



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2217/15

In the matter between:

**THE ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION**

First Applicant

**THE AMCU MEMBERS WHOSE NAMES
APPEAR ON ANNEXURE 'A'**

**Second to further
Applicants**

and

**THE NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT AND LOGISTICS INDUSTRY**

First Respondent

COMMISSIONER SHAAM FRIEDMAN N.O.

Second Respondent

MACDONALDS TRANSPORT UPINGTON (PTY) LTD

Third Respondent

Heard: 10 November 2015

Delivered: 18 November 2015

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me in urgent court. The first applicant (AMCU) sought the following relief:

“Reviewing, setting aside and correcting, on an urgent basis, the ruling dated 20 October 2015 issued by the Second Respondent under the auspices of the Bargaining Council and under case number GPRFBC36944 (the Ruling); and

Substituting the Ruling with one that reads that AMCU is entitled to represent the individual applicants in their unfair dismissal dispute referred to the first respondent under case number GPRFBC36944 and the condonation application in respect thereof.”

- [2] The Ruling arose from a point *in limine* raised by the third respondent (the company) at the outset of a condonation hearing. It was issued on 20 October 2015 and is brief. It reads as follows:

“Details of the hearing and representation

1. The matter was set down for 12 October 2015 as an *in limine* hearing. The employer party raised a point in limine that the membership of the employees that are party to the dispute, has lapsed. Therefore AMCU cannot represent the employees as they are no longer members.

Background to the dispute

2. The Parties have been in dispute since on or about 5 September when AMCU had referred a matter seeking organisational rights. Several attempts to meet to discuss the granting of organisational rights, has failed. Stop order forms had been submitted to the employer and the employer confirmed that through the process of verification on 12 November 2014, a handful of forms were found to be legitimate.

Submissions by employer

3. The employer submitted that the parties cannot read into the Constitution of the union. The membership of the employees has lapsed. The employer submitted that the Constitution clearly reflects that if members are in arrears for three months, then membership lapses. The Union, therefore cannot represent the employees. Rights have to be exercised within the framework of the law. The employer submitted that the employees could have paid subscriptions individually.

Submissions by employee party

4. The employee party submitted that the dispute arose after organisational rights were not granted and this had resulted in a strike. The employee party submitted that Union membership is a fundamental right and at no point during the continuation of the dispute, did the employer raise that the employees were not members of AMCU.

Ruling

5. From the commencement of the dispute for organisational rights, it is clear that the employer was unwilling to grant these rights. The Union is bound by its Constitution and should have made contingency plans to secure membership through the period of the dispute as the Constitution only allows for deductions to be made through remittance by an employer. The right to automatic deductions is earned if parties are members to the Council. There is no evidence before me that AMCU is party to the Council.
6. As much as the members require the assistance of the Union during the processes following their dismissal, the Union is bound by its own Constitution. I therefore find that the employees are not members in good standing and AMCU cannot represent them."

- [3] AMCU's Constitution, as well as the pleadings in the condonation application were before the second respondent. The company submitted in its opposing papers in the condonation application, that AMCU was not able or authorised in law to refer the dispute on behalf of the list of individuals and averred:

"In terms of the Constitution of the Applicant, particularly paragraphs 7.4 and 8.2 thereof, the membership of the individuals to the Applicant lapsed at the latest during January 2015 as the individuals have never paid subscription fees to the Applicant."

- [4] The company attached a list of names to their answering papers in the condonation application with included the dates of the respective application forms, indicating when the employees' applications for membership were submitted. It is noteworthy that there was a long standing organisational rights dispute between the parties. From April 2014 to May 2015 AMCU was not granted

organisational rights including the right to deduct trade union subscription fees. There followed a strike and the subsequent dismissals.

[5] The AMCU constitution provides in clause 7.4 as follows:

“7.4 Termination of Membership

7.4.1 Any member may resign from the Trade Union by writing a letter to the Branch Secretary, giving one (1) months' notice to the Trade Union.

7.4.2 Any member whose contract of employment has been terminated by the employer, his/her membership will not be terminated for one (1) full year. Such member will be exempted from paying subscription to the trade union until he/she is re-employed.

7.4.3 Membership shall lapse if a member is in arrears with subscription for three (3) months.

7.4.4 A member shall not be disciplined or expelled from the trade union if he/she did not participate on the strike action, if no ballot was held or the majority of members voted against it.”

[6] The company sought to rely on clause 7.4.3 read with clause 8.2 of the constitution. Clause 8 of the constitution reads as follows:

“SUBSCRIPTIONS

8.1 All subscription fees are payable to the national account of the trade union or to a person authorized by the National Executive Committee of the trade union to collect such fees.

8.2 Members who are three (3) months in arrears with their subscription fees forfeit their membership, any benefits they received from the Trade Union will cease. The member may re-apply for membership by completing new stop order form; such application will be treated as new.”

[7] The second respondent was enjoined to interpret the provisions of the constitution before her. It was common cause between the parties that at least those former employees contained in one of the lists to the answering affidavit in the condonation application had completed membership application forms, (incorporating a stop order form), but had not as yet paid any membership

subscription fees for a period in excess of three months from the date of completing the forms.

- [8] It was submitted by Ms Collet for AMCU that the second respondent failed to apply her mind to the AMCU constitution as a whole. The issue identified by her as the crux of the matter, is whether the individual applicants were ‘in arrears’ with their subscriptions as contemplated in clauses 7.4 and 8.2 of the constitution. The definition of “member” in the constitution was highlighted i.e.:

“member” mean a person prescribed in clause 16.1 of this constitution¹ and/or any person/ employee who have completed the application for membership stop order irrespective of whether the membership subscription has commenced or not”

- [9] It was further pointed out that Clause 9.3 of the constitution provides that: “Stop order facility will be entered into with all employers whose employees have joined AMCU for the purpose of deducting the subscription fees.” This it was submitted is the method by which the constitution provides for the collection of subscriptions.
- [10] The company, for its part, submitted on the papers before me that on a proper reading of the constitution in its entirety, the provisions of the LRA, the prevailing jurisprudence and the Rules of the Bargaining Council in respect of representation it is clear that the individual Applicants cannot lawfully be represented by AMCU.
- [11] Ms Lancaster for the company referred the court to *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (2009) 30 ILJ 1997 (LAC) in which the court held that where employees are relying on the existence of their membership of union, they bear onus of establishing that membership in terms of that union’s constitution.

Evaluation

- [12] This matter concerns a large group of employees. The legal effect of the Ruling should it stand, would be to prevent the individual applicants from relying on the founding papers in the condonation application (deposed to by an AMCU official)

¹ 16.1 is the ‘regional executive committee’

in the forthcoming hearing under the auspices of the first respondent. I am thus satisfied that the matter is urgent and that in terms of section 158(1B) of the LRA, it is just and equitable that I should entertain the review application.²

[13] The matter therefore stands to be decided on an interpretation of the constitution in question. In respect of its interpretation the oft quoted passage of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ is of guidance:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

² (1B) The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.

³ 2012 (4) SA 593 (SCA)

[14] The definition clause of “membership” in the constitution brooks no ambiguity or confusion. Having filled in the requisite application an employee is considered a member of the union, whether subscriptions have begun to be paid or not. Clause 8.2. must be read in light of that definition. To be in “arrears” is to be owing money that should have been paid already.⁴ Given that the method provided for paying membership dues in AMCUs’ constitution is by stop order facility entered into with an employer, the state of being in arrears can only occur once stop order deductions have commenced.

[15] Clause 9.2 of AMCU’s constitution in line with the LRA which provides as follows in respect of representative trade unions:

“13 Deduction of trade union subscriptions or levies

- (1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.
- (2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.
- (3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.
- (4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.”
- (5) With each monthly remittance, the employer must give the representative trade union-
 - (a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;
 - (b) details of the amounts deducted and remitted and the period to which the deductions relate; and
 - (c) a copy of every notice of revocation in terms of subsection (3).”

⁴ Dictionary.cambridge.org

[16] In my judgment had the arbitrator applied her mind to the clauses of AMCU's constitution referred to above in context, this would have led her to find that the union had the right to represent its members. She clearly did not do so and undertook the enquiry in the wrong way⁵, rendering the decision she arrived at reviewable.

[17] In the circumstances, I make the following order:

Order

1. The ruling dated 20 October 2015 issued by the Second respondent under case number GPRFBC36944 is hereby reviewed and set aside and substituted with the following:
 - 1.1 AMCU is entitled to represent the individual applicants in their dispute under case number GPRFBC36944;
2. Third Respondent is to pay the costs of this application.

H. Rabkin-Naicker
Judge of the Labour Court

⁵ Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at paragraph 21 deals with this time of latent defect.

Appearances:

For the Applicant: Adv S. Collet

Instructed by: Larry Dave Incorporated Attorneys

For the Third Respondent: Ms S Lancaster of Lancaster Kungoane Attorneys

LABOUR COURT