



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D459/16 and D722/15

In the matter between:

LUFIL PACKAGING (ISETHEBE), A DIVISION

OF BIDVEST PAPERPLUS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

LEON PILLAY N.O.

Second Respondent

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (KWAZULU-NATAL

REGION

Third Respondent

Heard: 23 November 2017

Delivered: 20 April 2018

Summary: Unions right to organisational rights. Unions constitution and scope.

JUDGMENT

GUSH J

- [1] This matter involves two applications by the applicant to review:
- a. firstly, a ruling by the second respondent regarding a challenge raised by the applicant, prior to the arbitration, to the first respondent's "jurisdiction" to hear a dispute regarding organisational rights referred by the third respondent and the third respondent's *locus standi* to refer such dispute; and
 - b. secondly, the arbitration award handed down by the second respondent in respect of the dispute regarding organisational rights referred to arbitration.
- [2] The ruling handed down by the second respondent relating to the preliminary issue raised by the applicant dismissed this preliminary point raised by the applicant; ruled that the third respondent was entitled to claim organisational rights from the applicant in terms of the provisions of the Labour Relations Act 66 of 1995 (LRA) and directed the first respondent to set the matter down for arbitration.¹
- [3] Pursuant to this ruling be handed down by the second respondent, the applicant filed an application to review the ruling under case number D722/15.
- [4] Prior to the arbitration commencing, the parties entered into a pre-arbitration minute in terms of which the second respondent was required in accordance with the referral by the third respondent, to determine:
- i. whether the [third respondent] is entitled to the organisational rights it seeks;
 - ii. whether the [applicant] is entitled to refuse organizational rights that the [third respondent] seeks;
 - iii. whether the terms and conditions proposed by the third respondent were reasonable, and if not, to set out terms and conditions that are fair;

¹ Ruling paragraphs 53-54 page 25 of the pleadings in D722/15.

iv. determine the date of implementation of the organizational rights that the [third respondent] seeks.²

[5] At the conclusion of the arbitration, the second respondent handed down the award that forms the subject of the review under case number D459/16. The second respondent in the award concluded that the third respondent was entitled to enjoy organisational rights and set out in the award the nature of those rights.³

[6] At the commencement of the review hearing, the parties agreed that the ruling (the subject of D722/15) lay at the heart of the matter. The crisp issue to be determined was whether the LRA entitled the third respondent to represent its members in an application for organisational rights and whether it was entitled to those rights.

[7] Counsel for the applicant conceded that in the event that its application to review the ruling did not succeed that would dispose of the matter. Should the applicant be successful in reviewing the ruling, it would follow that the review of the award by the second respondent should also succeed. Counsel for the third respondent agreed that the matter should be dealt with on this basis.

[8] The essence of the applicant's case was, as was recorded in the second respondent's ruling:

- i. that the operations of the [applicant] do not fall within the registered scope of the [third respondent]; and
- ii. that consequent thereupon, the [third respondent] does not have the required *locus standi* to bring the above dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA); and
- iii. that the [third respondents'] referral should be dismissed on this basis.⁴

[9] The applicant contended that the provisions of the third respondent's constitution that set out the third respondent's scope of, and the industries in

² Arbitration award paragraph 6 page 17 of the pleadings in D459/16.

³ Arbitration award paragraph 48 page 22 of the pleadings in D459/16.

⁴ Ruling paragraph 15 page 19 of the pleadings in D722/15.

which it is entitled to organise, do not entitle the third respondent to those organisational rights contained in Chapter 4 of the LRA. The applicant avers that the operations of the applicant do not fall within an industry in which the third respondent may organise or fall within the third respondent's scope.

[10] In addition, the applicant avers that the employees' right to join the third respondent is limited by its constitution. Section 4 of the LRA records the employees' right to freedom of association and includes the right to join a trade union "subject to its constitution".⁵

[11] The relevant part of Chapter 3 of the LRA (part A) deals with Collective Bargaining and in particular Organisational Rights. The overarching premise in this part that determines the entitlement to organisational rights is, apart from registration, the unions "representativeness". The term representative trade union is defined as meaning a trade union that is "sufficiently representative of the employees employed by an employer in a workplace".⁶

[12] Other than requiring a commissioner dealing with a dispute over organisational rights to "minimise a proliferation of trade union representation in a workplace" there is no reference to the scope or constitution of the trade as a prerequisite to organisational rights. What appears to be the determining factor is sufficient representation.

[13] It is also so that the rights contained in part A of chapter 3, (other than the right of access in section 12(1)) are all exercised by employees in the workplace who are members of the union and act in that capacity.

[14] Section 200 of the LRA regulates a unions rights of representation. It provides:

- '(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party -
- (a) in its own interest;

⁵ section 4(b).

⁶ Section 11.

- (b) on behalf of any of its members;
- (c) in the interest of any of its members.

- (2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.

[15] The regulation of the union's exercise of the rights in part A of chapter 3 is set out in section 21, it provides:

'21. Exercise of rights conferred by this Part 4

(1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade unions certificate of registration and must specify-

(a) the workplace in respect of which the trade union seeks to exercise the rights;

(b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and

(c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

Conspicuous by its absence in this section, is any reference to the union's constitution or scope.

[16] The exercise of organisational rights essentially governs and regulates the manner in which the unions right to represent is members is exercised. The

right to organise is on behalf of its member and at their instance and as their representative.

[17] The issue of the unions right to represent its members has been dealt both by this Court and the Labour Appeal Court.

[18] In *Bidvest Food Services (Pty) LTD v Numsa and Others*, (*Bidvest*)⁷ the applicant sought to interdict a strike. The respondent had, as in this matter referred a dispute to the CCMA over organisational rights in terms of section 22(1) of the LRA. The applicant in *Bidvest* matter (as in this matter) challenged the *locus standi* of the union to refer such dispute and the jurisdiction of the CCMA to deal with the referral on the grounds that the scope and constitution of the union did not include its operations.

[19] In the *Bidvest* matter, the members elected to embark on industrial action. Bidvest sought to interdict the strike on the grounds that the strike was in pursuit of an unlawful demand. Whilst the Court did not deal with the issue of whether the demand was unlawful with regard to the Union's scope and constitution, the court essentially upheld the right of the employees to embark on strike action as they had complied with the provisions of the LRA in so far as it was required in order to exercise their right to strike. It does not appear as if Bidvest ever appealed against this judgment or sought to review and set aside the commissioner's acceptance that the union had *locus standi* and that the CCMA had jurisdiction to deal with the dispute.

[20] In the matter of *Macdonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others*,⁸ the Labour Appeal Court had occasion to consider what right an employer had in challenging the right of a union to represent its members where the employer averred that the employees membership of the union had lapsed.

[21] In that matter, the employer had dismissed employees for embarking on a strike in support of a demand for organisational rights by and for their union.

⁷ (2015) 36 ILJ 1292 (LC).

⁸ [2017] 2 BLLR 105 (LAC) (*MacDonald's*).

[22] At the CCMA arbitration regarding the dismissals, the employer had challenged the right of the union to represent its members on the grounds that their membership of the union had lapsed as they had not paid their membership dues.

[23] In dealing with the appeal, the Labour Appeal Court considered *inter alia* “Whose rights are at issue?” and “What right, if any, does any employer have to concern itself with the membership status of individuals who wish to be represented by a particular union?”⁹

[24] As regards the issue of the rights, the Court held:

[32] Both the Arbitrator and the Labour Court, on the premise of the parties' presentation of their cases, treated the matter as if the representation issue was solely about the union's right to "represent" its members. However, it is also, and moreover, primarily, concerned with the rights of the individual workers who were parties to the dispute before the forum, to choose their representatives.

[35] Certainly, when a union demands organisational rights which accord to it a particular status as a collective bargaining agent vis à vis an employer, it asserts and must establish it, itself, has a right to speak for workers by proving they are its members; sections 11-22 of the LRA regulate that right.¹⁰

[25] The second issue the court in *MacDonald's* considered was the employer's right or *locus standi* to challenge the employees' membership status of the union.

‘What is an employer's locus standi to concern itself with the union membership status of an employee?’

[39] Although this matter can be decided on the interpretation issue alone, as did the Labour Court, the conduct of the appellant is so egregious that it is appropriate to deal with the tactic adopted by it, ie to challenge the right of its dismissed employees to demand in dismissal proceedings before an arbitration forum to be represented by a union of their choice of which they claimed to be members.

⁹ At page 109.

¹⁰ At pages 118/119.

[40] Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all.

[42] Moreover, except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. To interfere with the private contractual relationship of other persons, a stranger would have to demonstrate some sort of delictual harm. None exists to justify the appellant seeking to pierce the veil of AMCU's internal affairs in relation to the dismissal dispute. If regard be had, for example, to the requirements for an interdict, the appellant, on these facts, can demonstrate neither a right nor a harm. The appellant's legitimate interest in the validity of membership for another purpose, relating to it incurring an obligation to accord AMCU a representative status, is quite distinct from any legitimate concerns it might conceivably have in relation to arbitration proceedings about misconduct.

[43] Moreover, a constitution is a no more than contract between an institution and its members. Provisions of such a contract/constitution relating to the termination of membership by lapsing, are conditions for the benefit of one party only, ie the union. The union ought to be able, at its election, to decide whether to invoke them or not. Excluding the possibility of a union not enforcing its rights for an extraneous ulterior purpose, the union ought not to be obliged to invoke its rights, least of all mechanically. Even in such circumstances involving ulterior motives, it would still be a complaint that only fellow members would have the right to raise, not a third party.¹¹

[26] When the dispute regarding the organisational rights was due to be arbitrated by the CCMA, the applicant filed an application in terms of rule 31 of the rules of the CCMA challenging the jurisdiction of the first respondent to deal with the dispute and the *locus standi* of the third respondent.

[27] Quite clearly, the first respondent has jurisdiction. In fact, the LRA specifically empowers the CCMA, in terms of section 22, to deal with “disputes about organisational rights.

¹¹ At paras 39-43..

[28] As far as *locus standi* is concerned, the conditions precedent to a union wishing to exercise organisational rights, in accordance with the LRA, need only satisfy two conditions:

- a. Firstly, the union must be registered (see section 11 14 16 18 and 21). It is common cause that the third respondent is a registered union;
- b. Secondly, that the union must be sufficiently representative (sections 11, 12, 13, 15, 16, 18 and 21). It appears from the papers that the third respondent is sufficiently representative of the applicant's employees. (70% of the applicant's employees are members of the third respondent.)

[29] Had the legislature intended the scope of registration or the union's constitution to be determinative of the right to organisational rights, it would have said so. The essence of the organisational rights contained in part A of Chapter 3 are rights enjoyed essentially at the instance of the employees as members of the union.

[30] In so far as this matter is an application to review and set aside the ruling, the parties were *ad idem* that the outcome of that application depended solely on whether the LRA precluded the third respondent from representing its members in applying for organisational rights. I am not persuaded that the provisions of the LRA do that. The LRA sets out specifically what is required for a union to seek organisational rights and it is beyond any doubt that the third respondent has satisfied those requirements.

[31] For the reasons set out above, I am not satisfied that the ruling of the second respondent in Case number D772/15 is reviewable. That being so the review of the award in D459/16 also fails.

[32] As far as costs are concerned, the parties agreed that no order as to costs should be made.

[33] I make the following order:

- a. The applicant's applications to review and set aside the ruling in D722/15 and the award in D459/16 are dismissed;
- b. There is no order as to costs.

D H Gush

Judge of the Labour Court of
South Africa

APPEARANCES:

FOR THE APPLICANT:

Mr E Ellis; ENS Attorneys

FOR THE RESPONDENT:

Adv. Pillay

Instructed by Harkoo Brijlal and Reddy