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N v H

THE SOUTH AFRICAN TECHNICAL OFFICIALS' ASSOCIATION

and

THE PRESIDENT OF THE INDUSTRIAL COURT & OTHERS

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

THE SOUTH AFRICAN TECHNICAL OFFICIALS'
ASSOCIATION

Appellant

and

THE PRESIDENT OF THE INDUSTRIAL COURT

First Respondent

THE DEPUTY PRESIDENT OF THE INDUSTRIAL
COURT

Second Respondent

MINE SURFACE OFFICIALS' ASSOCIATION OF
SOUTH AFRICA

Third Respondent

THE CHAMBER OF MINES OF SOUTH AFRICA

Fourth Respondent

THE UNDERGROUND OFFICIALS' ASSOCIATION
OF SOUTH AFRICA

Fifth Respondent

CCRAM: MILLER, CILLIÉ, VILJOEN, JJA,
et GALGUT, ELOFF, AJJA

HEARD: 1 NOVEMBER 1984

DELIVERED: 22 NOVEMBER 1984

JUDGMENT /

J U D G M E N T

MILLER, JA :-

The appellant was party to a dispute such as is described in s 43 (1)(c) of the Labour Relations Act, No 28 of 1956 (the Act), namely, a dispute "concerning an alleged unfair labour practice". Such dispute, which stemmed from the failure or refusal by the fourth respondent to review the existing situation in regard to membership of the appellant, was referred to a conciliation board, which failed to achieve a settlement. The of Manpower Minister thereupon, acting in terms of s 45 (9) of the Act, referred the dispute to "the industrial court" for determination. The industrial court thus referred to came into being by virtue of a provision in the Industrial

. Conciliation/.....

Conciliation Amendment Act, No 94 of 1979, which substituted a new s 17 in the Act for the previous s 17.

The industrial court duly made a determination which was declared to be binding with effect, from 1 February 1982. The third respondent, however, being dissatisfied with such determination approached the Transvaal Provincial Division on notice of motion for review of the determination made by the industrial court and for an order setting aside such determination or sending the matter back to the industrial court for reconsideration. This application elicited from the appellant a counter-application, in terms of rule 30 of the Uniform Rules of Court, for the setting aside of the third respondent's application for review on the

ground /

ground that it was an irregular proceeding and there= fore a nullity. The Court a quo (FRANKLIN, J) rejected the appellant's contention and dismissed, with costs, the application for the setting aside of the third respondent's notice of motion. The appeal is against that decision. Only the third and fifth respondents actively oppose the appeal; the remaining respondents abide the decision of this Court.

The judgment of the Court a quo is fully reported under the name Vereniging van Bo-Grondse Mynamptenare van Suid-Afrika v President of the Industrial Court and Others at 1983(1) SA 1143. The main grounds upon which the appellant relied for its assertion that the third respondent's notice of motion to review the determination made

by the /

by the industrial court was entirely out of order
sufficiently appear from the summary thereof made by
FRANKLIN, J, at p 1145 to p 1146 D.

I reproduce that summary in full:

- "1. The industrial court, when exercising its powers in terms of s 17 (11)(a) and (f) of the Act, is for all purposes of the proceedings and the orders referred to in the applicant's notice of motion clothed with the full powers of a Superior Court with concurrent jurisdiction to that of a Provincial or Local Division of the Supreme Court in terms of s 19 of the Supreme Act 59 of 1959; or, alternatively, with exclusive jurisdiction as a Superior Court to the exclusion of all powers of such Divisions of the Supreme Court for those purposes and in those proceedings.
2. The proceedings, judgments and orders of the industrial court as a Superior Court in terms of s 17 (11)(a) and (f) of the Act are not subject to review or setting aside by the Provincial Division or Local Division of

of the /

of the Supreme Court because their powers of review are confined under s 19 (1)(a)(ii) or 19 (2) of Act 59 of 1959 to proceedings of inferior courts, and such Divisions are not otherwise vested with powers of review of the industrial court's proceedings or orders relating to the matters referred to in the applicant's notice of motion.

3. All legal questions referred to in the applicant's notice of motion must be decided only by the Appellate Division, by reason of the provisions of s 17 (21) read with s 17 (11)(a) and (f) of the Act.
4. No factual questions referred to in the applicant's notice of motion are capable of review by a Provincial or Local Division of the Supreme Court."

The vital question that arises relates to the identity and status of the industrial court. It is certainly not a division of the Supreme Court for it is not mentioned in the First Schedule of the Supreme Court Act, No 59 of 1959. (See s 2 of that Act.) Nor is it an

"inferior /

"inferior court" as defined by s 1 of the Supreme Court Act, for it is not required to keep a record of its proceedings. (This is true regarding the situation at the time when proceedings in this matter were commenced - rule 16 of the rules of the industrial court now require records to be kept.) What is in effect contended on behalf of the appellant is that the industrial court is a special court performing judicial functions and that in the performance of those functions it is to be fully equated with and to enjoy the status of a division of the Supreme Court presided over by a Judge or Judges. (Cf. Gentiruco A G v Firestone SA (Pty) Ltd 1972(1) SA 589 (AD) at p 601 D.)

The functions of the industrial court are described in s 17 (11) of the Act, which reads as follows:

"(11) The /

"(11) The functions of the industrial court shall be -

- (a) to perform all the functions, excluding the adjudication of alleged offences, which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered by the Department of Manpower Utilization;
- (b) to decide any appeal lodged with it in terms of section 21 A or 51;
- (b A) to consider and give a decision on any application made to it for an order under section 43;
- (c) to conduct arbitrations referred to it in terms of section 45, 46 or 49;
- (d) to advise the Minister on any matter contemplated in section 46 (7)(c);
- (e) to determine any question referred to it in terms of section 76 or 77;
- (f) to make determinations in terms of section 46;
- (g) to deal with any other matter which it is required or permitted to deal with under this Act; and

(h) generally /

(h) generally to deal with all matters
necessary or incidental to the performance
of its functions under this Act."

The industrial court's predecessor was the "industrial
tribunal", established by s 17 of Act 28 of 1956 when
its short title was "The Industrial Conciliation Act".

It has correctly been pointed out by De Kock (Industrial
Laws of South africa, 2nd Ed, at p 612) that the functions
described in (c), (d), (e), (g) and (h) above are virtually
the same as the functions of the replaced industrial
tribunal. S 17 of the Act, however, represents a
departure from its predecessor, not only in the sense that
what was called an industrial tribunal is now called an
industrial court but also in regard to the description of
the first of the functions of the industrial court listed

in s 17 (11)(a). It is expressly provided in that
 ss that it will be a function of the industrial court,
 within the statutorily defined limitations, to perform
 all the functions "which a court of law may perform".

These departures were understandably very
 strongly relied upon by Mr Muller, for the appellant,
 who made much of the circumstance that the words "a court
 of law" in s 17 (11)(a) are not in any way qualified and
 therefore would, he contended, include the Supreme Court.
 The result, so it was contended, is that the industrial
 court not only operates as a court of law but is a court
 enjoying the status of and therefore to be equated with
 the Supreme Court.

The Court /

The Court a quo (at p 1147) observed that s 17 (11)(a) of the Act provided for three "categories of functions; judicial, quasi-judicial and investigatory or administrative". It considered, too, that the provisions of s 17 (11)(c) furnished "cogent reason" for finding that when the industrial court makes a determination in terms of s 17 (11)(f), it exercises a judicial function. Stopping short of making a positive finding in that regard, the learned Judge assumed for purposes of his judgment that when it makes a determination in terms of ss (11)(f), the industrial court "sits as a court of law". The Court a quo nevertheless found against the appellant; however, because it rejected the appellant's contention that the industrial court sits as a court which is the equivalent /

equivalent of and equated with a Provincial or Local
Division of the Supreme Court.

It is reasonably clear that the industrial
court performs functions of different kinds or categories.

See an article by M S M Brassey, 1980(1) I L J 75,
and cf. 97 S A L J 137 at p 141, where Halton Cheadle
comments:-

"The 'court of law' - the industrial
court - is the creation of the amending Act"

and that it is

"to function as a court of law in respect of
any matter"

falling within the statutory limitations of its juris=
diction.

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When considering the implications of the use of the word "court" in the naming of the body which replaced the earlier industrial tribunal, and of the terms used in s 17 (11)(a) to describe a function of the "court", it is necessary to bear in mind that a body which is empowered to perform functions that a court of law performs, is not on that account necessarily to be regarded as a court of law when it performs such functions. An administrative body, although operating as such, may nevertheless in the discharge of its duties function as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body and becoming a court of law.

The status and true identity of a body such as the

industrial /

industrial tribunal, or now, the industrial court, is not determined simply or exclusively by the nature or type of the functions which it performs. In Shell

Company of Australia Ltd v Federal Commissioner of

Taxation. 1931 A C 275, P C, the issue was whether

the Board of Review (created by the Federal Income Tax Assessment Act, 1922 - 1925, to review the decisions of the Commissioner of Taxation) was a court of law.

The Court held that it was not - it was "an administrative as distinguished from a judicial tribunal", (p 299)

despite the fact that it performed "judicial functions".

The ultimate decision in that case obviously cannot serve as a guide in regard to the decision in this case, in which different statutes, different subject

matter /

matter and different circumstances are encountered.

It is helpful, however, to have regard to certain dicta and observations in the judgment delivered in the Shell case which are generally relevant to the question whether a body may be said to constitute, and function as, a court of law. At p 296 LORD Sankey, L C, said:-

"The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power."

And at p 297 he went on to enumerate "some negative propositions", thus:-

"1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to

decide /

decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

In the Gentiruco case, supra, TROLLIP, JA, came to the conclusion that the Court of the Commissioner of Patents was a special court the proceedings or decisions of which were not reviewable by the Supreme Court because they were equated with those of the Supreme Court. Considerations influencing the Court to that view in the Gentiruco case were, inter alia, the composition of the Commissioner's Court (prior to 1964, a former Judge or an advocate and after 1964 a judge or acting Judge of the T P D designated from time to time as Commissioner by the Judge President of that Division) and the terms of the

Patents Act which (i) endowed the Commission with specific judicial powers, and (ii) expressly conferred upon him all such powers "as are possessed by a Judge sitting alone to try a civil action in a provincial division of the Supreme Court " (See pp 600 - 1.)

As FRANKLIN, J, observed at p 1149, the Labour Relations Act contains no such provisions, nor does it provide, as the Patents Act does in respect of decisions by the Commissioner, that any determination or decision of the industrial court is to be regarded for all purposes as a decision of the Supreme Court. Mr Myburgh, for the fifth respondent, correctly pointed out that s 17 (11)(a) of the Act is the only provision which expressly relates the industrial court to a court of law and then only in the sense that within its statutory limitations it may

perform such functions as a court of law performs.

It is of some importance to note the following additional factors. (1) The members of the industrial court are appointed by the Minister of Manpower "by reason of their knowledge of the law"; they are not required to be judges or ex-judges or advocates or persons having special knowledge of industrial matters or industrial law (s 17 (1)(b)). (2) The Minister, or, if authorized thereto by the Minister, the President of the industrial court, may appoint "any fit person" as an additional member of the industrial court. Moreover, the members of the industrial court, including the president and deputy president, are appointed for such periods as the Minister (or the president) may deter-

mine. (S. 17 (1)(b) and (c).) (3) In connection with the performance of its functions, the industrial court may consult, and take into consideration any relevant information furnished by specified boards, "or any Department of State or any similar authority". (S. 17 (20).) (4) After a determination made by an industrial Court, the Minister (i.e. of Manpower) may approve of the correction of an omission or error, or the clarification of any provision in the determination "if in his opinion the correction or clarification is

necessary". (The underlining is mine.) (See

s. 49 (2)(a) of the Act, which relates to awards on

Arbitration, but which, in terms of s. 46 (9)(c) of the

Act, applies mutatis mutandis also to determinations by

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the industrial court.)

When the several factors I have mentioned are considered collectively, the argument that the Act requires the industrial court to be regarded, within its sphere of competence, as a court of law equivalent to and essentially to be equated with a division of the Supreme Court, is appreciably attenuated. The uncertainty of tenure of office of those selected to comprise the industrial court is not compatible with the judicial independence derived from the conditions of appointment of Judges to the Supreme Court. (See Herbstein and Van Winsen, Civil Practice of the Superior Courts in South Africa, 2nd Ed, pp 14 - 15; B R Bamford, "Aspects of Judicial Independence", 73 S A L J 380.) Nor can

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the procedure of consultation by the members of the industrial court with other bodies, government departments and "similar authority", as part of the judicial process, be reconciled with the principles which govern the Supreme Court in the performance of its judicial functions. And the provisions I have referred to in the fourth of the "additional factors" mentioned above are stridently incompatible with the protected authority of decisions reached and orders made by the Supreme Court. Apart from minor or formal errors in its orders which a division of the Supreme Court may itself correct, only a higher court of competent jurisdiction may correct or alter or elaborate upon an order made by the Supreme Court. The provision that a person, not being part of the

judicial process at all, may decide whether or not an order or determination of the industrial court should be corrected or enlarged upon, serves not to equate such "court" with the Supreme Court but to accentuate the unlikelihood of any intention to equate them as courts of law. (Cf. the observations of the president of the

industrial court in Moses Nkadimeng and Others v Raleigh Cycles (SA) Ltd 1981 (1) I L J 34 at p 47; and cf.

J D van der Vyver, "Die Nywerheidshof" 1981 (2) I L J 159.)

I agree with FRANKLIN, J, (p 1151 D - E) that for the reasons I have mentioned (and others stated by him) the industrial court, in making a determination under s 17 (11)(f) of the Act does not sit as a court equivalent to or to be equated with the Supreme Court.

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The very circumstances and considerations which lead to that conclusion appear to me to justify the further conclusion that the industrial court, when it makes such determination, does not sit as a court of law at all, even when it discharges functions of a judicial nature.

It was also contended on behalf of the appellant that by necessary implication the Act excluded any right to take the proceedings or decisions of the industrial court on review before the Supreme Court. We were referred to s 76 (10) which provides for the finality and binding nature of a determination made by the industrial court and the suggestion was that s 17(21), which afforded a limited right of appeal from the industrial court to the Appellate

Division of the Supreme Court, supported such an implication. I cannot accept that the exclusion of a right to approach the Supreme Court for the purposes of review of proceedings before the industrial court is a necessary implication from the provisions of the Act.

As OGILVIE THOMPSON, A J A, pointed out in Welkom

Village Management Board v Leteno 1958 (1) SA 490 (AD)

at p 502 G - H -

"The rule accordingly is that the Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication" "

See also Local Road Transportation Board a o v Durban

City Council a o 1965 (1) SA 586 (AD) at 593 C and 594

A - B, and Main Line Transport v Durban Road Transportation

Board /

Board 1958 (1) SA 65 (D) at p 73 H.

A similar argument was addressed to the Court
a quo; FRANKLIN, J, in my opinion, rightly rejected it.

(See the judgment a quo at p 1151.)

I should mention that by virtue of an amendment
contained in Act 51 of 1982, a right of appeal now lies
from the industrial court to the Supreme Court, but it
was common cause that this cannot affect the decision in
this case.

The appeal is dismissed with costs, which in
respect of the third respondent shall include costs of
two counsel.

S MILLER
JUDGE OF APPEAL

CILLIÉ, JA)
VILJOEN, JA) CONCUR
GALGUT, AJA)
ELOFF, AJA)