

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

LABOUR APPEAL COURT CASE NO: JA4/01
(LABOUR COURT CASE NO: J1978/00)

In the matter between:

MTN (PROPRIETARY) LIMITED

Appellant

and

PRAVIN PRAGRAJ

First Respondent

THANDI ORLEYN N.O.

Second Respondent

JUDGMENT ON APPEAL

PAGE AJA

[1] This is an appeal from a decision of a Judge of the Labour Court, Johannesburg, whereby he dismissed an application by the Appellant in terms of s. 158(g) of the Labour Relations Act, 1995, to review and set aside a decision of the Director of the Commission for Conciliation, Mediation and Arbitration, who is the Second Respondent.

[2] The facts giving rise to the decision under attack were, briefly, the following.

[2.1] The First Respondent was dismissed by the Appellant. He alleged that he was unaware of any valid reason for his dismissal, which was accordingly unfair, and referred the

dispute to the CCMA in terms of s.191(1)(b) of the Act. An attempt to resolve the dispute through conciliation was unsuccessful and a commissioner duly certified that the dispute remained unresolved. First Respondent requested that the dispute be arbitrated and the dispute accordingly proceeded to arbitration in terms of s.191(a)(iii) of the Act.

[2.2] In the course of the arbitration First Respondent alleged that his dismissal was due to unfair discrimination on the ground of race and, as such, an automatically unfair dismissal as defined in s.187(1)(f) of the Act. He accordingly withdrew his request for arbitration and indicated his intention to refer the dispute to the Labour Court for adjudication in terms of s.191(5)(b)(i) of the Act.

[2.3] Despite the fact that the 90-day time limit prescribed in s. 191(5)(11)(a) of the Act had expired, the dispute was referred to the Labour Court for adjudication. When the point was taken that the referral was out of time, First Respondent applied to the Labour Court for condonation of his non-observance of the timeframe applicable. That application was refused.

[2.4] The First Respondent then applied to the Second Respondent to refer the dispute to the Labour Court in terms of s.191(6) of the Act. The Appellant objected on the ground that s. 191(6) only empowers the Director to refer disputes of the type described in s. 191(5)(a) to the Labour Court, whereas the dispute in question was one of the type described in s. 191(5)(b). Despite this objection and after following the procedure prescribed by s. 191(7), the Second Respondent decided to refer the dispute to the Labour Court for adjudication and

notified the parties accordingly. First Respondent thereupon filed his statement of claim with the Labour Court.

[2.5] The Appellant then launched proceedings in the court **a quo** under s. 158(1)(g) to review and set aside the Second Respondent's decision to refer the dispute to the Labour Court on the ground that it was **ultra vires** s. 191(6), which only applies s. 191(5)(a) disputes, whereas the dispute in issue fell under s. 191(5)(b).

[2.6] First Respondent opposed the review not only on the merits, but also on the basis that it was premature by reason of the provisions of s. 191(10), which reads as follows: "No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be". The decision referred to is clearly, in the context of the section, the decision of the Director to refer the dispute to the Commission for arbitration or to the Labour Court for adjudication.

[2.7] The Court **a quo** dismissed the review application on the ground that it was premature, and found it unnecessary to decide upon the merits of the review. It is against this decision that the present appeal has been brought.

[3] The objection to the proposed review as premature must be dealt with and decided as a point **in limine**. If it is well-founded, it would be wrong to consider and premature to decide the merits of the proposed review. The contents of the review can only be taken into account in the point **in limine** inasmuch as the nature of the review may be relevant to deciding that point. This relevance is confined to the form in which and the grounds upon which the review is sought

to be brought. Those grounds are only relevant insofar as they affect the jurisdiction of the court to entertain the review at this stage.

[4] It is necessary at the outset to determine the nature of s. 191(10). Appellant has contended that it is what is generally termed an ouster clause and that its operation must accordingly be subject to the limitations which the courts have placed on such clauses, and, in particular, the limitation that they cannot preclude the courts from interfering with actions for which there is “a manifest absence of jurisdiction”. It is contended that the decision under attack constitutes such an action and that the court will accordingly not be precluded from setting it aside on review by the fact that there has not been compliance with s. 191(10).

[5] “Ouster clauses” are defined by Baxter, Administrative Law, p 726 as “provisions which appear to exclude or restrict judicial review of administrative action”. In my view s. 191(10) does not fall within this description, for it neither excludes nor restricts the jurisdiction of the Labour Court to review decisions by the Director: it merely prescribes the procedure which has to be followed before that jurisdiction can be invoked. It is more akin to so-called “limitation clauses”, of which the most common are those requiring proceedings to be instituted within a prescribed period and after a prescribed period of notice has elapsed. These are, in essence, a variety of ouster clauses which operate suspensively, as does s. 191(10), which suspends the aggrieved party’s right to approach the court for relief by way of review until the condition stipulated by it is fulfilled. Baxter (**op. cit.** p 736) points out that our courts have seldom

questioned the efficacy of such provisions, and states that this is presumably because there is less motivation for doing so as they do not completely deprive an aggrieved individual of recourse to the courts; and also because, being based on practical considerations, they are more reasonable than total ousters.

- [6] Nonetheless, the learned author does moot the possibility of circumventing such clauses in the same manner as could be done in the case of a true ouster clause (**loc. cit.** n 423) i.e. by holding them inapplicable to actions which are so tainted by a manifest absence of jurisdiction that they cannot be regarded as having been committed in terms of the empowering statute at all and are, as such, not subject to the limitations placed by the statute on proceedings to set aside actions committed in terms of that statute. In the note cited the learned author refers to **Anismisic Ltd v The Foreign Compensation Commissioner and another** [1969] 2 AC 147, also reported in [1967] 2 AER 986 (CA) and [1969] 1 AER 208 (HL). The relevant passages from the latter decision were quoted and applied in **Pinetown Town Council v President, Industrial Court**, 1984 (3) SA 173(N) by LEON J at pp 178G – 179D, where he says the following:

“The substantial doctrine of jurisdictional review is stated in

Halsbury’s **Laws of England** (4th ed by Lord **Hailsham**) vol 1 para 53 thus: “It is a primary function of the superior courts to contain inferior courts within their jurisdiction. Such a court or tribunal lacks jurisdiction if it has no power to enter upon an inquiry in the matter at all; and it exceeds its jurisdiction if it

nevertheless enters upon such an inquiry, or having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an error outside its limited areas of competence. Not every error committed by an inferior court or tribunal, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.” This passage from **Halsburg** aptly summarizes the major feature of the modern doctrine of jurisdictional review. It distinguishes “want of jurisdiction” (see **BROWNE J IN Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 223 at 235) in the sense of a tribunal’s failure to meet the objectively predetermined conditions precedent to its jurisdiction from “the observance of the law in the course of its exercise” – per Lord SUMNER in **R v Nat Bell Liquors Ltd** [1922] 2 AC 128 (PC) at 156 where the phrase in its full context appears thus:

“That supervision goes to two points: one is the area of the inferior judgments and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

”Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied, The conditions precedent to jurisdiction are know as “jurisdictional facts” (see **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147 (HL) at 208 per LORD WILBERFORCE) which must objectively exist before the tribunal has power to act; consequently a

determination on the jurisdictional facts is always reviewable by Courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it. (See also **Theron en Andere v Ring van Wellington van die N G Sendingkerk in SA en Ander** 1976 (2) SA (A) at (15).”

- [7] The application of this approach to the present matter would involve placing upon the expression “the director’s decision”, the interpretation of “the director’s decision in terms of the section” which, as already stated, I consider to be the correct interpretation in the context. This would then have the effect of excluding from the operations of s 191(10) decisions by the Director which, although purporting to have been made in terms of the preceding provisions, were clearly not empowered by those provisions and so tainted by manifest absence of jurisdiction
- [8] This interpretation would avoid the otherwise illogical result of requiring the arbitration or adjudication of a dispute by virtue of a referral (which is clearly foredoomed to be set aside) before the court can be approached to set it aside and thus invalidate the proceedings conducted in pursuance thereof.
- [9] This interpretation would not have the effect of rendering the provisions of s. 191(10) ineffective: they would continue to render the completion of arbitration or adjudication in pursuance of a decision of the Director obligatory before a review of that decision, in all cases except where the absence of jurisdiction to make the decision was so manifest as to bring it outside the ambit of the sub-section.
- [10] The intention of the sub-section was apparently to enable a dispute to be fully aired as expeditiously as possible without being held up by procedural objections. The above interpretation will not frustrate that

purpose, since it will only remove from the ambit of the section decisions which are so clearly fatally flawed that no practical purpose will be served in implementing them before they are inevitably set aside. If the court asked to review them is not satisfied that this is the case, it will insist that the procedure prescribed by s. 191(10) be followed.

[11] Applying this approach to the present case, it becomes necessary to investigate the basis upon which it is alleged that the Director's decision is **ultra vires** to determine whether she manifestly lacked jurisdiction to make that decision. The scheme of dispute resolution envisaged by s. 191 is as follows. If a dispute arises about the fairness of a dismissal, the dismissed employee may refer it to a council or, if none exists, the Commission, which must attempt to resolve it through conciliation. If this fails, s. 191(5) provides that:

“(a) the council or the Commission must arbitrate the dispute at the request of the employee if –

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable

or

iii) the employee does not know the reason for dismissal; or

- (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
 - (i) automatically unfair;
 - (ii) based on the employer's operational requirements;
 - iii) the employee's participation in a strike that does not comply with the provisions of chapter IV; or
 - iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to closed shop agreement."

[12] Sub-section (6) provides, however, that;

"Despite sub-section 5(a), the director must refer the dispute to Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering

- a) the reason for dismissal;
- b) whether there are any questions of law raised by the dispute;
- c) the complexity of the dispute;
- d) whether there are conflicting arbitration awards that need to be resolved;

(e) the public interest.”

[13] Sub-section (7) requires the Director to accord the parties a hearing before making the decision, whereafter the Director must, in terms of sub-section (8)

“refer the dispute –

a (a) to the Commission for arbitration; or

b (b) to the Labour Court for adjudication.”

[14] Subsection (9) provides that the Director’s decision is final and binding. Thereafter follows the provision in issue, subsection (10), quoted earlier in this judgment.

[15] The scheme which emerges is that, if the dispute is of the nature described in ss. (5)(a), the Commission (or a council) must arbitrate it at the request of the employee. If it is of the nature described in ss. 5(b) the employee may refer it to the Labour Court for adjudication. The words “Despite sub-section 5(a)” by which sub-section (6) is introduced clearly mean that the power of a Director to refer a dispute to the Labour Court is limited to disputes of the nature described in that paragraph. The employee is already entitled himself to refer a dispute falling under paragraph (b) to the Labour Court and there would be no point in empowering the Director to do so. What the section envisages is that there may be disputes which, although they fall within the description in sub-section 5(a), nevertheless merit the attention of the Labour Court by reason of the factors in sub-section (6). The Director is accordingly given the power, after considering the factors enumerated, to refer such a matter to the Labour Court for adjudication or to leave it to the Commission to arbitrate.

[16] In the present case the First Respondent, by alleging that his dismissal was automatically unfair, placed it squarely within the ambit of sub-section 5(b) and removed it from the scope of sub-section 5(a) and thus from the categories of dispute which the Director had jurisdiction to

refer to the Labour Court for adjudication under sub- section (6). The Director accordingly manifestly lacked the jurisdiction to refer it for adjudication under sub-section (6) as she purported to do. Her action in so doing was not a decision made in terms of the section and does not enjoy the limited protection afforded by sub-section (10) to decisions which are made in terms of the section.

[17] I do not consider that this conclusion does any injustice to the First Respondent. It was his own conduct (which the Labour Court found it could not condone) which deprived him of a hearing before the court. His only remedy was then to appeal against the refusal of condonation. He was not entitled to circumvent that refusal by applying to the Director to refer the matter afresh to the Labour Court under a provision which did not apply to his situation and was not intended for the purpose.

[18] It follows that the Court **a quo** should not only have entertained the review application but should also have granted the Appellant the relief sought.

[19] I would accordingly uphold the appeal with costs and substitute for the order made by the Court **a quo** the following order:

1. An order is granted in terms of prayer (a) of the Notice of Motion;
2. The First Respondent is ordered to pay the costs of the application.

N.S PAGE
ACTING JUDGE OF THE LABOUR APPEAL COURT.

I agree.

R.M.M. ZONDO
JUDGE PRESIDENT OF THE LABOUR APPEAL COURT

I agree.

C.R. NICHOLSON
JUDGE OF THE LABOUR APPEAL COURT.
I agree.

For the Appellant:
M.A. CROWE
Instructed by:
First Respondent in person

No appearance of Second Respondent.

Date of Judgment: 1 February 2002