

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)**

CASE NO: JA 12/2004
REPORTABLE

In the matter between:

**MOBILE TELEPHONE NETWORKS HOLDINGS (PTY)
LTD
("MTN")**
Appellant

(Respondent in the Court *a quo*)

and

ELOISE KNOETZE

Respondent
(Applicant in the Court *a quo*)

JUDGMENT

WILLIS JA:

An Outline of the History of the Matter

[1] The respondent, who was the applicant in the Court *a quo* and to whom I shall hereinafter, for the sake of convenience, refer as “the employee”, approached that Court *ex parte*, by way of urgency, for an order that the appellant (who was the respondent in the court *a quo*) and to whom I shall hereinafter, for the sake of convenience, refer as “the employer”:

- “ (i) (B)e compelled to comply with a fair retrenchment procedure;
- ii) (B)e interdicted or restrained from dismissing the applicant from its employment, prior to complying with a fair procedure;
- iii) (P)ay the costs of the application on a scale of attorney and own client.”

and certain alternative relief.

[2] Waglay J granted the following order on 30 September 2003 in response to this application:

“ 1. A rule *nisi* is hereby issued returnable on 14 October 2003 calling upon the Respondent to show cause why an order should not be made in the following terms:

- 1.1 Interdicting and restraining the Respondent from dismissing the applicant from its employ pending compliance with applicable procedures.

- 2. Paragraph 1.1 above will serve as an interim order pending the return date.

- 3. Insofar as other prayers are sought in this application, such will be dealt

with on the return date.

4. The Respondent is to file replying papers by no later than 10h00 on the 7th October 2003.
5. The Applicant is to file its opposing papers by no later than the close of business on 10th October 2003.
6. Both parties must file their heads of argument by noon on 13th October 2003.
7. Costs are reserved for determination on the return day."

[3] The rule *nisi* was extended from time to time. The matter then came before Revelas J on 10 November 2003. Revelas J handed down her judgment in the matter on 17 November 2003. In her judgment she notes the following:

"On the papers of the applicant, she and other employees were not properly consulted in accordance with fair procedures as envisaged by section 189 of the Labour Relations Act 66 of 1995, as amended ('the Act')."

and

"The respondent unfortunately has not been helpful in its opposition of the applicant's founding affidavit, to supply the Court with enough reasons why the rule should not be further extended or confirmed."

and

"On the papers I have a virtually uncontradicted version of the applicant."

and

"It would appear from the rest of the papers that she was treated very unfairly." (In the context in which Revelas J said this, she clearly meant 'in a procedurally unfair manner.')

[4] The ruling or order which Revelas J gave in that judgment reads as follows:

“1. The rule is extended to 31 March 2004 on which day it should automatically be discharged.

2. The respondent is to pay the applicant's costs save for the costs occasioned on 10 November 2003, in respect of all supplementary affidavits and supplementary heads of argument.”

Related to the question of the finality of the effect hereof, is the question of whether this is a ‘ruling’ or ‘order’¹. For the sake of convenience, I shall, in the same way as counsel did, refer to it as an ‘order’.

[5] It was against the order of Revelas J that the employer brought an application for leave to appeal. The Court *a quo* the application. The employer thereupon successfully petitioned this Court for leave to appeal.

[6] It is common cause that the employer had intended to retrench the employee on 30 September 2003. The employer has protested that it did indeed follow fair procedures.

[7] During the course of argument in the appeal hearing it became common cause that, consequent upon the order of the Court *a quo*, the employee was paid up to 31 October 2003 only.

¹ See, for example, *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) at 536B

The Parties' Respective Submissions

[8]] *Mr Cassim*, who appeared for the employer, conceded that the order of Waglay J was an interim order, in the generally understood meaning of that term.

[9] The employer has consistently taken the point that the Labour Court did not have jurisdiction to hear the matter because the matter had not first been conciliated and a certificate issued to the effect that the dispute had been referred to the Commission for Conciliation Mediation and Arbitration (the "CCMA") for a conciliation "as is required in terms of section 157 (4) read together with sections 135 and 191 of the Labour Relations Act".

[10] The employer has relied on other grounds as well, *inter alia*, that the requirements for an interdict had not been met, that it was most seriously prejudiced and that no urgency had been established.

[11] The employee, on the other hand, has defended the judgment of the court *a quo* on a number of grounds but has taken, in effect, a point *in limine*: the Court *a quo* had merely granted an interim interdict and, as such, no appeal could lie against it.

[12] It will be recalled that the Court *a quo*'s order extended until 31

March 2004 only. Although *Mr Cassim* conceded that the order of Waglay J was an interim order, he protested vigorously that the subsequent order of Revelas J was either a final one or, at the very least, final in effect. As the question of the finality of her order is relevant both as to the question of (a) jurisdiction and (b) appealability, I shall deal with it now.

The Question of the Finality of the Order

[13] In my opinion the concession of *Mr Cassim* that the order of Waglay J was an interim order, in the generally understood meaning of that term, was correctly and fairly made. Although there was some debate before us as to the precisely correct interpretation of Waglay J's order, it is clear that he did not purport to pronounce upon whether or not the employee had been or was about to be dismissed for a fair reason. Furthermore, the order was made before the dismissal had taken place. It needs to be emphasized that the order was made pending the happening of certain events which, quite conceivably, could occur in the near future. For all practical purposes, Waglay J ordered procedural compliance by the employer before taking the decision to dismiss. The object of an interdict is the protection of an existing right. It is not a remedy for a past invasion of rights.²

² See, for example, *Stauffer Chemical Products Division of Cheesborough-Ponds (Pty) Ltd v Monsanto Company* 1988 (1) SA 805 (T) at 809F; *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) at 735B.

[14] Although the manner in which Revelas J cast the order was unusual, it seems to me that, somewhat exasperated, she was attempting to deal in a practical way with a problem which, in her view, should have been relatively easily resolved. It seemed to her, on the ordinary test applicable to interim interdicts, that the employer had indeed not complied with fair procedures. The effect of the order of Revelas J was that the employer was not to dismiss the employee until the employer had complied with a fair procedure or the 31 March 2004 arrived, whichever should first occur. *Mr Cassim* conceded that this was indeed the effect of the order. It seems to me that Revelas J made an order *ad servandam causam* (in the service of the case). Essentially, the first paragraph contains both a ruling and an order as follows:

“(i) The rule is extended until 31 March 2004; (a ruling);

(ii) On 31 March 2004 the rule *nisi* is to be discharged (an order).” or, alternatively,

“(i) The rule *nisi* is discharged (an order);

(ii) The discharge of the rule *nisi* is suspended until 31 March 2004 (a ruling).”

It has a dual character. Revelas J discharged the interim order but suspended the operation of that discharge for a duration of time. Suspending the operation of an order for a relatively short duration of time seems to me to bear all the hallmarks of an interim order.³ It does not seem to me that Revelas J’s order was definitive of the

³ See, for example, Interlocutory Interdicts by C.B. Prest, Juta’s 1993 at page 5, *The Characteristics of the Remedy*

rights between the parties. There was no final pronouncement as to the fairness, whether procedural or otherwise, of the employee's dismissal. Ironically, however, when the rule was discharged on 31 March 2004, it became a final order against the *employee*: she could not approach the Court again for the same or similar relief on the same issues.⁴

[15] *Mr Cassim* however, persisted with the submission that even if the order was not final in form, it was final in effect.⁵ In *African Wanderers F.C. v Wanderers F.C.*⁶ Muller JA, delivering the unanimous judgment of the highest court in the land, said the following at 48 H:

“The fact that the order made by Howard J., could well prove to be prejudicial to the company does not therefore justify a contention that the order was a final and definitive order and not merely an order *ad servandam causam*. Indeed, it very often happens that, when a court is asked to grant a temporary interdict, and the right which it is sought to protect is not clear, the court weighs, *inter alia*, the prejudice to the applicant, if the interdict is refused, against the prejudice to the respondent if it is granted.”

⁴ See, for example, *Knox D'arcy Ltd and Other v Jamieson and Others* 1996 (4) SA 348 (A) at 358H-360D; *Donoghue and Others v Executor of Van Der Merwe* (1897) 4 OR1; *Ex parte Lewis & Marks* 1904 TS 281; *Carlis v Hertz's Trustee* 1904 TS 584; *Donaldson v Foster's Executors* 1909 TS 427; *Davis v Press & Co* 1944 CPD 108 at 113.

⁵ See, for example, *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H; *Zweni v Minister of Law and Order* 1993 (1) SA 523(A) at 532H.

⁶ 1977 (2) SA 38 (A)

[16] The *African Wanderers* case was approved vsoon thereafter, in the case of *South Cape Corp. v Engineering Management Services*⁷ and, more recently, in the Supreme Court of Appeal in the well-known case of *Knox D'Arcy Ltd and Others v Jamieson and Others*⁸. From these cases useful guidance may be gleaned on the difference between interim and final orders. The fact that a decision may cause a party an inconvenience or place that party at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability.⁹ In the case of *Zweni v Minister of Law and Order*¹⁰ the following was said:

“In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of a substantial portion of the relief claimed in the main proceedings.”¹¹

⁷ 1977 (3) SA 534 (A) at 549D

⁸ 1996 (4) SA 348 (A) at 359G

⁹ See, for example, *South Cape Corporation (Pty) Ltd v Engineering Management Services (supra)* at 533D; *Zweni v Minister of Law and Order* 1993 (1) SA 523(A) at 533B-C.

¹⁰ 1993 (1) SA 523 (A) at 536B

¹¹ This case, in my respectful opinion, contains a comprehensive review of the case law. It also describes as ‘thought-provoking’ an article by Prof H. J. Erasmus ‘Leave to appeal against “Judgments or Orders” in terms of s 20 of the Supreme Court Act 1959’ (1992) 109 SALJ 496

[17] It is not necessary for the purposes of this case to delve into the differences between purely interlocutory orders (or interlocutory orders proper) on the one hand and interim or temporary orders on the other. For obvious reasons, these expressions are often used coextensively and interchangeably with one another. Nevertheless, I am of the respectful opinion that, for the purposes of understanding the distinction between final orders and others, it would be difficult to improve on what Johannes Voet, after having noted that judgments are either interlocutory or definitive, said so many years ago:

*“Interlocutoria est pronuncatio aliqua de plano super incidenti aliquo in principio vel mediis litis facta, causam principalem non plene determinans.”*¹²

(“An interlocutory judgment is some announcement from the floor¹³ of the Court made on some incidental matter at the beginning or in the middle of a suit, and not fully deciding the main cause.” (Gane’s translation))

I consider that it is appropriate in the context of this case to make a few general observations. It seems to me that, in practice, we usually refer to orders:

- i) which are made, ordinarily, as a matter of urgency, where a Court, weighing the possibility of the respective prejudice of the parties, does not wish to

¹² Ad Pandectas 42.1.4

¹³ This denotes a process that may be less formal than normal (*Ad Pandectas* 5.1.3)

make a final order but nevertheless considers that a party is entitled to some kind of relief until greater clarity has been obtained on the matter, as 'interim orders'; and

- ii) which are made during the course of proceedings and which are incidental to main proceedings as 'interlocutory' orders.

It seems that an interim order is a species, type, genus or subset of an interlocutory order.¹⁴ These observations are made strictly *obiter*.

[18] My conclusion is that to the extent that the order of Revelas J operated until 31 March 2004, it was not a final one, in the generally understood meaning of that term. As against the *employee*, the discharge of the order on 31 March 2004 was indeed final but this has implications which I shall consider later on. In the meantime, I shall proceed on the basis the order was interim until 31 March 2004 and determine, in the light thereof, whether (a) the Labour Court had the jurisdiction to make the order and (b) the order of Revelas J is appealable.

The Question of Jurisdiction

[19] One way in which to cast the question as to whether or not the

¹⁴ See *Knox D'arcy Ltd and Other v Jamieson and Others* 1996 (4) SA 348 (A) at 359F; *Prentice v Smith* (1889) 3 SAR 28 at 29 and Voet (*supra*)

Court had jurisdiction is as follows: is a prior referral to conciliation a necessary 'jurisdictional fact' in order for the Court to be able to make an order of the kind made either by Waglay J or Revelas J?

[20] In *South African Defence and Aid Fund and Another v Minister of Justice*¹⁵, Corbett J, as he then was, described a 'jurisdictional fact' as:

"...a fact or state of affairs, which objectively speaking, must have existed before the statutory power could validly be exercised." The Constitutional Court has said that this remains the leading authority in our law on 'jurisdictional facts'.¹⁶

[21] Section 157(4) of the Labour Relations Act No. 66 of 1995, as amended ('the LRA'), provides that:

"(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that the dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation." (emphasis added)

[22] It is trite that, ordinarily, the use of the word 'may' in a statute is permissive rather than peremptory and confers upon a Court a

¹⁵ 1967 (1) SA 31 (C) at 34H-35A; See also *Stellenbosch Municipality v Director of Valuations and Others* 1993 (1) SA 9 (C).

¹⁶ *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para [168]

discretion (even if that discretion is a limited one)¹⁷. It is not insignificant that the statute did not employ 'shall' or 'must' instead of 'may'.¹⁸

[23] It is tempting, therefore, to conclude, on the simple basis that the section in question uses the word 'may', that it was not a necessary precondition for the Court *a quo* to have jurisdiction to hear the matter (or, put differently, a necessary 'jurisdictional fact') that the dispute should first have been referred for conciliation.

[24] *Mr Cassim* relied very strongly, however, on the case of *Numsa v Driveline Technologies (Pty) Ltd & Another* which has been decided in this Court.¹⁹ In order to understand the issues in that case, it is necessary for one to have a summary of the facts. The union had referred a dispute to the Labour Court in which it had alleged that its members' dismissal for operational reasons had been unfair because the employer had not fully complied with its obligations in terms of section 189 of the LRA. The dismissals had in fact taken place. The union then sought to amend its attack on the unfairness of the dismissals to include the allegation that their dismissals were automatically unfair in terms of section 187 (1) (c) of the LRA. The employer had objected to the amendment on the basis that the dispute concerning the allegedly automatically unfair

¹⁷ See, for example, *Gunn and Another NN.O v Barclays Bank D.C.O.* 1962 (3) SA 678 (A) at 685A-D

¹⁸ *Ibid.*

¹⁹ (2000) 21 ILJ (LAC); [2000] 1 BLLR 20 (LAC)

dismissals had not first been referred for conciliation. The Labour Court upheld the objection and disallowed the amendment on that basis. The matter went on appeal on the question of whether or not the Labour Court should have allowed the amendment. Conradie JA, who gave the minority judgment, held that the failure to comply with the formalities relating to conciliation did not deprive the Labour Court of the power to adjudicate the matter.²⁰ He held that the Labour Court had a discretion which should be exercised after examining the full factual matrix.²¹ He held, further, that the Labour Court had erred in not allowing the amendment on the basis that the alleged automatically unfair dismissal had not first been referred to conciliation.²² This line of reasoning informed his decision to allow the amendment. Zondo AJP, as he then was, (with whom Mogoeng AJA, as he then was, concurred), agreed that the amendment should be allowed but for a somewhat different reason: the amendment did not introduce a fresh dispute.²³ Zondo AJP strongly disagreed with Conradie JA's line of reasoning.²⁴ He said, in concluding his disagreement with Conradie JA,:

“The long and short of the above is therefore that, in my view, section 157(4)(a) provides no basis for the proposition that the Labour Court has jurisdiction to adjudicate a dismissal dispute which has not been referred to conciliation. It is only a basis for the proposition that, in a

²⁰ Ibid. at para [8]

²¹ Ibid

²² Ibid at para [14]

²³ Ibid at paras [35], [42] and [43], for example

²⁴ Ibid at paras [68], [69] and [70], for example

case where no certificate of outcome stating that a dispute remains unresolved has been issued but the dispute was referred to conciliation but no attempt was made to conciliate the dispute, the Labour Court may in its discretion refuse to determine the dispute.”²⁵

[25] Earlier on in his judgment Zondo AJP had remarked that:

“Section 157 (4)(a) will only apply, in my view, in a dispute where no certificate such as is referred to in section 191(5) was issued but where the employee acquired the right to refer the dispute to the Labour Court by virtue of the happening of the second event mentioned in section 191 (5), namely, the expiry of a period of 30 days. Section 157(4)(a) cannot apply to a dispute where the first event occurred, namely where a certificate of outcome was issued.”²⁶

and

“I say the above because in terms of section 157(4)(a) the Labour Court only has the discretion which my colleague relies upon for his proposition where it is not satisfied that an attempt was made to conciliate the dispute.”²⁷

[26] It is not necessary, however, in this case to enter into the fray between the two opposing views. The reason lies in the fact that in the *Driveline* case the parties were clearly dealing with an appeal

²⁵ Ibid at para [81]

²⁶ Ibid at para [76]

²⁷ Ibid at para [77]

against a final order.²⁸ Furthermore, as noted earlier, the dismissals had already taken place. The facts in the present case are clearly distinguishable.

[27] Section 158 (1) (a) of the LRA provides that the Labour Court “may make any appropriate order, including-

- i) the grant of urgent interim relief;
- ii) an interdict;
- iii) an order directing the performance of any particular act which order, when implemented will remedy a wrong and give effect the primary objects of this Act...” (emphases added)

It has to be borne in mind that the LRA gives the CCMA no power to grant interdicts. If a Court cannot make an urgent interim order unless there has first been a referral to the CCMA (never mind wait for the 30 day period referred to in section 191(5)), it cannot give effect to the powers given to it in terms of section 158, *inter alia*, to grant urgent interim relief and interdicts. The powers conferred on the Labour Court in section 158 would be nugatory. It is for this reason, quite apart from the fact that the *Driveline* case dealt with a case in which there had been a final order, that I am convinced that Zondo AJP and Mogoeng AJA could not have had in mind the kind of situation with which we are dealing *in casu*.

²⁸ Ibid at para [2]

[28] In the Labour Court, there have been a series of decisions which either expressly or by necessary implication, have recognized that that Court does indeed have the power to grant interim interdicts of the kind in question, without there first being a referral to conciliation.²⁹ In a number of these cases the orders in question have been referred to as *status quo* orders. The term is a convenient one. Obviously, the interim interdicts which may be granted in terms of section 158 (1) (a) neither provide specifically for *status quo* orders nor are limited to them. An interdict directed at the maintenance of the *status quo* pending final determination of the matter is, *par excellence*, an interim interdict.³⁰

[29] It should also be borne in mind that section 77 of the Basic Conditions of Employment Act No 75 of 1997 confers upon the Labour Court “*concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment*”.

[30] In the case of *Airoadexpress v LRTB, Durban*³¹ the common law principle that a Court could grant interim relief to prevent ‘hardship’ and ‘injustice’, provided that the ordinary principles applicable to interim interdicts were satisfied, was recognized.

²⁹ See, for example, *Fawu v Simba (Pty) Ltd* [1997] 4 BLLR 408 (LC); *Vela & Others v Savo & Others* (1998) 19 ILJ 916 (LC); *Fordham v OK Bazaars (1929) Ltd* (1998) 19 ILJ 1156 (LC); *SACWU & Others v Sentrachim* [1996] 6 BLLR 615 (LC); *Hultzer v Standard Bank of South Africa (Pty) Ltd* [1999] 8 BLLR (LC); *NUM v Elandsfontein Colliery (Pty) Ltd* [1999] 12 BLLR 1330 (LC); *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC). But see *Fordham v OK Bazaars 1929 Ltd* (1998) 19 ILJ 1156 (LC).

³⁰ See, for example, *Interlocutory Interdicts* by C.B., Juta’s 1993 at page 5

³¹ 1986 (2) SA 663 (A)

Historically, in Holland temporary relief of this nature was usually granted by way of a *mandamentum poenaal* (*mandatam poenale*)³². The right, power and duty of a Court to cut through adjectival obstructions on an interim basis in order to prevent hardship or injustice, more particularly to prevent irreparable harm, is therefore an ancient one, having a respectable pedigree. There seems to me to be no canon of interpretation which would require one to conclude that the legislature intended to deprive the Labour Court of the power to grant such eminently sensible and just relief.

[31] I therefore conclude that the Court *a quo* did indeed have jurisdiction to hear the matter and to grant interim relief even though the dispute had not first been referred for conciliation. This conclusion does not disturb the decision of the majority in the *Driveline* case to the effect that a final order cannot be granted in the principal dispute without there being a prior referral to conciliation.

The Question of Appealability

[32] In terms of section 166 (1) of the LRA:

“Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal against any final judgment or final order of the Labour Court.”

³² Ibid. at 677G

It seems to me, by necessary implication, that the LRA envisages no appeal against interim orders.

[33] In the *Knox D’Arcy*, ³³Grosskopf JA said at 359F:

“In passing it may be noted that the *grant* of an interim interdict stands on a different footing (from a refusal on an interdict³⁴). As far back as *Prentice v Smith* (1889) 3 SAR 28 the Court held (at 29) that an order granting an interim interdict ‘is an interlocutory order and that consequently there can be no appeal’. On the whole this view was followed in the Provincial Divisions³⁵, and, ultimately, prevailed in the Appellate Division.”³⁶

The *Knox D’Arcy* case has, more recently, been affirmed in the case of *Maize Board v Tiger Oats Ltd and Others*³⁷.

[34] As noted above, in my opinion the order granted by Revelas J on 17 November 2003 and which applied until 31 March 2004 was a temporary or interim interdict made merely *ad servandam causam*. Accordingly, there can be no appeal against it. The learned judge therefore correctly dismissed the application for leave to appeal. Save for the question of costs, all the other submissions on behalf of the employer as to why the appeal should be upheld, therefore fall

³³ (*supra*)

³⁴ words in parenthesis supplied by me

³⁵ The examples given by Grosskopf JA were *Loggenberg v Beare* 1930 TPD 714 and *Davis v Press & Co* 1944 CPD 108

³⁶ The Appellate Division Authorities to which Grosskopf JA referred were the *African Wanderers* case (*supra*) and *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A).

³⁷ 2002 (5) SA 365 (SCA) at para [6]

away.

[35] Even if the order of Revelas J (at least until 31 March 2004) is not to be considered an interim one, it seems to me that after 31 March 2004, there was no order against which the employer could appeal. *S.A.B. Lines (Pty) Ltd v Cape Tex Engineering Works*³⁸, Corbett J made it quite clear that once a rule *nisi* has been discharged, there is no order pertaining to the interim relief.³⁹ This judgment has been approved by the Supreme Court of Appeal.⁴⁰

[36] Taken as a whole, therefore, Revelas J did not make an order against which the employer could have any interest in the question of an appeal after 31 March 2004. *MrCassim* conceded that this was correct except that, he submitted, the question of costs remained relevant.

[37] Having come to the conclusion that the order of Revelas J was not appealable, I think it may be appropriate to note that a party which considers itself prejudiced by an interim order has other remedies available to it. It may anticipate the return day or it may request the Court to make an order for security for damages should

³⁸ 1968 (2) 535 (C)

³⁹ See also, for example, *Knox D'Arcy Ltd and Other v Jamieson and Others* 1996 (4) SA 348 (A) at 358H-360D; *Donoghue and Others v Executor of Van Der Merwe* (1897) 4 OR1; *Ex parte Lewis & Marks* 1904 TS 281; *Carlis v Hertz's Trustee* 1904 TS 584; *Donaldson v Foster's Executors* 1909 TS 427; *Davis v Press & Co* 1944 CPD 108 at 113.

⁴⁰ *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA); [2000] 4 All SA 400 (A) at para [6]

it subsequently appear that the other party was not entitled to the relief in question.⁴¹ Moreover, if the employee wishes to claim payment of more money by way of unpaid salary, it is open to the employer in this case to defend the claim on the basis that by 31 October 2003 it had indeed complied with a fair procedure. *Mr Knoetze*, who appeared for his wife in this matter, conceded that this was so. Furthermore, if as a result of the interim order, it is subsequently established that by 30 September 2003 the employer had indeed complied with a fair procedure, it may recover payments made after that date from the employee. Again, *Mr Knoetze* conceded that this was so.

Small Legal Conundrums and the Question of Costs

[38] In *Western Cape Education Department and Another v George*⁴², the Supreme Court of Appeal said:

“The cumulative consequence of all these factors is that no practical effect or result can be achieved in this case. No other reasons were suggested why the appeal should not be dismissed in terms of section 21A (of the Supreme Court Act, No 59 of 1959, as amended⁴³). This is therefore a

⁴¹ See, for example, *Kelly v Kirkwood & Another* (1857) 3 Searle 5 at 6; *Hillman Bros (West Rand) (Proprietary) Ltd v Van Den Heuvel* 1937 WLD 41 at 46; *Ndauti v Kgami & Others* 1948 (3) SA 27 (W); *Chopra v Sparks Cinemas Pty Ltd & Another* 1973 (4) SA 372 (D) at 379D-380A; *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC* 1990 (4) SA 349 (C) at 360D-F; *Sibex Engineering Services (Pty) Ltd v Van Wyk & Another* 1991 (2) SA 482 (T) at 512D; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd* 1994 (2) SA 172 (C) at 185B; *Smith v Day* (1882) 21 ChD 421 (CA) at 430.

⁴² 1998 (3) SA 77 (SCA) at 84F

⁴³ words in parenthesis supplied by me.

proper case in which to order such dismissal ”.

Subsection 3 of this section reads as follows:

“Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.”

[39] It is true that section 21A of the Supreme Court Act refers to civil appeals to the “Appellate Division” and not to this Court. Nevertheless, the provisions of section 21A (1) and (3) of the Supreme Court Act appear to be a codification of the common law.⁴⁴ The aversion to courts having to hear appeals relating to “small legal conundrums unrelated to a substantial dispute or one of public or professional interest”⁴⁵ is well known. I shall not, therefore, embark upon a detailed enquiry as to the merits of the Court *a quo*’s order as to costs, which, in any event, is a discretionary matter. Although the order relating to costs is perhaps amenable to criticism, it can be justified in the light of the employer’s unhelpful attitude referred to in the judgment of the Court *a quo*.

[40] There is no reason why costs should not follow the result in the appeal.

Order

⁴⁴ See, for example, *African Guarantee & Indemnity Co Ltd* 1956 (1) SA 326 (A) at 329 and *Haine v Podlashuc and Nicolson* 1933 AD 104 at 112

⁴⁵ See *Haine’s case* (*supra*) in footnote 44 above

[41] The order of the Court is the following:

The appeal is dismissed with costs.

**DATED AT JOHANNESBURG THIS 8th DAY OF
DECEMBER 2005**

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

I agree.

K.R. McCALL

ACTING JUDGE OF THE LABOUR APPEAL COURT

I agree.

R.G. COMRIE

ACTING JUDGE OF THE LABOUR APPEAL COURT

Counsel Appellant: *N.A. Cassim SC*

Attorneys for Appellant: Lebea & Associates

Counsel for the Respondent: *A. Knoetze*

Attorneys for Respondent: Assenmacher Attorneys

Date of hearing: 1 December, 2005

Date of Judgment: 8 December, 2005