REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 1897/12

In the matter between:

THE WORKFORCE GROUP	Applicant
and	
COMMISSIONER: ELEANOR HAMBRIGDE M.D	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRIES	Third Respondent

Heard: **17 April 2014**

Delivered: **27 May2014**

Summary: **Review Application**

JUDGMENT

SHAI AJ

INTRODUCTION

[1] This is an application by the applicant in terms of which it seeks an order reviewing, correcting or setting aside the arbitration award of the First Respondent dated 22 June 2012, and directing that any party that opposes the application bear the costs of the application.

[2] In her award dated 22 June 2012, the First Respondent, in a matter relating to seven combined referrals, dismissed each and every one of the applicant's point in limine and directed the Second Respondent's case management to schedule the matter for arbitration.

[3] Only the Third Respondent is opposing the application.

APPLICATION FOR CONDONATION

[4] The Applicant also seeks condonation for the late delivery of its replying affidavit. The said application is not opposed by the Third Respondent. The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA at 532* and involves weighing together the following factors; which are interrelated: degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, are not individually decisive, if there are prospects of success there would be no point in granting condonation.

[5] The said replying affidavit was delivered outside of the five days provided in the Rules, and is 33 days late. I am satisfied that the period of delay is not unreasonably excessive taking into account the administrative challenges that the applicant faced viz misfiling of the answering affidavit by its attorneys and the fact that the deponent of the founding affidavit was taken ill and was booked off for some time and could not attend to the matter timeously. I'm satisfied that on return to work of the deponent the Applicant attended to the matter expeditiously. I'm further satisfied that the Applicant has fair prospect of success in that the issues being raised against the Third Respondent viz Third Respondent's *locus standi* to enforce its agreement, Third Respondent's

none compliance with Exemption and Dispute Resolution agreement, hereafter referred as "EDRA" in respect of the investigation of a dispute and THIRD Respondent's failure to conciliate the dispute (Section 24 versus Section 33A of the LRA) are important issues between the parties and on the face of it the applicant has a fair chance of success. In the premise I grant condonation of the late filing of the replying affidavit.

GROUNDS OF REVIEW

[6] It was submitted on behalf of the applicant that the First Respondent committed gross irregularities in the conduct of the proceedings:

6.1 In so far as the dismissal of the applicant's point ***in limine*** relating to Third Respondent's ***locus standi*** in case number 6301LEV2 is concerned, the following submissions are made:

6.1.1 The First Respondent failed to have regard to Applicant's submission that within the context of Section 28 of the Labour Relations Act 66 of 1995 and Clause 2 of the Third Respondent's constitution (or indeed the provisions of the Main Agreement) no provision is made for the Third Respondent to step into the shoes of a union such as SATAWU or to act as its representative.

6.1.2 Rather, the clear intent of the legislature and the Third Respondent, when framing its constitution, was for the Third Respondent to resolve dispute whilst acting in an objective and non-partisan manner.

6.1.3 This is particularly so in circumstances where there was not even a referral of a dispute by SATAWU in terms of the Third Respondent's Exemption and Dispute Resolution Agreement ("EDRA").

6.2. In so far as the alleged non-compliance with the EDRA is concerned, the following submissions are made.

6.2.1 The First Respondent was wrong in failing to have regard to the peremptory provision contained in clause 5(1)(c) of EDRA to the effect that a designated agent of the Third Respondent *"must investigate a* *dispute that comes to his attention in the course of performing his duties."*

6.2.2 Moreover, no reasons are given as to why the First Respondent comes to the conclusion that an investigation in the above regard should not be of a formal nature.

6.2.3 In the Lev 3 matters numbered 3508 and 3841, no reasons are given how First Respondent came to the finding that a genuine attempt to investigate was made by the Third Respondent when there was no evidence on which she could have based such a finding.

6.2.4 Moreover, there was no evidence to suggest that such alleged attempts were frustrated by the respondent.

6.2.5 Such unfounded conclusion by the First Respondent could only have been arrived as a result of bias against the applicant.

6.2.6 There was no evidence at the arbitration hearing to the effect that there was even an investigation of this matter by the Third Respondent's designated agent, whether formal or informal.

6.2.7 The First Respondent moreover failed with regard to clause 5(1)(d) of EDRA which provides that conciliation may only take place *"in the course of or after investigation."*

6.2.8 Accordingly the drafters of EDRA clearly contemplated a process in terms of which there would first be a compulsory investigation of a dispute followed by (or simultaneously held with) a conciliation and culminating finally in an arbitration.

[7] The third ground of review relating to failure to conciliate (section 24 versus section 33A) was abandoned by the Applicant on the basis that my sister, her Ladyship Bhoola J has already made a determination thereon. The court will therefore confine itself to the two remaining grounds as properly captured above.

[8] The application for review therefore relates to two points *in limine* raised during enforcement proceeding which were taking place in terms of Section 33A of the Labour Relations Act 66 of 1995. The points *in limine* relates to *locus standi* of the Third Respondent to bring such proceedings against the applicant and secondly, to the alleged non-compliance by Third Respondent with paragraph 5 of the Third Respondent's Exemption and Dispute Resolution Agreement.

LEGAL EXPOSITION

[9] The applicable test in jurisdictional reviews was stated in the case of SA Rugby Players' Association (SARPA) and others v SA Rugby (PTY) LTD and Others', SA Rugby PTY LTD SARPA and another [2008] 9 BLLR 845 (LAC) as follows:

> *"The issue that was before the commission was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of Section 191 of the Act."*

[10] This approach was also followed in the case of *Sanlam Life Insurance LTD v CCMA* [2009] 301 LJ 2903 LAC. The court cited with approval the following paragraph from the *SA Rugby Players Association* (SARPA) at paragraph 7:

> *"The CCMA is a creature of statute and not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has a jurisdiction or not in a particular matter is a matter to be decided by the labour court. In Benicon Earthworks and Services (Edms) v. Jacobs No. and others (1994) 15 ILJ 801 LAC C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor or current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdiction facts but upon their objective existence. The court further held that any conclusion to which the Industrial court arrived on the issue has no legal significance. This means*

> *that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have……"*

The court therefore held that the test for review of jurisdictional rulings is simply whether or not the ruling was correct or not. The rational or reasonable test does not apply.

LOCUS STANDI

[11] The enforcement dispute before the Third Respondent related to attempts by the Council to recover money owing to the Third Respondent in terms of the Main Collection Agreement for the industry, which agreement was extended to non-parties. The money in question is the union subscriptions due to South African Transport and Allied Workers Union. It is in this context that the applicant contended that the Third Respondent was doing so acting on behalf of SATAWU and had no ***Locus standi*** to do so.

[12] Paragraph 31(1) (a) of the Main Agreement provides as follows:

> *"Every employer shall each week deduct from the wages of its employees who are members of a trade union that is a party to this Agreement the current union subscriptions referred to in paragraph (b) and payable by such employees to such union and shall transmit the total amount so deducted, together with a monthly return (Annexure D) in the form specified by the Council for this purpose, to the Secretary of the Council.''*

[13] Section 28 of the Labour Relations Act 66 of 1995 provides that:

> *"(1) The powers and functions of a bargaining council in relation to its registered scope include the following-*
>
> *(a) to conclude collective agreements;*
>
> *(b) to enforce those collective agreements."*

[14] Further that, Section 33 A (1) of the Labour Relations Act provides that:

> *"(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms this section or a collective agreement concluded by the parties to the council."*

[15] It was argued for the applicant that the Third Respondent did not have the *locus standi to enforce* the collective agreement and thereby acting on behalf of SATAWU or individuals in case numbers PTA 34/3841/11; PTA 32/3841/11, PTA 366/3508/10 and PTA 94/102/444/10. However, looking at paragraph 31(1)(a) of the Main Agreement read with Sections 33 A(1) and Section 28(1) of the LRA it is my conclusion that criticism of the First Respondent in this respect is without merit and must be rejected. It is clear to me that the Third Respondent has locus standing to enforce its collective agreement. The issue of jurisdiction has got nothing to do with the merits of the case but whether the Third Respondent has in law such jurisdiction which I find it has. The First Respondent was correct in her conclusion that by enforcing the collective agreement the Third Respondent was not acting on behalf of the union or individual members. The Third Respondent has the power to enforce the said collective agreement although in the end the union or individuals may be the beneficiaries of such an action. In my view there is no need for a referral by the union. The Third Respondent by virtue of its monitoring power as outlined in the Section 28 may notice non-compliance, or may receive complains and an investigation may reveal non-compliance. On noticing non-compliance The Third respondent may invoke its powers as aforesaid to remedy the situation by enforcing compliance. Having outlined the source of the powers of the Third Respondent as I did above I have no hesitation in finding that the criticism of the finding of the First Respondent on this ground is without merit and unsustainable.

Third respondent's non-compliance with EDRA-in respect of failure to investigate the dispute.

[16] At the heart of this complaint is that the enforcement dispute would not be arbitrated until such time that a formal investigation had been held into the non- payment of the subscription fees.

[17] Clause 5(1) (b) of the EDRA provides that:

> *"Any person may refer a dispute about the interpretation, application or enforcement of the council's collective agreements to the council who may require an agent/designated agent to investigate the dispute."*

[18] Clause 5(1) (c) of EDRA provides that:

> *"Any designated agent of the council must investigate a dispute that comes to his attention in the course of performing his duties."*

[19] Clause 5(1) (d) of the EDRA stipulates that a dispute may be conciliated by:

> *"(i) a designated agent in the course of or after an investigation or*
>
> *(ii) a duly appointed conciliator."*

[20] The First Respondent dealt with the matter as follows:

> *"Having carefully perused the arguments, I am not persuaded that clause 5(1)(c) of the EDRA has not been complied with as my reading of clause 5(1)(c) does not require such an investigation to be of a formal nature. It is also not stated in clause 5(1)(c) that an investigation is a pre-requisite to arbitrate and should an investigation by a designated agent not have taken place, The Responded will be afforded an opportunity to prove compliance with respective collective agreements during the course of the arbitration hearing."*

[21] It was argued for the Respondent that the First Respondent was correct in dealing with the matter as aforesaid because:

21.1. The enforcement proceedings were not brought in terms of EDRA but in terms of Section 33A of the LRA.

21.2. The investigation contemplated in terms of EDRA cannot possibly be a formal investigation and evidence existed that the clause had been subject to some investigation.

[22] The enquiry here is whether the Third Respondent had the jurisdiction to entertain the dispute at the arbitration level or not. In other words were there objective facts conferring jurisdiction or not?

[23] It is common cause between the parties that the matter was instituted in terms of Section 33A of the LRA. Section 33A of the LRA provides that:

> *"(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this Section or a collective agreement concluded by the parties to the council."*
>
> Section 33A (2) provides that:
>
> *"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.*
>
> *(4)(a) 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."*

[24] What are the requirements that must be satisfied for the Third Respondent to have jurisdiction to entertain the matter at arbitration embedded within Section 33A of the LRA? It is clear to me that such requirements are the issuance of a compliance order, and that the dispute must remain unresolved. Was the compliance order issued? The answer is in the affirmative. Was the dispute unresolved? The answer is also in the affirmative. It is therefore clear to me that the Third Respondent had jurisdiction to entertain the dispute regardless of whether there was or no investigation thereof.

[25] I agree with The Third Respondent's argument that an investigation in a claim instituted in terms of Section 33A is not a prerequisite before arbitration can be held. I have pointed out the requirements that must be satisfied to confer jurisdiction to the Third Respondent to arbitrate such dispute above. An investigation is not one of them. True, if the Third Respondent opted to approach the dispute from the EDRA angle, then the requirements as outlined in EDRA will have to apply.

[26] In a similar case of *The Workforce Group (Pty) Ltd v National Bargaining Council For The Road Freight Industry* P/128/11 my sister Bhoola J said the following at paragraph 8:

> *"In casu the arbitrator found that the arbitration as envisaged in Section 33A was valid dispute resolution mechanism for the dispute involving non-*

> *compliance with a collective agreement. This is akin to finding that the First Respondent was by law entitled to convene arbitration in respect of the unresolved dispute, and that the second respondent was correct in assuming jurisdiction in the matter."*

[27] At paragraph 9 she went on to say:

> *"I agree with the submission made by Mr. Orr and I'm persuaded that the review has no merit and falls to be dismissed given that the applicant is afforded an opportunity to raise its substantive defence at arbitration and* <u>*it is not entitled in fact and in law to seek enforcement of a procedure not envisaged in Section 33A,*</u> *there is no reason why the costs should not follow the result"* (my emphasis).

[28] In this case too, the applicant seeks to enforce a procedure not embedded in Section 33A and that can't be. It is for this reason that I find the criticism of the First Respondent on this ground of review without merit.

[29] Having concluded that section 33A does not require an investigation to be conducted before arbitration is held I see no reason to deal with whether an investigation was conducted or not as it will serve no purpose.

[30] In the premise I make the following order:

(a) That the application for review, correcting and setting aside the decision of the First Respondent in respect of her arbitration award dated 22 June 2012 is dismissed.

(b) The applicant is ordered to pay the costs.

Shai AJ

Acting Judge of the Labour Court of South Africa

<u>APPEARANCES</u>:

Adv. BM Jackson	:	Instructed by Hunts (Inc Borkums) Attorneys
Adv. Chris Orr	:	Instructed by Moodie & Robertson Attorneys