IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number 276/99
Reportable

In the matter of

FOOD AND ALLIED WORKERS UNION	First Appellant
VK NGCOBO AND OTHERS	Second and Further Appellants
and	
SCANDIA DELICATESSEN CC	First Respondent
and	
PER BJORVIG	Second Respondent

CORAM: HOWIE, FARLAM JJA and CHETTY AJA

DATE OF HEARING: **8 March 2001**

DATE OF JUDGMENT: **29 March 2001**

SUMMARY: Mandatory Interdict to enforce Industrial Court Order - whether criminal prosecution for breach of order adequate alternative remedy.

JUDGMENT

/FARLAM JA

FARLAM JA

[1] The appellants brought an application in the Durban and Coast Local Division of the High Court for an order: (1) declaring that the first respondent was obliged to comply with the terms of an order granted by the Industrial Court on 7 October 1998 and that the second respondent was obliged to do all things necessary to ensure that the first respondent complied with the order; (2) directing the respondents to do all things necessary to give effect to the order and (3) ordering the respondents jointly and severally to pay the costs of the application on the scale as between attorney and client.

[2] The application, which was unopposed, came before Page J, who dismissed it in a judgment delivered on 25 February 1999 in which he held that the High Court does not have the power to make a committal order for contempt based upon non-compliance with a judgment of the Industrial Court (following on this point the judgment of De Klerk J in *Food and Allied Workers Union v Sanrio Fruits CC and others* 1994(2) SA 486(T)) and that it is impermissible to attempt indirectly to confer that power on the High Court by seeking to convert the Industrial Court's order into an order of the High Court. It was held further, in the alternative, that even if the grant of such an order were theoretically possible the form of relief sought, viz a declarator combined with an order *ad factum praestandum*, is such that the court would have a discretion whether to grant it. In view of the fact that the legislature had made what it considered to be adequate provision for the execution of Industrial Court judgments by that court, and clearly considered those

provisions to be exhaustive (despite the fact that no power to commit for contempt based on non-compliance with an order *ad factum praestandum* was given to the Industrial Court), no grounds existed to justify making available to the appellants any additional means of enforcement which might be peculiar to the High Court. The judgment of the Court *a quo* is reported as *Food and Allied Workers Union and Others v Scandia Delicatessen CC and Another* 1999(3) SA 731(D).

FACTS

[3] On 7 October 1998 the Industrial Court, in an application brought by the appellants, ordered the first respondent to reinstate the appellants other than the first appellant, the Food and Allied Workers Union. (In what follows I shall where appropriate call these appellants 'the individual appellants'.)

[4] The first respondent was also ordered to pay to each of the individual appellants compensation equivalent to six months' wages, together with costs on the highest scale applicable in the Magistrate's Court.

[5] The order was served on both the first respondent and the second respondent, who is the sole member of the first respondent and in control of its business.

[6] On 23 November 1998 an application brought by the first respondent for the rescission of the order of 7 October was dismissed.

[7] Since then the first respondent has failed to comply with the Industrial Court's order and on 7 December 1998, when the individual appellants tendered their services, the second respondent refused to reinstate them and told them to consult their lawyer.

[8] For reasons set out below the appellants have not been able to obtain relief from the Industrial Court to enforce that part of its order in terms of which reinstatement was ordered. As a result they brought the application which forms the subject of this appeal.

RELEVANT STATUTORY PROVISIONS

[9] Before the submissions of counsel for the appellants are set out it is appropriate to refer to the relevant statutory provisions.

[10] As the purported dismissal of the individual appellants in this matter took place in August 1996, before the commencement of the Labour Relations Act 66 of 1995, it is clear that the dispute between the parties had to be dealt with under the previous Labour Relations Act 28 of 1956, as amended('the Act'): see Items 21 and 22 of Schedule 7 of Act 66 of 1995.

[11] At the relevant time the material provisions of the Act were these. Section 17(15) read as follows:

> '(15) Any decision, award, order or determination of the industrial court may be executed as if it is a decision, an award, order or a determination made by the Supreme Court.'

Section 53(1) provided as follows:

> 'Any person who contravenes or fails to comply with any ... order, condition of any order, decision, award or determination made by the industrial court ... shall be guilty of an offence.'

Section 82(1) read as follows:

> 'Any person who is convicted of an offence under the provisions of this Act shall be liable -
>
> (a) in the case of an offence referred to in sections 53(1) and 66(1), to a fine not exceeding R2000 or imprisonment

for a period not exceeding two years or such imprisonment without the option of a fine or both such fine and such imprisonment; ...'

[12] Section 12(1) of the Constitution, Act 108 of 1996, as far as is material, reads as follows:

> 'Everyone has the right to freedom and security of the person, which includes the right -
>
> ....
>
> (b) not to be detained without trial; ...'

THE INDUSTRIAL COURT'S JURISDICTION TO COMMIT FOR CONTEMPT

[13] The appellants contended in the court *a quo* and again in this Court that the Industrial Court did not have the power to enforce its own determinations by committal of those in contempt of its orders.

[14] This submission was based on the decision of the Industrial Court in *Chemical Workers Industrial Union v Price's Candles* [1994] 15 *ILJ* 857 (IC). In that case the Industrial Court followed the decision of De Klerk J in *Food and Allied Workers Union v Sanrio Fruits CC and Others,supra,* in which he held at (488B) that an order for committal for contempt is not a form of execution, with the result that section 17(15) of the Act did not confer upon the Industrial Court the power to enforce its own determinations by committal orders. De Klerk J also declined to follow the decision in *Wright v St Mary's Hospital, Melmoth, and Another* 1993(2) SA 226(D). There it was held that the Supreme Court had no jurisdiction to commit a recalcitrant respondent who defied an order of the Industrial Court to prison for contempt because section 17(15) of the Act vested such jurisdiction in the Industrial Court

[15] Counsel for the appellants contended further, both in the court *a quo* and before this Court, that even if the judgment in the *St Mary's Hospital* case was correct and the

Industrial Court did have the power of committal for contempt of its own orders in 1993, it lost that power on the coming into operation of the Constitution because, the Industrial

Court not being a court of law (*SA Technical Officials' Association v President of the Industrial Court* 1985(1) SA 597(A)), it was prohibited by section 12(1)(b), from ordering the detention of anyone. In this regard counsel referred to the decision in *De Lange v Smuts NO and Others* 1998(3) SA 785(CC) in which the Constitutional Court

held that an officer presiding over a creditors' meeting in terms of section 65 of the Insolvency Act 24 of 1936 who is not a magistrate cannot issue a warrant committing to prison a person who is being examined at the meeting, the reason being that a presiding officer who is not a magistrate is not a judicial officer in terms of the Constitution.

[16] Counsel for the appellants then referred to the cases of *National Industrial Council*

of the Leather Industry of SA v Parshotam and Sons (Pty) Ltd 1984(1) SA 277(D) and

Industrial Council for the Building Industry (Transvaal) v All Construction (Pty) Ltd and

Another (1980) 1 *ILJ* 123(W) in support of the proposition that the High Court had jurisdiction to enforce compliance with an Industrial Council agreement made binding upon non-parties in terms of section 48 of the Act by way of mandatory interdict and that such jurisdiction co-existed with the criminal sanction embodied in section 53(1) of the Act.

[17] There is no reason in logic or equity, so it was contended, why a determination of

the Industrial Court should not be dealt with in the same way in an appropriate case with the court exercising the jurisdiction it has to grant a mandatory interdict to ensure that obligations arising out of the Act are met.

[18] It was submitted further that the mere fact that defiance of an Industrial Court

order might constitute a criminal offence was no reason to preclude a party in whose favour such an order had been granted from seeking to enforce that order civilly.

Reference was made in regard to what was said by Didcott J in *De Lange v Smuts NO and Others, supra,* at 832C.

In my opinion, in order properly to understand the dictum relied on, it is necessary to quote what the learned Judge said at 832 A-E, namely:

> '... I [do not] find it helpful to investigate what is done in foreign jurisdictions about recalcitrant witnesses, or even how other statutes of ours deal with coercion when the need for its use arises within their areas. Such investigations may tend to distract our attention from where it should now be focused, on the particular purposes that s66(3) has been designed to achieve and on the particular circumstances prevailing in this country which are relevant to those purposes. In that situation, I believe, the threat of a subsequent prosecution under s 139(1) would not suffice by itself as coercion, however satisfactorily its counterparts may happen to work elsewhere. Here the threat is too remote. The notorious delays in the progress of prosecutions see to that, delays which were experienced even before the current congestion in the criminal courts prolonged them and, given our systems and procedures, are likely to remain inevitable despite any reduction in their duration that may realistically be expected. One cannot safely brush aside the delays as mere inconveniences. They would gravely damage the efficient administration and liquidation of insolvent estates if we had to rely on the prospect of prosecutions as the sole means by which witnesses might be compelled to co-operate in the process. A threat much more immediate is essential, a swift one taking effect before assets of the estate disappear or information about its affairs becomes unobtainable.'

[19] It was further submitted that the inevitable delays in criminal proceedings, the lack of control which a litigant has if dependent on a public prosecutor and the different onus in criminal and civil proceedings all militated against the criminal sanction being intended to be the exclusive remedy, precluding a party faced with a recalcitrant respondent from seeking relief in the High Court. In support of this submission counsel relied on the *Parshotam* case, *supra,* at 280 C-F.

[20] It was also argued that section 17(15) of the Act provided a clear indication that Parliament envisaged civil execution which would co-exist with the criminal sanction created by section 53(1) of the Act. To permit civil execution for money claimed but deny civil relief in respect of an order *ad factum praestandum* is, so it was contended, anomalous and illogical.

[21] Counsel also contended that the criminal sanction in section 53(1) of the Act, in so far as it related to a failure to comply with a determination of the Industrial Court, did not survive the repeal of the Act by the Labour Relations Act 66 of 1995 having regard specifically to Item 22 of Schedule 7 read with section 212 of that Act. Thus, so counsel argued, the only mechanism for enforcing awards of the Industrial Court was the civil procedure of the High Court.

[22] The appellants were thus faced, so submitted their counsel, with a situation where they had a clear right to be re-instated in terms of the order of the Industrial Court, their right was being infringed because the first respondent refused to comply with the order and they had no other adequate remedy apart from the mandatory interdict they sought in the court *a quo*.

[23] I am prepared to assume, without deciding the point, that the High Court has the power in a suitable case to order a person bound by an order of another court or tribunal set up under specific legislation to comply with that order despite the fact that the legislation in question lays down an enforcement procedure in respect of such order which does not include the power of committal for wilful failure to comply with such order. I assume further that an Industrial Court did not possess the power to commit persons who breached its orders for contempt.

[24] The question that arises, however, is whether this is an appropriate case for the grant of the order sought.

[25] Counsel for the appellant, correctly in my view, submitted that in essence what was being sought was a final mandatory interdict. One of the essential requirements for the grant of such an order is that the person applying therefor must show that there is no other satisfactory remedy available.

[26] The question to be considered, therefore, is whether the appellants have established that requisite.

[27] In essence what has to be considered, in my view, is whether a criminal prosecution under section 53(1) of the Act was competent in the circumstances and, if so, whether it was shown that such a prosecution would not be an adequate remedy.

[28] Schedule 7 of the 1995 Act contains transitional arrangements. In Part E of the schedule, which is headed 'Disputes and Courts', Item 21, which is headed 'Disputes arising before commencement of this Act', contains the following in paragraph(1):

> '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.'

[29] Item 22, to which the appellants' counsel referred and which is headed 'Courts' contains the following in paragraph (1):

> 'In any pending *dispute* in respect of which the industrial court or the agricultural labour court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of *this Act*, proceedings must be instituted in the industrial court or agricultural labour court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The industrial court or the agricultural labour court may perform or exercise any of the functions and powers that it had in terms of the labour relations laws when it determines the *dispute.*'

[30] Page J did not decide whether the criminal sanction had survived the repeal of the Act but indicated that he was by no means certain that it had been done away with (at 735 A-B).

[31] In my view the criminal sanction did survive the repeal in respect of disputes which were pending when the 1995 Act came into operation.

[32] The language of Schedule 7 is clear. As far as pending disputes were concerned things were to go on as they were before. Item 21(1), which has been quoted above, clearly states that such disputes had to be dealt with as if the Act had not been repealed. It is true that Item 22 preserves the jurisdiction of the Industrial Court and does not refer to the magistrates' court in which, presumably, prosecutions under section 53(1) would take place, but that was because, but for Item 22, the Industrial Courts would, on repeal of the Act, have come to an end. No such saving in respect of the magistrates' courts was required. In the case of a dispute pending when the 1995 Act came into effect, which was adjudicated upon in the Industrial Court which made an order which was not complied with, the punishment of those who disobeyed the order and were sentenced for contravening section 53(1) would still, in my view, constitute 'a dealing with' the dispute. To hold otherwise would be to interpret Items 21 and 22 as requiring pending disputes to be dealt with only partially according to pre-repeal procedure instead of completely according to that procedure. That interpretation would offend against the plain terms of the schedule.

[33] I am accordingly satisfied that a criminal prosecution under section 53(1) was competent.

[34] What must now be considered is whether such a prosecution would not be an adequate remedy for the appellants in this case.

[35] In my view it can be accepted that in certain cases a criminal prosecution may well be an adequate remedy such as to disentitle a person to whom such remedy is available from obtaining an interdict : *cf Celliers v Lehfeldt* 1921 AD 509 where an order binding over was, in the circumstances of that case, held to be such a remedy, and *Ebrahim v Twala and Others* 1951(2) SA 490(W) where Dowling J (at 493H - 494A) held that the remedy, *inter alia*, of a criminal prosecution was not adequate in the circumstances of the case before him and stated:

> 'I make this reservation advisedly, because I am not prepared to say that there may not be cases where these remedies [which included a criminal prosecution] or some of them may be adequate.'

[36] No attempt is made in the affidavits filed on behalf of the appellants in this case to indicate why a criminal prosecution in this case would be an inadequate remedy. Indeed, the deponents do not even say if any endeavours were made to lay a charge or what happened, or did not happen, if such a charge was laid. By contrast, in the *Ebrahim* case, *supra*, it was stated (at 493 A-B) that the remedy of the institution of a prosecution had been found to be ineffective.

[37] The passage in the judgment of Didcott J in the *De Lange* case, *supra*, on which the appellants' counsel relied is clearly distinguishable because what was in issue there was the need for a swift remedy to be applied against a recalcitrant witness in the interest of the efficient administration and liquidation of insolvent estates 'before assets of the estate disappear or information about its affairs becomes unobtainable'. Such considerations do not apply here. I cannot agree that it is possible to hold on the strength of this dictum alone that a criminal prosecution under section 53(1) is *per se* in every case, and particularly in this case, not an adequate alternative to civil proceedings for contempt.

[38] The *Parshotam* case was not an application for an interdict but an action for the recovery of contributions due to an industrial council fund. Booysen J held that the industrial council was entitled to sue civilly to recover the contributions in question and not restricted to asking for an order for payment of contributions, in terms of section 54(1) of the 1956 Act, from a criminal court which had convicted defendant of failing to pay the amounts in question to the council. He said (at 280 C-F):

> 'It is probably of importance to consider that a number of difficulties could confront the industrial council in seeking to recover through criminal proceedings, which would not be present in civil proceedings.
> Some of these difficulties would be that the State could decline to prosecute or a prosecution could fail for some technical reason *(Virginia Village Management Board v Southey (Pty) Ltd 1961 (4) SA 870(O) at 873F)* and that the State could fail to discharge in a criminal case the onus of proving the offence beyond reasonable doubt, thereby precluding the prosecution from ensuring that these amounts should be paid. In a civil matter, as one knows, the onus of proof is one on a balance of probabilities. *(Coetzer v Boekee 1956 (4) SA 245 (T) at 250H).*
> It seems to me also that mens rea is a requirement in respect of the offences that we are concerned with here and that this is also a difficulty which would confront an industrial council seeking to recover, through criminal proceedings, what it is entitled to receive. *(S v Wandrag 1970 (3) SA 151 (O).'*

[39] In the present case it is not suggested that the State declined to prosecute nor that there is any realistic reason to believe that a prosecution (whether brought by the State or by the appellants as private prosecutors) will fail for some technical reason. It is also not suggested that the fact that *mens rea* would have to be proved will, on the facts of this case, create a difficulty.

[40] In so far as the appellants' counsel argued that in civil contempt proceedings the onus of proof would be different from that which had to be satisfied in a criminal court *Uncedo Taxi Service Association v Maninjwa* 1998(3) SA 417(E). There it was held that even in motion proceedings in the High Court for so-called 'civil contempt' the guilt of neither shown nor even suggested that the possible onus difference could cause any difficulty of proof. It is accordingly not necessary to decide in this case whether the *Uncedo* case was correctly decided.

[41] It follows from what I have said that the unmotivated statement in *Minister of Health v Drums and Pails Reconditioning CC* 1997(3) SA 867 (N) at 877 E-G, that the fact that an Act provides by way of criminal sanction for an alleged contravention of its provisions is no bar to the granting of an interdict, is not correct for all cases.

[42] In the light of this conclusion it is unnecessary to decide whether all the other requisites for an interdict were satisfied.

[43] In the circumstances the appeal must fail. The following order is made:
The appeal is dismissed.

IG FARLAM
JUDGE OF APPEAL

CONCURRING
HOWIE JA
CHETTY AJA