REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JS 827/10

In the matter between:

MOIPONE EDITH MAGOMOLA **Applicant**

and

NORTH WEST PROVINCIAL GOVERNMENT (OFFICE OF THE PREMIER) **Respondent**

Heard: **21-22 November 2011**

Delivered: **10 April 2013**

Summary: (Trial– s187(1)(d) – automatically unfair dismissal not proved-no agreement requiring court to arbitrate unfair dismissal dispute – referral to arbitration).

JUDGMENT

LAGRANGE, J

Introduction

[1] In this matter, the applicant, who was a Director General employed in the office of the Premier Of the North West Provincial Government, claims that she was dismissed on 8 July 2010 because she had referred a dispute to the Public Services Sectoral Bargaining Council ('the PSSBC') on 24 June 2010. She claims that her dismissal was automatically unfair in terms of section 187(1)(d)(i) of the Labour Relations Act, 66 of 1995 ('the LRA') in that she was dismissed for exercising a right to refer a dispute to the bargaining Council in terms of the LRA.

[2] It is a matter of dispute between the parties whether or not the court had jurisdiction to entertain an alternative claim of an ordinary unfair dismissal, which will be addressed below.

[3] Only the applicant, Ms E M Magomola, and Ms M Z Makoti, currently the principal state law adviser to the Premier of the North West Provincial Government and an acting Senior Legal Adviser at the time the dispute arose, gave evidence.

Material evidence

[4] I will not repeat the evidence of both witnesses but will only highlight those parts of the evidence which have a material bearing on the issues.

[5] The outline of the narrative is common cause. The applicant was appointed by the respondent as a director-general for a fixed term of five years starting on 30 January 2008 and ending on 31 January 2013. On 30 June or thereabouts the Premier sent a letter to the applicant indicating she was considering transferring the applicant to Invest North West, a public entity, as its CEO with the ostensible aim of reviving the fortunes of the entity. The Premier went on to say that she had chosen the applicant because of her strong background in the corporate world and parastatals. The letter asked the applicant to give her consent to the transfer, failing which she was asked to provide reasons why she should not be transferred in the public interest in any event.

[6] The applicant had been appointed during the incumbency of the previous Premier, Ms E Molewa, who had subsequently been appointed as Minister for Water and Environmental Affairs. They had enjoyed a good working relationship according to the applicant, but that was not the case with the Premier's successor, Ms M Modiselle. After the new Premier had been in office for about three months the applicant's working relationship with her began to deteriorate. The Premier made it known to the applicant that she did not have to work with her but could choose her own director-general, and the Premier started to communicate directly with the applicant's own staff members, even to the point of relaying instructions to the applicant through the applicant's subordinates.

[7] On 21 October 2009 the applicant drafted a report on matters of concern regarding the North West Provincial Administration. In that letter she complained about poor communication between the Premier's private office in her Department which made it difficult to execute her duties and that the attempts to redeploy staff in recent weeks had "brought the matter to another level of dysfunctionality bordering on anarchy within the Department." The report also contained a stinging criticism of the Premier for not following the Public Service Act and guidelines published under that act for redeployment of staff, and in particular her failure to consult over any of the redeployments in question. The applicant called the Premier's attempts to redeploy her "the final straw". In a follow up request for intervention on 11 November 2009, the applicant complains about her office being totally disregarded leading to a dysfunctional administration. It was put to the applicant that all of these complaints were indicative of an intolerable situation rather than merely a difficult one, as she had characterised the situation in her evidence. The applicant's response to this suggestion was that she was still able to work on areas under her control, but conceded that it might appear to a third party that matters had become intolerable.

[8] A particular point of aggravation for the applicant was that the Premier would not conclude a performance agreement with her. This complicated the conclusion of performance agreements for the persons reporting to herself, which she eventually decided to finalise even though her own

agreement had not been. In desperation, she contacted the chair of the Public Service Commission, and subsequently the Minister of Public Administration but he said he had no authority to compel the Premier to conclude the agreement. Subsequent approaches to the Deputy President and the President also yielded no results.

[9] The applicant also gave evidence of how the Premier dragged her heels in cooperating with the finalisation of an evaluation report of the applicant's performance, which was done in conjunction with officials from the Public Service Commission. The Premier never finalised the evaluation, which the applicant felt was prejudicial to her because she was still on probation and a commendable evaluation was important for establishing a reputation with her subordinates.

[10] The applicant further gave evidence of an instance where the Premier had advised her one Thursday that she intended to transfer her to the Provincial Department of Local Government and Traditional Affairs, starting the following Monday, because she was "so good at what she did". It was only after speaking to the head of the province's political office that the transfer was withdrawn. On another occasion, in early October 2009, while the applicant was attending a conference in the USA, certain heads of department were issued with letters of transfer. The applicant was also transferred to the Treasury according to a letter which she read on her return. There had been no consultation with her about the transfers despite her position. These transfers were also subsequently withdrawn. According to the Senior Management Service Public Service Handbook redeployments of this nature were only supposed to be made if there was consensus between the Premier and the responsible MEC that the deployment was required to deal with the situation. In this instance no consultation had taken place with the MECs concerned.

[11] Another example of conduct which the applicant felt undermined her was the Premier's unilateral redeployment of an economist of considerable experience who was the Deputy Director-General for Policy and Governance to the Corporate Support directorate for the balance of the

duration of his contract. This redeployment was not even canvassed with the applicant and, in her view, the person in question was not suited to a corporate service role.

[12] The attempts to shuffle senior staff around without any consultation with the applicant or the responsible MECs did not end in October 2009. In February 2010 the Premier notified one of the Chief Directors in her department who headed the Communications unit that he was to move to the Department of Human Settlements. The same letter was sent to the MEC without any prior discussion and without anyone being appointed to take the director's place. Similarly, another officer responsible for information strategy for the province was also sent a letter transferring her to the Treasury Department. The official in question challenged the transfer as a demotion and litigation ensued.

[13] Of great concern to the applicant was the transfer of a member of her department, Ms B Matolo, in the International Relations unit, to the private office of the Premier in February 2010. Matolo's post level was then upgraded to level 14, which gave her authority to conclude service contracts exceeding R1 million in value. The responsibility for concluding such contracts lay with the applicant as the Head of the Department of the Premier's office and as the accounting officer. By giving the Acting Chief of Staff such authority, the applicant's ability to control such contracts and account for them was undermined in her view. By 8 June 2010, Matolo had already signed such a contract for a forensic investigation in the Premier's office. It was only when payments had to be made for the services in question that the applicant became aware of the contract. From other evidence it appears to be forensic investigation, at least in part, was directed at the applicant and other staff in her Department and that tension had arisen between the investigation team and the applicant in June 2010. From a memorandum dated 21 June 2010 prepared by the investigators for the consideration of the Premier it appears that charges were being considered against the applicant for alleged misconduct under the Public Finance Management Act 1 of 1999 ('the PFMA').

[14] At the end of June 2010 the applicant referred a dispute to the GPSSBC. When she classified nature of the dispute In the dispute referral form, , the applicant ticked the unfair dismissal option and inserted the word ‘constructive’ between the words ‘unfair’ and ‘dismissal’, instead of identifying it as one or other unfair labour practice dispute. In describing the procedures she had followed, the applicant said she had presented the problems she was experiencing with her ‘supervisor’, whom I understand to have been the MEC of the Premier’s office, without any resolution being achieved. In her summary of the facts of the dispute she referred, the applicant mentioned, amongst other things, the failure to conclude a performance assessment agreement, attempts by the Premier to unilaterally deploy her to positions of lesser responsibility, the redeployment of her own staff by the Premier without her knowledge or consent, the allocation of strategic issues to her peers or subordinates by the Premier without her involvement, and responsibility being given to another manager to sign contracts with service providers beyond his level of authority but encroaching on her own. When describing the outcome she required, the applicant stated:

> *"1 Premier to comply with PSA requirements re Performance Agreement and Performance Assessments.*
>
> *2. Attitude and conduct of undermining my authority to stop.*
>
> *3. Restore my authority and responsibilities."*

[15] The applicant also completed part B of the referral form, which is reserved for dismissal disputes, in which she gave the date of her dismissal as taking place over a period of approximately “6 months” and says she was ‘informed’ of the dismissal by the conduct and behaviour of her supervisor who ignores her and gives orders to her subordinates. She further confirmed that the reason for her dismissal was unknown and that it was a constructive dismissal. In completing the portion of the form dealing with substantive and procedural fairness, the applicant said that there were no reasons advanced for the behaviour of her supervisor, and that her performance had not been evaluated as required, which

impacted on her entitlement to a performance bonus. She also reiterated the assignment of functions and responsibilities to her subordinates.

[16] The applicant contends that at the time she completed the referral form she had intended to refer an unfair labour practice dispute, but was advised by bargaining Council staff to refer the matter as an unfair constructive dismissal. In particular, she had been uncertain which of the descriptions of the nature of the dispute she should select and had not filled that portion in. She did agree that someone reading the referral might assume that she was referring a constructive dismissal complaint, but in her mind she considered it was an unfair labour practice claim. She would not have asked the bargaining Council to assist if she was ready to leave, and the relief she wanted made it clear that she wanted to remedy the situation. She agreed that she could have ticked other boxes under the description of an unfair labour practice on the referral form, but did not because she was advised to select only one box.

[17] It should be noted that above the choices set out in the referral form it reads "(tick only one box)" (original emphasis) and a highlighted comment on the form alongside the options states: "If more than one box is marked it will be regarded as not properly served document" (*sic*).

[18] In a letter dated 8 July 2010, the Premier responded to the first dispute referral. The pertinent portions of that letter read:

> *"2. We note, with surprise, from the referral that you allege to have been constructively dismissed by the North West Provincial Government ('NWPG'). Since constructive dismissal presupposes the termination of employment by an employee because the employer has made the continued employment intolerable for the employee, our understanding of the referral is that serves as a notice for the termination of your employment with NWPG.*
>
> *3. We have considered the repudiation of your employment contract with the NWPG and hereby accept the repudiation. However, it is denied that the termination of your employment contract is due to intolerable working conditions created by the NWPG. In the circumstances, the NWPG will defend your alleged*

unfair dismissal claim referred to the GPSSBC in terms of the referral.

4. We further note that you have continued to come to work, despite the terms and/or allegations made in the referral that you have been constructively dismissed. Our understanding of your continued attendance at work is that your termination of employment is with notice as is required in terms of your employment contract. Therefore, please be advised that the NWPG hereby waives, in terms of section 38 (2) of the Basic Conditions of Employment Act, number 75 and 1997 ("the BCEA"), the notice period for the termination of your employment contract. You are no longer required to come to work for the duration of your notice period, but the NWPG will pay your remuneration in view of notice period as is required in terms of section 38 (2) of the BCEA."

(emphasis added)

[19] The applicant said she was shocked when she received the letter as it was the last thing she expected. She continued to perform her services and to have meetings with heads of Department to prepare for meetings. In her mind she was not serving her notice, and it was the employer who physically locked her out of her office the following week.

[20] On 16 July 2010, the applicant referred a dispute over alleged automatically unfair dismissal to the GPSSBC based on the letter of the Premier quoted above. In that referral she sought reinstatement of her contract. A few days later, on 22 July 2010, the applicant responded directly to the Premier's letter, which had purported to accept the applicant's repudiation of her contract. In that letter the applicant sought to clarify that she had no intention of repudiating her contract and that her original referral to the bargaining Council was the referral of an unfair labour practice dispute. Secondly, she had reported for work in terms of her contract of employment and not for the purpose of serving her notice. The fact that her office was closed, presumably on the Premier's instructions, made it clear to her that she had been dismissed. Despite

the state of affairs she still requested an urgent meeting with the Premier to discuss the contents of the Premier's letter.

[21] The applicant's second letter elicited a further response from the Premier on 3 August 2010. The Premier confirmed what she had said in her initial response of 8 July and further noted that the applicant had not disputed the contents of that letter until the applicant replied on 28 July 2010, which is when the Premiers' office received it. Though it reasserted the contents of the letter of 8 July 2010, this letter noted that the referral of the constructive dismissal dispute, which was a reference to the applicant's first referral to the bargaining Council, "presupposed that you have terminated your services with the NWPG", and "the referral also amounted to repudiation of your contract of employment was the NWPG, which was accepted by the NWPG on 8 July 2010" (emphasis added). Commenting on the latest referral of the automatically unfair dismissal dispute to the bargaining council, the letter states: "We hereby place on record, to avoid any doubt, that you were at no stage dismissed by the NWPG" (emphasis added). The Premier declined to meet with the applicant as she had requested in view of the impending referrals to the bargaining council.

[22] The applicant conceded that it might have been wiser for her to have taken advice on how to complete the referral form before submitting it. However, she said that even though she referred the dispute as a constructive dismissal dispute, the Premier could only have concluded that she was terminating her employment if the Premier had simply looked at which box she had ticked without considering the relief sought in the same form. Moreover, she still pursued her objection to the transfer to Invest North West in a letter to the Premier dated 5 July 2010, which was after her referral of the dispute.

[23] When the applicant was asked why she did not respond more promptly to the Premier's letter of 8 July 2010, she said she did not want to respond before she had spoken to certain persons because it was not her intention to resign. At the time she sought advice from senior officials and the Minister of the Public Service and Administration.

[24] The respondent's counsel tackled the applicant on the question of how the first two attempts to redeploy her could form part of the dispute referred because ultimately the Premier had not implemented these. The applicant's view was that redeployment was an ever present threat as the most recent attempt to transfer her to Invest North West had demonstrated, but she agreed that this had only occurred after the referral of her first dispute to the bargaining council.

[25] The applicant was also tested on the question of how familiar she was with labour law. A number of references made in her correspondence together with evidence that she had been admitted as a candidate attorney were highlighted. In particular, it was pointed out that in a letter dated 5 May 2010, where the applicant had set out her complaints about the performance agreement, performance evaluation and redeployment of staff, she had said near the end of the letter:

> *"I(n) view of all the above mentioned conduct, I am prepared to conclude that this is an attempt on your part to undermine and frustrate me in my job and <u>this borders on a constructive dismissal</u>."*

(emphasis added)

[26] When asked, under cross-examination, whether this did not indicate that, after careful reflection, she was of the view that her situation as portrayed in her correspondence was tantamount to a constructive dismissal, the applicant agreed that it bordered on it and, if it continued, it could have become intolerable. She also agreed that in the light of further developments in May and June 2010 the situation had become worse.

[27] On 14 July 2010 an e-mail was circulated by Mathobi, the recently appointed chief of staff in the private office of the Premier and former subordinate of the applicant, in which she stated that: "Our director-general has been dismissed and we have to start another process." This was an apparent reference to the applicant's status. Under cross-examination it was suggested that Mathobi was not a lawyer and was not involved with the legal team advising the Premier at the time. Makoti confirmed Mathobi had not been involved in giving advice on the legal

issues concerning the applicant's termination when she testified, but could not explain why she had referred to the applicant as having been dismissed when the Premier's letter purporting to accept the applicant's resignation had been issued nearly a week before Mathobi sent her e-mail.

[28] The applicant agreed that Mathobi's view appeared to be at odds with what was expressed in the Premier's letter of 8 July 2010 and other correspondence from her office, and that not too much could be read into the wording of her e-mail. Makoti testified that the letter had been drafted by the Premier's lawyers following a meeting on 7 July 2010, where the referral was discussed. Makoti agreed that she was unable to explain the construction of the letter.

[29] The applicant also agreed that a contrary view of her status was reflected in a newspaper article which appears to have been published in the last week of June or first week of July 2010, in which the appointment of an Acting Director-General to replace the applicant following her resignation and claim of constructive dismissal was apparently announced by a provincial government spokesman. Yet another view of the applicant's status at the time appears in a letter dated 15 July 2010 to the deputy director-general for personnel management requesting him to formally terminate the applicant's services on account of her constructive dismissal referral with effect from the 30 July 2010. In support of her contention that she had not intended to resign, the applicant drew the court's attention to clause 4.3 of her employment contract which entitled either party to give three months notice of the termination of the contract after consultation and agreement with the other party.

Evaluation

[30] The two central questions to decide are whether or not the applicant was still employed when she lodged her claim of automatically unfair dismissal and, if so, should her claim of automatically unfair dismissal succeed? The first question in turn depends on how the applicant's first referral of the controversially labelled 'constructive dismissal dispute' to

the bargaining council at the end of June 2010 and the Premier's response thereto on 8 July 2010 should be construed. The applicant claims her first referral was never intended to convey her resignation on account of her intolerable working conditions. By contrast, the respondent insists her classification of the dispute must be taken at face value and it should be accepted that she resigned, albeit in the misguided belief that it was a forced resignation which could be construed as a constructive dismissal.

Law relating to constructive dismissal

[31] A summary of the pertinent legal principles governing constructive dismissal was set out by Nicholson, JA (as he then was), in the case of ***Chemical Energy Paper Printing Wood & Allied Workers Union & Another v Glass & Aluminium 2000 CC*** **(2002) 23 *ILJ* 695 (LAC)**:

> *"[31] In Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at 985 this court dealt with constructive dismissal and laid down a number of features.*
>
> *(a) When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he would have carried on working indefinitely had the unbearable situation not been created.*
>
> *(b) He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves that his fears were unfounded then he has not been constructively dismissed and his conduct proves that he has in fact resigned.*
>
> *(c) Where he proves the creation of the unbearable work environment he is entitled to say that by doing so the*

employer is repudiating the contract and he has a choice either to stand by the contract or accept the repudiation and the contract comes to an end.

(d) It is the employer's unlawful act that has precipitated the refusal to work and the acceptance of the employer's repudiation. The two envisaged steps are not always easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not.

(e) In determining whether an employee was constructively dismissed the court will have to determine whether the employee's evidence of the intolerable work environment should be believed or whether the employer's evidence, which is to the effect that he actually resigned, should carry the day.

(f) The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

[32] In determining whether or not there has been a resignation the court has to evaluate what the intention of the parties was. A contract of employment may be terminated if the employer and employee by consensus decide to terminate the employment relationship between them. See Strachan v Lloyd Levy 1923 AD 670 and October v Rowe 1898 SC 119.

[33] Resignation brings the contract to an end if it is accepted by the employer. In Fijen v Council for Scientific & Industrial Research (1994) 15 ILJ 759 (LAC) Farlam J (as he then was) said at 772C-D with regard to the test for resignation that an employee has to 'either by words or conduct, evidence a clear and unambiguous intention not to go on with his contract of employment'. He went on to say that to resign he has to 'act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract'. Cf Tuckers Land & Development Corporation v Hovis 1980 (1) SA 645 (A) at 653D-F.

In the English case of McAlwane v Boughton Estates Ltd [1973] ICR 470 Donaldson J said that tribunals 'should not find an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him'.

[34] The courts look for unambiguous, unequivocal words to amount to a resignation (Hughes v Gwynedd Area Health Authority [1978] ICR 161) and the courts did not find such to be so when the employee was a mental defective and he uttered the words in the heat of the moment after an argument (Barclay v City of Glasgow District Council [1983] IRLR 313).

[35] The notion of a resignation in the heat of the moment was also discussed in Sothern v Franks Charlesly & Co [1981] IRLR 278 and Sovereign House Security Services Ltd v Savage [1989] IRLR 115 (CA) where resignation was held not to be effective which was that of 'an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into the decision by the employers'.

[36] In Sothern's case Dame Elizabeth Lane said the following:

'Those were not idle words or words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously. Nor was it a case of

employers anxious to be rid of an employee who seized upon her words and gave them a meaning, which she did not intend. They were sorry to receive the resignation and said so.' "[1]

Was the applicant constructively dismissed?

[32] The first question to be determined is whether the applicant in effect resigned when she referred the first dispute to the Bargaining Council. It is true that she selected the dismissal option on the referral form and inserted the word 'constructive' into the phrase unfair dismissal. Without anything more, I would agree with the submission of the respondent's counsel, Mr Dodson SC that, the employer would have been entitled to assume that the applicant had indeed resigned. I agree also that even if I accept that the reason why the applicant chose the option she did on the mistaken advice of bargaining Council staff, the focus of the test is an objective one, and the applicant's subjective understanding of why she selected that option does not assist her if the employer was unaware of her confusion at the time. However, in interpreting the meaning of the referral, a reasonable employer could not base its view on only one part of the referral form. Anyone reading the section dealing with the relief sought by the applicant, must have realised that the remedies she was seeking concerned the normalisation of aspects of her work relationship and not consequential relief following the termination of the relationship. That does not satisfy the requirement alluded to in the judgment above that the conclusion she had resigned had to be based on "evidence [of] a clear and unambiguous intention not to go on with [her] contract of employment."

[33] Moreover, the respondent chose to interpret the applicant's continued presence in the workplace as evidence that she was working out her notice even though there was nothing in the referral to indicate that her supposed resignation was not immediate, which is commonly the case in constructive dismissals. Interestingly, the Premier made no attempt to clarify whether this was the applicant's intention, and excluded from

[1] At 704-706

consideration the alternative and more plausible explanation for her continued presence at the workplace in the light of the relief she had asked for, namely that she had not intended to resign by making the referral.

[34] As such, the applicant's referral did not terminate the contract of employment as an act of resignation consequent on repudiatory conduct of the Premier, even if she might hypothetically have been entitled to claim she had been constructively dismissed at that stage. Consequently, the referral of her dispute could not bring an end to her employment relationship with the respondent.

[35] The respondent nonetheless decided, on a narrow and selective reading of the referral form, to construe it as a resignation and an allegation of constructive dismissal. In a somewhat convoluted fashion, on the advice of its lawyers, it fashioned its response of 8 July 2010. The response appears, possibly unintentionally, to conflate resignation with an act of repudiation. An act of resignation is a unilateral act which requires no further action by the employer party to bring the contract to an end.[2] In this instance, the employer construed the referral as a resignation on notice on the one hand, but on the other, treated the "resignation" as an act of repudiation which it relied on to terminate the contract. This dualistic approach was reiterated in the Premier's subsequent letter of 3 August 2010 (see paragraph [21] above), in which the Premier denied ever dismissing the applicant but reaffirmed that the applicant's action, which it construed both as a resignation and a repudiation, had been accepted by it. Given that the applicant had not in fact resigned and therefore had not terminated her employment herself, the only alternative is that it was the employer's decision to treat the relationship as having

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[2] See ***Lottering and Others v Stellenbosch Municipality*** **(2010) 31 *ILJ* 2923 (LC)** at [24]:

"...[A]s a matter of principle a decision to terminate on notice can never be a repudiation or a breach although the failure to properly give notice may do so. The breach is not the decision to terminate but the failure to give proper notice - a breach that entitles the employer to hold the employee to the contract (i.e. what is left of it) which means holding them to work their notice in full or to cancel the contract summarily and sue for damages."

ended. Whatever its reasons, the effect of the letter of 8 July 2010 was unequivocal: the applicant's services had been terminated and it dealt with her on that basis from that point onwards.

Was the applicant's dismissal automatically unfair?

[36] The applicant's claim that the termination was automatically unfair rests on an assertion that the reason for the employer ending her employment was because she exercised her right to refer an unfair labour practice claim to the bargaining Council. In a superficial sense, it is fair to say that her first dispute referral in June 2010 is what precipitated the employer's termination of her service. However, it was never seriously suggested to the respondent's witnesses that the reason it had terminated the applicant's service was in retaliation for her exercising that right. The referral might have provided an opportunity for the employer to seize upon as a basis for ending the applicant's employment, but it was not because she had exercised her rights, but because the employer believed it was entitled to, under the law of contract. Consequently, it was not the exercise of her rights but the employer's interpretation of the contractual consequences of her action which was the reason for terminating her services.

Does the court have jurisdiction to consider whether the respondents termination of the applicants services was substantively and procedurally unfair ?

[37] It is true that in paragraph 4.8 of the pre-trial minute, one of the issues identified by the parties for the court to determine was an alternative claim that "...(i)n the event that the applicant was dismissed, whether the dismissal of the applicant is unfair in that the respondent did not have a fair reason to dismiss and the dismissal was effected without following a fair procedure." Approximately two months before trial, the respondent filed a notice of intention to amend its answering statement. The applicant did not object to the amendment being made, and consequently the amendment must be given effect to. The aim of the amendment was twofold: one was to introduce an alternative defence of estoppel to the

applicant's claim that she had not terminated or repudiated her contract of employment, and the other was to raise a jurisdictional question concerning the court's power to determine her alternative claim of unfair dismissal on grounds that it was substantively and procedurally unfair.

[38] In the course of the hearing, the respondent abandoned the estoppel defence, but persisted with the jurisdictional objection. Mr Moshoana, who appeared for the applicant argued that the pre-trial minute encapsulated an agreement by the parties to allow the Court to determine the applicant's alternative dismissal claim sitting as an arbitrator under section 158 (2) (b) of the LRA. That section provides:

> *"(2) If at any stage after a dispute has been referred to the labour court, it becomes apparent that the dispute would have been referred to arbitration, the court may-*
>
> *(a) ...*
>
> *(b) With the consent of the parties and if it is expedient to do so continue with the proceedings with the court sitting as an arbitrator, in which case the court may only make an order that the Commissioner or arbitrator would have been entitled to make."*

[39] The applicant maintained that the pre-trial minute encapsulated a binding agreement on the parties, which the amendment to the answering statement could not alter. Both parties invoked the authority of the Labour Appeal Court decision in ***National Union Of Metalworkers of SA & Others v Driveline Technologies (Pty) Ltd & Another*** **(2000) 21 *ILJ* 142 (LAC)** in support of their respective arguments.

[40] The first issue that case disposes of is the respondent's jurisdictional objection to the court dealing with the matter as an ordinary unfair dismissal dispute because such a dispute was not referred to the bargaining Council. In *Driveline*, the union party had referred an alleged unfair dismissal for operational reasons to conciliation. Subsequently, the union sought leave to amend its statement of case to include a claim of automatically unfair dismissal. The LAC dismissed the employer's

argument that the Labour Court had no jurisdiction to entertain the latter dispute because that was not the dispute which was referred to arbitration. It held that such an approach would undermine the very purpose of the dispute resolution mechanisms in the LRA.[3]

[41] In this instance, paragraph 6.1.6 of the respondent's answering statement or the respondent identified as one of the issues to be determined on the following:

> *"In the event that the applicant was dismissed, but not in an automatically unfair manner, whether this Honourable Court should determine the fairness or otherwise of the applicants dismissal or dismissed this claim; ..."*

[42] It seems clear to me from this paragraph the question whether or not this Court should entertain an ordinary unfair dismissal dispute was clearly within the scope of the pleaded dispute between the parties. It is arguable that when the issues were framed at the pre-trial conference that this jurisdictional question was not pursued. However, the proposed amendment revived the issue in an even more explicit form and the applicant did not object to the amendment being made. In the *Driveline* case, Zondo, JP (for the majority) held:

> *[94] I think I find support in certain authorities for my view that, generally speaking, a pre-trial minute redefines those issues which appear from the pleadings (and not issues relating to a cause of action which falls outside the ambit of the pleadings). In Filta-Matix at 614C Harms JA, speaking in the context of the object of rule 37 in the High Court, said: 'If a party elects to limit the ambit of his case, the election is usually binding.' I think this sentence may well support my view because the election to limit one's case that is referred to must be a reference to the limiting of one's case as pleaded and not as can be pleaded at a later stage if an amendment is granted by the court. Also, when Harms JA refers at 614B to the object of rule 37 in the High Court as being*

[3] *Driveline* at 151-154, [35]-[46].

'to limit issues and to curtail the scope of litigation', this must, in my view, be a reference to limiting issues as they appear from the pleadings

[95] In the light of all the above I conclude that the appellants are not precluded by the pre-trial minute from seeking to amend their statement of claim so as to rely on an allegation that their dismissal was an automatically unfair dismissal."

[43] In this matter, I see little to distinguish the position of the respondents from that of the appellants in the *Driveline* matter. Moreover, unlike that case the respondent had originally raised the jurisdictional question in its answering statement. On the authority of *Driveline* the respondent was entitled to raise the matter afresh and in the absence of the amendment being opposed. Even if the pre-trial minute can be construed to encapsulate an agreement under section 158 (2) (b) of the LRA it would be completely anomalous to regard the pre-trial minute as unaffected by the amendment. If the applicant wished to object to the amendment on the basis of the alleged agreement in the pre-trial minute, it had the opportunity to oppose the amendment but did not do so.

[44] In the circumstances, I am satisfied that once the amendment had not been opposed the issue of this court's jurisdiction was clearly on the table regarding the alternative dismissal claim and the pre-trial minute in that respect can no longer be regarded as the final word on whether or not the parties had consented to this court hearing the alternative dismissal claim as an arbitration. Consequently, I am satisfied that there is not a binding agreement empowering this court to determine the dispute. Accordingly, that dispute must be determined in arbitration proceedings.

Costs

[45] The applicant has been successful on the jurisdictional question of whether or not she had been dismissed and the respondent has been successful on the question of whether or not her dismissal was automatically unfair and if this court has jurisdiction to hear her

alternative claim of unfair dismissal. In the circumstances, it seems fair and equitable that each party should bear its own costs for these proceedings.

Order

[46] In light of the analysis and my findings above,

46.1 I find that the applicant was dismissed by the respondent on 8 April 2010.

46.2 Further, the applicant's dismissal was not automatically unfair.

46.3 The determination of a dispute over the substantive and procedural fairness of the applicant's dismissal is referred to the General Public Services Sectoral Bargaining Council for arbitration, and proceedings on that dispute are stayed in this court.

46.4 Each party must pay its own costs for the Labour Court proceedings.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: G N Moshoana of Mohlaba & Moshoana Inc.

FIRST RESPONDENT: A Dodson, SC instructed by Bowman Gilfillan Inc.