Case Number : 406/99
Reportable
406/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

THE LION MATCH COMPANY LIMITED **Appellant**

and

PAPER PRINTING WOOD & ALLIED WORKERS UNION **First Respondent**

A FURTHER 217 RESPONDENTS **2nd – 218th Respondents**

Composition of the Court : **SMALBERGER ADCJ, OLIVIER, STREICHER, FARLAM JJA; CHETTY AJA**

Date of hearing : **11 MAY 2001**

Date of delivery : **30 MAY 2001**

SUMMARY

Review of application to establish conciliation board – review brought after conciliation board failed to resolve dispute – application dismissed because not brought within a reasonable time.

J U D G M E N T

FARLAM JA

1. INTRODUCTION

[1] This is an appeal from a judgment of Jappie J sitting in the Durban and Coast Local Division of the High Court in which the appellant's application for a declaratory order was dismissed with costs.

[2] The appellant carries on business as a manufacturer and distributor of safety matches and has a factory in Durban.

[3] The first respondent was a trade union registered in terms of the provisions of the Labour Relations Act 28 of 1956, which had been accorded recognition by the appellant in respect of its employees at its Durban factory. Although Act 28 of 1956 was repealed by Act 66 of 1995 it is common cause between the parties that it governs the dispute between them. (In what follows I shall refer to Act 28 of 1956 as 'the Act'.)

[4] The second to 218th respondents were all employees of the appellant at its Durban factory until 22 August 1996 when they were dismissed by the appellant from its employ after a strike took place at the factory. The

second to 142nd respondents are members of the first respondent.

[5] The order sought by the appellant was one declaring that an application made by the first respondent to the Regional Director of Manpower for Kwa Zulu Natal for the establishment of a conciliation board was invalid for want of compliance with the provisions of section 35(2)(b) of the Act. The application asked for a board to be set up to consider and, if possible, settle the dispute between the first respondent and the appellant concerning the alleged unfair dismissal of the second to 218th respondents from the appellant's employ. The appellant also sought in the order a declaration that the result of the invalidity of the application was that there had been no valid referral of the dispute to a conciliation board (within the meaning of section 46(9)(a) of the Act) with the further result that the industrial court had no jurisdiction to determine the dispute under the provisions of section 46(9) of the Act.

2. RELEVANT STATUTORY PROVISIONS

[6] Before the facts in this case and the contentions of the parties are summarised it is appropriate to set out the relevant statutory provisions.

[7] Section 35 of the Act dealt with the establishment of conciliation boards. As far as is material it read:

'(1) Whenever a dispute exists in any undertaking, industry, trade or occupation in any area, and the parties to the dispute are-

(a) one or more trade unions;

(b) one or more employees; or
(c) one or more trade unions and one or more employees,
on the one hand, and
(d) one or more employers' organizations;
(e) one or more employers; or
(f) one or more employers' organizations and one or more employers,
on the other hand (hereinafter referred to as the parties to the dispute), any such party may apply to the inspector defined by regulation, in the form and manner prescribed for the establishment of a conciliation board to consider and, if possible, settle the dispute.
….
(2)(b) If the applicant or one of the applicants is a trade union or an employers' organization, the application shall be in writing and signed by an office-bearer or official of the union or organization concerned, as the case may be, and that application shall be accompanied by a certificate stating that in taking the steps which led to the dispute and in making the application the union or organization and the office-bearers or officials concerned in the matter have observed all the relevant provisions of the constitution of the union or organization, as the case may be.'

[8] Section 46 (9)(a) read as follows:

'(9)(a) The industrial court shall not determine a dispute regarding an alleged unfair labour practice unless such dispute has been referred for conciliation to either an industrial council having jurisdiction or, where no such industrial council exists, to a conciliation board.'

3. FACTS

[9] On 30 July 1996 a substantial number of the employees of the

appellant embarked on what was referred to in the affidavits as a 'work stoppage', which appears on the evidence to have been intended to induce the appellant to transfer those of its employees who belonged to the first respondent from membership of the appellant's pension fund to membership of the first respondent's provident fund. On 14 August 1996 the appellant and the first respondent finally reached agreement with regard to the transfer of the employees concerned to the first respondent's provident fund. Despite this agreement the work stoppage continued. On 16 August 1996 the appellant issued a notice calling upon its employees to resume work on 19 August 1996. After they had failed to do so the appellant, on 22 August 1996, issued a notice dismissing the second to the 218th respondents from its employ.

[10] On 27 August 1996 the first respondent wrote to the appellant challenging the appellant's dismissal of its members and alleging that the dismissal was both procedurally and substantially unfair. An attempt made by the first respondent to arrange an urgent meeting between its representatives and those of the appellant was unsuccessful. On 22 November 1996 the Regional Director received an application for the establishment of a conciliation board from the first respondent. The application was accompanied by a certificate of compliance which reads as follows:

'I, the undersigned, LUCKY MHLONGO, Acting

> Branch Secretary of the PAPER PRINTING WOOD & ALLIED WORKERS UNION, hereby certify that in taking the steps which led to the dispute referred to and in making this application for the establishment of a Conciliation Board, the Union and its office-bearers and officials concerned have observed all the relevant provisions of the Constitution of the Union.'

This certificate was signed by Mr Mhlongo.

A copy of the application was transmitted to the appellant, as required by section 35(2)(a) of the Act. According to the application this occurred on 28 October 1996.

[11] After satisfying himself that the application met the minimum requirements of section 35 of the Act and that the parties were in agreement with the terms of reference of the conciliation board, Mr VL le Fortier, an Assistant Director in the Department of Labour in Kwa Zulu Natal, who had been appointed as an inspector for the purposes, *inter alia*, of section 35 of the Act, established the board on 5 December 1996.

[12] The conciliation board which consisted of representatives of both the first respondent and the appellant, duly met on 15 January 1997 but was unable to settle the dispute.

[13] On 17 March 1997 the first respondent and the employees instituted proceedings against the appellant in the industrial court, pursuant to the provisions of section 46(9) of the Act, for orders declaring the termination of the services of the employees to be an unfair labour practice and ordering the appellant to reinstate the employees.

[14] On 29 April 1997 the appellant filed its reply to the statement of case which had been filed on behalf of the first respondent and the employees.

[15] In its reply the appellant raised a special plea to the jurisdiction of the industrial court, in which it was alleged that the statement in the certificate of compliance that in taking the steps which led to the dispute and in making the application the first respondent and its office bearers and officials had observed all relevant provisions of the first respondent's constitution was false, with the result, so it was alleged, that the application was a nullity and the industrial court had no jurisdiction to make a determination in the matter.

[16] The matter was set down for trial in the industrial court in Durban for a continuous period of two weeks commencing on 9 February 1998. At the pre-trial conference held between the parties on 5 February 1998 it was agreed that the issues raised by the appellant's special plea of jurisdiction would be separated from the issues relating to the merits of the matter and that the issues raised by the special plea would be determined prior to the

adduction of evidence in respect of the merits.

[17] Argument on the issues raised by the special plea commenced before the industrial court on 10 February 1998 and culminated in an order made by consent of the parties in the following terms:

> '1. Subject to what is set forth in paragraph 2 hereof, the proceedings at present pending before this Honourable Court are stayed until a ruling has been obtained from a Court of competent jurisdiction on the question whether this Honourable Court has jurisdiction to make the determination sought by the Applicants pursuant to section 46(9) of the Labour Relations Act of 1956.
>
> 2. (a) The proceedings for the ruling more fully referred to in paragraph 1 hereof, shall be instituted by the Respondent within 21 Court days from the date of this order.
>
> (b) In consenting to the terms hereof, the Applicants shall not be deemed to have waived their rights to oppose such relief as the Respondent will seek under the proceedings for the ruling referred to in paragraph 1 hereof.
>
> 3. The costs incurred to date shall be

reserved.'

[18] The proceedings which have culminated in the present appeal were instituted by the appellant pursuant to the provisions of the order which I have just quoted.

4. PROCEEDINGS IN COURT A QUO

[19] The appellant's application was argued before Jappie J on 24 November 1998 and dismissed by him in a judgment delivered more than eight months later on 4 August 1999.

[20] The appellant contended before Jappie J that the certificate of compliance signed by Mhlongo was false because, so they said, the first respondent's office bearers and officials had, prior to 22 August 1996 (the date on which the dismissals took place) acted in breach of its constitution in two respects: (a) they had not acted in a conciliatory manner and (b) the certificate was signed by one signatory only instead of two.

[21] Jappie J dismissed both the appellant's contentions.

[22] In respect of the first contention he held that the steps which led to the dispute were those which were taken between the date the dismissals occurred, ie 22 August 1996, and the date when the first respondent first raised the contention that the dismissals were unfair. As the actions of the

first respondent's office bearers and officials on which the appellant relied for its contention that the first respondent's constitution had been breached all took place before 22 August 1996 they did not, so he held, constitute steps that led to the dispute. They could not therefore invalidate the application for the establishment of the conciliation board.

[23] In respect of the second contention he held that the relevant requirement in the first respondent's constitution was directory and not mandatory and as the application for the establishment of the conciliation board had in fact been authorised by the first respondent the defect in the application was one of form and not substance and there had been substantial compliance with the first respondent's constitution.

5. DISCUSSION

[24] In view of the fact that I am satisfied that the appeal can be disposed of on another ground I am prepared to assume, without deciding, that the contentions raised by the appellant may well be correct.

[25] In my view it is clear, as counsel for the appellant conceded, that in essence the appellant's attack on the jurisdiction of the industrial court to determine the dispute between the parties amounted to a review, even though it had not been brought under rule 53 of the Uniform Rules of Court. That being so, it follows that the rule that an applicant for review who fails to

bring the application within a reasonable time may (unless the delay can be condoned) lose the right to complain of the irregularity in regard to which the review is brought applies in this case; see, eg, *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978(1) SA 13(A) and *Mamabolo v Rustenburg Regional Local Council* 2001(1) SA 135(SCA).

[26] In the *Mamabolo* case, at 141 F-G, Mthiyane AJA referred to a review application launched some three months and one week from the date on which the termination of service (which was the subject of the attack in the review application) was to have taken effect and said that that was not 'a delay of such magnitude that it called for an explanation from the appellant in anticipation of delay being raised as a bar to his claim by either the council [the respondent in the case] or the Court.'

[27] In my opinion the delay in the present case was a delay of such magnitude. I base this view not only on the actual period which elapsed, which was at least five months, but also on the events that took place after the application which is now attacked was brought and before its validity was questioned, namely:

(1) the fact that the appellant's production manager, Mr Kelly, after having been contacted by an administration officer employed by the Department of Manpower, on 3 December 1996, prior to the

establishment of the conciliation board, confirmed the terms of reference for the board;

(2) the fact that after the board was established, on 5 December 1996, it met on 15 January 1997, a date suggested by Mr Kelly, and that among its members were representatives of the appellant who participated in the discussions, described in the minutes as 'lengthy discussions', after which the members of the board agreed that it had failed to settle the dispute;
(3) the fact that on 17 March 1997 the union and the employees instituted proceedings against the appellant in the industrial court pursuant to the provisions of section 46(9) of the Act, something which could only have been done if the dispute which the industrial court was asked to determine had previously been the subject of proceedings before a conciliation board.

[28] It is clear in my view that there was prejudice to the dismissed employees because the appellant delayed for no apparent good reason in taking the invalidity point. In fact it did nothing and allowed the whole conciliation board process to proceed and waited until the conciliation board failed to produce a result before taking the point. This with full knowledge of those events which preceded the dismissals which are now claimed to have amounted to breach of the first respondent's constitution.

[29] On the face of it the delay in mounting the attack was not only unreasonable but of such an extent as to call for an explanation in the founding papers.

[30] No such explanation appears in the founding papers. In his replying affidavit Mr Kelly admitted that the appellant participated in the proceedings before the conciliation board and did not challenge its establishment and

stated:

> 'I point out that the [appellant] only received *the original* of [the first respondent's constitution] subsequent to the institution of proceedings against it in the Court [sc the industrial court]." (The italics are mine.)

The copy it annexed to its founding papers appears to have been certified by the Industrial Registrar on 17 March 1997.

[31] It is not suggested that the appellant did not have a copy of the first respondent's constitution earlier. Indeed it is noteworthy that the Recognition and Procedural Agreement between the appellant and the first respondent contains a number of references to the first respondent's constitution (see the definition of 'official' in clause 2.18, clause 5.7 dealing with stop order facilities, clauses 6.1 and 6.8 dealing with the election of shop stewards, and clause 6.10.5 dealing with the termination of the appointment of a shop steward). In the absence of any indication in its founding or later affidavits to the contrary, the appellant must have known, or must be taken to have known, from the time the application for the establishment of a conciliation board was made that the first respondent had not complied with its constitution in the respects alleged.

[32] Failing an explanation for the delay in mounting an attack on the

validity of the application I consider that the delay was unreasonable in the circumstances and that no basis for condoning it has been advanced. It follows that the appellant lost its right to complain of the alleged invalidity of the application which was in a sense 'validated' thereby: *cf Harnaker v Minister of the Interior,* 1965(1) SA 372(C) at 381 A-C.

[33] In the circumstances I am satisfied that the appeal must fail.

6. ORDER

[34] The following order is made:

The appeal is dismissed with costs.

.....

IG FARLAM

JUDGE OF APPEAL

CONCURRING

SMALBERGER ADCJ

OLIVIER JA

STREICHER JA

CHETTY AJA