JUDGMENT

IN THE LABOUR APPEALCOURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.:JA 91/98

In the matter between:

NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA & OTHERS Appellants

and

AS TRANSMISSIONS AND STEERINGS (PTY) LTD Respondent

CONRADIE JA

[1] The first appellant purports to act on behalf of members who were dismissed from the respondent's employ on 23 November 1989. The dispute which arose from these dismissals was referred to the industrial court in good time in terms of section 46(9) of the Labour Relations Act 28 of 1956 ('the Act'). After the statement of defence had been filed, an objection that the first appellant had not been authorised to embark on the litigation on behalf of its members (there were said to have been two hundred and four of them) was upheld. Leave was given to amend the notice of application.

[2] After this, four years and as many months went by. Without having produced the required amendment or any proof of its authority to act, the first appellant then enrolled the application again. It was ordered by the court to put matters right within twenty-one days. It failed to comply with the order, but some time in June 1995 produced an amendment to the notice of application. It was served on the respondent on 25 November 1996. It is doubtful whether this step remedied the objection relating to the lack of authority and, in fact, the first appellant later reverted to its original notice of application. Almost a year later the application was enrolled for trial. Settlement negotiations caused a further delay. The application was finally heard in November 1998 when the court gave an order instructing

the registrar to remove the matter from the roll and not to re-enroll it. It is common cause that the effect of this order was to permanently stay the proceedings.

[3] Mr. Kennedy, who appeared for the respondent, relied particularly on the delay of seven years, after the initial objection to the notice of application had been upheld to the time when it was first set down for trial. There had been two interlocutory applications in the meantime but they were in my view misguided and there had in any event been no compliance with the orders given by the court.

[4] The respondent raised the objection that continuation of the proceedings would be unfair. In developing his argument Mr. Kennedy emphasised that the need for parties to proceed with expedition is of particular importance in labour disputes. Section 46(9)(a) of the Act requires such disputes to be determined 'as soon as possible.' The submission is correct. (See: Amalgamated Clothing and Textile Workers' Union v Veldspun Ltd 1994 1 SA 162 (AD) at 169 G – H.) But I consider that even had there been no such provision, the delay was so outrageously long that it has undermined all prospect of a fair determination of the issues. The respondent has produced evidence that all its witnesses to the occurrences preceding the dismissals had, by the time the application was finally brought on in the

court *a quo*, left its employ. All but one of them was untraceable. The one whose whereabouts could be ascertained had been involved in a motor accident which left him with serious physical and psychological deficits.

[5] Mr. Van der Riet, for the appellant, took a stand on principle. He submitted that the industrial court could not neglect the performance of its statutory functions by refusing to determine a dispute, no matter how long it took for the dispute to come before it. The argument assumes that the only statutory duty cast upon the industrial court was to consider a dispute on the merits and to give a determination thereon. The assumption is in my view not valid. The power of the industrial court was not confined to making determinations under section 46(9) of the Act. It was also empowered by section 17(11)(h) 'generally to deal with all matters necessary or incidental to the performance of its functions under this Act'. Mr. Van der Riet suggested that the power to put an end to a dispute without determining the merits was so far–reaching that the legislature cannot be considered to have intended to grant it under this general power. I do not agree. The industrial court commonly, and correctly, determined disputes by giving decisions on procedural matters. This happened on each of the many occasions that an application for condonation was refused without a consideration of the merits of a dispute. (See, for example Mahlangu v African Oxygen Ltd (1994) 15 ILJ

1117 (IC) and Mziya v Putco Ltd [1999] 2 BLLR 103 (LAC)). It has never been suggested that the industrial court, in doing so, acted outside its powers. The power to put an end to proceedings by refusing condonation is very much like that which the industrial court exercised *in casu*. There is no reason in principle or logic why, if the legislature saw fit to grant the former, it should be thought to have excluded the latter under s 17(11)(h). (On the meaning of 'determine' see Trident Steel (Pty) Ltd v John NO & Others, (1987) 8 ILJ 27 (W) at 34 B – F).

[7] This court has recently (12 August 1999) given a decision in the matter of Sacca Ltd v Thipe (case no JA65/98, unreported). In it (per Conradie JA, Nicholson JA concurring) the *dicta* in Manyasha v Minister of Law & Order 1999 (2) SA 179 (SCA) at 187 A – B, were endorsed. A litigant who is faced with a delay going beyond that permitted by the rules of court, is not obliged to compel a reluctant adversary to hurry his case along. The rules relating to barring are there for the benefit of a defendant or respondent. They are not there to force him or her to engage in unwanted litigation.

[8] It is plain from the concurring judgment in Sacca Ltd v Thipe & Another (supra) that the industrial court must be considered to have had the power to make an order effectively putting an end to the litigation. (See also National Union of Mineworkers v Minesa Mining (Pty) Ltd t/a Rustplaas

[9] I end this judgment on a whimsical note. The first appellant states in its notice of application that it acts on its own behalf as well as on behalf of the second to two hundred and fourth applicants. It failed to deliver a power of attorney by 10 December 1998 as it should, in terms of rule 6 of the labour appeal court rules, have done. It then, in applying for condonation for this omission, annexed two powers of attorney dated the same day and in identical terms but signed by two different persons, each purporting to act on behalf of the first appellant. It does not appear that either has been authorised to do so. Although Mr. Kennedy admitted from the bar that the signatories were the secretary-general and the legal officer of the first appellant, there is nothing to indicate that these functionaries have authority to involve the first appellant in litigation. This is obviously unsatisfactory. There is no power of attorney from any of the individual 'appellants' nor, assuming this to have been ordered by the industrial court, is there any authorisation to the first appellant by any of them to act on his or her behalf. This is yet another indication of the sub-standard way in which this litigation has been conducted. The application for condonation of the late filing of the power of attorney must be refused. I have little difficulty in coming to this conclusion since, as would have been evident from the preceding discussion, the individual appellants have,

Date of hearing: 24 August 1999

Date of Judgment: 15 September 1999

Attorney for the appellant: Ms R Edmonds

Advocate for the appellant: Adv. van der Riet

Attorney for the respondent: Mr. D Pretorius

Advocate for the respondent: Adv. Kennedy

nearly ten years after the problem first arose, not yet managed to prove that they have given the first appellant authorisation to act on their behalf, and, moreover, are dreadfully weak on the merits.

The application for condonation is dismissed and the appeal is struck off the roll with costs.

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CONRADIE JA

I agree

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ZONDO AJP

I agree

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MOGOENG AJA