



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: JR2027/2022

Not Reportable

In the matter between:

MOTOR INDUSTRY
BARGAINING COUNCIL

Applicant

and

SPARTAN SERVICE STATION (PTY) LTD
t/a SPARTAN SERVICE STATION

First Respondent

DISPUTE RESOLUTION CENTRE:
A DIVISION OF THE MOTOR INDUSTRY

Second Respondent

HAMBRIDGE E. N.O.

Third Respondent

Heard: 14 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 17 February 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] In addition to having applied for condonation for the late delivery of its application, the applicant applied for orders reviewing and setting aside two Rulings issued by the third respondent under consolidated case numbers MINT67377 and MINT55814 under the auspices of the second respondent ('the DRC').¹ The application was opposed by the first respondent.

Background

[2] The applicant referred two separate disputes to the DRC which were allocated case numbers MINT67377 and MINT55814. The first respondent having been registered with the applicant since March 2010, both disputes concerned its liability to it, in relation to certain invoices which had been rendered to it by the applicant in respect of provident fund contributions, council levies and union fees.

[3] Given that the issues involved in each dispute were common to both, they were consolidated ('the consolidated disputes') and enrolled for arbitration before the third respondent. It is evident from both the Ruling of 4 September 2021 as well as the transcription of the proceedings of that day that the disputes were categorised as enforcement disputes in terms of s33A of the LRA, it having been the applicant's case that the first respondent had failed to comply with the MIBCO Main Collective Agreement ('the Collective Agreement'). It is also apparent that one of the fundamental issues in dispute between the parties concerned the interpretation of Clause 4.1.B(8) of the Collective Agreement. The interpretation of this clause would determine whether the first respondent had been required to make provident fund contributions on the basis of employees in its business having been regarded as having worked for 45 hours irrespective whether they had worked hours less than

¹ In consideration of the record it is evident that the second Ruling was issued under case MCNT66-22/HV

this, and whether the calculation was to be performed on the basis of gross earnings or earnings after deductions.

[4] The transcription of the discussions between the parties at the outset of the arbitration on 20 August 2021 recorded the third respondent's understanding of that which she was required to determine,

'I think the issue that I have to arbitrate is whether the methodology adopted by MIBCO in calculating outstanding amounts whether the methodology is correct with reference to the Main Agreement.

...

And then the second point that MIBCO raised about should you base it on gross earnings before deductions or whether on actual hours worked I think that ties in.

...

Then the third issue is about how money is allocated when it comes in.'

[5] Pursuant to the parties having discussed various other issues, the first respondent's representative raised the issue of the DRC's jurisdiction, having questioned whether, in light of the fact that the issue fell to be determined on the basis of the interpretation of a collective agreement, the third respondent had jurisdiction. The third respondent canvassed the issue of her jurisdiction and indicated that the fact that the dispute entailed the interpretation of a collective agreement did not oust her jurisdiction to determine a dispute under s33A,

'But this case has not been referred as a section 24 it has been referred 33(A) and I am saying that part of my duty is to see whether your client is compliant or not compliant will entail a inquiry on what does the provision of the main agreement say. I do not think every case must start off as a 24 and then become a 33(A). I think a 33(A) is wide enough.

...

No, no, but maybe I am wrong. No, no, maybe you know why I am saying that Judge Zondo when he was still the Honourable Judge President of the Labour Appeal Court made a judgment once where he said there is the real issue in

dispute but there are issues that are peripheral that you must decide in order to decide the real issue and I think that is wise otherwise we going to have like a piece meal approach.

...

You going to send this now first to another Commissioner to interpret the collective agreement as a straight up and down section 24 then counsel must come in again as a 33(A). I do not see it like that I say that whilst I must decide whether the collective agreement has been breached, I need to be able to interpret the clause.'

[6] For reasons which are unnecessary to canvas, it was agreed that the arbitration would not proceed that day and was then adjourned to a date to be determined in due course.

[7] Some two weeks later on 4 September 2021 the third respondent handed down the Ruling which informs the first of the applicant's substantive claims in the present proceedings. Notwithstanding that which she had expressed in the course of the arbitration concerning her own power under s33(A) to interpret a clause of the Collective Agreement, as set out above, she found otherwise and Ruled accordingly. The third respondent reasoned,

'Although I had indicated at the proceedings of 20 August 2021 that part of my duties as an enforcement panellist, it will be required to interpret Clause 4.1.B(8) of the Main Agreement of MIBCO, having reflected, such approach may be seriously flawed. When dealing with a dispute as envisaged in terms of section 33A my powers are limited in determining whether a breach of the Collective Agreement has occurred and to remedy such by ordering compliance. In my opinion, I will be exceeding my own powers to interpret or apply a Collective Agreement, as such falls within the realm of a section 24-dispute (interpretation or application of a Collective Agreement).'

[8] She remarked in her Ruling that it would be advisable for the applicant to initiate such referral in view of the fact that it was *dominus litis* in the consolidated disputes. In consequence of the conclusions she had reached, the third respondent

issued a Ruling in terms of which the consolidated disputes were postponed until an award had been rendered concerning the interpretation or application of Clause 4.1.B (8) of the Collective Agreement.

[9] The applicant, notwithstanding its own reservations concerning the correctness of her Ruling, nonetheless referred a dispute to the second respondent on 11 January 2022 in terms of s24 of the LRA which was allocated case number MCNT66-22/HV. The nature of such dispute was discernible from transcript of the arbitration proceedings convened on 4 April 2022, as well as the eventual Ruling issued by the third respondent. Relying on the judgments of this court in Arends and others v SALGBC and others [2013] 5 BLLR 456 (LC) and South African Police Services v Du Preez and Others In Re: Du Preez v South African Police Services [2019] ZALCPE 3 the third respondent concluded that only a party to a collective agreement had the requisite *locus standi* to refer a dispute under s24 in relation to the interpretation thereof. As the applicant itself was not a party to the Collective Agreement, she concluded that it lacked the requisite *locus standi* to refer a dispute in relation to its interpretation. On 17 April 2022 the third respondent Ruled,

- ‘1. For the reasons set out above, MIBCO has no *locus standi* to make a referral in terms of section 24 of the LRA, as amended.
2. Accordingly, the DRC has no jurisdiction in the matter under case number MCNT 66-22.
3. It is, however, the statutory right of any of the parties to MIBCO (NUMSA, MISA, RMI or FRA) to make a referral in terms of section 24 (Interpretation or Application of a Collective Agreement) and to join the other parties to Council.’

[10] As was explained by the applicant in its founding affidavit, it understood that this Ruling under MCNT66-22/HV in effect corrected the third respondent’s first Ruling in respect of the consolidated disputes and duly requested that they be re-enrolled which was done on 18 July 2022. Pursuant to having heard argument on the issue of the second respondent’s jurisdiction, the commissioner who had been appointed to arbitrate the consolidated disputes found that the Ruling which had been issued by the third respondent on 4 September 2021 remained extant and

served to oust the second respondent's jurisdiction to determine the consolidated disputes until and unless an award as envisaged in terms of the first Ruling had been issued. He Ruled accordingly on 1 August 2022.

[11] The Ruling of 1 August 2022 prompted the applicant to initiate the present application on 19 September 2022.

Analysis

[12] Before the merits of the application may be considered, it is necessary to determine the issue of condonation. The applicant acknowledged that its application had been delivered outside the timeframes permitted in terms of s145 of the LRA and accordingly applied for condonation. In so doing, the applicant relied upon the date on which the third of the Rulings had been issued, 1 August 2022, as having been the date from which the time period in question had commenced to run. The first respondent disputed the correctness of the applicant's assumptions and asserted that the time periods in question commenced to run from the date on which each of the Rulings sought to be impugned had been delivered; ie 4 September 2021 and 17 April 2022.

[13] S145(1)(a) requires review applications to be initiated within six weeks of the date on which the award has been served. Rulings of the type under consideration in the present matter have been held by this court to be included under the term 'award' in this section. This being the case, the time period for the review of each of the Rulings commenced with effect from the date on which each had been served on the applicant.

[14] Notwithstanding that the applicant alleged that the period of delay was only three days, whereas in reality each period was considerably longer, the applicant nonetheless explained the entire period in its founding affidavit. Having received the first Ruling, it adhered to it and referred a dispute under s24 to the second respondent. When it was confronted with the Ruling of 17 April 2022, which effectively barred its way to the further prosecution of a s24 interpretation dispute by

it, it presumed that the third respondent's first Ruling was automatically affected thereby. The decision expressed in the Ruling of 1 August 2022 dispelled that notion.

[15] As will be dealt with hereunder, the applicant enjoys excellent prospects of success.

[16] Finally, insofar as prejudice is concerned, it is clear from the nature of the dispute which is sought to be resolved in terms of s33A that it is not the applicant alone which stands to be prejudiced if condonation is refused, but also the trade unions who are parties to the applicant to whom membership fees are alleged to be due; the employees in respect of whom provident fund contributions are alleged to have been short paid; and the first respondent itself which asserted that numerous payments have been made by it, which remain in unallocated accounts. Conversely, the first respondent stands to suffer no prejudice at all in the event that condonation is granted.

[17] The provisions of s158(1B) of the LRA also have bearing on the question of condonation,

'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.'

[18] The issue in dispute, being the disputes referred under s33A, has not been finally determined. The two Rulings, when read together, ensure that the s33A disputes cannot be resolved. Until and unless one or both of the Rulings are reviewed, set aside and corrected, the applicant will remain at an impasse.

[19] Although the period of delay is long, the explanation therefor was reasonable, the applicant's prospects of success are certain, and the question of prejudice

favours the applicant. In the circumstances this court is of the belief that the interests of justice requires that condonation for the late initiation of the review application be granted.

[20] Insofar as the first Ruling issued on 4 September 2021 is concerned, the applicant challenged the correctness of the conclusion arrived at by the third respondent, having alleged that she committed an error of law when she Ruled that she was precluded from interpreting a collective agreement in the course of the determination of a dispute concerning its enforcement in terms of s33A. The first respondent denied that the Ruling was reviewable, having alleged that it was not one which no reasonable decision maker could have arrived at. Mr Froneman for the first respondent suggested in argument that the Ruling itself did not evince a conclusion by the third respondent that she lacked authority to interpret the Collective Agreement, but rather that it would be advisable that the issue of the interpretation thereof be dealt with by means of a s24 referral.

[21] The first Ruling was unequivocal: the third respondent concluded that any attempt on her part to interpret the Collective Agreement would result in her exceeding her powers as such a determination was required to be dealt with by way of a dispute referred in terms of s24. Such conclusion was neither reasonable nor correct.

[22] S33A(7) expressly affords a commissioner in the position of the third respondent the power which she found that she lacked,

‘An arbitrator acting in terms of this section may determine any dispute concerning the interpretation or application of a collective agreement.’

[23] This subsection is dispositive of the question. However, even without the benefit of s33A(7), she would nonetheless have been empowered to do so. Although the judgment was overturned on appeal in Johannesburg City Parks v Mphahlani NO and Others (2011) 32 ILJ 1847 (SCA) on the basis of the interpretation of s62(3A) of the LRA,² the principles stated by the Labour Appeal Court in Johannesburg City

² S62(3A) provides,

Parks v Mphahlaneni NO and Others (2010) 31 ILJ 1804 (LAC) were not disturbed thereby,

'There are a number of areas in the LRA with references to dispute or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolutions. Some of the sections of the LRA which contain such references are 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be answered in order to resolve the main dispute. Let me make an example to illustrate the distinction I seek to draw between a dispute and an issue in a dispute. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement are applicable and/or complied with before the employer was dismissed is an issue necessary to be decided in order to resolve the real dispute.

'In any proceedings before an arbitrator, about the interpretation or application of a collective agreement, if a question contemplated in subsection (1)(a) or (b) is raised, the arbitrator must adjourn the proceedings and refer the question to the Commission if the arbitrator is satisfied that-

- (a) the question raised-
 - (i) has not previously been determined by arbitration in terms of this section; and
 - (ii) is not the subject of an agreement in terms of subsection (2); and
- (b) the determination of the question raised is necessary for the purposes of the proceedings.'

*In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of, resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, where the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute is required to be resolved through arbitration in terms of the LRA.*³

[24] In the circumstances, the first Ruling falls to be reviewed and set aside.

[25] It is not, strictly speaking, necessary to consider the correctness or otherwise of the second Ruling for the reason that it is the first Ruling which operates as the bar to the further arbitration of the consolidated disputes. Once set aside, the applicant will be at liberty to request the consolidated disputes to be arbitrated.

[26] However, for the reasons that in issuing her Ruling the third respondent relied on certain decisions of this court (as she was obliged to do), which decisions impact litigants who wish to utilise the mechanisms created by s24, the legal principles upon which the second Ruling was based will be addressed. The authorities upon which the third respondent relied were Arends and Du Preez.

[27] In Arends this court found that only a party to a collective agreement had the necessary standing to refer a dispute in terms of s24 to a bargaining council or the CCMA. This conclusion was arrived at as a consequence of the court's interpretation of s24 that, *'the section limits the dispute to be between the parties.'* Having discerned from this that a 'party' could only be one of the parties who had entered into the collective agreement, this court concluded that as an individual party cannot

³ At paragraphs 14 and 15

be a party to a collective agreement individual employees could not refer disputes in terms of s24.⁴

[28] The judgment was taken on appeal, the outcome of which is reported as Arends and Others v South African Local Government Bargaining Council and Others (2015) 36 ILJ 1200 (LAC). The appeal did not turn on any findings of the court *a quo* concerning the standing of litigants, but rather on the manner in which the parties had conducted the arbitration (without oral evidence) and the process in terms of which the arbitrator had arrived at his conclusion that the SALGBC lacked jurisdiction. In the result, the Labour Appeal Court upheld the appeal, set aside the order of this court and substituted it with an order reviewing and setting aside the arbitrator's award.

[29] Fortified by the Labour Appeal Court not having disturbed certain of its conclusions, this court in Du Preez restated that an individual employee had no *locus standi* to refer a dispute in terms of s24,

'... Therefore, in my view, the dispute is not about interpretation of a collective agreement. In the matter of Arends v SALGBC and others, I had occasion to say the following:

"It must follow axiomatically that an individual employee cannot be a party to a collective agreement. A party can either be a registered trade union or an employer or employer's organisation ... The issue of who a party is, is distinct from the binding nature of the agreement. Alive to the concept of stipulation alteri, the legislature introduced s23(1)(c)-(d). Employees can derive benefits from collective agreements even if not parties. To my mind employees only derive benefits from collective agreements and are not parties to the agreement ...

... I conclude by saying that a non-party cannot refer a dispute in terms of s24 of the Act. Since employees are generally non-parties but beneficiaries, they cannot in my view refer a dispute in terms of section 24."

The matter of Arends was taken on appeal. On appeal, the LAC did not upset the above finding. By necessary implication, the findings were approved by the LAC. It must therefore follow that Du Preez has no locus standi to refer a

⁴ At paragraphs 15 - 17

dispute to the Bargaining Council. Also, the third respondent had no jurisdiction to entertain the dispute. An award issued without the necessary jurisdiction is a nullity. On this basis alone, the award is susceptible to review.'

[30] S24 provides for the mechanisms by which disputes concerning collective agreements are to be determined. S24(2) provides,

'If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

- (a) the collective agreement does not provide for a procedure as required by subsection (1);*
- (b) the procedure provided for in the collective agreement is not operative;*
- (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.'*

[31] Absent from this subsection is the limitation understood by this court in Arends to have been present: it is plain that a party to a dispute concerning the interpretation or application of a collective agreement may refer a dispute in terms thereof; the subsection does not limit the scope of its operation only to those who are parties to the collective agreement itself.

[32] It also cannot be said that the Labour Appeal Court, by omission, endorsed such a proposition. The judgment of the Labour Appeal Court articulated the issue which had been before it as follows,

'This is an appeal against a decision of the Labour Court (Moshwana AJ) in which it dismissed an application by the appellants to review and set aside a decision of the second respondent ("the arbitrator") in which he declined on jurisdictional grounds to arbitrate a dispute referred to the first respondent, the South African Local Government Bargaining Council ("the SALGBC").'⁵

[33] In upholding the appeal, the Labour Appeal Court concluded,

⁵ At paragraph 1

‘The absence of any evidence; the absence of a stated case; and, the manner of its presentation make it impossible for this Court on appeal to determine whether the dispute is indeed one about the implementation of a collective agreement and, if so, how it should be resolved. This Court cannot resolve the question of jurisdiction or the merits of whether the new grading systems had been correctly implemented in terms of the applicable contracts and neither could the arbitrator.’⁶

[34] Had the Labour Appeal Court endorsed the finding of the Labour Court concerning the issue of standing, it follows that the appeal would not have succeeded, despite the absence of evidence or a stated case. If the existence of *locus standi* is, as was suggested by this court in Arends, a prerequisite for the existence of jurisdiction, then by parity of reasoning concurrence by the Labour Appeal Court that the appellants lacked *locus standi* to have acted in terms of s24 would have been dispositive of the appeal, and ought to have resulted in the arbitrator’s award that the SALGBC lacked jurisdiction being upheld by it.

[35] In the circumstances, this court is unable to agree with the conclusions previously arrived at by this court in Arends and Du Preez that only parties to collective agreements have the requisite *locus standi* to refer disputes in terms of s24 of the LRA. S24(2) expressly provides that any party to a dispute concerning the interpretation or application of a collective agreement may do so.

[36] Accordingly, in the present matter, the applicant had *locus standi* to refer a dispute concerning the interpretation or application of the Collective Agreement to the second respondent and the second Ruling falls to be reviewed and set aside.

Costs

[37] At the hearing of the matter Mr Sotsaka for the applicant submitted that it had been in the interests of both parties to obtain clarity on the matter and that, in such circumstances, each party should bear its own costs.

⁶ At paragraph 24

Order

1. Condonation for the late delivery of the applicant's review application is granted.
2. The Ruling issued by the third respondent under consolidated case numbers MINT 67377 and MINT 55814 dated 4 September 2021 is reviewed and set aside.
3. The Ruling issued by the third respondent under case number MCNT66-22/HV dated 17 April 2022 is reviewed and set aside.
4. Each party is ordered to pay its own costs.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr N Sotaka, Motor Industry Bargaining Council

Respondent:

Mr L Froneman, instructed by Yolandi Boshoff Attorneys