Case No. 140/89
whn

**SOUTH AFRICAN TEXTILE &**

**ALLIED WORKERS' UNION** ..... First Appellant

**ELIZABETH MBAMBO & 20 OTHERS** ..... 2nd - 22 Appellants

and

**SKIPPER INTERNATIONAL (PTY) LTD** ... Respondent

JOUBERT, ACJ.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SOUTH AFRICAN TEXTILE &

ALLIED WORKERS' UNION ..... First Appellant

ELIZABETH MBAMBO & 20 OTHERS ..... 2nd - 22 Appellants

and

SKIPPER INTERNATIONAL (PTY) LTD ..... Respondent

Coram: JOUBERT ACJ, et HOEXTER SMALBERGER KUMLEBEN JJA

et GOLDSTONE AJA

Heard: 17 August 1990

Delivered: 27 September 1990

JUDGMENT

JOUBERT, ACJ:

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This is an appeal against a decision of FLEMMING J in the Witwatersrand Local Division which has been reported as Skipper International (Pty) Ltd v South African Textile and Allied Workers' Union & Others, 1989 (2) SA 612 (W). The appeal is brought with leave of the Court a quo.

The relevant factual background to the present appeal may be briefly outlined as follows:

1. During October 1987 Skipper International (Pty) Ltd (hereinafter referred to as "Skipper International") dismissed its entire work force which included the 2nd to 22nd appellants (the "other appellants") on the ground that they had gone on strike. From subsequent correspondence it appears that the South African Textile & Allied Workers' Union (the "Workers' Union") denied the existence

of an alleged strike, claiming that there had been a mere work stoppage. With the exception of the other appellants, the majority of the work force was re-employed by Skipper International. Criminal charges of intimidation were subsequently brought unsuccesfully against some of the other appellants.

2. On 14 March 1988 the attorneys of the Workers' Union and the other appellants in a registered letter to Skipper International claimed that the dismissal of the other appellants was both procedurally and substantially unfair and constituted an unfair labour practice. It was also demanded that the other appellants should be reinstated in their employment on or before 18 March 1988 failing which the matter would be referred to the Industrial Council for

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the Clothing Industry (Transvaal) (the" Industrial Council") and thereafter to the Industrial Court for a final determination of the dispute in terms of s 46 (9) of the Labour Relations Act 28 of 1956 (the "Act"). See Annexure "KAL 2".

3. In their replying letter dated 15 March 1988 the attorneys of Skipper International denied that the latter had been guilty of any unlawful or unfair conduct. Their client did not intend to reinstate all or any of the other appellants. Moreover, their client would oppose any proceedings instituted by the Workers' Union and the other appellants. See Annexure "KAL 3".

4. The insertion of s 27 A in the Act by s 8 of Act

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83 of 1988 became operative with effect from 1 September 1988. I shall in due course consider the provisions of s 27 A.

5. On 23 September 1988 the attorneys of the Workers' Union and the other appellants wrote a letter to Skipper International stating that they had been instructed by their clients to declare a dispute on the issue of the dismissal of the other appellants and calling on Skipper International to reinstate the other appellants on or before 29 September 1988 failing which they had been instructed to refer the matter to the Industrial Council and thereafter to the Industrial Court. See Annexure "KAL 4".

6. On 29 September 1988 the attorneys of Skipper

International in a replying letter, delivered by hand to the attorneys of the Workers' Union and the other appellants, stated that the attitude of Skipper International remained as set out in the letter of 15 March 1988. See Annexure "KAL 6."

7. In response, the attorneys of the Workers' Union and the other appellants sent a registered letter, dated 24 October 1988, to the attorneys of Skipper International (See Annexure "KAL 7") in which was enclosed another letter of even date directed to Skipper International, informing the latter in terms of s 27 A (1)(d)(i) of the Act that a deadlock had been reached concerning the dispute and that the matter would be referred to the Industrial Council.

See Annexure "KAL 8".

8. On 27 October 1988 the attorneys of Skipper International in a letter to the attorneys of the Workers' Union and the other appellants maintained that a deadlock had been reached on reception of their letter dated 29 September 1988. Accordingly the period of 21 days referred to in s 27 A (1)(d)(i) had already expired. The dispute could therefore not be referred to the Industrial Council. See Annexure "KAL 9."

9. In their letter, dated 9 November 1988, the attorneys of the Workers' Union and the other appellants informed the General Secretary of the Industrial Council that they were referring the dispute to the latter.

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According to legal advice obtained by them the dispute which was deemed to have arisen on 1 September 1988 was not governed by s 27 A of the Act.

See Annexure "KAL 11."

10. During November 1988 Skipper International as a matter of urgency applied in the Witwatersrand Local Division for an order declaring a deadlock to have been reached on 29 September 1988 in the dispute between it and the Workers' Union as well as the other appellants. An interdict was also sought against them to prevent them from taking any steps to have the dispute referred to the Industrial Council.

11. On 23 December 1988 FLEMMING J granted an interdict

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as applied for by Skipper International. The appeal is against the judgment of FLEMMING J as I mentioned supra.

Whenever a dispute arises, as in the present matter, in an industry or trade between employees (the other appellants), assisted by their trade union (the Workers' Union), and their employer (Skipper International) it may be referred by any party to the dispute for settlement by an industrial council in terms of s 27 A (1)(a) of the Act. The question which falls to be decided is whether or not Skipper International was premature in bringing its application in the Court a quo. The answer to this question depends on the proper construction of s 27 (A) (1)(d)(i) of the Act as applied to the facts of the present matter. The relevant portion of s 27 A (1)(d), which prescribes the limitations of time within which a reference

of a dispute to an industrial council is to be made, reads as follows:

> "No dispute shall be referred to an industrial council-
>
> (i) unless the reference is made within 21 days from the date on which any party to the dispute has notified every other party to the dispute by registered post or by notice delivered by hand that a deadlock has been reached concerning the dispute : Provided that no dispute may be referred to an industrial council after the expiration of 90 days from the date on which the dispute was first alleged to have arisen, providing that the industrial council may condone such late reference."

A close examination of s 27 A (1)(d)(i) shows that it consists of three clauses which have been drafted in a rather maladroit fashion. The wording of the first clause is mandatory, viz. that a dispute cannot be referred

to an industrial council unless the reference thereof is made within 21 days, reckoned from the date of the notification to all other interested parties, that a deadlock has been reached concerning the dispute. The prescribed method of notification is by way of registered post or by notice delivered by hand. The purpose of the notification is obviously to inform all other interested parties of the existence of a deadlock concerning the dispute. The period of 21 days is to be determined from the date of the notification. Since the Legislature intended the first clause to be imperative, as appears from its wording, it follows that non-observance of the time limitation of 21 days within which reference of the dispute to an industrial council is to be made must be construed as being fatal. Compare Feinberg v Pietermaritzburg Liquor Licensing Board, 1953 (4) SA 415 (A) at p 420-421, Le Roux & Another v Grigg-Spall, 1946 A D 244 at p 249 -

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250. I shall in due course refer to other aspects relating to the interpretation of the first clause.

The second clause of s 27 A (1)(d)(i) relating to the reference of a dispute to an industrial council is worded as a proviso. "A proviso is usually enacted in order to qualify something contained in the preceding enactment" (S v Rosenthal, 1980 (1) SA 65 (A) at p 81 E - F per TROLLIP J A). According to Craies on Statute Law, 7th ed, at p 218:

> "(T)he effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

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While a proviso may be worded as such in form it may in substance amount to an independent enactment, having a more extensive operation than that of the preceding enactment. See Maxwell on Interpretation of Statutes, 12th ed., at p 190:

> "If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect."

The second clause of s 27 A (1)(d)(i) enacts that no dispute is to be referred to an industrial council after the lapse of 90 days from the date on which the dispute was first alleged to have arisen (subject to condonation by an industrial council). The only factor

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common to the first and second clauses is the existence of a dispute which is to be referred to an industrial council. A comparison between them reveals that they differ in substance entirely from each other in the following respects:

1. The periods of their time limitations differ, viz 21 days and 90 days prescribed by the first and second clauses respectively.

2. The dates from which their respective time limitations are to commence differ. The period of 21 days is according to the first clause to be determined from the date of notification of a deadlock having been reached, whereas the period of 90 days is in terms of the second clause to run from the date on which the dispute was first alleged to have arisen.

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3. The first clause requires a notification of the existence of a deadlock to be sent by registered post or to be delivered by hand to all other parties to the dispute. The second clause does not require any notification. It makes no mention of a deadlock at all.

4. A dispute and a deadlock are not synonymous terms. For some inexplicable reason the Legislature has not defined them in the Act notwithstanding the fact that lay people are mostly involved in the application of its enactments. The words "dispute" and "deadlock" must accordingly bear their ordinary meanings. The following meanings are given to them in The Oxford English Dictionary,

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2nd ed., vol 4 s.v. Dispute: "controversy, difference of opinion", and s.v. Dead lock: "A condition or situation in which it is impossible to act, a complete standstill." Webster's Third New International Dictionary, vol. 1 s. v. Deadlock states : " a state of inaction or of neutralization caused by the opposition of persons or of factions (as in a government or in a voting body): Standstill."

On considering s 27 A (1)(d)(i) as a whole I can find no repugnancy between its first and second clauses. In my judgment the second clause is in substance an independent enactment which has a separate and distinct operation from that of the first clause. In this instance punctuation is of no assistance in the construction of the section. It is the arrangement of the first and second clauses

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of s 27 A (1)(d)(i) in the same enacting compartment that causes confusion which could easily have been avoided by the draftsmen had they framed the contents of the second clause not in the form of a proviso, as they did, but as a separate and distinct enactment.

The third clause of s 27 A (1)(d)(i) is a condonation provision conferring on an industrial council a power to condone a late reference to it. It is clear from the aforegoing that it cannot refer to the first clause since non-compliance with its prescribed time limitation of 21 days would be fatal and accordingly not susceptible of condonation, as indicated supra. It can therefore only have reference to the second clause which it qualifies as a proviso.

I now turn to consider the application of s 27 A (1)(d)(i) to the facts of the present case. It

appears from the correspondence that by 15 March 1988 a dispute arose between the parties concerning the reinstatement of the other appellants in their employment (Annexures "KAL 2" and "KAL 3"). In the letter of 15 March 1988 the appellants were informed that Skipper International did not intend to reinstate the other appellants in their employment. That was the sole dispute between the appellants and Skipper International. It was in substance a very simple dispute. It did not involve intricate negotiations in regard to matters such as, for instance, conditions of employment, salary increases, sick leave or pension benefits.

Was a deadlock reached regarding the dispute ? If so, when ? Mr Redding, on behalf of the appellants, submitted that it was in the very nature of negotiations that workers are disposed to demand more than they realistically expect to achieve. His written Heads of

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Argument proceeded thus :

> "that in a factual sense, a standstill in negotiations occurs when the first party is unwilling to modify or alter its initial demand. A deadlock or standstill in the negotiations exists when no other options are open either to the first or second party." (Paragraph 21 of Appellants' Heads of Argument).

His contention as developed in argument amounted to the following: although one party has finally terminated the negotiations, there is in fact no deadlock within the meaning of s 27 A (1)(d)(i) unless such termination is acknowledged and accepted by the other party (by his not making a further offer, or in some other manner). I cannot agree. The Legislature used the word "deadlock" simpliciter in the main provision of s 27 A (1)(d)(i) without ascribing to it the wider meaning contended for by Mr Redding. As I indicated supra the

word "deadlock" should be given its ordinary meaning of a "standstill". In this sense it signifies a "stalemate" or an "impasse". In my judgment it is to be inferred from the correspondence, in particular the letters of 15 March 1988 (Annexure "KAL 2"), 23 September 1988 (Annexure "KAL 4") and 29 September 1988 (Annexure "KAL 6") that a deadlock in the negotiations was reached on 29 September 1988 when it clearly appeared that Skipper International was adamant and unrelenting in its attitude not to reinstate the other appellants in their employment. In the circumstances any attempt at further negotiation regarding the reinstatement would have served no useful purpose at all.

The remaining matter to be determined is whether or not the letter of 29 September 1988 amounted to a notification to the appellants that a deadlock had been reached concerning the dispute. Mr Redding contended that

it did not since it was not a formal notification using the word "deadlock". There is nothing in the Act to support this contention, since the Legislature did not prescribe any particular form or a standard form for the notification. In my judgment it suffices, as I indicated supra, if it can be clearly inferred from the contents of the notification that a deadlock had in fact been reached in the negotiations between the parties, as can in the circumstances be gathered from the letter of 29 September 1988 read in conjuction with the letter of 15 March 1988. In this regard I agree with the following dictum in the judgment of FLEMMING J at p 617 D - E :

> "It is adequate if it informs the other party of the attitude that negotiations have no future and are therefore terminated (or will not be commenced) with such clarity that the recipient realises that matters

> have reached the stage where he has to elect either to refer the matter to an industrial council or let matters be."

I may add that the letter of 29 September 1988 was delivered by hand and accordingly complies with one of the methods of delivery as prescribed by s 27 A (1)(d)(i).

The appellants failed to refer the dispute between them and the respondent to an industrial council within 21 days from the notification of the deadlock on 29 September 1988. It follows that in terms of the first clause of s 27 A (1)(d)(i) the period of 21 days elapsed within which the dispute could be referred to an industrial council. The proviso to s 27 A (1)(d)(i) is in the circumstances inapplicable. Skipper International was accordingly not premature in bringing its application in the Court a quo.

It follows that the appeal cannot succeed. The appeal is accordingly dismissed with costs which the appellants are ordered, jointly and severally, to pay.

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C. P. JOUBERT ACJ.

HOEXTER JA
SMALBERGER JA Concur.
KUMLERBEN JA
GOLDSTONE AJA