

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: JA11/99

In the matter between:

SCORE SUPERMARKET

Appellant

and

MYRA KENTE

Respondent

JUDGMENT

CONRADIE JA

[1] The respondent was, so it seems, suspected of complicity in a robbery which occurred at the appellant's store at Taung. Her dismissal was substantively and procedurally unfair; that much was conceded at the pre-trial conference. The trial proceeded on two procedural points, on the quantum of the respondent's compensation, and on the costs award in the court a quo. The two procedural points were dismissed following a preliminary hearing. Judgment was handed down on 20 October 1998. Subsequently, at a later hearing the respondent was awarded R 48 015,35 and costs on the magistrates' court party and party scale.

[2] In a notice of appeal delivered on 9 November 1998, the appellant raised

two issues: the compensation awarded was unreasonable and costs should not have been awarded to the respondent. Much later, on 9 June 1999, an amended, or supplemented, notice of appeal saw the light of day. It raised the two procedural points which had been dismissed at the first hearing. The amended notice of appeal was not accompanied by an application for condonation. That came later still. When it did come, on 30 July 1999, it also dealt with the late filing of the record of appeal and the late filing of the heads of argument. The reasons for the omission from the earlier notice of appeal of the two procedural points are not entirely satisfactory. The procedural points were not new. They were argued before and dismissed by Pienaar SM on 19 January 1998. Their exclusion from the earlier notice of appeal was due to carelessness. Carelessness is not in the ordinary course a sufficient excuse. However, the appeal raises intricate questions of interpretation of the Labour Relations Act 28 of 1956 ('the Act') and, being arguable, I think that the application for condonation of all the procedural defects should be granted.

- [3] An application for the establishment of a conciliation board was received by the authorities on 10 January 1996. The board was, however, never convened. This had also at one time been raised by the appellant as an objection. It was withdrawn after the presiding officer had indicated that he did not consider it to be any good.

[4] The point which is now taken by the appellant is that the dispute was referred to the industrial court before a conciliation board had been established and that this vitiated the proceedings before the court *a quo*. Mr Beaton argued on behalf of the appellant that section 46(9) of the Act contemplates a referral of a dispute to the industrial court only after the referral thereof to conciliation (by an industrial council or conciliation board) and, moreover, only after the relevant body, in this case the conciliation board, had failed to settle the dispute.

[5] The proceedings before the industrial court were vitiated, so Mr Beaton argued, because the application for the establishment of the conciliation board did not amount to a referral of the dispute to the board. Such a referral could only, at best for the applicant, occur when the inspector charged by section 35 with the establishment of the board determined its terms of reference. Mr Beaton was ready to concede that, in practice, no further step which could be construed as a 'referral' was taken by an applicant. The predicament of an applicant for a conciliation board, faced with tardiness by an inspector in establishing such a board, was that the time period started to run from the date of the application for the establishment of the board. The board was required to attempt to settle the dispute within thirty days of this date. Within ninety days of the expiry

of the first thirty days, an applicant was obliged, if the matter was not settled and he or she wished to proceed, to refer it to the industrial court. If this was not done, the industrial court could not hear the matter without having granted condonation for the late lodging of such a referral.

[6] *In casu* the conciliation board was eventually established on 9 September 1996. By this time the notice of application – the respondent’s statement of case - had already (on 12 June 1996) been referred to the industrial court. It is evident from the facts recited above that, although there was a referral to a conciliation board and to the industrial court, these events followed the wrong sequence.

[7] Section 46(9)(a) of the Labour Relations Act 28 of 1956 (‘the Act’) provided that –

‘The industrial court shall not determine a dispute regarding an unfair labour practice unless such dispute has been referred for conciliation... to a conciliation board.’

Paragraph (ii) set out the sequence in which the dispute resolution procedure should occur. Once a board had failed to settle a dispute, it had, within a certain time frame, to be referred to the industrial court ‘for determination.’

[8] I think that in order to solve the puzzle of what to make of sections 35, 36 and 46(9) of the Act, one should look carefully at the structure of, particularly, section 46(9). The opening – and I think principal - injunction is that ‘the industrial court shall not determine a dispute regarding an alleged labour practice unless such dispute has been referred for conciliation to ... a conciliation board.’ (s46(9)(a)) The emphasis, plainly, is on the *determination* of the dispute. That would appear to have been the principal object of the Act: the industrial court was not to embark on a hearing of the dispute until that dispute had been subjected to mediation. It is true that s 46(9)(b)(ii) then provides that if a dispute has been referred to a conciliation board, and that board has failed to settle the dispute, it might be referred to the industrial court for determination. This makes it appear as though the referral to the conciliation board had necessarily to precede the referral (by which I meant the filing and service of the notice of application) to the industrial court. In the light of the legislative purpose expressed in ss (a), the remaining provisions – which are ancillary provisions dealing with the mechanics of a referral – are not to be read as meaning that it was imperative for the sequence set out therein to be followed. As long as there had been conciliation, the industrial court was entitled, and obliged, to determine the dispute. I do not think that, had there been no conciliation, it would have been beyond the court’s powers to send the dispute for conciliation before allowing it to be determined.

[9] The provisions requiring a referral to the industrial court within certain time frames after the failure to settle a dispute were there to ensure the expeditious determination of disputes. I do not think that it does violence to the legislative intent to hold that a referral to the industrial court might precede the establishment of a conciliation board. If the authorities failed to establish such a board, an applicant would have no other option. (Cf. Ulac Prints (Pty) Ltd v Bulbulia NO & Others (1988) 9 ILJ 408 (W). Brassey et al, The New Labour Law p.40; Wepener v Natalse Landboukoöperasie Bpk (1989) 10 ILJ 1173 (IC)). Even if an applicant failed to apply for the establishment of a conciliation board, the only danger he would run was that the industrial court would refuse to determine a dispute which came before it without it having been referred to conciliation. The determination process might not be started before there had been a referral to conciliation. That process started in court. It did not begin with the preliminary procedure of referring the dispute to the court.

[10] The second point which is, by way of the condonation application, sought to be raised on appeal is not stronger. In fact, it is a good deal weaker. It is contended in the alternative that the statement of case was filed late and that, although it was accompanied by an affidavit seeking condonation,

condonation was not granted. My view is that where the court dealt with the dispute without explicitly granting condonation it must be considered to have been implicitly granted.

- [11] It was not contended before us that the industrial court incorrectly applied the principles relating to compensation. It awarded compensation on the footing that the respondent was entitled to two and a half years' salary. She had by the time of the determination been out of work for over three years. She tried to find other work. Her evidence was that each prospective employer (of whom there were six) turned down her application after, so she thought, having sought a testimonial on her from the appellant. Of course, the respondent could not know for certain whether each prospective employer had done so, but the probabilities favour the assumption that each of them did. If the appellant told such a prospective employer that the respondent was suspected of complicity in a robbery, it would explain why she could find no other work. If it did not do so, I think that it should have laid such evidence before the court in order to demonstrate that the respondent's failure to find another job was not of its making. In the absence of evidence from its side, one must assume that the appellant told prospective employers about the respondent that which it has never denied believing about her.

[12] I have no hesitation in saying that I consider the industrial court's award of compensation to have been fair. I see no reason, either, to interfere with the court's award of costs. The award rested on an acceptance of the contention that the appellant had a hopeless case and therefore should not have pursued it. I do not think that if I had been in the presiding member's shoes I would have rested my decision on quite this basis. But I should certainly have found it unfair that a respondent who conceded having substantively and procedurally unfairly dismissed an applicant should not pay that applicant's costs. The procedural points and the quantum of the compensation were not issues which should, in all fairness, have been canvassed at the respondent's expense. I am therefore not inclined to interfere with the discretion of the court a quo in its award of costs.

The application for condonation is dismissed with costs.

The appeal against the award of compensation and the order for costs is dismissed with costs.

CONRADIE JA

I agree

ring: 26 August 1999
gment: 16 September 1999
attorney: Mr Grimbeek from Van Zyl Le Roux & Hurter Inc.
e for Appellant: Adv. R G Beaton
's attorney: Mr Sihali from Maserumule & Partners
This judgment is available from the Internet: <http://www.wits.ac.za>

NICHOLSON JA

I agree

MOGOENG AJA