



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR874/22

In the matter between:

KENNETH SKHOSANA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

ABEL VENTER N.O.

Second Respondent

ESKOM HOLDINGS SOC (PTY) LTD

Third Respondent

Heard: 5 November 2024

Delivered: 9 January 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 9 January 2025 is deemed to be the date of delivery of this judgment).

Summary: Application to review jurisdictional ruling. CCMA incorrectly found that no individual has standing to refer a dispute over the interpretation or application of a collective agreement in terms of sections 24(2) and (5) of the LRA. Examination of collective agreement shows that the applicant misinterpreted its provisions relating to trade union leave. Although applicant had standing to refer dispute, review application is dismissed on the merits.

JUDGMENT

RAMJI, AJ

Introduction

- [1] This judgment concerns the applicant's (Mr Skhosana's) review application. At the hearing, I granted Mr Skhosana's application for condonation for the late filing of his review application. Both the condonation and review applications were unopposed. They were served by e-mail on the third respondent and his employer (Eskom).
- [2] Mr Skhosana referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) concerning the interpretation or application of a collective agreement, in terms of sections 24(2) and then 24(5) of the Labour Relations Act¹ (LRA). The collective agreement (a Recognition Agreement) bound Mr Skhosana as a member of a recognised union.
- [3] The dispute came before Commissioner Venter on 6 April 2022, with Mr Skhosana representing himself as he has done in this application, and Eskom being represented by an industrial relations official.
- [4] Eskom raised a preliminary point: It has a collective agreement with three trade unions, and as Mr Skhosana is not a shop steward, he is not entitled to appear as an individual to raise an individual dispute about the interpretation or application of a collective agreement.
- [5] The commissioner found that Mr Skhosana lacked standing for the above reason and dismissed Mr Skhosana's dispute for lack of jurisdiction.
- [6] Mr Skhosana seeks to have the jurisdictional ruling (the ruling) reviewed and set aside, so that he may proceed in the CCMA with his dispute against

¹ Act 66 of 1995, as amended.

Eskom on the interpretation of the Recognition Agreement. He has also sought various forms of material relief from this Court.

[7] I deal with matters in the following order:

- 7.1. First, the factual background explaining the dispute and the facts giving rise to it.
- 7.2. Second, Mr Skhosana's main review grounds.
- 7.3. Third, the nature of the review papers filed and compliance with the applicable rules.
- 7.4. Fourth, whether the commissioner's ruling was correct.
- 7.5. Finally, the appropriate order in the circumstances.

Background

[8] On 21 January 2022, Mr Skhosana referred his dispute to conciliation. Following conciliation, Mr Skhosana referred the dispute to arbitration on or about 18 February 2022.

[9] Mr Skhosana's referred his dispute as dispute about the interpretation or application of a collective agreement. Essentially, the dispute concerned the interpretation of the trade union leave provisions of the Recognition Agreement between Eskom, and the following trade unions: National Union of Mineworkers, the National Union of Metalworkers of South Africa and Solidarity. It was not disputed that the Recognition Agreement binds Mr Skhosana. Mr Skhosana appears to also rely on an aspect of Eskom's Disciplinary Code (the Code) in addition the Recognition Agreement. I will presume the Code is part of a collective agreement for purposes of determining this matter.

[10] The facts giving rise to Mr Skhosana's dispute about the Recognition Agreement are the following:

10.1. On 25 October 2021, Mr Skhosana wrote to his manager requesting “*trade union leave*” to file documents at the Labour Court the following day. The documents related to separate litigation which Mr Skhosana is pursuing against Eskom in terms of section 6 of the Employment Equity Act² (the EEA case).

10.2. Management responded to Mr Skhosana stating that Eskom did not recognise him as a part-time shop steward. He was instructed to apply for annual leave if he wished to be excused from duty on 26 October 2021.

10.3. Mr Skhosana replied stating, “*Please be informed that tomorrow I will be at the Labour Court for case JS698 filing*”.

[11] Mr Skhosana also attached a notice, dated 6 September 2021, calling him to attend a disciplinary hearing on 15 September 2021. This predates his present complaint about trade union leave for 26 October 2021, and it therefore appears to have no bearing on this matter.

[12] Although it is apparent that Mr Skhosana filed an internal grievance, Mr Skhosana did not plead to or attach documents about disciplinary action that was being taken against him regarding 25 to 26 October 2021. I therefore do not know if Mr Skhosana went to the Labour Court on 26 October 2021, and if he did, (a) whether he took annual leave to do so, or (b) whether Eskom took disciplinary action against him. The question of whether this was actually an unfair labour practice dispute arose according to the pleadings and record, but was not dealt with in any detail.

Review grounds

[13] Considering that Mr Skhosana is a lay person bringing an application on a complicated legal question, I will extract the main grounds of review from his pleadings.³ Mr Skhosana’s grounds of review primarily relate to gross irregularities:

² Act 55 of 1998.

³ See: *Norkie v Public Protector and Another* [2024] ZAWCHC at paras 5 – 6; 30 and 34.

13.1. The commissioner committed a material legal error in interpreting sections 24(2) and 24(5) of the LRA to exclude referrals by “*a single employee being affected by [the] interpretation and application [of a collective agreement]*”.

13.2. The commissioner misconceived the issue or dispute that he was to arbitrate. Expanding on this point, Mr Skhosana pleaded the following:

‘The commissioner committed a gross irregularity by failing to make [an] enquiry to understand the merits of the case he was required to arbitrate.’

13.3. Related to this ground, in his supplementary founding affidavit, Mr Skhosana stated that the commissioner was “*impatient*” with him and that he “*rushed*” him.

Review papers

[14] On 16 May 2022, Mr Skhosana filed a notice of motion seeking that: (a) the commissioner’s ruling be reviewed and set aside; (b) be substituted with an order that the CCMA has jurisdiction to hear his dispute; (c) Eskom be ordered to comply with the Recognition Agreement read with the Code; (d) Eskom be ordered to compensate Mr Skhosana by paying him ten months’ of his salary as “*a penalty for victimising and harassing [him] in breach of section 5 of the [LRA] and section 23 of the Constitution of the Republic of South Africa*”; and (e) Eskom be ordered to pay Mr Skhosana “*the maximum compensation permissible for breach of contract*” among other things.

[15] Mr Skhosana’s notice of motion was accompanied by the ruling and his founding affidavit, to which he attached the following documents:

15.1. The arbitration set down notice dated 14 March 2022;

15.2. The request for arbitration signed by Mr Skhosana on 18 February 2022, in which he sought the following relief:

‘Eskom to comply with the Recognition Agreement entered into with trade unions in particular disciplinary procedure... and compensate 10 equal months’ salary as penalty.’

- 15.3. The certificate of outcome dated 18 February 2022, describing the dispute as a “*section 24(2) [24(5)] Collective Agreement – Interpretation or Application*”, and referring the dispute to arbitration;
- 15.4. The Eskom Recognition Agreement on which his claim to trade union leave is based;
- 15.5. Pages 1; 2 and 4 of the Eskom Disciplinary Procedure (including the cover page, contents page and one of the pages with definitions);
- 15.6. A notice, dated 6 September 2021, for Mr Skhosana to attend a disciplinary hearing on 15 September 2021;
- 15.7. An e-mail exchange on 25 October 2021 which preceded Mr Skhosana taking the unauthorised leave for which he was disciplined;
- 15.8. An e-mail exchange on 14 December 2021 in which Mr Skhosana again sought leave to represent a fellow employee at the CCMA, to which management responded that he use “*contingency leaves, since you don’t have the locus standi*”;⁴
- 15.9. An internal grievance lodged by Mr Skhosana, and dated 28 October 2021, in respect of the refusal to allow him to take trade union leave in October 2021; and
- 15.10. The authorised manager’s grievance report dated 30 December 2021, in which he found that Mr Skhosana’s claim to union leave was misguided, and that Mr Skhosana had not been denied any labour rights or discriminated against.

[16] Normally, after this filing, a record of the CCMA proceedings would be filed with, or followed by, a notice to stand by or to amend the applicant’s founding papers.

⁴ This exchange is not relevant to the dispute or to the review application and is not considered.

- [17] Instead, on 13 June 2022, Mr Skhosana filed an amendment to the notice of motion, amending the material relief sought, from a “*penalty*” of ten months of his salary, to 24 months of his salary.
- [18] Mr Skhosana then filed an amendment to his founding affidavit, in which he added references to the transcript of proceedings relating to the transcript of proceedings. Mr Skhosana attached the same annexures to his amended founding affidavit and added the transcript of the CCMA proceedings.
- [19] On 10 October 2022, Mr Skhosana filed a notice stating that he “*stands by his notice of motion*”.
- [20] The effective resolution of labour disputes would not be served by drawing out technical mistakes made by Mr Skhosana: It is apparent that he delivered a notice of motion and founding affidavit, obtained a transcript of proceedings, provided this to the Court and to Eskom, and then made minor amendments to his original notice of motion and supplemented his founding affidavit, as he is entitled to do. He has also provided other relevant documents to this Court. Again considering that he is also a lay person working without any assistance,⁵ I am therefore satisfied that Mr Skhosana has substantively complied with the requirements of rule 7A of the previous Rules for the Conduct of Proceedings in the Labour Court, which are applicable in this case, and that this review application may be determined.

The correct approach to the legal standing of a union member to refer a dispute in terms of section 24 of the LRA

- [21] The issue before this Court is the CCMA ruling that Mr Skhosana, as an individual, had no standing to raise a dispute about the Recognition Agreement.
- [22] The reason for the commissioner’s finding on standing is not clearly stated in the ruling, but it appears that the commissioner’s view is that a collective agreement can only be challenged by a collective (i.e. a trade union) because

⁵ *Ibid* GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

it inherently concerns collective matters. In this regard, I refer to the transcript which shows that the commissioner inquired only into what each party meant by the word “collective”:

22.1. Once Eskom’s representative responded that a collective refers to a group of some sort, the commissioner took no further interest in the inquiry and stated that he was done with Eskom’s arguments on standing.

22.2. Mr Skhosana had responded that a collective is “*everybody combined together*”, the commissioner responded, “*Okay, no that is precisely the point Mr Skhosana*”.

22.3. When Mr Skhosana sought to make further submissions on the substantive aspects of his dispute (being denied trade union leave to file papers in his EEA action), he correctly stated that the commissioner rushed him.

[23] The commissioner’s understanding of an individual’s legal standing is borne out of the following aspects of his ruling:

23.1. “*The Applicant was on his own and had no representation from a union.*”

23.2. Mr Skhosana “*himself described collective as workers combined together*”.

23.3. “*As an individual the Applicant had no standing to raise a dispute about collective matters.*”

[24] The way the commissioner conducting the inquiry into Mr Skhosana’s legal standing and his ruling leave much to be desired. The record indicates a failure to apply his mind, and failure to conduct the hearing in accordance with clause 5.3 of the Code of Conduct for Commissioners, 2014.⁶

⁶ Clause 5.3 requires commissioners to be “*patient and courteous to the parties and their representatives*” during hearings.

[25] That said, the question of standing is a material legal question, and “a reasonable arbitrator does not get a legal point wrong”.⁷ The question is therefore whether the commissioner’s finding on standing, however, it was reasoned, and despite how the hearing was conducted, is ultimately correct: Did Mr Skhosana have standing to refer a section 24 dispute or not?

[26] There is Labour Court authority which supports the view that only parties to a collective agreement may refer disputes on the interpretation or application of the collective agreement:

26.1. In *Arends and others v SA Local Government Bargaining Council and others (Arends LC)*⁸, Moshwana AJ (as he then was) held that “party to a dispute” in sections 24(2) and (5) of the LRA meant only the parties to the collective agreement; if the Legislature intended to allow individual employees to refer disputes about collective agreements, it would have not used the word “parties”, but rather “employee/s”. He concluded that employees bound by collective agreements are not parties but beneficiaries and therefore cannot make referrals under sections 24(2) and (5) of the LRA. Moshwana AJ continued to explain how individual employees could invoke collective agreements through individual rights disputes:

‘For non-parties, a collective agreement may serve as evidence of a particular contended right. In such instance, if interpretation arises, it becomes an issue in a dispute and not the dispute.’⁹

26.2. In *South African Police Services v Du Preez and Others In Re: Du Preez v South African Police Services, (Du Preez)*¹⁰ Moshwana J reaffirmed his position in *Arends LC*. Although *Arends LC* was taken on appeal and the Labour Court decision overturned, Moshwana J reasoned that:

⁷ *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and others* (2016) 37 ILJ 2593 (LAC) at para 30.

⁸ (2013) 34 ILJ 2560 (LC) at paras 14 – 17.

⁹ *Arends LC* at para 39.

¹⁰ [2019] ZALCPE 3 at para 11.

‘On appeal, the LAC did not upset the above finding. By necessary implication, the findings were approved by the LAC.’

26.3. This approach was followed in other cases, including recently in *Minister of Justice and Constitutional Development v DS Panza and Others*, which expressly relied on *Du Preez*.¹¹

[27] I respectfully disagree with the quoted statements in *Du Preez*. On appeal (*Arends LAC*),¹² the LAC stated the following on the finding on jurisdiction in *Arends LC*:

‘It is unnecessary for this Court to decide the jurisdictional issue. It has not been properly ventilated because of the inept manner in which the parties presented their cases to the arbitrator. As already discussed, where parties wish to proceed by way of a stated case, they are obliged to set out the facts upon which the proposed legal argument is to rest, to define the questions of law that the arbitrator is being asked to determine and to set out the parties’ contentions in relation to those questions. Had that been done, the question of jurisdiction in this case would probably have been addressed more fully with due consideration to the relevant statutory provisions and the applicable collective agreements and in particular clause 5 of the collective agreement which provides that disputes regarding the implementation of the agreement should be referred to arbitration.’

[28] The LAC effectively held that in *Arends LC*, the question of jurisdiction could not have been pronounced on, and in fact, ought not to have been pronounced on. Putting it better, Kroon AJ, in rejecting the reasoning in *Du Preez* held:

‘The proposition, without qualification, that if an Appellate Court sets aside a decision but does not deal with part of the *ratio* underpinning it, it thereby necessarily endorses the unaddressed reasoning, is without merit. Taken to its logical conclusion, it would mean that, every time an Appellate Court did not express a view on an argument embraced by the Court *a quo*, it should be taken to have agreed with such argument... it means no more than that it was

¹¹ [2024] ZALCJHB 158 at para 59.

¹² *Arends and Others v SA Local Government Bargaining Council and Others* (2015) 36 ILJ 1200 (LAC) at para 23.

unnecessary for the Appellate Court to consider it in order to come to its conclusion.’¹³

[29] Beyond my disagreement with the position in *Arends LC* and *Du Preez*, there is also authority to the contrary, which may suggest or which hold that individuals bound by collective agreements may refer disputes to the CCMA about the interpretation or application of these agreements: In *Skulpad*, Kroon AJ held that *Arends LC* and *Du Preez* were incorrect on the question of standing of individuals to refer section 24(2) and (5) disputes and that they may be entitled to do refer these disputes.¹⁴ In coming to this conclusion, Kroon AJ considered a number of factors, including textual, practical, and purposive or constitutional factors:

[30] I have also had regard to the following cases in which the courts dealing with cases brought by individual employees (and not trade unions), have found that the case, or an aspect of it, concerned the interpretation or application of a collective agreement, and held that such disputes fell first within the jurisdiction of the CCMA. Although these are no *rationes* on the question of the standing of individuals to refer disputes concerning the interpretation or application of collective agreements, it is significant that none of these courts contemplated that the fact that the complaints would be raised by individual employees, would be an obstacle to referral:

30.1. In *Ampofo & others v MEC for Education, Arts, Culture, Sports & Recreation, Northern Province & another*,¹⁵ a group of employees (i.e. individuals) challenged administrative action concerning their employment status. The applicants raised an aspect of a collective agreement in support of their review, but the High Court held that the CCMA was the allocated forum for interpreting a collective agreement. While it declined to consider the collective agreement for lack of jurisdiction, it did not expressly state that the applicants were excluded from referring a dispute about a collective agreement because they

¹³ *Skulpad and Another v Department of Health Eastern Cape and Others* [2024] ZALCPE 45 at para 14.

¹⁴ *Skulpad* (above) at para 68.

¹⁵ (2001) 22 ILJ 1975 (T) at para 47.

were a group of individuals. It stated only that “*such dispute falls to be determined [by the CCMA].*”

- 30.2. In *Hlophe and others v Minister of Safety and Security and others*,¹⁶ van Niekerk AJ (as he then was) stated the following in the course of considering (and ultimately discharging) an interim interdict granted in favour of a group of police detectives (not their union):

“In terms of section 24, disputes concerning the application and interpretation of collective agreements, if unresolved, must be referred to arbitration. On the face of it, the bargaining council is likely therefore to have the jurisdiction to arbitrate any dispute between the applicants and the respondents concerning the application of [the collective agreement].”

- 30.3. In *Department of the Premier, Western Cape v Plaatjies N.O & others, (Plaatjies)*¹⁷ Steenkamp J held that a bargaining council did not have jurisdiction to challenge the terms of a collective agreement on the basis that they were unfair. He held, however, that the bargaining council had jurisdiction to “*deal with*” the “*main dispute [of] the application [of a collective agreement]*”. This case concerned individual trade union members who referred a dispute. It was therefore effectively found that the bargaining council had jurisdiction to determine these members’ dispute on the application of a collective agreement. Also, at the hearing, the Department abandoned this preliminary point:

“Trade union members not represented by the union did not have *locus standi* to litigate an alleged breach of a collective agreement concluded on their behalf by the union without the assistance of the union in the proceedings.”¹⁸

- [31] Finally, I am persuaded by the text of the LRA which distinguishes in section 24 between a “*party to a collective agreement*” and a “*party to a dispute*” over

¹⁶ (2006) 27 ILJ 1003 (LC) at para 19.

¹⁷ (2013) 34 ILJ 2876 (LC) at para 46.

¹⁸ *Plaatjies* (above) at paras 13.2 and 14.

the interpretation or application of the collective agreement: An individual who disputes the interpretation or application of a collective agreement therefore is entitled to refer that dispute to the CCMA, because they are the party to the dispute.¹⁹

[32] I therefore find that the commissioner erred in finding that Mr Skhosana lacked standing to refer a dispute over the interpretation or application of a collective agreement because he was an individual: an individual is not automatically precluded from referring such a dispute. (Even if *Arends LC* and *Du Preez* were correct, they hold that only parties to a collective agreement may refer a dispute about the interpretation or application of a collective agreement. The commissioner did not give effect to this position in simply asking each party, “*What do you understand by collective?*” and ending his inquiry when they both responded that it is a group.

[33] The commissioner ought to have conducted the following inquiry in response to the preliminary point on standing raised by Eskom:

32.1 Did Mr Skhosana have sufficient connection to and had he suffered harm from Eskom’s action to support him bringing the case?

32.2 If he did, then the commissioner was required to proceed to interpret the Recognition Agreement.

[34] The Constitutional Court has held that “*in determining a litigant’s standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified*”.²⁰ Assuming then that Mr Skhosana’s interpretation of the Recognition Agreement has merit, it cannot be denied that he was adversely impacted by Eskom’s interpretation of it. This gives him standing.

[35] The commissioner should have then proceeded to determine the merits of Mr Skhosana’s cause of action. The Commissioner’s error of law led to his failure to conduct the proper inquiry, resulting in an outcome that is both incorrect and grossly unreasonable.

¹⁹ See also: *Skulpad* (above) at paras 26 – 27.

²⁰ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 32.

[36] I turn now to the appropriate course of action,²¹ given that Mr Skhosana had standing to refer his dispute on interpretation of the Recognition Agreement.

Determination of the dispute about the interpretation of the Recognition Agreement

[37] First, I do not consider it appropriate to remit this matter to the CCMA for a hearing on the merits because I am in as good a position to make the decision on Mr Skhosana and Eskom's conflicting interpretations of the Recognition Agreement based on the documents before me – namely, the Recognition Agreement and the parties' respective interpretations of it. There is a possibility that Mr Skhosana's dispute, if he was in fact disciplined, is truly an unfair labour practice dispute, but because there is insufficient material before me in both the pleadings and record, I cannot remit the matter to the CCMA for determination on this basis. I simply do not know how Mr Skhosana acted on from 25 to 26 October 2021, and if he was issued a sanction short of dismissal. The reason for this shortcoming lies not only with Mr Skhosana but with the commissioner for what can only be described as a rash and dismissive approach to the dispute.

[38] Second, it would not serve either party's interests to have the dispute drawn out in circumstances where the failure of Mr Skhosana's referral on the merits is a foregone conclusion.²²

The disputed interpretation of the Recognition Agreement and the Code

[39] Mr Skhosana believes he was entitled to trade union leave under the Recognition Agreement to file papers in the Labour Court in his EEA case.

[40] First, Mr Skhosana argues that he was entitled to leave on 26 October 2021 in terms of clause 8.2.1.1 of the Recognition Agreement: "*A manager may grant a maximum of two days special leave on full pay to a bona fide member of a trade union recognised by Eskom to attend general domestic trade union meetings or conferences*". Eskom's position is that this leave is for "[s]hop stewards that are recognized". Eskom submitted further (at the CCMA) that

²¹ Section 145(4) of the LRA.

²² See: *General Motors SA (Pty) Ltd v National Union of Metalworkers of SA and others* (2018) 39 ILJ 1316 (LC) at para 26.

this leave is “*where there is a conference of the union organised by the union and he is a member... and he is invited he is eligible to two days leave...*”

- [41] Eskom’s interpretation is correct: Mr Skhosana was not entitled to trade union leave in terms of the Recognition Agreement, as a member, to file papers in his own court case or even the court case of another employee.
- [42] Second, Mr Skhosana referred to clause 2.5 of the Code 2.5 which provides that “[a]n employee shall, during all disciplinary proceedings be entitled to be assisted, or advised by a representative”. He argued that this was to be read with clause 2.3.4 of the Code which defines a “Representative” as “a fellow employee, or an official of a recognised trade union appointed by the employee to assist him/her”.
- [43] This has no bearing on Mr Skhosana’s request for trade union leave to attend the Labour Court for his EEA case on 26 October 2021: The EEA case is not a disciplinary proceeding. As an aside, it also has no bearing on Mr Skhosana’s request in December 2021 to attend the Labour Court to assist a fellow employee, for the same reason. The provisions in the Code apply to disciplinary proceedings. These are internal and involve neither the CCMA nor the Labour Court.

Conclusion on interpretation

- [44] I do not believe that any of the provisions relied on by Mr Skhosana, or any others contained in the record support his claim that he was entitled to trade union leave. Mr Skhosana has therefore incorrectly interpreted the Recognition Agreement.
- [45] I have already stated that there is insufficient information to indicate whether Mr Skhosana has an unfair labour practice dispute. In any case, my decision still determines that dispute: Mr Skhosana has misinterpreted the Recognition Agreement, and as a result, Eskom has not committed an unfair labour practice in disciplining him (if it did so). Further, Mr Skhosana’s rights under the Constitution and the LRA have not been violated. He is not entitled to a *mandamus* or to compensation.

[46] Therefore, despite finding that the commissioner committed a gross irregularity (not simply in his material error of law) and that Mr Skhosana had standing to refer his dispute, I cannot ultimately find in Mr Skhosana's favour.

[47] In the result the following order is made:

Order

1. The application is dismissed.

B. Ramji

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Self-represented

For the Respondent: No appearance

LABOUR COURT