



**IN THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Reportable/Not Reportable

Case no: JR538/14

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

and

NATIONAL UNION OF MINEWORKERS

First Respondent

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

JOHN SHARDLOW N.O

Fourth Respondent

SOLIDARITY

Fifth Respondent

Decided: In Chambers

Delivered: 9 May 2017

JUDGMENT – LEAVE TO APPEAL

BALOYI AJ

Introduction

- [1] Eskom Holdings SOC Limited (Eskom) seeks leave to appeal the judgment and order delivered on 7 December 2016 in which I ordered that: (i) the ruling of the arbitrator that the Commission for Conciliation Mediation and Arbitration (CCMA) lacks the jurisdiction to determine the dispute referred by the first and second respondents is reviewed and set aside; (ii) the CCMA must enrol the dispute referred by the National Union of Metalworkers of South Africa (NUMSA) and the National Union of Mineworkers (NUM) for arbitration on the merits; and (iii) Eskom pay the costs of the application. The application is opposed by NUMSA and NUM (collectively referred to as the “unions”).
- [2] Before me, the unions sought the review and setting aside of a jurisdictional ruling of the fourth respondent that the CCMA lacks the jurisdiction to conciliate an interest dispute referred by the unions, the dispute being:- (i) a demand that Eskom end the use of labour brokers; and (ii) a demand to extend the existing bargaining unit to include an additional 3 bands of employees (the M, P and S bands who, according to Eskom, comprise, *inter alia*, managers, professionals and consultants. It is not necessary that I repeat the facts as they appear in the main judgment.
- [3] To succeed in an application for leave to appeal, an applicant must show that there is a prospect that another court may reasonably arrive at a different

decision from the court *a quo*¹. I proceed to consider whether Eskom meets this standard.

The demand for the abolition of the use of labour brokers

- [4] Eskom asserts that the demand is not competent to be determined by the CCMA for the following reasons:- (i) the ruling of Commissioner Shear decided the issue and remains binding on the parties as it has not been set aside – further, that a commissioner does not have the power to set aside an administrative act, namely, the decision of commissioner Shear; (ii) the demand usurps the function of the legislature; (iii) the demand is unlawful; and (iv) the demand is not a demand between an employer and its employees.
- [5] Eskom contends that my finding and order that the commissioner has the jurisdiction to consider and determine the unions' demand amounts to effectively giving the CCMA the power to tell Eskom who it can contract with, and places in the hands of a commissioner the power to ban labour brokers at Eskom. This, so it is contended by Eskom, amounts to usurpation of the powers of the legislature (which, so it is contended, has authorised the use of labour brokers in section 198 of the Labour Relations Act² (LRA)). I do not agree that the judgment has the effect or consequence as contended by Eskom. As I understand section 198, it seeks only to regulate the relationship of the parties (the labour broker, the client of the labour broker – Eskom in this case, and the employees of the labour broker) where an employer has elected to utilise the services of a labour broker. It does not prescribe the use of labour brokers by any employer, or indeed the continued use of labour brokers where an employer elected to use one. Nothing in section 198 precludes a demand that an employer negotiate the use of labour brokers, or indeed that an employer desist from using a labour broker. Equally, section 198 does not preclude an employer negotiating or indeed agreeing with its employees not to utilise the

¹ See *Seatlholo and Others v CEPPWAWU and Others* [2016] ZALCJHB 39 (9 February 2016)

² Act 66 of 1995

services of labour brokers. It follows, in my view, that the decision of a commissioner to award such a demand does not amount to legislating in the place of the legislature and contrary to what the legislature has legislated by way of section 198, at the very least for the reason that such a decision would have no application beyond Eskom and its unions. Accordingly, the contention of Eskom that a demand such as is made in this case amounts to a demand to usurp the power of the legislature cannot be sustained.

[6] With respect to the contention that an arbitrator does not have the power to set aside administrative acts, the relevant administrative act being the decision of commissioner Shear, I agree with Eskom in its submission. However, this is frankly not an issue in this matter. I do not understand the unions to make such a proposition or demand, namely, that commissioner Shardlow must set aside the ruling of commissioner Shear. I also do not accept that a ruling in favour of the demand of the unions, in fact or effect, sets aside the ruling of commissioner Shear. In any event, the issue is whether, the demand as defined and presented to commissioner Shardlow, and the evidence in support thereof, is a matter that was the subject of a ruling by commissioner Shear. From the award and the record that was before me, I am unable to find that the issue that was before commissioner Shear, and in respect of which his ruling applies, is the same issue that was before commissioner Shardlow. In the application for leave to appeal, the applicant does not point to any facts in the ruling or record from which it is manifest, however obliquely, that the issue was the same as before commissioner Shardlow. The unions demand only that the commissioner consider the demand and the facts in support thereof and that he makes a determination on the facts before him. An exercise of this power by the commissioner does not, in fact or effect, set aside the award of Shear. I am therefore not persuaded that another court will reasonably come to a different decision on this aspect of Eskom's contention.

[7] The contention that the demand is unlawful is premised on the following contentions - (i) the demand seeks to restrict Eskom's rights as contained in section 22 of the Bill of Rights; (ii) the demand is illegal for seeking to prohibit the use of labour brokers which is allowed by law, and which therefore cannot

be the subject matter of interest arbitration; (iii) the demand seeks to prescribe to employees of labour brokers whom they should be employed by; and (iv) the demand seeks to force or induce Eskom to breach its contractual obligations with contracted labour brokers. Suffice to say there is no merit in any of these contentions. Neither the common law, section 22 of the Constitution³ (or any provision of the Bill of Rights for that matter), nor section 198 of the LRA preclude the unions and employers negotiating the use of labour brokers.

- [8] Eskom further contends that the demand is not a demand between an employer and its employees. It is incomprehensible to me how it could be contended that the demand is not a matter between an employer and its employees. I do not understand that the unions make the demand on behalf of employees of labour brokers, an issue a commissioner will have to determine if indeed the unions make such a demand as appear to be understood by Eskom. On the review papers, there is no contention that the persons represented by the unions are not employees of Eskom or that the demand is not made on behalf of such members. It seems to me that it is not difficult to see the interest or benefit to the members of the unions employed by Eskom should Eskom agree to the demand, one such example being that there will be no different conditions of employment between employees solely on the basis that they are employed by a labour broker or by Eskom directly, while both perform their services at Eskom. I find that there is no merit in this contention. It follows that I am not satisfied that that another court may reasonably arrive at a different conclusion in this regard.

The demand for extension of the bargaining unit

- [9] Eskom contends that:- (i) the demand is incompetent in the face of the present collective agreements; and (ii) the demand is unlawful.
- [10] Eskom contends that:- (i) the Recognition Agreement concluded by the parties in May 2000 which applies to employees in the “T.A.S.K grades of T04 to T13”; and (ii) the Conditions of Service for “T.A.S.K grades T04 to T13/P13”, preclude

³ Section 22 provides that “22 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.”

the demand of the unions for the following reasons - (i) the limits of the bargaining unit are prescribed in the collective agreement and therefore falls outside the ambit of issues that may be negotiated; and (ii) the demand is unlawful as it seeks to compel third parties to join and bargain under a Bargaining Unit and is an impermissible intrusion into employees right of freedom of association.

- [11] The Collective Agreement referred to sets the terms that govern the re-negotiation or amendment of the agreement. It contains no qualification that a party may not demand an amendment of the definition of the Bargaining Unit or indeed that a party seeking an amendment must first cancel the agreement (which in my view would be inconsistent with the amendment clause). It seems to me that it follows therefore that the Collective Agreement, on its terms, does not preclude negotiation of the amendment of the Bargaining Unit, provided that the demand for re-negotiation is made in accordance with the provisions of the agreement. Eskom has not contended that the unions did not comply with the prescribed procedure.
- [12] Eskom's submission that I found that the award of Fine SC is not binding on the parties is incorrect. On the contrary, I concluded that the award of Fine SC was based on the facts that were before him⁴, and by implication, if not expressly, if the relevant facts in the present matter are different from what they were before Fine SC, this may or may not result in a different decision. These are matters that the commissioner must consider in his determination of the demand. This the commissioner did not do and his decision therefore cannot stand. Eskom has not shown that another court may reasonably find otherwise.
- [13] Eskom further contends that the demand is unlawful because it seeks to compel employees to be part of a Bargaining Unit and thereby intrudes upon the right to freedom of association and that there is no evidence that the implicated employees have consented to bargaining collectively. I do not agree that the demand is unlawful for the reason contended by Eskom. In any event, the question whether the unions meet the required threshold to succeed in their demand for a re-definition of the Bargaining Unit is a matter that the CCMA

⁴ Judgment at paras 20 and 22-23

must determine on the facts properly placed before it. This has not been done, quite understandably, in the light of the approach adopted by the commissioner. Eskom has not shown that another court may reasonably arrive at a different decision on this aspect.

[15] In the result, I make the following order:

Order

1. The application for leave to appeal is dismissed.

MS Baloyi

Acting Judge of the Labour Court of South Africa