SUMMARY ***REPORTABLE***

LCA 28/08

DE BEERS MARINE (PTY) LTD vs JACOBUS IZAAKS

2009 February 6

PARKER, J

Statute - s. 24 of the repealed Labour Act (Act No. 6 of 1992) – Approval for lodging complaint out of time in terms of.

Held, by context the word "approval" in s. 24 of Act No. 6 of 1992 is not synonymous with "condonation".

Held further, it was not the intention of the Legislature that the word "approval" be understood to mean "condonation".

Practice - s. 24 of Act No. 6 of 1992 – Application for district labour

court's approval for lodging of complaint out of statutory time limit in terms of – Order granting such approval – Interlocutory or final order – Interlocutory order and final order explained – Unappealability of interlocutory order affirmed – Court finding order granting approval in terms of s. 24 of Act 6 of 1992 is interlocutory and therefore unappealable.

Held, the order of district labour court granting approval for lodging of complaint out of time in terms of s. 24 of Act No. 6 of 1992 is a preliminary step to lodging of the complaint and therefore an interlocutory order and so it is not appealable.

Held further, although the order granting the lodging of the complaint out of time is conclusive of the preliminary or subordinate matter it is not a final order because it is not conclusive of the main dispute or conclusive of the final rights of the parties which a decision in due course on the complaint is to determine.

REPORTABLE

CASE NO.: LCA 28/2006

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

DE BEERS (PTY) LTD **APPELLANT**

and

JACOBUS IZAAKS **RESPONDENT**

CORAM: **PARKER, J**

Heard on: 2009 January 23

Delivered on: 2009 February 6

JUDGMENT

PARKER, J

[1] This matter comes a long way, commencing its journey on 19 April 2006 in the district labour court, Windhoek, in terms of the repealed Labour Act, 1992 (Act No. 6 of 1992) (the repealed 1992 Labour Act). On that day in April 2006, the respondent in the instant matter but applicant in the 2006 application before the district labour court, Windhoek, brought an application by notice of motion, moving that court for its "*approval*" to lodge a complaint with that court. I have used the noun "approval" advisedly: not least because that is the word used by the Act. The word "condonation", which is bandied about by the parties and their legal representatives and also used by the learned chairperson of the district labour court in her judgment, is not used by the Act – for a good reason – and it is, therefore, inappropriate to bring it into the interpretation and application of s 24 of the repealed 1992 Labour Act. By context "approval" in s 24 is not synonymous with "condonation": it would have been a simple matter for the lawmakers to have used "condonation" if that was the word they intended to use; they did not use "condonation"; and, in my opinion, it was not the intention of the Legislature that the word "approval" be understood to mean

"condonation". Section 24 provides:

> Notwithstanding the provisions of any other law to the contrary, no proceedings shall be instituted in the Labour Court or any complaint lodged with any district labour court after the expiration of a period of 12 months as from the date on which the cause of action has arisen or the contravention or failure in question has taken place or from the date on which the party instituting such proceedings or lodging such complaint has become or could reasonably have become aware of such cause of action or contravention or failure, as the case may be, except with the *approval* of the Labour Court or district labour court, as the case may be, on good cause shown. (My emphasis)

[2] The respondent brought the application before the district labour court in April 2006, as aforesaid, because the statutory time limit allowed to lodge such complaint had expired within the meaning of the above-quoted s 24 of the repealed 1992 Labour Act. In a written judgment running into four pages of 'A-4' foolscap typing-paper sheets, the learned president exercised her statutory discretion and granted approval for the lodging of the complaint by the respondent out of time.

[3] The appellant now appeals against the decision of the learned chairperson of the district labour court. The respondent takes the preliminary objection that the order by the learned chairperson of the district labour court approving the lodging of the complaint out of time is interlocutory and, therefore, not appealable. Accordingly, it behoves me to determine the preliminary objection at the outset because if the preliminary objection is upheld, the appeal fails on that ground alone.

[4] In support of the respondent's contention, Mr. Grobler, counsel for the respondent, argued that the aforementioned order of the learned chairperson relates to an interlocutory matter and has no effect on the

merits of the case. Consequently, he submitted, the appeal could only be lodged after the matter (i.e. the complaint) has been decided by the district labour court on the merits. Mr. Grobler referred to me the following cases in support of his contention, namely, *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839; *South Africa Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91; *Thiro v M & Z Motors* NLLP 2002 (2) 370 NLC (LC). As I understand Mr. Grobler, his argument is simply that the order by the learned chairperson of the district labour court is an interlocutory order because it deals with an interlocutory matter and so, therefore, that order is unappealable. The principle underlying Mr. Grobler's argument is that an interlocutory order is unappealable.

[5] I did not hear Mr. Heathcote, counsel for the appellant, to refute the principle relied on by Mr. Grobler; neither would he have been correct, in my opinion, if he had done so. Mr. Heathcote's argument, as I understood it, was rather that the order of the learned chairperson of the district labour court is not interlocutory: it is a final order; and his reason for so saying is principally the following. Counsel argued that the learned chairperson's decision granting approval for the lodging of the complaint by the respondent out of time "is a final order in that proceeding and even if it is interlocutory it irrevocably determined the rights of the parties." This circular argument, with the greatest deference, does not add any weight. It has been said authoritatively in 22 *Halsbury* (3 ed): para 506 that an order which does not deal with the final rights of the parties is termed "interlocutory"; and "it is an interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals." Thus, the fact that an order is conclusive as to the subordinate or preliminary matter with which it deals does not make such order

conclusive of the main dispute or conclusive of the final rights of the parties, which a decision in due course is to determine. (See *Re Gardner, Long v Gardner* (1894) 71 LT 412 (CA); *Blakey v Latham* (1889) 43 Ch D 23 (CA); *Kronstein v Korda* [1937] 1 All ER 357 (CA); *Guerrera v Guerrera* [1974] 2 All ER 460 (CA); *Salter Rex & Co. v Ghosh* [1971] 2 QB 597 (CA).) As Lord Esher, MR stated in *Standard Discount Co v La Grange* (1877) 3 CPD 67 (CA) and *Salaman v Warner* [1891] 1 QB 734 (CA), the test was the nature of the application to the court; and not the nature of the order which the court made. I respectfully subscribe to those views. From the authorities, it seems to me clear that the principle of the unappealability of an interlocutory order is irrefutable; and that much both counsel agree.

[6] In *Thiro* supra, after setting out the relevant provisions of s 83 (b) of the Magistrate's Courts Act, (Act No. 32 1944), as amended, which entitled a party to any civil suit or proceedings to appeal against "any rule or order in such suit or proceeding and having the effect of a final judgment," Silungwe, P stated:

> It is trite law that an interlocutory order which does not have a "final or definitive effect" is not appealable forthwith. The rationale underlining the prohibiting or limiting of appeals against interlocutory order is salutary in that it discourages piecemeal appeals. See *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 at 870; *DH Meskin Construction Co (Pty) Ltd & Another v Magliamo* 1979 (3) SA 1303 (T) at 1306 B-C; *Makhothi v Minister of Police* 1981 (1) SA 69 (A).

[7] To start with, I understand the word "judgment" in the above-quoted part of s 83 (b) of the Magistrate's Courts Act to mean "decision" (*Concise Oxford Dictionary*, 10ed.) Moreover, I find myself in respectful agreement with Silungwe, P and I subscribe to the views expressed

Thiro supra; but that is as far as I shall go with Silungwe, P inasmuch as the principle pronounced in *Thiro* is relevant to the present matter. Silungwe, P's other statements in *Thiro* cannot, with respect, assist this Court in its present enterprise in virtue of what I have said previously about the fact that "approval" in s 24 of the repealed Labour Act is not by context synonymous with "condonation" and inasmuch as *Thiro* concerned "the order of *condonation* of the appellant's late filing of his complaint … (at 373)" [My emphasis]

[8] It follows inexorably that my present burden is first of all to determine whether the learned chairperson's order is interlocutory because if it is, this appeal fails on that ground alone, as I have already said.

[9] In the instant matter, the case before the district labour court, Windhoek, in the April 2006 was in the nature of *a preliminary* application by the respondent moving the district labour court *to grant* a section-24 *approval* for him to lodge a complaint with that court out of time. And there, as Mr Grobler correctly submitted, the respondent was merely granted *permission* by the learned chairperson to lodge a complaint out of time in that district labour court: the learned chairperson's order granting approval for the lodging of the complaint by the respondent out of time does not have any effect "on the final determination of the main action in the case"; that is, the complaint.

[10] It seems to me clear and incontrovertible that the learned chairperson's decision or judgment or order does not deal with the main dispute or the final rights of the parties: the dispute is whether the appellant dismissed the respondent fairly in terms of the applicable law

(i.e. the repealed 1992 Labour Act), and the rights of the parties are the right of the appellant to dismiss the respondent in terms of the applicable law and the respondent's right under the applicable law not to be dismissed unfairly by the appellant.

[11] I have not one iota of doubt in my mind that the learned chairperson's order is an interlocutory order because the respondent moved the district labour court, as I have said *ad nauseam*, merely for approval (that is, for permission) to lodge his complaint out of time (see *Kronstein* supra). Doubtless, the decision of the learned chairperson of that court determined that preliminary point, but it is not a final order (*Gardner*, supra; *La Grange* supra; *Blakey*, supra). In sum, I hold that the respondent's April 2006 application for the district labour courts' approval to lodge a complaint out of the statutory time was *merely a preliminary step* to the lodging of the complaint, and therefore an interlocutory matter, and the order granted is an interlocutory order (see *Gardner*; *La Grange*, supra). I should have said so even if I had not considered the aforementioned cases. But when I look at *Thiro*, *Gardner*, *Blakey*, *Salaman*, *Ghosh*, *Kronstein* and *La Grange* supra, I feel no doubt whatsoever, not even a modicum of doubt, that the order of the learned chairperson of the district labour court, Windhoek, approving the lodging of a complaint by the respondent out of time ought to be treated as an interlocutory order. An order is final only which determines the matter in dispute at the trial of an action (i.e. a complaint in the instant matter). Thus, having regard to the authorities and the facts of the case, I feel bound to hold that the aforementioned order of the learned chairperson of the district labour court, Windhoek, is an interlocutory order and, therefore, unappealable. Consequently, I

uphold the respondent's preliminary objection; and so the appeal must be dismissed.

[12] I now consider the issue of costs. Mr. Grobler submitted that the appellant all along knew that the "condonation granted to the respondent was an interlocutory matter and could not be appealed against at this stage" and so, according to him, to "continue with such an appeal is frivolous or vexatious as contemplated by section 20 of the Labour Act." With respect, I do not accept Mr Grobler's submission. The applicant's failure to see that the learned chairperson's order is an interlocutory order and, therefore, unappealable may be regrettable but it cannot be said that the appellant acted frivolously or vexatiously by holding on tenaciously to what it considered to be a genuine and honest position - even if a misadvised and misguided position that was doomed to fail. Accordingly, I am not persuaded that in pursuing its position, the appellant acted frivolously or vexatiously within the meaning of s. 20 of the Labour Act. That being the case, I think it is fair and just that the parties pay their own costs.

[12] In the result, I make the following orders:

(1) The appeal is dismissed.

I make no order as to costs.

Parker, J

ON BEHALF OF THE APPELLANT:	Adv. R. Heathcote, SC
Instructed by:	GF Köpplinger Legal Practitioners
ON BEHALF OF THE RESPONDENT:	Adv. Z J Grobler
Instructed by:	Grobler & Co.