overlooked that not all requirements were met. That Court held:

> "In this case, the applicants did not dispute that the parties in this matter were the same as those that were before the bargaining council in respect of disputes under case

[10] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*).

[11] Id at para 61.

[12] *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) at para 2.

> number NELRFBC 40165 and further that the review proceedings are pending in this Court under case number JR 919/16. When the applicants filed the statement of claim in which they required this Court to determine whether the individual applicants were unfairly dismissed in terms of section 186(1)(d) of the LRA, it essentially brought the same claim under a different guise and they are effectively seeking the same relief that was determined by the bargaining council. I agree with the respondent's view that this amounts to forum shopping and it is indefensible. To the extent that the review proceedings are pending in this Court, it follows that the matter is *lis pendens*."[13]

[28] Only one of the three requirements of *lis pendens* was satisfied here. That is the litigation was between the same parties in the two sequential proceedings. The others were not. It will be recalled that with regard to the second claim, the dispute was referred to the bargaining council for conciliation where Ngululu objected to the council's jurisdiction. A ruling rejecting the objection was made and as the dispute was not resolved, a certificate of non-resolution was issued by the council.

[29] The review application by Ngululu was directed at impugning the council's ruling and the certificate of non-resolution. It had nothing to do with the unfairness of the second dismissal. It follows that the causes of action in the two proceedings were different. And so were the subject matters. Therefore Ngululu had failed to establish the defence of *lis alibi pendens*.

[30] In *Nestlé*, the position was expounded in these words:

> "There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view, none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case), the one operating consensually and the other by force of statute, each

[13] *Association of Mine Workers Construction Union and Others v Ngululu Bulk Carriers (Pty) Ltd* [2017] ZALCJHB 122 at para 15.

> having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be inquiring into a ruling upon different matters, and neither will be capable of ruling authoritatively on the issue that falls within the competence of the other."[14]

[31] Here the review court could only determine whether the relevant bargaining council had jurisdiction to conciliate the dispute and whether the certificate issued by that council was valid. The review court could not enquire into the fairness of the dismissal in question because that was not an issue before it. Similarly the Labour Court here could not adjudicate the issues that were before the review court. Consequently the Labour Court erred in upholding *lis pendens* in present circumstances.

[32] The appeal must be upheld and since the merits of the claim were not determined, the matter must be remitted to the Labour Court.

Costs

[33] Although this is essentially a labour matter, the rule that ordinarily applies to labour matters is not appropriate here. The rule that costs orders should not be granted in labour matters is based on the special relationship that exists between employees and employers. In most cases that relationship continues even after the resolution of a dispute by a court. Here the circumstances are different. The employer-employee relationship has ended. Therefore, the usual rule that costs follow the result should apply.

Order

[34] In the result the following order is made:

[14] *Nestlé (South Africa) Pty Ltd v Mars Inc* [2001] ZASCA 76; 2001 (4) SA 542 (SCA) at para 17.

1. It is declared that the liquidators of Ngululu Bulk Carriers (Pty) Limited have replaced it as respondents.
2. Leave to appeal is granted.
3. The order of the Labour Court is set aside.
4. The matter is remitted to the Labour Court for determination of the merits.
5. The liquidators of Ngululu Bulk Carriers (Pty) Limited are ordered to pay costs in the Labour Court and in this Court.

For the Applicants:	S Collet instructed by LDA Attorneys Incorporated