

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No: C 489/2010

In the matter between:

**NATIONAL BARGAINING COUNCIL FOR
THE CLOTHING MANUFACTURING INDUSTRY
(CAPE)**

Applicant

and

J n' B SPORTSWEAR CC

First respondent

ADV C DE KOCK N.O.

Second respondent

JUDGMENT

INTRODUCTION

1. This application is brought in terms of section 158(1)(g) of the Labour Relations Act ('the LRA') for a review of the award handed down by the arbitrator (the second respondent) in the arbitration between the applicant, the Bargaining Council (in its capacity as custodian and enforcer of its collective agreements); and the first respondent, the employer. The employer is a member of an employers' organisation which is a party to the Bargaining Council's main collective agreement ('the Agreement').
2. The arbitration was held under the auspices of the Bargaining Council on 26 April 2010, and concerned a dispute relating to the employer's compliance with the Agreement. It was accordingly referred to the arbitrator in terms of section 33A(4)(a) of the LRA and in terms of clause 15.6 of the

Council's constitution.¹

3. The merits of the dispute pertained to the alleged underpayment by the employer of an employee, Ms Masnoena Davids ('the complainant'). As a consequence of the complainant's referral of the matter to the Bargaining Council an investigation was undertaken by a designated agent of the Council, which culminated in a compliance order against the employer in terms of section 33A(3) of the LRA read with clause 15.6.3.2.5 of the applicant's constitution.²

4. The merits of the dispute were not canvassed at the arbitration proceedings, since the employer raised a number of points *in limine* which were set down for prior hearing. The

¹ Section 33A(3) reads as follows: "A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period." And s 33(4)(a) stipulates: "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".

Clause 15.6 of the council's constitution stipulates that the council must request the Minister to appoint designated agents. "Such designated agents shall perform the functions and have the powers set out in the [Labour Relations] Act, including sections 33A and schedule 10 of the Act. It is specifically recorded that such a designated agent shall have the power to issue a compliance order."

² That clause empowers the designated agent to issue a compliance order requiring any person bound by the agreement to comply with the agreement within a specified period.

decision on these points had the effect of disposing of all but two months of the arrear short payments claimed by the Bargaining Council on behalf of the complainant. It is this decision which the Bargaining Council now seeks to review.

5. The points on which the arbitrator found in favour of the employer can be summarised as follows:

5.1 The Bargaining Council was estopped from claiming that the employer was not compliant with the terms of the Agreement as the Bargaining Council had previously issued the employer with compliance certificates, thereby representing to the employer that it was indeed compliant.

5.2 The arbitrator found in the alternative to the finding on estoppel that the Bargaining Council could only allege non-compliance once a previously issued compliance

certificate had been withdrawn by the Council, or reviewed or set aside by a competent body or forum.

The arbitrator accordingly concluded that the Bargaining Council was precluded from asserting that the employer was non-compliant with its Agreement for the periods covered by the certificates.

5.3 The third point *in limine* upheld by the arbitrator was that a designated agent of the Bargaining Council could not make an order for compliance beyond the term of one year, and that the arbitrator, too, was bound by this limitation. For that reason, according to the arbitrator, any recovery of arrear wages must be limited to a period of a year prior to the issue of the compliance order by the designated agent.

GROUNDS OF REVIEW

6. The applicant sourced the legal basis for its review

application in section 158(1)(g) of the LRA, which empowers this Court to review the performance of any function provided for in the LRA on any grounds that are permissible in law.

7. Grounds permissible in law would include a material error of law and/or where, owing to an error of law, an arbitrator misconstrues the true nature of the dispute and asks herself the wrong question, thus depriving the parties of a fair trial of the issues.
8. This Court must ask itself whether the decision arrived at by the arbitrator was one that no reasonable arbitrator could have come to. If the answer to that is in the affirmative then the decision falls to be set aside.³
9. Ms *MacKenzie*, for the applicant, submitted that the arbitrator erred as a matter of law in arriving at all three findings set out

³ *Sidumo v Rustenburg Platinum Mines Ltd* 2008(2) BCLR 158 at 191 paragraph [119]

above with regard to the points *in limine*. I shall deal with each of those points.

FIRST FINDING - *The Bargaining Council was estopped from alleging non-compliance with its agreement by the employer*

10. The arbitrator made a finding that the Bargaining Council was estopped from alleging that the employer was non-compliant with its Agreement as a consequence of having issued it with compliance certificates covering 12 months of the period in question.

11. The doctrine of estoppel by representation states that a person is precluded, that is estopped, from denying the truth of a representation previously made by him or her to another person if the latter, believing in the truth of the representation, acted thereon to his or her prejudice.⁴

⁴ See Joubert, *The Law of South Africa*, Second Edition, Vol 9, 401 at para 652.

12. Ms MacKenzie contended that the arbitrator erred in finding that the Bargaining Council was estopped from alleging a breach of its Agreement by the employer for the duration of those certificates.

13. Having considered the arbitrator's finding on that ground, I am of the opinion that it is misdirected for the following reasons:

Failure to prove estoppel

14. The onus of establishing that a party ought to be estopped rests on the party pleading it. In *Stellenbosch Farmers' Winery Ltd v Vlachos t/a Liquor Den*⁵ the Supreme Court of

⁵ [2001] 3 All SA 577 (SCA) 581h-l; 2001 (3) SA 597 (SCA)

Appeal held that:

'Where a misrepresentation is relied upon the party relying thereon has to establish the misrepresentation and a reliance thereon by the plaintiff, which reliance was 'the cause of his acting to his detriment'.

15. The employer failed to place any evidence before the arbitrator with regard *to the manner in which the 'representation' (that it was compliant) led it to act to its detriment, or why the Bargaining Council should be* precluded from alleging the true state of affairs.

Alteration of position and prejudice

16. The doctrine of estoppel requires that the party seeking to rely on an estoppel alters his position to his detriment or

refrains from doing something beneficial.⁶

17. The employer has not claimed that it has altered its position in any way or refrained from an otherwise beneficial opportunity. In short it has not alleged, much less proved, any prejudice, which is a requirement for a defence of estoppel.⁷

The representation

18. In the first place any 'representation' made by the Bargaining Council to the employer on which it seeks to rely cannot be imputed to the complainant, and it is the complainant's claim against the employer, not that of the applicant, which was sought to be enforced through the compliance arbitration.

⁶ *Albatross Fishing Corporation (Pty) Ltd v Ramsay* 1968 (2) SA 217 (C) at 221G.

⁷ *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 363E.

19.As to the representation itself, the compliance certificates issued by the Bargaining Council to the employer were issued based on information furnished by the employer to the Bargaining Council and an inspection of its business by agents appointed by the Council.

20.If the information furnished by the employer is subsequently challenged (in this case the categorisation of the complainant which forms the subject matter of the dispute on the merits), and found to be incorrect, the party responsible for that representation can only be the employer and not the Council. Since the compliance certificate is issued on the basis of that information, there can have been no misrepresentation by the Bargaining Council as required by the law of estoppel.

Estoppel would result in a situation contrary to law or ultra vires the powers of the applicant

21. A body such as the Bargaining Council has such powers and duties as are entrusted to it or imposed on it by statute and by its own collective agreements and cannot be bound by estoppel to act contrary to these powers.

22. Thus it was held in *Hoisain v Town Clerk Wynberg*⁸ that where a town clerk issued a certificate to trade in error, he was not estopped from refusing to put the name of the person concerned on the list of general dealers for the area, the reasoning being that he could not by his mistake be compelled to bring about a position which he had no power in law to create by his own free will.

23. In the same way, the Bargaining Council is tasked with monitoring and enforcing its collective agreements, and cannot be excused from this obligation if there has been an

⁸ 1916 AD 236 at 240

error in the issuing of a compliance certificate to an employer in circumstances where that employer was not, in fact, compliant at the time. See for instance *Fuls v Leslie Chrome (Pty) Ltd*⁹, where the Court stated that 'estoppels cannot prevail if such would result in the nullification of a statute'.

24. Moreover, considering that compliance certificates are issued with a view to the future (that is, for a period of six months) it is inconceivable that the Bargaining Council could be estopped on the strength of such a certificate from investigating and prosecuting future breaches of its collective agreements by the holder of such a certificate. This would amount to conduct (or an omission) contrary to the positive statutory duties placed on the Bargaining Council by section 33A of the LRA, which permits a council to patrol and enforce its collective agreements.

9 1962 (4) SA 784 (W) at 787

25. It is inconceivable that a Council could issue a compliance certificate on day one, based on the information that it has; on day two, the employer flagrantly breaches the Main Agreement; and then argues successfully that the Council cannot take any further steps to ensure compliance, because it has already certified that the employer is compliant.

26. The arbitrator's finding that the Council is stopped from claiming non-compliance by the employer with the Main Agreement relating to underpayment of wages for the period covered by the certificate of compliance is insupportable in law.

SECOND FINDING - *The Bargaining Council was obliged to withdraw the compliance certificate prior to instituting any claim based on non-compliance with its Agreement*

27. The applicant explains in its founding affidavit that

compliance certificates are issued as a matter of administrative convenience, and can at most amount to a *prima facie* indication that a particular employer is operating in accordance with the provisions of its collective agreements.

28.A compliance certificate cannot be construed as conferring rights on the holder thereof. It is simply a provisional acknowledgement that it is complying with the relevant prescripts of the collective bargaining process, and it is a system established for the facilitation of the monitoring function of the council concerned, nothing more.

29.To suggest that the Bargaining Council may not recover short payments on behalf of complainants while such a certificate is in operation, but must first take steps to withdraw it, amounts to an unsustainable construction of the status of such a certificate. It would lead to unjust results in respect of

individual employees in cases where subsequent investigation reveals that the minimum employment conditions laid down in the Agreement have not been complied with.

30. I am of the opinion that the conclusion arrived at by the arbitrator in this regard is unsustainable in law, or on the facts of this case.

THIRD FINDING - *The arbitrator's powers were limited to those of a designated agent issuing a compliance order*

31. The arbitrator also found that the compliance arbitration before him was based on, and dependent on, the compliance order previously issued by a designated agent of the Council. He further concluded that such an agent could not have greater powers than that of a labour inspector under the

Basic Conditions of Employment Act¹⁰ ('the BCEA').

32. For that reason, according to the arbitrator, any recovery of arrear wages must be limited to a period of one year prior to the issue of the compliance order by the designated agent.

33. This finding is untenable for two reasons.

34. Firstly, the powers of designated agents derive from sections 33 and 33A of the LRA read with Schedule 10 thereof, as well as *clause 15.6.2 of the Council's constitution*. These provisions empower an agent, after conducting an investigation of a specific complaint, *to 'issue a compliance order' directing the employer* to comply with the collective agreement to the extent of the deficit revealed by the investigation.

¹⁰ Act 75 of 1997

35. *These 'orders' are not enforceable against the employer, and if contested, must be arbitrated* through the usual dispute resolution procedures of the council concerned, in this case through referral to a member of the relevant panel of arbitrators for adjudication of the dispute in terms of clause 15.6.3.5 of the Council's constitution.

36. The arbitrator erred in elevating the *compliance order to the status of an enforceable finding in the dispute, thereby considering himself bound by the parameters of a designated agent's powers.*

37. This is clearly not the case, as the arbitration is an independent dispute resolution procedure contemplated by both the LRA and the Council's Constitution by virtue of provisions independent of, and separate from, those governing designated agents and the 'orders' they may make.

38. At most a compliance order can be regarded as a demand for payment. This finds support in the case of *Bargaining Council for Hairdressing & Cosmetology Trade (Pretoria) v Smit t/a Hair Mistique*¹¹ where the council sought to make a compliance order issued by a designated agent an order of court in terms of section 158(1)(c) of the LRA. In its constitution it had provided for this eventuality by deeming a compliance order to be an award for purposes of that section.

39. The Court held that this was impermissible, as the Council could not confer jurisdiction on a body where neither the common law nor the legislature had done so. It therefore held that compliance orders could not be made orders of court which could be executed on.

40. In this regard the Court stated as follows¹²:

¹¹ [2002] 3 BLLR 218 (LC). Although the judgment appears to precede the insertion of s 33A into the Act by way of the Labour Relations Amendment Act, Act 7 of 2002, the *ratio* is still applicable.

¹² At 220 H-I

Secondly, clause 31(3) of the collective agreement purports to amend the LRA by attaching a meaning to a concept, "award", found in section 158(1)(c) in an attempt to utilise the existing jurisdiction of the Labour Court by deeming a compliance order which is not an award, to be something else, namely an award.' (Italics added.)

41. The second ground on which the arbitrator erred was in finding that the powers of a designated agent in terms of the LRA were limited to those conferred on a labour inspector under the BCEA. In terms of s 70(d) of the BCEA a labour inspector may not issue a compliance order in respect of any amount payable to an employee if that amount has been payable to the employee for longer than 12 months before the date on which a complaint was made to the labour inspector or the date on which the inspector first tried to secure a written undertaking from the employer to comply.¹³

¹³ In terms of s 68 of the BCEA.

42. *It is the applicant's contention that, whatever the powers of a designated agent, they are in any event not binding on, or prescriptive of, the powers of an arbitrator in a compliance dispute. However, even on its own reasoning the arbitrator's award cannot be upheld in this regard as it is simply impermissible to import the provisions of one statute into another when the legislature has not specifically done so.*

43. In this case, the arbitrator mistakenly placed unwarranted limitations on the ambit of his powers, which, properly construed, are those set out, *inter alia*, in section 33A(8)(a) of the LRA which entitled the arbitrator to order the payment of 'any amount owing in terms of a collective agreement'.

CONCLUSION

44. The findings of the arbitrator in respect of all three points *in limine* are unsustainable in law, and fall to be set aside. The

decision of the arbitrator was not one that a reasonable arbitrator could have come to.¹⁴

45. Given that the matters canvassed in this review are of a purely legal nature, the applicant submitted that I should substitute my decision for that of the arbitrator. I agree. It would serve no purpose to refer the points *in limine* back for argument at the Bargaining Council.

ORDER

46. The arbitration award handed down by the second respondent on 26 April 2010 is reviewed and set aside.

47. The award is substituted with an award that the points *in limine* raised by the first respondent (the employer) are dismissed.

¹⁴ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 para [119]

48.The main dispute is remitted to the Bargaining Council for arbitration before a different arbitrator on the merits of the dispute.

49.There is no order as to costs.

STEENKAMPJ

Date of hearing and judgment: 3 March 2011

For the applicant: Ms K J MacKenzie

Herold Gie attorneys