REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 68/2002
Reportable

In the matter between:

CHEVRON ENGINEERING (PTY) LTD Applicant

and

NKAMBULE, JOSEPH AND 23 OTHERS Respondents

CORAM: VIVIER ADP, ZULMAN, FARLAM, LEWIS JJA et MLAMBO AJA

HEARD: 7 MAY 2003

DELIVERED: 2 JUNE 2003

SUMMARY: An appeal lies, without leave, to the Supreme Court of Appeal from a decision of the Labour Appeal Court given in terms of item 22(5) and (6) of Schedule 7 of Labour Relations Act 66 of 1995.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] In this matter the applicant seeks an order granting it leave to appeal against a judgment and order given against it by the Labour Appeal Court (to which I shall hereinafter refer as 'the LAC') on 28 November 2000. In this judgment, which has been reported as *Chevron Engineering (Pty) Ltd v Nkambule and Others* (2001) 22 *ILJ* 627 (LAC), the LAC dismissed the applicant's appeal against a judgment given on 15 October 1999 by the industrial court which ordered the applicant to reinstate the respondents, whom the applicant had dismissed from its employ on 23 March 1995 as a result of their participation in an illegal strike on 23 March 1995, with effect from the date of their dismissal.

[2] As the dispute between the applicant and the respondents was pending in the industrial court when the Labour Relations Act 28 of 1956 (to which I shall refer in what follows as 'the 1956 Act'), in terms of which the

industrial court was established and functioned, was repealed by the Labour Relations Act 66 of 1995 (to which I shall refer in what follows as 'the 1995 Act') the proceedings in the industrial court continued as if the 1956 Act had not been repealed (see item 22(2) of Schedule 7 of the 1995 Act, the terms of which are set out in paragraph [10] below) but the applicant's appeal from the judgment of the industrial court was heard by the LAC, which was established by s 167(1) of the 1995 Act (see item 22(5) of Schedule 7, the terms of which are also set out in paragraph [10] below).

[3] The judgment delivered by the LAC in the applicant's appeal was delivered by Nicholson JA, with whom Zondo JP concurred. The third member of the Court, Nugent AJA, dissented. He held that the appeal should have succeeded and that the relief granted by the industrial court should have been set aside and replaced by an order reinstating the respondents with retrospective effect for a period of six months.

[4] The applicant thereafter gave notice of its intention to apply to the LAC, ‘in so far as it may be necessary’, for leave to appeal to this Court against the LAC’s decision. The application for leave was refused by the LAC in a judgment delivered by Nugent AJA, with whom the other two members of the court concurred.

[5] Nugent AJA stated that item 22(6) of Schedule 7 of the 1995 Act (which is set out in paragraph [10] below) provided expressly that no appeal would lie against the LAC’s judgment in a case such as this. He referred to a submission advanced before the court on the applicant’s behalf that a further appeal from the LAC’s judgment to this Court is permitted by s 168(3) of the Constitution (Act 108 of 1996), which is set out in paragraph [11] below, but said that it was not necessary to express a view thereon because if the applicant was entitled to appeal it did not require leave because neither the

Constitution nor the 1995 Act required such leave to be sought and obtained from the LAC.

[6] He also held that item 22(6) provided in express terms that no appeal shall lie from a decision of the LAC hearing an appeal from an industrial court in terms of item 22(5).

[7] The applicant was thus not entitled to leave to appeal, either because no further appeal was allowed or because, if there was an appeal (because item 22(6) is in conflict with the Constitution) no leave was required.

[8] The applicant has now, as I have said, applied for leave to appeal against the LAC's decision dismissing its appeal. In the alternative it has sought an order giving such directions as this Court deems appropriate for the prosecution and conduct of its appeal against the LAC's judgment to this Court.

RELEVANT STATUTORY PROVISIONS

[9] Before the contentions of the parties are summarised it will be appropriate to set out the provisions of item 22 of Schedule 7, as far as is material, together with s 168(3) of the Constitution.

[10] Item 22 reads:

'(2) Any dispute in respect of which proceedings were pending in an industrial court ... must be proceeded with as if the labour relations laws [by which is meant, *inter alia,* the 1956 Act] had not been repealed.

....

(5) Any appeal from a decision of the industrial court ... in terms of sub-item ... (2) must be made to the Labour Appeal Court established by section 167 of this Act and that Labour Appeal Court must deal with the appeal as if the labour relations laws had not been repealed.

(6) Despite the provisions of any other law but subject to the Constitution, no appeal will lie against any judgment or order given or made by the Labour Appeal Court established by this Act in determining any appeal brought in terms of sub-item (5).'

[11] Section 168(3) of the Constitution reads as follows:

'(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –

(a) appeals;

(b) issues connected with appeals; and

(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.'

CONTENTIONS OF THE PARTIES

[12] Mr *Watt-Pringle,* who appeared with Mr *Snyckers* for the applicant, contended that item 22(6) should be read so as to be consistent with the constitutional provision in s 168(3), with the result that on a proper construction of the sub-item an appeal does lie to this Court from a decision

of the LAC given in an appeal from the industrial court. In the alternative he submitted that if the sub-item could not be read in this way it was unconstitutional, with the result that the applicant would have an appeal to this Court in terms of s 168(3) of the Constitution.

[13] Mr *Vally,* who appeared on behalf of the respondents, submitted that the decision of the LAC dismissing the applicant's appeal from the industrial court was not appealable. He relied in this regard on the judgment of the LAC in *Khoza v Gypsum Industries Ltd* (1998) 19 *ILJ* 53 (LAC), in which it was held (at 55G-H) by Myburgh JP, with whom Froneman DJP and Conradie JA concurred, that 'in terms of item 22(6) of schedule 7 no appeal lies against any judgment or order given or made by the new Labour Appeal Court in determining any appeal brought in terms of sub-item (5)'. In support of this conclusion Myburgh JP said (at 55H-I):

'The provisions of item 22(6) are consistent with the provisions of the 1995 Act. The new Labour Appeal Court –

- is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction (s 167(3));
- is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters in its exclusive jurisdiction (s 167(2)).

Subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court (s 183).'

[14] Mr *Vally* argued further that Mr *Watt-Pringle's* alternative argument that item 22(6) of Schedule 7 was unconstitutional should be rejected because the applicant had not brought a substantive application to declare it unconstitutional and that such an application can in any event not be entertained by this Court as it lacks original jurisdiction. It is authorised by s 168(3) of the Constitution to hear only appeals, issues connected with

appeals and other matters referred to it in terms of an Act of Parliament providing for such referral.

DISCUSSION

[15] The first question to be considered is whether on a proper interpretation of item 22(6) an appeal does lie to this Court from all decisions of the LAC given in terms of item 22(5), ie, when hearing appeals from the industrial court. If it were not for the inclusion of the words 'subject to the Constitution' the wording of sub-item (6) would impel one to the conclusion that the drafters of the sub-item did not intend to permit such appeals, which would raise starkly the question whether the sub-item could withstand constitutional scrutiny, given the clear wording of s 168(3) of the Constitution to the effect that this Court has jurisdiction to decide appeals 'in *any* matter' and that it is *the* highest court of appeal in all matters, except constitutional matters where it is the penultimate court of appeal. (See

further the comments of Ngcobo J in *Nehawu v University of Cape Town and Others* 2003(2) BCLR 154 (CC) at 162B-D (para [21]).)

[16] In my opinion the inclusion of the words 'subject to the Constitution' saves item 22(6) from being found to be unconstitutional. They can only mean that if the Constitution says something different in regard to the possibility of an appeal lying to some other court from a decision of the LAC hearing an appeal under item 22(5) from what is said later in the sub-item then what the Constitution says will prevail. This is not because what is said in the sub-item will be unconstitutional but because the sub-item itself provides that whatever the Constitution says on the point (if in conflict with what follows) will prevail in terms of the sub-item itself. This follows from the use of the expression 'subject to' which indicates clearly that that to which the rest of the sub-item is subject is paramount and will override it:

see *S v Marwane* 1982 (3) SA 717 (AD) at 747H-748A and *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC) at 624 D-G (para [27]).

[17] There was some discussion during the hearing of the appeal as to why these words were inserted in the sub-item. Several possibilities suggest themselves but in view of the clear meaning of the words used and its effect speculation on the point would in my view be an essentially unprofitable exercise.

[18] As regards the decision of the LAC on which Mr *Vally* sought to rely, *viz Khoza v Gypsum Industries Ltd, supra,* I agree with Mr *Watt-Pringle's* submission that that decision was clearly arrived at *per incuriam.* What happened was that counsel for the applicant in that case applied for leave to appeal to this Court from a judgment of the LAC sitting in terms of item 22(5). Neither the applicant's attorney nor his counsel had been aware when the application was launched that item 22 had been amended in September

1996 by Act 42 of 1996 which, *inter alia,* inserted item 22(6) and despite having their attention drawn thereto they 'stubbornly' (as the Court put it) pursued the application. In consequence the applicant's attorneys were ordered to pay the costs of the application *de bonis propriis* on an attorney and client scale. No argument was presented to the court on the proper interpretation of item 22(6), read in the light of s 168(3) of the Constitution, and the point was not considered. Similarly the comment by Nugent AJA, to which reference was made in paragraph [6] above, that item 22(6) provided in express terms that no appeal would lie from a decision of the LAC hearing an appeal from an industrial court in terms of item 22(5), is clearly erroneous because it overlooks the inclusion of the all-important phrase 'subject to the Constitution'.

[19] I am accordingly satisfied for the reasons I have given that the applicant is entitled to appeal from the LAC's decision dismissing its appeal

from the decision of the industrial court. I agree with Nugent AJA's view expressed in the LAC's judgment refusing leave to appeal to this Court that leave is not a pre-requisite in the Constitution or the 1995 Act and there is also no provision in the Supreme Court Act 59 of 1959 which requires such leave: it would be different if the LAC were a division of the High Court because ss 20 and 21 of Act 59 of 1959 would then apply. But it is clear that the LAC falls in the category of other courts established in terms of an Act of Parliament to which reference is made in s 166(e) of the Constitution.

[20] In view of my conclusion that the applicant is entitled to appeal to this Court against the decision of the LAC and that it does not require leave to do so, all that remains for consideration is its alternative prayer for directions in regard to further prosecution and conduct of the appeal. In my view all that need be ordered in that regard is that the provisions of Rule 10 of this

Court's Rules must be complied with by the applicant on or before 30 June 2003 and by the respondent on or before 30 July 2003.

[21] As far as costs are concerned the applicant asked that the costs of the applicant's application for leave to appeal in the LAC and this application be costs in the cause of the appeal.

[22] In view of my conclusion that the applicant did not need leave to appeal the LAC was correct in dismissing the application for leave. No basis accordingly exists for ordering the costs of that application to be costs in the cause of the appeal. I agree, however, that it is appropriate to order that the costs of this application should be costs in the cause of the appeal.

ORDER

[23] The following order is made:

1. The following directions are given as to the further prosecution and conduct of this appeal:

The provisions of Rule 10 of this Court's Rules must be complied with by the appellant on or before 30 June 2003 and by the respondent on or before 30 July 2003.

2. The costs of this application are costs in the cause of the appeal.

.....
IG FARLAM
JUDGE OF APPEAL

CONCURRING
VIVIER ADP
ZULMAN JA
LEWIS JA
MLAMBO AJA