



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA10/2016

In the matter between:

MACDONALD'S TRANSPORT UPINGTON (PTY) LTD

Appellant

and

ASSOCIATION OF MINEWORKERS

AND CONSTRUCTION UNION (AMCU)

First Respondent

MEMBERS OF AMCU LISTED

ON ANNEXURE "A" TO NOTICE OF Motion

Second Respondent

NATIONAL BARGAINING COUNCIL

FOR THE FREIGHT AND LOGISTICS INDUSTRY

Third Respondent

SHAAM FRIEDMAN N.O.

Fourth Respondent

Heard: 24 May 2016

Delivered: 28 June 2016

Summary: Right of dismissed employees to choose a union to represent them in unfair dismissal arbitration– employer contending that union could not represent employees as they are not union members in good standing, their membership having lapsed for non-payment of subscription fees – interpretation of union's constitution – constitution, properly interpreted not subjecting membership to a condition that fees be actually paid– employees becoming union members in terms of its constitution upon submitting

application form and acceptance thereof – employees were members at all relevant times

Employees' right to choose a representative in unfair dismissal proceedings distinguished from union's demand for organisational rights - in dismissal proceedings before the CCMA or a Bargaining Council forum, the union is not usually the party, the employees are the parties – rule 25 of CCMA Rules. Employees having the right to choose a union as their representative in dismissal proceedings - when a union demands to represent a member in dismissal proceedings it usually asserts its members' rights not its own. Union also entitled to represent members in dismissal proceedings – section 200 of LRA

Review test for interpretation of legal instruments, eg, a union constitution or other agreement or statute – Quaere: is it the *Sidumo* Reasonableness test or a correctness test?

Employer third party not having an interest in internal affairs of a union and having no locus standi to concern itself with such affairs – whether union enforces its rights against its members or chooses not to is never the legitimate business of an employer – employers legitimate interest in membership dynamics of a union confined to a unions demands in respect of organisational rights and does extend to union's representative role in unfair dismissal proceedings

Labour Court correct in setting aside arbitrator's ruling refusing to allow a union to represent workers - Appeal dismissed with costs.

Coram: Tlaletsi AJP and Ndlovu et Sutherland JJA

JUDGMENT

SUTHERLAND JA

Introduction

- [1] The controversy in this appeal concerns a ruling by the fourth respondent, an arbitrator, denying the first respondent (AMCU) the right to represent a number of individual workers in an unfair dismissal dispute with their employer, the appellant, in arbitration proceedings convened under the auspices of the third respondent, a bargaining council. On review, the Labour Court set the ruling aside and issued a declarator that AMCU is entitled to represent the individuals in the dismissal proceeding. The employer appeals against that order.
- [2] The individual workers had been dismissed in the wake of a strike, allegedly characterised by violence. The dismissed workers referred an unfair dismissal dispute to the bargaining council. Why did the workers strike? They did so in support of a demand that the appellant grant AMCU organisational rights in terms of sections 12 and 13 of the Labour Relations Act of 1995 (LRA).¹ The

¹ LRA Sections:

12 Trade union access to workplace

(1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members interests.

(2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.

(3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution.

(4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

13 Deduction of trade union subscriptions or levies

(1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.

(2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.

(3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.

(4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.

(5) With each monthly remittance, the employer must give the representative trade union-

(a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;

(b) details of the amounts deducted and remitted and the period to which the deductions relate; and

initial request for access and stop order deductions of the union subscriptions was made on 1 August 2014. Thereafter haggling over proof of membership and degree of representation followed the familiar dilatory pattern. The merits and demerits of each party's behaviour is unimportant for present purposes. Eventually, the representivity issue was conciliated and a certificate of non-resolution was given on 15 April 2015, almost nine months later. A strike notice followed on 21 May. The strike ensued and the dismissal occurred three weeks later on 18 June. Axiomatically, no deductions of union subscriptions had been effected.

- [3] At the dismissal hearing, the appellant raised, *in limine*, the argument that the workers were not at that time members of AMCU, because their membership had lapsed by reason of non-payment of subscriptions in excess of three months, and therefore AMCU could not represent them. The foundation for that submission was an interpretation placed on several provisions of the constitution of AMCU by the appellant, and the common cause fact that none of the individuals who had been dismissed had yet to pay any subscriptions to AMCU.
- [4] The arbitrator accepted the appellant's contention about the union constitution and also, that, as a fact, no subscriptions had been paid for that period. *Ergo*, he held that the memberships of the individuals had lapsed. In his view, the consequence was that AMCU could not represent them. The critical passage in the ruling reads:

'From the commencement of the dispute for organisational rights it is clear that the employer was unwilling to grant these rights. The union is bound by its constitution and should have made contingency plans to secure membership through the period of the dispute as the constitution only allows for deductions to be made through remittance by an employer. The right to automatic deductions is earned if parties are members of the council, the is no evidence that AMCU is party to the council'

- [5] On review, the Labour Court held that the arbitrator had not properly grasped the provisions of the Union constitution and, thus, the ruling had to be set aside.
- [6] The Labour court decided the review application on the basis that the arbitrator approached the enquiry in “the wrong manner” citing the passage at [21] in the judgment of *Heroldt v Nedbank (Congress of SA Trade Unions as amicus curiae) (Heroldt)*² for that proposition, a point addressed more fully hereafter. That decision is one of several which make up a suite of judgments regurgitating, explaining and extrapolating the decision in *Sidumo and Another v Rustenburg Platinum Mines and Others (Sidumo)*³ which laid down the review test: “Is the decision reached by the commissioner one that a reasonable decision maker could not reach” (The reasonableness test) Whether “reasonableness” is the appropriate test to be applied to reviewing the ruling about interpreting the union constitution is challenged by the appellant who contends that “correctness” is the appropriate test in relation to interpreting such an instrument.
- [7] Both the arbitrator and the Labour Court articulated the rationale for the outcome in terms of the *right of the union* to represent persons. Neither articulated the point that the issue was also about the *individuals’ rights to choose a union* to represent them.
- [8] Neither the arbitrator nor the Labour Court addressed the question of whether an employer has any *locus standi* to challenge the membership credentials of persons who desire a union to represent them in disciplinary proceedings before a statutory arbitration forum; (ie the CCMA or a Bargaining Council forum) The point was nevertheless argued in the appeal hearing and is addressed hereafter.

² (2013) 34 ILJ 2795 (SCA).

³ Ltd (2007) 28 ILJ 2405 (CC), *Sidumo*, per Navsa AJ, at [110]: ‘To summarize, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’

[9] Accordingly, four questions arise for consideration, which for convenience are dealt with in this order:

- 9.1. Upon a proper interpretation of the union constitution, were individual workers members of AMCU at the relevant time?
- 9.2. What is the review test by which to review a ruling by an arbitrator on the interpretation of a union constitution?
- 9.3. Whose rights are at issue?
- 9.4. 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?

Had membership lapsed?

[10] In terms of the constitution of AMCU, a person becomes a member by lodging an “application for membership” with a branch secretary which the branch executive accepts. (Clause 7.2) It is common cause that the putative members cleared this hurdle and it is accepted, moreover, no such putative member resigned.

[11] A “member” is defined in Clause 37.1 thus:

‘member - mean a person prescribed in clause 16.1 of this constitution and/or any person/employee who have completed the application for membership stop order irrespective of whether the membership subscription has commenced or not.’

The reference to paragraph 16.1 relates to full-time office-bearers of AMCU and is irrelevant to this enquiry. Plainly, as to all other persons, it is not contemplated that the new member is obliged to pay before the stop order regime is activated. Nor is it contemplated that when it is activated, there might be a sum owing for the interim period between signing up and the first stop order deduction. How long that interim period might be is not restricted.

- [12] Such a member is subject to the termination of such membership in certain circumstances. The first circumstances are those contemplated in Clause 7.4.2:

‘Any member whose contract of employment has been terminated by his employer his/her membership will not be terminated for one (1) full year. Such a member will be exempted from paying subscription to the trade union until he/she is re-employed.

This text provides for two happenings. First, a year of subscription-free membership post-dismissal. Second, post-dismissal, subscription free membership until re-employment. Is one or other happening qualified by the reach of the other? If reemployment occurs two years later has membership been preserved? That seems inconsistent with the first happening. The preferred way to interpret the text is to reconcile any apparent anomaly. This can be done by subordinating the second happening to the first. The upshot would be that membership is preserved subscription-free for a maximum of one year, and if the worker is reemployed earlier, the exemption to pay then ceases earlier, before the end of the year. Implicit in these provisions is that payment is due only whilst employed. Read thus, businesslike sense is made of the provisions.

- [13] The second circumstance which contemplates termination of membership is in Clause 7.4.3 which provides that :

‘Membership shall lapse if a member is in arrears with subscription for three months’

- [14] The concept of arrears means simply a failure to pay what is due on time. Self-evidently, as already seen, an obligation to pay subscriptions is linked to employment, and axiomatically the receipt of wages from which to disburse the sum. Any doubt about that evaporates when clause 9.2 is read:

‘Subscription fees shall be 1% of the member’s monthly basic salary.’

Significantly, there is no fixed sum. If unemployed, the member’s subscriptions are 1% of nought.

[15] Clause 9.3 provides that:

'Stop order facility will be entered into with all the employers whose employees have joined AMCU for the purpose of deducting fees.'

This seems to be the only provision dealing with the regulation of the collection of subscriptions. Again, it is apparent that payment is dependent upon being in receipt of wages.

[16] Clause 8.2 provides:

'Members who are three months in arrears with their subscription fees forfeit their membership, any benefit they received from the trade union will cease. The member may re-apply for membership by completing new stop order form, such application will be treated as new.'

How does this provision tie in with those already cited? In the first part, it simply re-articulates the substance of paragraph 7.4.3. The second part provides an opportunity *to de facto* "resume" membership without suffering any disability from the lapse, such as, perhaps, having to pay up the arrears. Of course, an application could be refused, subject to a right of appeal. (Clauses 7.2.2 and 7.3)

[17] Reading these provisions together points in the direction that AMCU undertakes to collect the subscriptions and the members' signing of the authorisation to collect the sum by a stop order is a full discharge of the member's obligation to tender payment. Were the risk of non-collection through the mechanism of a stop order not one which the union wished to run, it is astonishing that no alternative collection means is provided for.

[18] These provisions must be understood in the context of the provisions of the LRA about the procuring of organisational rights and in the context of labour relations dynamics, in which unions recruit members and have to engage with every employer to establish a right to enjoy a stop order facility. Section 13 regulates the procedure to obtain stop orders; it is elaborate and only commences once the majority representative status required by section 14 is shown to the satisfaction of the employer and if that is not forthcoming, the

procedure provided in section 21 leading on to conciliation and maybe, to arbitration, if not a strike. Axiomatically that may take time; sometimes a long time, as this very case illustrates.⁴

⁴ A reading of the relevant provisions is all that is necessary to illustrate the burdensomeness of the process:

Section 13 is cited above.

Section 14: trade union representatives

(1) In this section, 'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves-

(a) if there are 10 members of the trade union employed in the workplace, one trade union representative;

(b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;

(c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;

(d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every 100 additional members up to a maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and

(f) if there are more than 1 000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1 000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) The constitution of the representative trade union governs the nomination, election, term of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions-

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to-

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours-

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative

Section 21: Exercise of rights conferred by this Part 3

(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 union's 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.

(4) If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

(5) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on the other party to the dispute.

(6) The Commission must appoint a commissioner to attempt to resolve the dispute through conciliation.

(7) If the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.

(8) If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner-

(a) must seek-

(i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;

(b) must consider-

(i) the nature of the workplace;

(ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;

(iii) the nature of the sector in which the workplace is situated;

(iv) the organisational history at the workplace or any other workplace of the employer; and

(v) the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed-term contracts, part-time employees or employees in other categories of non-standard employment; and

[Sub-para. (v) added by s. 2 (a) of Act 6 of 2014.]

(c) may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.

(8A) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant a registered trade union that does not have as members the majority of employees employed by an employer in a workplace-

(a) the rights referred to in section 14, despite any provision to the contrary in that section, if-

(i) the trade union is entitled to all of the rights referred to in sections 12, 13 and 15 in that workplace; and

(ii) no other trade union has been granted the rights referred to in section 14 in that workplace.

(b) the rights referred to in section 16, despite any provision to the contrary in that section, if-

(i) the trade union is entitled to all of the rights referred to in sections 12, 13, 14 and 15 in that workplace; and

(ii) no other trade union has been granted the rights referred to in section 16 in that workplace.

[Sub-s. (8A) inserted by s. 2 (b) of Act 6 of 2014.]

(8B) A right granted in terms of subsection (8A) lapses if the trade union concerned is no longer the most representative trade union in the workplace.

[Sub-s. (8B) inserted by s. 2 (b) of Act 6 of 2014.]

(8C) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered trade union,

- [19] The notion that members of AMCU, recruited on, say, 1 January, and AMCU has not by 2 April secured stop order activations from their employer, forfeit their membership is preposterous. Were it so, an employer, by the simple tactic of delay, could undermine the recruitment efforts repeatedly, and “legitimately” claim that membership is unproven. The union constitution cannot be understood in a way that renders recruitment of members by a union to be susceptible to such a ruse.
- [20] Lastly, the observations of Lagrange J in *General Industries workers Union of SA v Maseko and Others* (2015) 38 ILJ 2874 (LC) at [23] which affirmed long standing authority that the approach to interpreting a constitution of a voluntary organisation is benevolence, rather than of nit-picking, and ought, rather, to be aimed at the promotion of convenience and the preservation of rights, should in my view, be unreservedly endorsed.
- [21] In my view, the argument that membership had lapsed under the circumstances addressed, must fail. It is common cause that the union had recruited workers. That was sufficient for the union to assert membership. That was sufficient for the workers to assert membership. The lapse of time

or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if-

- (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
- (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.

[Sub-s. (8C) inserted by s. 2 (b) of Act 6 of 2014.]

(8D) Subsection (8C) applies to any dispute which is referred to the Commission after the commencement of the Labour Relations Amendment Act, 2014, irrespective of whether the collective agreement contemplated in subsection (8C) was concluded prior to such commencement date.

[Sub-s. (8D) inserted by s. 2 (b) of Act 6 of 2014.]

(9) In order to determine the membership or support of the registered trade union, the commissioner may-

- (a) make any necessary inquiries;
- (b) where appropriate, conduct a ballot of the relevant employees; and
- (c) take into account any other relevant information.

(10) The employer must co-operate with the commissioner when the commissioner acts in terms of subsection (9), and must make available to the commissioner any information and facilities that are reasonably necessary for the purposes of that subsection.

(11) An employer who alleges that a trade union is no longer a representative trade union may apply to the Commission to withdraw any of the organisational rights conferred by this Part, in which case the provisions of subsections (5) to (10) apply, read with the changes required by the context.

(12) If a trade union seeks to exercise the rights conferred by Part A in respect of employees of a temporary employment service, it may seek to exercise those rights in a workplace of either the temporary employment service or one or more clients of the temporary employment service, and if it exercises rights in a workplace of a client of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including the client's premises.

brought about by the prevarications of the appellant, whether meritorious or not, cannot undo the fact of membership.

What is the test by which to review a ruling by an arbitrator on the interpretation of the union constitution?

[22] The decisions of arbitrators in the CCMA or Bargaining Council fora, are usually reviewable by reference to the reasonableness test derived from *Sidumo*. This test, given its very formulation, seems obviously appropriate in relation to credibility and factual findings, and the value choices inherent in determining fairness. However, is it necessarily the appropriate test to be applied when reviewing a statutory arbitrator who is required to interpret a statute, a contract, or, indeed, a union constitution, all questions of law? The appellant's contention is that the test ought to be whether the conclusions reached were "correct", rather than "reasonable".

[23] Davis JA, in *DENOSA v WC MEC Health (DENOSA)*⁵, in dealing with a review of an arbitrator's interpretation of a public service regulation, had occasion to remark on this very aspect, noting the significance of the considerations for reviews involving errors of law, as distinct from considerations for reviews on other grounds, and the appropriateness to the latter category, rather than to the former, of *Sidumo*'s reasonableness test. It was unnecessary in *DENOSA* to make a definitive finding, but on this troublesome question, Davis JA stated at [20] – [21]:

[20] Since the advent of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome. See in particular *City of Johannesburg Metropolitan Municipality v Gauteng development Tribunal and Others* 2010 (6) SA 182 (CC) at para 91; see also the remarks of Malan J (as he then was) with regard to the implications of *Hira, supra* in the constitutional dispensation in *South African Jewish Board of Deputies v Sutherland N.O and Others* 2004 (4) SA 368 (W) at para 27.

⁵ Unreported, 12 May 2016 CA 17/2014.

[21] To recap, Navsa AJ said in *Sidumo*, at para 105, that the review powers in terms of s 145 'must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair'. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of the error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that *is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in Sidumo, justify a review* and setting aside of the award depending on the facts as established in the particular case. (emphasis supplied)

[24] The Labour Court's remark about the arbitrator deciding the matter in the wrong way, derives from *Heroldt* where, in the course of distinguishing the different views about irregularities, or defects as contemplated by section 145 of the LRA,⁶ expressed in the judgments of the majority and the minority in *Sidumo*, it was stated that:

'[21] That does not mean that a latent irregularity, as Schreiner J originally used that term in the *Goldfield Investments* case, is not a gross irregularity within the meaning of s 145(2)(a)(ii). It is, but only in the limited sense mentioned earlier, where the decision maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner. That is well illustrated by the facts of that case. A magistrate seized with a valuation appeal was required under the relevant legislation to conduct a fresh enquiry into the question of the proper value of the property. Instead he refused to consider the evidence of value tendered by the appellant and approached the matter on the basis that he could only amend the valuation if it was clearly erroneous. In the circumstances he did not enter upon the correct enquiry and his decision was set aside.'(emphasis supplied)

[25] Picking up on that dictum, the Labour Court held that the ruling was reviewable because the arbitrator failed to apply his mind to the relevant

⁶ LRA section 145(2): A defect referred to in subsection (1), means-

- (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
- (b) that an award has been improperly obtained.

issues and thus acted in the wrong way: ie, he did not enquire into what was the proper interpretation of the document in the context of the LRA and labour relations practice, in the manner stipulated in the judgment of Wallis JA in *Natal joint Municipal Pension Fund v Endumeni Municipality*⁷ The thrust of the Labour Court's judgment is that upon a proper construction of the AMCU constitution, a person who signs the member application form is and remains a member. The provision for automatic lapse of membership, if three months in arrears with subscriptions, is triggered only after a stop order facility is put into operation and the non-payment occurs thereafter, because the sole method of collecting subscriptions is by stop order. Noteworthy is the finding by the arbitrator, himself that the only mechanism provided for in the constitution to collect subscriptions was *via* stop orders, but notwithstanding that finding, he reached a conclusion about arrears plainly at odds with it.

[26] Is a "reasonable" arbitrator entitled to be wrong on the law? In *Heroldt*, the court held:

'[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. *A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.* Material errors of fact, as well as the

⁷ 2012 (4) SA 593 (SCA) at para 18. *Endumeni* At para 18 '.... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’
(Emphasis supplied)

- [27] Part of the “material” alluded to in *Heroldt* must be the text of the constitution which, logically, must be properly read and properly understood. Davis JA in *DENOSA* postulated that the “law” is a dimension of the factual matrix (in the peculiar sense used to circumscribe what it is to which an arbitrator must apply his mind.) When the arbitrator read the document, he misunderstood its objective meaning. Can it be said that such a finding caused a wrong, and axiomatically, therefore an *unreasonable*, result as contemplated by *Sidumo*, more especially if proper weight is to be given to the requirement, among others, that decisions be ‘lawful’ mentioned by Navsa AJ in *Sidumo* ?
- [28] In *Telcordia Technologies v Telkom*,⁸ the court held that in a private arbitration, subject to the Arbitration Act 42 of 1965, there was no room to complain that the arbitrator was wrong on the interpretation of a contract, and provided the arbitrator understood the task presented to him, such an error was irreparable on review. However, in *Hira v Booysen (Hira)*,⁹ Corbett CJ famously held:

‘To sum up, the present-day position in our law in regard to common-law review is, in my view, as follows:

- (1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review. (See the *Johannesburg Consolidated Investment* case *supra* at 115.)
- (2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it ‘the tribunal’) has taken a decision, the grounds upon which the Court may, in the exercise of its common-law

⁸ 2007(3) SA 266 (SCA).

⁹ 1992 (4) SA 69 (A).

review jurisdiction, interfere with the decision are limited. These grounds are set forth in the *Johannesburg Stock Exchange* case *supra* at 152A-E.

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review.

(6) In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to

ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express a decisive view.¹⁰
(Emphasis supplied)

[29] In this case, it seems to me problematic to construe the conduct of arbitrator as not applying his mind to the task at hand. He knew he had to interpret the constitution. He just got it wrong. This looks more like the situation contemplated in the third point made by Corbett CJ in *Hira*. Does the LRA contemplate that an arbitrator in the CCMA or in a bargaining council forum, both statutory roles, has the last word on the proper interpretation of an instrument? If it is, the necessary implication would have been that a patently wrong interpretation would have to be upheld on review. Such a result, in my view, would be absurd.

[30] In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a Bargaining Council Forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged by Section 145 of the LRA; ie, a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations. If not, 'correctness' as a distinct test is necessary to address such matters. However, on either basis, the ruling in this case must be set aside.

[31] On that premise, it is unnecessary to take a firm view on whether there are two tests or one.

Whose rights are at stake?

[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*.

¹⁰ At 93A-94A.

- [33] The rules of the CCMA regulate representation of parties in misconduct proceedings before the CCMA. There is nothing before the court to suggest that the Bargaining Council did or could apply different norms.
- [34] CCMA Rule 25(1)(a)(ii), stipulates that a person who is a party to a dispute, may be represented in conciliation by an office bearer, official or member of that person's registered union. Rule 25(1)(b) ii extends that right that to arbitration proceedings. These provisions say nothing about a unions' right to represent their members in such proceedings.
- [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. But in dismissal proceedings (which, plainly, are not about collective bargaining) before the CCMA or a Bargaining Council forum, the union is not (usually) the party, but rather the worker is the party. It is the worker's right to choose a representative, subject to restrictions on being represented by a legal practitioner,¹¹ itself subject to a proper exercise of a discretion to allow such representation. When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that *worker's right* to choose that union.
- [36] Typically, when a union demands to represent a member in dismissal proceedings it asserts its members' rights not its own. However, a union can become a party to its member's dispute if it chooses to do so. This is optional. Section 200 of the LRA regulates union 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;
- (b) on behalf of any of its members;

¹¹ CCMA Rule 25 (1)(c).

(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.'

However, none of the three categories applies when a union official simply steps up to represent a member when the *member is the relevant party* in dismissal proceedings. Section 200 addresses the position when the *union itself becomes a party* to serve one or more of the three types of issues. The union may in terms of section 200(1)(b), "enter the dispute" of an individual member, by becoming a party in its own right, but it does not need to rely on section 200(1) (b) to "represent" individual parties; it can do so on the basis of the individual's rights as provided in CCMA rule 25. The utility of section 200(1)(b) is to facilitate circumstances where collective action is appropriate.

[37] *In NUM (obo Mabote) v CCMA (Mabote)*,¹² the Labour court (Steenkamp J) recognised that section 200 and CCMA Rule 25(1), found union rights and individual rights. On appeal, in *Kalahari Country Club v NUM (2015) 36 ILJ 1210 (LAC) at [1]* the decision was upheld. The distinction between the distinct roles of a union is, accidentally, illustrated by the controversy that arose in *County Fair Foods (Pty) Ltd v CCMA (2003) 24 ILJ 355 (LAC) (County Fair)*. A worker was dismissed. The dispute was referred to the CCMA by union A, in its name, as it could do in terms of section 200(1)(b). Later union A withdrew, but the worker presented himself with union B as his representative, who sought to have itself substituted for union A. The employer argued that the dispute was only between it and union A. The court held that substance had to prevail over form: the dispute was about the worker's dismissal and it mattered not which union "represented" him. Plainly, what triumphed was the worker's choice of his representative.

[38] In this matter, AMCU had become a party in its own right, but its presence could not have been limited to that role alone.

¹² (2013) 34 ILJ 3296 (LC) at para 30.

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.

[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.

[41] On the facts of this case, the individuals claimed to be members and the union claimed them as members. Assuming that the employer's challenge that the individuals were not in good standing were to be true, surely the choice of the union to elect not to cancel the membership or enforce specific performance is one which it can make without regard to any third party? No creditor is by law obliged to cancel a contract because the debtor fails to comply with the terms of the contract. Moreover, it has been held by Basson J in *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at [160] – [161] that an employee who appears before the Labour Court represented by a union pursuant to Section 161(c) of the LRA, needs not have been a member at the time of that employee's dismissal. If that be so, the relationship between union and a purported member in such proceedings is not dependent, in the least, on a history of membership, a point also latent in the decision in *County Fair (Supra)*

[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.

[44] In *Mabote*, Steenkamp J, in the course of addressing the admittedly distinguishable situation where an employer had tried to block workers from being represented by a union on the grounds that the union's constitution's limited it to organising in a sector other than that in which the employer operated, held at [26] –[28]:

'[26] What, then, to make of the restriction in s 4(1)(b) of the LRA that an employee may join a trade union 'subject to its constitution'?

[27] That restriction appears to me to regulate the relationship between the trade union and its members inter se. It is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature unduly to restrict the right to representation by a trade union to the extent that it is up to a third party — such as an employers' organization — to deny a worker that right, based on the trade union's constitution.

[28] The NUM constitution makes it clear that eligibility for membership is 'subject to the approval of the branch committee which has jurisdiction'. It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.'

[45] I concur wholly with the view that "it is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member" and such dictum is equally applicable to the circumstances of this case.

Costs

[46] The question of costs was contested. The Labour Court granted costs to AMCU. It has been argued that no prayer for costs was made by AMCU. This should unsuit it, says the appellant.

[47] In my view, the discretion to order costs is not fettered by what the parties seek.¹³ Whether or not to grant costs is a decision driven by the specific circumstances of the case. The prospects of a continuing relationship is a common influential factor in not granting costs. However, that is not an invariable, especially where one or other side had conducted itself inappropriately.

[48] In this matter, a patently flawed award was taken on review and set aside. The appeal followed to defend that patently flawed award. The point taken by the appellant at the arbitration was, at most, dilatory and calculated to protract litigation, harry AMCU and drive individual workers to litigate without assistance. Expeditious dispute resolution of a dispute is not promoted by such conduct, and ought not to be tolerated. Whether the appellant was *bona fide* in its belief in the point taken or not is unimportant; the substance of the point and its effect is what must be weighed. A litigant who behaves like this and consumes the time of both the Labour Court and of this Court cannot expect such conduct to go unremarked upon. Had a submission been made

¹³ See: Clifford Harris (Pty) Ltd v SG Building Equipment (Pty) Ltd 1980 (2) SA 141 (T) at 152, where Nicholas J, relying on the venerable authority of Curlewis J writing for the Full Bench in *Sing v Sing* 1911 TPD 1034 at 1038-1039 held that the absence of a payer for costs did not mean a successful party could not be awarded costs.

on behalf of AMCU for attorney and client costs, such submission would have been seriously considered. In my view, the Labour Court's award of costs should stand and the appellant should bear the costs to the appeal too.

The Order

[49] I make this order:

49.1. The appeal is dismissed.

49.2. The order of the Labour Court is confirmed.

49.3. The appellant shall bear the costs of the appeal.

Sutherland JA

Tlaletsi AJP and Ndlovu JA concur in the judgment of Sutherland JA

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