IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO. J575/00**

In the matter between:

THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Applicant

and

PROFESSOR JOSEPH MASEKO N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
PUBLIC SERVANTS ASSOCIATION	Third Respondent
NATIONAL UNION OF PROSECUTORS OF SOUTH AFRICA	Fourth Respondent
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Fifth Respondent

---

JUDGMENT

JAMMY AJ

Introduction.

1.For the sake of convenience I shall hereafter refer in this judgment to the Second Respondent as "the CCMA", to the Third Respondent as "the PSA" and to the Fourth Respondent as "NUPSA".

2.The Applicant, the Public Service Co-ordinating Bargaining Council, is a bargaining council for the public service, established in terms of Section 36(1) and registered in terms of Section 29 of the Labour Relations Act 1995 ("the Act"). It seeks in this application an order reviewing and setting aside an arbitration

award dated 31 December 1999 made by the First Respondent in his capacity as a Commissioner of the CCMA in arbitration proceedings between the PSA as applicant and the Applicant in this matter as respondent.

3.The nature of the dispute referred by the PSA to the CCMA for conciliation in terms of the Act was described by it in the referral form (Form 7.11) as follows:

failure of the State as employer and the Public Service Co-ordinating Bargaining Council to give effect to and implement an agreement to act jointly between the Public Servants Association and the National Union of Prosecutors of South Africa."

The outcome of that reference sought by the PSA was:

t the State as employer give effect to the agreement to act jointly by the PSA and NUPSA by amongst other, instructing Persal to immediately stop with agency shop deductions from the salaries of members of NUPSA."

4.A conciliation meeting was duly convened by the CCMA but failed to resolve the dispute. A "Certificate of Outcome of Dispute Referred for

Conciliation" was issued by the conciliating Commissioner on 7 April 1999 in which she described the unresolved dispute as concerning:

he failure by the State as employer and the PSCBC to give effect to and implement an agreement to act jointly between the PSA and the National Union of Prosecutors of S A."

5.Pursuant thereto, the PSA on 13 April 1999 lodged with the CCMA a formal "Request for Arbitration" in terms of Section 136 of the Act. The nature of the dispute was described in identical terms to those used in the initial Referral and the decision sought from the Commissioner was stated to be :

order directing the PSCBC and the employer party to the PSCBC to grant full recognition to the decision of the PSA and NUPSA to act jointly by immediately stopping all agency fee deductions from the salaries of members of NUPSA retrospectively from 1 July 1998 and all other steps

necessary to give effect to that decision."

6.An analysis of the gravamen of the dispute and the outcome sought by the PSA in the statutory dispute resolution procedures invoked by it necessitates, in my view, an examination of the relevant contractual and statutory provisions on which they are based.

The first is Section 25 of the Act, the relevant provisions of which are these:

Agency shop agreements

esentative trade union and an employer or employers organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.

e purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed -
yer in a work place; or
of an employers organisation in a sector and area in respect of which the agency shop agreement applies."

7**.**The powers and functions of bargaining councils are defined in Section 28 of the Act and include the conclusion and enforcement of collective agreements. Disputes about the interpretation or application of collective agreements where, as in the case of an agency shop agreement, they do not incorporate dispute resolution procedures, are governed by Section 24 of the Act which entitles any party to the dispute to refer it to the CCMA. The relevant subsections read:

The party who refers the dispute to the Commission must satisfy it that a

copy of the referral has been served on all other parties to the dispute.

he Commission must attempt to resolve the dispute through conciliation.

f the dispute remains unresolved any party to the dispute may request that the dispute be resolved through arbitration."

As will be apparent thus far, that was the statutory procedure invoked by the PSA.

8. Section 134 of the Act provides for the reference of a dispute about a matter of mutual interest to be referred in writing to the Commission, with the requirement that a copy of that referral must be served on all other parties to the dispute.

9. Section 56 of the Act deals with admission of parties to a bargaining or statutory council. Its relevant subsections are the following:

registered trade union or registered employers organisation may apply in writing to a council for admission as a party to that council.

pplication must be accompanied by a certified copy of the applicant's registered constitution and certificate of registration and must include

e applicant's membership within the registered scope of the council...

cil, within 90 days of receiving an application for admission, must decide whether to grant or refuse an applicant admission, and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant admission.

ouncil refuses to admit an applicant it must within 30 days of the date of the refusal, advise the applicant in writing of its decision and the reasons for that decision.

plicant may apply to the Labour Court for an order admitting it as a party to the council.

bour Court may admit the applicant as a party to the council, adapt the

constitution of the council and make any other appropriate order."

10. The Applicant's constitution was adopted by the founding parties thereto on 13 October 1997, the date upon which the Applicant was registered in terms of Section 29 of the Act. Section 2 of that constitution is the definition section and in terms of subsection 2.1.(j):

de Union" shall carry the definition as set out in the Act and shall also mean:-

union having organisational rights with an employer falling within the registered scope of the Council; or
more registered trade unions having organisational rights with an employer falling within the registered scope of the Council, acting together as a single party."

11. Material to this application are the provisions of clauses 6.2 and 6.3 of the constitution, which read as follows:

cation for admission of further parties to the council shall be made in writing on the form attached as annexure "A" and shall be considered and decided upon at a meeting of the council according to the following criteria:
must be a trade union registered in accordance with the provisions of the Act and this constitution.
nt trade union must represent at least 20 000 employees within the registered scope of the council as members in good standing.

or more trade unions that are registered and have organisational rights with an employer, falling within the registered scope of the council, act together to meet the admission criteria to the council then those trade unions may be represented in the council as single party."

The import of clause 6.3 is therefore that two trade unions, neither of which satisfies the 20 000 membership threshold prescribed in clause 6.2 (b), but whose aggregate membership attains or exceeds it, may combine in order **to meet the admission criteria to the council** (my emphasis) and be represented in the council as a single party. That mechanism would serve as well to procure the vicarious representation on the council of a trade union with inadequate membership in its own right and which, in the terminology of the constitution, acts together with a non-member but qualifying trade union in order to satisfy the admission criteria of the council and be represented therein as a constituent element of a single party.

12. It is common cause that an agency shop agreement, in conformation with Section 25 of the Act, was concluded by the parties in the Applicant, including the PSA, on 26 May 1998 and came into effect on 1 July 1998. Expressly applicable to the employer and all employees employed by the State and falling within the registered scope of the Applicant, its objective was stated "to ensure that all employees who receive the benefits of collective bargaining contribute towards its costs." Agency fee deductions, in terms thereof must be made by the employer (the State)

om the basic salary of each of its employees who are not members of any one of the trade union parties to the council"

Exemption from that provision may be applied for in writing to the council by any employee who "conscientiously objects to being associated with or paying contributions to .... associations" and may only be granted by agreement of the council.

13. NUPSA is a registered trade union which is not a party to the Applicant and whose members were in consequence liable for the compulsory payment, effected by way of deduction from their salaries, of the agency fee prescribed in the agency agreement. Its resistance to that obligation could not be addressed by independent application for admission to the Applicant as a party since its audited membership at the relevant time was 896, as against the requisite minimum of 20 000. It has not been suggested that its members or any of them sought exemption from the agency fee obligation by way of conscientious objection.

14. If therefore its members were to be absolved from the agency fee liability, some other device to procure this would of necessity have to be found and, with that acknowledged objective, NUPSA and the PSA concluded an oral agreement, the substance of which was conveyed to the Applicant by the PSA by a letter dated 3 July 1998 in the following terms:

ng jointly:PSA and NUPSA

se take note that the PSA and the National Union of Prosecutors of South Africa (NUPSA) have decided to act jointly in the Public Service Co-ordinating Bargaining Council as provided for in clause 2.1(j) of the Constitution of the Council and as also mentioned in Section 25(2) of the Labour Relations Act 1995.

confirmed that both the trade unions have organisational rights and a certificate from an auditor confirming the

bership of NUPSA to be 896 members as well as the Certificate of Registration as Trade Union of NUPSA are attached. These documents in respect of the PSA are already on record.

ll be appreciated if the matter could be brought to the attention of the Council as soon as possible."

15. A consequence of that agreement, the PSA contends, is that the members of NUPSA, which indisputably retained its identity as an independent registered trade union, but which was now a constituent of a single party admitted in the council, were exempted from paying the agency shop fee.

16. The Applicant replied succinctly to that communication in a letter to the PSA dated 13 January 1999 in which it said :

hereby wish to acknowledge receipt of your correspondence whereby you indicate your intentions to act jointly with NUPSA.

se be informed that Council deliberated on the matter and the following decision was taken:

notes that PSA is already admitted as a members of the PSCBC.

has no jurisdiction or authority to interfere in internal arrangements made between unions that are party to Council and those that are not."

In the result the PSA acting together with NUPSA was not admitted as a member party of the Applicant and agency fees continued to be deducted from NUPSA's members in terms of the agency shop agreement.

17. That, in essence, constituted the dispute referred by the PSA to the CCMA for statutory resolution.

18. The award eventually made by the First Respondent incorporated a number of conclusions, findings and orders. In summary, they were the following:

The PSA, following the oral agreement in question, emerged and regarded itself "as a new entity consisting of the PSA and NUPSA". In terms of the constitution, the First Respondent held, "the PSA and NUPSA qualify to act as they did and are actually a valid entity based merely on their agreement".

NUPSA members should not continue to be charged agency shop fees in the context of their union's agreement to act jointly as one entity with PSA. In that regard -

ve done all that is required to convert or transform themselves into a new entity that consists of

SA and PSA and has notified the PSCBC of their new status to each other and to the PSCBC. And the approval of the PSCBC is not sought or necessary here. At least as the Constitution stands and as the definition of trade unions stands in the Constitution of the Respondent".(sic)

t was unnecessary for the PSA to have applied to Court for admission into the PSCBC.

PSA was already a member and while NUPSA is not they "did not apply for admission, and nor do they wish to". They were entitled, said the First Respondent, "to be treated as a trade union in the PSCBC together with PSA, and the PSCBC has been notified of that fact. And that is all that is required."

19. In the result, the First Respondent determined:

The agreement between the PSA and NUPSA to act together "as envisaged in the provisions of Section 25(2) of the Act constitutes a lawful agreement".

The PSCBC was to recognise, give effect to and implement its provisions.

The PSCBC was to take appropriate measures to ensure that all deductions of agency fees from the salaries of members of NUPSA be terminated from the date of the award and deductions made since July 1998 were to be repaid.

Finally the PSCBC was advised "to respect the terms of their own constitution", at the risk "of appearing frivolous and vexatious".

The issues

20.1 The Applicant submits that the First Respondent's award in question is reviewable and should be set aside on a number of grounds. In the first instance, it contends, the First Respondent exceeded his powers, alternatively committed a gross irregularity in finding that he had jurisdiction to arbitrate the dispute between the parties.

Secondly it is contended, he failed adequately or at all to have regard to and to take into account for the purpose of his determination, relevant principles of law, relevant provisions of the Act, relevant provisions of the Applicant's constitution and relevant provisions of the agency shop agreement. These, it is submitted, were misconstrued by him to so material an extent as to indicate "a failure on his part to apply his mind properly to those provisions and the considerations that arise in relation to them".

21.1 The issue of jurisdiction is premised on the First Respondent's alleged failure to consider whether or not the party seeking relief was one that could be

recognised as a matter of law as having *locus standi* to institute dispute or any other proceedings and to seek consequential relief.

Secondly, in that context, the PSA failed to serve a copy of the referral of the dispute on the State as employer as required by Section 134(2) of the Act, to which I have made earlier reference in the context of the resolution of disputes about matters of mutual interest.

Thirdly, the oral agreement between PSA and NUPSA, it is contended, is not a collective agreement regarding which a dispute falling within the ambit of Section 24(5) of the Act could be resolved by arbitration under the auspices of the Second Respondent.

Finally, neither the Act nor the Applicant's constitution vested in the First Respondent the power, exclusively reserved for the Labour Court, to determine a dispute relating to the admission or otherwise of a party within the council.

22.I do not propose, for reasons which will become apparent, to deal with those allegations in the order in which they have been pleaded. The necessity to address them by way of more than passing reference will,
in my view, hinge on my determination of what I perceive as the cardinal challenge, that relating to the First Respondent's finding that the oral agreement between PSA and NUPSA to act together is one in compliance with the Act and the Applicant's constitution, and to the consequences thereof.

23.The Applicant's constitution, as I have said, includes in its definition of "trade union" two or more unions with organisational rights with an

employer within the registered scope of the employer, acting together as a single party. I have also made earlier reference to clause 6.3 of that constitution in terms of which two or more registered trade unions with organisational rights may **act together to meet the admission criteria to the council** and once admitted, may be represented in the council as a single party.

24.It is common cause that at an early stage of the arbitration hearing, the First Respondent was referred to the unreported judgment of this Court in **National**

Police Service Union v Public Service Co-ordinating Bargaining Council & Others (Case no. J2479/98).

At paragraph 17 of that judgment, Zondo J (as he then was) said this:

rder to meet the threshold of 20 000 members set by the First Respondent, the Applicant seeks to use a trade union whose membership has already been taken into account when that trade union got admitted as a single party with other unions. To allow that would defeat the purpose of setting the threshold.

the Applicant's contention that it can use a trade union which has already been admitted to the council either by itself or jointly with another trade union were upheld, the purpose of setting a threshold so as to ensure that each party that is admitted represents membership of the fixed size, would be defeated. A trade union in this situation cannot in my view act jointly with a union that has already been admitted with or without another union. I am therefore of the view that the Executive Committee of the Respondent was quite correct in adopting the view that they did, namely,

the Applicant could not be admitted on the basis of clause 6.3 where the union with which it had an agreement for purposes of clause 6.3 was a trade union that was already a party to the council."

25. As will be apparent, the First Respondent in that case is the Applicant in this matter and the reference to clause 6.3 in the extract from the judgment to which I have referred relates, as in this matter, to that specific clause in its constitution.

26. It is also not disputed that nowhere in the arbitration award in question does the First Respondent refer to, distinguish, approve or otherwise deal in any respect with that judgment. The reason for this, the Third Respondent submits, is that he did not need to. The notification by the

Third Respondent to the Applicant of 3 July 1998, it contends, was not, and was not intended to be, one made pursuant to the provisions of clause 6.3 but solely in terms of clause 2.1(j) of the constitution read with Section 25(2) of the Act. That was expressly stated to be the case in the letter referred to and in the course of the evidence presented to the First Respondent, the Third Respondent did not seek to dispute the objective of that agreement, which as testified to by Mr J A

Louwrens, its deputy general manager,

would mean that the members of NUPSA being party of the single party, the single union, would then be free and not have the agency shop fee deducted from their salaries."

27. It is for the express purpose of the conclusion of an agency agreement with an employer or employers' organisation in terms of Section 25(1) of the Act, that two or more registered trade unions may, in terms of Section 25(2), act jointly to constitute the representative trade union which will be the other contracting party. The PSA in its own right however was, at the time that its oral agreement with NUPSA was entered into, already an admitted member in the Applicant in its own right and in that capacity, a party to the agency shop agreement of 26 May 1998. Mr J A Louwrens, on behalf of the Third Respondent is a signatory to that agreement. In that context, Section 25(2) of the Act could have had no relevance to that agreement. On any interpretation, in my view, it will only have application, for the purpose of the section, where not any of the two or more registered trade unions therein referred to, was, at the time of their joint action, already a party to the contemplated agency shop agreement.

28. With reference to the definition in clause 2.1(j) of the Applicant's constitution, the First Respondent purports to analyse critically the Applicant's submission that the purpose of the oral agreement between the Third and Fourth Respondents was to act together in order to gain admission to the council in terms of clause 6.3. In paragraph 9 of his award he says this:

e there seems to be an assumption that NUPSA and PSA opted 'to act together for the purpose of gaining admission'.

there is nothing in the constitution that suggests that this should be the purpose to

act together or that acting together actually means becoming one trade union. My view is that **the two unions could act together for such admission as well as for any other reason**"(my emphasis).

Stated differently and as the First Respondent later in his award determines, two unions, even if one of them is already numerically qualified, can, in his view, by the simple expedient of an oral agreement, reconstitute themselves as a single trade union qualifying for membership in the Applicant council with all the consequences thereof including the benefit to the otherwise disqualified union, of exemption of its members from payment of the agency fee. That, on the basis of the First Respondent's own conclusion, is a contradiction in terms. The oral agreement, he states at paragraph 10(1) of his award, resulted in the creation of "a new entity consisting of the PSA and NUPSA and in that context

SA had done all that is required to convert or transform themselves into a new entity that consists of both NUPSA and PSA."

29. The necessary inference from that conclusion is that in some way or other, NUPSA has lost its identity but the very basis of the dispute between the parties negates that perception. NUPSA did not cease to exist and could not, through the medium of purported joinder with a trade union member of the Applicant, acquire such membership and thereby be constituted as a party to the agency shop agreement with the applicable exemption consequences.

30. Quite apart from his own perception of its validity moreover, the First Respondent's conclusion, to which I have made earlier reference, that "**...the two unions could act together for such admission..."**, flies directly in the face of the determination of this Court to the contrary in **National Police Service Union v The Public Service Co-ordinating Bargaining Council & Others (Supra)**, notwithstanding that he was specifically referred thereto.

31. In **Le Roux v Commissioner for Conciliation, Mediation & Arbitration & Others (2000) 21 ILJ 1366(LC)** Wallis AJ said this:

he result the commissioner came to the conclusion that he was entitled to disregard a judgment of this court "where a slavish adherence to that precedent would result in gross injustice".

view is not correct and must be rejected. The whole structure of the LRA

places the Labour Appeal Court at the pinnacle of the pyramid of adjudicative bodies established under that Act, In terms of s167 of the LRA it is established as a court of law and equity sitting as a final court of appeal in matters under its jurisdiction and having authority, inherent powers and standing equivalent to that of the Supreme Court of Appeal. Below the Labour Appeal Court sits the Labour Court which within its sphere of jurisdiction corresponds to the court of a provincial division of the High Court of South Africa. The CCMA and commissioners sitting as arbitrators in terms of the LRA are tribunals performing their functions in terms of the LRA and subject to review by the Labour Court.

erroneous to suggest that the jurisdiction of a commissioner sitting as an arbitrator differs on questions of law from the authoritative pronouncements of this court and the Labour Appeal Court. Commissioners are as much bound to follow and apply the judgments of this court as the Magistrate's Courts are obliged to follow and apply the judgments of the High Court (*Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482(N) at 485A-G)."

32.The First Respondent was bound by the judgment of this Court in **National Police Service Union** but, as I have said, not only made no attempt to distinguish it, but disregarded it altogether.

33.I am left in no doubt that the manner in which the First Respondent addressed the issues of the interpretation and application of the collective agreements in question in this matter and what in my view can only be described as his superficial and at times high-handed rejection of the Applicant's submissions in that regard, go further than constituting mere mistakes of law which might otherwise not have been reviewable. They indicate to me a failure on his part to apply his mind to those issues to an extent constituting gross irregularity. In his disregard of a binding labour court judgment in direct contradiction of the conclusions reached by him moreover, the First Respondent blatantly exceeded his powers.

34.It is unnecessary, in these circumstances, for me to traverse in any particular, the other grounds of review submitted by the Applicant. The locus standi of the Third

Respondent in the arbitration proceedings does not appear to have been an issue raised at that time. The failure however of the Third Respondent, as Applicant in the arbitration proceedings, to have cited the State as a party thereto in its capacity as the employer with what, in my opinion, was unarguably a direct interest in the substance of the dispute and its resolution would, standing alone, have thrown the jurisdiction of the Third Respondent to be properly seized of the matter seriously into question. In my view however no further analysis of that aspect of the matter is necessary.

35. For the reasons which I have stated therefore, the First Respondent's award cannot be sustained and the order which I accordingly make is the following:

The arbitration award by the First Respondent dated 31 December 1999 in CCMA case number HO112 is reviewed and set aside.

The Third Respondent is to pay the Applicant's costs, including the costs of two Counsel.

B. M. JAMMY
Acting Judge of the Labour Court
25 October 2000

Date of Hearing: 4 October 2000
Representation:
t:Advocate K S Tip SC, with him
inders instructed by
his & Associates
ents:Advocate E S J Van Graan, instructed by Cecile Botha Attorneys