IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: J324/97

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Appellants

and

DRIVELINE TECHNOLOGIES (PTY) LTD First Respondent

DORBYL LTD Second Respondent

JUDGEMENT

CONRADIE JA

[1] This is an appeal against a refusal by the court *a quo* to grant an application for amendment to the appellants' statement of case. The individual appellants contend that their dismissal for operational reasons was unfair because the respondent had not fully complied with its obligations under section 189 of the Labour Relations Act 66 of 1995 ('the Act'). The amendment which was disallowed sought to attack the fairness

of the dismissals, one supposes in the alternative, on the footing that they were automatically unfair in terms of section 187(1)(c) of the Act.

[2] I should say in passing that the Act in section 173(1)(a) provides that only appeals against final orders and final judgments of the labour court are appealable. It was not argued that the refusal of the amendment by the court *a quo* was anything other than a final order. (see: *South British Insurance Co Ltd v Glisson* 1963 (1) SA 576 (D))

[3] During November 1996 the respondent had purchased the business of TMI Propshafts ('TMI') as a going concern. The employment contracts of all TMI employees were transferred to the respondent. I refer to it as 'the respondent' because it has become common cause that the second respondent should not have been cited as a party to the application.

[4] During January 1997 there were discussions between the respondent, its employees and the first appellant concerning the amalgamation of TMI's business, which was conducted at Selby in Johannesburg, with the respondent's operations which were conducted at Spartan in Kempton Park. One of the difficulties which came to the fore

during these consultations was that some of the TMI employees would not relocate to the Spartan premises unless a transport allowance was paid to them. Another concern of the former TMI employees was that at Selby they were paid a canteen allowance which the respondent's employees at Spartan were not. They insisted upon not losing their canteen allowance. The respondent advised the Selby employees that anyone who was prepared to work at Spartan without a transport or a canteen allowance would be employed there. The others would be dismissed.

[5] The application for the amendment was opposed, the respondent alleging that the application was late, that a dispute involving an automatically unfair labour practice had not been 'processed in terms of the dispute resolution mechanisms … of the Act' that the conclusion of a pre-trial agreement precluded the granting of the amendment and that the respondent would, if the amendment were to be allowed, suffer incurable prejudice.

[6] Mr Pretorius who appeared for the respondent argued that the conciliation of the dispute concerning an automatically unfair dismissal was a jurisdictional precondition to a consideration of the matter by the labour court. Since this particular question had not been submitted to conciliation it could not now, by way of amendment, be introduced as an issue before

the court.

[7] It has often been held that unless a dispute had been referred for conciliation to an industrial council or a conciliation board, the industrial court had no jurisdiction to determine it. (See, by way of example, *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others* [1994] 9 BLLR 1 (LAC) at 3 D, one of the latest cases on the topic). The decisions were based on the wording of section 46(9)(a) of the Labour Relations Act 28 of 1956 which provided that 'the industrial court shall not determine a dispute regarding an alleged labour practice unless such dispute has been referred for conciliation…'

[8] There is in the Act no comparable provision which might be thought to impose preconditions to a labour court's jurisdiction. Section 157(4)(a) provides that the labour court may refuse to determine a dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. The court clearly has jurisdiction: it may or may not, in its discretion, determine a dispute which has not been submitted to conciliation. Subsection (4) finds itself in a section dealing with jurisdiction. I do not think that I should pay too much attention to that. The subsection does not really belong where it is. Subsection (1) gives the labour court "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". This jurisdiction should not in my view be made to depend upon the parties' compliance with prescribed procedures. A court may and, absent special circumstances, probably will, refuse to entertain a dispute if a party has not done what was supposed to have been done to bring it before the court. This is the party's fault. It may very well deprive him or her of a hearing. It does not deprive the court of jurisdiction. Obligations imposed on parties are not usually intended to be jurisdictional preconditions. I think that regarding them as such in the Act will lead to a resurgence of the kind of point that made the industrial court a forensic minefield. Non-compliance with conciliation formalities made the court powerless to deal with certain issues other than to declare itself powerless. I do not consider that one should travel that road again. In exercising its discretion the court will undoubtedly ask itself whether the dispute, in the sense of the essential quarrel between the parties, had been submitted to conciliation. It is the factual matrix which should be looked at. The idea of the Act, after all, is that parties should, in the presence of a knowledgeable outsider, have an opportunity of talking over their differences before going to court. What is discussed before the conciliator are the difficulties in the way of the parties' working together. The legal characterisation of a particular set of facts is irrelevant.

[9] The certificate which a mediator is obliged to issue in terms of section 135(5)(a) of the Act requires a statement only that the dispute has remained unresolved. Naturally enough the conciliator would state *what* dispute remained unresolved, otherwise the certificate of outcome would be unsatisfactorily vague. It would not serve to alert the labour court to what the parties had discussed in the conciliation phase. But it has no bearing on the future conduct of the proceedings. The forum for subsequent proceedings is determined by what the employee alleges the dispute to be. According to this characterisation, the employee may either request the commission to arbitrate the dispute or may refer it to the labour court. It is unnecessary to consider here what the consequences are if the employee's categorisation of the dispute turns out to be incorrect. In the present case, the dispute could, so the appellants allege, either have been classified as an unfair dismissal for operational reasons in terms of section 188(1)(a)(ii) or as an automatically unfair dismissal in terms of section 187(1)(c) of the Act – to compel the employee to accept the employer's demand on a matter of mutual interest. In either case the appropriate forum would be the labour court.

[10] Landman J in the court *a quo,* although sympathetic to the application for amendment, considered that he was bound to refuse the amendment by virtue of the decision in *Zeuna Stärker Bop (Pty) Ltd v*

Numsa (1998) 11 BLLR 1110 (LAC). The *Zuena Stärker* decision dealt with an appeal against a decision of the labour court upholding a review application. The appellant sought to review the decision of a CCMA commissioner who found that he lacked jurisdiction to conciliate a dispute because it had arisen before the Act came into operation. The labour court held that the commissioner had erred in investigating the facts of the matter. He should only have considered the assertion of the party referring the dispute for conciliation. The labour appeal court upheld the labour court's order reviewing the decision of the commissioner but disagreed with the judge *a quo* that the commissioner should not have investigated the facts. It held that the commissioner was obliged to enquire into the facts so that he might ascertain the real dispute between the parties in order to decide whether he had jurisdiction to conciliate the dispute.

[11] The decision of the labour appeal court does not mean that the categorisation of the conciliator in the certificate of outcome binds the parties to the dispute. The labour appeal court merely stated that, in a case where it has to be determined whether a dispute arose before or after 11 November 1996, the decision has to be based on the actual facts. This proposition has no implications for the question whether or not the description of a dispute in the certificate of outcome is binding on the parties.

[12] *Numsa & Others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LABOUR COURT) was also relied upon before us. In that case the court, in dealing with an application to amend, said the following –

'[25] In the circumstances, and having regard to ss 135 and 191 of the Act, I am satisfied that as long as the party who refers the matter to conciliation indicates, for example, that the dispute is about his or her dismissal, both on substantive and procedural grounds, despite any specific issue or issues he or she raises with regard to why he or she disputes his or her dismissal to be fair, if the matter is not resolved at the conciliation, he or she is not barred from raising new issues at arbitration or adjudication. A party may not, however, change the nature of the dispute, that is if the dispute referred to conciliation concerns an unfair dismissal, it must be clear whether what is being conciliated is an unfair dismissal relating to (I) operational requirements, (ii) misconduct, (iii) incapacity, or (iv) an automatic unfair dismissal. The commissioner must then in his or her certificate clearly indicate what the dispute it attempted to conciliate concerned and the party intending to take the matter further is bound by the commissioner's determination of the nature of the dispute.'

[13] Landman J understood these *dicta* as support for the proposition that a court is jurisdictionally unable to adjudicate a dispute other than the

one which is described in the commissioner's certificate. Having regard to the terms of his judgment I am not persuaded that Waglay AJ intended to go that far. A party would be 'bound' by the commissioner's categorisation only in so far as the court may conclude that the issues before it had not been ventilated adequately or at all during the conciliation phase and, before hearing the matter, refer it back to the CCMA for this to be done properly.

[14] For these reasons I conclude that the respondent's contention that the labour court lacked jurisdiction to entertain the dispute and therefore correctly declined to grant the amendment ought not to be sustained.

[15] Mr Pretorius also advanced other contentions which were, because of the view it took of the matter, not dealt with by the court *a quo*. He argued that the conclusion of a pre-trial minute indicating that the issue before the court would be the fairness or otherwise of a dismissal for operational reasons, precluded the appellants from thereafter adding another or a different cause of action to their statement of case.

[16] It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issues set out

therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (*Shoredits Construction (Pty) Ltd v Pienaar NO & others* [1995] 4 BLLR 32 (LAC) at 34 C – F) The agreement in *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LABOUR COURT) was not a pre-trial agreement which served to further define issues in a set of pleadings; it was an agreement that the fairness of the sanction imposed on an employee would not be challenged before a CCMA commissioner. It was, quite correctly, held that the commissioner exceeded her powers in then redetermining the sanction. It was an agreement limiting the issues which is usually binding (*Filta – Matrix (Pty) Ltd v Freudenberg & others* 1998 1 SA 606 (SUPREME COURT OF APPEAL) at 614 B – D)

[17] The flaw in Mr Pretorius's argument is that the pre-trial minute in the present case was, on a proper interpretation thereof, not a settlement of any issue between the parties. All it did was to more closely define the issues as they were then perceived to be. There is not the faintest suggestion that the appellants intended to abandon any claim for relief not already incorporated in their statement of case. The contention that by framing the issues as they did the parties intended to exclude every other issue from consideration is not supported by the wording of the pre-trial minute.

[18] It was finally argued that allowing the amendment would cause the respondent irreparable prejudice. The reason for this is said to be that, had the respondent at the conciliation stage been alerted to a claim involving an automatically unfair dismissal, it would then have been in a position to properly assess it liability with a view to effectively engaging the appellants in the conciliation process. I do not find the argument acceptable. The facts were known at the time of the conciliation. It was open to the respondent to assess its risk on the footing that the appellants, properly advised, might very well come to take the view, and to conclude the facts amounted to an automatically unfair dismissal, In any event, any question of prejudice should be dealt with by the trial court.

[19] Mr Pretorius expressed the desire that this court should itself allow the amendment rather than refer it back to the court *a quo*. In the light of the comment from the trial judge that he would have been inclined to allow the amendment had it not been for the impediment which he perceived, and in view of the proximity of the trial date, I think that we should, exceptionally, allow the amendment ourselves. The appellants asked for an indulgence. Opposition by the respondent was not unreasonable. I therefore do not consider that there is, despite the reversal of the order, sufficient reason to interfere with the costs order given in the court below.

The appeal succeeds with costs including the costs of the application for leave to appeal;

The order of the court *a quo* is set aside and replaced by an order reading: 'The amendments sought in the applicants' notice of intention to amend dated 10 May 1996 are granted.

The applicants are to pay the respondent's costs relating to the application including the costs reserved on 19 May 1999.'

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CONRADIE JA

ZONDO AJP:-

Introduction

[20] In this matter argument was heard on the 29th September 1999. On the 11th October 1999 this Court handed down an order. The order was in the following terms:-

"1. The appeal is upheld with costs including the costs of the application for leave to appeal;

2. The order of the Court *a quo* is set aside and replaced with an order reading

"(a) the amendments sought in the applicants notice of intention to amend dated 10th May 1999 are granted

(b) the applicants are to pay the respondent's costs relating to the application for amendment including the costs reserved on 19 May 1999."

[21] No reasons were furnished at the time of the issuing of the order. We decided to hand down the order at the time we did and to furnish the reasons later because it was essential that the outcome of the appeal be made known as soon as possible as the main dispute between the parties was set down for trial in the Labour Court in a matter of about two weeks at the time. Any further delay in the announcement of the result of the appeal could have necessitated a postponement of the trial- a result we wanted to avoid especially because this dispute has been going on for a long time between the parties.

[22] When this Court issued the order referred to above, it was indicated

that the reasons for the order would be furnished in due course. Since then my Colleague, Conradie JA, has prepared reasons for that order as he sees them. I have had the benefit of reading his reasons. Regrettably, the angle from which Conradie JA approaches the matter differs from mine. There are also certain statements in Conradie JA's reasons with which I am unable to agree. In the light of all this I have deemed it necessary that I give my own reasons for the order that we issued on the 11th October 1999.My reasons follow here below.

[23] This is an appeal against a ruling of the Labour Court dismissing an application by the appellants for an amendment of their statement of claim in a matter pending before that court. The ruling is that of Landman J. In order to properly consider the appeal, it is necessary to refer to such facts of the matter are as necessary for the proper understanding of the background to the application for an amendment, its refusal by the court *a quo* as well as the appeal to this Court.

The Facts

[24] The first appellant is the National Union of Metal Workers of South Africa, a registered trade union which is well known in this country and which has members in many companies which deal with metal. The

second and further appellants are, it would appear, members of the union. They were previously employed by the first respondent but were dismissed. No reference will be made to the second respondent as it was common cause that the second respondent should not have been cited. Accordingly the first respondent will be referred to hereinafter simply as the respondent.

[25] The second and further appellants were employed by the respondent. Following upon disagreement on certain issues between the appellants and the respondent, the latter dismissed the second and further appellants. Thereafter a dispute arose between the appellants ans the respondent about the fairness or otherwise of the dismissal of the second and further appellants. Obviously, the appellants maintained that the dismissal was unfair whereas the respondent maintained that it was fair.

[26] The appellants referred that dispute to conciliation in terms of sec 191(1) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**"the Act"**). Sec 191(1) of the Act provides: **"If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to -**

(a) a council, if the parties to the dispute fall within the registered scope of the council; or

(b) the Commission, if no council has jurisdiction".

[27] In referring the dispute to conciliation, the appellants described their dismissal as an **"unfair termination of services of (NUMSA) members (unfair retrenchment)."** Conciliation failed and the dispute was certified as unresolved in terms of sec 191(5) of the Act. In the certificate contemplated in section 191(5) of the Act the dispute was described as an **"alleged unfair termination of services of our members (unfair retrenchment)".**

[28] Later the dispute was referred in terms of sec 191(5)(b)(ii) of the Act to the Labour Court for adjudication on the basis that it was a dismissal for operational requirements. A statement of claim was filed on behalf of the appellants. A copy thereof was also served on the first respondent. The first respondent filed and served a response to the statement of claim.

[29] A pre-trial minute was subsequently agreed to between the parties in terms of which the parties sought to limit the issues which would be the subject of the trial in the Labour Court.

However, prior to the trial, the appellants appear to have had a closer look at the respondent's response to their statement of claim and concluded that, in the light thereof, they wanted to amend their statement of claim.

The amendment would entail an allegation that the dismissal was an automatically unfair dismissal as envisaged in sec 187(1)(c) of the Act in that the reason for the dismissal of the second and further appellants was that the respondent sought to compel them to accept a demand that they should not get a transport.

[30] Subsequently, the appellants made an application before Landman J for an amendment of their statement of claim along the lines indicated above. The respondent opposed the application. After hearing argument, the Court *a quo* dismissed the application. This appeal then ensued.

The appeal

[31] Before us, Mr P. Pretorius SC, who, together with Mr A T Myburgh, appeared for the respondent, opposed the appeal on two grounds. For convenience I will refer to the first ground as the jurisdictional ground and to the second as the pre-trial minute ground. I propose dealing with these two grounds in turn. I deal first with the jurisdictional ground, and, later, with the pre-trial minute ground.

The jurisdictional argument

[32] Mr Pretorius submitted that the dispute which the appellants had referred to conciliation was a dismissal for operational requirements and

that, in effect, by seeking to amend their statement of claim so as to allege that the dismissal was an automatically unfair dismissal, the appellants were introducing another dispute which had not been referred to conciliation. He submitted further that, as such dispute had not been referred to conciliation, the court *a quo* did not have jurisdiction to adjudicate it and, therefore, by implication, it would have served no purpose to allow the amendment.

[33] Mr Pretorius submitted further that, before the Labour Court could have jurisdiction to adjudicate a dispute, there had to have been meaningful conciliation. He said that this was very important from the point of view of the first respondent because the first respondent had to be afforded an opportunity to conciliate the automatically unfair dismissal dispute, especially because an employer who is facing an automatically unfair dismissal claim could be at risk for huge compensation claims under the Act. He also contended that the dispute had been described in the certificate of outcome issued in terms of sec 191(5) as a dismissal for operational requirements and said the appellants were bound by that description of the dispute. From the quotation about of the description of the dispute in the certificate, it will be seen that the dispute was not described as “a dismissal for operational requirements” but as an “ alleged unfair termination of services of our members.”

[34] The fundamental basis of Mr Pretorius' submission is that the appellants' proposed amendment will introduce a new dispute which is distinct and separate from the dispute which was referred to conciliation. The respondent's submission has as its basis the notion that there are two disputes between the parties now, namely, a dispute concerning a dismissal for operational requirements and a dispute concerning an allegedly automatically unfair dismissal.

[35] For the reasons that follow, I am of the view that it is a fallacy to regard the proposed amendment as introducing a new dispute. To my mind, this approach is a result of a failure to appreciate the nature of the dispute between the parties, the event giving rise to the dispute, and the cause of, or the event giving rise, to the dispute and the grounds of each party's case to the dispute.

[36] In a line of cases stretching over many years, it has been accepted by our courts that a dispute postulates, as a minimum, the notion of expression by the parties opposing each other of conflicting views, claims or contentions. (See Selke J (with De Wet concurring) in **Durban City Council v Minister of Labour and Another 1953(3) SA 708 (D)** at 712A). In **Williams v Benoni Town Council 1949(1) SA 501 (W)** at 507 Roper J

said, among other things, that a dispute exists "**when one party maintains one point of view and the other the contrary or a different one".** (see also **SA. Commercial, Catering and Allied Workers Union v Edgar Stores Ltd & Another (1997) 18 ILJ 1064 (LABOUR COURT)** at 1070E to 1079J and the authorities referred to therein.)

[37] The Act makes provision for the resolution of various disputes in the workplace by the employment of certain mechanisms in certain fora. One of such disputes is the dispute that arises between an employee or his union, on the one hand, and, an employer, on the other, when the employer dismisses the employee. That dispute consists of the employee side contending that the dismissal is unfair whereas the employer side contends it to be fair. The Act calls such a dispute a **"dispute about the fairness of a dismissal".** This is to be found in sec 191(1) where the subsection begins by saying: **"If there is a dispute about the fairness of a dismissal ....."**. It must be noted that in sec 191(1) the dispute about the fairness of a dismissal is not described with reference to the reason for the dismissal. It is simply referred to as **"a dispute about the fairness of a dismissal"**.

[38] The Act requires some disputes to be referred to arbitration, and,

others, to adjudication, if conciliation fails. (see Sec 191(5)). Whether a dispute will end up in arbitration or adjudication it must first have been referred to conciliation before it can be arbitrated or adjudicated. Subject to referrals to the Labour Court which the Director of the Commission for Conciliation, Mediation and Arbitration has power to make under sec 191(6) of the Act, it depends on the reason for dismissal as alleged by the employee whether a dispute should be referred to arbitration or adjudication.

[39] If the employee alleges reasons specified in sec 191(5)(a) as reasons for his dismissal or if he does not know the reason for his dismissal, the dispute goes to arbitration. If he alleges reasons specified in sec 191(5)(b), the dispute goes to adjudication by the Labour Court. Some of the reasons for dismissal which the legislature envisages in the Act are those set out in sec 191(5)(a)(I), (ii) and (iii) and in (b)(I)-(iv) of the Act. Sec 191(5)(a) and (b) provide as follows: **"If a council or commissioner has certified that the dispute remains unresolved, or, if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved -**

(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

(iii) the employee does not know the reason for dismissal; or

(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 employee's 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". (underlining supplied).

[40] In my view a reading of sec 191(1) to (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 sec 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 sec 191(1) of the Act.

[41] 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 sec 187(1) which deal with automatically unfair dismissals. It is clear from sec 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.

[42] An amendment of the appellants' statement of claim to the effect that the dismissal is an automatically unfair dismissal will therefore not introduce a new dispute but will simply be an allegation of another reason for dismissal or will be the reason relied upon by the appellants in the

place of, or, as an alternative to, the reason of operational requirements. The dispute remains the same dispute that was referred for conciliation in terms of sec 191(1) of the Act, namely, the dispute about the fairness of the dismissal of the second and further appellants.

[43] To hold that the amendment sought by the appellants will introduce a new dispute altogether would not only be illogical but would render the dispute mechanisms of the Act ineffective, unworkable and nugatory. I demonstrate this below.

[44] Generally speaking a party is entitled to apply for an amendment of its pleadings at any time prior to the Court handing down its judgment. In dealing with such an application, the Court will have due regard to prejudice to the other party. It will also have due regard to such agreement as may exist between the parties on what will not be part of the issues to be decided by the Court. If the allegation by the appellants of a new reason for dismissal other than the one they had alleged earlier created a new dispute which is separate from the dismissal dispute that has been referred to conciliation, two questions would arise. The one is:- in the light of sec 191(1) envisaging a dispute about the fairness of a dismissal, what would the nature of the new dispute be? It can't be a dispute about the fairness of a dismissal because no other dismissal would

be alleged to have occurred after the dismissal that is the subject of the dispute that had already been referred to conciliation. If it cannot be a dismissal dispute, what dispute can it be said to be then?

[45] If the dispute is not a dismissal dispute, as it cannot be, under what section of the Act would it fall to be referred to conciliation if Mr Pretorius' submission that it must still be referred to conciliation were to be accepted? Sec 191(1) cannot be the section under which it can be referred to conciliation because sec 191(1) contemplates dismissal disputes only. Another question that would arise would be: when did that dispute arise? Also another question would be: what event gave rise to the dispute? The date as to when the dispute arose would be required for the purpose of determining whether such dispute is being referred to conciliation within such time as may be prescribed by the Act. That in turn is important in respect of the jurisdiction of both a council and the CCMA.

[46] If the dispute is referred to conciliation outside the prescribed period, the council or the CCMA will lack jurisdiction to conciliate the dispute. (see sec 191(1) read with (2)) unless it grants condonation. However, condonation can only be granted on good cause shown. Another difficulty in the path of the referring party would be that, if the council or the CCMA discovered, as I think it inevitably would, that the dispute being referred for

conciliation relates to the dismissal in respect of which it has already dealt with a dispute, it would hold itself to be *functus officio* and refuse to conciliate the dispute because it would have already issued the certificate referred to in sec 191(5). The result of all this is that the approach we are urged by the respondent to adopt in this matter is one which would render the dispute resolution mechanism of the Act completely unworkable and ineffective. I can find no reason why we should adopt such an approach when there is an approach which we can adopt which would still leave the mechanisms of the Act operative and effective.

[47] In **NTE Ltd v Ngubane & Others (1992) 13 ILJ 910 (LAC)** the now defunct Labour Appeal Court established under the old Act had to consider the correctness or otherwise of a contention that a lock-out which had been instituted by the employer was illegal. The purpose of the lock-out was to compel its employees to agree to the employer's demands for a lesser wage increase than that demanded by the union and the employees and other terms and conditions of employment. The basis of the contention that the lock-out was illegal was that the employer had not applied for the establishment of a conciliation board in terms of sec 35 of the old Act in respect of its demands but had sought to rely on the conciliation board which had been applied for by the union. In terms of the contention, that conciliation board was in respect of the employee

demands and not the employer's demands. It was contended that because of this the lock-out was illegal.

[48] In **NTE** the Court rejected the argument referred to above. It held that the fact that in respect of wages and other terms and conditions of employment the employer had its own demands and the union had its own demands did not mean that the parties' respective demands constituted different disputes. The dispute was the same but it was made up of demands and counter-demands. (see Page J at 620 H-J). Applying the same reasoning to the case before us, I would say that a dispute about the fairness of a dismissal remains the same dispute whether or not the reason alleged as the reason for dismissal is changed, withdrawn or added to. The mere allegation of another or an additional reason for dismissal or the mere allegation of another ground of alleged unfairness does not change one dismissal dispute into as many dismissal disputes as there are alleged reasons for the dismissal or into as many disputes as there are grounds of alleged unfairness. If this was not the case, an employer could frustrate the entire processing of such a dispute by the mere device of keeping on changing the alleged reasons for dismissal.

[49] In the same way that at 620 H-J in **NTE** Page J said the bilateral demands between an employer and a union did not constitute two disputes

but one dispute and that they were two facets of the same dispute, I would also say that the allegations by the appellants initially that the dismissal was a dismissal for operational requirements or retrenchment and the appellants' allegations later that this was an automatically unfair dismissal do not each constitute a dispute on its own but are alleged reasons for the same dismissal about the fairness of which the parties have a dispute.

[50] Of the contention that he had to consider in NTE, page J had the following to say at 620J-621A:- **"In fact, this view, taken to its logical conclusion, would require each party to apply afresh for the establishment of a conciliation board whenever it modified its demands during the course of the conciliation process".** Of the respondent's contention in this case I would say: Taken to its logical conclusion, the respondent's contention would mean, if upheld, that, whenever a party, be it the employee side or the employer side, wished to add to or modify, its case with regard to the reason for dismissal or with regard to the grounds of alleged unfairness of a dismissal after conciliation, it would have to make a new referral to conciliation. However, such referral would have no prospect of being accepted and acted upon by either the CCMA or council with jurisdiction. This is so because it would be a referral of a dispute in respect of which the certificate contemplated in sec 191(5) would have already been issued.

[51] Finally Page J said the following in **NTE** at 621A-C in respect of the contention there under consideration:-

"Apart from rendering it practically impossible for the parties to preserve their right legally to resort to unilateral industrial action in the event of the failure of the conciliation process, such a limitation would make a mockery of the process itself. It is of the essence of that process that the board considering a dispute should be free to consider and recommend all options arising from the demands of all the parties to the dispute and any modifications thereof : to limit it to the consideration of one unilateral demand or set of demands would render it nugatory".

With certain changes of a contextual nature, this passage would, in my view, apply with equal force to the respondent's contention in this matter.

[52] Linked to the respondent's contention dealt with above was another submission. The submission was based on the tense used by the lawmaker in sec 191(5)(b) of the Act. Sec 191(5)(b) gives an employee the right to refer a dismissal dispute to the Labour Court for adjudication but it says the employee may do so **"if he has alleged"** that the reason for dismissal is operational requirements or is automatically unfair or is

participation in a protected strike or is because the employee has refused to join or has been refused membership of or has been expelled from, a trade union which is party to a closed shop agreement. It was argued on behalf of the respondent that the use of the tense used in sec 191(5)(b) demonstrated that the allegation must have been made prior to the referral. The rejection of the main submission to which this one was linked means that this one also falls away.

[53] We were also urged by the respondent's counsel to hold that parties to a dismissal dispute which has been to conciliation are bound by the conciliating commissioner's description of the dispute in the certificate of outcome contemplated in sec 191(5). For the reasons that follow, I am of the opinion that there is also no merit in this submission.

[54] A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or other view on certain aspects of the dispute but, for his purposes, whether the dismissal is due to operational requirements or to misconduct or incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee (see sec 191(5)(b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour court, why then should the

employee be bound by commissioner's description of the dispute?

[55] In this case the council's or conciliating commissioner's description of the dispute in the certificate of outcome and the appellants' allegation that this is an automatically unfair dismissal are not mutually exclusive. As already pointed out in the certificate of outcome the dispute was described as an **"alleged unfair termination of services of our members (unfair retrenchment)."** A dismissal that is automatically unfair would also fall within the ambit of the phrase: **"alleged unfair termination of services of our members."** The reference to **"unfair retrenchment"** is in brackets. To my mind this indicates that it was not seen as an essential part of the description of the dispute - the essential part of the description being the **"alleged unfair termination of services of (NUMSA) members"**. But even the reference to **"unfair retrenchment"** is also not inconsistent with an allegation of an automatically unfair dismissal. I explain this below.

[56] In sec 212 of the Act the phrase **"operational requirements"** is defined as meaning **"requirements based on the economic, technological, structural or similar needs of an employer".** There seems little doubt in this case that the appellants want to argue at the trial that, when the respondent insisted that the employees agree that they

would or should not be paid the transport allowance, it was doing so because, in its view, that is what was dictated by its economic needs (which would bring this under the definition of **"operational requirements")** and which, according to the appellants, constituted a reason for dismissal such as is referred to in sec 187(c) of the Act.

[57] In practice it is not unusual to find that a dismissal which an employer resorts to in circumstances such as those in this case is referred to as a retrenchment. (**see TAWU & Others v Natal Co-operative Timbers (1992) 13 ILJ 1154 (D)**). It is, however, different from a rtrenchment which occurs when an employee's job has become redundant because in the former case the emplyee's job is available but the employee is not prepared to perform it under certain terms or conditions which the employer insists upon. Irrespective of whether it is right or wrong to refer to such a dismissal as a retrenchment, one thing appears clear to me. That is that such a dismissal can be described as a dismissal for operational requirements because it falls within the ambit of the definition of the phrase **"operational requirements"** in sec 212 of the Act. If I am correct in this, as I think I must be, then the respondent's complaint about the amendment is even on weaker grounds on this aspect because, on the respondent's own version, the dismissal that was referred to conciliation was a dismissal for operational requirements. In my view the amendment sought by the

appellants does not detract from this but only seeks to add another label to what remains essentially a dismissal for operational requirements.

[58] In so far as the Labour Court may have intended to suggest in **NUMSA & Others v Cementation Africa Contracts (Pty) Ltd (1998) 19 ILJ 1208 (LABOUR COURT) at 1214I - 1215A** that, when a party refers a dismissal dispute to conciliation, it is a requirement of the Act that he states whether the dismissal relates to operational requirements or misconduct or incapacity or an automatically unfair reason, this is not correct. I must say that, despite what the Labour Court said at 1214I - 1215J, its statements at 1213H - 1214H appear to support the view that there is no such requirement. While it would be better and preferable if a party which referred a dismissal dispute to conciliation stated whether the dismissal was a dismissal for operational requirements or a dismissal for misconduct or for incapacity, the fact that that is not made clear in the referral to conciliation would not make the referral defective in terms of the Act. This must be so because, even when the employee does not know whether his is a dismissal for misconduct, incapacity, operational requirements or dismissal for an automatically unfair reason, he is still able to refer his dismissal dispute to conciliation.

[59] Sec 191(5)(a) does contemplate that an employee may refer to

arbitration a dismissal dispute even if he does not know the reason for his dismissal. In that case, obviously it cannot be said that the Act requires such employee to make it clear what he alleges the reason for his dismissal to be.

[60] If an employee does not know the reason for his dismissal at that stage of the processing of his dispute, obviously he would not have known it at the time he referred the dispute to conciliation. It can therefore not be said that such an employee would have been required by the Act to make it clear in his referral of the dispute to conciliation what the reason for his dismissal was. If this cannot be said in respect of such employee, I am unable to find any provisions in the Act that would justify the conclusion that the Act requires this in respect of some employees but not in respect of others.

[61] If, at the time of referring a dismissal dispute to arbitration after conciliation has failed, an employee is not compelled to decide on what reason he relies upon as the reason for dismissal, there can be no reason either in principle or logic why such employee must be compelled at an earlier stage than that to state the reason for dismissal he relies upon. On the contrary the nature of the conciliation proceedings is such that, in my view, there can be no reason why the employee has to make such an

election because at conciliation the parties would, through conciliation, be attempting to settle their dispute. Also the contents of their discussions are such that they should, and would, not be used in subsequent arbitration or adjudication proceedings to the prejudice of any party.

[62] At 1214J - 1215A in **Cementation Africa Contracts (*supra)*** the Labour Court made statements to the effect that, after conciliation, a party which wants to take a dismissal dispute further is bound by the conciliating commissioner's description of the dispute in the certificate of outcome. I do not agree with this. The position is, as the Labour Court correctly pointed out in that case, that a party cannot change the nature of the dispute. I would add that the conciliating commissioner is also bound not to change the nature of the real dispute between the parties. If he did, the party that seeks to take the matter further would not be bound by a wrong description of the dispute but would have a right to take further the true dispute that was referred to conciliation and to give a correct description of the dispute. What the parties are bound by is the correct description of the real dispute that was referred to conciliation.

[63] In so far as the Court *a quo* felt that it was bound by the decision of this Court in **Zeuna Starker Bop (Pty) Ltd v NUMSA (1998) 11 BLLR 1110 (LAC)**, I do not share that view. In **Zeuna** the issue this Court had to

deal with related to what a commissioner had to do where there was a dispute about whether or not the dispute had arisen prior to or after the date of commencement of the Act which would in turn determine whether the old Act or the new Act applied. There this Court held that the commissioner was obliged to inquire into the real dispute to establish exactly when it was that the dispute arose. In my view, the Court *a quo's* hands were not in any way "shackled" by this decision.

[64] At any rate, it matters not for purposes of jurisdiction whether at the time of the conciliation of a dismissal dispute, the reason alleged for the dismissal was operational requirements or an automatically unfair reason. The dispute is about the fairness of the dismissal. Therefore, provided the alleged reason is one referred to in sec 191(5)(b), the Labour Court will have jurisdiction to adjudicate the real dispute between the parties without any further statutory conciliation having to be undertaken as long as it is the same dismissal.

[65] Mr Pretorius emphasised that fundamental to his argument was the proposition that the Act required meaningful conciliation before a dispute can be adjudicated by the Labour Court and that, in the absence of meaningful conciliation in respect of a dispute, the Labour Court would not have jurisdiction to adjudicate such a dispute. As Mr Pretorius

subsequently conceded, correctly in my view, during argument, this proposition was too widely stated.

[66] The Act does contemplate that the Labour Court will have jurisdiction to adjudicate a dispute even when there has been no meaningful conciliation in respect of such a dispute. This is supported by the fact that sec 191(5) of the Act contemplates, among others, that a dispute may be referred to arbitration or adjudication if the dispute remains unresolved after a period of 30 days has lapsed since the council or the CCMA received the referral of such dispute to conciliation. Obviously, this provision was the product of past experience under the old Act.

[67] Under the old Act our experience taught us that, without a provision, such as is referred to in the preceding paragraph, there could be long delays in the conciliation of disputes. All an employer would need to do in order to frustrate the process if a meeting for conciliation was a *sine qua non* before a dispute could be adjudicated would be to ensure that he did not co-operate in having the conciliation meeting held. In the light of all this the respondent's submission falls to be rejected.

[68] That I reject the respondent's above submission on the meaningful conciliation as a jurisdictional requirement before a dispute can be adjudicated by the Labour Court, does not mean that I agree with Conradie

JA when, in par 8 of his judgement read with par 7 thereof he says it is not a precondition that a dispute should have been referred to conciliation before the Labour Court can have jurisdiction to adjudicate it. I deal with this proposition below.

[69] Conradie JA says in effect that the Labour Court **"clearly has jurisdiction"** to adjudicate a dispute which has not been referred to conciliation but it has a discretion to refuse to adjudicate it if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. He says it is up to the Labour Court to decide whether it adjudicates it or not .

[70] For his proposition, Conradie JA relies on the provisions of sec 157 (4)(a) of the Act. With respect, my Learned Colleague's proposition is erroneous and is not supported either by the provisions of sec 157 read as a whole or by other provisions of the Act. My reasons for saying this follow here below.

[71] Sec 157(4)(a) of the Act provides:-

" **(4)(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."

Those provisions must be read together with the provisions of sec 157 (4) (b) as well as other provisions of the Act. Sec 157 (4)(b) provides:-

"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."

[72] Furthermore regard must be had to the provisions of sec 191(1) which require a dispute about the fairness of a dismissal to be referred to conciliation and, then, more importantly, the provisions of sec 191(5)(a) and (b). In so far as the provisions of sec 191(5)(a) and (b) are relevant to this aspect of this judgement, they read thus:-

"**If a council or commissioner has certified that the dispute remains unresolved, or, if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved -**

(a) the council or the Commission must arbitrate the dispute at the request of the employee if -

(i) ....

(ii) ....

(b) the employee <u>may</u> refer the dispute to the Labour Court for adjudication ..."(underlining supplied).

[73] To me it is as clear as day light that the wording of sec 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication. I cannot see what clearer language the legislature could have used other than the language it chose to use in sec 191(5) if it had intended that the referral of a dismissal dispute to conciliation should be a pre-condition to such dispute being arbitrated or being referred to the Labour Court for adjudication. In sec 191(5) the legislature used the wording : "**<u>If</u> a council or commissioner certified that ..., or, <u>if</u> 30 days have expired since ... and the dispute remains unresolved-**

(a) the council or the Commission must arbitrate the dispute ...

(i) ...

(ii) ...

(iii) ... or

(b) <u>the employee may</u> refer the dispute to the Labour Court for adjudication ..."

[74] It will have been realised that sec 191(5) envisages that one of two events must have occurred or taken place before a dispute can be the subject of an arbitration or before an employee can acquire the right to refer a dismissal dispute to the Labour Court for adjudication. The one event is that of a council or a commissioner having certified that the dispute remains unresolved. The second event is that of a period of 30 days having expired since the referral was received by the council or the commission. In the absence of one of these two events, there is no competence to refer the dispute to arbitration nor does the Labour Court have jurisdiction to adjudicate a dispute in such circumstances.

[75] In the light of the above I am of the opinion, with respect, that in making the proposition that he makes in par 8 of his judgement, my Colleague has overlooked the provisions of sec 191(5) of the Act and has relied exclusively on sec 157(4)(a). In my view it is necessary to consider the Act as a whole rather than to focus on one section of the Act in dealing with an issue such as this one.

[76] Sec 157(4)(a) will only apply, in my view, in a dispute where no certificate such as is referred to in sec 191(5) was issued but where the employee acquired the right to refer the dispute to the Labour Court by virtue of the happening of the second event mentioned in sec 191(5), namely, the expiry of a period of 30 days. Sec 157(4)(a) cannot apply to a dispute where the first event occurred, namely, where a certificate of outcome was issued.

[77] I say the above because in terms of sec 157(4)(a) the Labour Court only has the discretion which my Colleague relies upon for his proposition where it is not satisfied that an attempt was made to conciliate the dispute. In a case where a certificate of outcome saying the dispute remains unresolved has been issued in terms of sec 191(5), the Labour Court would not be able to say it is not satisfied that an attempt has been made to conciliate the dispute because sec 157(4)(b) of the Act says such a certificate issued by a commissioner or a council is **"sufficient proof that an attempt has been made to resolve the dispute through conciliation."**

[78] There are other provisions of the Act which clearly show that the Act contemplates that disputes must be referred to conciliation before they can

be arbitrated or adjudicated. Without going into details, it should suffice to refer to secs 135 and 136. In particular reference must be made to sec 136 (3).

[79] In conclusion on this proposition, it seems most relevant to refer to what the drafters of the Bill (before it became an Act) had to say about the place of conciliation in the new dispute resolution dispensation. Their explanatory memorandum appears at (1995) 16 ILJ 278 - 336. AT 327 the drafters explained:- **" In almost every instance it is a requirement that a dispute is lodged with the Commission before the institution of proceedings in the Labour Court."**

[80] Later on in the same page the drafters went further and said:

"The Commission is designed as a one stop shop for resolving disputes. Its commissioners will attempt in the first place to resolve disputes by conciliation, mediating where appropriate ... Only where these attempts fail will the commissioner determine certain disputes through arbitration. Where disputes are to be adjudicated by the **Labour Court, the Commission will first seek actively to engage the parties in an attempt to resolve disputes to avoid unnecessary litigation."**

[81] The long and short of the above is therefore that, in my view, sec

157(4)(a) provides no basis for the proposition that the Labour Court has jurisdiction to adjudicate a dismissal dispute which has not been referred to conciliation. It is only a basis for the proposition that, in a case where no certificate of outcome stating that a dispute remains unresolved has been issued but the dispute was referred to conciliation but no attempt was made to conciliate the dispute, the Labour Court may in its discretion refuse to determine the dispute.

The pre-trial minute argument

[82] Another ground on which the respondent opposed the appeal was that, in terms of the pre-trial minute which was signed by both parties, the only issue the parties had agreed the Court should decide was a retrenchment and there was no reference to the issue of an automatically unfair dismissal. Counsel for the respondent emphasised that the pre-trial minute was a binding agreement from which neither party could resile in the absence of one or other ground generally accepted in law as justifying a party resiling from a contract.

[83] I think it is necessary to immediately accept as a point of departure that, where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our Courts will generally hold the parties to that agreement

or to those issues. (**Price NO v Allied - JBS Building Society 1986 (3) SA 874 (A) at 882D - E; Filta-Matix (Pty) Ltd v Freudenberg & Others 1998 (1) SA 606 (SUPREME COURT OF APPEAL) at 613E - 614D).** Counsel for the respondent submitted that in this case no such circumstances existed or were argued by the appellants to exist. He submitted that, through the proposed amendment, the appellants were seeking to introduce an issue which in terms of the pre-trial agreement they were not entitled to introduce.

[84] I am unable to uphold the respondent's submission on this point. What the cases relied upon by the respondent's Counsel reveal is that where our Courts have refused to allow a party to raise, rely upon or introduce, a new issue after a pre-trial minute has been agreed is in those cases where the party can be said to have abandoned such an issue or cause of action or where such a party can be said to have agreed not to rely upon or raise or pursue such an issue or cause of action. I refer to those cases below.

[85] In **Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) SA 106 (A)** the Court refused the appellant an opportunity to rely upon a cause of action which had been pleaded originally but which Miller JA was satisfied the appellant had expressly informed the Court of first instance it was not

relying upon. According to Miller JA in that case the appellant had indicated **"if not in express terms, by the clearest implication,"** that it was foregoing or abandoning the cause of action(see Miller JA at 114 F - H). In **Price NO v Allied JBS Building Society 1980 (3) SA 874 (A)** the Court refused a party the opportunity to pursue or raise a cause of action which Van Winsen AJA was satisfied such party had abandoned (see Van Winsen AJA at 881G - 822H).

[86] In **Shoredits Construction (Pty) Ltd v Pienaar NO and Others** [1995] 4 BLLR 32 (LAC) and **Shoprite Checkers (Pty) Ltd v Busane** [1996] 17 ILJ 701 (LAC), the old Labour Appeal Court held in each case that the industrial court had been bound to decide the matter on the basis of the issues as agreed between the parties in a pre-trial minute and set aside orders made by the industrial court in disregard of such pre-trial minutes.

[87] In **Shoredits Construction** the parties had agreed in a pre-trial minute that in the event of the industrial court granting a reinstatement order, the retrospectivity of such order should be limited to three months. The industrial court disregarded such agreement. The old Labour Appeal Court set the order of the industrial court aside. It is clear that in that case the employee party had abandoned whatever right he might have had to

longer retrospectivity of the reinstatement order.

[88] In **Checkers Shoprite** the parties had agreed in effect that whether the dismissal was or was not fair would be determined by whether the Court found that the employee had unlawfully removed goods belonging to the employer. Despite this agreement the industrial court decided the fairness of the dismissal with reference to whether the sanction was a reasonable one. The old Labour Appeal Court set this order aside. No amendment had been sought.

[89] During argument after a trial in **Filta-Matix (Pty) Ltd v Freudenberg 1998(1) SA 606 (SUPREME COURT OF APPEAL)** appellant's counsel sought to rely on claims **"A"** and **"B"** when, at a pre-trial conference, he had specifically said he would rely upon claim **"BB"**. Counsel sought to **"resile"** from the agreement by stating in an affidavit that the limitation of the claim to claim **"BB"** had been the result of confusion caused by the nature of the questions asked. The Supreme Court of Appeal held that that excuse could not, **"in the light of the facts recited, be accepted"** (at 614C). Harms JA continued and said: **"To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is**

to limit issues and to curtail the scope of the litigation. (Cf Price NO v Allied - JBS Building Society 1980(3) SA 874 (A) at 822 D - H). If a party elects to limit the ambit of his case, the election is usually binding (AJ Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy 1985 (1) SA 399 (A) at 415 B - D; Chemfos Ltd v Plaasfosfaat 1985 (3) SA 106 (A) at 114I - 115B). No reason exists why the principle should not apply in this case." (My underlining).

[90] Another case is **F&T Advisers (Edms) Bpk v Eerste Nasionale Bank van SA 1999 (1) SA 515 (SUPREME COURT OF APPEAL)**. It does not appear to me that **F & T Advisers** can be said to be inconsistent with the approach shown above in respect of the various cases. It seems to me that, in essence, the Supreme Court of Appeal concluded in that case that the agreement to which the appellant in that case was a party was inconsistent with an intention on its part to rely on the *in duplum* rule and, that, for that reason, it could not be allowed to rely on the *in duplum* rule. Indeed, Harms JA said that, had the respondent known that the appellant intended relying on the *in duplum* rule, it might have conducted its case at the trial on a completely different basis. Accordingly this case, like all the others referred to above, is distinguishable from the case before

us.

[91] To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pre-trial agreement or pre-trial minute has been concluded in a case depends on whether it can be said that the party seeking to rely upon or to introduce or raise such cause of action or issue has abandoned that cause of action or has agreed either expressly or by implication (I would say necessary implication) not to pursue or rely upon such cause of action or point or has informed the Court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed. If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract.

[92] It is clear from a reading of the pre-trial minute in this case that there is no reference to an automatically unfair dismissal. There is no suggestion that the appellants ever informed the respondent or its attorneys or the Court below that they would not rely upon any other cause of action other than retrenchment. If the amendment sought by the appellants was granted, the effect thereof would be to introduce a new

cause of action which had not been pleaded. But that is a new cause of action in respect of the same dispute that has been conciliated. To my mind, as this is a new cause of action, the appellants cannot be said to have abandoned their right to raise it or rely upon it when it was not even covered by the pleadings at the time the pre-trial minute was concluded.

[93] The purpose of a pre-trial conference is for parties to try and redefine issues which emerge from the pleadings. If a party wishes to introduce another cause of action or defence other than the cause of action or defence disclosed in the pleadings, such a party will usually be required to apply for an amendment first. The other party would then consider such application for amendment on its merits in due course and decide whether or not to oppose it. There may be cases where parties reach an agreement in a pre-trial minute the terms of which are such that a cause of action not covered by the pleadings cannot be introduced later - even by way of an amendment. However, in my view, before a Court could hold this to be the case in a matter, the agreement of the parties would have to be clear and to leave no doubt that that is what the parties intended. This is not such a case.

[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** (*supra*) at 614C Harms JA, speaking in the context of the object of rule 37 in the High Courts, 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 Courts as being **"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. Lastly, I mention, in passing, that it appears from the pre-trial minute that the respondent disputes the identity of the second and further appellants. This raises another interesting question. That is: in the light of the respondent's argument on the pre-trial minute being based on the proposition that a pre-trial minute is a legally enforceable agreement, how can it be said that the pre-trial minute in this case is a legally enforceable agreement in this case when the identity of

the parties against whom the agreement is sought to be enforced legally is being disputed by the same party who wants to enforce it?

[96] In all the circumstances I conclude that the appeal must succeed. In the light of this conclusion the question arises whether or not the application for an amendment must be remitted to the Court *a quo* to decide it in the light of this judgment or whether this Court must deal with it itself. Mr Pretorius indicated that the better route would be for this Court to decide the amendment itself. I agree. At any rate the Court *a quo* had also indicated that, had it not considered itself **"shackled"**, it would have granted the amendment. The result of the application, if remitted, would be a foregone conclusion. We are also in as good a position as the Court *a quo* would be to decide the application. To remit the application to the Court *a quo* would simply serve to unduly delay finality on the issue.

[97] The respondent submitted that, if the amendment sought was granted, it would be seriously prejudiced, because, with the issue not having been referred to conciliation, it has not had an opportunity to conciliate on it. In the light of the conclusion I have reached above that the introduction of this new alleged reason for dismissal does not constitute a new dispute, it must follow that it would not be competent to refer the new alleged reason for dismissal to conciliation as a new dispute. Actually, as

pointed out earlier, the allegation that the dismissal is an automatically unfair dismissal is not necessarily inconsistent with the dismissal being for operational reasons.

[98] At any rate, the respondent is free to initiate non-statutory initiatives at conciliation with the appellants in the light of this further reason alleged as the reason for dismissal. If conciliation would have been successful earlier if this new reason for dismissal had been alleged, there is no reason why it cannot be successful at this stage. In fact, if past experience is anything to go by, there would be greater prospects of conciliation now than there would have been earlier because now the trial is imminent. There is no prejudice to the respondent which warrants the refusal of the appellants' application for amendment.

[99] For the above reasons I came to the conclusion that this Court should grant the order that was handed down on the 11th October 1999 as set out earlier in this judgment.

R.M.M. ZONDO

Acting Judge President

Mogoeng AJA

[100] I have had the benefit of reading both judgments prepared by my Colleagues Zondo AJP, and, Conradie JA, in this matter. Except for what Conradie JA says in paragraphs 8 and 13 of the judgment, I agree with both judgments.

M.T.R. MOGOENG

Acting Judge of Appeal

APPEARANCES

For the Appellants: MR H CHEADLE

Instructed by: Cheadle, Thompson and Haysom.

For the Respondent: MR P PRETORIUS SC

(With Mr A T Myburgh)

Deneys Reitz.

Date of Hearing: 29 September 1999

Date of Order: 11 October 1999

Reasons furnished on: 21 October 1999