IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NUMBER: J1990/07

In the matter between:-

MOFOKENG, JANTJIE & 12 OTHERS	**Applicant**
and	
JAC PALLETS AFRICA CC	**First Respondent**
JAC PALLETS	**Second Respondent**
INTERNATIONAL ESATE WINES (TAIWAN) CC	**Third Respondent**
INTERNATIONAL ESTATE WINES	**Fourth Respondent**
INTERNATIONAL ESATE WINES (TAIWAN) CC t/a JAC PALLETS	**Fifth Respondent**
JAN GABRIEL KOEKEMOER	**Sixth Respondent**
COMMISSIONER BONGE MASOTE	**Seventh Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION (THE CCMA)	**Eighth Respondent**

APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] This was an application for leave to appeal to the Labour Appeal Court against an order of this Court handed down on the 19 June 2008. Full reasons for the order were also handed down. (I will hereinafter referred to those reasons as "the judgment"). That order read as follows:

"1) The matter is postponed sine die to allow the applicant to join the liquidator as an interested party in these proceedings.

2)The applicant is ordered to amend its papers and serve an amended copy on this court and the respondents within 10 court days of the date of this order.

3)The applicant is ordered to pay the respondents wasted costs for today"

[2] The Sixth Respondent (hereinafter referred to as “the Respondent”) opposed the application for leave to appeal. The application for leave to appeal was dismissed with costs. The Applicants requested reasons for this order. Herewith brief reasons for my order.

Condonation

[3] The first ground upon which this application was opposed was on the basis that the application was late and not accompanied by a condonation application. Without going into detail, I am satisfied that the application is

not late and that no condonation is needed. I will therefore only deal with the merits of the application.

[4] I should also point out that the Applicants have made no attempt to comply with the order granted on 19 June 2008. It would appear that the representative is not seeking to rectify their omission by appealing the order. I have indicated to the representatives that the tardiness in complying with the order will result (and probably already resulted) in a serious delay and will in effect deny the individual Applicants their right to a speedy resolution of the dispute. I will return to this point hereinbelow.

Is this order appealable?

[5] The main ground upon which leave to appeal was refused is on the basis that the first two parts of the order are interlocutory in nature and as such do not constitute a final order and is thus not appealable. Apart from this fact, the application has no merits on the facts. I will return to the latter aspect hereinbelow.

[6] Section 173 of the Labour Relations Act, No 66 of 1995 (hereinafter referred to as "the LRA") reads as follows:

"173 Jurisdiction of *Labour Appeal Court*

(1) Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction-

(a)*to hear and determine all appeals against the* ***final judgments*** *and the* ***final orders*** of *the Labour Court; and*

(b)*to decide any question* of *law reserved in terms* of *section* 158 (4)."[1]

[1] Own emhasis.

[7] In terms of this section it is thus clear that where an order of this court does not have the effect of a final order, it is not appealable. The first two parts of the order granted by this Court does not have the effect of a final judgement and is thus not appealable to the Labour Appeal Court. It is only in the event of a final judgement or order that a judgment will be appealable to the Labour Appeal Court. See in this regard the following from *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 676G-678D:

"The question is one which has troubled other courts in various circumstances down the ages. In many cases a court is called upon to make one or more preliminary decisions which may influence, and in some cases even determine, its ultimate decision. The problem arises when a party seeks to correct one of those preliminary decisions on appeal before the proceedings have run their course. The question which is generally asked in such cases is whether the particular decision is appealable. Usually what is being asked relates not to whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision may be placed before a court of appeal for correction in isolation, and before the proceedings have run their full course."

There are two competing principles which come into play when that question arises. On the one hand justice would seem to require that every decision of a lower court should be capable of not merely being corrected, but of being corrected forthwith and before any further decisions are made

in consequence thereof; while on the other hand the delay and inconvenience which may result if every decision is subject to appeal as and when it is made may in itself defeat the attainment of justice (see Schreiner JA in Pretoria Garrison Institutes v Danish Variety Products (PM Ltd 1948 (1) SA 839 (A) at 867-9). In that case the problem was considered in relation to decisions of a procedural nature only, but those competing principles are equally relevant in a case like the present one. At 868 the learned judge said that:

> *'It has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable the delay and expense might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable. No doubt various considerations have predominated in the minds of those responsible at different times for drawing the line at one place or another.'"*

Even where the line distinguishing these two categories has been sought to be drawn by the legislature, as in the section of the Magistrates' Courts Act 32 of 1944 which renders appealable rulings or orders 'having the effect of a final judgment', that line has succumbed by judicial interpretation to principles which by long experience have been developed by the courts. Thus in Pretoria Garrison Institutes, Schreiner JA said of the statutory distinction referred to above that the legislature 'must be taken to have had in mind the distinction, recognised in our cases, between what have been called simple interlocutory orders and all other orders'. At 867 he continued as follows:

> *'Presumably the distinction has always arisen in association with the interpretation of some statutory provision, ancient or modern (the judgment of the Chief Justice shows how old and deep-seated the trouble is); but comment has overcome construction and to-day it is no longer possible to interpret the present or any corresponding statutory provision by a straightforward application of the ordinary meaning of the words used.'"*

The approach which has been taken in drawing the line between those decisions which are subject to correction forthwith, and those which must await the outcome of the proceedings, has varied over time. In earlier cases the enquiry seems to have been directed primarily to the extent to which the decision concerned was determinative of the outcome of the proceedings. In the following passage from Pretoria Garrison Institutes at 869, Schreiner JA seems to have recognized though that a clear and universal test would remain elusive:

> *'If, as appears to be the case, there is no single principle which has in the past been uniformly applied in deciding which of these procedural orders are to be appealable and the most that we can find are enumerations of the factors that have led different commentators to support different tests, the further question may be asked whether there is any test that is specially indicated by considerations of justice. I do not think that there is.'"*

The Appellate Division has dealt with the problem on various occasions in the context of s 20 (1) of the Supreme Court Act 59 of 1959, which permits appeals from any 'judgment or order' of the court of a local or provincial division. The distinction between judgments and orders is not really important, being one of form rather than substance (see Van Streepen & Germs v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 5800; Zweni v Minister of Law & Order

1993 (1) SA 523 (A) at 532D-F). What is in issue in each case is a 'decision' of the provincial or local division concerned, emanating in one case from trial proceedings and in the other from motion proceedings. The more meaningful distinction, between those decisions which are appealable and those which are not, is one which has emerged from judicial practice rather than from the legislation itself.

In more recent times the approach taken has been increasingly flexible and pragmatic, directed more to doing what is appropriate to the circumstances of the particular case than to elevating the distinction to one of principle (see Van Streepen especially at 585E-S86E; SA Eagle Versekeringsmaatskappy Bpk v Harford 1992 (2) SA 786 (A). In Zweni at 531J-532A, Harms JA described the modern approach in the following terms:

> *'The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution."*

I have already indicated that the contemporary approach is a pragmatic one, which directs the enquiry towards what will more effectively and expeditiously contribute to the final solution, though the reluctance of courts to deal with matters piecemeal ought not to be overlooked. Viewed from that perspective it seems to me that while it will usually be a prerequisite for appealability that the decision should at least be final and definitive in its effect, and dispose of a substantial issue, that may not always be sufficient. There may be cases where, notwithstanding this, the remaining issues to be decided are of such a nature that it would be more expeditious and cost-effective to require the proceedings to

run their course before subjecting any of the court's decisions to an appeal."

[8] The Labour Appeal Court in *Sacca (PM Ltd v Thipe & Another* (1999) 20 *ILJ* 2845 (LAC) at 2846 to 2848, (the *Thipe* case) the Honourable held as follows:

" The appealability of interlocutory orders

[4] For the purpose of this judgment, it is necessary to deal with the meaning and nature of interlocutory orders. I am called upon to decide whether this order is appealable or not.

[5] There can be no doubt that the decision to allow the respondents to proceed on the merits, notwithstanding the late filing of the statement of case, was an order in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the appellant is constrained to await the outcome of the main proceedings before the decision can be attacked as one of the grounds of appeal in which event the decision of the Industrial Court under consideration would be a pure or simple interlocutory order or ruling.

[6] The question which is generally asked is whether the particular decision is appealable. Usually what is being asked relates not to whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision can be placed before a court of appeal in isolation, and

before the proceedings have run their full course.' (Nugent J in Liberty Life Association of SA Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 676H.)

[7] In determining the nature and effect of a judicial pronouncement, not merely the form of the order must be considered but also, and predominantly, its effect. (See SA Motor Industry Employers Association v SA Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H.)

[8] A judgment or order is a decision which, as a general principle, has three attributes; firstly, the decision must be final in effect and not susceptible of alteration by the court of first instance; secondly, it must be definitive of the rights of the parties; thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. (See Zweni v Minister of Law & Order 1993 (1) SA 523 (A) at 532J-533A ; Van Streepen & Germs (PM Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 5861-587B.)

[9] It follows, therefore, that unless an interlocutory order has a final and definitive effect on the main action it is not a judgment or order. It amounts to a simple interlocutory order which is not appealable. (See: SA Druggists Ltd v Beecham Group PlC 1987 (4) SA 876 (T) at 880B-C, a full bench decision which was cited with approval in Zweni above.) Simple interlocutory orders were equated with rulings in Sistag Maschinen Fabriek AG & another v Insamor (PM Ltd 1989 (1) SA 406 (T) at 408D-F. I endorse the view that their nature and effect are essentially the same.

[10] The courts have made a subtle shift from a strict adherence to the abovementioned requirements and adopted a more pragmatic and flexible approach to a situation where a party seeks to appeal against some

preliminary or interlocutory decision which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. Harms AJA had the following to say in Zweni at 531J-532A:

> *'The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final resolution.'*

[11] Having referred to this passage Mahomed CJ captured the essence of the less rigid and modern approach in the following terms in Beinash v Wixley 1997 (3) SA 721 (SCA) at 730D-F:

> *'What the court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such a decision anticipates an issue to be dealt with in the main proceedings. The objective is to ascertain what course would best "bring about the just and expeditious decision of the major substantive dispute between the parties' (Pretoria Garrison Industries v Danish Variety Products (PM Ltd 1948 (1) SA 839 (A) at 868; Van Streepen & Germs supra at 585E-J)'."*

[9] Although the above decisions dealt with the position under the now repealed Labour Relations Act, the same principle applies under the present Labour Relations Act namely that a flexible and pragmatic approach must be taken in order to determine the effect of the order. Bringing an appeal now will not necessarily lead to a more and cost-effective final determination of the main dispute between the parties and

will not decisively contribute to its final solution. Certainly, it also will not bring about the just and expeditious decision of the major substantive dispute between the parties. In the present matter the major substantive dispute is still pending before this Court and has not yet been ventilated by this Court.

[10] The *Niselow*-judgement has been cited with the approval by the Labour Court deciding a matter under the 1995 Labour Relations Act. See *Van der Merwe v Du Plessis* (1999) 20 *ILJ* 1305 (LC) at 1308 stated:

"Section 166 of *the Act gives any party to proceedings before the Labour Court the right to apply for leave to appeal against 'any final judgment or final order'. There is no direct authority* of *which I* am *aware that deals with the issue whether an order rescinding an earlier order given by default and directing that the matter be heard on an opposed basis can be the subject* of *appeal. I assume, however, that the normal test applies - that is, whether the order in question finally disposes* of *the proceedings between the parties, bearing in mind the tendency* of *the court to apply this test in* a *pragmatic manner: See Libertv Life Association* of *Africa Ltd v Niselow* (*1996) 17 ILJ 673 (LAC)."*

[11] In terms of the order granted on 19 June 2009, the matter was merely postponed *sine die* in the interests of fairness to allow the Applicant to join the liquidator as an interest party. This is certainly not a final order and does not finally dispose of the proceedings between the parties. As already pointed out, this Court has not yet had an opportunity to deal with the merits of the dispute between the parties. The papers before this Court revealed that the 1st Respondent has been placed in voluntary liquidation. It is trite that once an entity has been placed in liquidation, the liquidator steps in and becomes the relevant entity to deal with

any claims against the close corporation. The liquidator has not been joined as an interested party in the pending applications (and especially the contempt of court application) despite the fact that the Applicants have been made aware of the fact that the 1st Respondent has been placed in liquidation. Despite what appears to be a deliberate disregard of this fact, this Court has in fairness allowed the Applicants to joint the liquidator. The Applicants have decided not to do so. They will have to stand and fall by their decision. The effect of the order is therefore not to finally dispose of the matter. In fact, it does not dispose of the matter in any way at all. Furthermore, if the test, as referred to in paragraph [7] *supra* is applied, namely whether or not the appeal will lead to the *"the more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution"*, this Court can come to no other conclusion that it will not. In fact, as indicated to the representative, this appeal will have the effect of dragging this matter out even longer and will in effect deny the Applicants their right to a speedy resolution of their dispute.

[12] In terms of the second part of the order, the Applicants have been ordered to amend its papers within 10 court days of the date of the order. This also does not have the effect of a final order. By no stretch of the imagination can it be argued that this order disposes of the main dispute between the parties. In fact, this order has the effect of assisting the parties to bring the main dispute to a procedural point where this Court may be placed in a position where it can hear the merits of the dispute. It is for the Applicants to decide whether or not they want to amend their papers. The mere fact of their failure to amend their papers does not, in itself, dispose of the application. At the very worst it may lead to the ultimate dismissal of the matter but this consequence does not flow from this order. Even where the

parties ultimately comply with the order, they still have the remedy of applying for condonation for the late compliance of the order.

The costs order of 19 June 2009

[13] The only part of the order which is final in effect is the costs order. The Applicants have, however, not placed any reason before this Court why this part of the order is incorrect. This Court has decided to order the Applicants to pay the wasted costs of the proceedings in light of the fact that the Applicants were aware of the fact that the 1st Respondent was placed in liquidation but despite this fact still persisted in approaching this Court without joining the liquidator. The Respondent was as a result placed in the unnecessary position to oppose the application, *inter alia*, on the basis of non-joinder. It does not, however, appear from the application for leave to appeal that the Applicants are seeking leave to appeal against this order. It is therefore not necessary for me to deal with the order as to costs.

[14] The Application for leave to appeal is therefore dismissed on this basis alone. I will return to the aspect of costs hereinbelow.

The merits of the application

[15] Although it is not necessary to evaluate the merits of the appeal in light of the aforegoing conclusion that the order is not appealable, I have nonetheless briefly considered the merits of the appeal. In deciding whether to grant leave to appeal to the Labour Appeal Court, this Court must consider whether or not there is a reasonable prospect that another court *might* come to a different conclusion to that of the court *a quo.* In *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 *ILJ* 1442 (LC) at 1443A - B

the Labour Court applied the traditional test in deciding whether to grant leave to appeal, which is whether there was a reasonable prospect that another court might come to a different conclusion. See also *Karbochem Sasolburg (a division of Sentrachem Ltd) v Kriel & Others* (1999) 20 *ILJ* 2889 (LC) at 2890B where the Labour Court held as follows in respect of the test:

"I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See North East Coast Cape Forests v SAAPAWU & Others (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; NEWU v E LMK Manufacturing (PM Ltd & Others [1997] 7 BLLR 901 (LC) and Landman & Van Niekerk Practice in the Labour Courts (service 1) at A-41."

[16] The Applicants raised sixteen grounds for appeal. In terms of the first, fourth and twelfth ground[2] it is alleged that the Respondent is not in liquidation. It is, however, clear from page 85 of the papers which contain the CIPRO search that the closed corporation has been placed in liquidation. The allegation that the Respondent is in liquidation, is therefore not unsubstantiated on the papers. If the Respondent is not in liquidation (as alleged by the Applicants), surely the liquidator will be able

[2] *"By upholding the sixth respondent's unsubstantiated allegation, in that the first respondent was liquidated although the Applicant's had placed in the papers adequate and sufficient facts to rebut such a bald and a unsubstantiated allegation"; and "By making a finding that the Ladyship-could not proceed with the matter when the "Liquidator" was not joined as a party, although there was no proof before the court (except a bald allegation) that a Liquidator had been appointed"; and; "By placing on the Applicant's the onus to prove that there was no liquidation instead of placing the onus on Mr Koekemoer to prove that there was a liquidation, " and; "By unilaterally postponing the matter and then apportioned the blame on the Applicant's whereas Mr Koekemoer did not place before the Court admissible proof that the first respondent was liquidated or that a liquidator was appointed."*

to shed light on this crucial aspect. In terms of the second and third grounds[3] it is alleged that this Court erred in finding that the Applicants had known that the Respondent was in liquidation. These grounds are without merit. It is clear from the papers that the close corporation has been liquidated and that this fact was brought to the attention of the Applicants. No other court will therefore find differently on this point. In terms of the fifth to tenth grounds and thirteenth to fifteenth grounds it is argued that this Court failed to grasp the fact that Koekemoer was in control of the operations of the Respondent and that there is no proof of the fact that the Respondent is in liquidation. All of these grounds have no merit. On the face of it the First Respondent is under voluntary liquidation and in order to bring the matter properly before this Court it is necessary to join the liquidator to these proceedings. I am of the view that no other Court will find differently. I am in agreement with the submission on behalf of the Respondent that it appears that the representative of the Applicants simply does not want to understand why it is so important to have all the interested parties before court in the main application. It is trite that in law the liquidator has stepped into the shoes of the First Respondent and must be properly before the Court. If the Applicant does not want to join the liquidator it does not have to do so and can place the main application before the Court. If it fails to do so the Applicants will, however, have to be prepared to bear the consequences of their failure to do so.

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[3] *"By making a finding that on their dismissal the Applicant's had known that the first respondent was under liquidation, whilst the papers before the Court indicates that Mr Koekemoer had taken a decision to close down the first respondent and fails dismally to show if the first respondent was ever liquidated, " and "And also that documents given to the Applicants when dismissed were not signed or issued by a "liquidator" but by Koekemoer himself which aspect clearly shows that the sixth respondent was still in charge of the companies."*

Costs of this application

[17] In respect of the order as to costs in respect of this application. This Court makes costs orders in accordance with the requirements of law and fairness. See in this regard *Member of the Executive council for Finance Kwazulu-Natal & Another v Dorkin NO & Another* (2008) 29 ILJ 1707 (LAC) where Zondo, JP held as follows:

"The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this court should seek to strike a *fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is* a *balance that is not always easy to strike but, if the court is to err, it should err on the side* of *not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication. "*

[18] In the previous application the Respondents were dragged to this Court unnecessarily and there was no reason why costs should not have been awarded. In any event, as already pointed out the issue of costs did not

form part of the grounds for leave to appeal. In respect of the present application there is also no reason why costs should not again be ordered against the Applicants. I cannot lose sight of the fact that this matter could have been and should have been finalised long ago. Furthermore, the Applicants have brought a totally baseless application for leave to appeal. Again I am of the view that it was unnecessarily to have dragged the Respondent again to court. In the event the Applicants are ordered to pay the costs.

AC BASSON,J

Date of reasons: 27 July 2009

For the Applicants: Mr. Z Gobile instructed by Karabo Labour Organisation

For the Respondents: Adv. DG Graham of Graham Atts.