

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE No: JA 18/2004

In the matter between

**THE MINISTER FOR PUBLIC SERVICE &
ADMINISTRATION**

FIRST APPELLANT

**PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL**

SECOND APPELLANT

AND

SOLIDARITY

FIRST RESPONDENT

W J VENTER

SECOND RESPONDENT

R S STEARN

THIRD RESPONDENT

JUDGMENT

JAPPIE AJA

Introduction

- [1] The appellants, The Minister for Public Service and Administration and the Public Service Co-ordinating Bargaining Council (the PSCBC) appeal against a judgment of Ngcamu AJ sitting in the Labour Court. The judgment stems from an application, brought by the first respondent, Solidarity, a trade union on behalf of two of its members, the second and third respondents. In the application the respondents sought an order

declaring an agency shop agreement (hereinafter referred to as “the agreement”), concluded on the 26th of May 1988 between the State, as employer, and the union parties to the PSCBC to be invalid and unenforceable. The basis of the respondents contention is that the agreement was void for want of compliance with the provisions of section 25 (3) (a) of the Labour Relations Act 66 of 1995 (“the Act”)

[2] The Labour Court upheld the contention and held that the agreement was void. The Labour Court issued a declarator to that effect and awarded costs against the second appellant, the only party that had actively opposed the application.

[3] A prayer for an order declaring the deductions of dues pursuant to the agreement to be illegal, unjustified and unlawful was abandoned by the respondents in the course of the proceedings before the Labour Court

Background

[4] During 1998 the second appellant accepted and adopted an agency shop agreement concluded between the State, as the employer party to the PSCBC and eleven trade unions representing the majority of those in the employ of the State that were then the employee parties to the PSCBC. Although the first respondent was not a party to the agreement at the time

when the agreement was concluded, it subsequently acquired some five thousand members who are employees of the State.

[5] The agreement took effect on the 1st July 1998. Approximately one million and sixty five thousand employees of the State fell within the registered scope of the PSCBC. Of these, approximately nine hundred and seventy five thousand were represented by the trade unions that were parties to the PSCBC. Those employees who were members of the trade unions paid subscriptions to the PSCBC who in turn paid it over to the trade unions to fund the work of such unions. The agreement further required non-union members to pay subscriptions in a like manner to the PSCBC. This was achieved by including in the agreement a provision which allowed the State;

- i) to deduct an agency fee equal to 1% (up to a maximum of R 60.00) from the salary of those of its employees who did not belong to one or other of the trade unions that were a party to the agreement ;
- ii) to pay the amount so deducted to the PSCBC for distribution in turn amongst the parties to the agreement for use by them in accordance with the dictates of the agreement.

On the 1st of July 1998 the agreement was brought into operation by Resolution 1 of 1998.

[6] Section 25(3) of the Act governs the requirements for a binding agency shop agreement. Subsection (3) (a) of section 25 reads as follows:

“ An agency shop agreement is binding only if it provides that -
employees who are not members of the representative trade union are
not compelled to become members of that trade union;”

It will be seen from the above that sub-section requires that an agreement should provide that employees who are not members of the representative trade union are not compelled to become members of that trade union. In the present case the agreement in question did not have a provision to that effect. The respondents contended that as the agreement did not contain a clause that set out the requirements of the relevant sub-section, the agreement was not binding and was, therefore, void *ab initio*.

[7] It is common cause that the agreement as originally adopted by Resolution 1 of 1998 did not expressly meet the requirements of section 25(3) (a) of the Act. In the Labour Court, the appellants had initially denied that the agreement lacked the requisite provision, but it was conceded before this court that the agreement as originally adopted did not contain the provisions required by the sub-section (3) (a) of section 25 of the Act.

[8] It is further common cause that on the 19th June 2003, after the present proceedings had been instituted, the PSCBC, by way of Resolution 4 of 2003, inserted a clause in the agreement which clause reads as follows:-

“no employee is or can become obliged to join a trade union that is or becomes a party to this agreement. Employees who are not members of a trade union party to this agreement are not compelled to become members of any trade union party to this agreement”.

The decision of the court a quo

[9] It is clear from reading of the judgment of the Labour Court that in granting the declaratory order sought by the respondents that court based its decision on the *ratio* in *Greathead v SA Commercial Catering and Allied Workers Union* (2001) 22 ILJ 595 (SCA). In that case, Greathead, a retail advisor objected to the imposition of an agency shop agreement on him and he launched an application in the High Court for a declarator that the agreement infringed his right to freedom of association, freedom to make political choices, and his right to freedom from servitude or forced labour. He also wanted the agency shop agreement to be declared unenforceable, alternatively of no application to him.

[10] The High Court dismissed the application with costs. The High Court nonetheless granted Greathead leave to appeal to the Supreme Court of Appeal (SCA). That Court dealt with the matter on the basis of whether the agency shop agreement complied with section 25(3) of the Act.

[11] The SCA noted that in terms of section 25(3) of the Act an agency shop agreement was binding only if it complied with all the requirements of the section. *At 598 paragraph [8] of the judgment* the following appears;-

“It is common cause that the agreement does not expressly provide for the matters referred to in section 25(3)(a) and (c). In my view, the agreement is also silent about the requirements stated in section 25(3)(d)(i) and (ii). It is evident from the wording of section 25(3) that the agreement is binding (only if) it complies with all the requirements of this section, and that if it does not so comply it is invalid.”

At paragraph [12] the Court further stated

“The Act requires the agreement to be in writing and to ‘provide’ specifically for the matters prescribed by section 25(3). In my judgment the agreement in the respects referred to failed to comply with the requirements of section 25(3). In the result it never became a binding agreement.”

The Appeal

[12] If the *ratio* in *Greathead* was to be applied to the agreement in this case prior to the adoption of Resolution 4 of 2003, the conclusion would be inescapable, that the agreement would not be a binding agency shop agreement as it would not comply with the provision of sub-section (3)(a) of section 25 of the Act.

[13] As the respondents had abandoned all consequential relief, it was argued that the granting of the declaratory order as sought by the respondents would serve no useful purpose. While counsel for the appellants conceded that it was not incompetent for a court to grant declaratory relief where no consequential relief is sought, he argued that a court should, in the proper exercise of its discretion, decline to do so when the relief sought is purely abstract in its effect. He further submitted that since the amendment of the agreement by Resolution 4 of 2003 the validity of the agreement in its present form is now beyond question.

[14] Counsel for the appellant further emphasized that since May 1998 when the agreement was concluded:-

- (a) the individual members of the first respondent had known of the existence of the agreement since then;
- (b) these proceedings were instituted almost five years after the conclusion of the agreement;
- (c) throughout that period agency fees were paid over in compliance with the agreement and the monies were disbursed;
- (d) the individual members (of the first respondent) regulated their conduct as employees of the State as if the agreement was in fact valid.

- [15] In reply the respondents' counsel contended that although the declaratory relief may be "purely abstract in effect" this is no reason to set aside the order of the *court a quo*. He argued that even if Resolution 4 of 2003 had "cured" the invalidity of the agreement as originally adopted, the respondents were still entitled to an order declaring the agreement invalid. It was argued that even if the first respondent and its members had abandoned the claim for consequential relief, this did not alter the correctness of the decision of the Labour Court to have granted declaratory relief.

Discussion

- [16] Section 158 (a) (iv) of the Act grants the Labour Court the power to issue a declaratory order. The principles which are applicable to the granting of declaratory orders were dealt with in *Mohamed v. Mohamed and Others* 1976(3) SA 151 (T). At 154 F Marais J stated the position as follows:-

"The position now is that the Courts would entertain (not necessarily grant) an application for a declaratory order if neither an infringement nor a concrete dispute exists, the only condition precedent being that the declaratory order, if granted, would bind one or more interested parties as well as the applicant, who must be a party "interested" in a decision on a contingent right or obligation."

At 156 A, He made the point that:

"The matter before us is clearly of academic interest only and therefore not capable of a proper declaratory order in terms of the section."

In *Rutherford v Furguson and Others* [2000] 1 All SA113 (O) at 119 F the following was said:-

“ . Prior to 1963 an existing and concrete dispute between persons was required but this requirement was modified in *Ex Parte Nell* (*supra*). This modification has not eroded the rule that a party is not entitled to approach the court for what amounts to a legal opinion upon an abstract or academic matter. The court will not make a declaration of rights unless there are interested parties upon whom the declaration would be binding.”

[17] Although it was argued before the *court a quo* that the abandoning by the respondents of any consequential relief rendered the order for a declarator purely academic, it is apparent from the judgment of the *court a quo* that this issue was not considered at all. In my view this issue ought to have been considered in the light of the abandonment by the respondents of all consequential relief. The failure of the *court a quo* to give consideration to this aspect of the appellant's case was a misdirection which calls for interference in the relief granted.

[18] The arguments advanced by the respondents do not touch upon the principles which govern the discretion of a court in these circumstances to grant declaratory relief. In *JT Publishing (Pty) Ltd v Minister of Safety and*

Security 1997 (3) SA 514 (CC) Didcott J made reference to these principles at page 525 A of the judgment and stated the position as follows

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible."

- [19] A further factor which the *court a quo* ought to have considered was the time lapse between the adoption of Resolution 1 of 1998 and the launch of the present proceedings. That period was five (5) years. In *Naptosa and Others v Minister of Education, Western Cape, and others 2001 (2) SA 112 (C) at 126 E to G Conradie J* stated;-

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well established law that undue delay may be taken into account in exercising discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the Court, the order could serve as a review. A Court, in exercising its discretion

whether to grant a declaratory order should, accordingly, in an appropriate case weigh the same consideration of “justice or convenience” as it might do in the case of an interdict or a review.”

[20] In conclusion the failure of the *court a quo* to give proper consideration to the principles governing the granting of declaratory orders and its failure to consider the lapse of time between the adoption of Resolution 1 of 1998 and the launch of the present proceedings is in my view is a misdirection. The declaratory order relates to a complaint which had occurred in the past and which was subsequently corrected. At the date of the hearing If this matter in the court a quo that complaint no longer existed. It is plain that in the circumstances of this case the granting of declaratory relief in the form sought by the respondents is, purely academic. In the light of these circumstances, the *Court a quo* ought to have refused the relief sought by the respondents.

[21] In the result I make the following order:

- (1) The appeal is upheld with costs including the costs of two counsel.
- (2) The order of the *Court a quo* is set aside and replaced with an order in the following terms:

“the application is dismissed with costs.”

JAPPIE AJA

I concur.

ZONDO JP

I concur.

H. M. MUSI AJA

On behalf of the Appellants:

Adv M. Brassey S.C.

With Adv. D.C. Wood

Instructed by:

Attorneys Bowman Gillfillan Inc.

Sandton

On behalf of the Respondents:

Adv. J. G. Grogan

Instructed by:

Attorneys Geldenhuys Botha Inc.

Centurion

Date of Judgment: 29 March 2007

