

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

Case No: PA 2/02

In the matter between

QAVILE, SC

Appellant

and

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First Respondent

DE KOCK, C, N.O.

Second Respondent

DAIMLER CHRYSLER (SA) (PTY) LTD

Third Respondent

JUDGMENT

Du Plessis AJA:

- 1] In September 1999 the Appellant was dismissed from the service of the Third Respondent after a disciplinary inquiry relating to the unauthorised use of a company vehicle.

- 2] Contending that the dismissal was substantively unfair, the Appellant referred the dispute to the First Respondent (the CCMA). The matter was referred to arbitration before the Second Respondent (the arbitrator). The arbitrator found the dismissal to

have been unfair and ordered the Appellant's reinstatement.

- 3] In terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act") the Third Respondent (the employer) applied to the Labour Court to review and set aside the arbitrator's award. The Labour Court reviewed and set aside the reward. It further remitted the matter to the CCMA "for a fresh arbitration before another Commissioner on the issue of the appropriateness of the sanction" of dismissal.
- 4] With the leave of the Labour Court the Appellant noted an appeal to this Court against the whole of that court's judgment and order. When the matter was called before us Mr Gauntlett for the Third Respondent argued *in limine* that the order of the Labour Court is not subject to appeal and for that reason alone that the appeal must be dismissed. Due to a misunderstanding between counsel and the Court, counsel made submissions only as regards the point *in limine*. Accordingly this judgment deals only with that point. If needs be, the matter can be set down again for argument on the other issues raised in the appeal.
- 5] In terms of section 166 of the Act a party has a right of appeal (subject to leave being granted) against "any final judgment or final order of the Labour Court". Mr Gauntlett submitted that the Labour Court's order in this case was not a final order.
- 6] Mr Gauntlett developed the argument as follows: A review by the Labour Court of

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arbitration proceedings under the auspices of the CCMA is governed by section 145 of the Act. Section 145(4) of the Act provides:

(4) If the award is set aside, the Labour Court may—

(a) **determine the dispute in the manner it considers appropriate; or**

(b) **make any order it considers appropriate about the procedures to be followed to determine the dispute.**

By remitting the matter to the CCMA, counsel's argument continued, the Labour Court did not determine the dispute between the parties in terms of section 145(4)(a). It made an order in terms of section 145(4)(b) about the procedure to be followed to determine the dispute and thus, by definition, did not determine the dispute. Once it is accepted that the Labour Court did not determine the dispute between the parties, it follows, so the argument concluded, that the order it made cannot be final.

7] In order for us to deal with counsel's argument it is first necessary to determine the nature of the dispute before the Labour Court. Section 145(1) of the Act provides:

“A party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award ...” (Underlining supplied)

As is evident from the underlined words the issue before a labour court in review proceedings primarily is whether there has been a defect in the arbitration proceedings. Only if it determines that issue in favour of the party seeking the review and sets aside the arbitration award, may the labour court determine the underlying dispute between the parties to the arbitration (Section 145(4)(a) of the Act quoted

above.). The labour court is not obliged however to determine the underlying dispute after it has set aside the arbitration award. It has a discretion to make an order in terms of section 145(4)(b) instead.

- 8] In this case the Third Respondent followed exactly the procedure envisaged in section 145(4): Its first prayer in its notice of motion in the Labour Court was for that Court to review and set aside the arbitrator's award. In its second prayer the Third Respondent sought from the Labour Court such order as it "deems appropriate for the further conduct of the proceedings" regarding the underlying dispute about the fairness or otherwise of the Appellant's dismissal.
- 9] It is clear from the provisions of section 145 and also from the notice of motion in this case that the issue before the Labour Court was whether the arbitrator's award should be reviewed and set aside. Only after it so acted could, and did, the Labour Court exercise a discretion not to determine the underlying dispute but to remit it to the CCMA. Accordingly, counsel's argument that by remitting the matter to the CCMA the Labour Court did not determine the dispute before it cannot be upheld. The Labour Court determined the review dispute and then exercised a discretion as to the determination of the underlying dispute.
- 10] It remains to decide whether the Labour Court's judgment and order was final. In terms of section 20(1) of the Supreme Court Act, 59 of 1959 "a judgment or order" of

a high court is subject to appeal. Mr Gauntlett's argument proceeded on the basis that the words "final judgment or final order" in section 166 of the Act bear essentially the same meaning as do the words "judgment or order" in section 20(1) of the Supreme Court Act. As we did not have the benefit of full argument on this point, I specifically refrain from deciding whether the words in the two acts bear the same meaning and have the same practical effect. It is for present purposes sufficient to state that if a judgment or order has the following attributes, it will clearly be final within the meaning of section 166 of the Act: If it is "final in effect and not susceptible of alteration

by the Court of first instance"; if it is "definitive of the rights of the parties"; if it has "the effect of disposing of at least a substantial portion of the relief claimed" in the proceedings in respect of which the judgment was given or the order made. (See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J to 553A; See also *Steenkamp v South African Broadcasting Corporation* 2002 (1) SA 625 (SCA).)

11] The Labour Court's order reviewing and setting aside the arbitrator's award was final and not susceptible to alteration by the Labour Court. It is definitive of the rights of the parties as regards the alleged defect in the arbitration proceedings and the review of the arbitrator's award. The order disposes of the main relief claimed in the review application, namely to review and set aside the arbitrator's award.

12] In the result it is concluded that the judgment and order of the Labour is subject to

appeal and the Third Respondent's argument *in limine* cannot succeed.

- 13] Due to the misunderstanding to which I have made reference, we have not had the benefit of argument on the costs relating to the point *in limine*. In the circumstances the costs must be reserved to be determined when the matter proceeds.

The following order is made:

- 1 The Third Respondent's point *in limine* is dismissed. It is held that the judgment and order of the Labour Court is subject to appeal.
- 2 The costs are reserved.

B.R. du Plessis

Acting Judge of the Labour Appeal Court

I agree.

R.M.M Zondo

Judge President of the Labour Court

I agree.

D.M. Davis

Du Plessis AJA

Acting Judge of the Labour Appeal Court

Date of hearing: 26 September 2002
Date of Judgement: 4 October 2002
For appellant: Adv P.N. Kroon
Instructed by: Drake, Flemmer & Orsmond Inc.

For respondent: Adv J.J. Gauntlett SC
Instructed by: Linde, Dorrington & Kirchmann Inc.