IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JR1931/01

In the matter between:

VRYHEID (NATAL) RAILWAY,

Applicant

and

First Respondent

COMMISSION FOR CONCILIATION,

Second Respondent

Third Respondent

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JUDGEMENT

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FRANCIS J

Introduction

1. The third respondents ("the individual respondents") brought an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the 1995 LRA") to review and set aside an award made by the first respondent ("the commissioner") on 5 February and 6 December 2001.

2. The applicant filed a notice to oppose and an answering affidavit. It also brought an interlocutory application in terms of rule 11 of the Rules of this Court in terms of which the applicant raised a point *in limine* that this Court does not have

jurisdiction to hear the dispute since the review application was against a judgment made by the commissioner in his capacity as a presiding officer of the Industrial Court. The individual respondents opposed the point in *limine.*

Background facts

3. The dispute to which this matter relates is alleged to have arisen on 10 July 1996. The individual respondents were employed by the Vryheid (Natal) Railway, Coal & Iron Company Limited. They made an application for the establishment of a conciliation board on 2 December 1996. They referred a dispute to the Industrial Court for determination in terms of section 46(9) of the Labour Relations Act, 28 of 1956 ("1956 LRA"). They contend in their section 46(9) application that they were retrenched by the applicant after a misunderstanding between the Zulu and Xhosa employees of the applicant. Thereafter the applicant promised the individual respondents that after the violence was over they could return and would be re-employed and be paid their retrenchment benefits. The applicant had verbally agreed to pay them their retrenchment benefits later. The applicant had promised to re-employ them after everything was quiet which happened after a few years. On 10 June 1996 all the individual respondents went to the applicant to collect their monies and to seek re-employment in terms of the verbal agreement. The applicant failed to comply or to consider re-employment which the individual respondents contended was an unfair labour practice. This version is disputed by the applicant.

4. During March or April 1997 the individual respondents filed their application papers.

5. During May 1997 the applicant filed an application with the High Court for the review and setting aside of the decision of the Provincial-Director of the Department of Labour to establish a conciliation board. The High Court papers were not served on the individual respondents.

6. The section 46(9) application was first set down for a hearing from 30 March 1998 to 3 April 1998. The hearing did not take place. The matter was removed from the roll and later re-enrolled for a hearing from 1 to 5 June 1998. The hearing did not proceed during the said period. The matter was next set down for a hearing from 25 to 26 November 1998. The parties agreed to postpone the matter after the applicant had alleged that it did not receive timeous notice of the set down. Despite the agreement for a postponement, the matter remained on the roll for 25 November 1998 and on that day it was dismissed in the absence of the parties. The matter was subsequently rescinded on 19 January 1999.

7. The matter was again set down for hearing on 10 May 1999. On that day the papers in the High Court review application were served on the individual respondents. The parties then applied that the matter be postponed pending the outcome of the review application. The matter was postponed.

8. On 15 May 2000 the individual respondents applied that the matter be re-enrolled since there were no further developments in the review application. The matter was set down for hearing on 26 September 2000.

9. On 26 September 2000 the applicant raised a point in *limine* to the effect that no proof existed that a conciliation board was established. In the alternative it was submitted that the matter could not proceed until such time as the review application had been heard. After the hearing on 26 September 2000 the individual respondents filed an LR54 report reflecting that a conciliation board was established. The commissioner dismissed the point in *limine* and stated that the matter should proceed as the matter had correctly been referred to the Industrial Court. The commissioner directed that the matter should be set down for a hearing. The applicant was directed to show cause why the LR 54 form should not be regarded as proper proof that a conciliation board was established and why a finding should not be made that the section 36(1) period expired during January 1997. The individual respondents were further directed to prepare themselves to proceed with the hearing in the event of a finding that the matter falls to be determined in terms of section 46(9) of the 1956 LRA.

10. On 24 November 2000 the parties were notified that the matter was set down for a hearing on 22, 23 and 24 January 2001.

11. The individual respondents did not appear at the hearing on 22 January 2001. The commissioner found that the Industrial Court did not have jurisdiction to determine the dispute and dismissed the matter. The date of the determination is dated 5 February 2001.

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12. The individual respondents applied for a rescission, which application was set down for a hearing on 25 May 2001. There was no appearance for the individual respondents and the application for a rescission was refused in their absence. The reasons for refusing the application are set out in a judgement dated 1 June 2001.

13. On 27 June 2001 the individual respondents applied for a rescission of the findings dated 1 June 2001. The matter was set down for a hearing on 21 September 2001. The matter was postponed to 16 November 2001. The application for a recission of the judgement of 5 February 2001 was refused in a judgment dated 5 December 2001.

14. It is against this judgement that the individual respondents have brought the review application in terms of section 145 of the 1995 LRA.

The parties contentions

15. Mr Luthuli who appeared for the individual respondents contended that this Court has jurisdiction to hear the review application for four reasons. The first is that on

5 November 2001 Ngcamu AJ in a similar matter (filed under Case no: J5947/00) issued an order that the matter be postponed to enable the applicants in that matter to file supplementary affidavits regarding the application for condonation. Mr Luthuli argued that because such an order was made and that the application is set down for a hearing in August 2002, it followed that this Court has jurisdiction to hear the matter. The second ground is that he was advised by the Judge President of this Court that this Court has jurisdiction to hear such review applications. The third is that this Court is a High Court and does have the same jurisdiction like other High Courts. The fourth ground is that the dispute was not made in terms of the 1956 LRA but in terms of the 1995 LRA since the 1956 LRA was no longer in existence.

16. The applicants contended that this Court does not have jurisdiction to hear the matter since it should have been referred to either the High Court or the Labour Appeal Court.

Analysis of facts and arguments raised

17. It is common cause that the individual respondents referred a dispute to the Industrial Court in terms of the 1956 LRA. The dispute was dealt with by the Commission for Conciliation, Mediation and Arbitration ("CCMA") under the auspices of the CCMA but in terms of the provisions of the 1956 LRA. The review application is brought by the individual respondents in terms of section

145 of the 1995 LRA.

18. Mr Luthuli was referred to the judgment of *Liberty Life of Africa v Kaachelhoffer NO & Others* (2001) 22 ILJ 2243 (C) where it was found that the High Court as well as the Labour Appeal Court has jurisdiction in respect of review applications of Industrial Court judgements. Mr Luthuli argued that despite the aforesaid judgement this Court does have jurisdiction since the application was brought in terms of the 1995 LRA.

19. Schedule 7 to the 1995 LRA, part E thereof, contains provisions relating to the finalisation of disputes arising before the commencement of the 1995 LRA. Item 21(1) of Schedule 7 reads as follows:

"Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed."

20. Item 22 in particular deals with the positions of Courts which existed prior to the implementation of the 1995 LRA and finalisation of disputes before these Courts. It is clear from item 22 that any pending disputes which arose prior to the implementation of the 1995 LRA, must be finalised as if the 1956 LRA had not been repealed. The same applies to matters which were pending before the Labour Appeal Court which was established in terms of the 1956 LRA.

21. This Court does not have the required jurisdiction and/or powers to deal with the review application brought by the individual respondents. Under the old dispensation different institutions were established and available to deal with the judgement that the individual respondents now seek to review. In terms of the transitional arrangements, and a proper analysis of the provisions of the 1995 LRA, any judgment of the Industrial Court must be referred to these old institutions being the Labour Appeal Court or the High Court. The fact that the Industrial Court dealt with this matter under the auspices of the CCMA does not mean that the judgement that the individual respondents want to be reviewed is an award of the CCMA. The CCMA only fulfills an administrative role in this regard. The individual respondents are in the wrong forum.

22. There are therefore no merits whatsoever in the submissions made by Mr Luthuli. This Court does not have review jurisdiction of judgements of the Industrial Court. The course that is open for the individual respondents is to pursue their matter either in the High Court or the Labour Appeal Court. In this regard see also *Kaefer Insulation (Pty) Ltd v President of the Industrial Court & Others* (1998) 19 ILJ 567 (LAC) and *Minister of Labour & Another v Schoeman and Others* (1998) 20 ILJ 1514 (LAC).

23. The point in *limine* should succeed.

24. All that now remains to be determined is the question of costs. The individual respondents are represented by the United Peoples Union of South Africa ("UPUSA"). Mr Luthuli signed the affidavits in the main application as well as the answering affidavits in the interlocutory application. The individual respondents did not sign any supporting papers.

25. The applicant raised the issue of jurisdiction at an early stage. Despite this, the individual respondents persisted with their application.

26. There is no reason why costs should not follow the results. The individual respondents together with UPUSA are jointly and severally liable for the costs of the applicant.

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27. In the circumstances the following order is made:

1. The interlocutory application is upheld.

2. The individual respondents together with UPUSA are jointly and severally liable for the applicant's costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT

NT : ATTORNEY G VAN DER WESTHUIZEN

SPONDENTS : E LUTHULI - UNION OFFICIAL

: 21 JULY 2002

NT : 28 JULY 2002