IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No D146 / 97

In the matter between

REACTOR CLOTHING (Pty) Ltd	**Applicant**
and	
BRUCE ROBERTSON	**First Respondent**
NATAL CLOTHING MANUFACTURERS ASSOCIATION	**Second Respondent**
SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION	**Third Respondent**
BARGAINING COUNCIL FOR THE CLOTHING INDUSTRY (NATAL)	**Fourth Respondent**
TITUS TITO MBOWENI	**Fifth Respondent**

JUDGMENT

Zondo J.

1] Reactor Clothing (Proprietary) Limited ("the applicant"), is a company which carries on business at Tongaat, KwaZulu - Natal and a member of the Natal Clothing Manufacturers Association ("the second respondent"). It has brought an application against the first respondent, an arbitrator, as well as four other respondents. The first respondent was the arbitrator in certain arbitration proceedings which resulted in an award which is the subject of these proceedings. The second respondent is an

employers' organisation whose members are involved in manufacturing clothing in KwaZulu-Natal. The third respondent is a registered trade union which was a party to the arbitration proceedings which form the subject of this application and is the collective bargaining representative of employees employed by many employers (including the applicant) in the clothing manufacturing industry in South Africa. The fourth respondent is the Bargaining Council for the Clothing Industry (Natal). The applicant is a member of the fourth respondent. The fifth respondent is the Minister of Labour.

Background

2] As at May 1993 there were quite a few employers' organisations representing employers involved in the clothing manufacturing industry throughout South Africa. There were also many industrial councils in the clothing manufacturing industry throughout the country to which various employers organisations were party. The third respondent, as a trade union with many members employed in the industry, was party to either all or most of such industrial councils. The result of all this must have been that during the traditional wage negotiation period in any one year the third respondent would be involved in a plethora of wage negotiations in various industrial councils at more or less the same time.

3] In 1993 a number of the employers' organisations involved in the clothing manufacturing industry throughout the country (including the second respondent) came together and concluded an agreement with the third respondent. The object of

that agreement was the establishment of a national bargaining forum for the negotiation of wages and other terms and conditions of employment between the various employers'organisations, and the third respondent. I will refer to this agreement as the 1993 agreement. A copy of that agreement was annexed as annexure "A" to the applicant's papers.

4] Pursuant to the 1993 agreement the parties thereto held wage negotiations for the period 1 July 1996 to 30 June 1997. The agreement which was concluded pursuant to those wage negotiations was annexed as annexure "B" to the applicant's papers. I will refer to this agreement as the 1996 agreement. Clause 2 of the 1996 agreement covered the wage increase which was agreed upon in the national bargaining forum. That clause reads thus:-

"2. **Labour Cost Increase**

2.1 For the Cape, Natal, Transvaal and Eastern Cape regions, the total labour cost increase shall be 9% made up as follows:-

2.1. 1. Wages - 8,5%
2.1. 2. Annual December bonus 0,5%"

5] The 1996 agreement was concluded in October 1996. On a date not apparent from the papers the fourth respondent requested the fifth respondent to promulgate the 1996 agreement in terms of sec 48 (1) of the old Act. The fifth respondent "promulgated" the 1996 agreement in terms of sec 48 (1) of the Labour Relations Act, 1956 (Act No 28 of 1956) ("the old Act) on the 7th February 1997. Dealing with this promulgation, the applicant says the respondent gave effect to the parties agreement "by declaring

the essential terms and conditions contained in the 1996/1997 agreement to be binding in law (sic) in terms of section 48 (1) of the Labour Relations Act, 1956". A copy of the publication which purported to be in terms of sec 48 (1) was annexed as annexure "C" to the applicant's papers. The increase published by the fifth respondent was on minimum wages. It would appear that uncertainty arose among parties to the 1996 agreement as to whether clause 2 of that agreement meant that such increase as was to be effected was to be effected on minimum wages or on actual wages. To bring about finality and certainty on that issue the second and the third respondent concluded an agreement to refer the issue of the meaning of that clause to arbitration. The first respondent was appointed as the arbitrator to arbitrate that issue.

6] The arbitration was conducted on the 19th June 1997 and the first respondent's award was handed down on the 26th June 1997. The first respondents' award was: **" I hereby determine that clause 2.1 of the 1996/1997 National Collective Bargaining agreement shall be interpreted in a manner that requires all employers within the Natal Clothing Manufacturers' Association to increase their total labour cost by 9% for the period covered by the said agreement made up as follows:-**

- wages 8,5%

- annual December bonus 5%"

<u>The issues</u>

7] It is common cause that the applicant only effected the increase on the employees' minimum wages. The third respondent has maintained that this is no compliance with

the 1996 agreement and that the increase should have been effected on the actual wages paid by the applicant to its employees if the applicant were to comply with the 1996 agreement. The applicant has stood its ground and maintained that, in effecting the increase on minimum wage rates, it has complied with the 1996 agreement. On the papers before me it does not appear that the dispute has been about the legal effect of the sec 48 (1) promulgation by the Minister. On the contrary it appears that the applicant, the second respondent and the third respondent all accepted that the 1996 agreement was binding on them and the only issue related to what constituted compliance with clause 2 of that agreement. That probably explains why the dispute which the second and third respondents referred to arbitration before the first respondent was not whether the 1996 agreement was binding but what constituted compliance with clause 2 of the 1996 agreement. That is also probably why in the Notice of Motion the applicant did not include any relief to the effect that the 1996 agreement was not binding but instead sought a declarator that it was not in breach of clause 2 of that agreement. Indeed, the manner in which the applicant has, on its own version, implemented the wage increase is one which had been the subject of dispute between the parties as long ago as August1996 (see par 3.11 of the founding affidavit). As the sec 48 (1) promulgation only occurred on the 7th February 1997 (see the date of Annexure "C" to the founding affidavit), the applicant could not have been influenced prior to February 1997 by the promulgation in terms sec 48 (1) because no promulgation had prior to February 1997 taken place as yet. In fact the letter in which the third respondent declared a dispute is dated the 2nd October 1996. The nature of the dispute is revealed in that letter. In the heading of the letter the dispute is termed: "Failure of the Company to comply with the agreed percentage

increment."

8] In an attempt to try and resolve this issue once and for all the applicant has brought an application to this Court for an order declaring that:-

(a) it is not in breach of the terms of clause 2.1 of the National Collective Bargaining Agreement 1996/1997 entered into by, inter alia, the second respondent and the third respondent, and

(b) that the award made by the first respondent on 26 June 1997 in the arbitration proceedings between the second respondent, on the one hand, and, the third respondent, on the other, has no binding effect on the applicant or alternatively, is of no force and effect. The applicant also seeks an order for costs.

9] With regard to (a) above there can be no doubt that in order for this Court to be able to conclude whether or not the applicant is not in breach of the 1996 agreement, this Court must interprete the agreement and apply it to the facts presented in this case. Accordingly in this matter the Court is called upon to resolve a dispute of interpretation and /or application of that agreement. Mr Cassim, who appeared for the applicant, conceded that the 1996 agreement is a collective agreement as defined in sec 213 of the Act. That being the case, I raised the question with Mr Cassim at the commencement of the hearing whether this Court had jurisdiction to entertain such a dispute. I propose dealing with that issue of jurisdiction right now whereafter I will deal with the first declarator that the applicant is seeking.

Jurisdiction

As I have indicated above the first declarator that the applicant seeks relates to a

dispute of interpretation and /or application of a collective agreement, to wit , the 1996 agreement. As it was common cause that the 1996 agreement is a collective agreement as defined in sec 213 of the Act, the question which arises is whether the provisions of sec 157 (5) read with those of sec 24 (1) - (5) of the Act do not deprive this Court of jurisdiction. Sec 157 (5) says: **" Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration."** The provisions of sec 24 (1) - (5) read as follows:-

" 24. Disputes about collective agreements

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

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or
(c) any party to the collective agreement has frustrated the resolution of disputes in terms of the collective agreement.

(3) The party who refers the dispute to the Commission must satisfy it that

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

(4) The Commission must attempt to resolve the dispute through conciliation.
(5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration."

10] The 1996 agreement does not provide any dispute procedure to be followed in the event of disputes about the interpretation or application of the agreement. Accordingly this is a case where the provisions of sec 24 (2) - (5) would be applicable unless some reason exists which may render those provisions inapplicable to this matter.

11] In response to my question whether this Court has jurisdiction to entertain the applicant's application for the first declarator and whether relief such as that should not be sought through arbitration under the auspices of the CCMA in the light of the provisions of sec 24 (2) - (5) of the Act, Mr Cassim sought refuge in the provisions of item 12 (4) and (5) to schedule 7 of the Act and submitted and that a collective agreement such as this one must be dealt with as if the old Act has not been repealed. Schedule 7 makes various provisions for transitional arrangements. The heading to item 12 is: **"Existing agreements and awards of industrial councils and conciliation boards."**

Item 12 (4) and (5) read thus:-

" (4) Any pending request for the promulgation of an agreement in terms of section 48 of the Labour Relations Act must be dealt with as if the Labour Relations Act has not been repealed.

(5) Any request made before the expiry of six months after the commencement of this Act for the promulgation of an agreement entered into before the commencement of this Act must be dealt with as if the Labour Relations Act has not been repealed."

12] As item 13 may also be relevant, it is convenient to quote it as well. It reads thus:-

" 13 Existing agreements including recognition agreements.

(1) For the purpose of this section, an agreement-

(a) includes a recognition agreement,

(b) excludes an agreement promulgated in terms of section 48 of the Labour relations Act and

(c) means an agreement about terms and conditions of employment or any other matter of mutual interest entered into between one or more registered trade unions, on the one hand, and on the other hand-

one or more employers;

(ii) one or more registered employers' organisations-, or

(iii) one or more employers and one or more registered employers' organisations.

(2) Any agreement that was in force immediately before the commencement of this Act is deemed to be a collective agreement concluded in terms of this Act.

(3) Any registered trade union that is party to an agreement referred to in sub-items (1) and (2) in terms of which that trade union was recognised for the purposes of collective bargaining is entitled to the organizational rights conferred by section 11 to 16 of Chapter III and in respect of employees that it represents in terms of the agreement, for so long as the trade union remains recognised in terms of the agreement as the collective bargaining agent of those employees.

(4) If the parties to an agreement referred to in subsection (1) or (2) have not provided for a procedure to resolve any dispute about the interpretation or application of the agreement as contemplated in section 24 (1), the parties to the agreement must attempt to agree to a procedure as soon as practicable after the commencement of this Act.

(5) An existing non-statutory agency or closed shop agreement is not binding unless the agreement complies with the provisions of this item. Section 25 and 26 of this Act become effective 180 days after the commencement of this item."

13] In dealing with this matter it has to be borne in mind that the 1996 agreement was concluded prior to the 11th November 1996 which is the date when the Act came into operation. It must also be borne in mind that it was only on the 7th February 1997 that

the Minister purported to promulgate certain terms of the agreement. It also seems that the 1996 agreement falls within the ambit of the definition of an agreement in item 13 (1) (c). As that agreement was already in force at the time the Act came into operation, it seems that in terms of item 13 (2) it is deemed to be a collective agreement concluded in terms of the Act. It is clear that the Legislature made a specific provision with regard to agreements concluded, and in force, prior to the coming into operation of the Act and that provision, namely item 13 (2) to schedule 7, seeks to ensure that such agreements would be dealt with on the same basis as agreements concluded after the coming into operation of the Act where such agreements fall within the definition of a collective agreement in terms of the Act. That being the case, it has to go without saying that once such agreements are deemed to be collective agreements, as they must be, all the other provisions of the Act which relate to collective agreements in general will apply to them as well.

14] In terms of sec 24 (1) every collective agreement is required to provide for a dispute procedure to be followed in the event of a dispute between the parties thereto about an interpretation or application of such collective agreement and such procedure must provide for conciliation initially and arbitration thereafter. The 1996 agreement does not provide for such a dispute procedure. In a case such as this one where parties to a collective agreement have a dispute about the application or interpretation of the collective agreement but the collective agreement does not provide for a procedure to be followed in such an event, sec 24 (2) read with sub section (4) requires that dispute to be referred to the CCMA for conciliation. If conciliation is unsuccessful, such dispute is to be referred to arbitration. Altough, by reason of the statutory

provisions I have referred to above, I have reservations whether the Court would have jurisdiction in this matter, I have assumed, without deciding, in favour of the applicant that this Court has jurisdiction. At any rate it may well be that, as the third respondent has specifically requested that this Court addresses the merits of the dispute between the parties and knowing that the applicant also asks this Court to make a ruling on the merits, it can be said that sec 158 (2) of the Act applies. Sec 158 (2) of the Act gives this Court jurisdiction to deal with a dispute (which would otherwise be required to be referred to arbitration) if both parties consent and i.e it is demeed expedient to do so and if that the dispute ought to have been referred to arbitration only became apparent after the dispute had been referred to this Court. In this regard I mention that the issue of this Court's jurisdiction was raised by me at the hearing, on the papers no party had raised it. I would have considered it to be expedient for this Court to deal with the matter. I therefore proceed to deal with the matter on the assumption that the Court does have jurisdiction and also bearing in mind the provisions of sec 158 (2) and the wishes of both parties to have the matter dealt with on the merits.

Is the Applicant not in breach of clause 2.1 of the 1996 agreement?

15] As indicated above, the first declarator which the applicant is asking for is one to the effect that it is not in breach of clause 2.1 of the 1996 agreement. A declarator to that effect is simply another way of declaring that the applicant is complying with clause 2.1 of the 1996 agreement. Accordingly I cannot make such an order without considering whether the applicant is complying with clause 2.1 of the 1996 agreement. As the applicant had effected the increase on the minimum wage rates

earned by the workers and not on their actual wages, the first declarator raises the question whether compliance with clause 2.1 of the 1996 agreement requires that the increase to be effected on actual wages or whether clause 2.1 is complied with when the increase is effected on minimum wage rates. This is the same issue which the first respondent was called upon to deal with.

16] As stated above already, clause 2 of the 1996 agreement says:

"2. <u>Labour Cost Increase</u>

2.1 For the Cape, Natal, Transvaal and Eastern Cape regions, the total labour cost increase shall be 9% made up as follows:-

2.1.1 Wages - 8,5%
2.1.2 Annual December bonus 0,5%"

That clause requires the affected employers to increase their labour cost by 9% made up as 8.5% wages and 0,5% annual December bonus. What is required in order to implement this clause is for an employer to determine what its labour cost was immediately prior to the 1996 agreement being concluded. That done, the employer must determine 9% (0,8% and 0,5%) of such total labour cost and then increase that total labour cost by that 9%. If as the applicant in this case did an employer regarded the minimum wage rate payable to employees as the total labour cost envisaged in clause 2.1, that would quite clearly be erroneous. Accordingly to effect the increase on the minimum wage rates would be no compliance with clause 2.1 of the 1996 agreement.

17] I therefor conclude that the proper meaning of clause 2.1 of the 1996 agreement is that the increase therein envisaged should be effected on the actual labour cost as opposed

to the minimum wages rates. There can simply be no argument that effecting the increase on minimum wages constitutes an increase on an employer's total labour cost. Indeed Mr Cassim did not seek to present such argument. In the light of this conclusion the applicant is not entitled to the first declarator that it seeks, namely, that it is not in breach of clause 2.1 of the 1996/7 agreement. Accordingly its application for the first declaratory order must fail.

18] Whether or not the applicant is legally obliged to comply with the agreement in respect of any issue which is not covered by the publication in terms of sec 48 of the old Act is another matter. This brings me to the case which was argued by Mr Cassim in Court. He submitted that the applicant's obligations with regard to the 1996/7 agreement arose only from the sec 48 (1) promulgation. Mr Cassim continued and submitted that, as the sec 48(1) promulgation only referred to an increase on minimum wage rates and not on actual wages, the applicant had complied with all such obligations as it had in law in regard to the 1996/7 agreement. Mr Pillemer emphasised the fact that what was promulgated by the Minister in terms of sec 48 (1) was not the 1996/7 agreement; it was only certain portions thereof. He emphasised that in effect the promulgation did not embody the crucial aspect of a wage increase as agreed to between the parties in the 1996/7 agreement.

19] Mr Cassim stressed that the gist of his case was that without promulgation in terms of sec 48, the 1996/7 agreement was not worth anything in law and, therefore, no legal consequences flowed from it. He said if he was correct on this, he should succeed but, if he was wrong, then he should fail. I do not agree that the failure or success of

the applicant's case depends on the correctness or otherwise of the submission that the 1996/7 agreement is not a legally enforceable contract. I do not agree because the relief being sought by the applicant is neither a declarator that the applicant is not obliged to comply with the 1996/7 agreement nor is it a declarator that the only increase the applicant is obliged to effect is such increase as was promulgated in terms of sec 48 (1). Subject to one reservation (which I will come to shortly), if the applicant was seeking anyone of those declarators, Mr Cassim would have been correct in submitting that, if I found that in the absence of a sec 48 promulgation, the 1996 agreement did not give rise to any legal consequences, the applicant should succeed and, if I found that it did not give rise to legal obligations, the applicant should fail. The applicant seeks no such declarator in its Notice of Motion and, as no amendment of the Notice of Motion was sought, the applicant is bound by the case made out in his papers. As Mr Pillemer correctly pointed out in his argument, the applicants' case was in effect that the 1996 agreement meant that the increase had to be effected on minimum wage rates, that the Minister got it right when he promulgated an increase on the minimum wages and that, therefore, the applicant had complied with cluase 2.1 of the 1996/7 agreement.

20] As already indicated above I have in this case come to the conclusion that the applicant has not been complying with clause 2.1 of the 1996/7 agreement. In coming to that conclusion I have not necessarily held that the 1996 agreement is legally binding in the absence of promulgation in terms of sec 48 (1) of the old Act. This brings me to the one reservation I referred to above when I said, subject to that reservation, Mr Cassim would have been correct in saying the success or failure of the

applicants' case depended on the correctness or otherwise of his submission that in the absence of a promulgation in terms of sec 48 of the old Act, the 1996/7 agreement did not give rise to any legal obligations. The reservation is that that will not be so if the provisions of sec 31 of the Act apply to the 1996/7 agreement because in those provisions the drafters of the new Act have addressed the problem which existed under the old Act and, without any promulgation, collective agreements are now binding under the new Act. This means that if sec 31 is applicable to the 1996/7 agreement, that agreement has such legal consequences as the new Act provides flow from a collective agreement. If sec 31 of the new Act does not apply, then Mr Cassim is correct in his submission that in the absence of promulgation in terms of sec 48 (1) of the old Act, the 1996/7 agreement did not give rise to any legally enforceable obligations. This would be the case by reason, as Mr Cassim pointed out, of the provisions of sec 48(1) of the old Act and by reason of the judgments in **S.A. Association of Municipal Employers (Pretoria Branch) and Another v Pretoria City Council 1948 (1) SA 11(T) and in Sv Prefabricated Housing Corporation (Pty) Ltd & Another 1974 (1) SA 535 (A)**. Dealing with the legal status of an industrial council agreement under Act 36 of 1937, Dowling J had the following to say at 17 in the Pretoria City Council case:-

> "The representatives of the City Council on the industrial council are in no sense agents with power at common law to bind the City Council by their votes in the industrial council. They are persons with purely statutory functions, and it is only by virtue of the discharge of such functions in the manner prescribed by the statute that their votes can affect the City Council. The so-called industrial agreement is not really an agreement or contract, but a

form of permitted domestic legislation by which the will of a statutory body is by a majority vote imposed on all the members of a designated group of employers and employees, irrespective of any actual concurrence by the individuals affected, and notwithstanding any positive disapproval by any such individual. Moreover, this result ensues only if and when the Minister declares such an agreement binding under sec. 48 of the Act. The representatives of the parties on the council do not forge any contractual ***nexus*****. In my opinion an industrial agreement has statutory-and only statutory-force, and to such statutory force compliance with the statute is essential."**

That dictum was referred to with approval by Trollip JA in the Prefabricated Housing case at 540B. Trollip JA emphasised that an industrial council agreement was not a contract but a piece of subordinate domestic legislation made by the industrial council and the Minister and, said in that respect, it did not differ from by-laws made by the council of a local authority and approved by the Administrator of a province under its Local Government Ordinance or from a wage determination made by the Minister on the recommendation of the Wage Board under the Wage Act. I agree with Mr Cassim that the idea of a legally enforceable agreement co- existing with a sec 48 (1) promulgation of the same agreement is inconceivable. However, again if the 1996/7 agreement is governed by the old Act, then, again, the problem of whether this Court is the right forum rears its head and it may well be that which forum the applicant should have approached must be determined by reference to the law as it was prior to the coming into operation of the new Act.

21] Be that as it may, the applicant has not, as I have said above, sought any declarator that its obligation with regard to the 1996/7 agreement goes only to the extent that such obligation is part of what was promulgated by the Minister in terms of sec 48 (1) of the old Act. At any rate Mr Pillemer pointed out, and this was common cause, that what was promulgated by the Minister in terms of sec 48 (1) of the old Act, was not the 1996/7 agreement.. It therefore seems to me that it may well be that the 1996/7 agreement will become legally enforceable only if and when the Minister promulgates the 1996/7 agreement as concluded between the parties and not something other than what was agreed.

22] Is the second respondent's award binding on the applicant?

The second declarator which the applicant seeks is that the applicant is not bound by the second respondent's arbitration award. Mr Pillemer's approach to this part of the applicant's case was that, if the Court held, as he was submitting it should, that the applicant had not complied with the collective agreement, the need to deal with the issue whether or not the applicant was bound by the arbitration award fell away. I assume that this was based on the fact that the conclusion reached by the Court would have been the same as that reached by the second respondent in his arbitration award and that, therefore, even if the applicant was not bound by the interpretation of the collective agreement decided upon by the second respondent, it would be bound by the same interpretation reached this time by this Court. I did not understand Mr Cassim in his reply to fault this approach. In fact that approach makes sense to me . Accordingly I am of the view that in the light of the conclusion I have reached on the first declarator, the need to deal with the second declarator falls away.

23] In conclusion the application falls to be dismissed. It seems to be appropriate that costs should follow the result as both Counsel argued the matter on that basis too. Accordingly the order I make is that the application is dismissed with costs.

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RMM Zondo

Judge of the Labour Court of South Africa

Date of hearing : 11 December 1997
Date of judgment: 13 February 1998
Counsel for the applicant: Mr N.A. Cassim S.C.
Instructed by: Werksmans, Johannesburg
Counsel for the third respondent: Mr M. Pillemer S.C.
Instructed by Chennells Albertyn and Tanner, Durban
No appaerance for the 1st, 2nd, 4th and 5th respondents