

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT DURBAN

Case no : DA 20/98

In the matter between

Jabulani Shadrack Xaba

Appellant

and

Portnet Limited

Respondent

JUDGMENT

Zondo AJP:

Introduction

1. This is an appeal against a ruling of the industrial court that it did not have jurisdiction to entertain and determine a dispute of an alleged unfair labour practice between the appellant and the respondent. However, before the appeal can be considered, there are two matters of a procedural nature which require consideration. It is convenient to deal with those first

before considering the appeal itself.

2. Late Delivery of Respondent's Heads of Argument

The respondent's heads of argument were filed two days after the deadline. The respondent applied for condonation in respect of such delay. Although the appellant opposed the respondent's condonation application, we granted it because good cause was shown. The explanation for the delay was that, as a result of a failure by the appellant's attorney to include certain documents in the record, the respondent's attorneys had to ask the appellant's attorney for copies and when someone from the respondent's attorney's office went to the appellant's Attorney's firm to fetch such copies in terms of an arrangement, the offices of the appellant's attorney were closed and this caused the delay. The period of delay was negligible. The appellant could not show that it had suffered any prejudice as a result of such

delay.

3. **Delivery of the Record**

3.1 In this matter the notice of appeal was filed on the 22nd July 1998. The record of the proceedings in the industrial court was filed on the 11th January 1999. In the meantime the respondent had lodged an application to this Court on the 10th November 1998 in which it sought an order dismissing the appellant's appeal. This to was brought, inter alia, on the ground that the appellant had failed to deliver the record within the period of 60 days required by rule 5(8) of this Court, and, that, by virtue of the provisions of Rule 5(17), the appellant was deemed to have withdrawn the appeal.

3.2 In response to the above application of the respondent, the appellant brought an application for an order in the following terms:

“1. Condonating (sic) the late prosecution of the appeal in the above matter and/or,

2. Extending the time limits for the late prosecution of the appeal in the above matter and,

3. Re-instating the appeal in the above matter.”

3.3 The respondent did not file any papers opposing the appellant's application for the above order. It transpired

during argument in Court that the respondent had not been served with a copy of the application. The appellant's attorney could not produce any proof that there had been service of that application. However, in the end the respondent waived its right to file answering affidavits to oppose the application. Nevertheless, the respondent opposed the application and drew the Court's attention to certain aspects in the application itself to support its contention that condonation should not be granted.

3.4 It may not be necessary to deal with the question whether or not a proper case for condonation has been made out depending on whether there is a rule of this court which the appellant failed to comply with in delivering the record when it did. That is the question I now turn to consider.

Did the appellant fail to comply with any applicable rule of this court in delivering the record when he did?

3.5 In taking the point that the appellant had failed to deliver the record timeously, the respondent relied on the provisions of Rule 5(8) read with rule 5A(4) of the Rules of this Court as published under GN no 1666, GG 17495 of 14 October 1996 as amended by GN R961 GG 18142 of 11

July 1997. On the basis of rule 5(17) the respondent submitted that the appellant was deemed to have withdrawn his appeal and that, accordingly, the **“appeal”** should be dismissed with costs.

3.6 When the appellant filed its application for condonation with regard to the delivery of the record, it made reference to rule 2(1) of the rules published under GN R161 GG 13717 of the 10th of January 1992. Those rules governed the conduct of proceedings of the Labour Appeal Court established by section 17 A(1) of the now repealed Labour Relations Act, 1956 (Act No 28 of 1966) (“the old Act”).

3.7 The Labour Appeal Court to which the rules relied upon by the appellant applied is the old Labour Appeal Court which had been established by sec 17A(1) of the old Act, and not the present Labour Appeal Court. The present Labour Appeal Court was established by sec 167 of the Labour Relations Act, 1995 (Act No 66 of 1995)(“the Act”). The two courts should not be confused despite the fact that they bear the same name. The differences between the two Courts are well known. I do not consider it necessary to spell them out.

3.8 As the rules relied upon by the appellant applied to the old Labour Appeal Court, they cannot apply to the current Labour Appeal Court (because these two courts have separate identities) unless they were made applicable to the current Labour Appeal Court by an appropriate legislative measure e.g by a statutory provision or by a rule of this Court. In this regard I have considered the transitional provisions contained in item 22 of Schedule 7 to the Act together with sec 212(1), (2) and (3) of the Act. I am satisfied that there is no such legislative measure. I have also considered the rules of this Court and I am satisfied that there is no rule of this Court which makes those rules applicable to this Court. Accordingly, I conclude that the rules relied upon by the appellant are of no application to this Court and this matter.

3.9 The rules relied upon by the respondent are rule 5(8) and (17) read with rule 5A(4) of the rules of this Court as published under GN no 1666, GG 17495 of 14 October 1996 as amended by GN R961, GG 18142 of the 11th July 1997. A reading of all the rules leaves one in no doubt that these rules were intended in the main for appeals to this Court emanating from the Labour Court. However, it seems to me that the Rules Board overlooked the fact that it had also to provide for rules for appeals emanating from the industrial court to this Court. When this oversight was discovered, the Rules Board inserted Rule 5A which relates to appeals from the industrial court. Those appeals come to this Court by

virtue of sec 17(21A) of the old Act read with item 22(5) of Schedule 7 to the Act. This is such an appeal. Therefore, there can be no doubt that Rule 5A applies to this appeal.

3.10 The heading to Rule 5A is: **“Appeal from the industrial court.”** This indicates that its provisions apply to appeals emanating from the industrial court. That this is so is confirmed by a reading of the provisions of the rule itself. Rule 5A has four subrules. The first three subrules are not of immediate relevance to this judgement.

However, subrule (4) is. It reads thus: **“ When an appeal has been noted, the provisions of rules 5(7) to (22) apply.”** What does this mean? In my view rule 5(4) means that, when an appeal has been noted, an appellant and a respondent in an appeal against a decision of the industrial court have to comply with the requirement of the provisions of rule 5(7) to 5(22). It is necessary to consider, at least, some of the requirements prescribed by the provisions of sub- rules (7) to (22).

3.11 In terms of rule 5(7) an appellant is required to serve a copy of the record **“of the proceedings in the Labour Court.”** For an appellant in an appeal against a decision of the industrial court this requirement would be impossible to comply with because the only record which such appellant would have would relate to proceedings in the industrial court (and not in the Labour Court) as the proceedings he would be seeking to appeal against would have taken place in the industrial court. Accordingly, the rule makes no sense when, by virtue of rule 5A (4), it is sought to be applied to an appeal emanating from the industrial court.

3.12 Rule 5(8) requires that the appeal record must be **“delivered within 60 days of the date of the order granting leave to appeal unless the appeal is noted after a successful petition for leave to appeal, in which case, the record must be delivered within the period fixed by the court under rule 4(9).”**

3.13 The difficulty I have with rule 5(8) is that the period

within which an appellant against a judgement of the industrial court is required to deliver the record is calculated from a non-existent date, namely, “ **the date of the order granting leave to appeal.**” There is no such date in respect of appeals against judgements of the industrial court. This is so because parties to disputes in that court have an automatic right of appeal to this Court against its judgements. Unlike parties in the Labour Court who require leave to appeal before they have the right of appeal , parties to disputes in the industrial court do not require any leave to appeal.

3.14 In appeals against Judgement of the industrial court , **“the date of the order granting leave to appeal”,** from which the 60 days (referred to in rule 5(8)) must be calculated, is a date which never occurs. It, therefore, stands to reason that it can never be said in such appeals that the period prescribed by Rule 5(8) for the delivery of the record has expired. Because the date from when the 60 days must be calculated never occurs, the period of 60

days never commences to run.

3.15 Rule 5(17) provides:

“If an 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. If

consent is refused, the appellant may, after giving notice to the registrar, apply to the Judge President in Chambers for an extension of time.”

3.16 In terms of sub-rule (17) the consequences of an appellant’s failure to lodge the record within the period prescribed by rule 5(8) can be fatal to an appeal. However, before such consequences can follow, an appellant must have failed **“to lodge the record within the prescribed period.”** In this case, for the reasons already given above, it cannot be said that the appellant failed to lodge the record within the period prescribed by rule 5(8).

Accordingly, the appellant cannot be said to have withdrawn his appeal in terms of rule 5(17).

3.17 The provisions of rule 5A(4) of the rules of this Court complicate rather than simplify the appeal procedure applicable to appeals from the industrial court. This is so firstly because it is not clear whether the provisions of rule 5A were intended to prescribe the whole appeal procedure applicable to such appeals or only part of such procedure and, secondly, because the provisions of the subrules to rule 5 which rule 5A(4) seeks to make applicable to such appeals are simply unworkable when sought to be applied to appeals from the industrial court. I say this for the following reasons:-

(A) the record that subrules (7) and (8) require to be served, filed and delivered is the record of the proceedings in the Labour Court and not the record of proceedings in the industrial court (see also rule 5(14) and (15);

(b) the documents which subrule (10)(h) requires to

be included in the record are only those documents which were referred to “**in any proceedings in the Labour Court**” - this could not mean documents referred to in proceedings in the industrial court;

- c) As mentioned above, there are difficulties relating to the period within which subrule (8) requires the record to be delivered;
- d) the certification of the record which sub-rule (9) requires cannot be effected because the person required to certify the record as correct, who is the registrar of the Labour Court, cannot be competent to certify such record as correct because the record that the appellant would submit for such certification would be the record of proceedings in the industrial court and not the record of proceedings in the Labour Court as contemplated in sub-rule (9);

- e) by reason of the difficulties already mentioned above in relation to subrule (8), the provisions of sub-rule 17 cannot be invoked in appeals emanating from the industrial court,
- f) rule 8 envisages that an appeal can only be set down “when the record on appeal has been delivered and subject to the directions of the Judge President”; the reference to the record in rule 8 must be a reference to the record as contemplated in rule 5(7) read with subrules (9), (10) and (14); If I am correct in this, as I think I must be, then the position is that an appeal against a judgment of the industrial court can never be set down for argument without disregarding the injunction in rule 8 that can only happen after the record of the proceedings in the Labour Court has been delivered;
- g) If an appeal cannot be set down because the record contemplated by the rules cannot be

delivered, there will be no deadline for the delivery of the heads of argument in terms of rule 9 because the period within which heads of argument must be delivered is calculated from the date of the hearing of the appeal;

h) the deadline in rule 7, which makes provision for the making of an application for a party to be admitted as *amicus curiae*, cannot operate because it (i.e. the deadline) is calculated from the date of the hearing of the appeal once such date has been determined and such date cannot be determined without acting in breach of the rules;

i) an appeal from the industrial court cannot be set down for hearing without breaching the rules because there are requirements of rule 5 which simply can not be met which are required to be met before the appeal can be set down;

- j) if an appeal cannot be set down, the deadline for the delivery by the respondent's representative of a power of attorney in terms of rule 6 authorising him or her to oppose such an appeal cannot operate because it is required in that event by rule 6(2) to be delivered when the respondent delivers its heads of argument and there will be no deadline for the delivery of heads of argument for the reason that the appeal cannot be set down;

3.18 The sum total of the above is simply that at least the majority of the rules of this Court can simply not be effectively applied to appeals from the industrial court whereas they can be applied, it would appear, without much difficulty to appeals against judgments of the Labour Court. The latter appeals are the appeals for which, it is clear, the rules of this Court were primarily made.

3.19 In the light of the above the question still stands whether it can be said that the appellant failed to comply with rule 5(8) in that it delivered the record of appeal outside the time period prescribed by rule 5(8). In my judgment, for the reasons advanced above, it cannot be said. For the same reason it can also not be said that by virtue of rule 5(17) the appellant is deemed to have withdrawn the appeal.

3.20 The conclusion I have reached is not a conclusion that

one would reach lightly about court rules. Indeed, before such a conclusion can be reached about court rules, one would attempt to find, if at all possible, another interpretation of the rules which would render them effective. In my search for another way of reading various provisions of rule 5, I have considered whether purposive interpretation may be the answer to the difficulties which arise when the rules of this Court are sought to be applied to appeals against judgments of the industrial court. (On purposive interpretation see **Ndima & Others v Waverley Blankets Ltd; Sithukuza & Others v Waverley Blankets Ltd** (1999) 20 ILJ 1563 (LC) at 1570 J - 1072 G).

3.21 Can it be that, if purposive interpretation was resorted to, there would be room to read various provisions of the rules of this Court as to say:-

(a) the reference to the Labour Court in rule 5

would be read as a reference to the industrial court?

(b) the reference in rule 5(8) to the day of the granting of leave to appeal is a reference to the day of the noting of an appeal?

(c) the reference in rule 5(9) to the registrar of the Labour Court is a reference to the registrar of the industrial court?

3.22 I would be the first one to admit that, if the subrules to rule 5 can be read in the manner indicated par3.21 above, that would promote the smooth running of appeals.

However, to my mind, not even purposive interpretation can help because of the specific wording used in the provisions of the rules, in particular rule 5. There is a limit to which the wording of a statute or rule may be disregarded in the process of an application of purposive interpretation. In my view such limit is necessary if we are to heed, as I think we should, the unanimous warning of the Constitutional Court given in **S v Zuma 2 1995(2) SA642 (CC)**.

3.23 At 652I in Zuma Kentrige AJ, (with Chaskalson P, Langa J (as he then was), Ackerman J, Didcott J, Krieger J, Madala J, Mahomed J(as he then was), O” Regan J and Sachs J concurring), said : “ **While we must always be conscious of the values underlying a written instrument , it is nonetheless our task to interpret a written instrument.**” At 653A the Court went on and said

“We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination”.

3.24 The conclusion I have reached about whether an appellant in an appeal from the industrial court has a deadline by when to deliver the record is given within the context of rule 5(8) read with rule 5A(4) only. I say this because I have discovered that the Act has a provision which may mean that, by virtue of rules of another court, an appellant does have a deadline within which it must deliver the record. The statutory provision I refer to is section 173(3) of the Act. The Court I refer to is the Supreme Court of Appeal.

3.25 Section 173(3) provides thus:-

“An appeal to the Labour Appeal Court must be noted and prosecuted as if it were an appeal to the Appellate Division of the High Court in civil proceedings, except that the appeal must be noted within 21 days after the date on which leave to appeal has been granted.”

3.26 As there is no court known as the Appellate Division of the High Court in South Africa but there is one known as the Supreme Court of Appeal which was previously known as the Appellate Division of the Supreme Court, the reference in section 173(3) to the Appellate Division of the High Court must be a reference to the Supreme Court of Appeal. The question which arises is what the meaning and effect of section 173(3) are. What its effect is depends on what is meant by the phrase **“noted and prosecuted as if”** in section 173(3). In so far as section 173(3) says an appeal to the Labour Appeal Court must be **“noted”** as if it is an appeal to the Supreme Court of Appeal in civil proceedings, that must, inevitably, mean that the step that constitutes noting an appeal in the context of an appeal to the Supreme Court of Appeal is the step that must be taken when an appeal is noted to this Court.

3.27 It is clear (from section 173(3)) that, when the legislature was enacting section 173(3), it decided itself to determine the period within which an appeal to the Labour

Appeal Court must be noted and did not, as one would have expected, leave the determination of such a period to someone else, e.g the Rules Board, nor did it want the period within which such an appeal should be noted to be the same as the period prescribed elsewhere in respect of appeals to the Supreme Court of Appeal in civil proceedings. That is why it specifically said such period in appeals to the Labour Appeal Court is 21 days after the date on which leave to appeal has been granted.

3.28 If the legislature was happy to leave such period to be the same as the period prescribed for the noting of civil appeals to the Supreme Court of Appeal, it would have refrained from specifying the period of twenty-one days in section 173(3). In the light of this, it seems to me that, subject to what I say below about section 176, there is every reason to suggest that in enacting section 173(3), the legislature intended that the rules of the Supreme Court of Appeal relating to the noting of civil appeals to that Court would govern the noting of appeals to the Labour Appeal Court.

3.29 The next question which arises in connection with section 173(3) is whether, when section 173(3) says an appeal to the Labour Appeal Court must be “**prosecuted as if**” it were an appeal to the Supreme Court of Appeal in civil proceedings, that means that every step which an appellant in a Labour Appeal Court appeal must take between the noting and the hearing of an appeal must be every step which would have been taken in prosecuting a civil appeal to the Supreme Court of Appeal in terms of the

rules of the latter Court or whether the steps that must be taken must be the same but they do not necessarily have to be taken in the same way and within the same periods as are prescribed by the rules of the Supreme Court of Appeal in civil appeals to that Court.

3.30 The thought that, in enacting section 173(3), the legislature may have intended the last of the two interpretations mentioned in the preceding paragraph arises when regard is had to section 176(1) and (2) of the Act. Section 176(1) empowers the Rules Board to **“make rules to regulate the conduct of the proceedings in the Labour Appeal Court”**. Section 176(2) says that the Rules Board **“has all the powers referred to in section 159 when it makes rules for the Labour Appeal Court”**. The powers given to the Rules Board by section 159 in making rules are as wide as they can be. In my view they are not narrower than any that I would have expected to be given to a body of that kind.

3.31 Having regard to the powers which the legislature sought to give to the Rules Board when making rules for this Court, it seems highly unlikely that it intended the Rules Board to have limited powers such as only to prescribe - not the steps which must be taken between the noting and the hearing of such appeals to this Court (because that is already contemplated in section 173(3)) but only the periods within which such steps could be taken. If it is unlikely that the legislature intended this, then probably the legislature intended that, if there was to be a Rules Board, such Rules Board should have the wide powers specified in section 159 read with section 176(1) and (2) in order for it to perform its functions properly.

3.32 Having said what I have just said at the end of the preceding paragraph, I must also say that, before it can be accepted that the legislature intended that there should be a Rules Board with as wide powers as are set out in section 159 read with section 176(1) and (2), another question arises which needs to be answered. That question is:- If, in enacting section 176(1) and (2), the legislature intended that there should be a Rules Board with as wide powers as are to be found in section 159 read with section 176(1) and (2) which would make rules governing appeals to the Labour Appeal Court, why then was it necessary for the legislature to at the same time enact section 173(3) which tends to suggest that appeals to this Court are to be governed by rules of the Supreme Court of Appeal relating to civil appeals? This question arises because, if section 173(3) means that the rules of the Supreme Court of Appeal govern appeals to this Court, there would be no need for the Rules Board to be given powers to make rules governing appeals to the Labour Appeal Court because, by reason of section 173(3), those rules, being the rules of the Supreme Court of Appeal governing civil appeals, would already be there. In what circumstances, then, would the Rules Board use the wide powers that section 159 read with section 176(2) gives it?

3.33 If the position is that the legislature did not, by virtue

of section 173(3), intend that the rules of the Supreme Court of Appeal should govern appeals to the Labour Appeal Court, and if its intention was that rules governing appeals to the Labour Appeal Court should be those which could be made by the Rules Board in terms of section 176(1) and (2), what then did it seek to achieve in enacting section 173(3)? To my mind the provisions of section 173(3) and those of section 176(1) and (2) are mutually exclusive and reflect contradictory intentions on the part of the legislature.

3.34 I have had the opportunity of examining the rules of the Supreme Court of Appeal. It seems to me that, in so far as the position may be that appeals to this Court are governed by section 173(3) read with the rules of the Supreme Court of Appeal in civil proceedings, the problems created by rule 5(7) and (8) in regard to which record would be required to be delivered and the deadline for its delivery would not arise. There would also be no difficulty created by references to the Labour Court in those cases where the reference should have been to the industrial court or better still, to the court appealed from.

3.35 The problem which the Rules Board sought to avoid in rule 5(1) by enacting rule 5A(1) would, however, still persist because the period within which an appeal must be noted is required by section 173(3) to be from a non-existent date when one deals with an appeal against a judgment of the industrial court. But, at least, if the rules of the Supreme Court of Appeal are applied, an appeal would be capable of prosecution until it is heard - unlike when it is sought to use the rules of this Court in appeals against judgments of the industrial court because in such cases an appeal cannot reach finality without the rules of this Court being disregarded in one way or another.

3.36 When all the above is said and done, the question still remains: Are all appeals to this Court governed by the rules of this Court or are they governed by the rules of the Supreme Court of Appeal which govern civil appeals to that

court or is the position that appeals against judgments of the Labour Court are governed by the rules of this Court but those against judgments of the industrial court are governed by some but not all rules of this Court? It seems to me that the provisions of section 173(3) and those of section 176(1) and (2) as well as the provisions of rule 5A(4) of the rules of this Court create much confusion and uncertainty. This situation is totally unacceptable. It seems that there is a pressing need for an amendment of the Act as well as the rules of this Court in regard to the regulation of appeals to this Court. It seems to me further that pending such amendments, I should consider issuing practice directions to deal with the situation and that in doing so I should follow the rules of the Supreme Court of Appeal as much as possible.

3.37 Alternatively to the above, the Court may, as it is empowered to by rule 12(1), “excuse the parties from compliance” with any such rule of this Court as they may have failed to comply with or as they may have found it impossible to comply with. That is if the Rules Board had power to make such rules. If the Rules Board had no power to make such rules, then when section 173 (3) uses the phrase “**as if**” when it says appeals to this Court must be noted and prosecuted as if they are appeals to the Supreme Court of Appeal in civil proceedings, it may also be referring to the rule of the Supreme Court of Appeal which empowers the Chief Justice to issue practice

directions governing civil appeals to the Supreme Court of Appeal and that would mean that the Judge President of the Labour Appeal Court as well would have power even in that scenario to issue appropriate practice directions.

3.38 Finally, to my mind, the uncertainty surrounding the rules governing appeals to this Court is such that, within acceptable limits, this Court should be quite benevolent in granting condonation for non-compliance with one or other rule which may be applicable to one or other appeal to this Court pending such certainty as may be created by an appropriate practice direction or necessary statutory amendment or amendment of the rules of this Court.

3.39 In the light of all the above I am satisfied that, in so far as the delivery of the record in this appeal may be governed by the rules of the Supreme Court of Appeal and in so far as the appellant may have failed to comply with the relevant rule of the Supreme Court of Appeal, such non-compliance should be condoned. Without going into details, it is clear from the record that the delay was caused by the fact that the appellant's attorney mistakenly but *bona fide* believed that the transcript of the argument in the industrial court was necessary for inclusion in the record and, for reasons beyond his control, the transcript was not

made available for a long time. I now turn to consider the appeal on the merits.

The Appeal

4.1 The appellant was employed by the respondent in

1984. On the 26th May 1995 he was dismissed. In

September 1997 his present attorney referred an alleged unfair labour practice dispute on his behalf to the industrial court for determination in terms of section 46(9) of the old Act. The dispute related to the fairness or otherwise of the appellant's dismissal.

4.2 Prior to referring the dispute to the industrial court, the appellant's attorney had referred it to the Transnet Industrial Council which had jurisdiction to conciliate such disputes between, among others, the respondent and its employees. However, the referral to the council had been made way out of time. An application for condonation for such late referral had been lodged about four months after the referral itself.

4.3 On appeal before us, Mr Mbatha, the appellant's attorney who appeared for the appellant, submitted that the appellant's real complaint on appeal lay with the sequence in which the industrial court had decided to deal with the points in limine which the parties had raised against each other. He complained that, despite his request that the industrial court should start with the appellant's

point in limine against the respondent, the industrial court started with respondent's point in limine against the appellant.

4.4 The appellant's point in limine against the respondent was that the latter's statement of defence, which contained the respondent's point in limine, was not properly before the court because it had been filed out of time and there was no condonation application. If the statement of defence was not properly before the court, then, so went the argument, the point in limine contained therein could also not be considered by the court because it, too, was not properly before the court.

4.5 There is no substance in the appellant's complaint because the point in limine raised by the respondent related to a matter of the jurisdiction of the industrial court and a court or tribunal is always entitled, in fact it is obliged, to satisfy itself that it has jurisdiction before it can deal with a matter.

4.6 The only basis on which the appellant claimed that the industrial court had jurisdiction was that his attorney and the respondent (represented by one Mr Olmesdahl) had agreed in terms of sec 46(9)(d) of the old Act that the dispute be referred to the industrial court for determination by mutual consent.

Section 46(9)(d) says: **“Notwithstanding the provisions of paragraph(a) and (b), an industrial council, or , whenever there is no industrial council having jurisdiction in respect of the dispute, the parties to the dispute, may agree to report to the industrial court that it is or they are satisfied that it or they will not be able to**

settle the dispute, and on receipt of such a report, the industrial court shall as soon as possible determine the dispute in terms of paragraph (c)."

It is therefore clear from sec 46(9)(d) that in certain circumstances parties to an alleged unfair labour practice dispute could by agreement confer jurisdiction on the industrial court to determine such a dispute. In the case before us the question would then first be whether this was a case where parties could do that and, if so, whether in this the parties did conclude such an agreement.

4.7 The industrial court did not consider the question whether this was a case where the parties to the dispute could confer jurisdiction on it by agreement. However, it did consider whether there was such an agreement between the parties. The industrial court found that no such agreement had been reached between the appellant's attorney and Mr Olmesdahl

and, that, therefore, it did not have jurisdiction. It then dismissed the appellant's claim. The industrial court misdirected itself in finding that no agreement had been reached between the appellant's attorney and Mr Olmesdahl. I say this because the evidence placed by the appellant's attorney before the industrial court in the form of an affidavit that such an agreement had been reached was uncontradicted as the respondent had not filed any opposing affidavits to deny that version. The industrial court should have found that ,on the evidence before it, such an agreement had been reached. However, for the reasons that follow, the existence of such an agreement would not, in my view, have assisted the appellant in establishing the jurisdiction of the industrial court in terms of sec 46(9) (d).

4.8 A close analysis of section 46(9)(d) reveals that in a dispute in respect of which there was an industrial council with jurisdiction, there was no provision enabling parties to

a dispute to confer jurisdiction on the industrial court by agreement. It was only in a case where there was no industrial council with jurisdiction that parties could confer jurisdiction on the industrial court by agreement. To do so they had to agree to report to the industrial court that they would be unable to settle the dispute whereupon the industrial court would have jurisdiction to then determine the dispute. Where there was an industrial council with jurisdiction, it was the industrial council (and not the parties) which had the power to confer jurisdiction on the industrial court. It could do so by resolving to **“agree to report to the industrial court that it . . . is satisfied that it . . . will not be able to settle the dispute.”**

(See sec 46(9)(d) of the old Act). In the light of this I conclude, therefore, that the appellant’s reliance on the agreement with the respondent was misconceived.

Accordingly, for that reason, the industrial court did not have jurisdiction.

4.9 On the issue of costs, the respondent’s Counsel

submitted that costs should be awarded in favour of the respondent.

4.10 In those appeals which emanate from the industrial court, the issue of costs is governed by the provisions of section 17(21A)(c) of the old Act read with item 22(5) of schedule 7 to the Act, which require this Court to decide matters of costs **"according to the requirements of law and fairness."** The approach to be adopted by this Court in deciding costs according to the requirements of law and fairness was dealt with in **NUM v East Rand Gold & Uranium Co Ltd 1992 (1) SA 700 (A) ("Ergo")** under the old Act. Under the Act those provisions have been incorporated in sec 162 of the Act in respect of the Labour Court. The Labour Court has dealt with that phrase as well and the approach to be adopted in regard to costs under the Act. **(see Callguard Security Services (Pty) Ltd v Transport & General Workers Union & others (1997) 18 ILJ 380 (LABOUR COURT).** In my view that is also the approach which this Court is bound to adopt on matters of costs.

4.11 In this case the respondent's attempt to secure a dismissal of the appellant's appeal simply on the basis that the appellant failed to lodge the record in accordance with rule 5(8) and that in terms of Rule 5(17) he was deemed to have withdrawn the appeal has failed. On the merits, the appellant has failed in its appeal but not on any of the grounds relied upon by the respondent to oppose the appeal. On the basis of this as well as the general approach on costs which this Court is required to follow as given in **"Ergo"** above, I am of the opinion that it would not be in accordance with the requirements of law and fairness to make an order of costs against the appellant.

4.12 In the result the appeal is dismissed with no order as to costs.

RMM Zondo
Acting Judge President

I concur

C R Nicholson
Judge of Appeal
Appeal

I concur

M.T. Mogoeng
Acting Judge of

Appearances :

For the Appellant:	Mr M.A.S Mbatha
Instructed by:	M.A.S Mbatha & CO
For the respondent:	Mr I Moodley
Instructed by:	Kruger Ngcobo Inc
Date of hearing:	17 August 1999
Date of Judgement:	19 October 1999

[1] When this matter was called before us, there were a few issues which needed to be dealt with before the merits of the appeal could be dealt with. The first one was an application by the respondent for the condonation of the late filing of its heads of arguments. It is proper to begin with it.

[2] It is not necessary to say much about this application save to say that the heads of were only two or three days late. Mr Mbatha, who appeared for the applicant/appellant, opposed this application. His opposition lacked good grounds and, after hearing argument from both sides, we

had no hesitation in granting the required condonation. There was an acceptable explanation for the delay. The period of delay was negligible and the applicant/appellant had not been prejudiced in any by the delay in the filing of the respondent's heads of argument.

[3] The next issue was an objection by the respondent to the applicant's/appellant's notice of appeal. The objection was that the notice of appeal which was served on the respondent bore neither an office stamp of the registrar of this court nor a case number to show that it had been issued out. Another ground of objection was that the notice of appeal was filed out of time and that, in the absence of a condonation application showing good cause for the delay, the appeal should be dismissed on that ground alone. After the applicant's attorney had received these objections, he filed an application for condonation of the late filing of the notice of appeal.

[4] In the application for condonation, the applicant's attorney provided evidence that although the judgement appeared to have been signed on the 12th June 1998 by the Industrial Court member who heard it, he only received it in the 15th July 1998. He also stated that within seven days thereafter (ie on the 22nd July 1998), he filed the

notice of appeal. This evidence was not challenged and must be accepted. At the hearing the respondent did not persist in its objections relating to the notice of appeal. We are satisfied that such condonation as may be necessary in law ought to be granted and it is hereby granted. I now turn to consider the applicant's application for condonation for the late filing of the record and the application for the reinstatement of the appeal in the light of Rule 5(17) of the rules of this court.

5. THE LATE LODGING OF THE RECORD

5.1 In order to properly deal with the application for condonation in this regard, it is necessary to refer to the relevant rules of this court governing the filing of records in appeal matters such as this one. The appeal in this matter inter alia, an appeal to this court against a judgement of the industrial court in terms of sec 17(21A) of the Labour Relations Act 1956 (Act no 28 of 1956) ("the old Act") read with item 22(5) of Schedule 7 to the Labour Relation Act 1995 (Act no 66 of 1995 ("the Act").

5.2. Sec 17(21A) contains provisions which provided for appeals against decisions of the industrial court to the Labour Appeal Court that was established under the old Act and consisted of a chairperson who used to be a judge of the Supreme Court, as it was then known as, and two assessors appointed by such chairperson. That was the old

LAC. Item 22 of Schedule 7 to the Act contains transitional the transition form the old order in labour relations under the old Act to the new order in labour relations under the Act.

5.3 Item 22(5) provides that appeals against decisions of the industrial court, to which items 22(1) and (2) of schedule 7 to the Act apply must be made to the new Labour Appeal Court

(Which is constituted before three judges all of whom must terms of sec 153(2)(a) read with sec 168(1)(c) of the Act, be judges of High Court). This matter relates to an appeal to which item 22(1) and (2) of Schedule 7 apply. In those circumstances Rule 5A of the rules of this court as promulgated under GN no 1666, GG 17495 of 14 October 1995 as amended, in terms of sec 176 of the Act applies.

5.4 With its heading, Rules 5A reads as follows:
“5A Appeal from the industrial court”

(1)

5.5 It will be seen from rules 5A that the provision of those

rules relate to the delivery of a notice of appeal, the contents of a notice of appeal, and the notice of a cross appeal as well its contents. For any other aspects relating to such an appeal, rule 5A(4) refers one to appeals against judgements of the Labour Court to this court. It does so in these terms: “After an appeal the provision of rule 5(7) to (22) apply”. Rule 5A was inserted in the middle of provisions of rules applicable to appeals not from the industrial court by means of GN R961 GG18142 of the 11th July 1999. Once then goes back to the provisions of rule 5(7) to (22) of the rules of this court.

5.6 Rather than quote rule 5(7) to (22) extensively, I consider it convenient that a copy of the provisions of that rule should be annexed to this judgement. They are so annexed marked “A”.

5.7 Sub rule (7) places an obligation on the appellant, after he or she has noted his/her appeal, to “serve a copy of the record of the proceedings in the Labour Court” on each respondent and to file four copies thereof “with the registrar”. Rule 5A says “noting an appeal” (to this court against a judgement of the industrial court) “the provisions of the rule 5(7) to (22) apply”.

5.8 When rule 5A(4) says this, to my mind, it says to the appellant : after noting your appeal comply with the

requirements of rule 5(7) to (22) in order to process your appeal. If I am correct in saying this, as I think I must be, then there are a number of provisions in rule 5(7) to (22) which require the appellant in appeals to this court against judgements of the industrial court to comply with requirements that it would be impossible to comply with.

5.9 The provisions of rule 5(7) must be the first to be dealt with. There the appellant is required to serve a copy of record “of the proceedings in the Labour Court. The only record which the appellant in such a case is one of proceedings in the industrial court (and not in the Labour Court) as required by rule 5(7) because the proceedings he seeks to appeal against took place in the industrial court and not the Labour Court.

5.10 Next comes the provisions of rule 5(8). Rule 5(8) requires that the record must be “delivered within 60 days of the date of the order granting leave to appeal unless the appeal is noted after a successful position for leave to appeal in which case, the record must be delivered within the period fixed by the court under rule 4(a).

5.11 The first difficulty I have with rule 5(8) is that, by virtue of rule 5A(4), the period within which an appellant against a judgement of the industrial court is required to deliver the record is calculated from a non-existent date, namely, “ **the date of the order granting leave to appeal.**” There is no such date in respect of appeals against judgements of the industrial court. This is so because parties have an automatic

right of appeal to this court against judgements of the industrial court.

Date of judgment: 19 October 1999