IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Case No.: JA70/98

In the matter between:

JDG Trading (Pty) Ltd t/a Price 'n Pride **Appellant**

and

E.K. Brunsdon **Respondent**

JUDGMENT

Zondo AJP:

INTRODUCTION

[1] This is an appeal by the appellant against a determination made against it by the industrial court in terms of section 46(9)(c) of the now repealed Labour Relations Act 1956 (Act No. 28 of 1956) ("the old Act") in a dispute between the appellant and the respondent. The dispute was about whether the respondent's dismissal by the appellant constituted an unfair labour practice. Before proceeding to consider the appeal, there are two matters of a procedural nature that, I think, would be more conveniently dealt with at this stage of the judgment than later. I propose dealing with them first. The first relates to a power of attorney filed by the appellant. The second relates to what appears to be a failure on the appellant's part to deliver the record of the appeal within the time specified in the rules of this Court.

The power of attorney:

[2] At the commencement of his argument, Counsel for the appellant informed the Court that, as he had been unable to establish that the appellant's attorney had filed a power of attorney in this matter, he had arranged for one to be made available. A power of attorney was then handed up in Court without any objection from the respondent's Counsel. Counsel for the respondent did not seek to take any point about the filing or the timing of the filing of the power of attorney. Appellant's Counsel also handed up a substantive application by the appellant for the condonation of the filing of the power of attorney at the stage at which it was filed. Again there was no objection from the respondent's Counsel.

[3] Counsel for the appellant then presented argument in support of the appellant's application for condonation in respect of the power of attorney. Argument then proceeded on both matters relating to the delivery of the record at the time it was delivered as well as to the merits of the appeal. Thereafter the Court reserved judgment. This then is the Court's judgment. I deal first with the issue of the power of attorney.

Power of attorney

[4] In the rules of this Court, the only rule which provides for the filing of a power of attorney is rule 6. The rules of this Court were published under GN No 1666, GG 17495 of 14 October 1996 as amended by GN R961, GG18142 of the 11th of July 1997. In all probability rule 6 is the rule which Counsel for the appellant had in mind as the rule, which he was submitting, had not been complied with by the appellant in not filing the power of attorney. It is also the rule that the appellant's previous attorney, who, apparently, now practices as an advocate, had in mind when he deposed to an affidavit on behalf of the appellant seeking condonation for what he saw as the late filing of the power of

attorney.

[5] The first question that needs to be decided is whether rule 6 applies to a case such as this one, namely, an appeal to this Court against a judgment of the industrial court because, if that rule does not apply, and if no applicable rule requires the filing of a power of attorney in an appeal such as this one, then the appellant does not require any condonation.

[6] Rule 6 reads as follows:

"**Powers of attorney**

(1) **A power of attorney authorising a representative to prosecute the appeal or the cross-appeal must be delivered within 10 days of the delivery of any notice of appeal or cross-appeal.**

(2) If there is no cross-appeal, a power of attorney to oppose an appeal must be filed with the registrar by the respondent's representative when copies of the respondent's main heads of argument are filed under rule 9.

(3) The State Attorney or any attorney acting on behalf of the Republic of South Africa or the government of any province need not file a power of attorney."

[7] It is clear from a reading of all the rules of this Court that they were designed for the processing of appeals to this Court against judgments

emanating from the Labour Court and not from the industrial court. One such indication is rule 5(9) which requires that the record which is delivered to the registrar of this Court must be certified by the registrar of the Labour Court as correct. However, there is rule 5A which bears the heading: "**Appeal from the industrial court**". That rule was inserted, probably as an afterthought, in order to deal with appeals to this Court against judgments of the industrial court. It was inserted in the midst of rules governing appeals emanating from the Labour Court.

[8] Rule 5A does not contain any provision which requires the filing of a power of attorney. Subrules (1), (2) and (3) of rule 5A deal with the noting of an appeal and a cross-appeal against judgments of the industrial court as well as the contents of such notices. Sub-rule (4) seeks to make certain rules governing appeals to this Court against judgments of the Labour Court applicable to appeals against judgments of the industrial court.

[9] Rule 5A(4) reads thus:

> "**When an appeal has been noted, the provisions of Rule 5(7) to (22) apply**".
>
> The provisions of rule 5(7) to (22) do not anywhere deal with the filing of a power of attorney. It is clear from the provisions of Rule 5A(4) that rule 6 is not one of the rules of this Court which sub-rule (4) seeks to make applicable to appeals against judgments of the industrial court.

[10] The question which arises is whether rule 6 applies to appeals against

judgments of the industrial court in the light of the provisions of rule 5A. Subject to what I will say later on in this judgment, it appears that there are two possible interpretations of the rules of this Court in regard to this question. For convenience I will call the one interpretation the wide interpretation and, the other, the narrow interpretation. Let me begin with the narrow interpretation and then the wide interpretation.

[11] The narrow interpretation

> The narrow interpretation is that rule 5A was intended to do no more than to make provision for the noting of appeals and cross-appeals against judgments of the industrial court and to regulate the delivery of the record and matters connected with the delivery of the record. In terms of this interpretation the rest of the rules of this Court dealing with other issues relating to appeals apply to appeals against judgments of the industrial court with the result, therefore, that rule 6 would also apply to such appeals.

[12] Fundamental to this interpretation is the notion that the Rules Board realised that there would be logistical difficulties in applying rule 5(1) to appeals against judgments of the industrial court and decided to make provisions in rule 5A which would easily apply to such appeals. The difficulty which the Rules Board would have realised in rule 5(1) is that in fixing the period within which an appeal should be noted, rule 5(1) requires such period to be calculated from the date of the granting of leave to appeal - a date which would not exist in respect of appeals against judgments of the industrial court because parties do not require leave to appeal against judgments of that tribunal.

[13] The wide interpretation

> The wide interpretation is that, subject to such practice directions as the Judge-President has power to issue under rule 12(2) of the Rules of this

Court, the appeal procedure provided by rule 5A is the whole appeal procedure governing appeals to this Court against judgments of the industrial court. This would mean that, in so far as rule 5A read with rule 5(7) to (22) does not make provision for certain matters of practice and procedure, such matters could be dealt with by way of practice directions issued by the Judge-President. This may be understandable if regard is had to the fact that such appeals were of a temporary nature.

[14] Which of the two interpretations is the correct one may not be decisive of the question whether in this case a power of attorney was required to have been filed and at what stage it was required to have been filed. I say this in the light of the provisions of section 173(3) of the Act. Section 173(3) provides as follows:

> "An appeal to the Labour Appeal Court **must be noted and prosecuted as if it were an appeal to the Appellate Division of the High Court in civil proceedings, except that the appeal must be noted within 21 days after the date on which leave o appeal has been granted."**

[15] Whether or not rule 6 applies, or, indeed, whether or not the rules of this Court as published under GN 1666, GG 17495 of 14 October 1996, as amended, govern appeals to this Court may well depend on what the effect of section 173(3) is in law. It could be that its effect is that the rules of the Supreme Court of Appeal governing civil appeals also govern appeals to this Court. In that case rule 6 would not apply.

[16] If the rules of the Supreme Court of Appeal govern appeals to this Court, then rule 4(3)(b) and (c) of those rules would apply. Those provisions contain a requirement for the delivery of a power of attorney by each side to an appeal.

Supreme Court of Appeal rule 4(3)(b) and (c) provide: **"3(b) If the notice of appeal or cross-appeal is lodged by an attorney, he shall within 20 days thereafter lodge with the registrar a power of attorney authorising him to prosecute the appeal or the cross-appeal. (c) Where there is no cross-appeal, a power of attorney to oppose an appeal shall be lodged with the registrar by the respondent's attorney when copies of the respondent's main heads of argument are lodged under rule 8."**

[17] From a reading of the provisions of Supreme Court of Appeal rule 4(3)(b) and (c), it is clear that its provisions substantially correspond to those of rule 6(1) and (2) of the rules of this Court except for the period as well as the reference to an attorney, in the one, when, in the other, there is a reference to a representative. Whether rule 6 of the rules of this Court or rule 4(3)(b) and (c) of the Supreme Court of Appeal rules applies, one thing is clear, namely, that the filing of a power of attorney is required, and, in this case, should have been filed much earlier than it ultimately was filed.

[18] From the affidavit filed by the appellant's previous attorney in support of the application for condonation, it would appear that the failure to file a power of attorney earlier than was done was due to oversight. The respondent has not taken the point and does not oppose the condonation application. In the light of this I am of the opinion that this Court should, in so far as this may be necessary, grant condonation for the late delivery of the power of attorney, especially, as there seems to be some uncertainty about which rules govern appeals to this Court. (See the discussion of this issue in the judgment of this Court in **Xaba v Portnet Limited** Case no: DA20/98 paragraphs 3.5 - 3.38).

[19] With reference to the third paragraph of the separate judgment of my Colleague, Conradie JA, it seems appropriate for me to point out that I do not say in this judgment that **Leonard Dingler (Pty) Ltd v Ngwenya** [1999] 5 BLLR 431 (LAC) was wrongly decided in so far as it said rule 6 of the rules of this Court applied to appeals against judgments of the industrial court. What I do say in this judgment is that whether it is the provisions of rule 6 of the rules of this Court or those of the rules of the Supreme Court of Appeal which apply is academic for purposes of this judgment because both do require the filing of a power of attorney. At any rate it needs to be borne in mind that the Court in **Leonard Dingler** does not appear to have been aware of the provisions of section 173(3) of the Act because it did not deal with them. I have no doubt that, if it was aware of those provisions, it would have dealt with them in the judgment.

[20] Lastly I mention that I will give consideration to the question whether, in order to achieve certainty about the requirement of powers of attorney in appeals to this Court, I should not issue an appropriate practice direction.

The delivery of the record and the appellant's application for condonation:

[21] The appellant believes that it delivered the record of appeal out of time in this matter. As a result of this, it has made a substantive application for condonation for the delivery of the record at the time that it delivered it.

Counsel for the appellant presented argument in support of such condonation. As this is an appeal against a judgment of the industrial court in terms of section 17(21A) of the old Act, read with section 212(2) and (3) of the Act and Item 22(5) of Schedule 7 to the Act, rule 5(A) of the rules of this Court applies. For reasons that will be apparent shortly, I must add that that is on the assumption that the rules of this Court and not those of the Supreme Court of Appeal apply to appeals to this Court.

[22] The provisions of rule 5A of the rules of this Court do not require the delivery of the record. However, rule 5A(4) seeks to make certain provisions of the rules of this Court governing appeals emanating from the Labour Court applicable to appeals from the industrial court. Rule 5A(4) says: "**When an appeal has been noted, the provisions of rule 5(7) to (22) apply**." Sub-rule 8 of rule 5 is one of the rules which Rule 5A(4) seeks to make applicable to an appeal such as this one.

[23] Rule 5(8) reads as follows:

"**(8) The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9).**"

[24] There are a number of issues which arise with regard to the consideration

of the delivery of the record in appeals against judgments of the industrial court. These entail the interpretation of rule 5A and rule 5 of the rules of this Court as well as the provisions of section 173(3) of the Act. For the reasons I gave in **Xaba v Portnet Ltd**, a judgment of this Court under case number DA20/98, I am of the opinion that:-

(a) if the rules of this Court apply to appeals against decisions of the industrial court, in which case rule 5(7),(8),(9),(10) and (17) will apply, the record of appeal was not delivered outside the prescribed period because such period has never commenced;

(b) if the rules of this Court do not apply but those of the Supreme Court of Appeal dealing with civil appeals do, I am of the opinion that the delay should be condoned partly because of the benevolent approach referred to in **Xaba,** which I propose should be adopted, as well as because, for the reasons that will be apparent below, the appellant has appreciable prospects of success in the appeal.

[25] In conclusion on the issue of the record, it remains to point out that, although in **Leonard Dingler** (*supra*) this Court, in dealing with rule 5(8) at 437J - 438A, this Court dealt with the problem presented by rule 5(8) on the basis that the period of 60 days referred to in rule 5(8) must be calculated from the date of the noting of the appeal, it is clear that that decision was *obiter* because the Court found that the record had been delivered timeously.

Furthermore, the Court gave no reason providing the legal basis for reading 60 days from the date of the noting of the appeal into rule 5(8) when the language of rule 5(8) is so clear and unambiguous that the period is 60 days from the date of the granting of leave to appeal.

The Appeal:

[26] The determination of the industrial court was given by one Professor Cloete, who was an additional member of the industrial court. The determination itself related to a dispute between the appellant and the respondent on whether or not the appellant's dismissal by the respondent, who had been one of its managers, constituted an unfair labour practice, and, if so, what relief, if any, the respondent was entitled to. This appeal itself comes to this Court in terms of section 17(21A) of the old Act read with section 212(2) and (3) of the Act and Item 22(5) of Schedule 7 to the Act.

[27] It is necessary to give a brief factual background to the dispute. In the light of the basis on which, it seems to me, this appeal can be decided, I do not consider it necessary to refer to various incidents that characterised the employment relationship between the appellant and the respondent. I propose referring only to those facts which are strictly necessary for purposes of this judgment.

[28] The respondent was employed by the appellant from the 2nd of August 1986 up to the 15th of February 1996 when he was dismissed by the appellant. When the respondent commenced employment with the appellant, his position was that of a salesman. He was subsequently promoted to the positions of sales

manager, branch manager and general manager, but, about four weeks before he was dismissed, he was appointed to the position of General Manager: Credit and Administration, which is the position he occupied at the time of his dismissal.

[29] The events surrounding the dismissal of the respondent can conveniently be divided into those which occurred before the 15th January 1996 and those which occurred between that date and the 15th February 1996. The 15th January 1996 and the 15th February 1996 are, in my view, the most crucial dates to be borne in mind in regard to determining the fairness or otherwise of the respondent's dismissal.

[30] There is not much in regard to the period before the 15th January 1996 that needs to be recited, save to say that, for some time up to that date, the respondent's position was that of General Manager. In regard to that period I am also prepared to accept that the respondent's performance in that position left much to be desired or was poor.

[31] Before dealing with the events after the 15th of January 1996, it is necessary to deal first with what occurred on the 14th and 15th of January 1996. On the 14th of January the respondent received a call from the appellant's operations manager, Mr John Hall. Mr Hall asked the respondent to see him at

the appellant's head office in Johannesburg the following day, namely, the 15th of January 1996. The respondent agreed.

[32] On the 15th of January 1996 Mr Hall and the respondent met in Johannesburg. It is not necessary to go into details about the discussion between the two men, save to say that it revolved around the performance of the stores of the appellant which fell under the respondent. There can be no doubt that Mr Hall thought that the respondent's performance was not satisfactory. Indeed, Mr Hall told the respondent that they (i.e. Mr Hall and the respondent) needed to convince Mr Nel, the chief executive officer of the appellant, that the respondent needed to be given about five months to ensure that there was improvement in the areas falling under him. Apparently Mr Nel had paid a visit to the North-Eastern Transvaal Region, which fell under the respondent, before and had come back very unhappy about the respondent's performance.

[33] While Mr Hall and the respondent were busy trying to formulate proposals to put to Mr Nel, Mr Nel entered the office and joined the discussion. Mr Nel made it clear to the respondent that he was very unhappy about the respondent's performance and that he thought the respondent was not the right person to solve the problems in the region which fell under him. Mr Nel told the respondent that he had come to the conclusion that the respondent could not work with people.

[34] Mr Hall then offered to remove the respondent from the position of General Manager which he was occupying at that time and appoint him to the

position of General Manager: Credit and Administration. Mr Nel sought to justify this by saying the latter was a more specialised position which did not demand the same skills as the position of General Manager or which did not demand them to the same extent. Initially the respondent did not seem to be very happy with this but ultimately he accepted the offer. It was then agreed between the parties that the respondent would immediately take leave for a few days. The respondent took leave from that same day up to the 27th of January 1996.

[35] When the respondent returned from leave on the 28th of January 1996, he was asked to attend a "bosberaad" of the appellant's management. The "bosberaad" began on the 29th of January and went on until the 31st of January. The venue of the "bosberaad" is said to have been somewhere in the vicinity of the Hartebeespoortdam. The respondent, it appears, commenced duties in his new position on the 1st of February 1996, although, when he attended the "bosberaad", he attended it in his new capacity.

[36] On the 14th of February 1996, a month to the day since Mr Hall's call to the respondent in respect of the meeting of the 15th of January 1996, the respondent received a call while he was on a visit to Price n' Pride, Giyani, from Mr Tokkie Combrinck, the Executive Head: Credit and Administration, of

the appellant. Mr Combrinck instructed the respondent to attend a certain meeting at the respondent's head office in Johannesburg the following morning, namely, on the 15th of February 1996. The respondent asked Mr Combrinck what the meeting was about but all Mr Combrinck said in reply was that there were a couple of matters that needed to be discussed and did not disclose the nature of those issues.

[37] On the morning of the 15th of February 1996 the respondent proceeded to the meeting at the respondent's head office in Johannesburg. Present at the meeting were Messrs Nel, (the CEO), John Hall, Tokkie Combrinck, Donny and McCullock. In his statement of case the respondent says that, after he had greeted everyone at the meeting and sat down, he was informed by Mr Nel that the executive team of the respondent had come to the conclusion that, for reasons which Mr Hall would explain to him, the company no longer had a position for him. Mr Nel, who appeared for the appellant before us, conceded during argument, in my view correctly so, that in all probability the decision to dismiss the respondent was taken either prior to the meeting or just before the respondent entered the room where the meeting was held.

[38] In paragraph 4.17 of his statement of case the respondent made the following allegation: **"Mnr Nel het voortgegaan deur te se dat die besluit**

geneem is tot beswil van besigheid en dat hulle nie die huidige pos wat die applikant beklee het vir hom sou aanbied indien sekere feite tot hulle beskikking was nie. Dit was dus duidelik dat die besluit reeds geneem is voor die vergadering." In replying to this allegation, the appellant stated in its statement of defence that it was denying any allegations which were contrary to its version that it was faced with certain problems arising out of the respondent's failure to perform his duties properly and that Mr Nel informed the respondent that it was evident that the respondent did not possess the skills and abilities required for the performance of his "**current duties**". The allegations in paragraph 4.17 of the respondent's statement of case are not contrary to that version of the respondent and must, therefore, be taken as not denied.

[39] The appellant then went on in paragraph 25.2 of its statement of defence and said: "**Any contrary allegations contained in the paragraphs under reply to what is stated above are denied**." This was still part of the appellant's reply to the respondent's allegations contained in paragraph 4.17 of his statement of case. Again the respondent's allegations in paragraph 4.17 of the respondent's statement of case are not contrary to or inconsistent with the appellant's version.

[40] I have stated above that the respondent stated in his statement of case that when Mr Nel told him of the decision which had been taken about him, he had said that that decision had been taken for reasons which Mr Hall would explain

to him. In paragraphs 4.18.1 up to 4.18.3 of his statement of case, the respondent gives his version of what the reasons were which Mr Hall then told him at the meeting. According to the respondent (see paragraphs 4.18.1 to 4.18.3 of his statement of case), the following are the reasons for the respondent's dismissal as given by Mr Hall at the meeting:

"**4.18.1 Na 'n besoek deur Mnr Hall en Mnr Nel in die Noord Transvaal was hulle baie ongelukkig oor die toestand van sekere winkels onder andere die Louis Trichardt pakhuis waar hulle gevind het dat baie van die voorraad beskadig is en dat die voertuie nie in 'n goeie toestand was nie. Daar is vir hulle gese dat hierdie probleme by die Applikant aangemeld was, maar dat die Applikant niks gedoen het om die probleme op te los nie. Daar is ook aan hulle gese deur sekere takbestuurders wat van die pakhuis gebruik maak, dat die probleme in die pakhuis tot gevolg gehad het dat hulle baie besigheid oor die kerstyd verloor het en dat dit die rede vir 'n daling in hulle verkope was.**

4.18.2 Gedurende besoek aan die Swazilandstreek was daar ook aan hulle gese dat die Applikant se ondersteuning aan die streek nie voldoende was nie en dit was aangevoer as een van die redes waarom die streek nie so goed gevaar het nie.

4.18.3 Daar is ook volgens Mnr J Hall tydens 'n vergadering met area bestuurders wat aan Applicant rapporteer het, duidelike tekens dat hulle verlig was dat die Applikant nie meer in beheer van die streek was nie."

In paragraph 26 of its statement of defence the appellant admitted that

these were the reasons which Mr Hall gave the respondent at the meeting.

[41] After Mr Hall had told the respondent the appellant's reasons for its decision, the respondent was given an opportunity to react to what had been said. The respondent told the meeting that he could not see his way to reacting to what had been said as he had not been given an opportunity to prepare himself for this and seeing that he had already been told that the company no longer had work for him. Thereafter Mr Nel told the respondent that he would be paid up to the end of March 1996 and that, if he wished to, he could purchase the company car that he had been using. Mr Nel told the respondent that the respondent did not need to serve his notice period which was up to the end of March 1996. In essence that is what transpired at the meeting.

[42] It would appear that the appellant thereafter continued to seek to hear what the respondent had to say about what the management had said at the meeting, but the respondent never used that opportunity - probably for the same reasons that he had stated at the meeting of the 15th February 1996. The only communication the appellant received after the 15th of February from the side of the respondent was an attorney's letter in which apparently an exorbitant demand for a severance package was made. The appellant was not prepared to accede to that demand. Subsequently the respondent lodged an unfair labour practice claim in the industrial court.

[43] The industrial court heard evidence and reserved judgment. Thereafter it handed down a determination to the effect that the respondent's dismissal was without a valid reason and without a fair procedure. It did not order the respondent's reinstatement, but ordered payment by the appellant to the respondent of an amount of R241 500,00 as well as costs as between attorney and client on the B-scale of the Magistrate's Court. It gave no reasons for its determination. Even when the appellant's attorneys formally asked the

industrial court to furnish its reasons for its determination, these were not given.

[44] After about eight months of waiting in vain for the reasons, the appellant gave up and proceeded to file its notice of appeal and grounds of appeal without the benefit of the industrial court's reasons for the determination. No explanation appears to have ever been given why the industrial court member concerned did not give his reasons. The industrial court's failure to give reasons for its determination especially when asked to do so by the party against whom it had already given judgment must be deprecated in the strongest possible terms.

[45] The appellant has appealed to this Court against the finding that the dismissal was without a valid reason, that it was without a fair procedure, the order that the appellant pay to the respondent the amount awarded by the industrial court as well as the attorney and client costs order. All of these will be dealt with below.

Was there a valid reason for the respondent's dismissal?

[46] The appeal was argued by Mr Nel on the basis that the respondent's dismissal was justified because the respondent lacked the skills and abilities required of him in order to perform his duties. This raised the question as to what those skills and abilities were. In this regard Mr Nel argued the appellant's case on the basis that it was the inter-personal skills which the respondent did not have. There was also mention of the fact that at the "bosberaad", the respondent had not made any contribution.

[47] The reasons which were given to the respondent at the meeting of the 15th of February 1996 by Mr Hall as the reasons for his dismissal do not include his failure to make a contribution at the "bosberaad". Accordingly, in my view, it can be safely accepted that, on its own, the respondent's failure to make a contribution at the "bosberaad" did not form part of the real reasons for the dismissal. A finding that places much reliance on the respondent's failure to make a contribution at the "bosberaad" would, in my view, be to disregard the

issues as circumscribed by the parties in the pleadings because the reasons given in the pleadings for the respondent's dismissal are not in dispute. A court is not entitled to disregard issues as set out in the pleadings. At any rate, even the appellant says in paragraph 6 of its Counsel's heads of argument that the "deciding factor" in the conclusion of the appellant to dismiss the respondent was the "respondent's inter-personal skills". I think lack of interpersonal skills was intended. (my underlining).

[48] The difficulty I have with the appellant's reason, namely, a lack of interpersonal skills, is that it was accepted by the appellant that this was the same reason why the respondent had been removed from the position of General Manager which he was occupying as at the 15th January 1996. He was told that he was being offered the new position of General Manager: Credit and Administration because in it he would not need the same skills or would not need them as much as he would for the position of General Manager. Of course, that reasoning makes perfect sense. An employer who, when faced with an employee who lacks the skills required in a particular position, looks around to place such employee in another position which may not require the same skills rather than dismiss such employee must be commended as a good employer.

[49] It is common cause that on the evidence before us there is nothing that the respondent can be said to have done from the time he assumed duty in the new

position to the date of his dismissal which could be said to prove that he did not have skills required for the new position. Such lack of interpersonal skills or poor performance as the appellant relies upon to justify the dismissal relates to the respondent's performance as General Manager prior to the 15th of January 1996 and not as General Manager: Credit and Administration. In fact the reasons which Mr Hall gave to the respondent for the latter's dismissal at the meeting of the 15th February all relate to the period prior to the 15th of January 1996 when he was still General Manager.

[50] Mr Nel himself had told the respondent (and this is referred to even by the appellant's Counsel in his heads of argument), that he (i.e. Mr Nel) had specifically created a position for the respondent in a more specialised field because the respondent's lack of interpersonal skills made him unsuitable for the position of General Manager. This, quite clearly, implied that in the new position such interpersonal skills were not a significant requirement. In my view this meant that a fact which was common cause between the parties ran directly contrary to the very basis of the appellant's Counsel's argument, namely, the argument that the respondent was dismissed from the new position because he lacked interpersonal skills - the very skills the appellant's CEO had said were not required in any significant way in the new position.

[51] In the light of what, it is common cause, the CEO had said to the respondent in regard to interpersonal skills and the new position when he appointed the respondent to it and the argument that the latter was, nevertheless, dismissed for lacking interpersonal skills, the question arises whether the new position required possession of interpersonal skills as much as did the position of General Manager or in any significant way. For the appellant to remove the respondent from the position of General Manager on the basis that he lacked interpersonal skills and appoint him to another position which also required the same skills to the same extent would not only have made no sense but also it would have been illogical. I am of the opinion that there is nothing in the record which would justify a conclusion that the appellant or Mr Nel could act in that manner. Accordingly the matter must be decided on the basis that the new position did not require interpersonal skills to any significant degree. If that is so, then the appellant must show to what extent such skill was required and where the respondent fell short. This has not been shown.

[52] What I think may well have happened in this case is that, after the appellant had made the deal of the 15th January 1996 with the respondent, for some reason it changed its mind about keeping the respondent - maybe because someone did not agree with Mr Nel's decision to give the respondent another position or maybe because the full extent of the respondent's lack of skills or of his poor performance as General Manager was only discovered after the deal and it was thought that he did not deserve to have been given the new position but should have been dismissed. In those circumstances the decision was then taken to dismiss the respondent. Unfortunately for the appellant, by that time, in my view, it was too late. The respondent had already been offered by the appellant, and he had accepted, the new position. He had already had a deal with the appellant.

[53] The appellant should have waited until it completed its investigations into

the respondent's performance as General Manager before it could decide whether to offer the respondent another position or whether it would dismiss him because, if the results of the investigation showed him as not suitable for any other position in the company, the appellant would have been fully justified in dismissing him. The appellant did not do this. In those circumstances it is understandable that the respondent should feel aggrieved when he finds himself dismissed after completing only two weeks in the new job and before he has heard his superiors complain about his performance in the job.

[54] In my judgment once the appellant had removed the respondent from the position of General Manager on grounds that he lacked certain skills required for the position and had made a deal with the respondent in terms of which the latter was appointed to a different position, the appellant could only dismiss the respondent for poor performance or lack of skills if such poor performance or lack of skills related to the new position. In fact once the respondent had assumed duties in the new position which gave him a "lifeline" with the appellant, the respondent was entitled to expect that he would not be dismissed for poor performance or lack of skills before he could prove himself one way or the other in the new job.

[55] It was not suggested on the appellant's behalf, and in my view it could not be justifiably suggested, that the period of two weeks that the respondent had in the new position before he was dismissed, had been a reasonable opportunity for the respondent to prove himself. Indeed, there is not even evidence before us that during that period of two weeks, there was anything that the respondent did wrong or failed to do, nor is there evidence that during that period occasions arose which had required him to use skills in the new job which he had been unable to demonstrate. In those circumstances I am unable to interfere with the finding of the industrial court that the respondent's dismissal was without a valid reason.

<u>The attack on the finding of absence of a fair procedure:</u>

[56] When it is contemplated that an employee may lose his job because of poor performance, he is entitled to be afforded an opportunity to be heard before the decision is taken to terminate his services. Although **Lanzerac Manor (Pty) Ltd v de Vries & Others** (1996) 17 ILJ 11 (A) related to retrenchment, the

decision as to which employees were going to be selected for retrenchment was based on performance. At 17B - C in that case, Grosskopf JA said:

> "**In my opinion the affected employees should have been afforded a proper opportunity to make representations and deal with any unfavourable conclusions regarding their work performance, before any final decision on their retrenchment was made."**

In my view those remarks apply with equal force to the case before us.

[57] As already stated above, the decision to dismiss the respondent was taken prior to him being given an opportunity to state his case. In the light of this I asked appellant's Counsel whether that did not constitute a failure to observe the *audi alteram partem* rule which would render the dismissal unfair. Counsel for the appellant submitted that in our law it was permissible for an employer to take a decision to dismiss an employee before complying with the *audi alteram partem* maxim in certain circumstances. Counsel for the appellant ended up submitting that the circumstances where that is permissible are those to be found in **Blue Circle Materials v Haskins** (1992) 1 LCD (6) (LAC). That is a judgment of the old Labour Appeal Court.

[58] In my view appellant's Counsel's submission cannot be sustained. As a general rule, where the *audi alteram partem* rule applies, it must be complied

with prior to the decision being taken unless exceptional circumstances exist (see Corbett CJ in **Administrator of the TVL & Others v Traub & Others** (1989) 10 ILJ 823 (A) at 828J - 829C). As Corbett CJ found in **Traub** at 829C - D, in this case I also find that there were no exceptional circumstances justifying the taking of the decision to dismiss before the respondent could be heard. Accordingly even on that ground alone the dismissal of the respondent was procedurally unfair.

[59] Appellant's Counsel also sought to argue that, in the light of the poor performance of the respondent, even if he had been given an opportunity to be heard before the decision was taken, this would have made no difference and the result would have been the same. He submitted that in those circumstances it could not be said that the appellant acted unfairly. This submission attempts to resurrect the 'no difference' rule. In my view, that rule has no place in our law and should be rejected. (See **Administrator, Tvl & Others v Zenzile & Others** (1991) 12 ILJ 259 (A) at 273C - 274A).

[60] Appellant's Counsel finally submitted that the respondent could not be heard to complain about non-compliance with the *audi alteram partem* rule because he was given an opportunity to be heard but he did not make use of it. In my view the answer to this is that the respondent was being offered an opportunity to be heard in a manner which rendered his right to *audi alteram*

partem rule illusory. In such a case the respondent was entitled to reject such an opportunity. The appellant had taken its decision already and it would have been an exercise in futility for the respondent to make representations in those circumstances (see **Nkomo & Others v Administrator, Natal & Others** (1991) 12 ILJ 521 (N) at 528 I - 529 A). The respondent cannot be blamed for not utilising an opportunity to be heard which was so manifestly unfair and inadequate (see also Colman J in **Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture** 1980 (3) SA 476 (T) at 486 D - G).

[61] Some argument was also advanced by the appellant's Counsel that the respondent was employed as a senior manager and that he knew what his shortcomings were. That an employee is a senior manager does not, in my view, give the employer the licence to dispense with the observance of the *audi alteram partem* rule. Such an employee is also entitled to the observance of the *audi alteram partem* rule. What may be relaxed in the case of a senior manager may be the form which the observance of the rule may take (see what Vivier JA said in **Unilong Freight Distributors (Pty) Ltd v Muller** (1998) 19 229 (SCA) at 238 A - B).

[62] The opportunity which is given to a senior employee must still meet at least the two basic requirements of the *audi alteram partem* rule, namely, he must be given notice of the contemplated action and a proper opportunity to be

heard. The reference to "**notice of the contemplated action**" necessarily implies that the action has not been decided upon finally as yet but that it is one which may or may not be taken depending on the representations which the affected person may give. In this case the opportunity to be heard which the appellant purported to give to the respondent did not meet any of these two basic requirements (see Smalberger JA in **Administrator, Tvl & Others v Thelestane** (1991) 12 ILJ 506 (A) at 519D - E; - although this passage is in the minority judgment, it was not dissented from by the majority - see also what Colman J said in **Heatherdale Farms**, supra, at 486F - G). In my judgment the appellant's failure to afford the respondent a proper opportunity to be heard rendered the dismissal unfair.

Relief:

[63] The industrial court ordered payment of an amount which this Court was told by Counsel was the equivalent of the salary the respondent would have earned from the date of dismissal to the hearing in the industrial court. This dismissal has been confirmed to have been unfair both substantively and procedurally. Subject to the proviso that the respondent should not be paid twice for, for example, the month of March 1996, which was his notice period, I can see no reason to interfere with that amount.

[64] With regard to costs, there was clearly no basis for a costs order which was on the attorney and client scale. Even Counsel for the respondent indicated that he was unable to justify such a costs order. We are satisfied that at best for the respondent costs should have been party and party costs. We will amend the order of costs appropriately.

[65] With regard to costs in this Court, I am of the opinion that the

requirements of law and fairness dictate that the appellant should be ordered to pay the costs of the appeal.

[64] In the result the order I make is the following:

1. Subject to paragraph 2 below, the appeal is dismissed with costs.

2. The costs order made by the industrial court is amended by the deletion of the reference to attorney and client.

RMM Zondo
Acting Judge President

I concur

C R Nicholson
Judge of Appeal

CONRADIE JA

[65] I respectfully disagree with certain aspects of the judgment of my brother Zondo which I have read with great interest.

[66] I have difficulty with the notion that rule 6 of the rules of this court does not apply to appeals from the industrial court. As recently as

February of this year it was decided in *Leonard Dingler (Pty) Ltd Ngwenya* [1999] 5 BLLR 431 (LAC) at 435 E-F that 'it is clear that rule 6(1) does prescribe the filing of a power of attorney in respect of any and every appeal to this court.'

[67] Although the question has not yet, as far as I am aware, arisen in this court, I am strongly of the view that - particularly in the light of the provisions of s 167(3) of the Labour Relations Act 66 of 1995 establishing the labour appeal court as a superior court with the inherent powers and standing of the supreme court of appeal - this court should, like the supreme court of appeal, not depart from one of its own judgments unless it is convinced that it was clearly wrong. (See: *Ellispark Stadion Bpk v Minister van Justisie* 1990 1 SA 1038 (AD) at 1051 H - I. The corollary of this is that a previous decision considered to be wrong is normally unequivocally overruled.

[68] As I read the judgment of Zondo AJP his conclusion is that the filing of a power of attorney is required, either by virtue of rule 6 of the rules of this court or by virtue of rule 4(3)(b) and (c) of the rules of the

supreme court of appeal. Faced with an earlier positive finding that rule 6 applies and a later finding that it may or may not apply, I would not think that the earlier decision has, as a matter of *stare decisis,* been overruled. In my view, therefore, it is still the law that rule 6 of the rules of this court governs the filing of powers of attorney in appeals from the industrial court. Nothing makes me recoil from this conclusion since I do not, on reflection, consider that *Dingler's* case is clearly wrong.

[69] I do not take the same disconsolate view of the capacity of the drafters of this court's rules as Zondo AJP does. I would hesitate to conclude that they were, by early 1997, not aware of the fact that provision was to be made in such rules for appeals from the industrial court. It may be that the drafters of the rules initially overlooked this, but when they came to insert rule 5A in the text of the rules in February 1997, they had, on this assumption, clearly recognised their error and were attempting to put it right. If one supposes that, in doing so, they intended rule 5A to be the *only* rule applicable to appeals from the industrial court, one would have to attribute to them at the same time

the intention that the remaining rules, for example those relating to powers of attorney (rule 6), the delivery of heads of argument (rule 9) and the consequences of a failure to appear at an appeal hearing (rule 11) should *not* be applicable to appeals other than those from the labour court. I would feel awkward in attributing such a curious intention to the rule-makers. I think it far more likely that (whatever they may at first have thought) by the time they came to incorporate rule 5A, they realised that the rules had to cater for both types of appeals and made what they thought was adequate provision for that. I prefer to think, therefore, that when rule 5A was inserted in the rules and the wording of rule 6(1) and (2) was left unaltered this was done intentionally. They refer to a power of attorney for the prosecution of 'the appeal or cross-appeal' and to 'a power of attorney to oppose an appeal.' The word 'appeal' must, I think, refer to appeals for which provision has been made in rules 5 and 5A.

[70] As for the late filing of the record I am, of course, bound by the decision in *Xaba v Portnet* (case no.: DA 20/98, judgment delivered on 19/10/99). Save, therefore, to record my respectful disagreement with

the conclusion that the rules if this court, on a proper interpretation, fail to make provision for a vital procedural stage in the prosecution of an appeal, I say no more about it.

[71] I would think that where an employer on reasonable grounds comes to the conclusion that a senior management employee is unsuited to the position which he holds, the scope for having such a conclusion overturned in a court of law is small. It is in the highest degree desirable that an employer should, in the interests of efficiency, be entitled to chose with as much freedom as is compatible with the honest exercise of a discretion, who it wants at or near the helm of its enterprise. Qualities like leadership, resolve, business acumen, judgment and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable either.

[72] I agree with what is said in Smith & Wood's Industrial Law (6th ed.) p. 405:

> 'In the realm of dismissal for incapability, it is important that the employer's business should not have to suffer, to the detriment of all concerned, through the ineptitude or inefficiency of a particular employee. However, it is also important that the employee whose work is causing dissatisfaction should be treated fairly. The question for the tribunal is whether the

employer has satisfied them that he genuinely believed on reasonable grounds that the employee was incapable.'

[73] On the evidence the appellant genuinely believed on reasonable grounds that the respondent was incapable of properly performing his duties in the positions he had previously occupied. It then decided, I think magnanimously, to try a solution which was jettisoned before it had been established whether it would work or not. Blowing hot and cold like that is not fair to any employee. Once the respondent had been promised a (last) chance, he should have been given that chance. He was, after all, not being dismissed from his old job (at which he had failed) but from the new one in which he had not yet had the opportunity of proving himself.

[74] As for procedural unfairness, it is unfair to expect an employer to apply to a senior executive those guidelines regarding counselling which have been worked out by the courts in relation to workers who wear blue collars and those who wear no collars at all (Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 324 D – E). An experienced executive who needs to be counselled on fundamental job

skills is probably not fit to be an executive. He is there to oversee others. He cannot do that if he cannot even oversee himself. Prof. M P Olivier some years ago wrote an interesting article in the industrial law journal entitled 'The Dismissal of Executive Employees'. It is to be found at (1988) 9 ILJ 519. I agree with him that the courts have in the case of senior employees (I would say correctly) taken a more flexible attitude in the application of the unfair dismissal guidelines. Nevertheless, in the case of all employees poor work performance is a problem to the solution of which the incumbent whose work is under scrutiny must be allowed to contribute. In the present case the respondent was, as regards his new job, not given that opportunity.

I agree with the orders given by Zondo AJP.

CONRADIE JA

Date of Hearing:	25 August 1999
Date of judgment:	21 October 1999
For the Appellant:	Mr Nel
Instructed By:	Snyman Van Der Heever Heyns Inc
For the Respondent:	Mr Blignaut
Instructed By:	Andre Van Dyk Attorneys