IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Reportable: NO
Of Interest: YES

CASE NO. D 264/99

In the matter between:

WISEMAN MBATHA	**Applicant**
and	
ARBITRATOR: RICHARD LYSTER	**First Respondent**
INDEPENDENT MEDIATION SERVICES OF SOUTH AFRICA	**Second Respondent**
DURBAN METRO COUNCIL	**Third Respondent**

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

BASSON, J

[28] This is an application for leave to appeal. I requested the parties to file written heads of argument. The last set of heads were filed on 19 April 2000.

[28] The test is, as always, whether there is a reasonable prospect of success on appeal. In other words, whether there is a reasonable prospect that another Court (in this instance, the Labour Appeal Court) may come to a finding different from that of the Court *a quo* (see, *inter alia*, *Van Heerden v Cronwright* 1985 (2) SA 342 (T)).

[28] In its heads of argument the applicant relied heavily on the judgment of *Mobius Group (Pty) Ltd v Duff NO and Others* (1992) 13 *ILJ* 866 (W), a decision of the Full Bench.

[28] However, this case did not deal with an application brought on notice but with an application for a conciliation board in terms of section 43 read with section 35 of the previous Labour Relations Act, 28 of 1956 - "the previous LRA"). The Court held that "apply" meant that the document must be brought to the attention of the inspector concerned (at 870C-D). These statutory requirements are clearly distinguishable

from the requirements *in casu* which deal with bringing an application on notice to other interested parties. The question whether service was a necessary prerequisite for making an application therefore never arose in this case. This judgment is accordingly of no assistance in answering the legal question *in casu* and the fact that it is a Full Bench decision therefore matters not.

[28] It follows that the judgment in *S Bothma & Son Transport (Pty) Ltd v President, Industrial Court of SA & Others* (1989) *ILJ* 55 (TPD) which dealt with the same issue is also not of assistance.

[28] A similar judgment is to be found in the case of *Mlandu v Bulbulia NO and Another* (1989) 10 *ILJ* 71 (W), also relied on by the applicant.

[28] Further, in terms of this judgment, it was held that the date appearing on the applications themselves were the operative date, also for an application for *status quo* relief in terms of section 43 of the previous LRA.

[28] However, the Court came to this conclusion after carefully examining the Rules of the Industrial Court and stated as follows in this regard (at 75E-76G): "It is also clear that the s 43(4) application **need not be delivered (ie served on the parties and filed with the registrar**). The other parties need **only be in receipt** of the application. No doubt the registrar must be notified of the application **but no formal requirements need to be adhered to**" (emphasis supplied).

[28] This stands in stark contrast to the Rule 7(1) and (2) of the Labour Court which requires in no uncertain terms that the application must be **delivered**, and defines "deliver" to mean serve on other parties **and** file with the Registrar (see the judgment of the Court *a quo* at paragraphs [14] and [15]**)**.

[28] It follows that reliance upon Industrial Court judgments for authority for contending that only filing and not also service is required does not assist the applicant in the least. See in this regard, for example, the judgment of the Industrial Court in *Mhlangu v African Oxygen Ltd* (1994) *ILJ* 1117 (IC) which dealt with a section 49(6) application in terms of the previous LRA. It is clear that such "application" need not be served on the other party in terms of the procedural requirements and judgments such as these therefore do not assist in answering the crisp question *in casu*: is it necessary for a (review) application (in the Labour Court) to be filed **and** served before such application is made?

[28] I am very firmly of the view that the answer to this question must be found in the relevant statutes (the Arbitration Act and the present LRA) read together with the Rules of the Labour Court. These statutory

provisions as well as especially Rule 7(1) and (2) were discussed in detail in my judgment and I need not repeat that discussion here.

[28] The applicant also relied on the cases of *Fisher v Commercial Union Assurance Company of South Africa Limited* 1977 (2) SA 499 (C); *Peters v Union National South British Insurance* 1978 (2) SA 58 (D); *Zungu v KwaZulu Government* 1980 (1) SA 231 (NPD): and *Kunene v Union National South British Insurance Co Ltd* 1976 (4) SA 782 (D&CLD).

[28] However, these cases do not assist the applicant as they were concerned with the question whether the words "make application" referred to the filing and service of the application papers or, on the other hand, the actual hearing of the application in Court. They did not concern the issue to be determined *in casu*, that is, whether the timeous filing of application papers in Court but late service thereof on interested parties constituted compliance with "making an application" in terms of the prescriptive provisions of section 33 of the Arbitration Act, 42 of 1965 ("the Arbitration Act").

[28] This question was accordingly left open in these cases (see, for example, *Peter's* case at 60A-D).

[28] In the judgment of the Labour Court reviewing an arbitration award in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") in *Queenstown Fuel Distributors CC v Labuschagne NO and Others* (1999) 20 *ILJ* 928 (LC) at 929G-H this question was also left open, however it was stated that: "The filing **and** service of an application is what is intended by the word 'apply'" (emphasis supplied).

[28] The statement by Vos J in the *Fisher* case (*supra* at 501H to 502A) that "I would interpose that it is even arguable that the mere issue of process may suffice" was clearly made *obiter* and is accordingly not persuasive authority *in casu*.

[28] A point very similar to the point *in casu* was dealt with in the judgment of *Tladi v Guardian National Insurance Company Limited* 1992 (1) SA 76 (TPD) where the Court held that, although the expression "application is made" was capable of more than one meaning and that it should have a meaning favoured by the applicant, there was no authority for the proposition that the mere issue of an application was sufficient for it to have been made.

[28] The Court went on to hold that the application had to be brought by way of notice of motion which would in terms of the Uniform Rules have to be addressed both to the Registrar and any person against whom relief

was claimed. Further, bearing in mind the distinction between procedural steps over which the applicant has control, like the issue and service of process, and steps over which the applicant has no control, like dates of hearing, postponements, etcetera, and the fact that, as from the stage of service, it was in the power of the respondent to prevent any undue protraction: "it is not too onerous to require of an applicant not only to issue his application and file it with the Registrar but also to serve it" (at 80B-C).

[28] In the event, the Court held that the applicant was out of Court for not having made the application within the requisite ninety days and dismissed the application.

[28] This judgment is direct authority for my judgment in the Court *a quo*, even tough the application in the above case was one brought in terms of section 14(3) of the Motor Vehicle Accidents Act, 84 of 1986, for leave to bring a claim for compensation after it had prescribed in terms of section 14(1) of that Act. See also for another case which supports this view: *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 217 (W) at 219H-220D.

[28] The applicant's argument that the Judge in the *Tladi* case was bound by the decision of the Full Bench in the *Mobius* case has no merit as the *Mobius* judgment did not address the issue of whether service is required in addition to the filing of an application at all (as it was concerned with a wholly different matter, that is, an application for a conciliation board - see the discussion at paragraph [4] above).

[28] In any event, I reiterate that it is clear that the answer to the question that confronted the Court *a quo* is not to be found in the Rules of the former Industrial Court nor in the Rules operating in the High Courts. The answer is to be sought primarily in the Rules governing application proceedings in the Labour Court.

[28] In my judgment, I discuss the impact of these Rules in detail and I see no need to repeat that discussion here. My reasoning in this regard has not been attacked in any meaningful way.

[28] In any event, given the content of these Rules, I am satisfied that there is no reasonable prospect that another Court will come to the conclusion that it is not necessary to serve an application on other parties for an application to be made in terms of the Rules of the Labour Court.

[28] For the sake of completeness, I wish to express my full agreement with the sentiments declared in the *Tladi* and *Mame Enterprises* cases (*supra* at paragraphs [17] to [20]). There is no reason why these principles cannot be applied *in casu* as the same issue was to be determined. The applicant clearly has control over the issue and service of process and accordingly it is not too onerous a burden to require from the applicant to

file and serve in terms of the Rules of the Labour Court.

[28] In the event, there is no merit in the applicant's argument that the respondent is thereby put in a position to cause unreasonable delay.

[28] In my judgment I also dealt with the issue that the requirements of the Rules in regard to service and proof thereof are not unnecessary onerous and that it is therefore not difficult to comply with these Rules. Further, it needs to be reiterated that the applicant may apply for condonation of late filing and service in review proceedings in terms of the decision of the Labour Appeal Court in *Queenstown Fuel Distributors CC v Labushagne NO and Others* (2000) 21 ILJ 166 (LAC) (quoted at paragraph [22] of my judgment).

[28] In the event, the application for leave to appeal is dismissed. The applicant is to pay the third respondent's costs herein.

_____

BASSON, J

On behalf of the Applicant:	Mr MAS Mbatha of MAS Mbatha & Co
On behalf of the Third Respondent:	Mr AIJ Chadwick of Shepstone & Wylie
Date of judgment:	28 April 2000