

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO:C32/2006

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In the matter between:

SOUTHERN AFRICAN CLOTHING &
TEXTILE WORKERS UNION (obo)

10 XOLELWA STINISE

Applicant

and

DAKBOR CLOTHING (PTY) LTD

First Respondent

15 NATIONAL BARGAINING COUNCIL
FOR THE CLOTHING MANUFACTURING
INDUSTRY

Second Respondent

COMMISSIONER L MARTIN

Third Respondent

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J U D G M E N T

NEL AJ:

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[1] This is a review application of an award by the third respondent ("the Commissioner") in which the Commissioner found that the second respondent ("the Council") did not have jurisdiction to arbitrate the matter.

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[2] When the dispute came before the Commissioner, the employer (the first respondent herein) raised two points *in limine*. They were first that the Council did not have the jurisdiction to determine the matter because the main
5 collective agreement for the clothing manufacturing industry had not been extended to non-parties. The second point *in limine* was that the Council lacked jurisdiction to determine the matter as the employer and employee parties had agreed to submit any dispute between them to private arbitration for
10 resolution.

[3] The Commissioner dismissed the first respondent's first point *in limine* and found that the Council did enjoy jurisdiction over the dispute. However, the Commissioner upheld the first
15 respondent's second point *in limine* and as I said ruled that the Council did not have jurisdiction to arbitrate the matter.

[4] From the award it appears that the Commissioner reasoned that the private arbitration clause contained in the contract of
20 employment constituted a "non-negotiable offer of employment" that was accepted by the employee, Ms Stinise. The Commissioner appears to have reasoned that the private arbitration clause contained in the employment agreement formed part of a binding agreement between the parties and
25 that it thereby excluded the jurisdiction of the Council to determine, *inter alia*, dismissal disputes.

[5] The Commissioner continued to reason that, in any event, the provisions of section 147(6) of the Labour Relations Act ("the

LRA") required the applicant to have first referred its dispute to the CCMA, it being the only body with the power to appoint an arbitrator to determine the dispute in the absence of agreement on a private arbitrator. The Commissioner accordingly concluded that the Council lacked the jurisdiction to consider the dispute and that the clause in the contract of employment had specifically excluded the Council's jurisdiction.

10 [6] Mr Whyte, who appeared before me on behalf of the applicant, informed me that it was, *inter alia*, argued before the Commissioner on behalf of the applicant that the provisions of section 199 of the LRA prohibited the private arbitration clause found in the contract of employment. This he submitted was correct as this clause caused the employee to be treated in a manner less favourable than that prescribed by the main agreement. It also according to the applicant amounted to a waiver of the application of the provisions of the applicable main agreement, and in both such instances, 15 section 199 of the LRA prohibits that.

[7] It was contended on behalf of the applicant that the Commissioner's award does not reflect at all that he had applied his mind to the argument presented to him regarding section 199 of the LRA. The applicant in addition contended that the Commissioner grossly misapplied the law applicable to the issue before him when he concluded that he did not have jurisdiction over the applicant's dispute. It was finally 25 contended that the Commissioner also committed misconduct

by ignoring a highly relevant argument raised by the applicant as to why Council had jurisdiction over the dispute.

[8] Section 199 of the LRA reads as follows:

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"199 **Contracts of employment may not disregard or waive collective agreements or arbitration awards**

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(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not -

(a)...

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(b) permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award; or

(c) waive the application of any provision of that collective agreement or arbitration award.

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(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid".

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[8] It is apparent from the Commissioner's award that he did not at all have regard to the question whether the private arbitration clause contained in the contract of employment could possibly have the effect that the employee would be treated in a manner less favourable than that prescribed by

the collective agreement applicable to the parties. In short, I cannot from the Commissioner's award at all determine whether he had any regard to section 199 of the LRA. This omission on the part of the Commissioner renders his award reviewable.

[9] I am satisfied that the first respondent was bound by the main agreement applicable to the parties. This main agreement provides a dispute resolution procedure for non-party members to the agreement. It is readily apparent from the employment contract of Ms Stinise that the private arbitration clause sought to exclude or waive the provisions of the main agreement insofar as it dictates that disputes involving non-parties to the Council shall be resolved through arbitration if the LRA required that the dispute be arbitrated on. I am accordingly of the view that section 199(1)(c) of the LRA does apply. This being the case, in terms of section 199(2) this private arbitration clause contained in the employment contract under consideration is invalid.

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[10] Had the Commissioner properly applied his mind to the argument presented before him, I am of the view that he would have been driven to conclude that the arbitration clause did not exclude the Council from having jurisdiction to conciliate and, if necessary, arbitrate on the dispute before it.

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[11] It is also apparent from the record of the proceedings that the applicant argued that the arbitration clause contained in the employment contract also fell foul of section 199(1)(b) of the

LRA in that it would have the result that the employee was treated less favourably than prescribed by the collective agreement applicable to the parties. In this regard it was contended that the private arbitration clause denied the employee access to the compulsory and free dispute resolution mechanisms contained in the main agreement.

[12] I am of the view that the Commissioner's failure to apply his mind to this aspect before him also renders his award reviewable.

[13] I am accordingly persuaded that the Commissioner's conclusion was unjustifiable and irrational having regard to the material presented to him. It follows that the award herein should be set aside.

[14] It was contended by Mr Whyte that it would serve no purpose to remit the matter back to the Council for a fresh determination and that it would be in the interests of justice and practicality for this Court to substitute its own finding for that of the Commissioner. I am satisfied that I am able to do so. Whilst I do not believe that sufficient evidence was adduced to conclusively persuade me that the private arbitration clause renders the employment contract less favourable than the collective agreement applicable herein, I am indeed satisfied that the private arbitration clause constitutes a waiver of a provision of a collective agreement and that it is as such invalid. That being the case, I am further satisfied that the Council has jurisdiction over

the applicant's dispute.

[15] In the result the following order is made:

- 5 "1. The jurisdictional ruling of the third respondent
under case number CCCA110-05 dated 14
December 2005 is reviewed and set aside.
2. The award is substituted with the following:
"The Council does have jurisdiction to arbitrate
10 this matter".
3. The second respondent is directed to convene
an arbitration hearing on the merits of the dispute
between the applicant obo Xolelwa Stinise and
the first respondent.
- 15 4. The first respondent is ordered to pay the
applicant's costs of suit.

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DEON NEL

Acting Judge of the Labour Court

25 **DATE OF HEARING: 6 September 2006**

DATE OF JUDGMENT: 8 February 2007

APPEARANCES:

For the Applicant: Mr J White of Cheadle Thomson & Huysen

Attorneys.

For the First Respondent: Mr W P Welgemoed of Borman & Haywood Inc.

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