

SOUTH AFRICA / JUDGMENT

Mziba v Osborn Engineered Products SA (Pty) Ltd (JS110-21) [2024] ZALCJHB 528 (5 June 2024)

[2024] ZALCJHB 528

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS110/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS110/21

In

the matter between:

SELWYN

LUSANDA MZIBA

Applicant

and

OSBORN

ENGINEERED PRODUCTS SA (PTY) LTD

Respondent

Heard:

26 April 2024

Delivered:

5 June 2024(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 05 June 2024.)

JUDGMENT

PHEHANE, J

Introduction

[1] This is an interlocutory application to determine preliminary points raised by the respondent in opposition to the applicant's

referral to this Court. In his referral, the applicant claims that his dismissal from the respondent based on operational requirements, was unfair.

Background

[2] It is common cause that during 2020, the respondent embarked on a retrenchment process in terms of the provisions of section 189A of the Labour Relations Act[1] (LRA). The consultation process was facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the provisions of section 189A(3) of the LRA.

[3] At the end of the consultation process, a retrenchment agreement was concluded in October 2020 between the respondent on the one hand, and two unions that collectively held majority representativity in the respondent, being the National Union of Metalworkers of South Africa (NUMSA) and Solidarity and the elected representatives of non-unionised employees on the other hand.[2]

[4] It is common cause that:

4.1 the retrenchment agreement was a result of the consultation process;

4.2 the applicant is cited in the agreement as one of the employees that was covered by it;

4.3 the applicant's employment with the respondent was terminated following the conclusion of the retrenchment agreement; and

4.4 the applicant received a severance package in excess of the statutory minimum in terms of the retrenchment agreement.

Preliminary points

First preliminary point

[5] In essence, the respondent contends that the retrenchment agreement is a collective agreement and it is binding on the applicant by operation of section 23(1)(d) of the LRA. Further, clause 5 of the retrenchment agreement provides that the agreement is in full and final settlement of the dispute between the parties. In view of the afore-going, this Court lacks jurisdiction to adjudicate

the referral.

[6] Clause 5[3] of the retrenchment agreement reads:

‘5. FULL AND FINAL SETTLEMENT

5.1 The payment made to the Employee in terms of this agreement is in full and final settlement of all and any claims, of any nature whatsoever, that the Employee may have against the Company whether arising in contract, delete, statute or otherwise.

5.2 In particular, but without derogating from the generality of clause 5.1, the Employee shall have no claim against the Company arising from any alleged unfair dismissal or alleged unfair labour practise or alleged unfair retrenchment.

5.3 The employees specifically acknowledges that he may not upon signature of this agreement refer any dispute to the CCMA; The Metal & Engineering Industries Bargaining Council; the Labour Court or any civil court challenging the fairness and/or unlawfulness of the termination of the employment contract.’

[7] The respondent further contends that one Mr. Radley, one of the elected representatives of the non-unionised employees which included the applicant, signed the retrenchment agreement on the applicant's behalf, and therefore, the applicant is bound by the retrenchment agreement.

Second preliminary point:

[8] The second preliminary point is this Court is precluded by section 189A(18) of the LRA from adjudicating disputes regarding procedural unfairness where the dismissal occurred in terms of section 189A of the LRA, unless an applicant launches an application in terms of section 189A(13), which the applicant failed to do.

[9] In the heads of argument delivered by the applicant before this matter was heard, the applicant abandoned his claim that his dismissal was procedurally unfair.

[10] Therefore, only the first preliminary point was before this Court to adjudicate.

[11] The respondent launched an application seeking an adverse costs order against the applicant. I determined, in light of the applicant's request to file heads of argument opposing costs, that the costs be determined at a later stage.

Argument and evaluation

[12] As stated above, the respondent contends that the retrenchment agreement is a collective agreement as defined in section 213 of the LRA and therefore, it can be extended to non-union members as contemplated in section 23(1)(d) of the LRA.

[13] Section 213 of the LRA defines a collective agreement as follows:

“collective agreement” means 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 hand –

- (a) one or more employers;
- (b) one or more registered employers’ organisations; or
- (c) one or more employers and one or more registered employers’ organisations’.

[14] Section 23 of the LRA provides for the legal effect of a collective agreement. Section 23(1)(d) of the LRA provides:

‘A collective agreement binds –

- (d) employees who are not members of the registered trade union or trade unions party to the agreement if –
 - (i) the employees are identified in the agreement:
 - (ii) the agreement expressly binds the employees; and
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.’

[15] It is not disputed that the retrenchment agreement was concluded not only between the respondent and the two majority unions, NUMSA and Solidarity but also with the representatives of the non-unionised employees of the following three departments of the respondent: Sales, Engineering and Aftermarket Department, Operations and Supply Chain Department (under which department the applicant was

employed) and the Factory.

[16] The respondent contends the jurisdictional facts are met for the extension of the retrenchment agreement to non-union members such as the applicant in terms of section 23(1)(d) of the LRA, as the applicant is identified as an employee in the retrenchment agreement (section 23(1)(d)(i)); the applicant is expressly bound by it (section 23(1)(d)(ii)); and the majority unions are parties to the retrenchment agreement (section 23(1)(d)(iii)).

[17] Democratisation of the workplace is achieved through the principle of majoritarianism – the will of the majority should prevail over that of the minority.

[18] In discussing the purpose of the principle of majoritarianism, Zondo JP (as he then was) in *Kem-Lin Fashions CC v Brunton and Another*[4] held that:

‘[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...

[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 object 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.’ [Own emphasis]

[19] It follows therefore, that the principle of majoritarianism, the objective of labour peace and the primacy of collective bargaining was envisioned by the Legislature in drafting section 23(1)(d) of the LRA which extends collective agreements in the workplace to non-union members.

[20] In *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Ltd and Others*[5] (Bafokeng), the Constitutional Court per Froneman J held that the cascading hierarchy of consulting partners in section 189(1) of the LRA is rational, aligned with international standards and is not unconstitutional and our Courts have held that this hierarchy of consultation places no obligation on employers to hold parallel consultations with individual employees outside the confines of the hierarchy created in section 189(1) of the LRA. In addition, the extension of a collective agreement to non-union members as contemplated in section 23(1)(d) of the LRA is not unconstitutional, however, such extension is subject to judicial scrutiny by means of a legality review.

[21] In that matter, the employer (Bafokeng) concluded a retrenchment agreement with two trade unions which had the majority of employees in the workplace as their members. The retrenchment agreement identified members of the minority union (AMCU) and non-unionised employees as being among those who were to be retrenched. The retrenchment agreement contained a clause that it was in full and final settlement of the dispute between the parties. AMCU launched proceedings to challenge the fairness of the dismissal of its

members. Bafokeng contended that the AMCU members were precluded from pursuing their claim by operation of section 23(1)(d) of the

LRA, as the section rendered the retrenchment agreement binding on them.

[22] The Constitutional Court per Ledwaba AJ considered the Labour Appeal Court (LAC) decision in *National Union Metalworkers of South Africa obo Members v South African Airways SOC Limited*[6] and held that consultation is the antecedent to collective bargaining and where an employer elects to consult with majority unions and non-union members in an “all-comers” approach in a retrenchment process, the employer is then bound to consult with all parties affected but this did not hinder the extension of the retrenchment agreement to non-parties as contemplated section

23(1)(d) of the LRA.[7]

[23] The applicant contends that the definition of a collective agreement in section 213 of LRA does not provide for individual employees to be parties to a collective agreement. Therefore, the inclusion of non-unionised employees as parties to the retrenchment agreement has the effect of the retrenchment agreement losing the character of a collective agreement. Having lost its character as a collective agreement, the retrenchment agreement cannot be extended to him.

[24] The applicant submits that section 213 provides that a collective agreement is one that is concluded only between registered trade unions on the one hand, and an employer party or parties on the other; had the Legislature intended to

include individual employees as a party or parties to a collective agreement, as it has in the case of employers, it would have made provision for this in the definition of a collective agreement.

[25] In support of its contentions as aforesaid, the applicant relies on the case of *Arends and Others v South African Local Government Bargaining Council and Others*[8] (*Arends*) where this Court held that parties to a collective agreement are only a registered trade union and an employer or an employer’s organisation and not individual employees and that individual employees cannot be party to a collective agreement.

[26] At the very outset, *Arends* does not assist the applicant, as this decision has been overturned by the LAC[9]. In *Arends*, the Court a quo adjudicating a review of a jurisdictional ruling, considered whether individuals who are not party to a collective agreement but are beneficiaries thereto have locus standi to refer a dispute in terms of section 24 of the LRA on the interpretation and application of that collective agreement. The Court a quo found that they lack locus standi to refer such a dispute, as individual employees are not party to a collective agreement and therefore, cannot launch a dispute in terms of section 24 of the LRA. In my view, the views of this Court were obiter. The Court made reference to section 23(1)(d) of the LRA, stating that the Legislature had in mind, to make provision for employees who are not parties to a collective agreement to benefit from the terms of the collective agreement. The Court did not deal with the extension of the collective agreement

by operation of section 23(1)(d) to non-union parties where the jurisdictional facts in (a) to (d) are met. The Court, having found that the individual employees lacked locus standi to refer a dispute in terms of section 24 of the LRA, dismissed the review application essentially, on the basis that the nature of the dispute before the bargaining council was not a dispute concerning the interpretation and application of a collective agreement, but rather, a contractual dispute, and therefore, found that the commissioner did not misdirect himself when he ruled that the

bargaining council lacked jurisdiction to determine the dispute.

[27] On appeal, the LAC found that the commissioner misdirected himself in considering jurisdiction when the issue had been raised for the first time in the heads of argument and he failed to obtain submissions from the parties on the issue of jurisdiction before making his ruling. This, in circumstances where the parties had agreed that the referral could be decided on paper but had not filed a stated case. The LAC did not deal with the question as to whether or not individuals can be parties to collective agreements.

Nonetheless, Arends was overturned on appeal. It is for these reasons that Arends does not assist the applicants.

[28] In its counter submissions, the respondent submits that the absence of the word “only” in the definition of a collective agreement in section 213 of the LRA does not limit the parties to a collective agreement and that, out of an abundance of caution, it added non-unionised members as parties to the retrenchment agreement. Having done so does not alter the character of the retrenchment agreement such that it is no longer a collective agreement.

[29] The applicant unnecessarily reads the word “only” into the definition of section 213 of the LRA. It is now well established in our law that Courts interpret legislation to promote the spirit, purport and objectives of the Bill of Rights in Chapter 2 of our Constitution.[10] Section 23 of the Constitution provides that everyone has the right to fair labour practices. The LRA gives effect to section 23 of the Constitution. One of the purposes of the LRA is to advance labour peace and the democratisation of the workplace by fulfilling the primary objectives of the LRA, which include promoting and facilitating orderly collective bargaining at the workplace.

[30] The Constitutional Court in Bafokeng stated that the right to fair labour practice does not guarantee a right to be individually consulted in a retrenchment process and emphasized that our Courts have consistently interpreted section 189 of the LRA, which gives pre-eminence to collective bargaining in its hierarchy of consultation, to exclude the requirement of individual or parallel consultations outside the hierarchy created in section 189(1). Further, the limitation of individual consultation in retrenchment processes is justifiable in terms of section 36 of the Constitution.

- [31] The hierarchy of consultation in section 189(1) of the LRA and the extension of collective agreements as contemplated in section 23(1)(d) of the LRA aligns with the principles of majoritarianism and the democratization of the workplace. Therefore an interpretation of section 213 which gives effect to the principles and values of the Constitution is one that has regard for the promotion of labour peace and orderly collective bargaining.
- [32] The retrenchment agreement is a product of a consultation process in terms of the hierarchy of consultation as set out in section 189(1) of the LRA. A finding that the retrenchment agreement is not a collective agreement will have the adverse effect of picking apart the seams of a carefully woven garment of democratisation that is adorned in the workplace. In plain language, a finding that the retrenchment agreement is not a collective agreement will have the effect of undoing the rights and obligations of the parties to that agreement and will result in mayhem in the workplace.
- [33] The applicant further seeks to resile himself from the retrenchment agreement by contending that Mr. Radley, the elected representative of the non-unionised employees in the Operations and Supply Chain Department did not have a mandate to represent him, as he had not elected him and wanted to be consulted individually.
- [34] It is pertinent to bear in mind the dispute that the applicant brings to this Court – an unfair dismissal dispute premised on substantive unfairness alone, given his abandonment of procedural unfairness and the relief he seeks is reinstatement. The applicant does not bring a legality review.
- [35] In my view, the applicant's contention that Mr. Radley carried no mandate to represent him and therefore, he is not bound by the retrenchment agreement, does not assist the applicant, as absent Mr. Radley, firstly, there was no obligation on the respondent to consult the applicant individually in view of the hierarchy for consultation in terms of section 189(1) of the LRA that existed in the workplace and secondly, the applicant is bound by the retrenchment agreement by operation of section 23(1)(d) of the LRA.
- [36] The applicant does not dispute that he received a severance package in accordance with the terms of the retrenchment agreement, in particular, clause 4.4 which provides that the respondent will pay over to the retrenched employees, a severance package of two weeks remuneration for every completed years' service.[11] It is common cause that the applicant has not tendered the repayment of the severance payment he received. The applicant cannot approbate and reprobate.
- [37] I find that the retrenchment agreement has the hallmark of a collective agreement and it is therefore binding on the applicant by operation of section 23(1)(d) of the LRA.
- [38] A determination of the kind sought by the applicant in opposing the preliminary point raised would have the effect of undermining the principle of majoritarianism hewn by our Courts, and the objectives of the LRA of orderly collective bargaining, labour peace and democratization in the workplace.

[39] The preliminary point is meritorious and succeeds. In the premises, this Court lacks jurisdiction to adjudicate the referral.

[40] In view of the afore-going, the order is as follows:

Order

1. The preliminary point is upheld.
2. The referral is dismissed.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. V. Mndebele

Instructed by: Ningiza Horner Attorneys

For the Respondent: Adv R. Itzkin

Instructed by: Cliffe Dekker Hofmeyr

[1] Act 66 of 1995, as amended.

[2] pp 29 to 34.

[3] p 32.

[4]

[2001] ZALAC 23; (2001) 22 ILJ 109 (LAC) at paras [19] and [21].

[5]

[2020] ZACC 1; (2020) 41 ILJ 555 (CC).

[6]

[2017] ZALAC 32; [2017] 9 BLLR 867 (LAC).

[7] Bafokeng at paras [74] to [78].

[8]

(2013) 34 ILJ 2560 (LC).

[9] Arends and Others v South African Local Government Bargaining Council and Others

[2014] ZALAC 69; [2015] 1 BLLR 23 (LAC).

[10] Constitution of the Republic of South Africa, 1996. See: Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001

(1) SA 545 (CC) at paras [21] – [22].

[11] p 31.

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