

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

CASE NO.:JA 44/99

In the matter between:

DIE GAUTENG PROVINSIALE ADMINISTRASIE

Appellant

and

A E SCHEEPERS

First Respondent

L J SMIT

Second Respondent

J B C BARWISE

Third Respondent

JUDGMENT

CONRADIE JA

[1] There are two procedural matters relating to the prosecution of this appeal from the judgment of the industrial court. The notice of appeal was delivered late. The non-compliance has been satisfactorily explained. It had to do in part with the omission of the industrial court to give the appellant's attorneys notice of the delivery of the judgment, and in part with the non-availability of counsel who conducted the matter in that court. That necessitated the briefing of new counsel. The delay was not significant and was not caused by carelessness or indifference. We accordingly condoned the non-compliance.

[2] The record of the appeal proceedings was also delivered late. It was due on 13 September 1999, but was only delivered on 4 November 1999. Rule 5 of the rules governing proceedings in the labour appeal court deals with delivery of an appeal record. Sub-rule (8) provides that 'the record must be delivered within sixty days of the date of the order granting leave to appeal...' This formulation has given occasion to my brother Zondo to remark in *Xaba v Portnet Ltd* [2000] 1 BLLR 55 (LAC) and *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* (case no JA 70/98, Judgment 21.10.99) that a determinable period for delivery of an appeal record cannot be said to have been laid down by the rules in the case of an appeal from the industrial court. I was inclined to the view that one should, in the context of an appeal from the industrial court, adopt the expedient of reading the section as though it provided for a period of sixty days from the date of the industrial court judgment appealed against. This is the scheme of rule 7 of the rules of the supreme court of appeal. However, this interpretation runs into the difficulty that rule 5A permits an appeal to be noted ten days after the date on which the court gives (full) reasons for its judgment. This, as experience has shown, may be long after the sixty days have elapsed. The record cannot be delivered before this. It would be fruitless to do so and is, anyway, not allowed by sub-rule (7).

[3] The majority view taken in *Xaba v Portnet* (supra) has the merit of avoiding the difficulties associated with sub-rule (17). That sub-rule prescribes a

procedure for permission to deliver an appeal record late –

(17) If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of a notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application.

It is not entirely clear whether the application to the judge-president envisaged by the sub-rule must also be made within the sixty-day period. I assume not. But it would still have to be made before the record is lodged, since (without the consent of the respondent to the late delivery of the record) the appeal would have lapsed and a lapsed appeal cannot be prosecuted. Another aspect which is obscure is whether the procedure in rule 5(17) is meant to be the only means of obtaining an indulgence for the late filing of an appeal record. I would think not. Rule 12(1) of the labour appeal court rules gives the court the power, for sufficient cause shown, to excuse parties from compliance with any of the rules. An appellant making

an application for condonation in terms of this rule would, apart from explaining the lateness of the record, also have to offer a sufficiently persuasive explanation why an application for an extension of time for filing of the record was not timeously presented to the judge-president and why the appeal should no longer be regarded as having lapsed. In all the circumstances and since the respondents, with whose consent the period for delivery of the record could in any event have been extended, did not oppose the condonation application, we condoned the late filing of the record.

[4] The appellant comes before us on appeal from a judgment of the industrial court as the public body responsible for the affairs of the Pretoria Academic Hospital. ('The Hospital'). The respondents are employed at the Hospital where they at all relevant times held posts in the occupational class 'administration clerk' in the salary structure group: administrative support personnel. Despite their allocation to this occupational group, they have for some time been employed to perform tasks ordinarily performed by incumbents of posts which fall within the occupational class 'network controller' in the salary structure group: information technology personnel.

[5] The occupational class of each of the appellant's employees (in which I include 'officers') is determined by a 'Personnel Administration Standard' ('PAS'). It prescribes the broad job contents, appointment requirements,

promotion requirements and salary determination and progression for employees in each occupational class. The PAS favours network controllers with regard to salaries, benefits and career opportunities in comparison to administration clerks. The first respondent has been tasked as a network controller since 1989 and the second and third respondents since 1992 and 1996. The industrial court member found that it was unfair of the appellant to have used the respondents as information technology personnel when they were not employed in that category. He determined that this was an unfair labour practice and made what he considered the appropriate remedial orders.

- [6] A similar matter was recently heard in this court. Judgment was delivered on 9 March 2000 in *Hospersa & another v Northern Cape Provincial Administration* case no.: JA39/99. It is as yet unreported. It decided that a chief professional nurse who had for two years acted as nursing services manager at the Gordonia hospital was not entitled to the salary appropriate to the higher post. It was decided that the judgment of the labour court, given on review from a decision of a commissioner of the Commission for Conciliation, Mediation and Arbitration ('The CCMA'), that the decision could not be allowed to stand, was correct. The labour court judgment has been reported as *Northern Cape Provincial Administration v Hambidge NO* [1999] 7 BLLR 698 (LC). The labour court decided (at 701

H – I) that the dispute about the so-called ‘acting allowance’ to which the second appellant, the employee, claimed to be entitled was a dispute of interest which could not have been adjudicated by the CCMA. The reasoning was approved by this court. Mr Oosthuizen, who appeared before us for the appellant, relied on the decision. Mr Van der Merwe, for the respondents, did not contend that it was wrong. He contented himself by arguing that the respondents did indeed enjoy certain rights and that the dispute before this court was a dispute of right.

- [7] The importance of the distinction between disputes of right and matters of mutual interest in the present case is that the now repealed Public Service Labour Relations Act 105 of 1994 (‘the PSLRA’) did not permit any dispute other than a dispute of right to be submitted to the industrial court. S 5(10) (a) of the PSLRA contained the following provision –

‘An employee who ... has declared a dispute ... may apply in the case of an unfair labour practice dispute, to the industrial court in terms of this Act, or, in the case of any other dispute of right, to any other court for a decision...’

This provision was amplified by s 22 dealing with the powers of the industrial court. Ss (5) of s 22 read –

‘ (5) In the event of a dispute of right not being –

- resolved by a chamber of the council;

- settled by a conciliation board; or
- settled by the parties contemplated in section 23(3),

any party to the dispute may, in the case of an unfair labour practice, approach the industrial court, or, in the case of any other dispute of right, any other court for adjudication of the dispute.’ The concession that the industrial court could only have pronounced upon the dispute if it had been one of right, was therefore correctly made.

[8] There is a valuable collection of authorities on what is to be comprehended under the notion of dispute of right in *Mineworkers’ Union & another v AECI Explosives and chemicals Ltd, Modderfontein Factory* [1995] 3 BLLR 58 (IC). The discussion shows that, by and large, disputes of right concern the application or interpretation of existing rights. Generally speaking a dispute relating to proposals for the creation of new rights or the diminution of existing rights is a dispute of mutual interest. Such disputes are ordinarily to be resolved by collective bargaining. (See also: *Bester Homes (Pty) Ltd v Cele & Others* (1992) 13 ILJ 877 (LAC) at 886 D – H; *Hlope v Transkei Development Corporation Ltd* (1994) 15 ILJ 207 (IC(TK))). The PSLRA defined ‘matters of mutual interest’ to mean, *inter alia*, terms and conditions of employment, employee compensation, remuneration and service benefits.’ Since a rights dispute must be one about a right or rights, the applicants before the industrial court were

obliged to show what that right was and where it was located. It could be located in statute, in a collective agreement or in a contract of employment or, as Mr Van der Merwe suggested, in the unfair labour practice under the 1956 Labour Relations Act.

- [9] S 14(3)(c) of the Public Service Act 103 of 1994 ('the Public Service Act'), in so far as it is presently relevant, provides that an officer who is employed in a post which is graded higher than his or her own grade is not, by reason only of that employment, entitled to a higher scale of salary applicable to the post. S 30(c) of the Public Service Act makes it impermissible for an officer in the public service to claim additional remuneration for any work which he or she is required by a competent authority to perform, unless his or her conditions of service provide otherwise. S 30(c) being directed, I would think, at the payment of overtime, it and s 14(3)(c) are not meant to cover exactly the same ground; but they do make the same point. Unless provision therefor has been made in a collective agreement, or regulation or individual employment contract, an officer has no claim (right) to remuneration other than that which attaches to the post to which he or she is appointed.

- [10] It has not been suggested that the respondents' entitlement rested on any (individual) employment contract. The only other place where a right might reside would be the Public Service Staff Code. That Code had, by

virtue of the provisions of s 13(5) of the PSLRA, the status of a collective agreement. Mr Van der Merwe was unable to point to any provision in it which might have assisted the respondents. It nowhere provides that an employee whose services are utilised in a post other than the one to which he or she has been appointed is entitled to the service benefits attaching to that post. The Code in clause 2(b) of part IV rather suggests the contrary:

‘An officer transferred to a post of a higher grade than his/her own (held out of adjustment) or whose post is upgraded, is not entitled to the higher scale of salary applicable to that post (section 14(3)(c) of the Public Service Act 1994)’

- [11] In the absence of any right derived from statute, collective agreement or employment contract, what right was there to have sustained the respondents’ cause of action? The respondents rely on a right not to be unfairly treated which is said to derive from the Labour Relations Act 28 of 1956 and from s 1 of the PSLRA which defined ‘unfair labour practice’ in the same terms as the 1956 Labour Relations Act. However, s 5(10)(a) and 22(5) of the PSLRA quoted above made it clear that an unfair labour practice, to be justiciable, had to involve a dispute of right. If Mr Van der Merwe were correct that an unfair labour practice included a broad general ‘right’ not to be unfairly treated, all practices which were unfair would under the PSLRA have qualified as ‘unfair labour practices’. That

was patently not the intention of the lawgiver. Moreover, unfair labour practice, as traditionally understood, involved the infringement of a right; that the right (one thinks for example of the entitlement of an employee to be heard before dismissal for misconduct) was judicially created pursuant to powers given to the industrial court by statute, and not by contract or legislation did not make it less of a right.

[12] The appellant ought not to employ persons as administration clerks and then for extended periods utilise them as network controllers. The situation which this creates is intolerable to the employees. They cannot progress within their own occupational class because they are not gathering experience in that field. They cannot progress in the class within which they are utilised because they do not strictly speaking belong there. So, for example, an administration clerk is not eligible to do a public service sponsored course in information technology because he or she does not fall in the information technology occupational class. It is a phenomenon which is by no means uncommon in the public service. It even has a name in public service jargon. It is called 'misappropriation'. There have been discussions between the appellant and the respondents' trade union about the inequity of this practice since 1995, but despite the support of the appellant's superintendent general of health and the director: information technology for the establishment of information technology sub-directorates for the Hospital, the provincial service commission has refused to approve their establishment. There is agreement on a broad front that the respondents should have different and better conditions of employment. But a dispute of that kind is an interest dispute which can only be resolved by the mechanisms of collective bargaining. The industrial court was not entitled to pronounce upon it.

Mr Oosthuizen indicated that his client would, if successful, not seek costs on appeal or in the court below.

The appeal is upheld. The order of the industrial court is set aside and replaced by one reading:

'The application is dismissed.'

CONRADIE JA

I agree

ZONDO AJP

I agree

WILLIS JA

Date of Hearing: 23 March 2000

Date of Judgment:

Attorney for Appellant: E H Erasmus for the State Attorney

Attorney for Respondent: Sampson Oakes Higgins Inc

Counsel for Appellant: Adv M M Oosthuizen

Counsel for Respondent: Adv F J Van der Merwe

