

Roelofs3

COVER SHEET



INDUSTRIAL COURT VERDICT

HELD AT PRETORIA

CASE NUMBER 11/2/17066



LABOUR APPEAL COURT VERDICT

DIVISION

CASE NUMBER



SUPREME COURT - APPELLATE
DIVISION

CASE NUMBER



AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

**IN THE INDUSTRIAL COURT OF SOUTH AFRICA
HELD AT PRETORIA**

IR NETWORK
PAGES 8
REF LH 95354

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In the matter between:

ROELOFSZ, BRYAN ANDREW

Applicant

and

BONNACORD (PTY) LIMITED
t/a SHELL ULTRA CITY (RUSTENBURG)

First Respondent

MIDAS FILLING STATION (RUSTENBURG)

Second Respondent

HAFFAJEE, SALIM
t/a THE GOLDEN EGG RESTAURANT

Third Respondent

JUDGMENT

ON BEHALF OF APPLICANT:

UITSPRAAK GELEWER OP
1995-06-09 19
TYD 9-00
PRESIDENT/ADJUNKPRESIDENT
NYWERHEIDSHOF

Mr L M De La Guerre

ON BEHALF OF RESPONDENTS:

Adv A R Bhana

BEFORE:

JUDGMENT/UITSPRAAK
No. 76 VAN OORDE 95
CIRCULATE/VERSPREI
PRESIDENT INDUSTRIAL COURT
PRESIDENT NYWERHEIDSHOF

L F Shear AM

DATE OF HEARING:

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JUDGMENT

This is an application in terms of section 46(9) of the Labour Relations Act.

On 24 May 1995, respondents filed a special plea. The matter was dealt with as a point *in limine*. The special plea concerned the fact that the applicant's estate had been placed under sequestration and this fact had not been disclosed to respondents or respondents' legal representatives. Respondents admitted that

as a result of the sequestration order, applicant lacked the necessary *locus standi* to launch the present application, in view of the fact that the applicant had not received the consent of his trustee at the time that he filed the present proceedings.

It is common cause that the applicant's estate was placed under final liquidation on 12 November 1991. Applicant is not rehabilitated, and remains under the said sequestration order.

Respondents argued that the rights of applicant to initiate the present application were governed by the terms of the Insolvency Act, 24 of 1936.

Respondents further argued that applicant's right and *locus standi* to initiate proceedings in this court were governed by the terms of section 23 of the Insolvency Act.

Section 23(6) of the said Act reads as follows:

"The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate, or in respect of any claim due or against him under this section ..."

Section 23(6) is qualified by subsection 23(7) to subsection 23(9), which read as follows:

"23(7) *The insolvent may for his own benefit recover any pension to which he may be entitled for service rendered by him ...*

23(8) *The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury ...*

23(9) *Subject to the provisions of subsection (5) the insolvent may recover for his own benefit the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate."*

(my underlining)

Respondents argued that the section had to be restrictively interpreted and that any acts or claims falling outside the terms of subsections 23(6) to (9) would not be competent without the consent of the trustee, which consent, respondents submitted, had to be obtained prior to or simultaneously with, the launching of the present application. It was common cause that the trustee had

not granted his consent, nor indeed was the trustee aware of the current application.

The trustee, Mr Muller, was subpoenaed to court. He was asked whether, having been advised of the present proceedings, he was willing, or not willing, to grant his consent. After due consideration, and after having taken advice, the trustee stated before this court on 25 May that he was willing to grant consent.

Mr Bhana, on behalf of respondents, indicated that he was not prepared to accept that the consent granted by the trustee was sufficient to cure the lack of status which existed at the time of the launch of these proceedings. Status, argued Mr Bhana, is a peculiar matter, which cannot be cured *ex post facto*. Furthermore, the lack of status is a matter which goes to the very lack of *locus standi iudicio*, and which cannot be cured by the fiction of ratification. One has to distinguish, argued Mr Bhana, between ratification of a matter requiring consent to enter into a transaction, such as a contract, from a matter which affects the very *locus standi* of an applicant.

If ratification was in fact possible, said Mr Bhana without conceding the point, he stated that such ratification would not be competent after an objection had been taken thereto. He cited various Supreme Court authorities to support this

contention. The authority is compelling, but I believe that a court retains a discretion to consider each such matter on its own merits.

However, I believe that the matter may be considered on an entirely different basis to that which was argued by the respective representatives. The answer to this vexed question, I believe, lies in the very wording of the Act relied upon by the respondents.

Section 23(6) of the Insolvency Act states that an insolvent may "*sue or be sued in his own name without reference to the trustee of his estate*" in certain circumstances. The word "*sue*" is defined in the Shorter Oxford English Dictionary *inter alia* as "*to institute a suit*", "*make a legal claim to*", "*to make application before a court*", "*to institute legal proceedings against a person*", "*to prosecute in a court of law*" and "*to bring a civil action against*".

It is trite law that the Industrial Court is not a court of law. The Appellate Division in **SA Technical Officials Association v President of the Industrial Court and others** (1986) 6 ILJ 186 (A), held that the Industrial Court is a *quasi-judicial* tribunal which also exercises a function as an administrative body.

An applicant in the Industrial Court coming under section 46(9) seeks a determination from the court that a party (an employer) has committed an unfair labour practice, and seeks compensation flowing from such Act.

The applicant is, in my opinion, not suing or being sued when he brings a matter before the Industrial Court. There is adequate authority that a statement of case in the Industrial Court is not a pleading in the strict sense of the word. It is merely a statement which contains details of his complaint. Because he is not "*suing*" when he comes before the Industrial Court, he does not require the consent or reference of or to his trustee.

Mr Bhana argued that if subsection 23(6) is not available to an insolvent applicant, he would have to satisfy the Industrial Court that his claim is one which falls within the exceptions contained in subsections 23(7) to 23 (9) quoted above.

With respect, I have read these subsections very carefully and I believe they have been misinterpreted. They have been interpreted to mean that an insolvent may only bring an application in his own right if his claim is one contemplated in subsections 23(6) to (9). Reliance in this regard is placed by the respondents on the words, "***The insolvent may for his own benefit recover***".

After careful consideration, I believe that the correct interpretation of this phrase merely means that an insolvent recovering any amount contemplated by the aforesaid subsections would be entitled to retain such amount for his own account. They would not I believe, therefore, have to be forfeited to the insolvent's estate, but may be retained by the insolvent "***for his own benefit***".

The phrase cannot have the broader meaning or interpretation sought to be relied upon by respondents. It does not in my opinion constitute an exception to the general rule laid down in subsection 23(6) but merely indicates or defines certain claims which may be retained by the insolvent for his own benefit, as opposed to that of his estate.

Because of the conclusion that I have reached, namely that an applicant in the Industrial Court is neither suing or being sued, I do not believe that there is any requirement that he be assisted by or make reference to his trustee. Such reference or consent would in my view be superfluous and hence unnecessary.

Accordingly, the point *in limine* is dismissed.

The question of the costs occasioned by the application in respect of the special plea is reserved.


L. E. SHEAR
Additional Member
Industrial Court
Pretoria

5 June 1995