

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO J145/2011

**NATIONAL ENTITLED WORKERS
UNION**

Applicant

and

LEONARD DINGLER (PTY) LTD

1st Respondent

MINISTER OF LABOUR

2nd Respondent

JUDGMENT

LAGRANGE, J

Introduction

- 1] Judgment in this matter was handed down earlier today and my brief reasons for the decision are set out below.

Background

- 2] The applicant in this matter is the National Entitled Workers Union ('NEWU'), which is currently deregistered, pending an appeal to the Labour Appeal Court against a decision of the labour court to dismiss its appeal against the decision of the registrar of labour relations to deregister it. On 30 November 2010, following the decision of the

labour court to dismiss the union's appeal against the registrar's decision¹, the first respondent ('the company') cancelled all collective agreements between itself and the union. The second respondent was joined in the matter because of the alternative relief initially sought which entailed a possible constitutional challenge to a number of provisions in the Labour Relations Act, 66 of 1995 ('the LRA').

Analysis

- 3] The reasons relied upon by the company at that stage were twofold. Firstly, the respondent relied on the provisions of section 106 (3) of the LRA, which reads "*When a trade unions or employers organisations registration is cancelled, all the rights it enjoyed as a result of being registered will end.*" Secondly, in terms of the collective agreement between the company and the union the union had to be registered.
- 4] The union attempted to persuade the company that pending the outcome of its application for leave to appeal, the effect of the labour court's judgement was stayed and accordingly the union should be treated as registered for the time being. The company was of the view that unless the union obtained a special order to stay the effect of the labour court's decision to dismiss the appeal against the NEWU's deregistration, the registered status of the union did not revive, even if leave to appeal against that decision was granted. In a further letter of 10 December 2010, the company also advised that on the basis of the reasons given for the registrar's decision, which the labour court upheld, the company was unwilling in any event to be party to a collective agreement between itself and the union, given the gravity of the findings which were made against NEWU.
- 5] According to clause 4 (1) of the Consolidated Collective Agreement between the union and the company dated 22 September 2003, collective bargaining in respect of wages and other terms and conditions of employment would take place annually during the

¹ *National Entitled Workers Union v The Ministry of Labour and 4 others* (J 2180/06 dated 25/11/2010)

month of May, though it was suggested that this was to have changed this year to February, which made the matter urgent.

- 6] In the notice of motion, the union sought a wide range of relief against the company aimed at declaring the decision of the company to cancel the collective agreements, and the organisational rights contained in it, unlawful. However, at the hearing of the matter on 24 February 2011, the union expressly abandoned all its other prayers for urgent relief, including alternative prayers declaring certain provisions of the LRA inconsistent with the Constitution, and sought only to obtain a declaratory order in the following terms:

"Declaring that, regardless of whether or not NEWU is an unregistered, registered or deregistered trade union:... (2) NEWU has the right to engage in collective bargaining with the first respondent."

- 7] The first respondent's representative, Ms Savage, argued that this was a right which NEWU 'already had'. On the face of it, this proposition appears paradoxical: the company is refusing to engage in collective bargaining with the union, but asserts in the same breath that the union still has a right to engage in collective bargaining.
- 8] The paradox is resolved if one has regard to the true nature of the right to engage in collective bargaining. The right is derived from section 23(5) of the Constitution², which states:

“(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1).”

² The Constitution of the Republic of South Africa, Act 108 of 1996

9] The limited relief now sought by the union, in effect relies on the direct enforcement of its constitutional right to engage in collective bargaining in terms of this provision of the Bill of Rights. In the Constitutional Court case dealing with whether or not a military trade union, SANDU, was entitled to compel the Defence Force to engage with it in collective bargaining in a Military Bargaining Council the court had the following to say about the direct enforceability of Constitutional Rights, after analysing the issue:

“[52] Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting in its protection of the s 23(5) right in the litigant's view, then that legislation should be challenged constitutionally.”³

10] No doubt informed by this judgment, Mr Maluleke, who appeared for NEWU, had correctly sought to challenge a number of provisions of the LRA as alternative relief and had duly cited the Minister of Labour as the second respondent in the matter. Nonetheless, as the matter now stands, NEWU is relying solely on a constitutional right to engage in collective bargaining. Leaving aside the union's procedural problem of abandoning a challenge to the LRA, the question can still be asked whether the constitutional right it seeks to assert could conceivably lay the foundation for the urgent relief sought. If not, then the application stands to fail, even if the union could overcome the procedural obstacle of not pursuing its alternative claim about the unconstitutional status of the provisions of the LRA.

11] Because the Constitutional Court found that SANDU's assertion of its rights to collective bargaining did not entail a constitutional challenge but relied on the enforcement of the regulations governing bargaining in SANDF, the court found it unnecessary to interpret the ambit of the right to engage in collective bargaining set out in section 23(5) of the Constitution and declined to endorse any of the dicta of the High

³ *South African National Defence Union v Minister of Defence and Others* 2007(5) SA 400 (CC) at 420

Courts or Supreme Court of Appeal in the trilogy of cases which had previously addressed the issue.⁴

- 12] The highest court to have considered the issue is the Supreme Court of Appeal in a consolidated appeal against the three decisions of the Pretoria High Court.⁵ In that case, Conradie, JA, held that:

“[5] The expression ‘right to engage in collective bargaining’ in ss(5) is open to more than one interpretation. It may mean that the contemplated national legislation to regulate collective bargaining must provide for an employer or a union called upon to bargain to comply with the demand on pain of being ordered to do so. On the other hand it may mean that the envisaged national legislation must provide the framework within which employers, employers’ organisations and employees may bargain; or it may mean no more than that no legislative or other governmental act may effectively prohibit collective bargaining.”

- 13] After a careful analysis of the genesis of the section 23(5) and the meaning attached to collective bargaining by the Constitutional Court in the first *Certification* judgment, the learned judge held that the legislature had not intended a major departure from the previous provision protecting labour rights in the interim Constitution of 1994⁶, namely section 27 which contained, amongst other provisions, sub-sections 27(3) and (4). These provisions read: “(3) *Workers and employers shall have the right to organise and bargain collectively.* (4) *Workers shall have the right to strike for the purpose of collective bargaining.*”⁷ In interpreting these earlier constitutional provisions, Conradie, JA, said the following:

⁴ At 421, [56]

⁵ *South African National Defence Union v Minister of Defence and others; Minister of Defence and others v South African National Defence Union and others* 2007 (1) SA 402 (SCA)

⁶ At 413, [16] of the SCA decision

⁷ Constitution of the Republic of South Africa, 1993

“[15] Subsection (4) tied the right to strike directly to ‘collective bargaining’. This right was given to workers as a means of enforcing the right to ‘bargain collectively’ in ss (3). In addition, of course, workers had the right, by striking, to secure an outcome to any demand whether or not the parties had (inconclusively) bargained about it.

Any disagreement about collective bargaining was considered as a dispute of interest: that is why workers were permitted to strike about it. Like every other ‘interest’ in the labour-relations field (as opposed to a justiciable dispute of right), collective bargaining had to be secured by negotiation prompted by the threat of collective action. In the classic dispute of interest case, the parties have no right to enforce; they attempt to establish a right, in the final resort by coercive economic action. Allowing workers to strike ‘for the purpose of collective bargaining’ firmly puts collective bargaining in the category of interest disputes, excluding any right to judicially obliged collective bargaining.”

(emphasis added)

14] Considering that the court found no material change of meaning had been effected by the change of wording from the right to collective bargaining to the right ‘to engage’ in collective bargaining, the position remains that the right to engage in collective bargaining does not entail a right to compel an employer to bargain, on the reasoning of that decision. What this means for present purposes is that an order confirming the existence of NEWU’s right would have no practical consequences in the circumstances of this matter. It also means that an order of the court could not prevent the harm which NEWU anticipates will befall the union if negotiations do not take place, and accordingly it cannot be said the union runs the risk of irreparable harm if the order is not granted.

15] The order sought by NEWU does not say in so many words that it seeks an order

which is enforceable against the company, though clearly that was the thrust of the primary relief which it abandoned. The question then arises, should the court not simply confirm that the union does indeed have a right to engage in collective bargaining even if no practical consequences flow from such a declaration of rights? The absence of any consequential relief which would flow from such an order means that the question the court is asked to answer is essentially academic. The situation might be very different in circumstances where, for example, the state sought to outlaw collective bargaining by legislation or executive action. In such a case, an order affirming the union's right to engage in collective bargaining would necessitate consequential relief striking down the offending statutory provision or decision.

- 16] However, in the case before me no consequential relief would flow from an order affirming NEWU's right to engage in collective bargaining in the voluntarist sense identified in the SCA's decision. If the company refuses to deal with it, it is free provided it complies with the pre-requisites for protected strike action, to seek to compel the company to accept it as a collective bargaining partner. The mere fact that a party has a right does not necessarily entitle it to relief in the form of a confirmatory order to that effect. The Labour Appeal Court has upheld the general principles that underlie the court's reluctance to grant declaratory orders which have no practical consequences. In the LAC's decision in the *Solidarity* case, Jappie AJA, writing for the court, cited the following authorities with approval⁸:

"[16] Section 158(1)(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 & others 1976 (3) SA 151 (T). At 154F 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

⁸ *Minister for Public Service & Administration v Solidarity & Others* (2007) 28 ILJ 1747 (LAC) at 1752

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 156A, 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 & others [2000] 1 All SA 113 (O) at 119F 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] The court is confronted with similar considerations in this matter, and accordingly, must decline to make a declaratory order as requested.

Costs

- 18] I believe the application was brought *bona fide* and the respondents were given ample time to respond, given the time limits for filing replies stipulated in the notice of motion. The matter also concerns an important issue. In the circumstances, I do not think costs should follow the result, but parties should pay their own costs.

Order

- 19] The application for urgent relief declaring that, regardless of whether or not the

applicant is an unregistered, registered or deregistered trade union, it has the right to engage in collective bargaining with the first respondent is dismissed.

20] No costs order is made.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 24 February 2011

Date of judgment: 01 March 2011

Appearances:

For the applicant: Mr G Maluleke

For the first respondent: Ms K Savage of Bowman Gilfillan Attorneys

For the second respondent: Mr W Mokhare, SC instructed by the state attorney.