

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO CA 16 / 98

In the matter between:-

FIDELITY GUARDS HOLDINGS (PTY) LTD

Appellant

and

NATIONAL UNION OF SECURITY OFFICERS AND

Respondent

GUARDS (NUSOG) obo BERNER EMIL LOMAX

JUDGMENT

MOGOENG AJA

[1] Mr Berner Emil Lomax (“Lomax”) was employed by the Appellant in 1983. He was dismissed on 11 December 1996. His dismissal was confirmed on the first and second level appeal on 18 December 1996 and 27 January 1997 respectively. He was a member of an unregistered body known as the Employees’ Representative Council (“the ERC”) at all times material hereto.

[2] Subsequent to the foregoing appeals, Lomax lost confidence in the ERC . As a result, he joined the National Union for Security Officers and Guards (“NUSOG”) to deal with the dispute further. Acting on this mandate, NUSOG referred the dispute to the CCMA on 30 January 1997.

[3] The Appellant objected to such a referral on the basis that the jurisdiction of the CCMA was ousted by the recognition agreement which it had concluded with the ERC on 23 September 1991. That agreement embodies an arbitration clause which provides that after the

appeal stages ‘it shall become compulsory to refer the matter to arbitration.’ The parties contemplated private arbitration, preferably under the auspices of the Independent Mediation Service of South Africa (“IMSSA”). As a result of this objection, the CCMA did not entertain the dispute.

[4] On or about 16 July 1997 the ERC referred the dispute to IMSSA on behalf of Lomax. The Appellant refused to cooperate in the appointment of an arbitrator on the grounds that the delay preceding that referral was inordinate. It was not prepared to allow the matter to proceed to arbitration and regarded it as closed.

[5] The next step taken by NUSOG on behalf of Lomax was to apply to the Labour Court for an order in the following terms:

“(1) Ordering the Respondent to comply with its obligation to have the dispute invoked by the Applicant’s member, Berner Emil Lomax, in terms of Respondent’s recognition agreement with its Employees Representative Council (“the ERC”), arbitrated under the auspices of the Independent Mediation Services of South Africa in order to give effect to section 158 (3)(d) of the Labour Relations Act, 66 of 1995.”

[6] The learned Judge arrived at the conclusion that she could not grant Lomax the order as prayed for. She made the following order instead:

- “1. “The applicants are entitled to refer the first applicant’s dispute to the Commission for Conciliation, Mediation and Arbitration.
2. The Commission for Conciliation, Mediation and Arbitration has the necessary jurisdiction to conciliate this dispute.
3. The respondent is ordered to pay the costs of the applicant in this matter.”

[7] I have examined all the grounds on which the Appellant bases its appeal against the judgment of the court *a quo*. The only fundamental issue which stands out is whether the totality of the facts can sustain the order granted. I will, therefore, confine myself to the facts which are relevant to the determination of this issue.

[8] As I said above, the ERC and the Appellant concluded a recognition agreement which also makes provision for compulsory private arbitration. In terms of item 13 of Schedule 7 to the Labour Relations Act No. 66 of 1995 (“the Act”), a recognition agreement is deemed to be a collective agreement. A collective agreement binds members of every other party to it (see s23(1)).

[9] NUSOG referred the dispute to the CCMA in January 1997. In July 1997 the dispute was referred to IMSSA by the ERC. It follows that Lomax was still a member of the ERC which is a party to the abovementioned collective agreement even after he had joined NUSOG.

[10] It is common cause between the parties that the arbitration clause of the abovementioned agreement was and is binding on them. It was their common understanding that only IMSSA or a similar private body had jurisdiction over their dispute and not the CCMA. It was for this reason that NUSOG and Lomax brought an application to the Labour Court for an order intended to facilitate the application or enforcement of the arbitration clause.

[11] The order sought by the Respondent(s) required the Labour Court to adjudicate a dispute about the interpretation or the application of a collective agreement. Section 24 of the Act vests such powers on the CCMA. The court *a quo* was therefore correct to conclude that it did not have jurisdiction to entertain such an application, as a forum of first instance. It was also correct in refusing to grant the order prayed for.

[12] As a result of this finding of the court, a superficial reading of the order may well lead one to think that the Labour Court intended to ‘refer’ the question of the interpretation or application of the recognition agreement to the CCMA. However, a closer scrutiny of the order suggests otherwise. The court *a quo* stated that the Respondent(s) was ‘entitled to refer the.....dispute’ to the CCMA and that the CCMA has ‘the necessary jurisdiction to conciliate the dispute.’ Clearly, the dispute referred to is the one which arose from Lomax’s dismissal and not the interpretation or application of the recognition agreement.

[13] A case was not made out for the order granted. Appellant could not have understood the granting of such an order to be part of the case it had to meet. It was therefore effectively denied the opportunity to express itself on such a possible order.

[14] By referring the dispute to the CCMA, the court order flew in the face of the clear and binding provisions of the agreement and rendered the arbitration clause nugatory. Such an order cannot stand.

I am satisfied that the appeal must be upheld. In the result, I make the following order:

- 1) The appeal is upheld with costs.
- 2) The order of the Labour Court is set aside and the following is substituted therefor:

“ (i) The application is dismissed.

(ii) There will be no order as to costs.”

MOGOENG AJA

I agree

CONRADIE JA

I agree

NICHOLSON JA

Appearances:

**Appearing for the Appellant:
Heever Heyns Attorneys.**

Mr S Snyman instructed by Snyman van der

**Appearing for the Respondent:
Security Officers and Guards.**

Mr C Wilson instructed by National Union of

Date of hearing:

1 September 1999

Date of judgment:

28 September 1999