

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

**Case No: DA
1015/99**

In the matter between:

KEM-LIN FASHIONS CC

Appellant

and

C BRUNTON

1ST Respondent

BARGAINING COUNCIL FOR

THE CLOTHING INDUSTRY

2ND Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] There are two questions for determination in this appeal.

The first one is what the procedure is that a bargaining council is required to follow when it seeks to enforce a collective agreement against an **“employer”** to whom such a collective agreement has been extended by the Minister of Labour in terms of s 32(2) of the Labour Relations Act, No 66 of 1995 (**“the Act”**) where such collective agreement contains a procedure for its own enforcement. The second is whether the second respondent required accreditation in terms of the Act before it could have a dispute such as this one arbitrated under its auspices.

The relevant facts

[2] The appellant is a close corporation which is involved in the clothing industry in Kwazulu- Natal. The first respondent is the arbitrator who gave the ruling which is the subject of this appeal. The second respondent is the Bargaining Council for the Clothing Industry (Natal). The employer party to the second respondent is the Natal Clothing Manufacturers' Association which is an employer's organisation. The appellant is not one of the employers who are members of this

employers' organisation. The employee party to the second respondent is the Southern African Clothing and Textile Workers Union, a registered trade union which operates in the textile industry.

[3] On the 27th November 1998 two collective agreements which had been concluded between the parties to the second respondent were published in the Government Gazette of that date. The one was published in Government Gazette No R1516. The other one was published in Government Gazette No R1517. The first one was the main collective agreement of the second respondent. The second was the second respondent's Provident Fund. (**"the Provident Fund collective agreement"**). On the same day the Minister of Labour extended the two collective agreements to employers and employees falling within the second respondent's registered scope who had not been party to the collective agreements. The Minister did this in terms of s 32(2) of the Act. As the appellant fell within the second respondent's registered scope, this meant that the two collective agreements were also extended to it.

[4] Obviously, the two collective agreements placed certain obligations on all those who were bound by them. One of the obligations which the main collective agreement placed on employers to whom it applied was the obligation to register with the second respondent. Another obligation was to pay employees who fell within certain categories at no less than certain rates of pay.

[5] The two collective agreements contain identical dispute resolution and compliance or enforcement procedures. As the compliance or enforcement procedure provided for in the two collective agreements is identical, I will not refer to procedures in both agreements but will refer only to the procedure in the main collective agreement. The compliance or enforcement procedure is the procedure which is required to be followed when the second respondent seeks to enforce the collective agreements. In terms of the collective agreements the power to administer these collective agreements vests in the second respondent.

[6] In the main collective agreement the enforcement procedure is provided for in clause 38(3). Clause 38(3) provides as follows:-

“(3) Compliance Procedure - enforcement

(a) The Council shall take all reasonable steps necessary to ensure compliance with this agreement. If, whether through its

own investigations or through any other source, it appears that the provisions of this agreement may have been breached, then the following procedures shall apply to enforce compliance.

(i) The Secretary shall appoint a designated agent to investigate the alleged breach;

(ii) if, upon completion of the investigation, the designated agent has reason to believe that an agreement has been breached, the agent may endeavour to secure compliance with the agreement through conciliation;

(iii) at the end of the conciliation process, the designated agent shall submit a report to the secretary as to the result of the investigation, the steps taken to secure compliance through conciliation and the outcome thereof;

(vi) upon receipt of the report, the Secretary of the Council in question may-

(aa) require the designated agent to undertake further investigations; or

(bb) refer the matter to arbitration and require the arbitrator to hear and determine the alleged breach of the agreement, in which case the terms of subclause (2)

above will apply to the arbitration, read with the necessary changes required by the context; or (cc) take such other steps as he deem (sic) reasonable.”

[7] Clause 38(2) sets out the procedure to be followed when a dispute has been referred to the second respondent for arbitration. The provisions contemplate the keeping of a panel of arbitrators who conduct arbitrations in disputes which are referred to the second respondent for arbitration. The provisions are to the effect that, when conciliation has failed and the secretary of the second respondent receives a request for a dispute to be referred to arbitration, he, or, another designated official of the second respondent, must appoint an arbitrator from the panel of arbitrators who will arbitrate the dispute. However, the appointment is on a rotational basis. Although clause 38(2)(c) allows an employee of the second respondent to be appointed to the panel of arbitrators, it says an arbitrator who is an employee of the second respondent will not be eligible for appointment to arbitrate a dispute in which the second respondent has an interest.

[8] The second respondent's officials have undertaken certain investigations in relation to the appellant. As a result of those

investigations, the second respondent believes that the appellant could be in breach of the two collective agreements. In particular it is alleged that the appellant has failed to register as an employer with the second respondent. It is also alleged that the appellant has also failed to register its employees with the second respondent. The appellant's answer to this is that it is not an employer. For that reason it maintains that the collective agreements do not apply to it. It says the persons whom it is thought it employs are **“a network of independent contractors”**. The second respondent disputes the allegation that those persons are not employees of the second respondent.

[9] In due course the second respondent invoked the compliance/enforcement procedure in clause 38(3) in order to enforce the collective agreement on the appellant. It referred the matter to conciliation as contemplated by clause 38(a)(ii). The appellant failed to attend the conciliation meeting despite notice. Then, in accordance with the provisions of clause 38(a)(iv)(bb) of the main collective agreement, the Secretary of the second respondent referred the matter to arbitration. The first respondent was allocated the matter.

[10] At the arbitration presided over by the first respondent, the appellant raised a point *in limine* to the effect that the first respondent had no jurisdiction to entertain the matter. The

first respondent ruled against the appellant on the issue of jurisdiction and held that he had jurisdiction to deal with the matter. The appellant then brought an application in the court a quo to review and set aside that decision. The matter came before Basson J in the court a quo. Basson J dismissed that application with costs. With the leave of the court a quo the matter now comes before us on appeal. I now turn to deal with the first question that this appeal raises.

The appeal

[11] As already indicated above, the first question to be determined in this appeal is what the procedure is which must be followed by a bargaining council which seeks to enforce its collective agreement against an employer to whom such an agreement has been extended by the Minister of Labour in terms of s 32(2) of the Act. When such collective agreement contains a procedure for its enforcement, is it that procedure which must be followed or is there another procedure that must be followed?

[12] In terms of s 23 of the Act a collective agreement is “a

written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other,

(a) one or more employers;

(b) one or more employers and one or more registered employer's organisations;

Section 23 of the Act sets out provisions dealing with the legal effects of a collective agreement. It sets out on whom a collective agreement is binding. For present purposes it is not necessary to say anymore than simply that a collective agreement is binding on those who are parties to it as well as their respective members.

[13] Section 24 deals with disputes about collective agreements. Section 24(1) provides as follows:

“(1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.”

Section 24(2) says a dispute about the interpretation or application of a collective agreement may be referred to the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) in certain specified circumstances which do not obtain in this matter.

[14] Section 27 makes provision for the establishment of bargaining councils. Section 28 makes provision for the powers and functions of bargaining councils. In terms of s 28(1)(a), (b) and (c) a bargaining council has power to “**conclude collective agreements**”, to “**enforce those collective agreements**” and to prevent and resolve disputes respectively.

[15] Section 32 makes provision for the extension by the Minister of Labour of a collective agreement concluded in a bargaining council to employers and employees who are not parties to that collective agreement. Such employers and employees are referred to in the Act as non-parties to distinguish them from, on the one hand, the employers or employer’s organisations, and, on the other, trade unions and employees who are parties to the collective agreement.

Section 32(1) and (2) read thus:-

**“Extension of collective agreements 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 unions 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.

(2) Within 60 days of receiving the request, the Minister must extend the collective agreement as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice."

[16] In my judgement the answer to the question under consideration at this stage of this judgment depends on what the meaning, effect, implications and consequences are of an extension of a collective agreement as contemplated under of

s 32(2) of the Act.

[17] The purpose of the Act is stated in s1 to be the advancement of economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act. One of the primary objects of the Act is to provide a framework within which employees and their trade unions, on the one hand, and, employers and employers' organisations, on the other, can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest (s 1(c)(l)). Another one is the promotion of:-

“(i) collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) -----

(iv) the effective resolution of labour disputes.”

[18] The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector , employers and their organisations, on the one hand, and, employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.

[19] The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the

minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism. Some of them are s 14(1); 16(1); 18(1); 25(1) and(2); 26(1) and (2); 32(1)(a) and (b); 32(3)(a),(b), (c) and (d) and 32(5); 78(b)).

[20] The rationale behind the extension of collective agreements by the Minister of Labour in terms of s 32(2) is to prevent unfair competition which employers who are not party to collective agreements concluded in a bargaining council may pose to their competitors who are bound by collective agreements. This is because a collective agreement concluded in a bargaining council lays down minimum wages and other terms and conditions of employment to be observed in respect of employees.

[21] If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary objects of the Act. If this were allowed, there would be little, if any, point in any employer seeking to be party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country.

[22] It is clear from what has been said above that the mischief which the legislature sought to prevent by s 32 is the unfair competition that I have referred to. The legislature decided that the way to prevent such mischief would be to ensure that in certain circumstances non-parties could be subjected to the same terms and conditions as parties to a collective agreement. That means ensuring that everyone in a sector is subjected to the same rules. This means that non-parties become subjected to rules to which they have not consented and on which they have not been consulted. However, it is open to them, if they want to have a say in such rules, to take steps to be part of bargaining councils and influence the rules from inside. If they do not become part of bargaining councils, they run the risk of being subjected to rules decided upon by their competitors without their input.

[23] The Act recognises that there may be cases where subjecting non-parties to a collective agreement concluded in a bargaining council may operate too harshly against them. It is for that reason that the Act precludes the Minister from extending a collective agreement to non-parties in certain circumstances. Those circumstances are those where the Minister is not satisfied that :

- (a) provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, appeals brought against the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement or the withdrawal of such an exemption by the bargaining council (s 32(3)(e)); in this connection it needs to be stated that s 30(1)(k) requires the constitution of a bargaining council to contain a procedure for exemption from collective agreements;

(b) the collective agreement contains criteria which must be applied by the independent body when it considers an appeal, and, that those criteria are fair and that they promote the primary objects of the Act. (S 32(4)(f);

(c) the terms of the collective agreement do not discriminate against non-parties.

In other words non-parties cannot seek to have different rules applied to them simply on the basis that they are not parties to the collective agreement.

[24] Apart from the fact that the Act sets out circumstances in which the Minister may not extend a collective agreement to non-parties, the legislature has considered that, even when the Minister has correctly exercised his power to extend a collective agreement to non-parties, there may be cases in which individual businesses or entities or employers and employees or their trade unions may experience hardship. It is for that reason that the Act requires that every collective agreement concluded in a bargaining council should contain an exemption procedure in terms of which exemption from the collective agreement or from certain of its provisions can be granted. The Act requires that the collective agreement should contain a procedure for appeals against decisions of bargaining councils refusing exemption to an independent body.

[25] In the light of the above, it seems to me that the effect in

law of an extension of a collective agreement in terms of s 32(2) is that, for all intents and purposes, a non-party is turned into a party, and, is placed in relation to the collective agreement on the same level as a signatory to the collective agreement. The extension of a collective agreement by the Minister in terms of s32(2) means making the collective agreement binding on employers and employees who otherwise would not be bound by it. S32(2) says:” ... the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.” It seems to me that, once it can be said that the Minister has, in terms of s32(2), extended a collective agreement to an entity by publishing a notice in the Government Gazette declaring that the collective agreement will be binding on such entity, such entity is bound by the collective agreement, and, cannot escape the consequences thereof unless it is granted an exemption or in an appropriate case, the extension is set aside by a court of competent jurisdiction.

[26] We have to decide this case on the basis that there is a valid extension of the collective agreement to, among others, the appellant. In such a case it is no longer open to such an entity to say: But 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 to declare it binding on such a party in terms of s32(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 or bind such an entity.

[27] The result of the above is that, for as long as the extension stands, it is not open to such non-party to avoid the obligations of the collective agreement by saying that it is not a party to the collective agreement or that it is not a signatory to the collective agreement. In fact it appears inaccurate to continue to refer to such a party as a non-party because, for all intents and purposes, the extension makes it a party to the collective agreement.

[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 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 a party which was a signatory to the collective agreement (s 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 parties which signed the collective agreement. In the absence of any provision either in the Act or in the collective agreement sanctioning differential treatment for non-parties, 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.

[30] The procedure for the enforcement of the main collective agreement is contained in clause 38(3). That is the procedure which the second respondent was required to follow in seeking to enforce the collective agreement against the appellant. It was correct in invoking that procedure against the appellant.

[31] The appellant's counsel submitted that the procedure set out in s 63 of the Act is the procedure that the second respondent was required to follow. S 63 provides that any party to a dispute about **"the interpretation or application"** of Parts A and C to F of Chapter III of the Act may refer the dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation and if conciliation fails, the dispute must be referred to the Labour Court for a adjudication. The basis for this submission was that this is a dispute about the interpretation or application of Part C of Chapter III of the Act in that it is about whether the second respondent had power under section 28(1)(b) to resort to the procedure it resorted to in order to enforce the collective agreement. I agree with Mr Pillemer, who appeared for the second respondent, that section 63 can simply find no application in this case because this matter is not one about the interpretation or application of any part of Parts A and B and C to F of Chapter III of the Act. This is a matter relating to the enforcement of the two collective

agreements. The two collective agreements provide a procedure for their enforcement. That is the procedure to be applied.

[32] On behalf of the appellant it was also submitted that the use of the procedure that the second respondent sought to use against the appellant was unconstitutional in that the council was a judge in its own case. It was submitted that the first respondent was not independent of the second respondent and that the result of this was that the second respondent was arbitrating the matter itself. It was submitted that this was contrary to the rules of natural justice. In my view this part of the appellant's complaint is a result of a failure by the appellant to understand and appreciate how the Act and the rules of natural justice operate. The position is that the majority in the sector have come together and agreed on a procedure that they believe is an acceptable procedure for the enforcement of the collective agreement. That procedure applies to them as well. It is not just a procedure that the majority has specially created to be used against non-parties. The appellant's complaints in this regard are nothing more than the consequences of the extension of the collective agreement to the appellant.

[33] The situation the appellant finds itself in is a result of the fact that the collective agreement has been extended to it. As long as the extension of the collective agreement remains, the appellant is subject to the collective agreement. If it were to appear to the appellant that there was some unfairness about any aspect of the application of the collective agreement to the appellant, there is a remedy available to the appellant to avoid either certain provisions of the collective agreement or the entire collective agreement. That is the exemption procedure. In terms of the procedure even a non-party to whom the collective agreement has been extended may apply to the second respondent to be exempted from either certain provisions of the collective agreement or from the collective agreement as a whole. If the second respondent

were to refuse to grant the appellant exemption, there is even provision in the collective agreement for an appeal against such a decision to an independent body.

[34] In any event it is not correct to say that the second respondent sought to arbitrate the matter itself in this case. Arbitration should not be required to meet the same standards as courts of law. But even in courts of law, situations do arise which have the same features as the features the appellant complains about in respect of the arbitration. In fact this Court put it to Mr Reinecke, for the appellant, during argument that even with the CCMA the Act contemplated that, should the CCMA and anyone of its employees have a dismissal dispute for example, the dismissed employee would be required to refer the dispute to the CCMA for conciliation.

[35] The conciliation between such CCMA employee and the CCMA would be conducted by a commissioner of the CCMA. If conciliation failed, the dispute would be arbitrated by a CCMA commissioner. In all probability the Commissioner would be a part-time commissioner. But that would not be because the Act requires that but it would be a decision that may be taken at a practical level. That is very similar to what the second respondent's procedure entailed in this case. I can see no reason why, if that is what the Act contemplates in respect of the CCMA, it should contemplate anything different in respect of the second respondent and none was suggested to us by Mr Reinecke.

[36] Outside the field of labour law similar situations can be found, too. Magistrates are appointed by the Minister of Justice and magistrates' salaries are paid by the Department of Justice of which the Minister of Justice is the political head. When a person sues the Minister of Justice in the Magistrates' Court and a magistrate hears such a trial and gives a judgement, there can be no suggestion that it is the Minister of Justice who has decided the case. In the light of all the above I conclude that the appellant's contention in this regard falls to be rejected.

Was accreditation required before the collective agreements could be enforced?

[37] It was argued on behalf of the appellant before the first respondent as well as in the court a quo that the second respondent required accreditation before it could deal with a dispute such as the one involved in this matter. In support of this, reliance was placed on clause 12(1) of the constitution of the second respondent. Both the first respondent and the court a quo found that the correct interpretation of clause 12.1 of the second respondent's constitution was that accreditation was required only in those cases where the Act required accreditation.

[38] It is in s. 51 of the Act that the Act deals with the requirement of accreditation in the performance of certain dispute resolution functions by bargaining councils. S 51(1) says a dispute in that section means a dispute about **“a matter of mutual interest”** between an employer party and an employee party. Both the first respondent and the court a quo found that, as the matter at hand was not one of mutual interests, s 51 did not apply and, accordingly, the Act did not require accreditation. In my view they were right.

[39] In the premises the appeal must fail. I can see no reason why the appellant should not be ordered to pay the costs of the appeal. The appeal is accordingly dismissed with costs.

RMM ZONDO

Judge President

I agree

M.T.R. MOGOENG
Judge of Appeal

I agree

M. JOFFE

Acting Judge of Appeal

Appearances:

For the Appellant: Mr Reinecke SC
Instructed by: Shepstone & Wylie
For the Respondent: Mr Pillemer SC
Instructed by: Dirk Coetsee Attorneys

Date of hearing: 29 September 2000
Date of Judgement: 16 November 2000