Conciliated confusion - who said what and why?

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Without Prejudice

Navsa JA (Willis JA and Schippers AJA concurring) make the point in the Middelburg "coffin case"(*Oosthuizen & Another v S (144/2018) [2018] ZASCA 92 (1 June 2018*)) that race as a historically destructive divisive factor is something that none can be unaware of in South Africa.

In addition, they say - at paragraph 42 of the judgment - that "it is sad, as this case and others in the public eye demonstrate, that we as a nation have reached this stage of racial polarisation and that we have not yet overcome the deep divisions that our history imposed on us. It is the very antithesis of our constitutional compact. We cannot ignore the fact that racial intolerance is something that can be exploited by those intent on undoing and subverting constitutional values. Racist behaviour is absolutely unacceptable and courts can rightly be expected to deal with it firmly. Maya Angelou, the American author and poet, said the following: 'Prejudice is a burden that confuses the past, threatens the future and renders the present inaccessible.' We cannot allow our futures and the future of our children and grandchildren to be undone".

At paragraph 43 Navsa JA goes on to say: "Lastly, and with apologies to a great American and a former justice of their Supreme Court, Thurgood Marshall, whose words I have adapted to apply to us as a nation, I pause to reflect that we should, each of us, consider and apply them: 'I wish I could say that racism and prejudice were only distant memories…. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust…. We must dissent because [South Africa] can do better, because [South Africa] has no choice but to do better.'" In response, *kulungile ngokuphelele*, I humbly say.

The above quotes from the SCA are relevant in part to the merits of the February 2018 decision of the Constitutional Court in *September and Others v CMI Business Enterprise CC [2018] 5 BLLR 431 (CC*) to which I refer in the concluding paragraphs. The underlying dispute in September is yet another case that concerns racist conduct in the workplace.

There are two aspects of the judgment that are important to those who appear in conciliation processes. The first relates to the status of what is said at conciliation and second is what happens to the actual dispute thereafter where there is uncertainty about the real dispute. Much has already been said about the first issue, which is now a clear point and one which I will not belabour. It is the latter part that I want to focus on, as I am critical of the conclusion of the majority of the Constitutional Court and agree with the views expressed by the one dissenting judgment.

But first, those who appear at conciliation need to be alert that the process is not a mere routine step in the post termination litigation trajectory. The highest court has confirmed that not everything said in conciliation is "off the record" despite the CCMA rule (at the time), which provides that "conciliation proceedings are private and confidential and are conducted on a without prejudice basis and that no person may refer to anything said at conciliation proceedings during any subsequent proceedings unless the parties agree in writing or as ordered otherwise by a court of law".

The purpose of the rule is to allow parties to make offers and counter-offers without being bound by them. The purpose is achieved by the general rule relating to “without prejudice” settlement negotiations. But evidence relating to the nature of the dispute is different and is not privileged. So, certain admissions made, or issues raised at conciliation can be referred to in arbitration. The result is that parties need to be conscious of what is and is not said, at conciliation for such references may arise in later stages of the litigation process.

Turning to the second issue - what happens to the claim after conciliation when there is uncertainty about the real underlying dispute? This is not a theoretical question and is encountered in practice very often. For instance:

1. an employee initially refers a retrenchment dispute to conciliation;
2. a certificate is thereafter issued by the CCMA certifying a retrenchment dispute;
3. the employee than finally proceeds to sue in the Labour Court on the basis of an automatically unfair dismissal.

Will this be entertained by the Labour Court? All labour lawyers know that the answer to this question is yes. This is because of longstanding authority of the Labour Appeal Court in Driveline Technologies (*National Union of Metal Workers of South Africa v Driveline 2000 (4) SA 645 (LAC)*), which endorses such form of referral of claim. The authority in *Driveline* is now upset by the September decision and there is a measure of uncertainty on the applicability of the *Driveline* ratio going forward.

What we know is that every dispute that goes to arbitration or the Labour Court must first be referred to conciliation. Without a referral to conciliation there can be no further process. But what happens when there is uncertainty about the true nature

of the dispute when it gets to the next level? Is the employee bound by what is set out in the referral forms? The majority of the Constitutional Court says no. It concludes that what is said at conciliation about the nature of the dispute is a matter that can be relied upon in determining the actual dispute down the line even (by the Labour Court) if that is not the dispute referred to conciliation in the first place. This is the judgment of the full bench. There is one dissent from Zondo DCJ who disagrees in a well-reasoned judgment.

Zondo DCJ finds that the conclusion of the majority is not cogent or based on a proper analysis of existing law. Respectfully I must agree with him.

These very simply were the facts:

1. The employees referred an unfair discrimination claim to the CCMA under the Employment Equity Act (EEA). They also referred an unfair labour practice claim under the Labour Relations Act (LRA).
2. The employees did not refer a dismissal dispute under the LRA to the CCMA.
3. The CCMA Commissioner issued a certificate referring to the claim under the EEA.
4. The employees, however, sued in the Labour Court based on a dismissal claim under the LRA. They allege that they referred to this claim at conciliation even though it was not specifically referenced in the referral document.
5. The Labour Court ultimately granted relief to the employees under the LRA and not the EEA.

In Driveline the majority said that the LRA requires some disputes to be referred to the CCMA, and others, to the Labour Court, if conciliation fails. Whether a dispute will end up in the CCMA for arbitration or the Labour Court for adjudication it must first have been referred to conciliation before it can be arbitrated or adjudicated. In other words, “the dispute" must be referred to conciliation.

The majority in *Driveline* also said that: “To me it is as clear as daylight that the wording of section 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 section 191(5) if it had intended that the referral of a dismissal dispute to conciliation should be a precondition to such dispute being arbitrated or being referred to the Labour Court for adjudication.”

The LAC also had this to say in *Driveline*: “It will have been realised that section 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."

The majority in *September* find that the referral of a dismissal dispute to conciliation process is not a precondition that must strictly be satisfied before the Labour Court may have jurisdiction in respect of the dispute. This is not consistent with the ratio in *Driveline*. The Constitutional Court is not bound by *Driveline*, but the complication arises from its earlier judgment in *NUMSA v Intervalve & Others* upheld the legal position articulated in *Driveline* was upheld. In *September* the majority do not properly explain why, having endorsed *Driveline* in *Intervalve*, they now depart from this approach.

The LRA is clear in that the dispute that a commissioner is authorised to conciliate is a dispute that has been referred for conciliation. The clear LRA provisions accordingly to Zondo DCJ mean that the propositions made by the majority that the Labour Court in *September* had jurisdiction in respect of a dispute that was not referred to conciliation provided that such a dispute was discussed at a conciliation meeting convened to discuss another dispute is contrary to clear statutory provisions and the ratio in *Driveline*. I agree with the learned DCJ's conclusions.

In all, the order of the Labour Court was correctly set aside by the Labour Appeal Court and was, in my view, incorrectly overturned by the Constitutional Court.

At the very least the order of the Labour Court was unfair to the employer – as this was not the case the employer was called upon to defend at inception of the referral. As abhorrent as the acts of the employer were in this matter, even this employer is entitled to know the case it was called upon to conciliate - this being the basic tenant of the rule of law under which we are governed.

Let me be clear about my position on the merits - for the vile and racist conduct of the employer there can never be any justification. The incidents of abuse suffered at the hands of the employer was despicable to say the least and one would have thought were relics of our dark apartheid past. But they obviously are not. The applicants were the only black employees of the respondent and they alleged they were addressed and referred to as "*coloureds*", "*kaffir[s]*", "*koffee stokkies*", "*kittare*", "*tang*", "*kettings*", "*warm knope*", "*Hottentote*" and "*Bushies*". Mr Cronje of the respondent would also read from a cult book and publicly make statements such as "Blacks are animals which have the footprint of a human".

The judgment states: "The applicants spent prolonged periods away from home working on mining sites. They were often provided with accommodation inferior to that of their white counterparts. On an assignment in September 2009, in Komatiepoort, no accommodation was arranged for the applicants and they were forced to sleep in a toilet. In September 2011, at the Khumani Mine in the Northern Cape, the accommodation quarters of the white employees had separate bathrooms, a kitchen and contained appliances such as flat-screen televisions, fridges and kettles. The applicants slept in a washroom without separate toilet facilities. When early morning travel was necessary, the applicants, unlike the white employees, were required to sleep at Mr Cronje's residence. The room allocated to the applicants was stacked with tools and car

parts and had an open toilet attached to it. The room was usually used to house Mr Cronje's dogs. The applicants were always obliged, when being transported to and from work, to sit at the back of the vehicle. If they attempted to sit in the front, they were asked if they were 'becoming white' and were told that 'a dog should know its place'."

Clearly, from Middelburg to the Northern Cape, the beloved country continues to cry. Very sad, but real. But in the zest to deliver justice to *September et al* the rights of the employer need also to remain respected. This is after all the bedrock of our new constitutional dispensation.

So, you could easily be forgiven for being confused by the conciliation, believing that referring a dispute to the CCMA is as simple as it is made out to be – clearly it is not.

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