REPORTABLE

CASE NO: SA 26/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA FINANCIAL INSTITUTIONS UNION (NAFINU)	**Appellant**
and	
NEDBANK NAMIBIA LTD	**First Respondent**
LABOUR COMMISSIONER	**Second Respondent**

Coram:	DAMASEB DCJ, MAINGA JA and SMUTS JA
Heard:	**7 August 2015**
Delivered:	**19 August 2015**

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and MAINGA JA concurring):

[1] The first respondent, Nedbank Namibia Limited, a commercial bank, obtained an order in the Labour Court against the appellant, a registered trade union (the union) effectively interdicting it from calling out a strike of Nedbank employees within the bargaining unit, pending the determination of a dispute referred to the Labour Commissioner by Nedbank under s 86 of the Labour Act 11 of 2007 (the Act).

[2] The union has appealed against the granting of that order to this court. The question arises as to whether that order is appealable as of right or is of an interlocutory nature, requiring the leave of the Labour Court under s 18(3) of the High Court Act 16 of 1990. That subsection provides:

> 'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court'.

Background

[3] This question for determination arises in the following way. The dispute which has given rise to this appeal had its origins in the most recent annual wage negotiations between the two protagonists. The union is recognised as the bargaining agent for Nedbank employees within the bargaining unit. This was in terms of a recognition agreement entered into between the parties in 2010.

[4] The parties commenced wage negotiations in February 2015. Four sessions were held on separate dates until the negotiations failed on 12 March 2015. The union referred a dispute of interest to the Labour Commissioner under s 82 of the Act. The latter in turn appointed a conciliator to deal with the dispute. Conciliation meetings were held on four occasions in April 2015. But these meetings failed to resolve the dispute between the parties. The conciliator then issued a certificate of unresolved dispute in terms of s 82(15) of the Act.

[5] The parties thereafter commenced negotiations on strike rules. They could not agree on these either. The conciliator thereafter furnished the parties with strike rules on 13 May 2015 in terms of s 76(2) of the Act. The union gave notice of its intention to proceed with a strike ballot process. Its members voted overwhelmingly in favour of a strike.

[6] In the meantime, Nedbank on 28 April 2015 referred a dispute to the Labour Commissioner under s 86 of the Act, complaining that the union had refused to negotiate in good faith and had engaged in conduct which was subversive of orderly collective bargaining during the wage negotiations and thereafter. Nedbank maintain in that referral that the stumbling block in the wage negotiations and conciliation had been the question of medical aid. The union had filed a demand for a 100% employer's contribution at the outset of the wage negotiations. According to Nedbank, the issue of the employer's contribution to medical aid remained central to the union's position throughout the wage negotiations and during conciliation. Nedbank pointed out that the issue of medical aid was subject to an existing agreement reached between the parties in April 2014. It had set the employer's contribution to medical aid at the level of 60% for the 2014 financial year and 70% for the 2015 financial year.

[7] The union had disputed the manner in which the medical aid agreement had been implemented and had itself on 26 September 2014 referred a dispute under s 86 concerning the interpretation to be given to the relevant term on that issue in the wage agreement.

[8] It was Nedbank's position in its referral that the insistence on renegotiating a term which had already been agreed to prior to its expiry amounted to negotiating in bad faith and conduct subversive of orderly collective-bargaining and in conflict with s 49 of the Act. It applied in the referral for a declaratory order to that effect and an order directing the union to return to the bargaining forum to negotiate the remuneration package of employees within the bargaining unit without reference to medical aid contributions. It also sought to interdict the union and its members within the bargaining unit from taking industrial action during those annual wage negotiations until those negotiations had become unresolved and the further provisions of the Act had been followed in respect of unresolved disputes.

[9] The union's position was that it had followed the provisions of the Act regarding the procedures to be exhausted before a strike could be called out. In particular, it had further polled its members who had overwhelmingly supported a strike and that it should consequently proceed with it.

Proceedings in the Labour Court

[10] Nedbank then approached the Labour Court on an urgent basis for an interdict to prevent the union from calling out the strike, pending the determination of the dispute which it had referred to the Labour Commissioner on 28 April 2015. The matter came before the Labour Court on 2 June 2015. On the following day the Labour Court gave judgment and granted an order which included the following interdicts against the union:

‘(a) . . .

(b) Pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent’s conduct during the 2015 negotiations between the applicant and the first respondent, the first respondent and its office bearers and agents are interdicted and restrained from organising, causing, directing, inviting or encouraging any of the applicant’s employees to embark on any industrial action.

(c) Pending the finalisation of the dispute referred to the Labour Commissioner by the applicant on 28 April 2015 concerning the first respondent’s conduct during the 2015 wage negotiations between the applicant and the first respondent, the first respondent’s members employed by the applicant are interdicted from embarking on any industrial action’.

[11] The union appealed against the granting of that order to this court. It applied for and was granted leave for the appeal to be set down outside of the court terms provided for in the rules of this court, given the urgency of the appeal which relates to the right to strike in support of annual wage negotiations.

Submissions in this court

[12] Nedbank, as first respondent in this appeal, has raised the preliminary point that the order granted by the Labour Court was of an interlocutory nature and that the union required leave to appeal against the order of the Labour Court and that

the failure to have done so should result in the appeal being struck from the roll with costs.

[13] Mr Heathcote, SC, who together with Ms B de Jager, who appeared for Nedbank, argued that the interim interdict granted by the High Court did not determine the rights of the parties in any final sense and that this would only be done by the arbitrator to whom the dispute would be referred, after having been appointed by the Labour Commissioner to arbitrate that dispute. He argued that the order of the Labour Court was thus interlocutory and that leave would be required to appeal to this court. As leave had not been obtained, he submitted that the appeal should be struck from the roll with costs.

[14] Mr Marcus who appeared for the union argued that the order of the Labour Court bore all the hallmarks of a judgment or order as contemplated by s 18 of the High Court Act (and s 14 of the Supreme Court Act 15 of 1990). He submitted that it was not interlocutory because it was, so he contended, final in effect and not susceptible to alteration by the court which had made it. He further argued that it was definitive of the rights of the parties and had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Was the order appealable without leave?

[15] This court has on several occasions considered the appealability of judgments and orders of the High Court[1]. The starting point is s 18(1) which grants a right of appeal against all 'judgments and orders' of the High Court. Its corollary is s 14(1) of the Supreme Court Act which vests this court with jurisdiction to hear and determine appeals from 'any judgment or order of the High Court'. The Labour Court is a division of the High Court. (See s 115 of Act 11 of 2007).

[16] In *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC) para 10, this court stated in this context:

> 'This court has, with approval, accepted the meaning ascribed to the words "judgment or order" set out in the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 523I (see *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC)). Generally speaking, the attributes to constitute an appealable judgment or order are threefold, namely, the decision must be final, be definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding. In terms of s 18(3) of the High Court Act interlocutory orders are not appealable as of right and need the leave of that court or, if that was refused, the leave of the Chief Justice, given by him on petition, to be able to come on appeal'.

[1]See, for example, *Vaatz and Another v Klotzsch and Others*, unreported judgment of this court, SA 26/2001, dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); M*inister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC); *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC). *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC); *Kahuure and Another in re Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2013 (4) NR 932 (SC).

[17] The threefold attributes, drawn from *Zweni* and referred to by the court in *Knouwds,* have been frequently followed by this court.[2] In *Zweni*, the court made the distinction between 'judgments and orders' – the phrase also employed in the Supreme and High Court Acts – on the one hand which are appealable and 'rulings' on the other hand which are not.

[18] As was stressed by this court in *Shetu Trading,* the principles set out in *Zweni* on the question of appealability are 'not cast in stone' but are 'illustrative and not immutable'.[3] They are thus 'useful guidelines but not rigid principles to be applied invariably'.[4]

[19] Judgments and orders with these attributes can thus be appealed against as of right to this court. Section 18(3) creates an exception to this general principle. Interlocutory orders or costs orders only left to the discretion of the High Court cannot be appealed against except with leave of the High Court, or where refused, on petition where granted by this court. Leave was not sought in this instance.

[20] The question arises as to whether the order appealed against is a judgment or order contemplated by s 14 of the Supreme Court Act and s 18(1) of the High Court Act. In this context, this court in *Shetu* stated[5]:

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[2]See for example in *Knouwds, NO, supra,* para 10, *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy and Another* 2005 NR 21 (SC) at p 29; *Shetu Trading, supra,* para 18 – 19. *Kahuure, supra,* para 18.
[3]*Supra at para 22.*
[4]*Supra at para 22.*
[5]*Supra* at para 24.

> 'The fact that leave to appeal is granted by a lower court does not put an end to the issue whether a judgment or order is appealable. The question of appealability, if an issue in the appeal, remains a question for the appellate court to determine. If it decides that, despite the fact that leave to appeal has been granted by the lower court, the judgment or order is not appealable, the appeal will still be struck from the roll'.[6]

[21] In this matter, Nedbank had referred a dispute for arbitration to the Labour Commissioner under s 86 of the Act. Orders were sought in terms of s 86(15) which empowers an arbitrator appointed by the Labour Commissioner to grant interdicts, declaratory orders and an order directing the performance of an act to remedy a wrong (in this case directing the parties back to the negotiating forum).

[22] Part C of Chapter 8 of the Act deals with the arbitration of disputes. It establishes arbitration tribunals under the auspices of the Labour Commissioner to determine disputes in respect of labour matters. As was stressed by the Labour Court previously,[7] the jurisdiction to grant urgent relief is confined under s 117(1)(*e*) to urgent relief including interdicts pending the resolution of disputes referred to arbitration under chapter 8 of the Act.

[23] That was the nature of the relief sought from and granted by the Labour Court in this matter, interdicting a strike pending the determination of the arbitration of the dispute between the parties referred by Nedbank under s 86. The arbitration proceedings would make a definitive determination of the parties' rights. The statutory intention behind the new regime of arbitration of disputes is clearly that Labour disputes would be determined with all due speed and not subject to

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[6]See *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 689B-D.
[7]*Meatco v Namibia Food and Allied Workers Union and Others* 2013 (3) NR 777 (LC) para 24 – 25.

delays which had previously characterised court proceedings. This underlying statutory intention was explained in earlier Labour Court proceedings:

> 'But the Act did away with district labour courts. It placed greater emphasis on conciliation and, of importance in this context, it brought about a new regime of arbitration of disputes by specialised arbitration tribunals operating under the auspices of the Labour Commissioner. The provisions dealing with these tribunals in Part C of the Act place emphasis upon expediting the finalisation of disputes and upon the informality of those proceedings. The restriction of participation of legal practitioners and the range of time limits for bringing and completing proceedings demonstrate this. Arbitrators are enjoined to determine matters fairly and quickly and deal with the substantial merits of disputes with a minimum of legal formalities. The overriding intention of the legislature concerning the resolution of disputes is that this should be achieved with a minimum of legal formality and with due speed. This is not only laudable but particularly appropriate to labour issues. I stress that it is within this context that the Act places greater emphasis on alternative dispute resolution and confines the issues to be adjudicated upon by this court (in terms of) s 117'.[8]

[24] Within this statutory scheme, the Labour Court's jurisdiction in granting urgent relief under s 117(1)(*e*) is to be of a temporary nature and limited to relief pending the final determination of a dispute by an arbitrator (in terms of chapter 8).

[25] *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 691A, concerned the appealability of an order granting an interim interdict *pendente lite*. That court applied *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839A and *Zweni* (that in order to be appealable an order must be final

[8] *Meatco, supra*, para 24 quoting *Namdeb Diamond Corporation v Mineworkers Union of Namibia and Others* Case No LC 103/2011, unreported 13/04/2012.

in effect) and found that an interim interdict *pendente lite,* where a court had no intention of making a final and definitive order, was not appealable.[9]

[26] The order of the court below is not final in effect and not definitive of the rights of the parties. Nor does it have the effect of disposing of a substantial portion of the relief claimed. That would still need to be done in arbitration. The fact that the order is not susceptible to change by the Labour Court itself, a factor heavily emphasised in argument by Mr Marcus, is but a single factor which has been used to explain the attribute of finality[10] and is to be understood within that context. The overriding nature of the order of the Labour Court is anything but final. It is plainly temporary and is expressly stated to be. The fact that the Labour Court is not in a position to alter that order does not elevate it to the realm of finality. The order would clearly fall away upon the award of the arbitrator.

[27] The primary forum chosen by the legislature for the determination of disputes is an arbitration tribunal under the auspices of the Labour Commissioner. Only an interim interdict can thus be granted by the court pending the arbitration award by that tribunal. This necessarily entails that prejudice may arise in the sense that time runs – often crucial in annual wage negotiations – and cannot be recalled as was acknowledged in *Cronshaw.*[11] But this would be a matter to be taken into account in the exercise of its discretion by the Labour Court. In a civil context, a court may (and often does) require an undertaking to pay damages if it subsequently emerges that an interdict should not have been granted.[12]

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[9] *Supra* at 690 – 691.
[10] *Zweni supra.*
[11] *Supra* at 690H-I.
[12] *Cronshaw supra* at 690I-J.

[28] Schutz JA in *Cronshaw* provides a further explanation why the grant of a temporary interdict is without prompt appeal.[13] Prospective harm is a factor to be judged by the court of first instance in weighing the balance of convenience. This weighing exercise is aptly described by Schutz JA:

> 'This is a responsible and often difficult balancing, premised as it is on the distinct possibility that the order be wrongly granted, because of the incomplete information available to the judge, and sometimes the haste with which such matters have to be dealt with. If the grant of an interim interdict were appealable and leave were to be granted (the test being reasonable prospects of success) the interim order would be stayed. Such a stay would be destructive of the main object of an interim interdict - to maintain the status *quo* pending the final determination of the main case.
>
> The stay may in its turn lead to what is called an application for leave to execute (to put the order into operation again) where considerations similar to those already weighed under the balance of convenience would have to be re-assessed. The court of first instance would then be required to reach a decision, on imperfect information, a second time, all with regard to the interim situation. If it be postulated that leave to appeal can and has been granted, the appeal court would have to reconsider that situation without being in a position to reach a final decision. From a practical point of view it seems preferable that the merits of the interdict be left for final determination at the trial, and that the interim relief, to which the balance of convenience is relevant, be considered once only.
> The net effect of a contrary rule, allowing an appeal against the grant of interim orders, could be the undermining of a necessarily imperfect procedure, which is nonetheless usually best designed to achieve justice'. [14]

[29] These reasons for the non-appealability of the grant of interim interdicts pending the finalisation of an action apply with equal force to interim interdicts

[13] *Cronshaw supra* at 691B-C.
[14] *Supra* at 691 B-F.

granted pending the finalisation of disputes under s 86 of the Act. The court in *Cronshaw* found that, even if leave were given (as had occurred in that matter) an interim interdict *pendente lite* would not be appealable on an application of the principles distilled from the *Pretoria Garrison* and *Zweni* cases. It is not necessary for current purposes to make that finding in this appeal, given the fact that the order of the Labour Court is interlocutory and no leave was sought or granted.

[30] The fact that one of the parties – in this case, the union as emphasised in argument – is caused inconvenience or at a disadvantage (being delayed in exercising its strike weapon in annual wage negotiations) is not taken into account in determining appealability, as was expressly found in *Zweni.*[15] These would be factors to be considered by the court granting the order when weighing the balance of convenience and may conceivably be raised in an application for leave to appeal. But more importantly this predicament should hardly arise if the dispute resolving mechanisms established by the Labour Act function effectively. That Act after all brought about a new regime of resolving labour disputes by specialised arbitration tribunals under the auspices of the Labour Commissioner. The Act expressly contemplates that they are to go about this important task with all due speed and with a lack of formality to ensure these disputes are resolved expeditiously. This principle is further underpinned by the statutory injunction to arbitrators to make their award within 30 days of the conclusion of the arbitration proceedings.[16]

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[15] *Supra* at 533B-C. See also *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550D-H.
[16] S 86(18) of Act 11 of 2007.

[31] At the hearing of the appeal, counsel were asked at what stage the arbitration proceedings are. Counsel, relying on instructions, replied that no date had even been set for those proceedings. This, despite the fact that the dispute had been referred on 28 April already - some three and a half months ago. This inexplicable delay can in no way be ascribed to the fact the interdict proceedings were brought in the Labour Court. Those proceedings, launched on 31 May 2015 (more than a month after the dispute had been referred), concerned an interdict pending the determination of the dispute so referred. The Labour Court application had no legal effect upon the determination of that dispute. If anything, it accentuated what the Act provides – that disputes referred under s 86 should be expeditiously disposed of. The Labour Court application expressly and correctly contemplated that the arbitration under s 86 should proceed and was entirely ancillary to those proceedings. Indeed, if those proceedings had gone ahead as contemplated by the Act, they should already have been completed and an award made by now or very shortly from now. These proceedings on appeal exemplify what the Act seeks to prevent - protracted litigation of labour disputes with the attendant unsatisfactory features of escalating costs, delays and uncertainty and the spectre of the courts not being in a position to address and resolve the real dispute between the parties.

[32] What is clear from the aforegoing is that an interim interdict as granted by the Labour Court is inherently an interlocutory order upon an application of the principles laid down in *Zweni,* which have been applied in this Court. Leave was thus required under s 18(3) of the High Court Act. It had not been sought and was

thus absent. Given what was stated in *Cronshaw*[17], cited with approval in *Shetu*[18], it is by no means clear that the order would even have been appealable with leave. But that further question is left open.

[33] In the absence of leave, it follows that the appeal is to be struck from the roll. In those circumstances, costs should follow the event.

[34] The appeal is accordingly struck from the roll with costs. Those costs include the costs of one instructing and two instructed counsel.

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SMUTS JA

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DAMASEB DCJ

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MAINGA JA

[17] *Supra* at 689B-D.
[18] *Supra* in para 22.

APPEARANCES

APPELLANT:	N Marcus Instructed by Nixon Marcus Law Office
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