CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 279/16

In the matter between:

THEO SEPTEMBER First Applicant

DEAN SEPTEMBER Second Applicant

ROLAND PAULSEN Third Applicant

and

CMI BUSINESS ENTERPRISE CC Respondent

Neutral citation:	*September and Others v CMI Business Enterprise CC* [2018] ZACC 4
Coram:	Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	Theron J (majority): [1] to [79] Zondo DCJ (dissenting): [80] to [152]
Heard on:	10 August 2017
Decided on:	27 February 2018
Summary:	Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration — rule 16 prior to 2015 amendment — allows courts, in exceptional circumstances, to consider evidence emanating from conciliation proceedings — evidence as to the nature of the dispute conciliated is not privileged

Rescission of default judgment — dispute of automatically unfair constructive dismissal conciliated — Labour Court had jurisdiction to hear the dispute — default judgment not erroneously granted

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ORDER

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside and substituted with:

   "The appeal is dismissed".
4. There is no order as to costs.

JUDGMENT

THERON J (Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Labour Appeal Court handed down on 26 October 2016 setting aside a default judgment granted by the Labour Court against the respondent and in favour of the applicants. This matter concerns the interpretation and application of rule 16 (in its pre-amended form) of the Rules of the Commission for Conciliation, Mediation and Arbitration (CCMA Rules). The main question in this matter is whether the Labour Court could receive and rely on evidence which related to discussions held

during a conciliation hearing at the Commission for Conciliation, Mediation and Arbitration (CCMA), which in turn related to the determination of the dispute between the parties or whether that evidence is privileged.

Parties

[2] The first to third applicants are Mr Theo September, Mr Dean September and Mr Roland Paulsen (the applicants), who were employed by the respondent, CMI Business Enterprise CC. The respondent conducts the business of maintenance and mechanical field services in the mining industry in South Africa and in other African countries.

Factual background

[3] The applicants commenced employment with the respondent during the course of August 2009. They were employed as general workers and were required to perform various duties, primarily technical and mechanical, on mining related projects throughout Africa.

[4] The applicants resigned on 13 September 2011. They alleged this was as a result of the respondent making their working conditions intolerable. On this day, they sent a text message to Mr Cronje, the respondent's founder, informing him that they could no longer tolerate the working conditions to which they were subjected. They alleged that they were subjected to racial discrimination which manifested in physical, verbal and mental abuse.

Litigation History

CCMA

[5] The applicants lodged two referral forms with the CCMA. The first was in respect of an alleged unfair labour practice and the Skills Development Act.[1] The

[1] 97 of 1998.

second was in respect of alleged unfair discrimination in terms of the Employment Equity Act.[2]

[6] In form 7.11[3] (referral form) the dispute was described as "[u]nfair discrimination section 10 of the Employment Equity Act". Under item 6, in respect of the results of conciliation, the applicants described their desired outcome as "[e]mployer to stop discriminating us". The dispute was set down for conciliation on 10 October 2011. The respondent was a member of Ad Finem Employers' Organisation and Mr Andrew Lewis, an official of that employer organisation who has since passed away, represented the respondent. The conciliation hearing was attended by the applicants and Mr Lewis. According to the applicants, it became apparent during the conciliation hearing that the dispute was primarily one of constructive dismissal. They also submit that this was canvassed to some extent during the proceedings.

[7] On 1 November 2011, the commissioner issued a certificate of outcome, certifying that a dispute of "unfair discrimination" remained unresolved and indicating that the matter could be referred to the Labour Court.

Labour Court

[8] On 12 January 2012, the applicants instituted proceedings in the Labour Court, in terms of sections 187 and 191 of the Labour Relations Act, by way of a statement of claim. They sought an order that their resignations amounted to automatically unfair dismissals based on racial discrimination and compensation.

[9] The statement of material facts filed by the applicants in the Labour Court set out in detail the incidents of abuse suffered at the hands of their employer. They were the only black employees of the respondent. The applicants alleged they were

[2] 55 of 1998.

[3] In terms of the Labour Relations Act 66 of 1995.

addressed and referred to as "coloureds", "kaffir[s]", "koffee stokkies", "kittare", "tang", "kettings", "warm knope", "Hottentote" and "Bushies". Mr Cronje would also read from a cult book and publicly make statements such as "Blacks are animals which have the footprint of a human".

[10] 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.

[11] 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".

[12] At various times during their employment, the applicants were subjected to physical abuse by Mr Cronje. In Mali, during July 2010, the first applicant was slapped on the face whilst the second applicant had a hard-hat thrown at him. In November 2010, in Chingola, Zambia, Mr Cronje hit the third applicant on the back. The applicants were also denied training opportunities, which were available to white employees.

[13] The respondent opposed the claim alleging that the applicants had absconded from their employment and that the Labour Court did not have jurisdiction to

adjudicate the dispute. The respondent failed to oppose the claim in accordance with the rules and practices of the Labour Court. As a result, the Labour Court deemed the matter to be unopposed. On 12 February 2013, the Labour Court granted default judgment in favour of the applicants.[4]

[14] The Labour Court held that it was "satisfied that the applicants were constructively dismissed" as they were forced "to work under intolerable working conditions which entailed racial abuse and racially discriminatory treatment".[5] The Labour Court further held that the dismissal was "based on their race" and was automatically unfair in terms of section 187(1)(f)[6] of the Labour Relations Act.[7] The respondent was ordered to pay the maximum compensation permitted by the Labour Relations Act, namely 24 months remuneration, calculated to be R240 000 for the first and second applicants and R192 000 for the third applicant.[8]

Rescission judgment

[15] On 2 May 2013, the respondent applied to the Labour Court for rescission of the default judgment granted against it. It alleged that it had relied on Mr Lewis to represent it in all proceedings before the Labour Court. Mr Lewis maintained that he had not received notice of set down of the proceedings in the Labour Court.

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[4] *September v CMI Business Enterprise CC*, unreported judgment of the Labour Court, Johannesburg, Case No JS 1107/11 (12 February 2013) (Default judgment).

[5] Id at para 1.

[6] Section 187(1)(f) provides:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
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> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

[7] Default judgment above n 4 at para 3.

[8] Id at paras 3-4.

[16] The respondent contended that the judgment was granted erroneously as the Labour Court did not have jurisdiction to hear the matter. Essentially, the respondent argued that the nature of the dispute had changed from what was referred to the CCMA.[9] The applicants maintained that the true nature of the dispute became apparent during the CCMA proceedings and that it was a dispute of "constructive dismissal due to unfair discrimination". They alleged that with the assistance of the commissioner the dispute was "extensively canvassed". On this basis, they asserted that the Labour Court did have jurisdiction.[10]

[17] The Labour Court was alive to the jurisdictional fact that before arbitration or adjudication can occur the dispute must have been referred to conciliation. The Labour Court had regard to rule 15[11] and held that the nature of a dispute is determined either by what is contained in the referral document or by what the commissioner identified during the proceedings.[12] It further held that the commissioner is required to determine the nature of the dispute in order to be able to attempt to conciliate the dispute. In order to do this, the commissioner cannot be "precluded from enquiring into the nature of the dispute because the referrer of the dispute did not absolutely accurately describe the dispute".[13] The Labour Court held that it would frustrate the functions of the commissioner if the nature and description of the dispute in the referral were to be strictly interpreted.[14]

[18] The Labour Court concluded that it had jurisdiction as there was a referral of the dispute for conciliation and a certificate was issued stating that it had not been resolved.[15] Consequently, the Labour Court held that the order and judgment were not

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[9] See *CMI Business Enterprise CC v September*, unreported judgment of the Labour Appeal Court, Case No JA 111/2014 (26 October 2016) (Labour Appeal Court judgment) at para 20.

[10] Id at para 21.

[11] CCMA Rules. See [38] below for the full rule.

[12] *CMI Business Enterprise CC v September; In Re: September v CMI Business Enterprise CC* [2014] ZALCJHB 228 (Labour Court judgment) at para 42.

[13] Id.

[14] Id at para 43.

[15] Id at para 47.

granted erroneously as there was "no error in procedure, or any mistake".[16] The Labour Court dismissed the respondent's application with costs.[17] Gush J granted the respondent leave to appeal on 29 October 2014.[18]

Labour Appeal Court

[19] In the Labour Appeal Court the respondent again argued that the Labour Court had no jurisdiction as the dispute had not been referred to conciliation and relied on section 165[19] of the Labour Relations Act, alternatively, rule 16A[20] for requesting the rescission of the order and judgment of the Labour Court. The main issue before the Labour Appeal Court was whether "constructive dismissal based on unfair discrimination had been conciliated before the referral to the Labour Court".[21]

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[16] Id at para 48.

[17] Id at para 72.

[18] *CMI Business Enterprise CC v September*, unreported judgment of the Labour Court, Johannesburg, Case No JS 1107/11 (29 October 2014) at para 5.

[19] Section 165 provides that:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order—
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> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
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> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
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> (c) granted as a result of a mistake common to the parties to the proceedings."

[20] Rules for the Conduct of Proceedings in the Labour Court (Labour Court Rules). Rule 16A provides that:

> "(1) The court may, in addition to any other powers it may have—
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> (a) of its own motion or an application of any party affected, rescind or vary any order or judgment—
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> (i) erroneously sought or erroneously granted in the absence of any party affected by it;
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> (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (iii) granted as the result of a mistake common to the parties; or
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> (b) on application of any party affected, rescind any order or judgment granted in absence of that party."

[21] Labour Appeal Court judgment above n 9 at para 29.

[20] The Labour Appeal Court had regard to *Driveline*[22] and reasoned:

> "The upshot of *Driveline* is, therefore, two-fold. First, that where the real issue was conciliated, the employee's statement of case can be amended to broaden the issue's characterisation. However, where the issue was never referred to conciliation at all, the Labour Court does not have jurisdiction to determine the dispute. In short, it is now settled that referral for conciliation is a precondition to Labour Court jurisdiction. Obviously, where a dispute arises as to whether the real dispute was conciliated, that is a factual enquiry which must be determined with reference to the facts of a particular case. Such an enquiry, however, falls within a very narrow compass, in my view. It can only be determined with reference to two aspects, namely, the characterisation of the dispute on the referral form and the contents of the certificate of outcome. The contents of the certificate of outcome are especially important in this regard, for they mirror the nature of the real dispute identified in the conciliation."[23]

[21] The Labour Appeal Court then considered whether the dispute of unfair dismissal was actually conciliated. It noted that the dispute that the applicants had referred for conciliation was one of unfair discrimination. It added:

> "It is common cause that the dispute which the respondents had referred for conciliation was for unfair discrimination. The referral form makes no mention of unfair dismissal, even though that is one of the options available on the form. Part 'B' of the referral form, which is to be completed for dismissal disputes only, was not only left uncompleted, but it was crossed out with the words 'cancelled' in between two lines. The nature of the dispute was stated to be an unfair discrimination in terms of section 10 of the Employment Equity Act."[24]

[22] The Labour Appeal Court held that the Labour Court erred as the evidence supported the conclusion that the referral was for unfair discrimination, not dismissal based on unfair discrimination and that the applicants did not consider themselves to

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[22] *National Union of Metal Workers of South Africa v Driveline* [1999] ZALC 157; 2000 (4) SA 645 (LAC) (*Driveline*).

[23] Labour Appeal Court judgment above n 9 at para 32.

[24] Id at para 33.

have been dismissed.[25] Consequently, the Labour Appeal Court held that it was not clear whether the applicants were dismissed.[26]

[23] In addition, the Labour Appeal Court held that the Labour Court erred in concluding that an unfair dismissal dispute had been conciliated. The Labour Appeal Court held that the evidence of what "supposedly" transpired during the conciliation proceedings was inadmissible in the subsequent Labour Court proceedings. The Labour Appeal Court held that the Labour Court's conclusion that the unfair dismissal was conciliated was "not supported by any admissible evidence". The Labour Court should have held that it did not have jurisdiction to hear the dispute as it was "not entitled to venture beyond the referral form and the certificate of outcome" in an endeavour to determine what dispute was conciliated.[27]

In this Court

Submissions of the parties

[24] The applicants maintain that the Labour Appeal Court's interpretation of rule 16 does not promote the spirit, purport and objects of the Bill of Rights as required by section 39(2) of the Constitution. They further submit that it is wrong to adopt the Labour Appeal Court's approach which limits the role and function of the commissioner to determine the nature of the dispute with reference only to the description of the dispute given by the referring party.

[25] Whilst the respondent accepts that the Labour Relations Act is a subsidiary constitutional enactment, it maintains that this application does not fall within the realm of matters that warrant the attention of this Court. The respondent contends that this matter does not raise a fresh issue pertaining to the interpretation, protection or enforcement of the Constitution in relation to privilege and the law of evidence. It

[25] Id at paras 34-5.

[26] Id at para 35.

[27] Id at paras 37 and 41.

further contends that the application does not raise an arguable point of law of general public importance which ought to be considered by this Court, as it concerns the application of rule 16 prior to its amendment during March 2015.

[26] In regard to the merits, the respondent is of the view that the applicants' claim is premised on false allegations of racial discrimination and abuse. The respondent contends that there is no constitutional imperative to interpret the pre-amended rule 16 so as to allow disclosure of communications in conciliation proceedings. According to the respondent, this is unambiguously prohibited by the rule. The respondent maintains that evidence on how the dispute in question was identified by the commissioner in conciliation is limited to the contents of the certificate of outcome. The respondent further submits that parties to conciliation proceedings are vested with rights to absolute privacy pertaining to conciliation proceedings under the pre-amended rule 16.

Condonation

[27] The respondent applied for condonation for the late filing of its notice of intention to oppose. The delay was slight, being only four days, and the explanation provided was reasonable. As such, condonation should be granted.

Jurisdiction

[28] Section 167(3) and (7) of the Constitution provides:

> "(3) The Constitutional Court—
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> …
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court;
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> …

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[29] The applicants rely on both sub-section 167(3)(b)(i) and (ii) in submitting that this Court has jurisdiction to hear this matter. Whether a matter is a constitutional matter should not be interpreted narrowly.[28] A constitutional matter may involve the direct application of the Bill of Rights; the direct application of other provisions of the Constitution; as well as the indirect application of the Bill of Rights.[29] This Court has held that "the interpretation and application of legislation that is specifically mandated by the Constitution is always a constitutional matter".[30]

[30] The questions raised concern the interpretation of the CCMA Rules that are promulgated in terms of the Labour Relations Act and, in particular, the rights of employees to fair labour practices under section 23 of the Constitution. Interpretation of the Labour Relations Act is a constitutional matter.[31] In light of this conclusion, it is not necessary to consider whether the application raises an arguable point of law of general public importance.

Leave to appeal

[31] Whether this Court will grant leave to appeal will depend on whether it is in the interests of justice to do so. In answering this question this Court may have regard to a variety of factors.

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[28] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14. See also Du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) (Du Plessis) at 18-20.

[29] Du Plessis id.

[30] Id at 20.

[31] See *National Union of Metal Workers of SA v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervalve*) at para 25; *SATAWU v Moloto N.N.O* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 10; *Aviation Union of South Africa v South African Airways (Pty) Ltd* [2011] ZACC 31; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) at para 28; *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC) at para 15; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) at para 30; and *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14.

[32] The relief sought goes beyond the interests of the applicants alone and it "implicate[s] the interest[s] of a significant part of the general public".[32] A substantial portion of the population utilises the dispute resolution mechanisms created by the Labour Relations Act in order to resolve their labour disputes and to enforce their rights to fair labour practices.

[33] This Court is called upon to determine whether it is permissible to lead evidence emanating from conciliation proceedings at subsequent proceedings. The courts have not been consistent in their application of rule 16 and clarity on the correct interpretation and application of this rule would be desirable. In addition, for the reasons set out below, I am of the view that there are reasonable prospects of success.

[34] As alluded to, rule 16 has since been amended. However, the interpretation this Court may attribute to rule 16 in its pre-amended form will have a significant impact not only on the applicants' matter, but also on similar cases which have been launched before the amendment.

[35] For the reasons set out above I am of the view that it is in the interests of justice to grant leave to appeal.

Discussion

Functions of commissioners

[36] Section 135 of the Labour Relations Act sets out the powers of the commissioner to resolve a dispute through conciliation. Section 135(3) provides that the commissioner must determine a process to resolve the dispute, which may include (a) mediating the dispute; (b) conducting a fact-finding exercise; and (c) making a recommendation to the parties, which may be in the form of an advisory award.

[32] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26. See also Du Plessis above n 28 at 33.

Where conciliation has failed, or at the end of the 30-day period, the commissioner must issue a certificate stating whether or not the dispute has been resolved.[33]

[37] It is evident from section 135(3) that commissioners have three primary functions. The first is to attempt the resolution of disputes. Many disputes under the Labour Relations Act are resolved through conciliation, which, according to section 135(3)(a), may take the form of mediation. In conciliation, the commissioner in essence assumes the role of a neutral mediator facilitating a resolution of the dispute by agreement between the parties.

[38] The second function of commissioners is to identify the nature of the dispute. Rule 15 of the CCMA Rules provides:

> "A certificate issued in terms of section 135(5) that the dispute has or has not been resolved, must identify the nature of the dispute and the parties as described in the referral document or as identified by the commissioner during the conciliation proceedings."

[39] The third function is to make a recommendation to the parties, which may be in the form of an advisory arbitration award. In this way, commissioners perform a filtering function in the dispute resolution machinery of the Labour Relations Act. Commissioners must certify, for instance, whether a dispute is referred to strike action, arbitration or the Labour Court. These functions are not merely clerical and inevitably call for application of the mind, discretion and some adjudication.

[40] The Labour Appeal Court based its decision on two grounds. First, with regard to the jurisdiction of the Labour Court, it held that the factual enquiry as to whether a dispute was conciliated can only be determined "with reference to two aspects,

[33] Labour Relations Act above n 3 at section 135(5)(a).

namely, the characterisation of the dispute on the referral form and the contents of the certificate of outcome".[34]

[41] Secondly, the Labour Appeal Court held that the Labour Court misdirected itself by relying on inadmissible evidence relating to what had transpired during conciliation.[35] No authority was cited for this conclusion. However, it can be assumed that the Labour Appeal Court had rule 16 in mind. I will revert to rule 16 later in this judgment.

[42] The approach to be followed by a commissioner in arbitration proceedings under section 138(1) of the Labour Relations Act has been explained in *CUSA*:

> "A commissioner must, as the Labour Relations Act requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature."[36] (Footnote omitted.)

[43] In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute. The majority judgment in *Driveline* categorically held that the parties are not bound by the commissioner's description of the dispute in the certificate of outcome.[37]

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[34] Labour Appeal Court judgment above n 9 at para 32.

[35] Id at para 37.

[36] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 66.

[37] *Driveline* above n 22 at paras 53-4 provides:

> "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 section 191(5). For the reasons that follow, I am of the opinion that there is no merit in this submission.
>
> 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

[44] The Labour Appeal Court adopted an overly formalistic approach as it held that to answer the question whether the real dispute had been conciliated necessitates a very narrow factual enquiry which entails only looking at two aspects, namely, "the characterisation on the referral form and the contents of the certificate of outcome".[38] The Labour Appeal Court failed to take into account the purpose and context of the Labour Relations Act and the dispute resolution mechanisms for which it provides. By relying only on the referral form and the certificate of outcome the Labour Appeal Court essentially held that no evidence from the conciliation proceedings may be led as evidence in subsequent proceedings.

[45] The approach of the Labour Appeal Court is inconsistent with the jurisprudence of this Court in that it has "cautioned against a narrowly textual and legalistic approach".[39] The Labour Relations Act provides that it must be interpreted "in compliance with the Constitution"[40] and in such a way as "to give effect to its primary objects" which include giving effect to and regulating "the fundamental rights conferred by section 23 of the Constitution"[41] and "to promote the effective resolution of labour disputes".[42] By employing a narrowly textual or legalistic approach the Labour Appeal Court cannot be considered to have achieved these objects, especially as such an approach would not have led to the promotion of the effective resolution of the true labour dispute in this case.

> incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner to whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee (see section 195(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 the commissioner's description of the dispute?"

[38] Labour Appeal Court judgment above n 9 at para 32.

[39] *Intervalve* above n 31 at para 177; *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 24-5; and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Office, South Africa Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 30.

[40] Labour Relations Act above n 3 at section 3(b).

[41] Id at section 1(a).

[42] Id at section 1(d)(iv).

[46] As already mentioned, the Labour Appeal Court placed reliance on *Driveline* and *Intervalve*.[43] It correctly held that both *Driveline* and *Intervalve* established that a dispute must be referred for conciliation in order for the Labour Court to have jurisdiction.[44] The applicants accept this principle but contend that the true dispute had been conciliated and as such the Labour Court did have jurisdiction.

[47] In *Driveline*, and pursuant to the employees' retrenchment, a dispute was referred for conciliation to the relevant bargaining council. The council issued a certificate of outcome indicating that a dispute concerning the alleged unfair termination of services (unfair retrenchment) of the employees remained unresolved. Later, the union attempted to amend its statement of case to provide that the dismissal had been automatically unfair in terms of section 187(1)(c) of the Labour Relations Act. The Labour Court held that the parties were bound by the commissioner's characterisation of the dispute as one concerning the alleged unfair termination of services (unfair retrenchment) of the employees and the union was not entitled to change the nature of the dispute. On appeal, the Labour Appeal Court held that the Labour Court's finding was incorrect.

[48] Zondo AJP reasoned that it would be a fallacy to regard the proposed amendment as introducing a new dispute:

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[43] Labour Appeal Court judgment above n 9 at paras 30-2.

[44] *Driveline* above n 22 at para 73 provides:

> "To me it is as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal 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 clear 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."

Intervalve above n 31 at para 32 provides:

> "The reasoning of the *Driveline* majority is, in my view, convincing. Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour-law history for nearly a century. We should not tamper with it now." (Footnote omitted.)

> "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."[45]

He further stated:

> "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 section 191(1) of the Act, namely the dispute about the fairness of the dismissal of the second and further appellants."[46]

[49] The Court departed from the written words and held that the amendment would only introduce an additional reason for dismissal rather than a new dispute. In coming to this conclusion, it considered the circumstances in which the dispute arose and how the facts may cover both "unfair retrenchment" as well as automatically unfair dismissals, and held that they were both reasons for the dismissals which were not mutually exclusive.[47] According to Zondo AJP, to hold otherwise would be illogical and "would render the dispute mechanisms of the Act ineffective, unworkable and nugatory".[48]

[50] In addition, the majority in *Driveline* held that it would be nonsensical to refer a matter back to conciliation that had already been conciliated.[49] It did not simply rely on the wording and what was contained in the referral form and the certificate of outcome. In the instant matter, the Labour Appeal Court failed to take into account

[45] *Driveline* above n 22 at para 35.

[46] Id at para 42.

[47] Id at para 55.

[48] Id at para 43.

[49] Id at para 44-6.

that in *Driveline*, the majority judgment held that the parties are not bound by the categorisation of the dispute in the certificate of outcome.[50] The majority embraced a non-formalistic outcome by holding that the referral of an ordinary unfair dismissal (unfair retrenchment) dispute was sufficient to afford the Labour Court jurisdiction to adjudicate an automatically unfair dismissal:

> "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 section 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."[51]

[51] The danger of adopting a formalistic approach is evident in this matter. This case involves allegations of racism and unfair labour practices. It involves applicants who were unable to receive legal advice and who did not know the law. They trusted the procedures of the CCMA and its officials. The applicants allege that the true dispute, automatically unfair constructive dismissal, was brought to their attention during the conciliation proceedings and that it was thoroughly canvassed.

[52] It would therefore be wrong to adopt the Labour Appeal Court's approach, which essentially precludes the courts from referring to evidence outside of the certificate of outcome and referral form, to determine the nature of the dispute conciliated. The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.

[50] Id at para 53.

[51] Id at para 64.

[53] The concept of constructive dismissal is legalese and is generally foreign to non-lawyers. It would be expecting too much of a non-lawyer who has her- or himself left employment without a pronouncement by the employer that she or he was being dismissed to know that she or he had, in fact, been dismissed. Flowing from this, to slavishly expect a non-lawyer to know – in this context – what part of the form to fill in with what information is to disregard reality. To be more direct, that the applicants did not fill in that part of the form headed "unfair dismissal" is quite understandable. As non-lawyers who had no legal assistance at the time, the applicants simply did not know themselves to have been dismissed, whether constructively or otherwise.

[54] Of importance, on a subject as technical as constructive dismissal, it is clamant that where – during the conciliation process – it appears to a commissioner that the true dispute may well involve this subject, she or he must actively satisfy her- or himself that it does or does not relate to this subject. If it does indeed relate to this subject, the commissioner's certificate must reflect the true position. Even if the certificate does not, it would be formalism of the highest order for courts to ignore substance. Ultimately, the question is whether – during the conciliation process – the substance of the dispute sought to be conciliated became apparent. On the facts before us, I say it did.

[55] The question that needs to be addressed on this aspect of the case is whether there was compliance with section 191 of the Labour Relations Act, before the matter was referred to the Labour Court. The question may be determined with reference to the purpose of a referral of a dispute to conciliation. In *Intervalve* this Court declared:

> "The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships."[52]

[52] *Intervalve* above n 31 at para 46.

[56] While it is true that the certificate of non-resolution here describes the dispute that was conciliated as "unfair discrimination", the uncontroverted evidence on record establishes that the commissioner who convened the conciliation meeting drew the parties' attention to the fact that the real dispute between them was a constructive dismissal. It is this dispute which the parties attempted to resolve but resolution eluded them. Consequently, the purpose of section 191 was achieved through the parties attempt to resolve the constructive dismissal dispute during conciliation.

[57] The attainment of the provision's purpose in turn establishes compliance with the Labour Relations Act. *Intervalve* outlines the test for compliance in these terms:

> "This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."[53]

[58] What remains for consideration is whether it is permissible to show compliance with section 191 by reference to evidence on what occurred during conciliation. Although section 157(4)(b) stipulates that a certificate of non-resolution issued by a commissioner constitutes sufficient proof that an attempt has been made to resolve the dispute, the Labour Relations Act does not exclude other means, including evidence on what happened at conciliation. In opposing consideration of such evidence in the enquiry for determining whether a constructive dismissal dispute was discussed during conciliation, the respondent laid much store on rule 16 of the CCMA rules.

[53] Id at para 44 citing with approval *Maharaj v Rampersad* 1964 (4) SA 638 (A) at 646C-E.

Rule 16 of the CCMA Rules

[59] As mentioned above,[54] the Labour Appeal Court no doubt placed reliance on rule 16. At the time of the conciliation proceedings in this matter, rule 16 of the CCMA Rules was headed "Conciliation proceedings may not be disclosed" and provided that:

> "(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.
>
> (2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation."

[60] The CCMA Rules were amended during 2015, and rule 16 now reads:

> "(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. 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*.
>
> (2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation *unless as ordered by a court of law*."

[61] The amendment provides that a court of law may order that evidence of what transpired during conciliation proceedings be produced.

[62] It is clear, from the terms of rule 16, both pre- and post-amendment, that all communications of a without prejudice nature, made during conciliation proceedings, are privileged and may not be disclosed in subsequent proceedings. This privilege

[54] See [41].

may be waived by consent between both parties or, as provided for in the amendment, by order of a court of law. Documents disclosed during the course of conciliation proceedings, that are otherwise privileged, retain their privilege in subsequent proceedings, unless otherwise agreed between the parties or if ordered by a court of law.

[63] In exceptional circumstances, and subject to the discretion of the arbitrator or the court, evidence as to the conduct of parties, including the commissioner, or the content of any advice or views expressed by the commissioner during conciliation, may be admissible, if the interests of justice require the disclosure thereof in subsequent proceedings.[55]

[64] The purpose of rule 16, both pre- and post-amendment, is to create a safe harbour for parties who are attempting to resolve a dispute. Hence it prohibits disclosure of offers, counter-offers and discussions. The purpose of conciliation is to achieve the speedy resolution of disputes. In order to achieve this, rule 16 prohibits the disclosure of "anything said at conciliation proceedings" as to allow parties to be able to speak openly and honestly without concern of something they have said being used against them at a later stage.

[65] There is thus a general requirement of non-disclosure. This interpretation is in line with and supported by the text and context of the rule. Furthermore, it gives effect to its purpose which is to facilitate the settlement of labour disputes at the earliest available opportunity, without having to resort to expensive and time-consuming litigation. It does so by providing for without prejudice discussions

[55] *Kasipersad v Commission for Conciliation, Mediation & Arbitration* [2002] ZALC 89; (2003) 24 ILJ 178 (LC) at paras 5-6, where the Labour Court provided, with reference to a review application, that:

> "The prohibition against reference to statements made at the conciliation during any subsequent proceedings and the prohibition against the commissioner or any other person testifying about the conciliation process conflicts with the right of the applicant to administrative justice and the power of this court to review the performance of any function by the CCMA.
>
> The CCMA Rules, as subordinate legislation, must therefore yield to the Labour Relations Act and to the Constitution".

to take place during conciliation, and to expressly record that these discussions are privileged in any further proceedings, thus encouraging parties to speak freely, without apprehension that concessions or offers made would be used against them in subsequent proceedings if the matter did not settle.

[66] The rationale behind providing privilege for statements made "without prejudice" is very similar, if not the same, which is that—

> "public policy demands the parties to the disputes should be encouraged to avoid litigation and all the expenses, delays, hostility and inconvenience that it usually entails, by resolving their differences amicably in full and frank discussion without fear that, if the negotiations fail, any admissions made by them during these discussions will be used against them in ensuing litigation".[56] (Footnote omitted.)

[67] Evidence as to the nature of the dispute is, to my mind, not privileged. This evidence does not relate to the substance of the proceedings and is merely descriptive. There is nothing in the majority judgments in either *Driveline* or *Intervalve* which precludes approaching the question of what dispute was conciliated and what was referred to the Labour Court for adjudication as a question of substance that requires substantive adjudication. In order to determine whether a matter referred to the Labour Court for adjudication had first been referred to the CCMA for conciliation, the first point of reference is the referral documents. However, if there is a dispute as to the nature of the dispute referred to the CCMA then regard may be had to evidence outside of these documents.

[68] In *Premier Foods*[57] the applicant had applied to the Labour Court to review and set aside an arbitration award made by the commissioner on the basis of misconduct by the latter in the conduct of conciliation/arbitration proceedings in the CCMA. During the course of the proceedings, the commissioner had expressed a strong

[56] Dendy "Privilege" in *LAWSA* 3 ed (2015) vol 18 at para 181.

[57] *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation & Arbitration* [2016] ZALCJHB 426; (2017) 38 ILJ 658 (LC) (*Premier Foods*).

adverse view of the merits to one of the parties. This had formed the basis of a recusal application when the proceedings commenced before the commissioner. The commissioner refused to hear the recusal application and proceeded to arbitrate the dispute. On review, the Labour Court correctly considered the evidence of what had transpired at conciliation, and held that the conduct of the commissioner constituted a material irregularity in the conduct of the proceedings.[58] The conduct of the commissioner in *Premier Foods*, as in the matter under consideration, had nothing to do with the rightful purpose of rule 16 which is to create a safe harbour for parties who are attempting to settle a dispute.

[69] The concepts of negotiation privilege, settlement privilege or privilege attached to statements made without prejudice are well established in our law. Settlement privilege provides:

> "Statements are made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute may not be disclosed in evidence without the consent of both parties."[59]

Statements or admissions made during the course of settlement negotiations, that are unconnected to or irrelevant to the settlement are not covered by the rule.[60]

[70] There is no reason to surmise that the Governing Body of the CCMA intended, by enacting rule 16, to extend the common law privilege attached to without prejudice settlement negotiations. Such an interpretation is not supported by the context and purpose of the rule. The purpose of rule 16, to promote frank discussion and early settlement of disputes, is properly served by the application of the common law rule of settlement privilege. The interpretation of rule 16, as contended for by the respondent,

[58] Id at paras 37-8.

[59] Zeffert et al *The South African Law of Evidence* 2 ed (LexisNexis/Butterworths, Durban 2009) at 700.

[60] Id at 703, relying on *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 678 and *Erasmus v Pienaar* [1984] ZAGPPHC 1; 1984 (4) SA 9 (T) at 30C-E.

to impose a blanket ban on the entirety of the content of conciliation proceedings, does not further promote this purpose, or serve any legitimate purpose.

[71] There may have been concern about determining the scope of the privilege under the rule with reference to the common law, given that conciliation involves lay people who may not know the common law parameters on privilege. And without legal advice, they could be inhibited from participating freely in the discussions. Since the rule has been amended, parties involved in conciliation would know that whatever is said during conciliation proceedings may be disclosed in subsequent proceedings with their consent or if ordered by a court. It is assumed that such an order would be issued sparingly and where the interests of justice warrant disclosure.

What was before the Labour Court?

[72] It must have been apparent to all parties at conciliation that the applicants' employment with the respondent had terminated by the time conciliation was held on 1 October 2011. It was common cause that they had withheld their services from the respondent since about 13 September 2011.

[73] It is highly probable that the commissioner, on learning that the applicants had "terminated" their employment, would seek clarity on the reason for termination, and would, from the evidence, deduce that the reason was alleged constructive dismissal, due to discriminatory conduct against the applicants. It was not in dispute that the applicants had referred a dispute to the CCMA based on discriminatory conduct.

[74] In their statement of case filed in the Labour Court, the applicants stated that the referral to the Labour Court was in terms of sections 187 and 191 of the Labour Relations Act. As already mentioned, their statement of material facts set out in detail the racial discrimination they were subjected to during the course of their employment with the respondent. They alleged that this unfair discrimination, primarily on the basis of their race, had led to their decision to resign in circumstances where their continued employment had become intolerable.

[75] The respondent opposed the application and Mr Lewis, who had been present at the conciliation proceedings, deposed to an opposing affidavit on its behalf. In the affidavit, Mr Lewis stated that the applicants had absconded from their employment and denied all allegations of racial discrimination on the part of the respondent. He also alleged that the court had no jurisdiction to hear the matter.

[76] The Labour Court judgment captures the essence of the opposing affidavit:

> "[T]he opposing affidavit avers that the allegations in the respondents' statement of case are either 'fabricated', 'denied' or 'untrue'.
>
> . . .
>
> Under the heading 'legal issues', Lewis states that the respondents' application 'does not qualify with section (187) of the Act or section (186E) of the Act of the Labour Relations Act of 1995' (sic). This clearly indicates that Lewis, who was present at the conciliation, clearly understood the respondents' claim to be based on an automatically unfair dismissal (section 187) and a constructive dismissal (186(e)).
>
> . . .
>
> "[T]he opposing affidavits stand in stark contrast to the affidavit filed by the applicant in support of this application."[61]

[77] It is inconceivable that had the nature of the dispute, as set out in the statement of claim, been at odds with the dispute conciliated that this issue would not have been raised in the opposing affidavit by Mr Lewis, who had attended the conciliation. In the absence of direct controverting evidence, the evidence of the applicants to the effect that the true dispute, automatically unfair constructive dismissal caused by unfair discrimination and racially discriminatory treatment, was conciliated by the CCMA, should have been accepted. There is no explanation for the inconsistency between the version of the applicants and the certificate of outcome. Once the version of the applicants is accepted, the conclusion must inevitably be that the Labour Court

[61] Labour Court judgment above n 12 at para 6-8.

had jurisdiction to entertain the matter. It follows that the decision of the Labour Appeal Court must be overturned.

[78] On the application papers, the Labour Court correctly held that what was conciliated involved an allegation that the applicants had been dismissed. The evidence to support a finding as to the nature of the dispute conciliated was not inadmissible. The respondent had not made out a case for rescission. For these reasons, I am of the view that default judgment was properly granted.

Order

[79] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside and substituted with:

   "The appeal is dismissed".
4. There is no order as to costs.

ZONDO DCJ

Introduction

[80] I have read the judgment prepared by my Colleague, Theron J (first judgment). It grants leave to appeal and concludes that the Labour Court had jurisdiction to adjudicate the alleged constructive dismissal dispute or an automatically unfair dismissal dispute that the applicants referred to the Labour Court for adjudication. It, accordingly, upholds the appeal against the decision of the Labour Appeal Court, sets it aside and in effect restores the decision of the Labour Court in terms of which that Court dismissed the respondent's (CMI's) rescission application.

[81] I am unable to agree with the conclusion and outcome of the first judgment. In my view, the Labour Court did not have jurisdiction and the Labour Appeal Court's decision was correct and in accordance with established precedent. Accordingly, the appeal should be dismissed. I set out the reasons for this conclusion.

[82] If we grant the applicants leave to appeal, the issue that this Court will be called upon to decide in the appeal is whether the Labour Court was correct in dismissing CMI's rescission application. The answer to that question will depend upon whether the Labour Court had jurisdiction to adjudicate a constructive dismissal dispute or an automatically unfair dismissal dispute that the applicants had referred to the Court for adjudication in respect of which the Labour Court awarded them certain amounts of compensation in a default judgment. This is so because the basis upon which CMI sought the rescission of the Labour Court's default judgment against it was that the Labour Court did not have jurisdiction to adjudicate an alleged constructive dismissal dispute or an automatically unfair dismissal dispute. If the Labour Court did not have jurisdiction, it erroneously granted the default judgment and that judgment should have been rescinded. If, however, the Labour Court did

have jurisdiction, then the default judgment was correctly granted and should not be rescinded.

Background

[83] It is not necessary to set out the full background to this matter as the only issue is whether the Labour Court had jurisdiction to adjudicate the alleged constructive dismissal dispute or automatically unfair dismissal dispute which the applicants referred to the Labour Court for adjudication. It is only necessary to refer to those facts that are relevant to the question whether the Labour Court had jurisdiction.

[84] The applicants were employed by the respondent in 2009. They allege that during their period of employment by the respondent, they were subjected by the respondent or its representatives to various acts of unfair discrimination based on their race or colour. They allege in their statement of case in the Labour Court that on 13 September 2011 they resigned from CMI's employ because the acts of unfair discrimination based on their race or colour had become intolerable. The respondent CMI disputes the allegation that the applicants resigned or informed it that they were resigning. It says that they absconded from its employ. It also disputes that the applicants were subjected to acts of unfair discrimination based on their race.

Referral of dispute to conciliation

[85] On 19 September 2011 the applicants referred a certain dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. They described the dispute that they were referring to the CCMA as being "unfair discrimination S10 of the Employment Equity Act." This was done in paragraph 3 of the referral document. Paragraph 3 had a list of various disputes from which the applicants had to choose the dispute that they were referring to the CCMA for conciliation. The other disputes in the list included those described as "unfair dismissal", "refusal to bargain", and "unfair labour practice". Paragraph 3 of the referral document required the applicants to indicate "the nature of the dispute". They

were required to do this by way of a tick. They ticked the dispute described as "unfair discrimination S10 of the Employment Equity Act". They did not tick the dispute described as "unfair dismissal". In the referral document there was also a blank space provided which the applicants could use to describe the nature of their dispute if their dispute was not one of those listed in that paragraph. The applicants did not use that space.

[86] In another section of the referral document the applicants were required to "summarise" the facts of the dispute they were referring to conciliation. They summarised the facts of their dispute as "racial discrimination, verbal abuse". They did not mention any dismissal nor did they say that they had resigned. They also did not mention the phrase "constructive dismissal".

[87] In yet another section of the referral document, the applicants were required to specify the outcome they wanted out of the referral of the dispute to the conciliation process. They gave their desired outcome as being: "[e]mployer to stop discriminating us". They did not mention the outcomes that dismissed employees normally demand or ask for, namely, "reinstatement" or "compensation for unfair dismissal" or "compensation for constructive dismissal". It is difficult to understand why the applicants said that the outcome they wanted was that the employer should "stop discriminating us" if they had left CMI's employ with no intention of returning. I say this because, on their version, the applicants say that they resigned on 13 September 2011. They completed the referral document on 19 September 2011.

[88] The outcome that the applicants asked for is consistent with people who had not resigned from CMI when they completed the referral document. How could CMI stop "discriminating" against them if they were no longer in its employ? That the applicants said that this was the outcome they wanted out of the referral of the dispute to the conciliation process is consistent with CMI's version that they did not resign and is inconsistent with their version that they had resigned on 13 September 2011.

[89] Finally, the referral document had Part B. Part B was written in big words; "UNFAIR DISMISSAL DISPUTES ONLY". Part B in the referral document is for unfair dismissal disputes. It is the section to be filled in if the dispute is one concerning an unfair dismissal. The applicants did not complete this part of the referral document and it is not included in the record before us. On 14 September 2011 the applicants had referred another dispute to the CCMA for conciliation. The referral document they signed was the same as the one they completed on 19 September 2011. That referral document is part of the record before us. In that referral document the applicants ticked an "unfair labour practice" dispute as opposed to an unfair dismissal dispute or an unfair discrimination dispute as the dispute they were referring to the CCMA. When they came to Part B of the referral document, the applicants made two lines across the page and wrote the word "cancelled" between the two lines.

[90] The applicants must have seen Part B of the referral document which deals with dismissal disputes but chose not to complete that part of the referral document. If the applicants had intended to refer to the CCMA for conciliation a dismissal dispute, there is no way that they would not have completed that section of the referral document. It seems to me that the reason why the applicants did not complete this section of the referral document is that the dispute that they were referring to the conciliation process did not involve dismissal and was not constructive dismissal.

[91] After the CCMA had received the referral document in respect of the dispute for conciliation – that is the referral document in which the applicants ticked the dispute of "unfair discrimination S10 Employment Equity Act" as their dispute – it convened a conciliation meeting of the parties. That meeting was called so that a commissioner would have a conciliation meeting with the parties to try and have the dispute referred to the CCMA resolved. According to the applicants, at that meeting there was some discussion of an alleged constructive dismissal dispute.

[92] The parties were not able to resolve the dispute. As required by the LRA, the commissioner completed a certificate of outcome indicating that the dispute remained unresolved. To indicate what the dispute was that remained unresolved, the commissioner wrote on the certificate of outcome that the dispute was "unfair discrimination". That reference by the commissioner to an unfair discrimination dispute was a reference to the dispute of an "unfair discrimination S 10 Employment Equity Act" which the applicants had ticked in the referral document. If I am right in this, as I think I must be, then it is clear that the commissioner himself says that the dispute that he conciliated is the same dispute that was referred to the CCMA by the applicants and that dispute is one that excludes any dismissal dispute by virtue of section 10(1)[62] of the Employment Equity Act.

Referral of dispute to the Labour Court and default judgment

[93] Subsequent to the issuing of the certificate of outcome by the commissioner, the applicants referred to the Labour Court for adjudication an alleged dispute of constructive dismissal and/or an automatically unfair dismissal dispute by delivering to the Registrar of the Labour Court and serving on CMI a statement of claim. CMI delivered its response but failed to take one or other step required by the Rules of the Labour Court. For that reason the applicants applied to the Labour Court for, and, were granted, default judgment.[63]

[94] The Labour Court dealt with the matter on the basis that the dispute before it was one concerning constructive dismissal. However, elsewhere in its judgment the Labour Court also dealt with the matter on the basis that the dispute was an automatically unfair dismissal dispute.[64] Indeed, the relief it granted was one that it could only grant if it had concluded that the applicants had been dismissed and the dismissal was automatically unfair. The Labour Court granted the applicants compensation equivalent to 24 months' remuneration.

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[62] Section 10(1) of the Employment Equity Act is quoted in [123].

[63] Default judgment above n 4.

[64] Id at para 3.

CMI's rescission application in the Labour Court

[95] CMI later brought in the Labour Court an application for the rescission of the default judgment. The applicants opposed the application. CMI's case in the rescission application was that the Labour Court had erroneously granted the default judgment because it did not have jurisdiction in respect of the alleged dispute of constructive dismissal or an automatically unfair dismissal dispute. It argued that this was so because the applicants had not referred any such dispute to the conciliation process. The applicants contended that the Labour Court had not erroneously granted the default judgment because it had jurisdiction in respect of the constructive dismissal dispute or the automatically unfair dismissal dispute. The applicants based this contention on their version that constructive dismissal had been discussed at the conciliation meeting. It was implied in their contention that, as long as a dispute had been discussed at the conciliation meeting, the Labour Court would have jurisdiction, even if the dispute had not been referred to the conciliation process. CMI insisted that a dispute was required to have been referred to conciliation before the Labour Court could have jurisdiction.

[96] It seems to have been accepted by both parties that if, indeed, the Labour Court had granted the default judgment erroneously, CMI was entitled to a rescission order but, if the Labour Court had not granted the default judgment erroneously, the rescission application would fall to be dismissed. The Labour Court held that it had jurisdiction in respect of the alleged dispute of constructive dismissal or dispute concerning an automatically unfair dismissal. It, accordingly, held that it had not erroneously granted the default judgment. It, therefore, dismissed the rescission application.

[97] In a subsequent appeal, the Labour Appeal Court took a different view on the issue. Relying on its previous decision in *Driveline*, the Labour Appeal Court held that, if a dismissal dispute had not been referred to a conciliation process,

the Labour Court would not have jurisdiction. It, therefore, upheld CMI's appeal and set aside the decision of the Labour Court.

[98] The applicants now apply to this Court for leave to appeal against the decision of the Labour Appeal Court.

Jurisdiction

[99] This Court has jurisdiction in respect of this matter because the matter raises the interpretation and application of the Labour Relations Act which is a statute enacted to give effect to section 23 of the Constitution. That is a constitutional issue. The question is whether or not the Labour Court had jurisdiction to adjudicate a constructive dismissal dispute or a dispute concerning an allegedly automatically unfair dismissal if that dispute had not been referred to the conciliation process.

Leave to appeal

[100] This Court grants leave to appeal if it is in the interests of justice to grant leave. It considers a number of factors in this regard. The question is whether the Labour Court had jurisdiction to grant the default judgment in this case if the dispute had not been referred to conciliation. The question of whether the Labour Court had jurisdiction depends upon the interpretation and application of various provisions of the LRA and the Employment Equity Act. This is an important matter. It goes beyond the parties to the present proceedings. Since the Labour Court and Labour Appeal Court gave conflicting judgments, there are reasonable prospects of success. It is in the interests of justice to grant leave to appeal.

The appeal

[101] The broad question before us is whether the Labour Appeal Court was right in concluding that the Labour Court did not have jurisdiction to adjudicate a constructive dismissal dispute or an automatically unfair dismissal dispute. If the Labour Appeal Court was right, the appeal must be dismissed. If it was wrong, the

appeal must be upheld. The basis for CMI's contention that the Labour Court did not have jurisdiction was that the applicants had not referred any dismissal dispute to the CCMA for conciliation and that, therefore, whether one is talking about a constructive dismissal dispute or an automatically unfair dismissal dispute, it makes no difference.

[102] The applicants' basis for their contention that the Labour Court did have jurisdiction was that they said that the constructive dismissal was discussed at the conciliation meeting. I propose to deal first with the question whether the Labour Court had jurisdiction to adjudicate an alleged constructive dismissal dispute. The term "constructive dismissal" does not appear anywhere in the LRA but it means the termination of a contract of employment by an employee (as opposed to the employer) owing to the fact that the employer has made continued employment intolerable. The term "constructive dismissal" is used in labour law to refer to what is contemplated in section 186(e) of the LRA. That provision reads:

> "'Dismissal' means that –
>
> (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

[103] The applicants say that they resigned from CMI's employ on 13 September 2011. Section 191(5) of the LRA provides that, if a constructive dismissal dispute has been referred to conciliation and either a certificate that the dispute remains unresolved has been issued or 30 days has lapsed from the date when the CCMA received the referral, whichever occurs first, the dispute must be arbitrated by the CCMA or by the bargaining council. Section 191(5)(a)(ii) reads:

> "(5) If a council or a 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—

(ii) The employee has alleged that the reason for dismissal is that the employer made continued employment intolerable."

[104] The Labour Court has no jurisdiction to adjudicate such a constructive dismissal dispute even if that dispute was referred to conciliation. That is because section 157(5) of the LRA provides that the Labour Court has no jurisdiction to adjudicate a dispute which in terms of the LRA is required to be arbitrated. Section 157(5) reads:

> "Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration."

Section 158(2) reads:

> "If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may—
>
> (a) stay the proceedings and refer the dispute to arbitration; or
>
> (b) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable."

[105] In dealing with the default judgment, the Labour Court did not purport to exercise any power in terms of section 158(2). In any event, section 158(2) cannot be resorted to in the case of a dispute that was not referred to conciliation. It is only available in respect of a dispute that was referred to conciliation and either the commissioner issued a certificate that the dispute remained unresolved or a period of 30 days expired after the dispute had been received by the CCMA.

[106] Given all the above, there can be no doubt that, in so far as the applicants contend that the dispute that they referred to the Labour Court for adjudication was a constructive dismissal dispute, the Labour Court simply had no jurisdiction in respect of that dispute even if that dispute had been referred to conciliation. Accordingly, the Labour Court erroneously granted the default judgment in a matter in respect of which it had no jurisdiction. This disposes of the appeal in so far as the applicants rely upon a constructive dismissal dispute. Therefore, to the extent that the applicants relied upon a constructive dismissal dispute, the appeal falls to be dismissed.

[107] I now proceed to deal with the appeal in so far as the applicants contend that the dispute that they referred to the Labour Court for adjudication was a dispute concerning an automatically unfair dismissal. What I say below in regard to an alleged automatically unfair dismissal dispute will apply to a constructive dismissal dispute to the extent that it may be argued that the Labour Court may be asked to deal with the matter by virtue of the first part of section 158(2) of the LRA. In other words, if the constructive dismissal dispute was not referred to conciliation, the Labour Court would have no jurisdiction even under section 158(2).

Is the referral to conciliation of a dismissal dispute a jurisdictional prerequisite for the jurisdiction of the Labour Court?

[108] With regard to a dispute about an automatically unfair dismissal, the Labour Court would have jurisdiction in respect of such a dispute if that dispute had been referred to the CCMA or relevant bargaining council for conciliation and one of two events had happened. The one event would be if the commissioner had issued a certificate to the effect that the dispute remained unresolved or if 30 days had expired from the date of receipt of the referral by the CCMA or bargaining council.

[109] The question that arises, therefore, is whether the referral of a dismissal dispute, including an automatically unfair dismissal, to conciliation is a jurisdictional requirement before the Labour Court may have jurisdiction to adjudicate such a dispute. The answer to this question is in the affirmative. As the Labour Appeal

Court pointed out in *Driveline*, referring an unfair dismissal dispute to the conciliation process without labelling the dismissal as an automatically unfair dismissal would not mean that the Labour Court would not have jurisdiction to adjudicate an automatically unfair dismissal dispute. All that would be required would be for an appropriate amendment to be made to the statement of claim to the effect that the dismissal was automatically unfair. That is if an unfair dismissal dispute had been referred to the conciliation process but such an amendment would not help an applicant if no unfair dismissal dispute had been referred to the conciliation process. That is because it would be a different dispute altogether from the one that was referred to the conciliation process. In the present case the applicants did not by any stretch of the imagination refer a dismissal dispute of any description whatsoever to the conciliation process. If they had referred to the conciliation process some dismissal dispute, they would have been able to amend their statement of claim appropriately to allege or contend that the dismissal was automatically unfair. In which case the Labour Court would have had jurisdiction.

[110] The Labour Court has no jurisdiction to adjudicate a dismissal dispute if that dispute has not first been referred to conciliation. That this is the legal position has been made plain by not only the Labour Appeal Court but also by this Court. In this regard it is to be noted that the first judgment relies heavily on the Labour Appeal Court's judgment in *Driveline*[65] for the position that it adopts. However, the first judgment omits to refer to various parts of the majority judgment in *Driveline* which upheld the position that the Labour Court had no jurisdiction to adjudicate a dismissal dispute that has not been referred to conciliation.

[111] In the above connection a reference to two or three areas in the majority judgment in *Driveline* should suffice to make this point clear. In *Driveline* the majority said:

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[65] *Driveline* above n 22.

> "The Act requires some disputes to be referred to arbitration, and others, to adjudication, if conciliation fails (see section 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*."[66]

Later on, the majority in *Driveline* said:

> "*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*."[67]

[112] Finally, the Labour Appeal Court 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."*[68]

It is also necessary to point out that in *Driveline* the question whether or not the referral of a dispute to the CCMA or a bargaining council for conciliation was a jurisdictional requirement for the Labour Court was the main issue for determination by the Court. Accordingly, the Labour Appeal Court's pronouncement as reflected in the passages quoted above was not a pronouncement made in passing. Those are

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[66] Id at para 38.

[67] Id at para 73.

[68] Id at para 74.

statements which the Labour Appeal Court made to decide an issue that was squarely before it.

[113] The first judgment implies that the referral of a dismissal dispute to a conciliation process is not a precondition that must be satisfied before the Labour Court may have jurisdiction in respect of a dispute. For this the first judgment seeks to rely on *Driveline* to support that position. *Driveline* does not support that position. That is the position that was taken by the minority in *Driveline* which was rejected by the majority.

[114] In *Intervalve*[69] four judgments were written by different members of this Court. They were the main judgment, concurrence and two dissents. The main judgment and the concurrence were majority judgments. Both the main judgment, by Cameron J, and the concurrence, upheld the legal position articulated by the Labour Appeal Court in *Driveline* as reflected in the passages quoted above. The main judgment and the concurrence were both majority judgments. The main judgment said:

> "[31] On the point crucial to this case, the majority [in *Driveline*] *firmly rejected the proposition that the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all*. It said that it was—
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> > 'as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication.'
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> [32] The reasoning of the *Driveline* majority is, in my view, convincing. Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this

[69] *Intervalve* above n 31. Cameron J wrote for the majority with Mogoeng CJ, Moseneke DCJ, Khampepe J, Leeuw AJ and Zondo J concurring. Zondo J wrote a concurring judgment. Nkabinde J and Froneman J wrote dissenting judgments.

requirement has been deeply rooted in South African labour-law history for nearly a century. *We should not tamper with it now*."[70]

Later, it was said in the main judgment:

"*Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. NUMSA therefore had to refer the dispute between the employees and Intervalve and BHR for conciliation*."[71]

[115] The concurrence in *Intervalve* was to the same effect as what the main judgment held as reflected in the passages quoted above. In the concurrence, this Court said in part:

"[107] The next question is whether the dismissal disputes involving Intervalve and BHR could be adjudicated by the Labour Court notwithstanding that they had not been referred to conciliation.

[108] The main judgment holds that the Labour Court has no jurisdiction to adjudicate the Intervalve dismissal dispute and the BHR dismissal dispute as these disputes were never referred to conciliation. This is right. *The Labour Court does not even have a discretion to adjudicate a dismissal dispute that has not been referred to conciliation*."[72]

[116] The fact that a dismissal dispute may have been discussed at a conciliation meeting called for a different dispute is of no legal significance in the determination of whether or not the Labour Court had jurisdiction to adjudicate the dismissal dispute or an automatically unfair dismissal dispute. I make this point because both the applicants, in their papers, and, the majority, in the first judgment, suggest that, even if the constructive dismissal dispute was not referred to conciliation, the Labour Court would have jurisdiction if, at the conciliation meeting, the constructive dismissal

[70] Id at paras 31-2.

[71] Id at para 40.

[72] *Driveline* above n 22 at para 107-8.

dispute was discussed. The proposition that the Labour Court will have jurisdiction to adjudicate a dismissal dispute as long as the dispute was discussed at a conciliation meeting even if it was not referred to the conciliation process is not based upon any provisions of the LRA. Indeed, even the first judgment does not identify any provision in the LRA which supports the proposition that the Labour Court has jurisdiction to adjudicate a dispute that was not referred to conciliation but one that was discussed at conciliation.

[117] On the contrary, there are provisions in the LRA which make it clear that the dispute that a commissioner must conciliate must be a dispute that was referred to conciliation. In other words, a commissioner may not conciliate a dispute that has not been referred to conciliation. Sections 115(1), 133(1) and 135(1) of the LRA make this crystal clear. Section 115 reads:

> "(1) The Commission must—
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> (a) *attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;*
>
> (b) *if a dispute that has been referred to it remains unresolved after conciliation,* arbitrate the *dispute* if—
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> (i) *this Act* requires arbitration and any party to the *dispute* has requested that the *dispute* be resolved through arbitration."

Section 133(1) reads:

> "(1) The Commission must appoint a commissioner to attempt to resolve through conciliation—
>
> (a) *any dispute referred to it in terms of section 134*; and
>
> (b) *any other dispute that has been referred to it in terms of this Act*."

Section 135(1) reads

"(1) *When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation*."

These provisions make it plain that the dispute which a commissioner of the CCMA is authorised to conciliate is a dispute that has been referred to the CCMA for conciliation. These provisions mean that the proposition made in the first judgment that the Labour Court has 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.

[118] Provisions that make it a requirement that a dispute must be referred to conciliation before it can be referred to the Labour Court for adjudication are not confined to the LRA. In other labour statutes, too, similar provisions are to be found. Section 52 of the Employment Equity Act deals with the procedure for disputes about the interpretation and application of Part C of Chapter V. Section 52(2) provides:

"(2) The CCMA *must attempt to resolve a dispute referred to it in terms of this Part through conciliation."*

Section 19 of the Skills Development Act has the heading: "Disputes about learnerships." Section 19(2) of that Act confers upon any party to a dispute referred to in that provision the right to refer such a dispute to the CCMA for conciliation. Then section 19(5) provides that "[i]f the dispute remains unresolved, any party may request that the dispute be resolved through arbitration as soon as possible." The dispute referred to in subsection (5) is a dispute about learnerships. Similar provisions are to be found in section 80(1) and (4) of the Basic Conditions of Employment Act.[73]

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[73] 75 of 1997. Section 80(1) and (4) reads as follows:

"(1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer the dispute in writing to—

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

(b) the CCMA, if no council has jurisdiction.

[119] From the passages quoted above from the main judgment and the concurrence in *Intervalve*, there can be no doubt that this Court has made it clear that the Labour Court has no jurisdiction to adjudicate a dismissal dispute that has not been referred to conciliation. In fact, referring to this principle, this Court went a step further in *Intervalve* and said in the main judgment: "we should not tamper with it now". As this Court said in *Intervalve*, it is a well-settled principle that has been part of the dispute resolution system in labour legislation in this country since at least 1924.[74]

How to determine whether a certain dispute was referred to conciliation

[120] The next question that arises is how a court determines whether a particular dispute was referred to conciliation in circumstances where there was some referral of a dispute to conciliation. In *Intervalve* this Court had this to say in the concurrence about how to determine whether a certain dispute has been referred to conciliation:

> "Once it is accepted that the dismissal of the employees who took part in the strike on 14 April 2010 could have given rise to multiple dismissal disputes, the next enquiry is to determine whether the referral of 20 April 2010 was limited to the dismissal dispute between the union and Steinmuller or whether it included the dismissal disputes between the union and Intervalve as well as the dismissal dispute between the union and BHR. How does one determine this? *The only way to determine this lies in examining and construing the contents of the referrals documents".*[75]

This means that this Court articulated the approach for determining whether a particular dispute was referred to conciliation or not. It is the examination and construction of the contents of the referral documents. This is correct. It cannot be any other way because, when a person refers a dispute to the CCMA or to a

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> (4) If a dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication."

[74] *Intervalve* above n 31 at para 109.

[75] Id at para 100.

bargaining council for conciliation, it is in the referral document(s) that he or she articulates what the dispute is that he or she is referring to the conciliation process. Therefore, one cannot look elsewhere for a place where that person would have articulated what the dispute is that he or she is referring to conciliation.

[121] In *Intervalve* this Court also dealt in the main judgment with the question of how to determine whether or not a particular dispute was referred to conciliation in a case where there is or was a referral of some dispute to conciliation. To determine whether the dismissal dispute between Intervalve and its former employees and whether the dismissal dispute between BHR and its former employees had been referred to conciliation by way of the first referral i.e. the referral of 20 August 2010, in its main judgment this Court formulated the question to be asked as being whether it can be concluded from the facts that the referral of 20 August 2010 "encompassed" those disputes.[76] This Court put it thus:

> "But can we conclude from these facts that the Steinmuller conciliation referral encompassed also Intervalve and BHR?"[77]

[122] Later in the main judgment in *Intervalve* this Court formulated the question as being whether the Steinmuller conciliation referral "embraced"[78] the dismissal dispute involving Intervalve and the dismissal dispute involving BHR. Therefore, the question could be formulated as being whether the referral document in question can be said to have "encompassed" or "embraced" the dismissal dispute in issue. If it can be said that the referral document concerned did encompass or embrace the dispute in question, then the dispute was referred to conciliation. If, however, it cannot be said that the referral document concerned "encompassed" or "embraced" the dispute in question, the dispute cannot be said to have been referred to conciliation. The result would be that the Labour Court had no jurisdiction to adjudicate the dispute.

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[76] Id at para 44.

[77] Id.

Did the referral of the dispute concerning "unfair discrimination S10 of the Employment Equity Act" to conciliation "encompass" or "embrace" the constructive dismissal dispute or any dismissal dispute?

[123] The only referral document on the basis of which this case has been dealt with by all the courts below is the one in which the applicants ticked in paragraph 3 thereof a dispute described as "unfair discrimination S 10 of the Employment Equity Act" as the dispute that they were referring to conciliation. That is the referral document where, when they were required to give a summary of the facts of the dispute, they wrote: "racial discrimination, verbal abuse".

[124] When, in the referral document, the applicants were required to give the outcome they desired out of the referral of the dispute to conciliation, they wrote: "The employer to stop discriminating us". That referral document reveals that the dispute that the applicants were referring to conciliation was a dispute of unfair discrimination as contemplated in section 10 of the Employment Equity Act. That is why the box which the applicants ticked in the referral document has an express reference to section 10 of the Employment Equity Act. An unfair discrimination dispute contemplated in section 10 of the Employment Equity Act cannot, as a matter of law, encompass or embrace an unfair dismissal dispute that must be referred to the relevant body in terms of section 191 of the LRA. This is so because section 10(1) provides:

> "(1) In this section, the word 'dispute' excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act."

[125] Given the express exclusion of a dismissal dispute from a dispute under section 10(1), this Court cannot hold that the unfair discrimination dispute ticked by

the applicants in the referral document encompassed or embraced a dispute concerning a constructive dismissal or an automatically unfair dismissal. Therefore, we are forced to hold that no dismissal dispute of any kind was referred to the CCMA for conciliation by means of the referral document that related to the dispute about unfair discrimination. To hold otherwise will be to make a decision that is contrary to a statute. We are, therefore, constrained to conclude that the Labour Court did not have jurisdiction to adjudicate a constructive dismissal dispute or any dismissal dispute in this case. Therefore, the Labour Court erred in adjudicating the alleged constructive dismissal dispute or an automatically unfair dismissal dispute. This means that the default judgment was erroneously granted by the Labour Court. Accordingly, CMI's rescission application in the Labour Court should have succeeded. The Labour Appeal Court was right in upholding CMI's appeal and in setting aside the default judgment granted by the Labour Court.

[126] The first judgment concludes that, by way of the referral document to which I have referred, the dispute which the applicants referred to the CCMA for conciliation was a constructive dismissal dispute. Of course, the dispute that the applicants ticked in that referral document as the dispute that they were referring to conciliation is a dispute described as "unfair discrimination S10 of the Employment Equity Act" and not one described as "unfair dismissal" or "constructive dismissal" or described in any terms that involved "dismissal" or "resignation." I have said above that the express reference to "S10 of the Employment Equity Act" in the description of the dispute they ticked as the dispute that they were referring to the conciliation process means that the unfair discrimination dispute was the unfair discrimination dispute contemplated in section 10 of the Employment Equity Act.

[127] Once one accepts that that dispute was a dispute falling under section 10 of the Employment Equity Act, then one is immediately confronted by section 10(1) which excludes a dismissal dispute from the disputes contemplated in section 10. The exclusion of a dismissal dispute from a dispute under section 10 stands in one's way if one wants to say that the unfair discrimination dispute that the applicants ticked

included or encompassed or embraced a constructive dismissal dispute or any dismissal dispute. The first judgment says in effect that the unfair discrimination dispute that the applicants ticked was a constructive dismissal dispute without explaining how it overcomes the exclusion in section 10(1).

[128] If this Court is to find against CMI on the basis that the dispute ticked in the referral document encompassed or embraced or, was, a constructive dismissal dispute despite the fact that it expressly described the dispute as a dispute under section 10 of the Employment Equity Act, then, in all fairness, CMI would need to know how this Court overcame the hurdle of the exclusion of a dismissal dispute in section 10(1). In this regard, it must be remembered that the applicants have not themselves explained how they overcame this hurdle despite the fact that its lawyers would have checked what section 10 says because the description of the dispute in the referral document expressly refers to that section. Nor does the first judgment. The applicants' answering affidavit in the rescission application in the Labour Court was deposed to by their attorney and he did not provide any explanation.

[129] Even apart from the exclusion of a dismissal dispute by section 10(1) from a dispute contemplated in section 10, there is nothing in the contents of the referral document on the basis of which it can be concluded that the referral document in issue encompassed or embraced a constructive dismissal dispute or any dismissal dispute for that matter. On the contrary, most, if not all, of the information written by the applicants in the referral document is inconsistent with any suggestion that the dispute that the applicants sought to refer to the CCMA for conciliation was a dispute concerning dismissal or resignation. When one examines and scrutinises the referral document used in this case, as this Court scrutinised the referral document in *Intervalve*,[79] to determine whether a constructive dismissal dispute was referred to conciliation, the result is that no such dispute was referred to conciliation. Therefore, on that basis too, the Labour Court had no jurisdiction to adjudicate the dispute.

[79] *Intervalve* above n 31 at paras 100 and 134.

[130] The view that the alleged constructive dismissal dispute was referred to the CCMA for conciliation by way of the referral document dated 19 September 2011 is a view that is in conflict with almost everything that is contained in that referral document. First, there is not a single mention of the word "dismissal" or "dismiss" in the referral document. Second, there is not a single mention of the word "resignation" or "resign" or "resigned". Third, there is not a single mention of "constructive dismissal". Of course, there is not a single mention of "automatically unfair dismissal".

[131] Furthermore, the first judgment holds the view referred to in the preceding paragraph despite the absence of any explanation by anybody as to—

(a) Why, if the applicants intended to refer a constructive dismissal dispute to the CCMA for conciliation, they did not tick "unfair dismissal" in paragraph 3 of the referral document but instead ticked "unfair discrimination S10 of the Employment Equity Act";

(b) why, when giving a summary of the facts of the dispute, the applicants did not include any mention of "dismissal" or "resignation" or "constructive dismissal" or "automatically unfair dismissal" but instead simply mentioned "racial discrimination, verbal abuse";

(c) why, as the outcome of the conciliation process, the applicants did not say that they wanted compensation if they believed that the dispute that they were referring to conciliation was a "constructive dismissal" dispute; in this regard it needs to be pointed out that for constructive dismissal the only competent relief under the LRA is compensation. Reinstatement and re-employment are not competent because, for those remedies, there must have been a dismissal; therefore, the outcome that the

applicants said in the referral form they wanted is not competent in respect of a constructive dismissal dispute; the remedy they desired is only competent in respect of an unfair discrimination claim under section 10 of the Employment Equity Act because, for that type of dispute and others, section 50 of the Employment Equity Act gives the Labour Court the power to grant a "just and equitable" remedy as well as an interdict; the outcome that the applicants said they wanted is consistent with them having intended to refer an unfair discrimination dispute to conciliation and inconsistent with them having intended to refer a constructive dismissal dispute to conciliation;

(d) why, the applicants elected not to complete Part B of the referral document which is required to be completed by those employees referring an unfair dismissal dispute to conciliation;

(e) why, the applicants did not use the blank space in the referral document to indicate the nature of the dispute that they were referring to conciliation if they felt that there was no applicable box provided for in the referral document that accurately captured the dispute which they intended to refer to conciliation; and/or

(f) how the hurdle created by the exclusion of a dispute under section 10 of a dismissal dispute contemplated in section 191 of the LRA. Section 10(1) of the Employment Equity Act makes it clear that, as a matter of law, an unfair discrimination dispute under section 10(1) excludes any dismissal dispute from the ambit of an unfair discrimination dispute under section 10 of the Employment Equity Act.

[132] The first judgment seems to infer that the dispute that was referred to conciliation by way of the referral document in issue in this case was a constructive

dismissal dispute. In *S v Mtsweni* the Appellate Division warned that inferences and probabilities must be distinguished from conjecture or speculation.[80] In *Caswell v Powell Duffryn Association Colliers Ltd* the Court said that there can be no proper inference unless there are objective facts from which the other facts are sought to be established.[81] The inference that is sought to be drawn must be consistent with all the proved facts and, in civil proceedings, it must be the most plausible inference. In this case, given what I have set out above, there can be no basis for any suggestion that the inference drawn is plausible.

Did this Court in Intervalve use the referral document to determine whether a dispute was referred to conciliation?

[133] The next question is whether in *Intervalve* this Court used the referral document to decide what dispute had been referred to conciliation and what dispute had not been referred to conciliation. Yes, indeed, in *Intervalve* this Court examined and scrutinised the referral document to determine which dispute was, and, which dispute was not, referred to conciliation. This is to be seen in paragraphs 102 to 106 of the judgment. They read:

> "[102] The union did not include in the record the referral form that it used to make the referral of 20 April 2010. However, we do have in the record the referral form that the union used for the second referral which is identical to the referral form that the union would have used on 20 April 2010. Paragraph 1 of the referral form requires particulars of the party referring the dispute. In paragraph 1 the union would have put itself only or itself and the dismissed employees as the referring party. Paragraph 2 requires the details of the other party to the dispute. The heading to paragraph 2 reads: 'DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)'. Here the union stated that the other party to the dispute was Steinmüller.
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> [103] Paragraph 2 of the referral form also requires the referring party to state whether the other party with whom it is in dispute is an employer, union, employee or

[80] 1985 (1) SA 590 (A) at 593D

[81] [1939] 3 All ER 722 at 733.

employers' organisation. In paragraph 2 the union would have stated that Steinmüller was the employer. Paragraph 3 bears the heading: 'NATURE OF THE DISPUTE'. It then has the question: What is the dispute about? and then a space is provided. Under paragraph 3 the party referring the dispute is required to 'summarise the facts of the dispute you are referring'. Under paragraph 3 the union would have indicated that the workers listed in the referral had been dismissed by Steinmüller on 14 April 2010 for participating in an unprotected strike. It would also have probably alleged that the dismissal was procedurally and substantively unfair.

[104] Paragraph 4 of the referral form required the date of dismissal and the place where the dismissal was effected. Here the union would have given 14 April 2010 as the date of dismissal and Pretoria as the place where the dismissal was effected. Paragraph 6 required the specification of the result or outcome that the referring party would like to have out of the conciliation process. In that paragraph the union would have indicated reinstatement or payment of compensation as the result it sought out of the conciliation process.

[105] The above means that the first referral was used to refer to conciliation only the dismissal dispute between the union and Steinmüller in respect of the dismissal of the employees appearing on the list attached to that referral. The fact that we now know that some of the employees whose names appeared on that list were not employed by Steinmüller but by Intervalve and BHR is neither here nor there. This is because in that referral all the employees were alleged to have been employed by Steinmüller. Intervalve and BHR were not mentioned at all in the referral.

[106] The conclusion is inescapable that the first referral did not include the dismissal dispute between Intervalve and its former employees and the dismissal dispute between BHR and its former employees. Therefore, those dismissal disputes were not referred to the bargaining council for conciliation in the first referral. I am unable to agree with the proposition that the first referral was for any dispute other than the dispute between the union and Steinmüller about the fairness of the dismissal of the employees whose names appeared on the list attached to the referral. In this regard it must be remembered that, in so far as that list included names of persons who had not been employed by Steinmüller and, therefore, could not have been dismissed by Steinmüller, the definition of the word 'dispute' in section 213 of the LRA includes an alleged dispute."

There can, therefore, be no doubt that in *Intervalve* this Court not only articulated the approach as to how a court should determine whether a dispute was referred to the conciliation process where some referral was made but it also went on to apply that approach to the facts of that case. There is no sound reason for that approach to be departed from in this case.

Was the approach adopted in Intervalve formalistic?

[134] In the main judgment in *Intervalve* this Court rejected any criticism that the approach adopted by the majority was formalistic. That is the approach that: (a) the referral of a dismissal dispute to conciliation is a precondition before the Labour Court can be said to have jurisdiction; and (b) to determine whether a dispute was referred to conciliation in a case where some referral was made, the correct approach is to examine and scrutinise the contents of the referral document. In respect of this approach this Court rejected criticism in the third judgment by Nkabinde J that it was adopting a formalistic approach. This Court pointed out that "jurisdiction is not a formality".[82] It went on to say: "The majority judgment [in *Driveline*] eased markedly the formalities relating to dispute characterisation at the conciliation stage. That counters any resurgence of formalism."[83]

[135] The main judgment in *Intervalve* went on to say:

> "[38] There is a further important point, one that is central to the question of formalism in this case. The statute makes it easy to refer disputes for conciliation. The facts here illustrate the point. Though the initial referral cited Steinmuller alone, the referral could have mentioned any entity NUMSA suspected may have been an employer. Indeed, the second, abortive referral two months later did precisely this. Why NUMSA failed to adopt this expedient from the start we do not know. *The point is that it could have done so easily. That is not contested.*

[82] *Intervalve* above n 31 at para 37.

[83] Id.

> [39] What is more, though the employee must satisfy the council that a copy of the referral had been served on the employer, the statute provides for readily practicable methods of service. It can be effected by hand, post or fax. In contrast to initiation of process in the Magistrates' and Superior Courts, proof of service requires no formality. So the statute itself, and the labour courts' jurisprudence, have abated the risk of crippling formalism."[84]

[136] Just as in *Intervalve*, in this case too, the applicants could have easily referred a constructive dismissal or unfair dismissal dispute to the CCMA for conciliation. They were able to refer an unfair labour practice dispute to the CCMA for conciliation on 14 September 2011. They were equally able to refer an "unfair discrimination section 10 of the Employment Equity Act" dispute on 19 September 2011. What prevented them from referring an unfair dismissal dispute to conciliation? In my view, nothing and they have not told us anything either.

[137] The confusion which appears to have led the Labour Court to conclude that it had jurisdiction in this matter seems to be the statement by the applicants in their answering affidavit in the rescission application that during the conciliation meeting the true nature of the dispute emerged and the commissioner identified the true nature of the dispute. They then suggest that a commissioner is entitled to identify the true dispute between the parties. The first point to be made is that a commissioner has no power to conciliate a dispute other than the dispute that the applicants referred to the conciliation process. In other words, the statute limits a commissioner to conciliating the dispute that has been referred to the conciliation and no other. As shown elsewhere in this judgment, a number of provisions of the Labour Relations Act make this clear. In this regard it must be remembered that the CCMA and, therefore, a commissioner of the CCMA, is a creature of statute and derives its powers from the LRA. If, therefore, a commissioner sought to conciliate a dispute that has not been referred to the conciliation process, he or she will be acting *ultra vires*.

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[84] Id at paras 38-9.

[138] The CCMA is a body created by legislation and exercising public power when it conciliates a dispute. In accordance with the principle of legality, a commissioner of the CCMA may not exercise any power other than power conferred upon him or her by law. In this case sections 115, 133 and 135 of the LRA make it abundantly clear that the power to conciliate conferred upon the CCMA or a commissioner is the power to conciliate a dispute that has been referred to conciliation. Not a single provision can be found in the whole LRA which confers power on the CCMA or a commissioner to conciliate a dispute that has not been referred to conciliation.

[139] In some areas the first judgment implies that a CCMA commissioner may conciliate a dispute that was not referred to conciliation as long as it is raised at the conciliation meeting. That is a view that is contradicted by clear statutory provisions, namely sections 115, 133 and 135 of the LRA. In other parts the first judgment says that it agrees with the conclusion of the Labour Court that the constructive dismissal dispute was referred to conciliation. The first judgment does not refer to anything that supports this view. In this judgment I have referred to numerous aspects in regard to both the content of the referral document and the law to show that any view that the constructive dismissal dispute or any dismissal dispute whatsoever was referred to conciliation by way of the referral document used in this case is simply without any basis in fact or law. The view that a constructive dismissal dispute or an automatically unfair dismissal dispute was referred to conciliation by way of the referral document used in this case is simply not supported by anything.

[140] It is, however, true that a commissioner may have to try and identify what the true dispute between the parties is where this is not clear. However, the purpose of that exercise has to be that, if the true dispute is the same as the dispute that was referred to the conciliation process, he or she can conciliate the dispute with a full appreciation of what it is. However, should the commissioner form the view that the true dispute between the parties is not the one that was referred to the conciliation process, the commissioner is required to rule that he or she cannot conciliate that dispute for lack of jurisdiction because it was not referred to conciliation and that he

or she is confined to the dispute that was referred to the conciliation process. What a commissioner may not do, as a matter of law, is to conciliate dispute B which has not been referred to conciliation in circumstances where dispute A is the dispute that was referred to conciliation.

[141] The Labour Court is not bound by a commissioner's identification of what he or she believes to be the true dispute. The Labour Court is free to make its own identification of what dispute was referred to conciliation, what the true dispute between the parties is, what dispute was conciliated and what dispute was referred to it for adjudication.

[142] Furthermore, it is important to avoid using the Rules of the CCMA to decide the jurisdiction of the Labour Court. Whether or not the Labour Court has jurisdiction in a particular matter or dispute is determined by reference to the provisions of the LRA and not by reference to the Rules of the CCMA.

[143] Again, as stated elsewhere in this judgment, the fact that a dispute was discussed at a conciliation meeting is irrelevant to the question whether the Labour Court has jurisdiction in a particular matter. In this regard I see that both the Labour Court and Labour Appeal Court made statements which suggest that that may be a relevant factor. That is an error. It is a view that is not supported by any provision in the LRA. The LRA allows the referral of a dismissal dispute to adjudication by the Labour Court or to arbitration by the CCMA after the expiry of 30 days from the date of receipt by the CCMA of the referral even if no conciliation meeting was held between the parties. This fact supports the view that the holding of a conciliation meeting is not a requirement for the jurisdiction of the Labour Court. This, therefore, means that the Labour Court will have jurisdiction even when there has been no discussion between the parties to attempt conciliation. Therefore, a discussion of a dispute at a conciliation meeting is not a jurisdiction-conferring factor.

[144] It would seem that there are two possible bases upon which the first judgment reaches the conclusion that the Labour Court had jurisdiction to adjudicate the dismissal dispute that the applicants referred to it. The one is that it may be saying that the applicants did refer the constructive dismissal dispute to the conciliation process. At least two features of the first judgment support this proposition. The one is that the first judgment accepts the correctness of the decision of this Court in *Intervalve* and that of the Labour Appeal Court in *Driveline* that the referral of an unfair dismissal dispute to a conciliation process is a jurisdictional requirement before the Labour Court can have jurisdiction.[85] That the first judgment accepts this proposition as correct is important. This is so because it means that, flowing from that, the first judgment must also accept that, if no dismissal dispute was referred to the conciliation process, the Labour Court could not have had jurisdiction.

[145] The question that arises is: does the first judgment point to or refer to any facts on record which support the proposition that the applicants did refer a dismissal dispute of any kind to the conciliation process? The answer is: it does not. It is also not the applicants' case on the record that, when they completed the referral document, they intended to refer a dismissal dispute to the conciliation process.

[146] Another feature that supports the proposition that the reason for the first judgment's conclusion that the Labour Court had jurisdiction is an implied acceptance that the applicants did refer a constructive dismissal dispute to the conciliation process is this. The first judgment criticises as formalistic the LAC's approach for determining whether the constructive dismissal dispute was referred to conciliation. That approach was one focused on the contents of the referral document. Why would it have been necessary for the first judgment to criticise the approach of the LAC if it (i.e. the first judgment) was not taking a different approach to that of the LAC? I think it did so because it sought to adopt a different approach to determine whether the constructive dismissal dispute was referred to conciliation, and, it implied that the dispute was referred to the conciliation process.

[85] See [46] above.

[147] If the basis of the first judgment's conclusion that the Labour Court had jurisdiction is that the constructive dismissal dispute was referred to the conciliation process, two observations need to be made. The first is that the basis is not supported by any facts whatsoever and it disregards *Intervalve,* a previous decision of this Court, on how to determine whether a dispute was referred to conciliation. I say this because in *Intervalve* this Court used the contents of the referral document to determine what dispute was referred to the conciliation process. Indeed, this Court expressly held that this is the way to determine whether a dispute was or was not referred to conciliation on the basis of a certain referral document. However, the second is that at least this basis does not upset the legal position that has obtained in our labour law over a long time that disputes about the fairness of dismissals must be referred to the conciliation process before they can be arbitrated or adjudicated.

[148] Another basis is that the first judgment accepts that the applicants did not refer the constructive dismissal dispute to the conciliation process but holds that the Labour Court, nevertheless, did have jurisdiction because the constructive dismissal dispute was discussed at the conciliation meeting convened in respect of another dispute, namely, the "unfair discrimination S10 of the Employment Equity Act" dispute. There are many features in the first judgment which suggest that this is the basis upon which the first judgment reached its conclusion that the Labour Court had jurisdiction. The one is that the first judgment clearly records that this is the contention that was advanced on behalf of the applicants. The second is that one sees in various parts of the first judgment that it proceeds as if what matters for purposes of jurisdiction is whether a dispute was conciliated or not. It seems implied in the first judgment that, even if a dismissal dispute was not referred to the conciliation process, that does not matter as long as that dispute was actually conciliated at the conciliation meeting, that will give the Labour Court jurisdiction.

[149] If this is the basis upon which the first judgment reaches the conclusion that the Labour Court has jurisdiction, it would mean that it is in conflict with the decision of

this Court in *Intervalve* which it accepts as correct. In *Intervalve* this Court held that a dismissal dispute must be referred to conciliation before the Labour Court may have jurisdiction. In fact if the basis of the first judgment's conclusion that the Labour Court had jurisdiction is that the constructive dismissal dispute was discussed at the conciliation meeting relating to another dispute and that gives the Labour Court jurisdiction, the first judgment would be making new law. The new law would be that there is an exception to the principle that a dispute about the fairness of a dismissal is required to be referred to conciliation before it can be the subject of arbitration or adjudication. This basis is not supported by any provisions of the LRA and the first judgment also does not refer to any.

[150] I find it difficult to say which of the above bases is the basis upon which the first judgment concludes that the Labour Court had jurisdiction.

[151] In my view, the unfair discrimination dispute that the applicants referred to the CCMA for conciliation related to the alleged acts of racism or unfair discrimination based on their race or colour that the applicants complain they were subjected to by CMI. That is why in the referral document they summarised the facts of the dispute as being "verbal abuse, racial discrimination" and that is why, as the outcome of the referral of the dispute to conciliation, they wrote in the referral document: "employer to stop discriminating us". They sought to get CMI to stop subjecting them to alleged acts of racism or racial discrimination. If the applicants pursue the unfair discrimination dispute, they may claim compensation under the Employment Equity Act. They can also adduce evidence to the effect that they had to resign as a result of the alleged acts of racial discrimination in the workplace and ask the Labour Court to take that factor into account when it determines the amount of compensation it may award them under section 50 of the Employment Equity Act. There is no limit to the amount of compensation that an employee may be awarded under section 50 for unfair discrimination.

[152] In the circumstances I would have dismissed the appeal and made no order as to costs.

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