



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: C 97/2012

In the matter between:

CONTRACT EMPLOYMENT CONTRACTORS

(PTY) LTD

Applicant

and

MOTOR INDUSTRY BARGAINING COUNCIL

-MIBCO

1ST Respondent

MINISTER OF LABOUR

2ND Respondent

RETAIL MOTOR INDUSTRY ORGERNISATION

3RD Respondent

FUEL RETAILERS ASSOCIATION OF SOUTH

AFRICA

4TH Respondent

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA

5TH Respondent

Heard: 17 February 2012

Delivered: 27 February 2012

Summary:

RULING: POINT IN LIMINE

RABKIN-NAICKER J

Introduction

[1] This application came before me on an urgent basis on 17 February 2012 when a point in limine was raised and argued. The respondents urged the court to find that the founding papers in the application did not disclose a cause of action and as a result, there was no case to answer.

[2] I must consider how the court should approach such a point in limine. In *Valentino Globe BV v Phillips and another*¹, Harms JA held that it was wrong to permit the use of the procedure whereby the respondent in a court of first instance argued at the outset that the founding affidavit did not make out a prima facie case for the relief claimed, without reference to other affidavits filed, where there was no real conflict of fact on the papers. (At 779I--I/J.)

[3] He held, further, that the analogy between this procedure and the exception procedure might have been inappropriate and the comparison should rather have been made with an application for absolution from the instance in a trial action². (At 779J--780B.)

[4] The test for absolution from the instance is that to escape absolution, a plaintiff must tender evidence on which court might or could reasonably find for him or her³.

[5] I consider it appropriate, given the Supreme Court of Appeal authority referred to above, to treat the point in limine as akin to an application for absolution from the instance.

[6] In its notice of motion the applicant sought inter alia the following orders:

¹ 1998 (3) SA 775 (SCA)

² *Valentino Globe BV v Phillips and another* 1998 (3) SA 775 (SCA)

³ *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA)

"Declaring that clause 38(5) of the collective agreement concluded by the 3rd, 4th and, 5th respondents on 17 September 2010 are (sic) unconstitutional, contrary to section 198 of the Labour Relations Act and as such of no legal effect and or unenforceable;

Declaring that the extension of the collective agreement to non-parties by the 2nd respondent as promulgated in the Government Gazette No. 9459, Vol.547 and dated 28 January 2011 is unconstitutional, contrary to section 198 of the Labour relations Act and as such of no legal effect and or unenforceable in so far as the said clause 38(5) of the amended collective agreement are (sic) contained therein".

[7] In the alternative, the applicant sought a rule nisi, the terms of which are not necessary to traverse for the purposes of this ruling.

[8] Mr. Katz for the first respondent submitted that the applicant's purported cause of action was two-fold:

1. That clause 38(5) of the Council's main collective agreement is inconsistent with section 22 of the constitution and;

2. Secondly, that clause 38(5) of the Council's main agreement is inconsistent with section 198 of the LRA.

[9] The right on which applicant sought to base its application is that contained in section 22 of the Constitution. Section 22 provides as follows:

"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[10] Respondents argued that this right does not attach to corporate persons but only to natural persons and furthermore to those natural purpose who are citizens of the Republic of South Africa. Further, it was submitted that on the papers, the applicant did not purport to bring the case on behalf of any other person or party. In the result, so the argument went, because the applicant is not a natural person who is a citizen and yet complains that its section 22 rights

have been threatened or violated, it clearly has no cause of action. I note that in paragraph 18 of the founding papers, the Applicant avers that its “immediate concern was and still is” for the impact of compliance with the collective agreement on the 22 employees it supplies to work in the affected sector of the motoring industry.

[11] Of the cases referred to by Mr Katz, for the First Respondent, two decisions support the proposition that section 22 introduces a constitutional protection to be enjoyed by individual citizens as opposed to juristic persons. Davis J held in *City of Cape Town v AD Outpost (Pty) Ltd and Others*⁴ that section 22 was not a provision that should be extended to the regulation of economic intercourse as undertaken by enterprises owned by juristic bodies (at 747E-F/G). This approach was followed obiter by Conradie J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*⁵, a case later reversed on appeal to the Constitutional Court.

[12] The Court in *Van Rensburg v South African Post Office Ltd*⁶, did not decide the question as to whether rights under section 22 can be enjoyed by a body corporate, but in so far as it was necessary, assumed that a body corporate can claim the protection of section 22 rights. (At 1322 B-D.)

[13] In *Platinum Asset Management (Pty) Ltd v Financial Services Board and others; Anglo Rand Capital House (Pty) Ltd and others v Financial Services Board and others*⁷, the court held inter alia that the rights to freedom of trade, occupation and profession of the applicant company under section 22 of the Constitution had not been infringed. (At 147.)

[14] The Constitutional Court has not decided the issue but in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*⁸, the court, in a full bench decision, considered whether principles of market competition were

4 2000 (2) SA 773

5 2001 (3) SA 310 (C)

6 1998(10) BCLR 1307 (E)

7 2006 (4) SA 73 (W)

8 2007 (6) SA 350 (CC)

constitutionally recognised. The court per Langa CJ, held that although the Bill of Rights did not expressly promote competition principles, the right to freedom of trade enshrined in s 22 of the Constitution was consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare (paragraph [36]). In *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC) the court per Ngobo J, as he then was, considered the scope of the right stating inter alia that: “In broad terms this section has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus, in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection.”(at paragraph 57)

[15] Section 8(4) of the Constitution provides that:

“A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”

[16] In dealing with NT 8(4) in *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744*, the Constitutional Court stated:

“[57] Objection was also taken to NT 8(4), which states that

'(j)uristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons'.

The comparable provision in the IC is 7(3), which provides that

'(j)uristic persons shall be entitled to the rights contained in this chapter where, and to the extent that, the nature of the rights permits'.

The objection was based on the language of CP II, which provides

that 'everyone shall enjoy all universally accepted fundamental rights and freedoms'. It was argued that 'everyone' in CP II refers only to natural persons, and that, by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: many 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.

[58] The objectors were also concerned that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. But the same could be said of powerful and wealthy individuals. Moreover, the objection wrongly equates juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than do natural persons. The CA was entitled to retain the provision in IC chap 3 that provides that juristic persons are entitled to the benefits of the entrenched fundamental rights. The objection therefore has no basis in the CPs.”

[17] The sentiment relating to small corporate bodies that may need and deserve protection resonates with the recent judgment of the Namibian Supreme Court in *Africa Personnel Services (Pty) Ltd v Government of the Republic Namibia & others* (2011) 32 ILJ 205 (Nms.). In this case the constitutionality of s 128 of the Labour Act 11 of 2007 (Namibia) which provided for the prohibition of labour hire was considered. The first ground upon which the respondents challenged the appellant's right to seek constitutional review of

s 128 of the Act related to standing, on the basis that the fundamental right protected by article 21(1) (j) of the Constitution, (that all persons shall have the right to practise any profession, or carry on any occupation, trade or business) only vests in natural - not juristic - persons. The Court referred to the South African judgment of *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) at 274H – 275B in which Ngcobo J stated in dealing with section 22:

“What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence.”

[18] The Namibian Supreme Court remarked that:

“It must also be recognized that the freedom is essential to the social, economic and political welfare and prosperity of our society. By according its members freedom to engage in different professions or occupations and to carry on a wide range of different trades and businesses, the Constitution allows them to render services, to provide food and goods and to earn incomes which are necessary to sustain and uplift their families, their communities and, ultimately, the nation - even, if and where needed or required, also communities in other countries. This they do, not only as individuals or in partnership or association with others, but also - and perhaps most importantly - by organizing themselves and contributing their collective resources to structured corporations and enterprises which, by their size and

resources, are often better positioned to make larger and more meaningful contributions to the development and welfare of society.” (At paragraph 36.)

[19] Having adopted a purposive approach to the interpretation of the relevant clauses of the Namibian Constitution the Court went on to hold that:

“We do not find any justification to exclude juristic persons from the protection of article 21(1)(j) and hold that the phrase 'all persons' in article 21(1), when read in the context of the freedom protected in para (j) thereof, is inclusive of natural and juristic persons; that the appellant, as a juristic person, is also a bearer of that freedom and, therefore, that it is an 'aggrieved person' entitled to approach the court to seek enforcement or protection of its fundamental freedoms as contemplated by article 25(2) of the Constitution. The respondents' objection to the appellant's standing is dismissed. No justification to exclude juristic persons from the protection of article 21(1)(j) and held that the phrase 'all persons' in article 21(1), when read in the context of the freedom protected in para (j), was inclusive of natural and juristic persons; that the F appellant, as a juristic person, was also a bearer of that freedom, and therefore that it was an aggrieved person entitled to approach the court to seek enforcement or protection of its fundamental freedoms as contemplated by article 25(2) of the Constitution.” (At paragraph 44.)

[20] The applicants sought to suggest that the distinction between the words 'all persons' and “every citizen” in the relevant sections of the Namibian and South African was determinative. I cannot agree. The implications of such a reading would be that those who did not enjoy freedom to trade under the apartheid order would only be protected by this right if they conducted their trade as sole proprietors.

[21] In my view, given the internal limitations contained in section 22 of our Constitution and the wording of section 8(4), in particular its reference to the nature of the juristic person in question, the word “citizen” in section 22 may be

read to include juristic persons. This takes into account the purpose of redress that section 22 serves and the possibility that its ambit may cover certain forms of South African juristic persons, the benefits of which were previously enjoyed only by a minority of our people.

[22] Even if I am wrong in my view that the Applicant has standing to base its application on section 22 of the constitution, I find that given its averment contained in paragraph 18 of the founding papers, in regard to its concern towards the natural persons it employs, I must find that the doctrine of objective unconstitutionality applies. In terms of this doctrine a corporate applicant will not need to show that a law infringes its own constitutional rights to challenge the validity of that law.

[23] Davis comments on this doctrine relying on *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others*⁹ at paragraphs 27-30 and 158-168, and states that that if a law unconstitutionally violates the s22 rights of natural persons, it is objectively invalid, and any corporate with an interest in setting aside the law has standing to challenge its constitutional validity.¹⁰

[24] The Applicant therefore meets the threshold required by an application for absolution in respect of the attack on its standing in respect of section 22. Given this finding I do not consider it necessary to deal with the issue of the interpretation of section 198 of the LRA in this ruling. The application should be fully ventilated, including the question as to whether the applicant has met the requirements of urgency.

Order

I make the following order:

1. The point in limine is dismissed.
2. The parties are to agree a timetable for the further conduct of the matter.

9 1996 (1) SA 984 (CC)

10 Constitutional Law 2nd Edition at S4-8, footnote 4

3. The parties are to arrange a date with the Registrar for the hearing of the application.

4. Costs to stand over

Rabkin-Naicker J
Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Adv. C de Kock, instructed by CK Attorneys.

FIRST RESPONDENT: Adv. A. Katz SC and Adv G. Leslie, instructed by Cliffe
Dekker Hofmeyr Inc.

SECOND RESPONDENT: Adv. C. Tsegarie, instructed by the State Attorney

FIFTH RESPONDENT: Adv. A. Oosthuizen SC, instructed by Haffegée Roskan
Attorneys