THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2462/18

In the matter between:

INDEPENDENT MUNICIPAL & ALLIED TRADE UNION (IMATU) **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

LORRAINE MARTIN N. O **Second Respondent**

MUNICIPAL AND ALLIED TRADE UNION OF SOUTH AFRICA (MATUSA) **Third Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS' UNION (SAMWU) **Fourth Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA) **Fifth Respondent**

MATJHABENG LOCAL MUNICIPALITY **Sixth Respondent**

Heard: **10 September 2019**

Delivered: **12 September 2019**

Summary: Union rivalry - right to represent members at disciplinary hearings is not a right that can be usurped using collective bargaining. It is a right consonant with the right to join a trade union and freedom of association.

Interpretation of a collective agreement must be one that is consistent with the Constitutional rights. Any interpretation that does not impair the rights entrenched in the Bill of Rights is to be favoured. Held: (1) The application for review is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] One of the objectives that a commissioner dealing with a dispute about organisational rights seeks to achieve is to minimise the proliferation of trade union representation in a single workplace and where possible to encourage a system of a representative trade union in a workplace.[1] The Labour Relations Act[2] (LRA) is based on majoritarian principle. There is no doubt that the Local Government sector is continually suffering a proliferation of trade unions, an act inimical to the majoritarian principle. This case is a perfect example of trade unions fighting for turf. Before me is a review application in terms of which, the applicant trade union (IMATU) seeks to review and set aside an award issued by the second respondent under the provisions of section 24 of the LRA. The application for some unclear reasons stands unopposed[3].

Background facts

[1] Section 21(8)(a) of the LRA.

[2] Act 66 of 1995, as amended.

[3] I was advised by the applicant's counsel that MATUSA attempted to oppose but later withdrew.

[2] On February 2018 and at the South African Local Bargaining Council (SALGBC) a collective agreement (known as Disciplinary Procedure (DP) was concluded between the South African Local Government Association (SALGA); Independent Municipal and Allied Trade Union (IMATU) and South African Municipal Workers Union (SAMWU). Suffice to mention that these parties to the collective agreement are members of the SALGBC. A dispute arose with regard to the interpretation and application of clause 15 of the DP. A non-party, MATUSA, on 6 August 2018 referred the dispute to the SALGBC. The second respondent was appointed to resolve the dispute through arbitration. In the referral, MATUSA did not join IMATU; SAMWU and SALGA to the dispute. A joinder application was brought by MATUSA but was turned down by the second respondent on 28 August 2018[4].

[3] Subsequent thereto, an arbitration process was undertaken on or about 18 September 2018. The parties to the arbitration proceedings was MATUSA on behalf of its three members and the sixth respondent, the Municipality. What ignited the dispute was that MATUSA was denied representation of its members at a disciplinary hearing after the coming into effect of the DP. On or about 1 October 2018, the second respondent issued an award allowing the members of MATUSA to be represented by it at the disciplinary hearing[5]. Aggrieved by the award, on 19 November 2018, IMATU launched the present application. As pointed out above, the application stands unopposed.

Grounds of review

[4] It is apparent from the founding papers that the applicant raises an error of law and excess of power as grounds for review. In a supplementary affidavit, the applicant added as grounds of review non-joinder, extension in terms of

[4] I point out that a ruling refusing the joinder has not been attacked and is not before me.

[5] This Court has not been told whether the hearings did take place and whether they were finalised at the time this Court heard the matter. Given the fact that the award was issued in October 2018, this Court can safely assume that MATUSA and its members have already reaped the benefits of the award. Thus as an added string to the bow, this review may have become moot.

section 32 of the LRA, absence of jurisdiction, wrong interpretation of a Constitutional Court judgment.

Evaluation

[5] The first issue to be addressed is whether this Court has jurisdiction to entertain a review application brought by a non-party to the dispute. In its founding papers, the applicant alleged that this application is brought in terms of section 145 of the LRA[6].

[6] Section 145 of the LRA provides thus:

> "Any party to a dispute who alleges a defect in any arbitration award proceedings…may apply to the Labour Court for an order setting aside the arbitration award…"

[7] It is clear to me that only parties to a dispute may approach this Court for an order setting aside any arbitration award proceedings. The applicant before me never attempted to become a party to the dispute. It was only MATUSA who attempted and failed to join the applicant and others. It must follow that the applicant before me lacks the necessary *locus standi* to challenge the award issued by the second respondent. On this basis alone, this Court lacks jurisdiction and must dismiss the application for want of jurisdiction. The applicant for some unexplained reasons failed to attack the ruling allegedly made on 28 August 2018.

[8] This Court in terms of section 158(1)(g) is empowered to review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. Instead, the applicant supplemented its grounds by mentioning how wrong and unreasonable was the ruling made against MATUSA. This, in my view, the applicant cannot do.

[6] 10 This is an application in terms of section 145 of the LRA… (paragraph 10 of the Founding Affidavit.

Yet again, it was not a party to the dispute that led to the ruling that is considered by it to be unreasonable and erroneous. The ruling was made on 28 August 2018 and has not been attacked by MATUSA, being the affected party. It can only follow that MATUSA somewhat perempted its right of review of the ruling. Advocate Van der Westhuizen, appearing for the applicant submitted that the applicant did attack the ruling. I disagree. In the notice of motion presented in support of this application no reference is made to the ruling of 28 August 2018. Only the award allowing MATUSA to represent its members is being attacked, which award is dated 1 October 2018. Assuming that I am wrong in the above conclusion, I continue to consider the merits of the review before me.

[9] The role of an arbitrator in any matter involving interpretation and application of a collective agreement is to consider an interpretation of the collective agreement and/or consider its application *inter partes*. I mention in passing though that MATUSA is not a party to the collective agreement, therefore in my view, it lacked the *locus standi* to refer a dispute in terms of section 24 of the LRA[7]. This point was not raised nor addressed at the arbitration proceedings. It does seem to me that the true nature of the dispute is one of mutual interest – the 'right' to represent members at a disciplinary hearing. However, it is understood why the matter ended as being labelled as one involving interpretation and application of the collective agreement. When MATUSA sought to exercise the right of representation, the Municipality flagged the collective agreement in denying MATUSA the right. Properly considered, the application of the collective agreement to MATUSA and its members became an issue in a dispute as opposed to the dispute itself.

[10] Turning to the merits of the review. As always, the starting block is the Constitution of the Republic of South Africa. For the purposes of this judgment, a good place to start is section 23. In terms of section 23(2) every worker has the right to form and join a trade union. Building on that, it is clear that the right to join a trade union is an individual worker right. Allied to this

[7] *Arends and others v SALGBC* [2013] BLLR 4 (LC) and [2015] 1 BLLR 23 (LAC).

individual worker right is the right to freedom of association. Yet again, the right to associate freely is an individual right. The last place to look at is section 23(5) which affords every trade union the right to engage in collective bargaining. A national legislation may be enacted to regulate collective bargaining.

[11] Having established that, the next place to turn to is the LRA, section 3 commands that whenever the provisions of the LRA are to be interpreted there is an obligation to interpret them in compliance with the Constitution of the Republic. In expatiation of the right to freedom of association, section 4 (1)(b) provides that an employee has the right to join a trade union subject to its constitution. Section 213 defines a trade union to mean an association of employees whose principal purpose is to regulate relations between employees and employers. In terms of section 8 (a)(i), a trade union has a right to determine its own constitution and rules. Section 23 gives collective agreements legal effect and force. The LRA provides for the establishment of Bargaining Councils. Section 28 (1)(a) and (b) grants the Bargaining Councils powers to: (a) conclude collective agreements and (b) to enforce those collective agreements. Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds parties to the bargaining council who are also parties to the collective agreement.

[12] What can be discerned so far is that a collective agreement concluded in a bargaining council binds only parties to the bargaining council who are also parties to the collective agreement. In *casu* the collective agreement involved is: (a) concluded in the South African Local Government Bargaining Council (SALGBC) and (b) the parties thereto are the SALGA, IMATU and SAMWU. Therefore, it is binding only on the parties to the council and to the collective agreement. MATUSA is not a party to the bargaining council nor a party to the collective agreement involved herein. In terms of section 31, this collective agreement is not binding on MATUSA and its members.

[13] The only legal manner to bring MATUSA and its members into the binding fold is by invoking the provisions of section 32 of the LRA which provides thus:

> **'32 Extension of collective agreement concluded in bargaining council**
>
> (1) A *bargaining council* may ask the *Minister* in writing to extend a *collective agreement* concluded in the *bargaining council* to any non-parties to the *collective agreement* that are within *its registered scope* and are identified in the request, if at a meeting of the *bargaining council*-
>
> (a) One or more registered *trade unions* whose members constitute the majority of the members of the *trade union* that are party to the *bargaining council* vote in favour of the extension; and
>
> (b) One or more registered *employers' organisations*, whose members employ the majority of the employees employed by the members of the *employers' organisations* that are party to the *bargaining council* vote in favour of the extension.'

[14] A lawful extension of a collective agreement happens if: (a) there is a request in writing to the Minister of Labour for an extension followed by a (b) favourable vote in the bargaining council meeting. In the absence of the above, a collective agreement cannot be lawfully extended, thus non-binding to non-parties. The applicant contends that section 32 does not apply in the Local Government sphere. I disagree. The contention is pillared on an incorrect reading, in my view, of section 71 (3) of the *Local Government Municipal Systems Act*[8] (MSA). The section provides thus:

> '**Bargaining council agreements**

[8] Act 32 0f 2000.

71 (3). Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities.'

[15] This section properly interpreted simply means that a Municipality has an obligation to comply with collective agreements concluded by an organised local government body in the SALGBC. This implies that even if a Municipality, as a legal entity, is not a party to a collective agreement, a Municipality is obliged to comply and cannot avoid compliance on the basis of being a non-party to the collective agreement. As an example, the Metropolitan City of Tshwane may not refuse to comply with a collective agreement concluded in the SALGBC simply because it is not party to the said collective agreement. The relevant collective agreements are to be concluded by an organised local government, a body established in terms of section 2 of the *Organised Local Government Act*[9] (OLGA).

[16] On the contrary, the section is not intended to replace, as it were, the requirements of section 32 in the Local Government sphere. The South African Local Government Association (SALGA) is a body established in terms of section 2 of OLGA. One of the roles and mandates of SALGA is to regulate the relationship between its members and their employees within the meaning of section 213 of the LRA[10]. SALGA is a party to SALGBC. In *casu,* the collective agreement was concluded by SALGA. Thus, section 71 (3) of the MSA finds application in this matter only in so far as the sixth respondent not avoiding compliance simply because it is not a party and or signatory to the DP.

[17] If it is aimed at replacing section 32, then it is clearly inconsistent with the peremptory requirements of section 32. Section 71 (3) of the MSA does not provide for: (a) written extension and (b) voting in favour in a meeting of the bargaining council. The DP in clause 4.2 do recognise the provisions of

[9] Act 52 of 1997.

[10] Article 3.11 of the constitution of SALGA.

section 32. Section 210 of the LRA provides that if there is any conflict, which conflict this Court does not observe in the present instance, relating to the matters dealt with in the LRA, arises between the LRA and the provisions of any other law save the Constitution or any Act expressly amending the LRA, the provisions of the LRA shall prevail. For this reason, too, the provisions of section 32 shall prevail. To that extent, the Arbitrator was correct in concluding that section 32 of the LRA finds application and its provisions were not met in order for the terms of the collective agreement to apply to MATUSA and its members.

[18] It remains the objectives of every trade union to protect and promote the interests of its members, assist members to retain employment and provide assistance to its members in matters affecting their employment. It must be a constitutional objective of MATUSA to represent its members at disciplinary hearings or matters affecting the employment of their members. Regard being had to the Constitutional imperatives; the first respondent has a right to represent its members in a disciplinary hearing.[11] I already found that the terms of the collective agreement do not apply to MATUSA and its members.

[19] However, recognising the fact that the arbitrator was engaged in duties contemplated in section 24 of the LRA, this Court must amongst others have regard to the question whether she performed her task in a manner consistent with the Constitution of the Republic and the LRA. Some of the rights implicated in the process were, the right to join a trade union and the right to freedom of association. Section 39(1) of the Constitution, enjoined the arbitrator to, when interpreting the implicated rights in this matter, promote the values that underlie an open and democratic society based on human dignity, equality and freedom and to consider international law. Therefore, reliance on *NUMSA v Bader Bop (Pty) Ltd and Another*[12] cannot be faulted.

[11] Recently the Constitutional Court in *AMCU and others v Chamber of Mines and others* CCT 87/1 delivered on 21 February 2017 held that the majoritarian system must allow minority unions to co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions. (at para 2)

[12] 2003 (3) SA 513 (CC).

[20] The Constitutional Court in *Bader Bop supra* expressly held as follows:

> '[34] Of importance to the case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford trade unions the right to recruit members and to represent those members at least in individual workplace grievances…The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but be required to be represented by a rival union that they have chosen not to join…
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> [36] Taking these two principles together…would suggest that a reading of the Act which permitted minority unions the right to strike…for the purposes of the representation of union members in grievances and disciplinary procedures would be more in accordance with the principle of freedom of association entrenched in the ILO Conventions.[13]
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> [37] …If it is capable of a broader interpretation that does not limit the fundamental rights, the interpretation should be preferred.'

[21] The arbitrator preferred an interpretation that shall not impair the fundamental rights of MATUSA and its members. Such an interpretation cannot be faulted by a court of review. Recognising that before me there is no application to declare the provisions of the collective agreement to be invalid, this Court is not in a position to declare that any of the provisions are invalid and unenforceable in law. I disagree with a submission that the arbitrator has declared the DP or its contentious clauses to be unlawful and as a result, she treaded on a territory she is not empowered to. Her conclusion was simply that the DP cannot be applied to MATUSA and its members. It is trite that no

[13] My own underlining and emphasis.

law may limit any right entrenched in the Bill of Rights. Any interpretation other than the one adopted by the arbitrator in this instance would impair the fundamental rights of MATUSA and its members. The applicant placed reliance on the judgment of this Court in *Solidarity v SAPS and others*[14]*.* This judgment is distinguishable to the present matter. In the first instance, in *Solidarity*, the applicant by-passed the provisions of the LRA and placed direct reliance on the Bill of Rights. In *casu*, the second respondent, as she was entitled to, interpreted or established the application of the collective agreement, a task, she was authorised by section 24 of the LRA, to perform, within the spirit and purport of the Constitution of the Republic. Therefore, for all the above reasons, the application for review is bound to fail.

[22] In the results, the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate G Van der Westhuizen

Instructed by : Savage Jooste & Adams Inc, Pretoria.

For the Respondents : No appearance

[14] [2019] 40 ILJ 448 (LC).