THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA 128/2023

In the matter between:

INNOVATIVE STAFFING SOLUTIONS (PTY) LTD	**First Appellant**
ISIDINGO LOGISTICS CC	**Second Appellant**
SNB FREIGHT CC	**Third Appellant**

and

THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
CAMERON MORAJANE *N.O.*	**Third Respondent**

Heard: **5 November 2024**

Delivered: **12 November 2024**

Coram: **Molahlehi JP, Savage ADJP *et* Van Niekerk JA**

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal, with the leave of this Court, against the whole of a judgment delivered by the Labour Court on 2 June 2023. The appeal turns on the interpretation of s 33A (4) of the Labour Relations Act[1] (LRA). That section concerns the enforcement of bargaining council agreements and provides:

> '(a) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.
>
> (b) If a party to an arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph (a), the Commission, on request by the council, must appoint an arbitrator.
>
> (c) If an arbitrator is appointed in terms of subparagraph (b) –
>
> (i) the Council remains liable for the payment of the arbitrator's fee; and
>
> (ii) the arbitration is not conducted under the auspices of the Commission.'

[2] The appeal raises a crisp question – if in any enforcement proceedings, a non-party to a bargaining council objects to the appointment of an arbitrator appointed by the council and the CCMA then appoints an arbitrator in terms of s 33A (4)(b), can the CCMA appoint an arbitrator who is also a member of a panel of accredited arbitrators appointed by the council to arbitrate disputes that arise within its jurisdiction?

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[1] Act 66 of 1995, as amended.

Factual background

[3] The first respondent (council) is a bargaining council registered for the road freight and logistics industry. The first appellant describes itself as an operational outsourcing and consulting business; the second and third appellants are two of the first appellant's clients. The business model adopted and applied by the first appellant is one in which the first appellant takes transfer of its clients' employees in terms of s 197 of the LRA, thus becoming the employer of those employees. In the course of providing services to its clients, the first appellant places the services of the transferred employees at the disposal of the client. The first appellant contends that in these circumstances, where the business of the client (as is the case with the second and third appellants) resorts under the scope and jurisdiction of the council, its business does not. On this basis, the first appellant submits that despite the extension of the council's agreements in terms of s 32 of the LRA to non-parties who fall within the council's registered scope, the agreements are not binding on it.

[4] This state of affairs led to a dispute in which the CCMA issued a demarcation award in terms of s 62 of the LRA. The presiding commissioner held that the first appellant, as a temporary employment service providing employees to clients who fell under the scope and jurisdiction of the council, itself fell under the council's scope and jurisdiction and was thus bound by those of the council's collective agreements extended by the minister in terms of s 32 of the LRA to bind non-parties to the council. The demarcation award remains the subject of a pending application for review.

[5] The first appellant sought to stay enforcement proceedings against it and its clients. In a judgment delivered on 24 November 2021, the application was dismissed, but a counter-application seeking an order that the first appellant comply with the main agreement was granted. The first appellant was further interdicted from representing to its clients that it and its clients were not obliged to comply with the council's main agreement. Appeals against that judgment, both to this Court and the Constitutional Court, were dismissed.

[6] The council then initiated enforcement proceedings against the first appellant and its clients. All of the proceedings concerned an alleged failure by the appellants to comply with the council's main agreement. The first appellant filed a notice of objection against the arbitrator appointed by the council. The first appellant, through its attorneys, ultimately sought an undertaking from the council that the matter be referred to the CCMA and further, that the appointed arbitrator have no affiliation with the council whatsoever. In the absence of the undertaking sought, the appellants filed an urgent application in the Labour Court.

[7] By the time that the urgent application was argued, any disagreement or confusion about whether the CCMA would appoint an arbitrator at the request of the appellant was resolved, and the only relief pursued was an order to the effect that on receipt of any notice of objection from a non-party (including the appellants), the CCMA "*appoint different arbitrators who are not appointed on any panel of the first respondent* [the council]*, or affiliated whether as an employee or independent contractor with the first respondent"* to preside over enforcement disputes between the bargaining council on the one hand, and the appellant and its clients on the other. In effect, the appellants sought an order declaring that in the face of an objection by a non-party, the CCMA was limited in its choice of arbitrators, and specifically not permitted to appoint any arbitrators who may serve on any panel appointed by the council to preside over enforcement arbitrations.

The Labour Court

[8] In its analysis, the Labour Court noted that in terms of s 33A, a bargaining council enforces its own agreements, through the vehicle of agents empowered to grant compliance orders, and ultimately by way of the appointment by the council of an arbitrator to determine any dispute regarding the enforcement of binding collective agreements concluded by the council. The Court described s 33A(4)(b) as a 'balance', applicable only to non-parties to a bargaining council where the appointment of the

arbitrator in enforcement proceedings is taken out of the hands of the council and placed in the hands of the CCMA. The Court came to the following conclusion:

> '[39] The point that emerges from the above is clear. The only obligation on the bargaining council in the context of receiving an objection to its appointment of an arbitrator, in terms of section 33A(4)(b), is to request the CCMA to appoint an arbitrator. The actual appointment of the arbitrator lies entirely in the hands of the CCMA. That being so, it is simply not for ISS [the first appellant], the NBCRFLI [the council] itself, or even this court, to prescribe to the CCMA how this appointment must be made. That would constitute undue interference in a task specifically dedicated to the CCMA.'

[9] The Labour Court went on to note that it should be accepted that arbitrators appointed to act under the auspices of the council will demonstrate the necessary independence in deciding a matter. What the appellant sought to do was impose conditions on the CCMA when it decided to make appointments of arbitrators in the case of disputes involving the appellant and its clients that concern the enforcement of the council's collective agreements. The Court found that s 33A (4) did not make provision for any requirement that arbitrators appointed by the CCMA must be entirely independent from the bargaining council itself. All that is required is that the CCMA "*exercise oversight of the appointment, and then deciding what would be an appropriate appointment, even if that appointment comes from the core of arbitrators that may be affiliated with the NBCRFLI"*. It could not be assumed that an arbitrator appointed by the CCMA to preside over any enforcement proceedings in which the appellant and its clients are involved would necessarily be biased simply because the arbitrator is affiliated with the council in the form of membership of a panel of arbitrators appointed by the council to discharge dispute resolution functions for which the council was accredited.

[10] In regard to costs, the Labour Court noted that it had wide discretion when it came to the issue of costs and that in the circumstances, an order for costs against the

appellant was appropriate and justified. In the result, the Labour Court dismissed the application, with costs.

Analysis

[11] Prior to August 2002, the LRA was silent on the powers of a bargaining council to enforce collective agreements. Parties to collective agreements concluded under the auspices of a bargaining council typically determined, by means of a collective agreement, the rules and procedures for enforcing compliance with agreements concluded by parties to the council. Where bargaining council agreements were extended by the minister in terms of s 32 of the LRA, non-parties were bound both by those agreements and the enforcement procedures agreed by parties to the council. An objection to this state of affairs came before this Court in *Kem-Lin Fashions CC v Brunton & another*[2] *(Kem-Lin)* where a non-party to a council to whom a collective agreement had been extended contended that the bargaining council had acted unconstitutionally in seeking to enforce the agreement, as it was a judge in its own cause. The Court dismissed that contention, and viewed the dispute in the context of the legislative purpose underpinning the extension of bargaining council agreements, the elimination of unfair competition on the basis of wages and conditions of employment within a sector and the primary objects of the LRA, which include both the promotion of orderly collective bargaining and the promotion of bargaining at sectoral level. The Court concluded that at least for so long as the extension of the collective agreement remained in place, non-parties were bound by the terms of the council's collective agreements as if they were parties, and should be treated in the same manner. This had the consequence that the same enforcement process applied to both parties and non-parties to a bargaining council.

[12] In 2002, the Labour Relations Amendment Act 12 of 2002 inserted s 33A into the Act. The Explanatory Memorandum[3] explains the purpose of the amendment as follows:

[2] (2001) 22 *ILJ* 109 (LAC); [2002] 7 BLLR 597 (LAC).
[3] See (2000) 21 *ILJ* 2195.

'8.2 Disputes concerning bargaining council agreements – Insertion of new section 33A

(a) In terms of the 1956 Labour Relations Act, the failure to comply with industrial council agreements was a criminal offence. The 1995 Act decriminalised enforcement of collective agreements. Disputes concerning compliance with bargaining council agreements that cannot be resolved by conciliation are now referred to arbitration.

(b) The Act does not deal expressly with those disputes in which a bargaining council is a party (whether to claim payments on behalf of an employee or payments such as levies that are due to the council or contributions to funds established by councils).

(c) Many councils have provided for these arbitrations by collective agreement in the Labour Court has recently confirmed their validity. Nevertheless the status of these arbitrations requires clarification.

(d) A new section 33A is included to provide an explicit statutory basis for arbitrations dealing with the enforcement of bargaining council collective agreements. It is proposed that these arbitrations should be conducted by arbitrators appointed by the CCMA so as to ensure the independence of the arbitration process. The powers of arbitrators are modelled on those of the Labour Court in dealing with violations of the BCEA.'

[13] In the present instance, the appellants do not call into question the decision of this Court in *Kem-Lin*, nor do they seek to challenge the constitutionality of s 33A (4) The appellants also do not impugn the integrity of individual arbitrators accredited by the CCMA, and who may serve on a panel established by a bargaining council for the purpose of conducting enforcement arbitrations. Their claim is one of institutional bias or put another way, a lack of institutional independence on the part of bargaining councils seeking to enforce collective agreements as against non-parties by way of arbitration proceedings.

[14] Counsel for the appellants submitted that in any enforcement proceedings, s 33A(4)(b) introduces a right of unqualified objection to the appointment of an arbitrator by the council. The ambit of this right, so it was submitted, extends to a limitation on the choice of arbitrator by the CCMA, one that serves to exclude any arbitrator who has any affiliation with the council. To interpret s 33A(4)(b) otherwise, so counsel submitted, would frustrate the purpose of the amendment introduced in 2002, the objectives of the section read as a whole, and undermine the integrity of the enforcement process.

[15] There is no merit in these submissions. First, there is no textual support for the construction for which the appellants contend. The wording of the section, in the context of the whole of s 33A (4) and the reasons for its introduction, is clear – a non-party may object to the council appointing the arbitrator in enforcement proceedings. The CCMA must then appoint the arbitrator. There is nothing in the wording that suggests that the CCMA's choice of arbitrator is limited or constrained, or that the CCMA is obliged to appoint an arbitrator who has no links to the council. There is also nothing in the section read as a whole, or the Explanatory Memorandum, that supports the constraint on the CCMA for which the appellants contend. The section intends to accomplish no more in the face of an objection by a non-party than to the remove the power to appoint the arbitrator from the hands of the council, and to place that power in the hands of the CCMA. In short, the right of unqualified objection for which the appellants contend does not extend to the identity of the individual arbitrator.

[16] Secondly, and to the extent that the appellants contend that the purpose of s 33A (4) would be defeated if it remains open for the CCMA to appoint an arbitrator from the same panel from which the council would make an appointment in respect of an enforcement dispute concerning a party (or in the absence of any objection by a non-party), it is undoubtedly true, as the appellants submit, that the rule against bias is anchored in public confidence. But it does not necessarily follow that because a particular arbitrator may serve as a CCMA commissioner and an arbitrator on one or more panels of conciliators and arbitrators established by one or more bargaining councils that as a general proposition, there is a failure of the right to a fair hearing

should such an arbitrator be appointed by the CCMA in terms of s 33A(4)(b). The appointment of arbitrators to the council's panel and the manner of their appointment is described in the answering affidavit in the following terms:

> 'The NBCRFLI appoints Arbitrators to preside over enforcement proceedings from its panel of Arbitrators. All of these Arbitrators are Commissioners who have been certified by the CCMA. None of them are employed by the NBCRFLI but they are rather independent, professional Arbitrators. Most of them are in fact also part-time CCMA Commissioners. None of them act as Arbitrators exclusively for the NBCCRFLI.
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> The Code of Conduct for such panelists, their continued accreditation by the CCMA and their professional reputation all require that they act independently.'

[17] To the extent that the appellants sought to introduce evidence of what they allege to be bias on the part of particular arbitrators in particular cases, the appellants seek to elevate the particular to the general. If the appellant harbours allegations of bias or other grievances against a particular arbitrator, it has remedies at its disposal. First, as the Labour Court observed, a non-party in any enforcement proceeding is entitled to seek the recusal of the appointed arbitrator on the grounds of bias or indeed, any other legitimate ground for recusal. Further, any ruling in an application for recusal, as well as the arbitration award enforcing a collective agreement concluded under the auspices of a bargaining council, is subject to review under s 158 (1)(g) and s 145 of the LRA respectively.

[18] It thus cannot be said that in these circumstances every appointment by the CCMA acting in terms of s 33A (4)(b) of an arbitrator who happens to be both a CCMA commissioner and a member of the appellant's panel of arbitrators necessarily gives rise to institutional bias.

[19] Finally, and to the extent that s 33A (4)(c) provides that despite the appointment of an arbitrator by the CCMA, the council remains liable to pay the arbitrator's fee and to conduct the arbitration under its own auspices and not those of the CCMA, the same

considerations apply. There is no suggestion that the procedure for the arbitration of enforcement disputes under the auspices of the council is in any way different to that applicable in the CCMA, or otherwise unfair or prejudicial to the appellants. As I have noted, the integrity of the arbitrators themselves has not been called into question. The provisions of s 33A (4)(c) accordingly do not in themselves serve to constrain the CCMA's selection of an arbitrator in terms subparagraph (b).

Costs

[20] It follows that the Labour Court correctly dismissed the application and that the appeal must fail. While counsel sought to persuade us that the appeal was brought as part of a campaign to frustrate the enforcement of the council's agreements as against the appellants and that a punitive order for costs is thus warranted, the point raised by the appellants does not fall into the category of the frivolous or vexatious, nor is there any evidence to suggest that the proceedings before this Court were initiated in bad faith. The requirements of the law and fairness are best satisfied by an order that each party bear its own costs.

[21] I make the following order:

Order

1. The appeal is dismissed.

van Niekerk JA

Molahlehi JP *et* Savage ADJP concur

Appearances:

For the appellant: Adv F Boda SC

Instructed by: Cliffe Dekker Hofmeyr Inc.

For the first respondent: Adv G Fourie SC
Instructed by: Tricker Inc.