IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

Case no. P 65/98

matter between:

1st Applicant

Roland Anton Dorp N.O. in his capacity as

2nd Applicant

and

The Commission for Conciliation, Mediation

1st Respondent

2nd respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

JUDGMENT

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MLAMBO J.

1. This is an application for leave to appeal which is brought against the court's judgment handed down on 11 December 1998. The application is directed at two issues in the judgment. These issues relate to the court's ruling on what the applicant refers to as a demarcation issue and the court's ruling on the commissioner's refusal to allow a postponement.

2. It is necessary to firstly consider what test must be applied to applications for leave to appeal from this court to the Labour Appeal Court. The Labour Appeal Court is the court of final instance in labour matters. Section 166(1) and (4) provide that:

"(1) Any party to any proceedings before the Labour Court may apply for leave to appeal to the Labour Appeal Court against any final judgment or any final order of the Labour Court.

(4) Subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court."

3. It is so that an appeal from the Labour Court to the Labour Appeal Court is akin to an appeal from the High Court to the Supreme Court of Appeal. The test applicable there is that the applicant must show that the appeal raises a substantial point of law, that it is an issue of great public importance and that the prospects of success are so strong that a refusal of leave to appeal would result in a manifest

denial of justice. See **Westering house Brake & Equipment v Bilger Engineering 1986 (2) SA 555 (A).** In this matter the Supreme Court of Appeal dealt extensively with the Appeals Amendment Act no. 105 of 1982 which brought about this appeals dispensation. Herbstein and Van Winsen in "**The Civil Practice of the Supreme Court of South Africa"** fourth edition (Juta 1997) at page 830 state:

"The reason why these provisions were invented in the Supreme Court Act was to ensure that appeals purely on fact are not dealt with by the Appellate Division. They should not unnecessarily take up the time of that division which is more profitably devoted to issues of law".

This test is not different tothe test that applied to appeals from the Labour Appeal Court to the then Appellate Division in terms of the now repealed Labour Relations Act no. 28 of 1956. In terms of this test it is not sufficient in an application for leave to appeal, to make out a case that there are reasonable prospects of success on appeal. The applicant must show that in addition there is something else in the sense of special circumstances which merit the attention of the appeal court.

4. The Labour Court in considering applications for leave to appeal to the Labour Appeal Court, has followed the reasoning that if there was a reasonable possibility that another court could come to a different conclusion to its own then leave had to be granted. In **North East Coast Cape Forests v SAAPAWU & others (1997) 6 BLLR 705 (LC).** At page 710A-B Zondo J said

"**Notwithstanding what I have said above on Mr Loxton's second argument, I am of the opinion that the Labour Appeal Court may well take a view which is different from mine on this argument. For that reason I am prepared to grant the applicant leave to appeal to the Labour Appeal Court against my judgment on this ground as well."**

In **NEWU v LMK Manufacturing (Pty) Ltd & Others (1997) 7 BLLR 901 (LC)** at 902J to 903A the court said:

" **In the event, there is no reasonable prospect that another court will come to the conclusion that the urgent interdict sought against second respondent should not have been dismissed."**

5. Landman and Van Niekerk in their book **"Practice in the Labour Courts" Juta & CO. (1998)** at page A-41 state that one of the requirements in an application for leave to appeal is that the applicant must have reasonable prospects of success on appeal. This is a standard requirement applicable to all applications for leave to appeal which should not be viewed in isolation. In the court's view the requirement for an application for leave to appeal as opposed to an automatic right of appeal to the Labour Appeal Court is indicative of a legislative objective to limit appeals from the Labour Court to the Labour Appeal Court.

6. In the court's view the test that another court could come to a different conclusion is not appropriate if one considers that the Labour Appeal Court is the court of final instance in labour matters. The proper test is the one set out in **Westering House Brake & Equipment v Bilger Engineering (supra).** This test will ensure that a qualitative process of appeals evolves. It will shut the door on hopeless

appeals, and appeals based entirely on factual issues unless of course the prospects of success are such that to refuse leave would be to deny justice. The statement that the Labour Appeal Court is the final court of instance in labour matters should be understood in the light of section 166 of the Act as it presently stands. The court does not exclude the possibility that this provision may be unconstitutional if viewed against **clause 168** of the **Constitution of the Republic of South Africa, Act 108 of 1996** which provides for only two courts of final instance in the country being the Constitutional Court in constitutional matters and the Supreme Court of Appeal in other matters. This possibility is also mooted by Landman and Van Niekerk in their book (supra) page A- 42.

7. Turning to the issues in this case the court firstly consider the so-called demarcation issue. The court found that commissioner Le Roux did not exceed his powers in arbitrating this dispute. The court reasoned that the dispute referred to Le Roux for arbitration was in terms of Section 24. The submission advanced by Mr Wade, counsel for the applicant, is that even though the dispute referred to Le Roux was in terms of Section 24 its nature is such that it was a demarcation dispute which should have been referred to this court for adjudication.

8. The implication of Mr Wade's argument is that in a dispute which is referred for arbitration relating to non-compliance with a collective agreement if one party denies that the collective agreement is binding or applicable to it then that issue

must first be resolved before the dispute proper can be resolved. Such situations are bound to occur and it is in the public interest that where this situation presents itself the legal position must be clarified . This will involve the proper interpretation to be applied to Section 24 in such situations. Under normal circumstances, a commissioner tasked with the arbitration of a dispute involving non-compliance with a collective agreement, must be satisfied, first, that the collective agreement applies to the parties. Where he is not satisfied that the collective agreement applies he could stop the arbitration and refer the matter to the Labour Court to determine the applicability of the collective agreement. Another course of action would be to dismiss the arbitration and it would then be up to the party who insists that the collective agreement applies to refer it to the Labour Court for adjudication. The situation becomes compounded when in a non-compliance dispute the party who disputes the application of the collective agreement fails to appear and the arbitration proceeds in his absence. The two courses of action suggested above could conceivably be open to the commissioner. The implication of this situation however is that non-compliance disputes will always face this dilemma. It is in the public interest that this situation be clarified. In other words whether the commissioner should only consider the strict terms of the referral in such situations or extend the scope of the dispute. It appears that on this ground leave ought to be granted.

9. The same however cannot he said for the postponement argument. At the end of

the day the situation necessitating a postponement in which Mr Dorp and the applicant found themselves in was of their own making. The Commission for Conciliation, Mediation and Arbitration cannot simply accede to any postponement request. In the court's view this is a factual issue which in any way has no prospects of success whatsoever on appeal. Leave is therefore refused on this issue.

10. In the court's view whether the Labour Appeal Court upholds the court's ruling on on the so-called demarcation point or sets it aside, will have no bearing on the relief granted to the fourth to seventh respondents regarding their dismissal. For that reason the applicant must comply with the orders set out in paragraphs 22(4) and (5) of the court's judgment.

11. The order of the court is therefore

1 The application for leave to appeal is allowed only in respect of the ruling regarding the applicability of the Bargaining Council agreement.

2 Costs are to be costs in the appeal.

MLAMBO J.

Date of judgment: 15 April 1999.

For the applicant: Mr Wade instructed by Oosthuizen & Associates of Port Elizabeth.

Mr Beningfield instructed by Wilke Weiss Van Rooyen & Preston of Port Elizabeth.

Reportable and also of interest to other judges.