



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no: JS 1082/09

In the matter between:

UASA – THE UNION

First Applicant

ASSOCIATION OF MINEWORKERS

AND CONSTRUCTION UNION

Second Applicant

and

BHP BILLITON ENERGY COAL

SOUTH AFRICA

First Respondent

NATIONAL UNION OF MINEWORKERS

Second Respondent

Heard : 07 May 2012

Delivered : 07 May 2012

Summary : Labour Court's Jurisdiction in terms of section 157 (1) of the Labour Relations Act to determine the lawfulness of an agency shop agreement

JUDGMENT

AC BASSON J

1] On 7 August 2012 this Court made the following order:

1. The first point *in limine* is dismissed.
2. The second point *in limine* is upheld.
3. The issue of costs must be determined at the conclusion of the trial.

Introduction

2] The first applicant in this matter is UASA a trade union duly registered in accordance with the Labour Relations Act¹ ('the LRA'). The second applicant is the Association of Mineworkers and Construction Union Africa ('AMCU') a trade union duly registered in accordance with the LRA. (I will refer to UASA and AMCU collectively as 'the applicants'). The first respondent is BPH Biliton Energy Coal South Africa Limited ('BECSA'). The second respondent is the National Union of Mineworkers ('NUM') a trade union duly registered in accordance with the provisions of the Act.

3] From the papers it appears that it is common cause that BECSA owns and manages a number of coal mines (Douglas Mine (this mine is, however, being closed down); Kutala Mine; Klipspruit Mine and Middleburg Mine) and employs a significant number of employees at each operation in one of four grades (B, C, D or E) comprising as to B grade, general workers; as to C grade most members of the skilled and supervisory staff; as to D grade some

¹ Act 66 of 1995.

officials and managerial staff; and as to E grade senior personnel such as engineering and general managers. This application only concerns B and C level employees. The applicant is of the view that the interests of members of each grade diverge significantly. BECSA is of the view that it is irrelevant for purposes of this application whether there may be some differences between the members of each grade as this application only applies to B and C level employees. I am in agreement with the latter submission as this issue will be canvassed during the trial.

4] Apart from the four mines, BECSA also has within its organisational structures a Central Services Department, a mine closure operation, a research unit ("Yanka") and the BECSA Academy. These four units all fall under Central Services and operate, according to BECSA as part of a single integrated BECSA business. According to the applicant, each of these locations (eight in total) is geographically and administratively a discrete and separate unit and is treated as a *separate* unit by the respondents under the Threshold Agreement and Industrial Relations Policy documents applicable at BECSA. It is stated in the statement of claim that each of these locations accordingly constitutes a separate workplace within the contemplation of the LRA in general and section 25² in particular. This is denied by BECSA. According to BECSA, these divisions, units and depots are not "independent" of one another: All of these operations are situated in close proximity to each other in the Witbank/Middelburg area and are all controlled as a single and integrated unit. According to BECSA, these operations do not operate independently from one another by reason of their size, function or organisation. (As will be pointed out hereinbelow, this dispute is not the subject of these proceedings.)

5] During July 2009, BECSA and the NUM entered into an Agency Shop Agreement (hereinafter referred to as 'the agreement'). The agreement provides for the deduction of agency fees from employees 'within the B and C

2 '25. Agency shop agreements

- (2) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed-
 - (a) by an employer in a workplace; or
 - (b) by the members of an employers' organisation in a sector and area in respect of which the agency shop agreement applies.'

levels job grades in a workplace of BECSA'. The agreement further conceives of BECSA as a single entity and the degree of representation for the grant of agency shop rights (a clear majority) is determined with reference to BECSA's enterprise taken as a whole.

6] BECSA expressed an intention to deduct with effect from November 2009 agency fees in the amount of 1% from the basic salaries of all BECSA employees in the B and C grades who are not members of NUM.

7] Pursuant to this intention, the applicants filed a statement of claim setting out the following two causes of action:

- i) The first claim relates to a breach of section 25 of the LRA. The applicants argue that, under section 25 of the LRA, agency shop agreements can be lawful only if the union enjoys the *majority* support within the *workplace* in which the agreement is expressed to be binding. According to the applicants, within BECSA, such support must be determined by polling employees in *each* of the eight workplaces and, for this purpose, they must be treated as separate and discrete. The applicants therefore claim that the agency shop agreement is in breach of section 25 of the LRA because NUM's support was calculated with reference to BECSA as a whole (and therefore as a single workplace) instead of eight separate workplaces. In its respective responses to the statement of claim, both BECSA and NUM deny that BECSA consists of eight workplaces for purposes of polling support within the workplace. Instead it is submitted that the workplace of BECSA consists of all its operations operating as a single unit.³
- ii) The second claim (assuming that the agency shop agreement is otherwise lawful and enforceable) relates to the constitutionality of the agency shop agreement. In essence, it is claimed that the agency shop constitutes an impermissible contravention of the rights to freedom of association and fair labour practices embodied in clauses 18 and 23(1)

³ The merits of this point will be determined by the trial court.

of the Bill of Rights respectively.

The applicants seek an order declaring the agency shop agreement unlawful and invalid and an interdict restraining the respondents from implementing the agency shop agreement. The applicants further claim that any monies deducted from the applicants' members be reimbursed with interest.

[8] BECSA and NUM oppose the claims and seek an order dismissing the claims.

[9] In its response to the applicants' statement of claim, NUM (the second respondent) raised two points *in limine*. These two points in limine are the subject of these proceedings:

- i) Firstly, in relation to the applicants' *first* claim, it is submitted on behalf of NUM that the Labour Court does *not* have jurisdiction to determine whether an agency shop agreement complies with section 25 of the LRA because that is not a matter that has been assigned to the Labour Court for determination in terms of 'any other law', as envisaged in section 157(1)⁴ of the LRA. (I will refer to this point as 'the first point *in*

4 '157. Jurisdiction of Labour Court

- (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
 - (a) employment and from labour relations;
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
 - (c) the application of any law for the administration of which the Minister is responsible.
- (3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.
- (4) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.
 - (a) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.
- (5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.'

limine.)

- ii) Secondly, in relation to the applicants' *second* claim, NUM submits that this constitutional challenge is bad in law. In essence, it is argued that the applicants have not challenged the constitutionality of section 25 of the LRA and therefore the claim does not disclose a cause of cause of action. (I will refer to this point as the 'the second point *in limine*.')

[10] BECSA opposes the first point *in limine* raised by NUM but supports the second point *in limine*. I am in agreement with the applicant that should the jurisdictional point be upheld no evidence will be required to determine the applicants' claim.

First point in limine raised by the second respondent

[11] Mr Van der Riet, on behalf of NUM, submitted with reference to section 157(1) of the LRA that the Labour Court does *not* have jurisdiction in respect of the question whether an agency shop agreement complies with section 25 of the LRA nor does 'any other law' assigns this question to the Labour Court. In support of this argument, the Court was referred to the decision in *Gcaba v Minister of Safety and Security and Others*,⁵ where the Constitutional Court held that where section 157(1) of the LRA does not expressly confer upon the Labour Court jurisdiction to determine certain issues, the High Court retains jurisdiction to determine those disputes.

5 [2009] 12 BLLR 1145 (CC) at paras 72 and 73: '[72] Therefore, [section 157\(2\)](#) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by [section 157\(1\)](#)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by [section 157\(2\)\(a\)](#), [\(b\)](#) and [\(c\)](#).

[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and [section 157](#) should not be interpreted to do so. Where a remedy lies in the High Court, [section 157\(2\)](#) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa, supra*, speaks of a court for labour and employment disputes, it refers to labour and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies.'

- [12] In respect of BECSA's submission to the effect that this Court does have jurisdiction (see hereinbelow), Mr van Der Riet argued that the LRA must override the Basic Conditions of Employment Act's⁶ ('BCEA') general provisions. Consequently, the answer to the jurisdictional challenge of this Court cannot be sought in the BCEA as submitted by Mr. Myburgh.
- [13] Mr Myburgh⁷ on behalf of BECSA argued the matter differently. He correctly pointed out that it does not appear that NUM is arguing that the Labour Court does not have jurisdiction because the CCMA does, but rather that there is, in effect, a *lacuna* in the LRA in that the LRA does not provide for the resolution of disputes about the lawfulness/validity of agency shop agreements by this Court. What is, however, clear is the fact that the CCMA does not have jurisdiction to decide the lawfulness or validity of agency shop agreements. The CCMA only has jurisdiction in relation to the interpretation and application of a valid collective agreement (including an agency shop agreement) in terms of section 24(6) of the LRA.⁸
- [14] This Court has already had occasion to decide whether or not the Labour Court has jurisdiction to pronounce on the validity of agency shop agreements. Francis, J in *Annandale Building Materials (Pty) Ltd t/a Altocrete Brickworks and Another v NUM*,⁹ concluded that this Court does have jurisdiction on the following basis:

'[40] This brings me to the question whether this Court does have jurisdiction to rectify the agency shop agreement. In terms of [section 24\(6\)](#) of the Act, a dispute over the *interpretation* of an agency shop agreement must be referred to the CCMA which must attempt to conciliate the dispute and if it fails to do so, the dispute must be resolved by the CCMA in arbitration. Where it is the *validity* of an agency shop agreement that is challenged, the CCMA would lack jurisdiction to entertain the dispute. The Labour Court would have

⁶ Act 75 of 1997.

⁷ I have taken the liberty of quoting extensively from the first respondent's Heads of Argument in setting out the arguments raised on behalf of BECSA.

⁸ See in this regard: *NUMSA and Others v Highveld Steel and Vanadium Corporation Ltd* [2002] 1 BLLR 13 (LAC) at para 21 and *Annandale Building Materials (Pty) Ltd t/a Altocrete Brickworks and Another v NUM* [2002] 11 BLLR 1058 (LC) at para 40.

⁹ [2002] 11 BLLR 1058 (LC) at para 40.

to exercise jurisdiction over that dispute in terms of [section 157\(1\)](#) of the Act. That section confers on the Labour Court “exclusive jurisdiction of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court”. The Labour Court has general supervisory powers and appellate jurisdiction in terms of [section 24\(7\)](#) of the Act in regard to some portions of an award dealing with an agency shop agreement. It follows that it may pronounce on the validity of the agreement.¹⁰

[15] Mr Myburgh submitted with reference to this decision that the Court was correct in considering whether the determination of the lawfulness or validity of an agency shop agreement is, in the language of section 157(1), a matter that ‘elsewhere in terms of the [LRA] or in terms of any other law [is] to be determined by the Labour Court’ but submitted that the Court was wrong in assuming jurisdiction on the basis that it did namely that this Court has ‘general supervisory powers’. In this regard, it was submitted that the mere fact that this Court has supervisory powers or appellate jurisdiction over CCMA awards regarding the manner in which funds are being administered and utilised in terms of section 24(7)¹¹ of the LRA (read with section 25 (3) (c) and (d)) this does mean that it is clothed with jurisdiction to determine a dispute about the lawfulness or validity of the agency shop agreement itself.

[16] I am in agreement with this submission. If regard is had to the decision in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others*,¹² it is clear that the LRA does not confer a general jurisdiction on this

¹⁰ The Court’s emphasis

¹¹ ‘24. Disputes about collective agreements

7) Any person bound by an arbitration award about the interpretation or application of section 25(3)(c) and (d) or section 26(3)(d) may appeal against that award to the Labour Court.’

¹² [2002] 2 BLLR 119 (CC) at para 38: ‘[38] Section 157(1) therefore has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act provides otherwise. Deciding which matters fall within the exclusive jurisdiction of the Labour Court requires an examination of the Labour Relations Act to see which matters fall “to be determined” by the Labour Court. It is quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. As Nugent JA held in *Fedlife Assurance Ltd*:

“... s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees.”

See also *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) at paragraph 25: ‘[25] Furthermore s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. Some of the implications were recently discussed by Zondo JP in *Langeveldt v Vryburg Transitional Local Council and Others* (2001) 22 ILJ 1116 (LAC); [2001] 5 BLLR 501 (LAC). Its exclusive jurisdiction

Court to deal with all disputes arising from employment.

- [17] The question, therefore, arises namely where can the jurisdiction of this Court to determine the applicants' first claim regarding the validity and/or lawfulness of the agency shop agreement be located? Is this a matter that can be determined in terms of the LRA or is this a matter than may be determined by the Labour Court in terms of 'any other law'? I am in agreement with the submission that it does not appear that there is a section in the LRA which expressly clothes the Labour Court with jurisdiction to determine the said dispute. Mr. Myburgh argued that a jurisdictional foundation may be found in the BCEA which, in the language of the section 157(1) of the LRA qualifies as 'any other law'. Following on this argument, Mr. Myburgh argued with reference to section 34(1)(b) of the BCEA which deals with deductions from remuneration of an employee, that the Labour Court has exclusive jurisdiction in terms of section 77(1) of the BCEA in respect of all matters in terms of the BCEA. Section 34(1)(b) of the LRA stipulates that an employer may not make any deduction from an employee's remuneration unless 'the deduction is required or permitted in terms of a ... collective agreement'. An agency shop agreement is a collective agreement consequently the Labour Court has jurisdiction. The jurisdictional foundation of the Labour Court can, therefore, be found in section 77(1) of the BCEA which provides that the Labour Court 'has exclusive jurisdiction in respect of all matters in terms of the [BCEA]'. Furthermore, in terms of section 77(2) the Labour Court has jurisdiction to 'review... any act or omission of any person in terms of [the BCEA] on any grounds that are permissible in law.'

- [18] I am in agreement that it would appear that the Labour Court has jurisdiction in terms of section 77(1) and/or section 77(2) of the BCEA on the basis set

arises only in respect of 'matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court'. Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed (see for example ss 9, 24(7), 26, 59, 63(4), 66(3), 68(1), 69, etc). In my view those are the 'matters' that are contemplated by s 157(1) and to which the Labour Court's exclusive jurisdiction is confined (though there may be some debate in particular cases as to their ambit: See for example *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union and Others* (1997) 18 ILJ 84 (D); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others* 1998 (1) SA 685 (C); (1998) 19 ILJ 43 (C).)'.

out above. If regard is had to the applicants' amended statement of claim, it is clear that what the applicants are claiming is for an order declaring the agency shop agreement (permitting the deduction from the applicants' members' salaries of an agency fee) unlawful and invalid and for an order that all monies deducted unlawfully from the applicants' members with interest to be reimbursed. This being the case for the applicants, I am persuaded that the Labour Court has jurisdiction in terms of section 157(1) of the LRA 'in terms of any other law [in this case the BCEA]'.

[19] In the event, the first point *in limine* is dismissed.

The second point *in limine* (supported by both the first and second respondents)

[20] In respect of the second point *in limine*, NUM argued with reference to case law that it has been held that, where the legislature gives expression to the Bill of Rights, a party cannot rely on the Bill of Rights without challenging the legislation in question first. As already pointed out, this point is supported by the BECSA.

[21] Section 23(6)¹³ of the Bill of Rights (contained in the Constitution)¹⁴ provides that national legislation may recognise union security arrangements contained in collective agreements and that, to the extent that such legislation may limit a right in the Bill of Rights, the limitation must comply with section 36(1) of the

13 '23 Labour relations

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right-
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right-
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (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 section 36 (10

14 Act 108 of 1996.

Constitution.¹⁵

- [22] As already pointed out, the applicants argue that the agency shop agreement is unconstitutional. Mr. Brassey, in arguing this point, referred to various decisions¹⁶ which, according to him, warrant this Court to conclude that an agreement under section 25 of the LRA is not immune from constitutional scrutiny.
- [23] I am in agreement with the submission that an agency shop agreement could not be challenged without challenging section 25 of the LRA. In this regard, the Court was referred to the unreported decision in *Greathead v Metcash Trading Ltd and Others*¹⁷ where the Court pertinently held that, in order to succeed in declaring an agency shop agreement unconstitutional, section 25 of the LRA must first be declared unconstitutional.¹⁸ Moreover, where legislation is enacted to give effect to a constitutional right, it is not competent for a litigant to bypass legislation (such as the LRA) and rely directly on the Constitution in claiming that a collective agreement (such as for example an agency shop agreement) is unconstitutional. In *Mazibuko v City of Johannesburg and Others*¹⁹ the Court confirmed this point and pointed out that were litigants permitted to ignore legislation and rely directly on a constitutional provision, it may lead to the creation of a dual system of constitutional jurisprudence: the one under the Constitution and the other under legislation.²⁰ See also *SANDU v Minister of Defence and Others*.²¹

¹⁵ See generally, Cheadle *et al*, *South African Constitutional Law: The Bill of Rights* (issue 11, 2011) at 18-17, para 18.5.2

¹⁶ *MEC for Education, Kwa-Zulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 40 and *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA) and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).

¹⁷ Unreported Judgment of the WLD Case No 97/24313.

¹⁸ *Id* at page 9 of the typed pages line 20 *et seq*.

¹⁹ 2010 (4) SA 1 (CC) at para 73.

²⁰ '[73] Having abandoned the challenge, the question arises whether the applicants are nevertheless entitled to challenge the City's Free Basic Water policy that is self-evidently based on the minimum water standards set by the Minister. The answer to this raises the difficult question of the principle of constitutional subsidiarity. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.'

²¹ [2007] 9 BLLR 785 (CC) at para 51.

[51] Section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. The question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution. In *NAPTOSA and Others v Minister of Education, Western Cape, and Others*, the Cape High Court held that a litigant may not bypass the provisions of the Labour Relations Act 66 of 1995, and rely directly on the Constitution without challenging the provisions of the Labour Relations Act on constitutional grounds. The question of whether this approach is correct has since been left open by this Court on two subsequent occasions. Then, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*, Ngcobo J writing a separate judgment held that there was considerable force in the approach taken in *NAPTOSA*. He noted that if it were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation. In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.'

[24] See lastly, *National Manufactured Fibres Employers Association and Another v Bikwani and Others*,²² where Zondo J (as he then was) held as follows: in respect of section 25 of the LRA:

'Where the benefits of the deals secured through the efforts of the representative trade union in collective bargaining are passed on to other employees who are not members of the representative trade union, such employees should make a contribution towards the costs which the representative union incurs in connection with its collective bargaining work. If they do not pay that is unfair because members of the representative trade union pay for those costs. An agency shop agreement seeks to make them pay without compelling them to join the representative trade union... The fact that such workers may be members of another union in the workplace to which they pay union dues does not turn them into paying riders. They remain free riders... because they make no contribution towards the collective bargaining costs of the representative union...'²³

22 [1999] 10 BLLR 1076 (LC).

23 Id at paras 20-21

[25] In conclusion, in the present matter, the applicants do not contend that the agency shop agreement does not comply with the requirements of section 25. Put differently, the applicants do not contend that the agency shop agreement is invalid. What they do contend is that the agency shop agreement, although lawful and binding in terms of section 25 of the LRA, is unlawful and invalid because it is unconstitutional. I have already referred to relevant case law. The applicants should have attacked the constitutionality of section 25 of the LRA. As in *Greathead* the application therefore must be dismissed because the attack is launched against the agency shop agreement and not the constitutionality of section 23 of the LRA which enables the conclusion of an agency shop agreement.

[26] In the event, the second point *in limine* is upheld.

1. In respect of costs I have decided that the issue of costs must be determined at the conclusion of the trial.

AC BASSON J

Judge of the Labour Court

APPEARANCES:

For the Applicants : Advocate M.Brassey SC

Instructed by : Bester & Rhodie Attorneys

For the First Respondent : Advocate H.van der Riet SC

Instructed by : Brink Cohen Le Roux Incorporated

For the Second Respondent : Advocate A.Myburgh SC

Instructed by : Cheadle Thompson Haysom Attorneys