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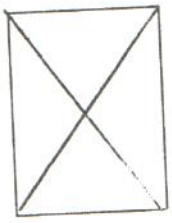


INDUSTRIAL COURT VERDICT

HELD AT **CAPE TOWN**

CASE NUMBER **NHK11/2/4132**

LABOUR APPEAL COURT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

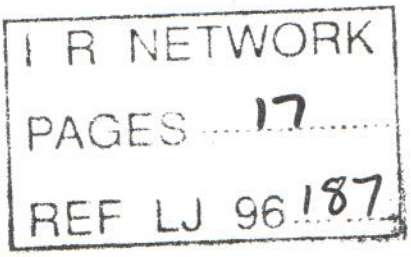
CASE NUMBER: NHK 11/2/4132

IN THE INDUSTRIAL COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

In the matter between:

MEWUSA OBO HENRY ISAACS

AND 69 OTHERS **Applicant**



and

KWIKOT (PTY) LTD **Respondent**

JUDGMENT

This is an application in terms of section 46(9) of the Labour Relations Act 28 of 1956 as amended. The Respondent raised three points ***in limine***. These points were enrolled for hearing on 12 April 1996. The points were argued and the Court reserved judgment on the issues. Here follows the Court's judgment. I will deal with the three points ***in limine*** seperately in the same order as the parties dealt with them.

1. JURISDICTION

The Applicants in this dispute referred a dipute in respect of the refusal of the Respondent to remunerate the members of MEWUSA for a paid holiday. The Applicants contend that this refusal constitutes an unfair labour practise as contemplated by the Labour Relations Act.

The Respondent contends that this Court does not have the jurisdiction to hear the matter as the dispute is regulated by th Public Holidays Act 36 of 1994. In terms of this Act payment for the holidays as is regulated by section 11(1) of the Basic Conditions of Employment Act 3 of 1983, as amended. Failure by an employer to make payment in terms of section 11 is an offence in terms of section 25 of the same Act. The Respondent submits that the Applicants' remedy is therefore to refer the matter to the Attorney-General's office for criminal prosecution in terms of section 25(1)(a) of that Act. Should the Attorney-General decline to prosecute, then the Applicants must furnish this Court with a certificate from the Attorney-General to that effect. Consequently, as the Applciants have not furnished the Court with such a certificate this Court has no jurisdiction to hear the matter.

The dispute arose when the Respondent invoked a section of an industrial council agreement, that reads as follows:

> **"An employee who is required by his employer to work the shift immediately preceding and/or following any public holiday and who absents himself from work on such a shift or shifts, shall not be paid for such holiday, unless absent with the permission of his employer or on account of sickness or circumstances beyond his control, or the hours of the shift or shifts concerned have been**

worked in, in which event payment shall be made for the day as provided for in terms of this section."

Applciants contend that the provision of the Public Holiday Act supercedes any agreement. Accordingly this Court must find that the Respondent's decision to withhold payment to the Applicants' for the holiday to be an unfair labour practice.

This point thus concerns the possible applicability of the Basic Conditions of Employment Act to the Applicants' claim for compensation. It is the Respondent's contention that they are not attempting to secure or enhance security of tenure.

This point ***in limine*** as was raised by the Respondent goes hand in hand with the Court's jurisdiction to deal with a "question of law" and the "dispute of law" in the limited sense of the word. There need not, in principle, be a rigid classification of all matters to be decided by a court of law as being either questions of fact or questions of law. The expression "question of law" may be used in "a more limited sense to exclude not only questions of fact but also a third category of questions which are neither questions of law nor questions of fact. It is thus convenient first to consider a few analyses of the concepts of question of law and question of fact as an aid to the possible meaning of the expression "question of law".

In the case of **Cronje v Wes-Kaapse Streekdiensteraad**, unreported case no NHK 9/2/125, the Court dealt with this issue at length. I quote from the typed written judgment at page 4 to 5:

"Die aard van regtegeskille word soos volg verduidelik in Voluntary Arbitration of Interest Disputes - A practical guide ILO 1984 op bladsy 1 :

> "Disputes over rights, ... are those usually involving individual workers or a group of workers who claim that they have not been treated in accordance with rules laid down in collective agreements, in individual contracts of employment, in laws or regulations or elsewhere. For example, a worker may claim not to have been paid wages in accordance with the overtime provisions of the applicable collective agreement ... a provision on the subject already exists, and the issue relates to the interpretation and application of that provision in the light of the facts of the particular case. Thus the important point is that the dispute involves an alleged violation of an established right recognised by law."

Die gebruik het in Suid-Afrika ontstaan om geskille aangaande beweerde onbillike arbeidspraktyke te karakteriseer as regtedispute. Die rede vir die toedrag is duidelik. Daar is van die standpunt uitgegaan dat die antwoord op die vraag of 'n bepaalde party hom aan 'n onbillike arbeidspraktyk skuldig gemaak het opgesluit is in die omskrywing van "onbillike arbeidspraktyk" en die nodige feitebevindings.

Mettertyd is die gebruik verduidelik aan die hand daarvan dat alle betrokkenes geregtig is op billike behandeling en billike arbeidspraktyke. Die gebruik om na geskille aangaande beweerde

onbillike arbeidspraktyke te verwys as regtedispute slaan dan op daardie breë reg."

During the Industrial Court's investigation of an alleged unfair labour practice, a determination is made on the facts of a particular case. This function in terms of section 46(9) of the Act can not be compared with the function of a court or institution that has to determine whether a certain employer or employee has committed a specific offence.

In the matter of **Media Workers Association of SA & Others v The Press Corporation of S A Ltd (1992) 13 ILJ 1391 (A),** the Appellate Division dealt with the meaning of the term "question of law", as it was used in section 17A (3)(e)(ii) of the Act. The Court amiably refers at pages 1397 - 8 to Salmond that categorise matters that could come before court as: (1) matters and questions of law, (2) matters and questions of judicial discretion and (3) matters and questions of fact. With reference to the definition of an "unfair labour practice" the Court held as follows at 1400 B-D:

"The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition the labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions."

The Court dismissed any suggestion that the Industrial Court is primarily concerned with interpretation when it considers applications in terms of section 46 (9) of the Act. The Court stated as follows at 1403 A - :

> **"After quoting the well-known passage in Morrison v Commissioner for Inland Revenue 1950 (2) SA 449 (A) at 455 ... and analysing the provisions of the Act, Spoelstra J (at 102E) came to the conclusion that, irrespective of whether the test in Cotton's case or Morrison's case were applied, the ultimate question was one of law because the definition of unfair labour practice could not be applied without recourse to interpretation. In particular, the word "unfairly" required interpretation. With respect, I do not agree with this reasoning. Interpretation is the process whereby the meaning of language is established. Spoelstra J may well be right in saying that it may sometimes be necessary to interpret words in the definition of "unfair labour practice such as "strike" or "lock-out" .... In the present case this need did not arise. Nor was there any problem in determining the meaning of the word "unfairly". The Labour Appeal Court was consequently not faced with a question of interpretation. The real problem in the present case is to decide whether particular acts or the consequences of acts are unfair. This is a matter of applying a general criterion to the facts. As Wilson classifies it, it is a "description question" - do the acts or their consequences fall within a particular description? This calls, not for a determination of what "unfairly" means, but for a value judgment on the facts and their consequences."**

It is important to note that if the particular parties differ as to the meaning of words contained in an agreement, act, regulation etcetera, and it is clear that the dispute will be resolved by the solution thereof, then you are dealing with a pure dispute of law in the limited sense of the word.

Disputes concerning alleged unfair labour practices must be decided in accordance with moral precepts. Salmond calls this category matters or questions of judicial discretion. That will include all matters and questions as to what is "right, just, equitable or reasonable", except in so far as predetermined by authoritative rules of law.

The question arises whether the Industrial Court can determine pure disputes of law. The **Wes-Kaapse Streekdiensteraad** matter, ***supra***, investigated this question at pages 16 - 36. It is trite law that the Industrial Court is a creature of statute and only has the powers the Act bestows upon it. The Court raised the question whether the court that resolves the question of law, will necessarily come to the conclusion that an unfair labour practice was committed. The conclusion was drawn that where the fairness of the conduct is investigated within the dispute resolution mechanisms, then a different conclusion might be drawn regarding the commission of an unfair labour practice. The secondary investigation into questions of law in terms of the Labour Relations Act, can be done to the extent that it can clarify fairness. I support the conclusion drawn in the matter of **Wes-Kaapse Streekdiensteraad *supra***.

Mr Jacobs, the Respondent's representative, referred the Court to the matter of **Harmse v Alberton Town Council (1993) 14 ILJ 933 (W),** where the Court held that a finding that the Applicant was entitled to the declaration sought was equivalent to a finding that the Respondent had to pay him. Applicant's true claim was for a judgment sounding in money in respect of his remuneration for

that period. A declaration in the terms sought would not be the appropriate form of relief to which the Applicant would be entitled. This claim for a declaration was no more than a devious way of claiming payment of his salary and other remuneration under his contract of employment. Compliance with the provisions of the **Basic Conditions of Employment Act no 3 of 1983**, section 30(3) in particular, is a prerequisite to the institution of proceedings.

The case at hand differs from the **Harms**-matter. Firstly, the Court that dealt with the matter is a court of law ***contra*** to the Industrial Court that is an administrative tribunal. Secondly, the declaration sought in that matter was based on a civil claim that drastically differs from the Industrial Courts unfair labour practice jurisdiction.

The Court in **Elsey v Global Cargo Systems (Pty) Limited**, unreported case no NH 11/2/17595, held that in terms of section 46 (9) (c) the Industrial Court shall determine a dispute on such terms as it may deem reasonable, including, but not limited, to the ordering of reinstatement or compensation.

In casu the Court firstly needs to resolve the question of law. A finding on that question does not bring an end to the primary labour dispute. A determination in terms of section 46(9) of the Act has therefore to be made i.e. deciding if an unfair labour practice has been committed or not. The last step in the proceedings would be for the Court to decide the measure of relief that ought to be granted.

The basis for measuring of compensation is essentially based on the guidelines laid down, in the matter of **Ferodo (Pty) Limited v De Ruiter (1993) 4 SALLR 47 (LAC).** The main guideline is that an award of compensation should not seek to punish the employer. A further subsidiary

guideline relates to the reasonableness in making an award. See **Camdons Realty (Pty) Ltd and Another v Hart (1993) 14 ILJ 1008 LAC** at 1019 B - D.

Professor AA Landman in his article **Labour Law Briefs Volume 4, Number 2 of 15 September 1990** at page 9 deals extensively with the concept of compensation as it appears in the Act. The learned author concludes that the word "compensation" in terms of section 46 (9), is synonymous with damages and goes on to state the following:

> **"A claim for the determination of an ULP is not a claim for damages or compensation arising from a breach of contract, although various contracts .... feature prominently. Neither is a claim under S 46 (9) a claim based on a delict, although there is a strong resemblance. In both cases we have to deal with the breach of a duty imposed by law. A claim for redress as a result of an alleged unfair labour practices differs from a delictual claim principally because it is only adjudicable in the Industrial Court which is an administrative tribunal and not a court of law.**
>
> **We must distinguish between a claim for wrongful dismissal (a contractual claim) and a claim for unfair dismissal. The Court, in a claim for wrongful dismissal, would probably be limited to ordering damages in a sum of money commensurate with the notice period.**
>
> **It is submitted that compensation, in view of the dictionary definition, means the redress of a loss. We must accept that the legislature has decreed that if an employee, a trade union, an employer or an employers' organisation has suffered a "loss" as a**

result of the commission of an ULP by another, the Court may provide monetary redress...

Consequently we may say that compensation in terms of s46(9) of the LRA is a concept created by the legislature to serve a distinct purpose. That purpose, it is submitted, is to compensate an applicant who has suffered loss or damage as a result of the commission of an ULP. The compensation must endeavour to place an applicant in the position he would have been in had the ULP not been committed."

In the **Global Cargo** matter, ***supra***, Hutchinson AM concluded on the issue at hand as follows:

"The application for the determination of a dispute to the Industrial Court differs markedly from the instituting of civil proceedings for the recovery from an employer of any amounts due as provided for in the BCEA.

The benefits accorded to an employee under a contract of employment will, where relevant, be taken in terms of account in determining the patrimonial loss suffered by the employee. If for instance a contract of employment provides for other benefits over and above a salary such as a motor vehicle allowance or bonuses, these will be relevant factors to be taken in terms of account in quantifying what financial loss an employee has suffered. Taking the example of an employment contract that provides for a period of one month's notice prior to termination, if an employee is unfairly dismissed without the requisite one month's notice, he

would be entitled to invoke the provisions of the BCEA to recover one month's salary. This is regardless of the fact that he may have found alternative employment at a higher remuneration immediately upon his dismissal. The Industrial Court adopting "a close resemblance" to a delictual standard to the question of patrimonial loss, would in these circumstances not award the employee anything. although an employee may frame his prayer for compensation based on a contractual measure, the enquiry at the end of the day is whether the employee has suffered a financial loss that is causally related to his unfair dismissal. Although an Applicant may believe that he is instituting proceedings for the "recovery from an employer any amount due by virtue of a provision of one of the Sections of the BCEA", he is in fact acting under an erroneous belief because of the Industrial Court's approach to compensation. By approaching the Industrial Court he cannot in law be instituting civil proceedings for the recovery of salaries or notice pay. The remarks of Professor Landman (*supra)* are apposite in this regard:

> "An interesting question arises as regards a possible conflict between the relief which a court of law may award and that which the Industrial Court may award. For instance will the Industrial Court, in determining compensation, take in terms of account an award of damages for wrongful dismissal by a court of law? It is suggested that the Court would do so on the basis that the award related to the contract of employment which is the subject of the claim for compensation.

> However, if the employee initially received compensation for unfair dismissal, and subsequently sued for wrongful dismissal then the legal position is not at all clear. It is, however, submitted that the court of law would be obliged to investigate whether the Industrial Court had in fact compensated the employee for the period of his notice. If this does not appear from the award it may be that the court would be obliged to award him damages for wrongful dismissal." (page 13)

Quite simply the Industrial Court is not competent to grant relief in terms of the BCEA without determining the employee's actual patrimonial loss coupled with the requirement of fairness to both parties. Thus, by approaching the Industrial Court for a determination coupled with a prayer for compensation, this cannot be equated with the institution of civil proceedings for the recovery of amounts owed by the employer to the employee. There is nothing in the Act that even remotely suggests that an enquiry in terms of compensation must in some manner have regard to the provisions of the BCEA. I am therefore of the view that the provisions of the BCEA are not applicable to the Industrial Court enquiry in terms of compensation. The disadvantage of framing a prayer for relief based on a contractual measure is that the Applicant may at the hearing of the matter be prevented from leading evidence about his true patrimonial loss if it falls outside the grounds set out in his statement of case as plead."

I am convinced that the ***dicta*** quoted above satisfactorialy deals with this point raised by the Respondent. I am in full agreement with what has been stated above in this regard.

2. CONDONATION

Section 46(9)(b)(ii) provides that ***"... the Industrial Court may only condone the late lodging of such referral on good cause shown."*** In deciding what constitutes ***"good cause"*** for the purpose of condonation the Industrial Court is guided by decisions of the Supreme Court on what is ***"sufficient cause"*** for the late filing of an appeal. See **SACCAWU & Others v Hotel Osner 1992 (3) 7 SALLR 64 (IC)** at 65J and **NUMSA v Interroc (Pty) Ltd 1993 (4) 3 SALLR 96 (IC)** at 98F. The Industrial Court has a discretion in regard to the ***"good cause"*** requirement that should be exercised judicially upon consideration of, ***inter alia***, the following factors that were enumerated in **Melane v Santam Insurance Co Limited 1962 (4) SA 531 (A)**:

1. The degree of lateness;
2. The explanation advanced by the applicant for the delay;
3. The Applicant's prospects of success;
4. The importance of the case to the parties; and
5. The opposing party's interest in reaching finality in the matter.

Also see **SACCAWU & Others v Hotel Osner 1992 (3) 7 SALLR 64 (IC)** at 65L - 66A, **NUMSA v Interroc (Pty) Ltd 1993 (4) 3 SALLR 96 (IC)** at 98G and **Manene & 2 Others v Firestone SA (Pty) Ltd 1993 (4) 9 SALLR 222 (IC)** at 223 D-G. The Court must consider all the circumstances of a particular case in conjunction with each other, and with the application as a whole in deciding

whether it is a proper case for the grant of relief. All the considerations are interrelated.

The matter was referred to the Court on 3 November 1995 that is 3 days after the expiry of the 90 day limit for the referral of a dispute in terms of section 46(9) of the Act. The Court finds this period not to be long. In the event of the Applicants presenting a good explanation for such delay, such delay can also not be considered to be unreasonable.

The wording of section 49(b)(ii) of the Act is peremptory in the sense that at the very least there should be something before the Court to explain the failure to refer the matter within the prescribed 90 days. See **Andreas Gcaleka v Machine Moving International 1993 (4) 3 SALLR 93 (IC)** at 95 G-H. The Applicant must furnish a fairly complete explanation of the events contributing to the late filing of his statement of case in order to enable the Court to evaluate the situation and to exercise its discretion judicially. See in this regard **Metal and Allied Workers Union & Others v Laudon Locks (Pty) Ltd 1988 (9) ILJ 1140** at 1143 E-F and **South African Commercial Catering and Allied workers Union v Cater Plus (Pty) Ltd 1993 (4) 7 SALLR 78 (IC)** at 79 H-J.

The Applicants' representative, Mr Amien, had an appointment scheduled with the first Applicant in the week of the 30th of October to the 6th of November 1995. He was however unable to consult with the Applicants due to his sudden and unforseen absence. On his return to the office he attempted to consult with most of the 70 Applicants which was a major task. The Respondent accepts Mr Amien's ***bona fides*** and I find that it is not necessary to discuss the fact of failure to annex the doctor's certificate for that period. It seems to be common cause between the parties that this application only became necessary as a result of the sickness of the Applicant's attorney. It is

also common cause between the parties that at all times the Applicants desired and intended to refer the dispute to this Court for determination.

The facts set out clearly differ from the facts of the **Cater Plus** - matter,***supra***. Mr Amien's neglect in not monitoring the time limits prescribed for an application in terms of section 46(9) of the Act, as well as his remission and inattentive oversight in regard to the referral of the case, can only be described as negligent. I feel however, that his negligence is not so gross as to debar the Applicants from the relief sought. His explanation is thus ***"reasonable and acceptable"*** (**Harrington Mining Services (Proprietary) Limited v The President of the Industrial Court** unreported case no 13368/89 (LAC) at page 24 of the typewritten judgment).

Having dealt with the first point ***in limine*** extensively, the Applicants have ***prima facie*** establish a viable case (**Hotel Osner** - matter, ***supra***, at 67G).

As regard the ***bona fides*** of the application, it is a fact that the Applicants had desired to continue with their application from the outset. The Industrial Council meeting was attended and continued discussions were held with the Respondent thereafter. They also consulted with their Union and attorney in order to enable him to draft the application and formulate the claim for relief. If he intended merely to delay, he could have adopted other dilatory tactics. It seems to me that the Court should be slow to refuse the Applicants the opportunity of having their application heard.

There can be no doubt that this case is of great importance to the Applicants as they are without the certainty as to their future terms and conditions and some were deprived of income for the day. The case is of equal importance to the Respondent who has followed SEIFSA's instructions for the industry in the matter. This is therefore a neutral consideration

An application such as the present will always receive favourable consideration, because a Court is hesitant to allow a party to forfeit the enforcement of his rights by reason of a technicality or the non-compliance with a rule of Court. It is conceivable that it is important for both parties that finality be reached in this matter as soon as possible, in order for them to continue with their employment relationship. Finality would bring certainty as the Respondent would then know whether its actions had been unfair or not and it would be in a position to plan for the future.

3. JOINDER

The Respondent submitted that the SEIFSA is the umbrella federation of the employers' organisation in the metal industry. It represents the interests of the body of its collective membership in collective bargaining and dispute resolution. It therefore has a direct and substancial interest in the process of dispute resolution in general and the outcome of this dispute in particular. Not only is the outcome of this particular dispute merely of academic interest to SEIFSA, but it will directly affect the collective interests of many thousands of its employer members. This litigation could more effeciently be conducted by SEIFSA rather than the many employers who could face subsequent litigation against each of them individually as a likely consequence of a decision in favour of the union. Moreover, SEIFSA was directly and continuously involved in the subject matter of this dipute virtually from the outset. SEIFSA should have been cited as the Respondent, or at the very least should have been joined as a co-respondent.

This Court has held on numerous occasions that a person that alleges that an unfair labour practice had been committed against him or her, must have been an employee at the time of the alleged unfair labour practice. The existence of

an employer employee relationship is thus imperative for the Court to have jurisdiction in determining the dispute.

I am satisfied that the Applicants have established that an employer employee relationship existed between them and the Respondent. However the Respondent's argument is not without merit as I agree that SEIFSA does have a direct and substantive interest in this dispute. I therefore join SEIFSA as co-respondent in this dispute in terms of Rule 11. The Applicants are to serve a copy of their statement of case as well as any annexures thereto, on SEIFSA at their place of business within 14 days of receipt of this judgment.

4. CONCLUSION

After careful consideration of the documents placed before the Court, the arguments of the respective representative, as well as the applicable authorities, I find it fair and reasonable to make the following order:

1. The points in limine raised on the Respondent's behalf are dismissed.
2. Condonation is granted to the Applicants.
3. SEIFSA is joined as co-respondent in this dispute and the Applicants are to serve a copy of their statement of case as well as any annexures thereto, on SEIFSA at their place of business within 14 days of receipt of this order.
4. No order is made as to costs.

SIGNED and DATED at CAPE TOWN on this 5th day of JUNE 1996.

Steyn Visser

Frederi Steyn - Visser