IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case no. D 217/97

In the matter between:

SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION	**APPLICANT**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
MG COWLING	**SECOND RESPONDENT**
ISLAND VIEW HOLDINGS LTD t/a FELTEX FOAM	**THIRD RESPONDENT**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	**FOURTH RESPONDENT**

JUDGEMENT

ZONDO J

Introduction

[1] In this matter the applicant seeks an order reviewing and setting aside a certain arbitration award which was handed down by a commissioner of the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**). The CCMA has been cited as the first respondent whereas the commissioner concerned is the second respondent. The third respondent is cited as Island View Holdings Limited t/a Feltex Foam. Lastly, the fourth respondent is cited as the National Union of Metal Workers of South Africa (**"NUMSA"**).

Background

[2] The second respondent's award, which was handed down following arbitration proceedings which the second respondent had conducted in respect of a dispute between the third and fourth respondents under

the auspices of the CCMA under CCMA case no. KN 1441, was handed down on the 23rd May 1997.

Circumstances preceding the arbitration proceedings under review

[3] The papers in this matter reveal that in an operation known as Feltex Foam the fourth respondent enjoys membership of the overwhelming majority of the employees. For that, reason, it was no later than January this year that it claimed that it was entitled to the deduction of union subscriptions from the wages of its members in that operation in terms of sec 13 of the Labour Relations Act, 1995 (**"the Act"**). The employer of its members did not agree to effect such deductions with the result that, believing that this was a violation of its rights in terms of sec 13 of the Act, the fourth respondent referred the dispute about its alleged entitlement to such right to the first respondent for conciliation and thereafter for arbitration.

[4] Sec 13 of the Act provides:-

"13 Deduction of trade union subscriptions or levies

(1) Any *employee* who is a member of a representative *trade union* may authorize the employer in writing to deduct subscriptions or levies payable to that *trade union* from the *employee*'s wages.

(2) An employer who receives an authorization in terms of subsection (1) must begin making the authorized deduction as soon as possible and must remit the amount deducted to the representative *trade union* by not later than the 15th day of the month first following the date each deduction was made.

(3) An *employee* may revoke an authorization given in terms of subsection (1) by giving the employer and the representative *trade union* one month's written notice or, if the *employee* works in the *public service*, three months' written notice.

(4) An employer who receives a notice in terms of subsection (3) must continue to make the authorized deduction until the notice period has expired and then must stop making the deduction.

(5) With each monthly remittance, the employer must give the representative *trade union*-

(a) **a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;**

details of the amounts deducted and remitted and the period to which the deductions relate; and

(c) **a copy of every notice of revocation in terms of subsection (3)."**

Sec 13 appears in Part A of Chapter iii of the Act and for purposes of Part A of Chapter iii **"representative trade union"** is defined in sec 11 as meaning **"a registered trade union or two or more registered trade unions, acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace."** The phrase **"sufficiently representative"** is not itself defined in the Act.

In his arbitration award the second respondent says Feltex Foam **"is a subsidiary of Island View Industrials ...".** Neither the applicant nor the fourth respondent has provided the Court with an explanation of the relationship between Island View Holdings Ltd and Island View Industrials. There is no indication too whether Island View Industrials is a company, a partnership or an operation of some other kind. The applicant's founding affidavit does, however, have an allegation that the applicant has a collective agreement in place with what it says is the **"the third respondent's division now known as Island View**

Industrials."It says in terms of that agreement the applicant has the right to collectively bargain on behalf of the hourly paid employees of Island View Industrials at certain defined units. The deponent goes on to say one of those units of Island View Industrials is a unit which is now known as Feltex Foam which is the unit in respect of which the fourth respondent claimed it was entitled to sec 13 rights. In a nutshell as at January 1997 the fourth respondent demanded that the employer of its members at Feltex Foam should deduct union subscriptions from its members' wages in accordance with sec 13. It seems that the legal entity that would constitute the employer of the employees at Feltex Foam would be Island View Holdings Limited, the third respondent.

In the form which a party who requests arbitration in the CCMA in respect of a dispute has to complete, the fourth respondent was required to state what the issues were which remained in dispute (after the failure of the conciliation process).The fourth respondent stated: **"Refusal to deduct union dues for members"**. The applicant was not a party to the dispute whether or not the third respondent should accede to the fourth respondent's demand and deduct union dues from the fourth respondent's members at Feltex Foam. However, at some stage it was allowed by the second respondent to participate in the arbitration proceedings. The second respondent does not in his award give any reasons for his decision to allow the applicant to participate nor does he explain what *locus standi* the applicant had to participate in those proceedings. It is not necessary for me to decide whether this was an irregularity or not and, for that reason, I refrain from expressing any opinion.

The award that the second respondent handed down pursuant to those arbitration proceedings was in the following terms:- **"The following rights must be conferred on the applicant by the Respondent in respect of the former's members in the Foam Mouldings Operation:**

(I) trade union access to the workplace - s 12;

(ii) deduction of trade union subscriptions - s 13;

(iii) recognition of trade union representatives - s 14.

The exact ambit and manner of implementation of these rights should be negotiated on good faith during the forthcoming month."

Where the award refers to **"the applicant",** that is a reference to the fourth respondent in these proceedings and the reference therein to the **"respondent"** is a reference to the third respondent in these proceedings.

The issue

The applicant's complaint about the second respondent's award relates to his decision to award the fourth respondent the right to trade union representatives in terms of sec 14 of the Act. Sec 14 of the Act reads thus:-

"Trade union representatives-

(1) In this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that has as members the majority of the employees employed by an employer in the workplace.

(2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves-

(a) if there are 10 members of the trade union employed in the workplace, one trade union representative;

(b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;

(c) if there are more than 50 members of the trade union employed in the workplace, two trade union representaitves for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;

(d) if there are more than 300 members of a trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one trade union representative for every 100addiotional members up toa maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for evey 200 additional members up to a maximum of 12 trade union representatives; and

(f) if there are more than 1 000 members of a trade union employed in the workplace, 12 trade union representatives for the firts 1000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) the constitution of the representative trade union governs the nomination, election, terms of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions-

(a) at the request of an employee in the workplace, to assist and represent the employee in the grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with the work-related provisions of this Act, any law regulating terms and conditions of employment and collective agreement binding on the employer;

(c) to report any contravention of the workplace related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to-

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off within pay during working hours-

(a) to perform the functions of a trade union represenative; and

(b) to be trained in any subject relevant to perfomance of the functions of a trade union representaitve."

The applicant contends that the second respondent had no right or power to award the fourth respondent sec 14 rights because no dispute about such rights had been referred to him for arbitration. In this regard the applicant contends that the only dispute that had been referred to the second respondent to arbitrate was a dispute about the third respondent's alleged refusal to deduct union dues from the fourth respondent's members at Feltex Foam.

Out of the four respondents only the fourth respondent opposed the applicant's application. Before dealing with the merits or demerits of the application it is necessary to deal with two procedural issues which were dealt with in argument. The first relates to an application for condonation which the applicant included in its founding affidavit. That was occasioned by the fact that the applicant filed its application outside the period of six weeks which is the period within which a review application which is made under sec 145 of the Act must be lodged. In this regard the fourth respondent took the point in its opposing affidavit that the applicant's application did not comply with the provisions of sec 145 in that it was made outside the period of six weeks referred to in that section. However, when the fourth respondent's representative presented his argument, he did not pursue that objection.The second is the question whether this review application should be dealt with under sec 145 or sec 158 (1) (g). The applicant's stand is that this application was brought in terms of section 145, alternatively, sec158 (1) (g). Sec 145 reads as follows:-

"Review of arbitration awards.-

(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commision may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect

involves corruption.

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(iii) committed misconduct in relation to the duties of a commissioner as an arbitrator;

(iii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an ward has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

(a) determine the *dispute* in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the *dispute*."

Section 158 deals with the powers of the Labour Court. Section 158 (1) (g) says **the Labour Court may, "despite sec 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act or on any grounds that are permissible in law;**

As the grounds on which the applicant relies for the order that it seeks is one which falls within the ambit of both sec 145 (2) as well as sec 158 (1) (g), it seems to me that, save for the issue of condonation, it is not necessary for me to decide whether this application should be treated as a sec 145review or as a 158(1) (g) review. With regard to condonation the fourth respondent did not pursue its objection during the hearing; but, even apart from that, in so far as it may be necessary to grant condonation, I am satisfied that good

cause has been shown. Accordingly, to the extent that it may be necessary, such delay as there may have been in bringing this application is condoned. I now proceed to consider the grounds of review relied upon in this matter.

The grounds of review relied upon

There is only one ground on which the applicant seeks to have the offending portion of the second respondent's award set aside.The ground is that the second respondent exceeded his powers in so far as he arbitrated issues that were not part of the dispute that was referred to him for arbitratrion. It was common cause that the dispute that was referred to the CCMA (and therefore to the second respondent) by the fourth respondent for arbitration was the refusal by the third respondent to deduct union dues and that the referral form did not include any issue relating to sec 14 rights. The fourth respondent's contention to this was in effect that in response to a written enquiry from the CCMA prior to arbitration as to which rights it sought to excercise, it had by respondent by including sec 14 rights as part of the rights it sought to exercise. The applicant countered this argument by pointing out that there was no evidence to the effect that the third respondent had been party to the inclusion of such issues as part of the dispute to be arbitrated by the second respondent.

In the light of the undisputed fact that the only dispute that had been referred to the first and second respondents for arbitration was the third respondent's refusal to deduct union dues, there simply can be no way in which the second respondent could have been entitled to arbitrate any other dispute except, perhaps, and I stress perhaps, with the consent of all affected parties. In the CCMA form in which the fourth respondent had to complete as the party requesting arbitration, there was somewhere in the form a blank space where the fourth respondent had to say what decision it was seeking from the arbitrator - in other words what relief the fourth respondent was seeking in the arbitration proceedings. On behalf of the fourth respondent it was stated there that the decision that the fourth respondent was seeking was **"that the company deduct union dues."** No mention was made at that stage that any other rights were sought.

On the basis that no dispute relating to sec 14 rights had been referred to the first or second responednt for arbitration, the second respondent was not entitled to deal with such a matter.There is also another more fundamental objection to the second respondent doing what it did in this case. That is that in terms of the Act neither the CCMA nor the second respondent has power to arbitrate on a matter unless (a) the matter constitutes a dispute, (b) such dispute has been the subject of conciliation and (c) after conciliation, such dispute has remained unresolved. As to what constitutes a dispute, see the judgment of this Court in SACCAWU v Edgars Stores Limited and Another case no J44/97. .

There was no evidence before the second respondent nor was there evidence before me, that a dispute had already existed between the third and the fourth respondent about sec 14 rights. It is fair to assume that, if such a dispute had already existed when the request for arbirtration was made, the fourth respondent would have included such a dispute in the request for arbitration. The overwhelming probabilities are that no such dispute existed as yet and the second respondent sought to arbitrate on such a matter even before the parties could try conciliation and, probably, even before the parties could have serious discussions over sec 14 rights. That is something the second respondent was not entitled to do and, to that extent, he exceeded his powers.

When a commissioner or arbitrator exceeds his powers, that is a ground justfying the setting aside of his or her decision. In this regard Jones J said in Adamsteim v Adamsteim 1930 CPD 165 at 168: **"An award which bears evidence of a disregard by the arbitrator of the terms of the submission is of no force and effect and will not be enforced by courts of law. In other words the award must be in terms of the reference."** In Mckenzie N.O v Basha 1951 (3) SA 783 (N) at 788 A-B Broome JP, with whom Selke J concurred, quoted, with approval, a statement made by the Privy Council in Attorney General for Manitoba v Kelly 1992 1 A. C. at 276 that: **"It would be impossible to allow an umpire to arrogate to himself**

jurisdiction over a questoin which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties." The judgment of Judges Page and Thirion in Transvaal Pressed Nuts, Bolts & Rivets (Pty) LTD v President, Industrial Court & others (1990) 11 ILJ 1237 (N) is consistent with the view I have expresed above as well the judgements referred to above. In fact what Page J said at 1205J-1251A in the TVL Pressed Nuts case had happened in that case is very similar to what happened in this matter. I am of the opinion that the second respondent's conduct did not only fall outside his jurisdiction but also that it constituted a gross irregularity in the proceedings justifying the setting aside of that part of the award which purported to confer on the fourth respondent sec 14 rights.

This is not a matter where it was through oversight that the second respondent exceeded his jurisdiction or powers. He was quite alive to the fact that no dispute had been referred to arbitration by the fourth respondent relating to sec 14 rights. However, upon a certain reasoning he came to the comclusion, erroneously as I have said, that he was entitled to grant the fourth respondent not only sec 13 rights that it was seeking but also sec 12, and 14 rights. To summatise his reasoning, as I understand it, it was this. Once **"a trade union has been determined to be sufficiently representative of the employees in the workplace, certain basic organisational rights will automatically arise."** (P.4 of the award). He went on to say examples of such basic rights were section 12, 13, 14 and 15 rights. This is clearly inaccurate because a registered trade union which is a **"representative trade union"** for purpose s of sec 12 rights and sec 13 rights is not necessarily a **"representative trade union"** for purposes of sec 14 rights because, while the level of representativeness which a union must prove to acquire sec 14 rights is that of majority membership, a lower level of representativeness is required for sec 12 and 13 rights.

Later in the award the second respondent dealt with the question as to how an arbitrator was expected to

decide that it would be appropriate to grant the one organisational right and not others. After dealing with how such rights were acquired under the old Act, the second respondent said: **" However at the end of the day I find that there would have to be very special circumtances to distinguish between the granting of such rights as access to the workplace; (s12) deduction of trade union subcriptions (s13) and recognition of trade union representaitves (s14); and leave for trade union office bearers in order to perform their activities (s15). In other words, if an arbitrator was prepared to grant one of these rights, he or she would have shown special circustances in order to justify a refusal to grant any of the others."** This, too, is not accurate because, where a union which seeks to exercise sec 14 rights does not enjoy majority membership in the workplace but is only sufficiently representative, it would not be entitled to sec 14 rights even though it may be entitled to sec 12 rights and sec 13 rights. An arbitrator who rejects such a union's claim to sec 14 rights would not have to show any special circumstances for rejecting its claim and all he or she would have to do would be to point out that it lacks the level of representativeness required in terms of sec 14.

Lastly the second respondent held in effect that he was not bound by the terms of reference (by which I think he meant the request for arbitration) which placed before him only the sec 13 rights dispute for decision. The reason the second respondent saw himself as not bound by the **"terms of reference"** was that to so hold would amount to **"taking a far too narrow and formalistic approach to arbitration that is not in keeping with the spirit of dispute resolution and arbitration process in terms of this Act."** He thereafter went to great lenghts to try and justify this conclusion. It is not necessary to deal with everything that he says in attempting to justify his approach. It suffices to point out that an arbitrator or a commissioner under the CCMA or, or any arbitrator or tribunal, for that matter, has no power to give itself jurisdiction over a matter that it otherwise has no jurisdiction on simply because it would be too formalistic or technical to do otherwise or just because it would be unfair to do otherwise. If the approach of the second respondent were permissible, soon the labour relations community would find commissioners of the CCMA

usurping unto themselves powers to deal with disputes which for example are left to this Court to deal with simply because it would be unfair to turn the parties away and tell them the CCMA has no jurisdiction to arbitrate such disputes. To take this one step further, I shudder to think that commisioners or arbitrators could even start dealing with matrimonial matters between a husband and his wife just because the two happen to have an employer - empolyee relationship and on the basis that it would be fair to do so or that it would amount to adopting too formalistic an approach not to deal with such a matter when there is an employment relationship between the parties.

In all the circumstances Par 6 (iii) at p. 15 of the second respondent's award falls to be reviewed and set aside . The applicant did not pursue any costs order and none will be granted. In the premises par 6 (iii) appearing at p.15 of the second respondent's award under CCMA Case no.KN1441 is hereby set aside with no order as to costs.

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R M M ZONDO Judge of the Labour Court of South Africa

Date of Argument : 09 December 1997

Date 0f Judgement : 19 December 1997

For the Applicant : Mr R. D. Haslop

Instructed by : Woodhead Bigby & Irving

For the 4th Respondent: Mr N. J. Rhode`, Legal Officer, NUMSA

No appearance for the 1st, 2nd and 3rd respondents