

CASE NO.: SA 6/99

IN THE SUPREME COURT OF NAMIBIA

In the matter between

TRANSNAMIB LIMITED

APPELLANT

And

W.F. POOLMAN AND 150 OTHERS

RESPONDENTS

CORAM: Mtambanengwe, A.J.A.; Silungwe, A.J.A. et O'Linn, A.J.A.

HEARD ON: 1999/10/05

DELIVERED ON: 1999/11/17

APPEAL JUDGMENT

O'LINN, A.J.A.: The Appellant, Transnamib Ltd., Appeals against the order of the Full Bench of the High Court of Namibia made on 3 February 1999, dismissing Appellant's appeal against the judgment of Hannah, J in the Labour Court of Namibia, handed down on 2 May 1997.

The Labour Court made the following order:

- "(1) The Applicants are granted special leave in terms of section 48 of the National Transport Corporation Act, 1987 to institute claims against the Respondent in respect of the underpayment of salary by the Respondent for the period from 20 February 1994 until 31 March 1996.
- (2) The Court refuses to entertain the application made in terms of section 24 of the Labour Act, 1992."

The Full Bench of the High Court, on appeal to it by Transnamib, dismissed the appeal.

Both the Labour Court and High Court declined to make any order as to costs.

It is necessary at the outset to briefly deal with the background of the litigation before the district labour court, the Labour Court and the High Court. For this purpose the following part of the judgment of the High Court will suffice:

"On 11 January 1996 the First Respondent addressed a letter to the Appellant and pointed out to it that the manner in which it calculated the overtime was in violation of the provisions of the Labour Act and demanded that the situation be rectified. The aforesaid letter was followed by a further letter written to the Appellant on the first Respondent's behalf on 31 January 1998 by his attorney wherein the Appellant's attention was again drawn to the fact that the overtime was

not calculated in accordance with the provisions of section 31 of the Labour Act, 1992. The matter was also discussed telephonically by a Mr. Hill representing the Appellant and Mr. Light, the attorney acting for the First Respondent. It is common cause that, as a result of the aforesaid communications, the Appellant, since March 1996, calculated the overtime in accordance with the provisions of section 31 of the Act and also undertook to calculate and pay to the relevant employees any amount underpaid as a result of the incorrect method of calculation for a period of one year.

The Respondents were, however, not satisfied with the Appellant's offer to make payments of unpaid overtime for a period of one year only and each of them lodged a complaint with the district labour court in which they claimed payment of the underpayment of overtime for the period 1 March 1993 to the date of the filing of the complaint, being 26 April 1996. In reply to the complaints the Appellant raised two special pleas. The first special plea is irrelevant to the present proceedings. The second special plea was to the effect that the claims cannot be enforced because the Respondents did not lodge written claims with the Appellant within three months from the date on which the claims became due as is required by section 48 of the National Transport Corporation Act, 1987.

To overcome this difficulty the Respondents applied to the Labour Court in terms of the proviso of section 48 of the Act for special leave to institute their claims. This application was argued before Hannah P (President) who came to the conclusion that the Respondents satisfied the requirements contained in the said proviso and exercised his discretion in favour of the Respondents by granting the orders referred to in the beginning of this judgment. The Appellant thereupon applied for and was granted leave to appeal by the Court below on 8 September 1997."

For the sake of convenience the Appellant will hereinafter be referred to as Transnamib and the Respondents as Poolman. The Labour Court will be referred to as the Labour Court and the Full Bench of the High Court as the Court *a quo*. The National Transport Corporation Act, 1987, will be referred to as the "NTC" Act and the Labour Act No. 6 of 1992, as the "Labour Act."

Mr. Clinton Light appeared before us for Poolman and Adv. Smuts for Transnamib. It must be noted that although Mr. Light appeared for Poolman in the Labour Court as well as the Court *a quo*, Adv. Maritz, SC, as he then was, appeared for Transnamib in the Labour Court and the Court *a quo*. Mr. Smuts was only briefed for this appeal after Mr. Maritz was elevated to the Bench.

After consideration of the extensive and thoroughly written heads of argument submitted by counsel for the parties and before the commencement of oral

argument, this Court, per O'Linn, AJA, raised certain legal issues *in limine*, which had neither been raised at all in the Labour Court nor in the Court *a quo*.

These issues were the following:

"Were the proceedings in both the Labour Court as well as the Court *a quo* not misconceived and as such an exercise in futility, in view of the fact that the initial application for special leave for the late institution of proceedings in the district labour court for unpaid wages, was based on section 48 of the NTC Act instead of section 24 of the Labour Act which deals with the requirements of special leave when employees wish to institute proceedings in the district labour court against their employers."

A subsidiary question was whether the Labour Court at any rate had the necessary jurisdiction as a Court of first instance, to hear an application under section 48 for special leave, when such application is not for a declaration of rights or an appeal and where the district labour court is at any rate the Court of first instance at least in regard to the claim for arrears or unpaid wages.

Mr. Light, on behalf of Poolman, after hearing the remarks of O'Linn, AJA, conceded the correctness of the main point raised by the Court, but reserved his position on the aforesaid subsidiary point.

Mr. Smuts however, was unable to make any concession on any of the aforesaid two points at that stage and requested more time to prepare argument on both points.

As a consequence, the hearing of this appeal was adjourned to 1 November 1999 and counsel given leave to file additional written heads of argument dealing with the aforesaid issues raised by the Court.

Mr. Light in his supplementary heads of argument, reiterated in his *viva voce* argument, repeated his concession made when the Court first raised the issues *in limine*. He concluded that:

"In other words, in the special area of claims brought under the Labour Act, section 24 regulates the time period exclusively, section 48 continues to operate in the area of claims against Appellant, except where a claim is brought under the Labour Act, when section 24 applies exclusively.

This also explains why the Legislature did not repeal section 48 when it enacted the Labour Act. The Legislature no doubt intended section 48 to continue in operation, but with its ambit reduced by section 24. In other words, section 24 would apply exclusively where the claim against Respondent was brought in a district labour court or the Labour Court. Section 48 would continue to apply in all cases where section 24 did not apply."

In regard to the supplementary issue raised by the Court, Mr. Light submitted in effect that the Labour Court would have had the necessary jurisdiction under section 18(1)(f) and/or (g) of the Labour Act to hear the application, if section 48 was indeed the correct section under which the application for special leave had to be brought.

Mr. Smuts on the other hand strenuously contended on the main issue raised by the Court that the Applicant in the position of Poolman had to comply with both section 24 of the Labour Act and section 48 of the NTC Act.

After reference to several authorities on the principles of Interpretation applicable, Mr. Smuts made the following submissions in conclusion on the main issue:

"19. With regard to the two provisions in question, it is respectfully submitted that section 48 sets a requirement for liability for the NTC. Liability does not ensue unless a claim is lodged within 3 months. It regulates claims against the NTC. It is the product of the special protective provision the legislature saw fit to provide to the NTC. Liability thus cannot attach to the NTC without compliance with section 48. That is the nature of the special provision relating to liability of the NTC.

20. On the other hand, section 24 is of a general nature and general application. It regulates the bringing of matters to the Labour

Court and district labour court. It does not regulate the liability of institutions such as the NTC. It merely regulates the procedure for bringing claims in those Courts:

21. The bringing of those claims to those Courts would, if submitted, always be subject to specific provisions in other specific legislation (or the common law) regulating liability of specific institutions or specific types of institutions. Other examples which spring to mind relate to the liability of a trust and how the substantive law requires that trusts be sued.

22. Another example would relate to the notice requirement as a requisite for liability to be found in other statutes. If any proceedings in any Court are to be preceded by a form of notice, then that notice must be given, notwithstanding the fact that section 24 regulates the instituting of proceedings in the Labour Court and the lodging of complaints in the district labour court. Thus special legislation or substantive law providing for liability for institutions or types of organisations or legal personalities must be complied with as a matter of substantive law in addition to the procedural requirements set by section 24 for the bringing of claims to those specific Courts, namely the Labour Court and district labour court.

23. It is further and in any event respectfully submitted that section 48 itself is not contrary to section 24 and that any apparent conflict at first blush is capable of a sensible reconciliation in accordance with the authorities referred to in paragraphs 15 and 16 above. Section 48 regulates the liability of the NTC whilst section 24 provides for the procedure of lodging complaints in the district labour court. Section 24 does not preclude prior notice or earlier lodging as a prerequisite for liability on the part of a respondent. It merely requires that a complaint shall not be lodged later than 12 months in that Court. It does not preclude lodging at an earlier stage. It merely prevents in peremptory terms lodging complaints later than 12 months save with special approval given on good cause shown.
24. It is accordingly not in conflict with section 24 to also require that other specific requisites provided for in other statutes must be met in the lodging of complaints against such institutions, namely requiring that the claim embodying the complaint be lodged within 3 months. That would not be in conflict with a prohibition of filing a complaint later than 12 months. The provisions are thus capable of reconciliation. The intention embodied in section 24 is to provide a cut-off after which complaints should not be filed. It does not preclude an earlier time limit required by a specific statute such as the NTC Act for

the lodging of complaints against that specific respondent. This is reinforced by the fact that the legislature in passing the Labour Act, had specific regard to the provisions of the NTC Act in doing so."

In regard to the supplementary issue raised by the Court, Mr. Smuts contended that: if the Court were to find that section 48 became repealed by implication in relation to labour matters, then the Labour Court would not have had jurisdiction to have heard the original application. He contended furthermore: "... that even if this Court were not to make such a ruling and in fact finds that section 48 is capable of being reconciled with section 24 as has been submitted, then it is contended that the Labour Court in any event did not have jurisdiction to hear the application brought by the respondents. ... The Labour Court is not a 'competent court' for the purpose of section 48 in relation to the lodging of complaints. The competent Court in that instance would be the district labour court in as much as it (the district labour court) is vested with jurisdiction to adjudicate upon such complaints."

In my respectful view, the submissions of Mr. Smuts on the main issue are untenable and those of Mr. Light the correct view.

In regard to the subsidiary issue it appears to me, *prima facie*, that the submissions made by Mr. Smuts are correct and those of Mr. Light incorrect. However, the latter issue need only be decided by this Court, should this Court hold on the main

issue that Poolman was correct in basing the application for special leave on section 48 of the NTC Act.

The main reasons for my aforesaid view on the main issue can be briefly stated as follows:

1. Section 48 of the NTC Act is clearly incompatible with the provisions of section 24 of the Labour Act in so far as section 24 specifically deals with special leave for late claims between employee and employer lodged or to be lodged in the district labour court.

Section 48 of the NTC Act of 1987, provides:

"Notwithstanding anything to the contrary contained in any law, no claim against the Corporation shall be enforced and the Corporation shall not be liable unless the claim has been lodged in writing, by hand or registered post, with the Corporation, within three months from the date on which it became due: Provided that if a competent Court is satisfied on application being made to it, which application shall be made three months before the expiration of the relevant period of prescription in terms of the Prescription Act, 1969 (Act 68 of 1969), that the Corporation shall not be prejudiced by reason of failure by the plaintiff or applicant to so lodge such claim within the said three months and that, having regard to special circumstances, the plaintiff or applicant could not reasonably have been expected so to have lodged

such claim within such period, such Court may grant the plaintiff or applicant special leave to institute such claim, and the Court may make such order as to the costs of the application as it may deem reasonable."

Section 24 of the Labour Act of 1992 under the heading "Limitation of institution of proceedings in Labour Court or lodging of complaints with district labour courts" 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."

It was never in dispute that Poolman and the 150 other colleagues joined as applicants in the proceedings, were "employees" and Transnamib an "employer" in terms of the definition clause, being section 1 of the Labour Act. Furthermore it is common cause that the said employees at the time of the application for special leave to file a late complaint, had filed, or had intended to file, a claim for payment of

wages for overtime, with the district labour court. It is also not in dispute that the said district labour court is the only Court of first instance, having jurisdiction to hear and decide on the merits of the claim by Poolman and his colleagues.

As Mr. Light correctly points out in his heads of argument:

"Appellant has failed in its supplementary heads of argument to deal at all with the interpretation of the phrase in section 24, 'notwithstanding the provisions of any other law to the contrary'. An understanding of the effect of this phrase is critical to a proper understanding of the operation of section 24 and how it affects section 48, which contains a similar phrase."

See the decisions also referred to by Mr. Light:

S v Marwane, 1982(3) SA 717 (A) at 747 H - 748 D, per Miller, JA;
S v Van den Berg, 1996(1) SACR 19 (Nm) at 38 D - J per O'Linn, J, as he then was;
De Beer v Commissioner for Inland Revenue, 1932 CPD 443 per Sutton, J;
Levitt v Schwartz, 1938 CPD 47 at 51, per Centlivres, J;
Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd and An, 1990(2) SA 693 (A) per Goldstone, AJA;
Road Accident Fund v Smith NO, 1999(1) SA 92 (SCA) at 98 B - D;
Concise Oxford Dictionary, 4th edition for ordinary meaning of the phrase "notwithstanding".

The effect of the phrase "notwithstanding the provisions of any other law to the contrary" is consequently clearly that it overrides any clause in any earlier law to the contrary. If that was not the intention, the words "subject to section 48 of the NTC Act", would have been used.

That section 48 contains provisions "to the contrary" in regard to the requirements for special leave for a late claim between employee and employer, is self-evident. The submission by Mr. Smuts that section 48 of the NTC Act is not inconsistent or contrary to section 24 of the Labour Act in regard to employees who claim unpaid wages from employers in the district labour court, cannot be sustained.

It is trite law on the tenets of interpretation that the Legislature is presumed not to have intended absurd or anomalous results.

See: Devinish - Interpretation of Statutes, 1996, pp. 177 - 178.

It will certainly be an absurd or anomalous result if the employee had to satisfy the patently inconsistent requirements of both sections 48 and 24 for leave to institute a late complaint before the district labour court.

Mr. Smuts contended that the Legislature in enacting section 116 of the Labour Act read with the third column of the Schedule, provided expressly for the repeal of one section and the amendment of another section of the NTC Act, but left intact section 48 of the NTC Act. "It was thus clearly the intention of the Legislature", according to Mr. Smuts, "whilst having regard to the provisions of the NTC Act when passing the Labour Act, to maintain the provisions of section 48 in an un-amended form".

This argument again cannot be accepted. In my view, the Legislature when enacting the Labour Act, neither intended to repeal the whole of section 48, nor to maintain

it in an unamended form. This is so because section 48 of the NTC Act had to be maintained for all those actions between persons claiming against the NTC in delict or contract, in the ordinary Courts of the land, whereas claims between employee and employer for causes of action, such as the payment of wages or salary due but unpaid, have to be instituted in the district labour courts as the Courts of first instance, and procedurally, were to be governed by section 24 of the Labour Act.

The appropriate manner for the Legislature to achieve this purpose consequently was to provide in section 24, that notwithstanding the provisions of any other law to the contrary, proceedings and/or complaints between employees and employer had to be instituted respectively in the Labour Court or district labour court within a certain time limit, unless the said Labour Court or district labour court, as the case may be, allowed a later lodging of the proceedings or complaint on good cause shown.

Mr. Smuts also contended that the Labour Act is a "general" statute and NTC Act a "special" statute and that consequently "in accordance with the canons of construction, the Labour Act is not to be construed as repealing the NTC Act by "mere implication". Mr. Smuts continues: "It is well settled that such an intention should be expressed in explicit language".

For this proposition Mr. Smuts referred the Court to:

Khumalo v Director General of Cooperation and Development 1991(1) SA 158(a) AT 164 E - 165 E.
Sedgefield Ratepayers & Voters Association v Government of RSA 1989(2) SA 685(C) at 700 A - E.

As Mr. Light correctly points out, "both sections 24 of the Labour Act and section 48 of the NTC Act are in their respective areas of regulation, special legislation".

At any event, even if explicit language was required, the words in section 24 - "notwithstanding the provisions of any other law to the contrary", certainly qualifies as "explicit language".

See: New Modderdam Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 at 397; and Devenish, Interpretation of Statutes 281.

I also agree with Mr. Light that the rule or maxim of interpretation "*lex posterior derogat priori*" (a later statute amends an earlier one) is the more appropriate maxim to apply in the case of sections 24 and 48, than the *maxim generalia specialibus non derogant*.

See: Government of the Republic of South Africa v Government of KwaZulu 1983(1) SA 164(A) at 200 A - 201 H; Devenish at pp. 281 - 284.

It follows from the above that the application by Poolman and colleagues in the Labour Court, based on section 48 of the NTC Act as well as the appeal by Transnamib to the Full Bench of the High Court, were misconceived. Similarly, the hearings, the judgments and the orders given in the Labour court as well as in the

High Court (Full Bench of three judges) were similarly misconceived and amounted to an exercise in futility.

In the light of the above finding, the subsidiary issue whether or not the Labour Court would have had jurisdiction to hear and decide the application by Poolman and colleagues for special leave to lodge their complaint in the district labour court, if this court had decided that section 48 was the correct launching pad for the application, remains a hypothetical and speculative issue, not necessary to decide in this judgment.

Mr. Light informed the Court that subsequent to the order by the Labour Court, granting leave to Applicant to institute claims against Transnamib for payment of overtime to which they were allegedly entitled but which were not paid for the period 20/2/94 - 31/3/96, Poolman and his colleagues obtained an order in the district labour court for the district of Windhoek on the 1st August 1997, granting leave to applicants to lodge their complaint. A complaint for these claims was then lodged on 23 September 1997.

Mr. Light argued in conclusion:

"It is submitted in conclusion that the order of the Labour Court should be set aside and substituted with an order declaring that it is not necessary for Respondents to make application in terms of section 48 of the Act if they wish to lodge a complaint against Appellant for an

alleged contravention of, or alleged failure to comply with any provision of the Labour Act. Respondents have already complied with section 24 of the Labour Act and lodged a complaint, so there is no need to make a further order in this regard. It is further submitted that regardless of the outcome of this appeal, a costs order should not be made for the reasons advanced in Respondents' heads of argument."

Although Mr. Light suggests that the order of the Labour Court be set aside by this Court, he probably has in mind the first of the two orders, i.e. in so far as the Labour Court granted special leave in terms of section 48 of the NTC Act.

The second order by the Labour Court was that "the Court refuses to entertain the application made in terms of section 24 of the Labour Act".

Mr. Light and his clients are presently still relying on leave granted by the district labour court in terms of section 24 of the Labour Act to lodge their complaint late and has even lodged their complaint with the district labour court pursuant to such leave. But the point is that in doing so, Poolman probably relied on the ratio of the Labour Court in refusing to entertain the application made in terms of section 24 of the Labour Act.

The ratio for the latter order of the Labour Court appears from the following passages of the judgment of Hannah, P:

"Section 24 of the Labour Act provides, *inter alia*, that no complaint shall be lodged with a district labour court after the expiration of a period of twelve months from the date on which the cause of action has arisen or from the date on which the party lodging the complaint has become or could reasonably have become aware of such cause of action except with the approval of the district labour court on good cause shown. The parties agreed that this Court should have jurisdiction to hear the application to approve the lodging of a complaint in the district labour court after the expiration of the twelve month period and the matter was initially argued on that basis. However, having reserved judgment and having read section 24 more closely, I called for further argument and both counsel agreed that this Court cannot entertain such an application.

That, in my view, is the correct position. The wording of section 24 is clear. The material part of the section reads:

'...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 ... except with the approval of the Labour Court or district labour court, as the case may be, on good cause shown.'

It was clearly the intention of the Legislature, as expressed in these words, that approval to institute proceedings out of time in the Labour Court shall be given by the Labour Court and that approval to lodge a complaint out of time in a district labour court shall be given by that court. The parties cannot, by agreement, confer on this Court

jurisdiction to deal with a matter when the statute expressly provides that it shall be dealt with by the district labour court. See Neckermann v Feinstein, 1909 TS 913 at p. 913. The section 24 application must be brought in the district labour court."

It is also clear from Mr. Smuts' submissions that he accepts that the district labour court is the correct Court of first instance for an application in terms of section 24. I agree that if a complainant wishing to lodge a complaint with the district labour court is late in terms of section 24, then the district labour court is also the exclusive Court of first instance for giving leave for the late lodging of the complaint.

I am however, unable to agree with Hannah, P in so far he appears to found justification for splitting up section 24 in two parts - the first part to justify applications under section 48 of the NTC Act to the Labour Court as the Court of first instance and the second part to justify applications for approval of the late lodging of complaints to the district labour court.

The words "no proceeding shall be instituted in the Labour Court or any complaint lodged with any district labour court after the expiration of a period of twelve months as from ... except with the approval of the Labour Court or district labour court, as the case may be, on good cause shown", relied on by Hannah, P, do not in the least support the Labour Court's implied finding that section 24 provides justification for the Labour Court assuming jurisdiction as a court of first instance for

hearing applications for approval to institute proceedings out of time, in terms of section 48 of the NTC Act.

Although the Labour Court clearly has jurisdiction to hear applications for the late institution of proceedings before it, the "proceedings" referred to must be late in that it does not comply with the requirements laid down in section 24, namely that it should not be instituted "after 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... "The "proceedings" in the Labour Court must obviously relate to causes of action, contraventions or failures in terms of the Labour Act. The "proceedings" do not relate to proceedings in terms of the NTC Act where these proceedings are late in terms of section 48.

It follows furthermore, that the proceedings referred to in section 24 are those provided for under section 18 of the Labour Act, setting out the functions and powers of the Labour Court as distinguished from those of the district labour courts, set out in section 19 of the Labour Act. The "proceedings" referred to in section 24 refer to proceedings where the Labour court has exclusive jurisdiction in terms of section 18 and thus entitled to sit as a Court of first instance, and not on appeal from judgments and orders of the district labour court. In cases of appeal from the district labour court the Labour Court Rules as to such appeals will govern the time limits within which the appeals may be brought. Typical examples of proceedings

before the Labour Court which will have to comply with the requirements of section 24 are e.g. applications for declarations of rights; appeals in terms of sections 54(4), 68(7), 70(6), 95(4), 100(2) or 114(6); applications for reviews of decisions by the Minister, Permanent Secretary, the Commissioner, any inspector or any officer involved in the administration of the provisions of the Labour Act.

Any proceedings brought before the Labour Court in terms of section 18(1)(g), must comply with the requirements of that provision, including the fundamental requirement in section 18 for the "exclusive" jurisdiction of the Labour Court. It is consequently not applicable where the Labour Act e.g. gives the district labour court jurisdiction as a court of first instance.

Far from section 24 justifying the Labour Court to hear an application for late filing of a claim between employee and employer under section 48, the contrary is true namely that section 24 and its requirements regarding late claims, exclude section 48 of the NTC Act. Compare in this regard: Drysdale v Namibia Breweries Ltd and An, NLLP, 1998(1) 133 NLC at 137, per O'Linn, P, where I pointed out that section 18(3) does not confer jurisdiction on the Labour Court as such, because it appears that before the Labour Court can enjoy the powers of the High Court of Namibia, it must first be exercising or performing its own powers and functions.

It follows from the above, that the Labour Court could not rely on section 24 of the Labour Act to give itself jurisdiction under section 48 of the NTC Act.

In this case, the Labour Court clearly did not have the necessary jurisdiction to consider the application, based on section 48 of the NTC Act. The High Court on the other hand completely overlooked section 24 and its implications and gave an elaborate judgment on appeal on section 48, which section, in my view, was not applicable at all and as such irrelevant.

Both the judgments of the Labour Court and the High Court respectively, were given *per incuriam* or *sub silentio*.

Examples of decisions *per incuriam* or *sub silentio* are:

- (a) A court overlooks a statute or rule having statutory effect, knowledge or which would have led the Court to give a decision different from the one it gave; or
- (b) Those in which a Court overlooks a statute affecting jurisdiction - the type of incuria referred to "which seminally affects its ratio decidendi", can vitiate the decision and even a lower court could impugn the decision on such ground.

See: State v Vries 1996(2) SACR 638 (Nm) the judgment of O'Linn J, at 654 g - h, and the authorities therein cited;
Trade Fairs & Promotions v Thomson & An 1984(4) SA 177 (WLD) at 185 D - 186 D;
Shifren & Ors v Sentrale Kooperatiewe Graanmaatskappy Bpk 1964(2) SA 343 (O) at 344 F - H.
Namunieto & Ors v Commanding Officer of the Windhoek Prison & Ors, High Court, FA 7/98, unreported, where the Full Bench per O'Linn AJ,

pointed out that a decision vitiated by illegality or given per incuriam is not a valid decision.

Hahlo & Kahn, the South African Legal System 1968, Juta, at 253

Kahn, SALJ, Vol. LXXXIV, p 314/315

Van Zyl & Van den Heever, Inleiding tot die Regswetenskap, 2nd ed, 1982, at 402.

S v Cassidy 1978(1) SA 687 AD at 690 B - 691 C.

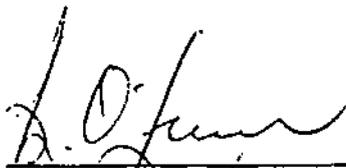
In the result it is not a question of the "appeal succeeding", because the points taken by the Court *mero moto*, were not the grounds of appeal.

Mr. Smuts nevertheless asked for a special order as to costs. Mr. Light submitted that no order should be made in the circumstances.

In my respectful view, no order should be made as to costs in the circumstances pertaining to this appeal.

IN THE RESULT:

The proceedings and orders in both the Labour Court and High Court are set aside.



O'LINN, A.J.A.

I agree.


MTAMBANENGWE, A.J.A.

I agree.


SILUNGWE, A.J.A.

/mv

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