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- (1) REPORTABLE: YES/NO.
- (2) OF INTEREST TO OTHER JUDGES: YES/NO.
- (3) REVISED.

29/09/21

DATE

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS991/20

In the matter between:

CLEMENCE MATUNGA

Applicant

and

G and R HYDRAULICS (PTY) LTD

Respondent

Heard: 9 July 2021

Delivered: (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 29 September 2021)

JUDGMENT

MAHOMED, AJ

Introduction

- [1] The applicant approaches this Court on the basis of an alleged automatically unfair dismissal.¹
- [2] The controversy between the parties relates to whether the automatically unfair dismissal claim has been timeously referred to the Labour Court under section 191 of the Labour Relations Act² (the LRA). Under which subsection is ultimately the question for determination in this matter and for reasons which appear below.
- [3] The respondent contends in its Response to the statement of claim by way of a Special Plea that this Court has no jurisdiction in that the filing of the statement of claim is late and that condonation has not been sought by the applicant. The applicant argues that condonation is not required. To determine this question, it is necessary to unscramble a complicated jurisdictional egg peppered with facts which go back to a period shortly before the cursed Covid-19 pandemic reached South African shores in 2020. I do so with reference to the common cause facts which are set out in the pre-trial minute³ and the papers which comprise the bundle of documents filed in the interlocutory proceedings.
- [4] The applicant initially referred an unfair suspension dispute to the MEIBC on 17 January 2020. The basis of the claim is a challenge to a final written warning issued against the applicant ("the unfair labour practice"). The unfair labour practice dispute was unsuccessfully conciliated on 5 February 2020 on which date a certificate of deadlock was issued by the MEIBC.

¹ The relief sought in the statement of claim which is dated 3 December 2020 (the court stamp is dated 30 December 2020) is more extensive in that the applicant seeks:

"payment for hours worked....;

compensation for an automatically unfair dismissal alternatively, unfair dismissal;

compensation for an unfair labour practice"

² No. 66 of 1995, as amended.

³ A minute was signed on 25 March 2021.

- [5] The applicant then on 17 March 2020 referred an unfair dismissal claim to the MEIBC. The referral however categorises the dismissal as one based on misconduct. The applicant cannot be blamed for this as the referral makes no reference to an automatically unfair dismissal and he does not appear to have been legally represented at the time in any event. The applicant however foreshadows in his referral that his claim is one automatically unfair.
- [6] The MEIBC enrolled the dismissal dispute for conciliation on 16 April 2020. Conciliation however did not take place on the day because of the "*hard lockdown*" imposed in late March 2020 because of the pandemic. On 14 August 2020 in the absence of a conciliation taking place or a certificate of deadlock being issued, the applicant referred the dismissal dispute to arbitration in the form of challenging a misconduct dismissal. There is a dispute about whether the applicant obtained condonation for the alleged late referral to arbitration of the misconduct dispute. This dispute is however irrelevant in that the applicant asserts that his dismissal is automatically unfair. There is accordingly no reason for me to consider the submissions on this issue any further as raised in the Special Plea as will be apparent for the reasons set out further below.
- [7] On 8 September 2020 the MEIBC issued a ruling consolidating the unfair labour practice with the dismissal dispute. It appears that the consolidated dispute was then enrolled for arbitration on 3 December 2020. Another Commissioner of the MEIBC on such date then ruled that the dispute is an automatically unfair claim and that the MEIBC consequently lacked jurisdiction. This is correct and the Commissioner cannot be faulted in the conclusion where this is indeed the assertion of the applicant that his dismissal is automatically unfair. Whether the applicant is ultimately successful with such claim is to be determined by this Court and is a question for another day.
- [8] However, before the Labour Court gets to interrogate if the dismissal is automatically unfair there are jurisdictional gates through which the applicant must pass.

- [9] Against the background sketched above, the question now arises, does the Labour Court have jurisdiction to adjudicate the automatically unfair dismissal which was referred to the Labour Court in December 2020. This begins against the backdrop of an unfair dismissal dispute having been referred to the MEIBC in the first instance.
- [10] It is not lost to me that this matter is well advanced in the Labour Court process with the parties having already filed a pre-trial minute. Outside of this skirmish the applicant would have been in a position to effectively apply for a trial date. He is prevented from doing so because of the jurisdictional objections which are presented by these set of facts and these first need to be unraveled. To do so means to unpick at a complex set of authorities which implicate this question in one way or another.

The statutory position

[11] 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;

- (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.”

[12] The precursor to section 191 however is section 135 which provides that:

135. Resolution of disputes through conciliation

- (1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.
- (2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However, the parties may agree to extend the 30-day period.
-
- (5) When conciliation has failed, or at the end of the 30day period or any further period agreed between the parties –
 - (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved"

Section 135(5) is of relevance as will emerge further below.

[13] The applicant has satisfied the initial jurisdictional prerequisites and there is no dispute around this aspect. The applicant referred the dismissal dispute within 30 days to the MEIBC for conciliation under section 135(1) read with section 191(1). Specifically, he referred "*a dispute about the fairness of [his] dismissal*". He categorised his dismissal as relating to an unfair dismissal based on misconduct. The phase pre-conciliation is concerned not so much

with the underlying reason for the dismissal as opposed to ensuring that a dismissal dispute is timeously filed.⁴

[14] Depending on the reason for the dismissal, once conciliation fails to resolve the dispute, the 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)(a), then he may ask the bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate the dispute. (For convenience, I am only going to refer to the CCMA in the remainder of this judgment even though this matter was before the MEIBC). The other option is that the employee may refer the dispute to the Labour Court for adjudication under section 191(5)(b). This is an important distinction⁵.

[15] Theron J writing for the majority in *September and Others v CMI Business Enterprises CC*⁶ noted that commissioners have three functions: to resolve disputes; to identify the nature of the dispute and to make recommendations to the parties. These functions are not merely clerical and inevitably call for application of the mind, discretion and some adjudication and these functions are effectively to be exercised at the stage contemplated under section 135 as set out above. This is at the stage of conciliation. This clearly did not occur in this matter as there was no conciliation of the dismissal dispute.

[16] Now, section 135(5) comes into play. But, this section must be read specifically with section 191(5) which provides that:

“(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved-

⁴ In *AMCU and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others 2020 (7) BCLR 779 (CC)* the court held at paragraph 18 that: “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”.

⁵ See paragraphs 84 onward in *Sidumo and Another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC)

⁶ (2018) 39 ILJ 987 (CC)

- (a) the council or the Commission must arbitrate the dispute at the request of the employee if -
 - (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;
 - (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
 - (iii) the employee does not know the reason for dismissal; or
 - (iv) the dispute concerns an unfair labour practice;

[17] Section 191(5)(a) effectively provides that an employee alleging any form of dismissal dispute set out in 191(5)(a)(i) – (iv) must refer to arbitration after either of the following events:

If a Commissioner has certified that the dispute remains unresolved – this may occur within a period shorter than 30 days after the referral to conciliation; or

14.2 Once 30 days (or any further period as agreed between the parties) has expired since the Commission received the referral.

[18] So, an employee who alleges a dismissal dispute in the above circumstances, 90 days after either of the above circumstances is to refer the claim to arbitration. This it appears is in fact what happened in this case. The applicant after the lapsing of 30 days after the MEIBC received the referral referred his dispute to arbitration. At the time the applicant labouring under the belief that his dismissal was for misconduct and accordingly under section 191(5)(a) to be referred to arbitration.

[19] However, section 191(5) is not straightforward in its formulation. It provides that in respect of the category of dismissal claims which are to be pursued in the Labour Court that section 191(5)(b) applies with a reading of section 191(11). This is the pool into which the applicants claim falls and it is accordingly necessary to have regard thereto. Section 191(5)(b) reads as follows:

- (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved-
- (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -
 - (i) automatically unfair;
 - (ii) based on the employer's operational requirements;
 - (iii) the employees' participation in a strike that does not comply with the provisions of Chapter IV; or
 - (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

[20] Despite the provisions in section 191(5), section 191(11)(a) then further provides that: *"The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved". (my emphasis)*

[21] This conflicting provisions in section 191(5) and section 191(11)(a) give rise to a great deal of uncertainty. The uncertainty with no surprise arose soon after the promulgation of the LRA. It is now to the authorities which have had to grapple with this and other ancillary issues that I now turn to consider. This judgment will now fall into that line, as I fear despite this judgment, the issue will not rest until there is greater certainty around this debate.

The Authorities on section 191

[22] The Labour Appeal Court (LAC) in 2003 in the matter of *NUM v Heric Exploration (Pty) Ltd*⁷ had to consider a retrenchment dispute which went back to December 1998 when NUM referred a dispute to the CCMA. The 30-day period to conciliate the dispute lapsed on 15 January 1999 by which the certificate of outcome had not been issued. The CCMA only issued a certificate of non-resolution on 18 February 1999. Heric the employer argued that the CCMA is required by the LRA to attempt to conciliate a dismissal dispute within 30 days from the date on which the dispute was referred unless that period has been extended by the parties. If the dispute remains unresolved, the dispute must be referred to the Labour Court, within 90 days for adjudication failing which the Labour Court will have no jurisdiction. The respondent argued that the Labour Court had no jurisdiction because the dispute was referred to the Labour Court after the expiry of 90 days from the expiry of the 30 day period. The Labour Court dismissed the point in limine. The LAC held:

"It was submitted that, where [the CCMA] so certifies outside the 30-day period or the extended period, the statutory 90 days within which the dispute must be referred to the Labour Court runs from the expiry of the 30-day period and not from the date when or after the commissioner certifies or has certified that the dispute remains unresolved. I am unable to agree with this contention. Section 191(11)(a) is clear in its provision that the referral of a dismissal dispute to the Labour Court for adjudication in terms of s 191(5)(b) must be made within 90 days after the... commissioner **"has certified that the dispute remains unresolved."** In any event section 191 which deals with the referral of dismissal disputes to conciliation, arbitration and adjudication does not anywhere provide for such disputes to be referred to the Labour Court for adjudication within 90 days from the expiry of the 30 day period or any extended period".⁸

⁷ (2003) 4 BLLR 319 (LAC)

⁸ Ibid at para 45

[23] However, the Labour Court in *Osenton v Commercial Refrigeration Services (Pty) Ltd*⁹ rejected the argument of the respondent employer that the 90 day time-frame only applies when a certificate of outcome was issued. In this matter Moshoana J, held that on an interpretation of section 191 (11), one must have regard to the provisions of section 191(5)(b) which refers to two instances. The first being the certification and the second being the expiry of the 30 day period coupled with the fact that the dispute is unresolved. Where a dispute continues to exist, it can never be said to have been resolved.

"Therefore the interpretation contended for [the employer] that the time frame only applies to where a certificate is physically issued, is, in my view, wrong and actually absurd. The section understands the word certified to mean the one referred to in the Act in particular section 135(5). Where the reference is made to be certified, it must mean certified after conciliation or after the expiry of the 30 days and the dispute remaining unresolved. Any other interpretation would render the opening phrase of the section superfluous and meaningless. It is nonsensical to suggest that the 90-day period ought to be reckoned from the date on which a party launches an enquiry and he...is told that there shall be no conciliation nor issuing of a certificate".¹⁰ Further at paragraph 11 the court held that: "Accordingly, in my view the prescribed timeframe does apply where the 30 days have expired and the dispute remains unresolved".

[24] However, prior to *Osenton* the LAC again had occasion to consider the issue. This time in the decision of *SAMWU obo Matenza v Ngwathe Local Municipality and others*¹¹. In this matter the employee alleged that he had been unfairly dismissed and referred a dispute to the Bargaining Council on 10 February 2003. Instead of issuing a certificate of outcome, the council erroneously enrolled the matter for arbitration on 1 December 2003. A certificate of outcome was issued only on 15 April 2004. The dispute was referred to arbitration on 24 June 2004.

⁹ (2019) 40 (ILJ) 1843 (LC)

¹⁰ *Id* fn 8 at para 10

¹¹ (2015) 36 ILJ 2581 (LAC).

[25] I pause to point out importantly, that *Matenza* dealt with a referral to arbitration and not to adjudication. This is not an artificial distinction in the LRAe respondent employer in *Matenza* raised a point that the dispute had been referred out of time (to arbitration not to the Labour Court). The arbitrator held that there was no need to apply for condonation since the certificate of outcome had been issued only on 15 April 2004, and the referral made within 90 days of that date. The Labour Court, on review, held that the arbitrator had no jurisdiction to entertain the dispute because it had been referred more than 90 days after the lapse of the 30-day period referred. The lapse of the 30-day period was the earlier event, and the 90-day limit was to be calculated from that date, and not the later date of the issuing of the certificate of outcome in 2004. The LAC framed the issue as follows:

"On a proper interpretation, section 191(5) of the LRA entitles an employee to refer an unresolved unfair dismissal...for arbitration to the CCMA..., in terms of subsection (a) thereof, or for adjudication to the Labour Court, in terms of subsection (b) thereof, upon the occurrence of either of two events: the issue of a certificate of non-resolution of the dispute or the expiry of the 30-day period from...the CCMA's ...receipt of the referral. The effect of this interpretation is that the occurrence of either of these two events entitles an employee to request... the CCMA to arbitrate the dispute in terms of section 191(5)(a) of the LRA or to refer the dispute to the Labour Court for adjudication in terms of section 191(5)(b) thereof..."¹² Furthermore, the court held that: "Whilst the issue of a certificate of outcome by ... the CCMA... may found the right of referral of an unfair dismissal....to arbitration or adjudication prior to the lapse of the 30-day period contemplated in section 191(5) of the LRA, as the right of referral accrues on the issue of such certificate and is, consequently, a prerequisite for a referral to arbitration or adjudication in those circumstances only, the subsection does not impose an obligation on... the CCMA... to issue a certificate of outcome on the lapse of 30 days.... Since the issue of a certificate of non-resolution by the CCMA..., is not a prerequisite for a referral to arbitration in terms of section 191(5)(a) of the LRA, it cannot, in my view, cure the lack of jurisdiction of the CCMA....to arbitrate an unresolved unfair dismissal.....dispute, where such

¹² Paragraph 28

certificate is issued after the elapse of 30 days from the date on which the CCMA...received the referral, and the employee has not sought condonation for its non-observance of that time frame."¹³ And the court further held at paragraph 46 that "It is thus evident from the general scheme of section 191(5) of LRA that either of the two events: the issue of a certificate of non-resolution by... the CCMA ... or the expiry of 30 days from the date on which the CCMA...received the referral and the dispute remains unresolved, entitles an employee to request arbitration or adjudication".

[26] My attention was drawn by Mr Rasmussen to the decision in *NUMSA and Another v BMW (South Africa) (Pty) Ltd*¹⁴ in which case van Niekerk J held on an interpretation of section 191(5)(b) read with section 191(11) that the 90 days for the referral to the Labour Court is reckoned from the date the Commissioner has certified that the dispute remains unresolved.¹⁵

[27] *NUMSA v BMW* thus follows the authority of the LAC in *Hernic*. In *NUMSA and Another v BMW (Pty) Ltd* the dispute was referred to the CCMA for conciliation on 15 February 2018 which process took place on 13 July 2018 and the commissioner issued a certificate of non-resolution. On 11 October 2018, NUMSA referred a dispute to the Labour Court for adjudication. The employer raised a special plea contending that the dispute was referred for adjudication out of time. In dismissing the special plea, the Court relied on *Hernic* and concluded that the remarks of the LAC in *Manentza* are *obiter* to the extent that the *SATAWU obo Manentza* judgment made reference to any referral for adjudication. **The Court held that:**

"[10] The SAMWU judgment was one that dealt with a referral made to a bargaining council in terms of s 191(5)(a). The present case is distinguishable; it is a referral for adjudication made in terms of s191(5)(b). To the extent that the judgment makes references to any referral for adjudication under s191(5)(b), these are *obiter*. Further, it seems to me, contrary to what the respondent submits, that the LAC did not refer to or

¹³ Paragraph 45

¹⁴ (2019) 40 ILJ 1818 (LC)

¹⁵ Van Niekerk J deals with the Constitutional Court judgment in *FandJ Electrical v MEWUSA obo E Mashatola and others 2015 (4) BCLR 377 (CC)*

explicitly overturn *Hernic*. The judgment makes no reference to s191(11), which specifically provides that a dispute be referred for adjudication (as opposed to arbitration) within 90 days of the date that the CCMA certifies that the dispute remains unresolved. There is no corresponding provision that applies to referrals to arbitration. This may well be anomalous, but the plain wording of s191(11) draws a clear distinction between the processes of arbitration and adjudication, and the time limits applicable to each. The Labour Court further held that: "[13] In summary: in the case of a dispute that is required to be referred for adjudication (as opposed to arbitration), s191(11) requires the dispute to be referred within 90 days of the issuing of a certificate of outcome, regardless of the date of which the 30-day period immediately following the date of referral of the dispute expired. The applicant's referral to this Court was made within 90 days of the date of the certificate of outcome, and was thus timeously made. Condonation for a late referral is not required ..."

- [28] I am in agreement with the position expressed by the court in *NUMSA v BMW*.
- [29] The views expressed by the LAC in *Manentza* are clearly *obiter*. The matter before the LAC in *Manentza* related to an arbitration. The matter before the LAC in *Hernic* related to a claim to the Labour Court.
- [30] The question before the LAC in *Hernic* arose by way of a cross-appeal and formed part of the *ratio* which clearly was not upset by the LAC in *Manentza*.
- [31] The matter before this court is one which is referred to the Labour Court and the *ratio* in *Hernic* is accordingly binding. I am thus persuaded by the decision in *NUMSA v BMW*. I am thus not inclined to follow *Osenton*.¹⁶
- [32] I stated earlier that the issue about whether the applicant obtained condonation for the alleged late referral to arbitration of the misconduct

¹⁶ I also pause to mention that *September and Others v CMI Business Enterprises CC* is not authority in support of the approach adopted in *Osenton*, in that in *September and Others v CMI Business Enterprises CC* the question before the Constitutional Court did not relate to the matter which was before the court in *Osenton*. Also, *Osenton* does not deal with the LAC authorities on section 191(5) and (11) which are referred to above.

dispute is irrelevant. I come to this conclusion on the basis of an analysis of a line of authority which ends with the recent Constitutional Court judgment in *AMCU and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others*¹⁷ which dealt with the referral of an automatically unfair dismissal to the Labour Court. The facts in *Ngululu* were brought about by an unprotected strike which resulted in the dismissal of 476 employees. Many of the dismissed employees were members of the AMCU. AMCU referred an unfair dismissal dispute to the Bargaining Council. In the meantime, Ngululu re-employed some of the dismissed employees (none of which were AMCU members). AMCU with no surprise considered the selective re-employment by Ngululu to be a further claim and, again, referred an unfair dismissal dispute to the Bargaining Council.

[33] A jurisdictional point raised by Ngululu at conciliation objecting to the second dismissal dispute was dismissed. Unhappy with the dismissal of the jurisdictional point, Ngululu challenged the ruling on review proceedings in this court. AMCU also approached the Labour Court by initiating proceedings for an automatic unfair dismissal alleging that its members were dismissed based on their union affiliation. Ngululu successfully defended the automatically unfair dismissal in the Labour Court by raising two preliminary points: -

27.1 In relation to the first dismissal; that the Labour Court lacked jurisdiction to adjudicate the dispute as an automatically unfair dismissal was not referred to conciliation;

27.2 In relation to the second dismissal, *lis alibi pendens* was raised. I am in this judgment not going to deal with this aspect any further as it is not a matter which arises herein.

[34] The LAC refused leave to appeal, AMCU thus petitioned the Constitutional Court. The Constitutional Court had to consider, whether the Labour Court had jurisdiction to adjudicate the automatically unfair dismissal cause of

¹⁷ 2020 (7) BCLR 779 (CC)

action where the dispute that was referred to conciliation was that of an unfair dismissal. The Constitutional Court held that the Labour Court had jurisdiction to adjudicate the automatically unfair dismissal claim. The court considered section 191 of the LRA which requires dismissed employees to refer disputes about *"the fairness of a dismissal to conciliation"* and if conciliation fails and the employee alleges that the reason for the dismissal is one listed in section 191(5)(b) of the LRA¹⁸, the employee may elect to refer the dispute on the basis set out therein.

- [35] The court emphasised that *"what is referred to conciliation is the dispute and not the cause of action or claims which may arise from the dispute"*. This is a confirmation of the position adopted by the Constitutional Court previously and now settles the debate which has raged for over two decades in the Labour Courts on this question and endorses recent Constitutional Court cases where this issue was also raised.¹⁹ The Court noted that the reason for the dismissal is always known by the employer prior to conciliation and it is often only at this juncture where employees understand the true reason for the dismissal. This comment is to be read against the authorities which deal with the duty of a conciliating Commissioner.
- [36] The Constitutional Court rejected the Labour Court's view that: *"a referral to conciliation of an unfair dismissal dispute does not include an automatically unfair dismissal dispute"* and that accordingly in terms of section 157(4) of the LRA the Labour Court may refuse to adjudicate the dispute if the automatically unfair dismissal was not conciliated. The Labour Court did not consider the fact that what is referred to conciliation is the unfairness of the dispute, be it automatic or not, and not the reason for a dismissal.
- [37] However, *Ngululu Bulk Carriers* does not in my view upset the dicta of the LAC in *NUM v Heric*²⁰ despite what the court held at paragraph 21 in *Ngululu*

¹⁸ Automatically unfair, operational requirements, participation in an unprotected strike and the employees' refusal to join, refused membership or expulsion from a trade union or closed shop agreement

¹⁹ See the references to the cases cited in ft 8 below.

²⁰ *NUM v Heric* is not referenced by the Constitutional Court.

Bulk Carriers where it said that: "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 reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal!" (own emphasis).

- [38] There is no practical interpretation of *Ngululu Bulk Carriers* in my view which avoids the criticism of the Labour Court judgment (*in Ngululu Bulk Carriers*) to the present facts²¹ save for reconciling the *Ngululu Bulk Carriers* dicta with the LAC decision in *NUMSA v Driveline Technologies (Pty) Ltd and Another*²² where the court held at paragraph 40 - 41 that: "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!". (my emphasis). *Driveline Technologies* was affirmed by the Constitutional Court in a number of decisions.²³
- [39] It is also of significance that the LRA Form 7.11 (which is promulgated under Regulation) does not feature an automatically unfair dismissal as a specific form of dismissal claim (i.e. cause of action). This is obviously to avoid complexity in the completion of the referral. It is at conciliation that the Commissioner in pursuit of his/her statutory obligations directs the matter to arbitration or adjudication. This is clearly the intent in section 191(5) read with the duties of a Commissioner.
- [40] Not for a moment, are the statutory duties of the CCMA and its Commissioners to be underestimated. In the early 1990's a policy decision was taken to overhaul the 1956 Labour Relations Act and thrust industrial

²¹ Where there was no conciliation of the dismissal dispute

²² 2000 (4) SA 645 (LAC)

²³ *NUMSA v Intervolve (Pty) Ltd* (2015) 36 ILJ 363 (CC); *AMCU v Ngululu* supra; *September and Others v CMI Business Enterprises CC* (2018) 39 ILJ 987 (CC)

relations disputes into a new dispute resolution scheme. Central to such process is conciliation and the right to conciliation in circumstances vastly different to the arrangement under the apartheid era legislation.

- [41] The democratic dispensation birthed the CCMA and I can do no better than quote Navsa AJ writing for the majority in *Sidumo Another v Rustenburg Platinum Mines Ltd and Others*²⁴ where he remarked that:

"employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated".

- [42] Whether we can as a developing country afford the Rolls Royce system we have in place, is not a question for this court. It is the system we have in place and must be applied. I make this point because I have had regard to the decision of my brother Mofokeng AJ in the as yet unreported judgment in *Charles William Joseph Weller V Absa Bank Limited*²⁵ which comes to the contrary conclusion to me in finding that for purposes of section 191(5) of the LRA, a certificate of non-resolution is not a *sine qua non* for referral of a dispute to the Labour Court for adjudication.²⁶ Mofokeng AJ analyses *Manentza* and finds that it is not *obiter* and then proceeds to rely on an interpretation of s191 based on expeditious dispute resolution to come to his conclusion. I respectfully must decline to follow the lead in *Weller*.

- [43] Where the *Manentza ratio* is as suggested in *Weller*, then *stare decisis* obliged the court in *Weller* to follow such course and not to engage in a further interpretation of section 191(11) read with section 191(5). I reiterate my view that *Manentza* was *obiter*.

²⁴ [2007] 12 BLLR 1097 (CC) at paragraph 75

²⁵ (JS850/20) [2021] ZALCJHB 207 (2 August 2021)

²⁶ *Ibid* at para 30

Where does this leave the applicant?

- [44] The reason which the applicant is relying upon to pursue his dispute is an automatically unfair dismissal and this became apparent it would seem only in early December 2020 which gave rise to the jurisdictional ruling. It is this aspect which is the missing piece in the jurisdictional quagmire which comes before the court for determination of the remaining Special Plea raised by the respondent.
- [45] It is apparent that no Commissioner of the MEIBC has issued a certificate of deadlock in respect of the dismissal dispute. If there was a conciliation the Commissioner pursuant to her duties as noted in *September v CMI Business* would have identified the dispute as an automatically unfair dispute and had this not been resolved would have issued a certificate of deadlock. The 90 day clock would then only have commenced for the referral to the Labour Court. But, there was no conciliation and in the absence of a certificate of deadlock, the 90 day period for the referral of the dispute to this court under section 191(11)(a) has not even begun to commence.
- [46] This is an oddity under the LRA but one cleared on the basis set out above where a Commissioner at conciliation assists the employee by directing the matter to arbitration or the Labour Court. I must accordingly conclude that the automatically unfair dismissal claim is accordingly prematurely before this court.
- [47] What then is to become of this claim which has progressed so far down the Labour Court track? Well in the absence of a Commissioner certifying that there was deadlock at conciliation, this court has no jurisdiction to adjudicate the automatically unfair dismissal. As harsh as this may be (to the applicant), it is trite that a court must have jurisdiction to consider the dispute. This court lacks jurisdiction.
- [48] It was not competent for the Commissioner in September 2020 to make a ruling on consolidation in that there was no conciliation of the dismissal

dispute. Also, it was not for the Commissioner to consolidate an unfair labour practice dispute with an automatically unfair dismissal claim in that such consolidated claims cannot be further determined at arbitration. Alas, a consolidation ruling was issued in respect of a dispute the Commissioner at the time believed was a misconduct dismissal.

[49] Whilst the Commissioner in December 2020 came to conclude that she had no jurisdiction in respect of an automatically unfair dismissal and ruled that the dispute was to be referred to the Labour Court, what she did not interrogate was whether a certificate of deadlock was issued in respect of the automatically unfair dismissal. She was obligated to have done so and she did not do so.

[50] Both the consolidation and jurisdictional rulings have the force of law until set aside on review. Accordingly, until these rulings have been set aside and a certificate of deadlock issued in respect of the automatically unfair claim this court may not proceed with the current matter. There is simply no jurisdiction for this court to adjudicate upon the automatically unfair dismissal claim and it must decline to deal with the matter any further.

[51] Fortunately, for the applicant he is not outside the 90 day period in having his claim adjudicated by the Labour Court. He however needs to first make his way out of a messy jurisdictional labyrinth before he may again engage the attention of this court on his claim that his dismissal was automatically unfair.

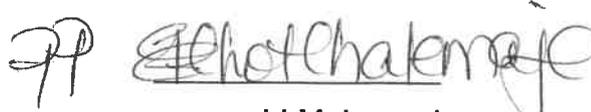
Costs

[52] I heard extensive argument on the day in respect of the issue of costs. This question is sufficiently complex that there be no order for costs. The law on this issue was not as clear as one would have liked it to be and I dare say, until the LAC again is called upon to decide will probably remain the sad position.

[53] In the premises the following order is made:

Order

1. The Labour Court does not have jurisdiction to adjudicate the claim of an automatically unfair dismissal in that the MEIBC has not issued a certificate of deadlock under section 191(5)(b) read with section 191(11) of the Labour Relations Act, 66 of 1995, as amended ("the LRA").
2. The claim filed by the applicant under the above case number is stayed pending:
 - 2.1 The finalisation of an application to be launched by the applicant to review and set aside the rulings issued by the MEIBC under case numbers: MEGA55697 and MEGA56063 dated 08 September 2020 and dated 03 December 2020 respectively;
 - 2.2 Should the applicant be successful in the review application, the MEIBC is then directed to either enroll the automatically unfair dismissal claim for conciliation or issue a certificate of deadlock in respect of the automatically unfair dismissal claim;
 - 2.3 Within 30 days thereafter the applicant is to file a supplementary statement of claim establishing the jurisdiction of this court in respect of the automatically unfair dismissal whereafter the dispute of an automatically unfair dismissal will further proceed in this court.
3. Should the applicant not file the review application referred to in 2.1 within 30 days of this order, the order to stay the automatically unfair dismissal claim will automatically lapse and in such instance the order in paragraph 1 will come into effect.
4. There is no order for costs.

 I.I. Mahomed

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the applicant : Mr A Rasmussen of Jayshree Juglal Attorneys

For the Respondent: Mr Higgs of Higgs Attorneys

LABOUR COURT