IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case Number: JR2428/07

REPORTABLE

In the matter between:

UNITED TRANSPORT AND ALLIED TRADE UNION	Applicant
and	
BARRY JAMMY N.O	First Respondent
TRANSNET BARGAINING COUNCIL	Second Respondent
TRANSNET LIMITED t/a TRANSWERK	Third Respondent

REASONS FOR THE ORDER

MOSHOANA AJ

INTRODUCTION

[1] On 17 February 2010, I issued an order in the following terms: The application for review is dismissed with costs. Hereunder follows the reasons for the order.

BACKGROUND FACTS

[2] The applicant is a registered trade union operating within the third respondent. From January 2006 to 13 May 2006 there was mass action being embarked upon by the employees of the third respondent. Following that action, management and labour embarked upon a process of integration. This led to a collective agreement being concluded on 23 May 2006. As a result of the collective agreement, further negotiations ensued in order to harmonise the terms and conditions of employment of Spoornet maintenance employees and the third respondent's employees. These negotiations culminated into an agreement between the third respondent and other unions inclusive of the applicant in April 2006.

[3] The agreement became the centre of the dispute arbitrated by the first respondent leading to this application. The clause that led to the dispute read as follows:-

"Current Transwerk employees who start to work shifts as part of Transwerk 24/7 operation, will from the date they commence working on a 24/7 operation, receive an adjustment to their salary to take them up to the prevailing second notch of the Spoornet salary band as determined by the outcome of the Spoornet wage negotiations for 2006/07"

[4] What sparked the dispute was the phrase "*second notch*". According to the applicant, the common intention was the third notch. In their case, the word second notch actually should read third notch as it was the negotiating parties' common intention to say so. On the contrary, the third respondent persisted that they understood what the second notch meant as opposed to the third notch. If third notch was intended, they would not have agreed thereto because of the financial implications thereof. Due to the above, the applicant referred a dispute to the second respondent seeking to rectify the wording in the contract to reflect the common intention. In turn, the applicant through a private dispute resolution agency (TOKISO), contracted to it, appointed the first respondent to arbitrate the dispute. The first respondent heard evidence and on 11 August 2007, he published his award. The applicant was aggrieved by the said award and launched these proceedings. The award of the first respondent was couched in the following terms:-

"*The Applicants in my view have manifestly failed to discharge the onus upon them to establish a "clear and unmistakeable common intention of the parties which justify <u>rectification</u> of the relevant clause of their collective agreement with the respondent. Their application is therefore dismissed. The tortuous background to this dispute does not however suggest that this application was frivolous or irresponsibly made and pursued. In that context I do not consider that the Applicants should be further burdened by an order for costs and none is made".*

The third respondent opposed the review application.

THE GROUNDS OF REVIEW

[5] As grounds for review, the applicant contended that the first respondent failed to apply his mind to the evidence led at the arbitration proceedings, with particular reference to the diagram that was presented during the course of the arbitration proceedings. It was submitted that the fact that the third respondent erred in calculating the financial cost of the notch had no bearing on the fact that the agreement had been reached on the issue. The first respondent was accused of having overlooked the fact that upon signing the agreement, if a third party had asked the parties which notch they were referring to, they would have unanimously stated that it was the third notch as reflected in the diagram.

[6] Further, the applicant contended that the conclusion arrived at was not rationally justifiable. In its view, the third respondent should have been estopped from alleging that there was no agreement on the issue because of its own mistake.

ARGUMENT

[7] The heads of argument filed on behalf of the applicant were signed by Advocate Wayne Hutchinson. In there, the applicant submitted that the first respondent overlooked the doctrine of *quasi-mutual assent* as enunciated in the English case of *Smith v Hughes (1871) LR 6 QB 597*. Advocate Snider appearing for the

applicant on the day of argument wisely jettisoned this point. In my view that was a wise move indeed. However he carried the baton in so far as other grounds foreshadowed therein are concerned. He persisted with the diagram argument. The argument being that on the diagram, Harris' evidence suggested that the first notch was the so-called base notch, the 25th percentile and the first notch was actually the second notch and the second notch was the third notch. He dramatised that by pointing panels in the court room. The second notch being the third panel. With reference to the record, he attempted to show that other people in the company of Van Niekerk understood the diagram as presented. Unfortunately those people were not called at arbitration. In his submission, the third respondent was obliged to call them. Those people being the CEO and the HR Manager. In the written submissions, it was contended that in their absence, the evidence of Van Niekerk and Albertyn carried little weight. Advocate Snider maintained that the failure to apply mind is manifested by the taking into account an irrelevant consideration, the consideration being the costs aspect. He agreed that the award can only be reviewed under Section 33 of the Arbitration Act. He submitted that costs should follow the results.

[8] On the other hand, attorney Kate Savage appearing for the third respondent stood firm on the point that there was no common intention therefore rectification could not be ordered as sought. In short, she submitted that the award of the first respondent is not reviewable.

ANALYSIS

[9] One issue that troubled me was the test to be applied in reviewing this award. In mind, I had the test developed in *Sidumo*. I held a *prima facie* view that since the award was, in my view, issued by a member of a private agency, TOKISO, and then the test developed in *Sidumo* does not find application. (*See Standard Bank of SA v Mosime and another (2008) 29 ILJ 3078 (LC), Lufuno Mphapuli and Associates (Pty) Ltd v Andrews 2009 (4) SA 529 (CC) and an unreported judgment of Transnet Rail Engineering Ltd v Transnet Bargaining Council and others case number JR 2917/06 dated 2 February 2010)*. Although Snider conceded that Section 33 applies, Savage submitted that since the award was issued by the first respondent acting under the auspices of the second respondent, a registered Bargaining Council, the test in *Sidumo* should apply. However even on that test the award is not reviewable, she argued. She however agreed with the court that regards being had to the function performed by the first respondent in this matter, it is doubted whether the test finds application.

Does the test truly apply to the Bargaining Councils decisions?

[10] It seems that a concrete view is being held that if a dispute is arbitrated under the auspices of a registered Bargaining Council, such is what was termed "*compulsory arbitration"* therefore the test applies. Is this view correct? Perhaps one should test it. In order to do so one may have to go back to *Carephone.*

[11] At paragraph 11 of the judgment, Froneman DJP, as he then was, had the following to say:-

"Although the commission is an independent body with jurisdiction in all the provinces, it was not created as a court of law... It thus has no judicial authority in constitutional terms. When it...conducts compulsory arbitration in terms of the LRA this involves exercise of a public power and function, because it resolves disputes between parties in terms of the LRA without needing the consent of the parties. This makes the commission an organ of state in terms of the Constitution."

[12] It is without doubt that Froneman DJP was referring to the CCMA and not to the Bargaining Councils. In his view, because the CCMA was resolving disputes between parties in terms of the LRA without needing their consent, it exercised public power and function and that made it an organ of state as defined. So one can safely say that if a function or power is not exercised firstly in terms of the LRA and secondly performed with consent it is not being contemplated as being performed by an organ of state. Section 239 defines an organ of state as-

(a) Any department of state or administration in the national , provincial or local sphere of government; or

(b) Any other functionary or institution-

(i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

> (ii) *Exercising a public power or performing a public function in terms of any legislation.*
>
> *but does not include a court or a judicial officer*.

[13] I suppose that it can be said without a shadow of a doubt that the CCMA performs public function in terms of the LRA. Can the same be said about Bargaining Councils? I doubt. Is arbitration of labour disputes *per se* a public function? In my view it is not.

[14] The CCMA is established in terms of Section 112 as a juristic person. It is given functions by Section 115. Those include arbitration. On the other hand Bargaining Councils are established by parties, by complying with Section 27 and registering in terms of Section 29 of the LRA. The only dispute resolution functions it can perform are those set out in Section 51 as prescribed by Section 28 (1) (d). Otherwise, in terms of Section 28 (1) (c), it has powers and functions to prevent and resolve labour disputes. It is not clear from the section how it should resolve labour disputes and also what qualifies as a labour dispute. However Section 51 clearly sets out what kind of disputes. It refers to disputes about matters of mutual interest *inter partes*. In terms of Section 29 registration takes effect upon submission of amongst others a copy of the constitution of the Bargaining Council in question. In this judgment I choose not to deal with the Bargaining Council in the Public Service. The PSCBC is established in terms of Section 35 and its sectors in terms of Section 37.

[15] Once a council is registered, it seems to me that it can resolve disputes about unfair dismissals and unfair labour practices if such disputes fall within its registered scope (Section 191). In terms of Section 191(5) (a), the council is obliged to resolve the dispute through arbitration if the alleged reason is what the section sets out. It also seems to me that a council can only arbitrate if it has been accredited in terms of Section 127 (1) (b) of the LRA. Can it be said that if a council performs accredited functions it is the CCMA for all intends and purposes? Perhaps it is. In other words, it also performs public function with the blessing of the CCMA. The question becomes, if a council is registered but not accredited by the CCMA, can it perform public functions? In my view it cannot.

[16] That being my view, regard must be had to the provisions of Section 127 (2) of the LRA. That subsection specifically excludes some disputes. For the purposes of this judgment, I shall direct my attention to Section 24. The Section deals with disputes about collective agreements. If there is a dispute about the interpretation or application of a collective agreement, such could be resolved by the CCMA only if the collective agreement does not provide for a resolution procedure or another party has frustrated the resolution. It stands to reason that if the collective agreement in question, allows resolution by arbitration, it ought to be one in terms of the Arbitration Act. If not, the arbitration must be by the CCMA for it to be seen as a public function. Bearing in mind, this function cannot be delegated as it were.

[17] Returning to the question, it must not be forgotten that the test applied in *Sidumo* has its origin in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 (4) SA 490 (CC).* To be exact, Navsa AJ said:-

"*That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*

This ought to be understood from the premise that contrary to the SCA, the Constitutional Court held a view that PAJA applies to CCMA decisions.

[18] It is then important to have regard to what was said in *Bato Star*. In coming to that test, the Constitutional Court was dealing with Section 6 (2) (h) of PAJA, which all should know finds application only to administrative decisions. The Section Provides: ...*is so unreasonable that no reasonable person could have so exercised the power or performed the function.* In developing the test and giving meaning and content to Section 6 (2) (h), the Constitutional Court borrowed the words of Lord Cooke in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 (CA)*. Those were: "so *unreasonable that no reasonable authority could ever have come to it."*

[19] My point being that the test applies only to administrative decisions. If a decision is not an administrative decision as defined in PAJA, I do not see how the test should apply. We know what PAJA says is an administrative decision. It seems settled now that arbitrations of the CCMA are administrative decisions. I doubt whether decisions of the Bargaining Councils are. However Ngcobo J in *Sidumo* said as to what an administrative action is must now be determined not by looking at the identity of the body that performs the function but by considering the nature and the function that is being performed. The Constitutional Court in *President of*

the RSA v SARFU 2000 (1) SA 1 (CC) acknowledged that it may be difficult to define what an administrative action is, but it seems the power must be public and not private as it were. However what is clear from the definition in PAJA is that it must be by an organ of state exercising constitutional powers/public power or function in terms of any legislation or a person natural or juristic exercising public power or performing public function in terms of the empowering provision. With the difficulty abound, I am of the view that in most instances, it cannot be said that the Bargaining Councils exercises public power or public function. How can arbitration of a dispute between Joe Soap and his employer have anything to do with the public?

[20] It seems to me that Froneman DJP in introducing the term compulsory arbitration, he tied that to exercise of public power and function. Therefore, the compulsion alone to my mind is not determinative. One can readily conclude that the fact that Section 191 (5) (a) refers to *must* arbitrate, a party to a dispute about a fairness of a dismissal or an unfair labour practice is compelled to arbitration. I am minded to say that the same cannot be said about other disputes like interpretation and application of a collective agreement at least in so far as the Bargaining Council is concerned or the CCMA for that matter, regard being had to the wording employed in Section 24 (5).

[21] Returning to the matter before me, the first respondent was asked it seems me to interpret and apply a collective agreement. What is not clear is whether it was in terms of that collective agreement or not. However judging by the fact that the parties referred the dispute to the second respondent, it can be assumed that the

collective agreement may not have had specific dispute resolution mechanism. In terms of Section 127, the CCMA cannot accredit the second respondent to perform resolution of such a dispute. It therefore follows that the second respondent could not assume the identity of the CCMA as it were. I am certain that in determining whether the applicant is entitled to rectification, the first respondent could not have been exercising public power. He then did not make an administrative decision. Accordingly the test developed in *Sidumo* should not find application. The fact that the first respondent was acting under the auspices of the second respondent, a registered council, is of no moment in my view. I therefore conclude that at the very least the *Sidumo* test would not always apply to Bargaining Council decisions.

Was the dispute truly one contemplated in Section 24 of the LRA?

[22] A determination of this question also assists in relation to the earlier question. One of the issues to be determined might be whether in arbitrating disputes in terms of the LRA, a council performs statutory function therefore public power. Taking such a simplistic approach may be dangerous. This court does perform functions in terms of the LRA, but it does not perform administrative functions. However on the assumption that that fact is determinative, I proceed to consider the question.

[23] In my view a true dispute contemplated in Section 24, is one that seeks either an application or an interpretation of a collective agreement. Such would be, for instance in an application claim, a party may approach the CCMA or a council to

say in terms of clause 4; it is entitled to 3 hours lunch and is not been afforded it. If the employer party does not afford him or her the 3 hours lunch then it does not apply clause 4. In that event the CCMA or council may order that the other party must afford him or her the 3 hours lunch (as in specific performance). On the interpretation issue, a party may approach the CCMA or council to resolve an interpretation issue. For instance, if according to party A, the term lunch, as employed in the agreement means a period of one hour as opposed to three hours.

[24] Rectification is a civil law remedy. A party to a contract is entitled to approach a civil court and seek correction of a contract to reflect what that party contends is the common intention of the parties to a contract. As *RH Christie, in The Law of Contract in South Africa 5th Edition* puts it, if the remedies for common mistake were confined to a declaration of nullity or rescission and a defence against any claim based on the contract there would be a danger of injustice in those cases (which are not uncommon) where a written contract records a version of the contract that is not in accordance with what was actually agreed and one of the parties wishes to enforce the true version. The appropriate remedy in such a case is an order for the rectification of the written contract. (*See Page 329 and Using "enforce" in the broadest sense as including cancellation for breach, as in Munnik and Munnik v Sydney Clow & Co Ltd 1965 4 SA 312 (T) 314A).* It is required that a party seeking rectification must plead mistake. (See *Offit Enterprise (Pty) Ltd v Knysna Development Co (Pty) 1987 4 SA 24 (C).*

[25] In my view, Section 24 did not contemplate this remedy, which I am certain the drafters of the LRA were alive to. It could not have been the intention of the legislature to clothe the CCMA or council with powers to deal with the remedy under Section 24. The law on rectification is complex and complicated. Therefore I doubt that the legislature would deliberately throw a commissioner or an arbitrator to that deep end. In so saying, I am alive to the possibility of rectification being raised as a defence to a referral of application or interpretation dispute in terms of Section 24. It had been raised as such in provisional sentence proceedings (*Taylor v Cape Importers 1937 CPD 471).* Under those circumstances, rectification as a defence becomes an issue in a dispute and not an issue in dispute. (See *SAPS v Salukazana and others yet to be reported P284/09 dated 16 February 2010)*.

[26] In my view, a party approaching an arbitrator to seek rectification does not do so in terms of Section 24. Equally an arbitrator deciding that matter does not do so in terms of Section 24. I conclude that the dispute was not one contemplated in Section 24.

[27] Linked to this question is whether the Labour court has powers to review under Section 145 or 158 (1) (g)? The applicant when launching this application did not indicate in terms of which Section it was approaching the Labour Court. In its heads of argument, it submitted that the application was launched in terms of Section 145 of the LRA. The third respondent disputed that and submitted that the application should be in terms of Section 158 (1) (g) instead. In my view neither Section 145 nor Section 158(1) (g) applies. The function performed by the

first respondent was not one provided for in the Labour Relations Act. As I have pointed out above, disputes about interpretation and application of collective agreements do not include the remedy of rectification. Therefore the function of dealing with a rectification remedy is not one in terms of the LRA. At first glance, it could be argued that because the arbitration was about a "*labour dispute*", judging by the parties and the issues, then the function, being arbitration, was in terms of the LRA. In my view that argument ignores the pertinent provisions of Section 146 of the LRA. The function performed by the first respondent was one contemplated in the Arbitration Act 42 of 1965. Accordingly, in my view Section 33 of the Arbitration Act applies. This may well have been a commercial contractual dispute. The fact that a union and an employer are involved does not of necessity elevate a dispute to be one of labour.

Are there any grounds for review nonetheless?

[28] In my view there are none. Such grounds ought to be sourced from Section 33 of the Arbitration Act. None of the grounds contemplated in Section 33 has been shown. According to the applicant, the first respondent failed to apply mind. The issue of costing cannot be seen as an irrelevant consideration. Evidence on the issue was led before the first respondent. Why should he not consider that?

[29] If he does not he will be accused of ignoring evidence. It does not accord to the applicant, who did not object to particular evidence on the grounds of say relevance; to later cry foul, when the first respondent accords that evidence the

treatment it deserves. In my view the issue of cost was relevant. It went to the very relevant issue of meeting of minds. In a rectification claim common intention is important. (See *Bardopoulos and Maccrides v Miltiadous 1947 4 SA 860 (W) at 863-864*). Therefore the award is not reviewable at all. Even on the *Sidumo* test, which Snider conceded does not apply, the award is still not reviewable. Of course in my view the *Sidumo* test does not apply here. The other issue raised pertinently was the diagram issue. The applicant contends that when it referred to the second notch it was actually referring to the third notch. In a claim for rectification, which this dispute was about, quiet often extrinsic evidence is allowed in order to determine the common intention. (See *HL&H Timber Products (Edms) Bpk v Bischoff 1995 1 PH A21 (N).* The diagram formed part of the record of review. Looking at the document one deducts nothing from it.

[30] However the record reflects that Harris made a presentation to the CEO of Transwerk, Van Niekerk and the HR manager. In his evidence Van Niekerk asked the two whether they understood it and if they can afford it, to which they answered in the positive. The fact that the CEO and the HR manager did not testify did not affect the third respondent's case. The two could possibly have been important for the applicant's case. According to it, the two understood Harris to have been referring to third notch. Why they were not called or subpoenaed by the applicant it escapes my comprehension. The argument by Snider that they should have been called by the third respondent to rebut the version of Harris lacks merit. The evidence of Harris was rebutted by Van Niekerk when he placed on record his recollection which was at odds with that of Harris. According to the

applicant, the common intention emanates from the two (CEO and HR manager) allegedly understanding the diagram. Of importance is that that which the two understood was labelled as notch two and nothing else. In the mind of Harris, that notch two was actually notch three or as Snider argued, the "*pointed panel three*". That was not the end of the story. The third respondent's team went back to cost that which they said they can afford. Lo and behold they do not cost it on the "*pointed panel three*", but on the mentioned notch two. It cannot be accepted that that was a mistake on their part as argued. The applicant overtly mentioned notch two. They found that the figures were slightly higher than anticipated. Instead of reneging from what they were overtly told, notch two, they went ahead despite their discomfort on the costs. It was after that costing exercise that the third respondent signed the agreement.

[31] The fact that the applicant was unaware of the exercise is of no moment. From their own evidence, Van Niekerk asked if *"they can afford it".* This I take into account knowing full well what Van Niekerk's recollection of the presentation was which was contrary to that of Harris. This clearly suggests the aspect of costs and nothing else. Much as I can accept that the applicant was unaware of the costing exercise, it clearly should have anticipated it to happen. But as I say, it is of no moment that the applicant was unaware. I therefore cannot fault the first respondent when he attached importance to the fact that Van Niekerk's evidence of third notch costing twice the amount was not challenged. The upshot of that unchallenged evidence being that if the third respondent's team understood that the applicant was referring to third notch, there could not have been meeting of

minds and of necessity, no contract. The rational justifiability argument is without merit and is rejected. It is not contemplated in Section 33. Even if it was, the outcome is rationally connected with the material placed before him.

[32] It was for reasons set out above that I dismissed the application.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 17 February 2010

Date of Reasons: 26 February 2010

APPEARANCES

For the Applicant: Adv A Snider instructed by Fluxmans Inc, Rosebank.

For the Third Respondents: Attorney K Savage of Bowman Gilfillan, Sandton