

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case no: JA77/97

In the matter between

EDGARS STORES LIMITED

Appellant

and

SOUTH AFRICAN COMMERCIAL

CATERING AND ALLIED WORKERS UNION

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

JUDGMENT

- 1] On 14 August 1996 the appellant, Edgars Stores Limited (“the company”), commenced a disciplinary enquiry into the conduct of fifty-one of its employees. The charge was that on 31 July the employees had held members of management hostage in order to compel compliance with a demand. The employees were represented by the first respondent, the South African Commercial Catering and Allied Workers Union (“the union”). The

enquiry ended on 28 October. On 8 November the company dismissed the employees. The employees appealed against the dismissal. The appeal was dismissed on 13 December 1996.

2] On 11 November 1996 the Labour Relations Act, 95 of 1996 ("the 1995 Act") came into operation. One of the statutes it repealed was the Labour Relations Act, 28 of 1956 ("the 1956 Act").

3] On 10 January 1997 the union referred the dispute concerning the dismissal to the second respondent, the Commission for Conciliation Mediation and Arbitration ("the Commission") in terms of the 1995 Act. The dispute was described in these terms in LRA Form 7:

"The dispute was about:

The dismissal of individual applicants on the 8 November 1996 whose names can be seen on annexure A hereto. The outcome of the appeal was on the 13 December 1996 whereby the company upheld the dismissal and thereby refused to reinstate individual applicants."

4] The company took the point before the Commission that in terms of items 21(1) and 22(1) of schedule 7 of the 1995 Act the Commission did not have jurisdiction to conciliate or arbitrate the dispute as the dispute had arisen on 8 November 1996, prior to the commencement of the 1995 Act. The contention was that only the industrial court had jurisdiction to determine the dispute.

5] The union's answer was that the dismissal did not become effective until the

appeal procedure had been exhausted, an event which occurred after 11 November 1996.

- 6] On 10 April 1997 the union applied for the establishment of a conciliation board in terms of 1956 Act “to consider and settle a dispute”. The dispute was stated to concern “unfair dismissal of E Wabile and 50 others”. It was said that the matter in dispute was “... an unfair labour practice and commenced/ceased on 8/11/96”. The dispute concerning the dismissal of the fifty-one employees is hereinafter referred to as the “dismissal dispute”.
- 7] The Commission upheld the company’s contentions and rejected those of the union.
- 8] The union thereafter instituted review proceedings in the Labour Court.
- 9] The Labour Court reversed the decision of the Commission. The Court accepted that the dismissal was final on 8 November 1996, but held that the dismissal dispute arose after 11 November 1996, and that accordingly it was the Commission, and not the industrial court, which had jurisdiction to determine the dispute.
- 10] Schedule 7 to the 1995 Act contains the transitional arrangements. Item 21 deals with “disputes arising before commencement of this Act”. Subitem (1)

provides: “Any dispute contemplated in labour relations laws which arose before the commencement of this Act must be dealt with as if those laws had not been repealed.”

Item 22(1) provides:

“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 the 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.”

- 11] The Labour Court’s reasoning, in essence, was that the word “dispute” in item 22 is not defined in the 1995 Act; that a dispute arises when there is “[the] expression by parties, opposing each other in controversy, of conflicting views, claims or contentions”, in the words of Selke J in Durban City Council v Minister of Labour 1953 (3) SA 708 (D) at 712A; that the dismissal and “... the arising of the dispute in this case, occurred on different dates”; that “... a dispute about the fairness or otherwise of the dismissal cannot be said to arise until in deed or words the employee or his agent has, at the very least, shown that he disputes the fairness of such dismissal”; and “... [a]lthough no

date is given as to when the declaration of the dispute was made, it is clear that this was soon after the [union] learned of the [company's] rejection of the appeal - which clearly represented the taking by the [company] of a position on the fairness or otherwise of the dismissal, a position which was contrary to that already taken by the [union]."

12] In terms of items 21(1) and 22(1) of schedule 7 of the 1995 Act the industrial court is required to determine the dispute if:

- the dispute was contemplated by the 1956 Act;
- the dispute arose prior to 11 November 1996;
- the industrial court had jurisdiction to determine the dispute; and
- proceedings had not been instituted prior to 11 November 1996 to determine the dispute.

13] It is common cause between the parties that the dismissal dispute was one:

- contemplated by the 1956 Act;
- in respect of which the industrial court had jurisdiction; and
- in respect of which proceedings had not been instituted.

14] The sole inquiry is whether the dismissal dispute arose prior to 11 November 1996.

15] By virtue of the provisions of items 21 and 22 of schedule 7 of the 1995 Act, the answer must be sought in the 1956 Act.

16] The dispute which the industrial court had jurisdiction to determine in terms of

the 1956 Act was “a dispute concerning an alleged unfair labour practice.”

- 17] The functions of the industrial court included the power to grant urgent interim relief until an order was made in terms of s43(4); to grant interim orders in terms of s43; and to make determinations in terms of s46(9). S43 conferred on the industrial court the power “to order reinstatement of employees or restoration of terms and conditions or abstention from unfair labour practice”. In terms of ss (1) the term “dispute” used in s43 meant “a dispute concerning an unfair labour practice”. In terms of s46(9) the industrial court had the power to determine “a dispute regarding an alleged labour practice”. In terms of the definition of unfair labour practice in s1 an unfair labour practice consisted of “any act or omission” which had or might have had one or more of the effects set out in the definition.
- 18] For the purpose of the prescription of claims under s43 and s46(9) the prescription period was calculated from the date the unfair labour practice was committed, not the date on which the parties declared a dispute concerning the unfair labour practice, and no distinction was drawn between the notion of “a dispute” and that of “an unfair labour practice”. The crucial date was the date the cause of action (based on the unfair labour practice jurisdiction of the industrial court) arose. In terms of s43(4)(a) read with s43(2) any party to a dispute concerning an unfair labour practice was obliged to refer the dispute to an industrial council or conciliation board “within 30 days of the date on

which notice was given of the alleged unfair labour practice, or if no such notice was given, of the date on which the alleged unfair labour practice was introduced". S46(9)(a) read with s27A(1)(d)(i) and s35(3)(d)(i) provided that:

(a) the industrial court was precluded from determining a dispute concerning an alleged unfair labour practice unless the dispute had been referred for conciliation to either the industrial council having jurisdiction or, where no such industrial council existed, to a conciliation board; and

(b) no dispute concerning an unfair labour practice could be referred to an industrial council or conciliation board unless the dispute had been referred to the industrial council or conciliation board "within a 180 days from the date on which the unfair labour practice commenced or ceased as the case might be."

19] In terms of the 1956 Act, the date of dismissal constituted the date on which the alleged unfair labour practice was introduced, commenced or ceased. The 30 day and 180 day periods were calculated from the date of dismissal, not the date that the parties declared a dispute regarding the dismissal. Put differently, a dismissal dispute arose on the date of the dismissal.

20] Neither in its referral to the Commission nor in its application for a conciliation board did the union allege that the company acted unfairly after 8 November 1996. Its contention was that the dismissal did not become final until the internal appeal procedure had been exhausted, a submission which the Commission and the Labour Court, correctly, rejected.

21] The Labour Court should have found that the dispute concerning the unfair

labour practice allegedly committed by the company in dismissing the fifty-one employees arose on 8 November 1996, that on 11 November the dismissal dispute was pending and that the industrial court had jurisdiction to determine the dispute.

22] The appeal succeeds, with costs.

23] The order of the Labour Court is altered to read:

“The application is dismissed, with costs.”

Myburgh JP

I concur:

Froneman DJP

I concur:

Kroon JA

Date of hearing: 20 February 1998

Date of judgment: 2 March 1998

Appearances for appellant: Mr Brian Bleazard of Brian Bleazard Attorneys

For respondent: Adv J.G. Rautenbach instructed by S V Khampepe Attorneys