REPORTABLE
Case number: 107/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SOUTH AFRICAN CHEMICAL WORKERS UNION **1st APPELLANT**

P DLADLA **2nd APPELLANT**

and

AFRICAN COMMERCE DEVELOPING COMPANY (PTY) LTD t/a BUFFALO TAPES **RESPONDENT**

CORAM: SMALBERGER, MARAIS, ZULMAN JJA, MELUNSKY and MPATI AJJA

DATE OF HEARING: 8 MAY 2000

DELIVERY DATE: 26 MAY 2000

Labour Law - condonation - grant of - appealability - interpretation of s 17(21A)(a) of Act 28 of 1956

JUDGMENT

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SMALBERGER JA

SMALBERGER JA:

[1] This is an appeal, in terms of s 17C(1)(a) of the Labour Relations Act 28 of 1956 ("the Act"), against the decision of the Labour Appeal Court ("the LAC") in the present matter, reported as *African Commerce Developing Company (Pty) Ltd t/a Buffalo Tapes v SACWU & Another* [1997] 12 BLLR 1537 (LAC) ("the judgment"). The appeal concerns the proper interpretation of s 17(21A)(a) of the Act. The main issue which arises for decision is whether the granting of condonation by the Industrial Court ("the IC") is appealable before the IC has determined the dispute between the parties concerning an alleged unfair labour practice.

[2] The relevant facts appear from the judgment at 1538 C to I and need not be repeated. Suffice it to say that the second appellant, Mr Protus Dladla ("Dladla"), was

that his dismissal was unfair and requested the first appellant ("the Union") to take up his cause. The matter was referred to the IC by the Union and Dladla after a conciliation board had failed to resolve the dispute between them and the respondent. The referral was substantially out of time, and they were obliged to seek condonation from the IC. After a considerable delay the application for condonation was eventually heard by the IC on 18 October 1994 and granted on 8 November 1994. The Union and Dladla were ordered to pay the respondent's costs.

[3] The respondent noted an appeal to the LAC. Myburgh JP came to the conclusion that the order of the IC was appealable at that stage. The LAC considered the appeal and allowed it. No costs order was made. The determination of the IC was altered to provide for the dismissal of the application for condonation and certain ancillary relief (see the judgment at 1542 D). The Union and Dladla now appeal against the LAC's decision with the necessary leave.

[4] The vexed question of whether a finding of the IC on a preliminary issue is appealable before the IC has determined the dispute referred to it in terms of s 46(9) of the Act has been the subject of conflicting decisions in the LAC in the past (see *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) and the cases referred to). More specifically, views have differed on whether the grant of condonation is immediately appealable. The answer has to be sought and found in the wording of s 17(21A)(a) of the Act. It is trite that a right of appeal from a decision of a statutory tribunal must be found in the statute governing that tribunal.

[5] Section 46(9)(c) of the Act provides that the IC shall determine a dispute referred to it "as soon as possible" after such referral. It was common cause that the legislative policy underlying the Act was that disputes should be resolved in an expeditious and inexpensive manner (*cf National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992(1) SA 700 (A) at 739 D-E). When interpreting s

17(21A)(a) regard must be had to, and where possible effect given to, the Legislature's intention.

[6] Section 17(21A)(a) provides, to the extent relevant:

> "Any party to any proceedings before the industrial court in respect of any dispute referred to the industrial court in terms of section 46(9) may . . . appeal against the decision of the industrial court in regard to that dispute or any order as to costs. . ."

[7] The appellants accept for the purposes of the appeal before us that the IC's order granting condonation was final in its effect; that it was definitive of the rights of the parties in relation to the condonation issue and that it settled a definite portion of the dispute between them, *viz,* that relating to the IC's jurisdiction, which would have been lacking but for the grant of condonation. They acknowledge that the IC's order was appealable, but contend that, on a proper interpretation of s 17(21A)(a), it was only open to attack on appeal after the IC had made, in terms of s 46(9), a

determination in respect of the merits of the dispute referred to it. The appellants' argument, in effect, is that the appeal to the LAC was premature. It therefore lacked jurisdiction to entertain the appeal at the time it did so. I am unable to agree with the appellants' contentions.

[8] In interpreting s 17(21A)(a) one must, in the first instance, have regard to the language used. The subsection is not a model of clarity. What is immediately apparent, however, is that the right of appeal is given to "[a]ny party to any proceedings before the industrial court in respect of any dispute referred to the industrial court . . .". It is not limited to "any party to . . . any dispute". Its ambit is significantly widened to include the parties to "any proceedings . . . in respect of any dispute". "Any proceedings", given their literal and wide meaning, would include proceedings in regard to preliminary issues such as jurisdiction, rescission and condonation.

[9] What may be appealed against is "the decision of the industrial court in regard to that dispute". This must be read in consonance with the earlier part of the subsection analysed above. One notes that the subsection does not read "against the determination of that dispute by the industrial court" as might have been expected if the Legislature had intended the subsection to have the meaning contended for by the appellants. The words "in regard to" can mean "concerning" or "in connection with" and should, in my view, be so read to harmonise the earlier and later parts of the subsection. If the decision appealed against may be one "concerning" or "in connection with" the dispute referred to the IC it can, without straining the language unduly, encompass a decision in relation to a preliminary issue of the kind referred to. The fact that the word "decision" is preceded by the definite article "the" rather than the indefinite article "a" does not detract from this interpretation.

[10] The conclusion that s 17(21A)(a) allows (subject to a qualification that will be

mentioned later) an immediate appeal against a decision of the IC in relation to a preliminary issue, is strengthened when regard is had to the following. The subsection provides for an appeal "against the decision of the industrial court in regard to that dispute or any order as to costs". The use of the disjunctive "or" makes it clear that "any order as to costs" is a separate concept. It is not confined to a costs order following upon a determination of the dispute on the merits. It embraces any costs' order, including one made in the exercise of the IC's discretion in relation to a preliminary issue. Such an order is immediately appealable. Mr Buirski, for the appellants, was unable to contend otherwise.

[11] It follows that if, in the present matter, when granting the appellants condonation, the IC had ordered the respondent to pay the costs, because it considered the respondent's opposition to have been unreasonable and unjustified, the respondent could have appealed immediately against such order. Because there is

almost invariably a connection between a costs order and the relief granted the LAC, in deciding the appeal, would probably have been called upon to consider whether the IC had exercised its discretion properly in granting condonation. If it were to find that the IC had not done so, the appeal against the costs order would succeed. A consequence of such a finding would be that the IC lacked jurisdiction in relation to the dispute on the merits because, in the absence of condonation, it would not be entitled to entertain a late referral. If the appellants' interpretation of the subsection were correct, one would be left with the absurd result that despite the LAC's finding no order could be made setting aside the order of condonation, because it was not appealable at that stage. As a result the matter, notionally at any rate, would have to proceed, at unnecessary cost and waste of time, until the merits were finally determined. Only then would the condonation order become appealable, with the outcome of the appeal a foregone conclusion. This would be at variance with the

Legislature's underlying policy (see para [5] above) and could never have been what it intended.

[12] Even if no order as to costs is made in determining a dispute effectively concerning jurisdiction, it is inconceivable that the Legislature could have intended, given the policy underlying the Act, that an issue of jurisdiction, which could be decided expeditiously and relatively cheaply on appeal, should have to wait to be resolved until after the merits have been dealt with - a matter which might take considerable time. While this may offend against the principle that matters should not be dealt with piecemeal, it would be more than justified because of the possible avoidance of long trials and the potential saving of time and money.

[13] The qualification I referred to in para [11] above is this: Clearly s 17(21A)(a) cannot be interpreted to permit appeals in respect of all preliminary decisions lest there be a plethora of appeals and the piecemeal disposal of issues. This would militate

against the expeditious disposal of matters and result in unnecessary costs being incurred. A line must of necessity be drawn somewhere. In my view, the Legislature must be taken to have intended that for a decision of the IC in relation to a preliminary issue to be appealable it must, in keeping with general principle, at least dispose of a substantial issue and be final and definitive in its effect (*cf Zweni v Minister of Law and Order* 1993(1) SA 523 (A) at 532 I-533 A; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996(3) SA 1 (A) at 10 E-G). Whether or not a decision on a preliminary issue falls into that category is a matter for the LAC to determine.

[14] In the result the IC's order granting condonation was appealable, and the LAC was correct in so holding.

[15] The LAC's reasons for upholding the respondents' appeal against the granting of condonation appear from the judgment at 1540 A to 1542 C. It concluded (at 1542

B-C) that:

> "Having regard to the defective nature of the application for condonation for the late referral; the inadequacy of the explanation; the failure to canvass prospects of success at all in the application; and the substantial period of delay, whether three or five months, the application for condonation should not have been granted."

[16] In granting condonation to the appellants the IC was required to exercise a judicial discretion. Its decision was accordingly only open to attack on limited grounds (see *Ex parte Neethling and Others* 1951(4) SA 331 (A) at 335 D-F). One such ground would be that the IC failed to act "for substantial reasons". In holding that "condonation should not have been granted" the LAC obviously intended to convey that no substantial reasons existed for the IC's decision - this is a necessary inference to be drawn from a perusal of the IC's judgment. The LAC cannot be faulted for coming to this conclusion. It analysed the relevant facts carefully and its reasoning is both persuasive and compelling. Nothing can usefully be added to its

judgment in this regard and no point would be served traversing the same ground. Suffice it to say that I agree with its reasoning and conclusion. In the result the LAC correctly upheld the respondent's appeal to it.

[17] The appeal is dismissed, with costs.

J W SMALBERGER
JUDGE OF APPEAL

MARAIS JA)Concur
ZULMAN JA)
MELUNSKY AJA)
MPATI AJA)