

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J4114/02

2003-03-07

In the matter between

MIBCO

Applicant

and

M.J. OSBORNE & OTHERS

Respondents

J U D G M E N T

LANDMAN, J: The Motor Industry Bargaining Council MIBCO seeks to have several awards, delivered on or after 1 August 2002, made orders of the Labour Court in terms of Section 158(1)(c) of the Labour Relations Act 66 of 1995. MIBCO also seeks interest and costs on an attorney and client basis. The awards were handed down by arbitrators of the Dispute Resolution Centre, the DRC.

Du Toit et al, **Labour Relations Law** (3rd ed) observe at page 217: "While a party who does not comply with an agreement can be said to be in dispute with the bargaining council (or vice versa) Section 51 of the LRA (which sets out the dispute resolution functions of bargaining council) in its definition of a dispute, excludes the possibility of a bargaining council being a party to a dispute, in respect of which that council might exercise its dispute resolution functions. It has been argued that the rationale for this is to be found in the principle that: "No person may be a judge in his/her own matter.

As the LRA is silent on the question of how such a dispute ought to be resolved, the question arises whether the legislature ever could have contemplated having a bargaining council as a party to a dispute. Recent arbitration awards have held that bargaining councils or dispute resolution structures, which form part of the bargaining council, have jurisdiction to arbitrate disputes over the enforcement of that council's agreement, provided the council's constitution either required or permitted it to do so."

The Labour Appeal Court has ruled in *Kemlin Fashions CC v Brunton and Others* (2001) 22 ILJ 109 (LAC) as follows:

"26. We have to decide this case on the basis that there is a valid extension of the collective agreement to, amongst others, the appellant. In such a case it is no longer open to such an entity to say that this collective agreement does not apply to me or does not bind me. This has got to be so because the whole purpose of the Minister's decision to extend the collective agreement and declare it binding on such a party in terms of Section 32(2), is to render the collective agreement applicable to and binding on such an entity. Of course such an entity may be able to take the point that a particular clause in the collective agreement does not apply to it, but that is different from taking the point that the collective agreement itself does not apply to bind such a party".

and

28. In the light of the above in order to determine what procedure the second respondent was required to follow if it sought to enforce the collective agreement against the non-party, to whom it has been extended, one must ask what procedure the second respondent would have been required to follow if it sought to enforce the collective agreement against the party, which was a signatory to the collective agreement (Section 32(4)(g)).

29. The above means that except where the collective agreement or the Act may be providing otherwise, a party which did not sign the collective agreement, but to whom the collective agreement has been extended is to be treated on the same basis as the party which signed the collective agreement. In the absence of any provisions, either in the Act or in the collective agreement, sanctioning differential treatment for non parties must be treated in the same way as would parties to the collective agreement, in any given situation, once the collective agreement has been extended to them."

The result is that one must look to the collective bargaining agreement of the motor industry, MIBCO: Main Collective Agreement (R697 in Government Gazette 23421 of 31 May 2002), which has been extended in terms of Section 31 of the LRA for the appropriate dispute resolution procedure.

Clause 29 is relevant. So is clause 24 of MIBCO: Administrative Collection(R557 in Government Gazette 22392 of 22 June 2001)

There is a minor difference between clauses 24 and 29, but it is of no significance. Clause 24 reads as follows:

poses of this Agreement, "dispute" means any dispute about the

application, interpretation or enforcement of this Agreement or any other collective agreements entered into by the parties to the council.

24(2) Any such dispute shall be referred to the council in the form specified by the council. This provision shall not apply when the council makes use of the procedure set out in sub-clause (4).

24(3) If the council fails to resolve the dispute through conciliation and the dispute remains unresolved, such dispute shall be referred for arbitration to the MIBCO Dispute Resolution Centre, in terms of section 52 of the Act. The arbitrator shall have the power to decide upon the procedure to be followed at the arbitration hearing in terms of section 138 of the Act, and be entitled to make an award in respect of the parties' arbitration costs in terms of section 138 (10) of the Act.

24(4) The provisions of this clause stand in addition to any other legal remedy through which the council may enforce a collective agreement.

24(5) The arbitrator's decision shall be final and binding, subject to the parties' right of review to the Labour Court.

24.6 Any other dispute shall have the same meaning as defined in the Act, and shall be dealt with in terms of

section 51 of the Act."

This clause refers to section 52 of the LRA. Section 52 (1) reads as follows:

- "(1) A certificate of registration is sufficient proof that:
with a view to performing its dispute resolution
functions in terms of Section 51(3), every council
must:
- (a) apply to the Government body of the Commission for
accreditation to perform those functions; or
 - (b) or appointed an accredited agency to perform those of
the functions referred to Section 51(3) for which the
council is not accredited."

Section 52(1)(b) in turn refers to Section 51(3) of the LRA. This section, as is plainly evident from the definition of "dispute" in Section 51(1), would not cover a dispute involving the bargaining council. MIBCO cannot, by means of clause 24, amend the LRA. But collective agreements can incorporate, by reference, the wording of statutory instruments. This is what I assume has been done by clauses 24 and 29 respectively.

The result of this analysis confirms that an arbitration, in terms of the collective agreement, is regulated by the Arbitration Act 42 of 1965. A final and binding award made by an arbitrator of the DRC,

acting in terms of a collective agreement referred to above, may be made an order of this court in terms of section 31 of the Arbitration Act. The order is enforceable in the ordinary way. The amendments affected to the LRA by the Labour Relations Amendment Act 12 of 2002, have no bearing on the Arbitration Act.

The applications serving before me seek to have the DRC awards made orders of this court in terms of section 158(1) of the LRA. *Prima facie* the word "award" in that subsection would include awards made in terms of the LRA and the Arbitration Act. However, the Arbitration Act is applicable to the awards of the DRC. This Court has been given, in terms of section 157(3) of the LRA, jurisdiction in respect of the arbitration of labour disputes regulated by that Act.

I am of the view that section 158(1)(c) is inapplicable to awards made pursuant to the Arbitration Act. I am strengthened in my view by the fact that awards of this kind, although *prima facie* falling within the wording of section 145 of the LRA, are not reviewable in terms of that section. But only in terms of the Arbitration Act. In the result I am of the view that the applications before me should have been brought in terms Section 31 of the Arbitration Act.

Have the amendments to Section 51 of the LRA, which introduce subsections 8 and 9 affected the views expressed above? This is the question that I posed to Mr Locke, who appeared on behalf of MIBCO.

Subsections 8 and 9, read as follows:

"51 Subject to this Act, a council may not provide, in a collective agreement for the referral of disputes to the Commission, without prior consultation and with the director,.....

- (8) Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council.
- (9) A bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in this section."

Section 143 has been amended by the substitution of subsection 1 and the addition of subsections (3) and(4). These read as follows:

- "(1) An arbitration award issued by a Commissioner is final and binding, and it may be enforced as if it were an Order of the Labour Court, unless it is an advisory arbitration award.
- (3) An arbitration award may only be enforced in terms of

subsection, if the director has certified that the arbitration award, is an award contemplated in subsection (1).

- (4) If a party fails to comply with an arbitration award that orders the performance of an act other than payment of an amount of money, any other party to the award, may enforce it by way of *contempt* proceedings instituted in the Labour Court."

The effect of Section 51(8) read with the Sub-Sections to which it refers is that the procedure in Section 143 would be available to enforce an award of a bargaining council, without the need to make the award an order of the Labour Court. Upon certification by the director of the CCMA, an award is deemed to be an Order of the Labour Court, for purposes of enforcing it. This is intended to be a more expeditious and less expensive means for a successful party to enforce an award. It may be that an application could still lie in terms of Section 158(1)(c), but that is a matter which I need not decide.

However, Section 51(9) permits a bargaining council to exclude the operation of the LRA in the circumstances contemplated in that Sub-Section, by establishing its own procedures by means of a collective agreement, which obviously can be extended to non parties. A collective

agreement, such as those to which I have referred in this judgment, circumvent the operation of the LRA.

The result is that MIBCO would be entitled to have the awards made Orders of this Court, in terms of Section 31, subject of course to the exercise of a judicial discretion. As I have previously noted these applications come before me in terms of Section 158(1)(c). This raises the question whether these applications should be dismissed so that they can be brought in terms of the correct Act. In my view the long standing, but erroneous reliance in this court on Section 158(1)(c), persuades me to grant MIBCO leave to file an amended notice of motion in each one of these applicants, which should be served on the respondents.

When the amended notices of motion are drafted, attention should be taken of the fact that the arbitrators have not awarded interest to be paid on the amounts which they have found to be due.

I am indebted to Mr Locke for his helpful heads of argument which addressed the concerns that I have raised earlier about the effects of the 2002 amendments to the LRA to the awards of the DRC.

In the result the applications under case numbers

J4114/02, J3932/02, J4277/02, J41465/02, J41464/02, J4116/02
and J4117/02 are postponed *sine die*.

**SIGNED AND DATED AT BRAAMFONTEIN ON APRIL
2003**

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

18 FEBRUARY 2003

OF JUDGMENT: 7 MARCH 2003

THE APPLICANT: MR J B LOCK

DE WET DU PLESSIES ATTORNEYS