IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASES NUMBER:C114/97

In the matter of:

FOOD & ALLIED WORKERS' UNION	APPLICANT
and	
ERNEST BUTHELEZI	FIRST RESPONDENT
DIRECTOR, COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION WESTERN CAPE PROVINCE	SECOND RESPONDENT
PROF.B. JORDAAN N.O	THIRD RESPONDENT

J U D G M E N T

MLAMBO J

[1] In this matter the applicant seeks to review and set aside an award of the third respondent issued under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the Commission").

The first respondent opposes the application and in turn seeks to have the third respondent's award made an order of court in terms of the provisions of section 158(1)(c) of the Act.

A. The facts

[2] The background facts leading to these applications, are largely common cause. On 12 April 1997 the First Respondent was dismissed by the Applicant, pursuant to disciplinary proceedings wherein he was charged on four counts of misconduct.

[3] After his dismissal, first respondent was advised, and the Court accepts, that he had a right of appeal to the National Executive Committee ("NEC") of the applicant. However, first respondent elected not to exercise his right of appeal to the NEC but instead declared a dispute against the applicant and referred it to the Commission for conciliation. The NEC ratified first respondent's dismissal after he failed to appeal .

[4] He alleged, in his referral to the commission that his dismissal was substantively and procedurally unfair. The conciliation took place but could not resolve the dispute and consequently the Commission issued the certificate contemplated by section 135(5)(a). The first respondent then requested the Commission to arbitrate the dispute.

[5] The third respondent was appointed in terms of section 136 as Commissioner to arbitrate the dispute. The arbitration was set down for hearing on 10 June 1997 but was bogged down by a number of preliminary arguments by both parties**.**
The substantive merits of the matter were not touched. At the end of the day, the third respondent adjourned the arbitration proceedings for hearing to the 25th June 1997.

[6] When the arbitration proceedings resumed on 25 June 1997 the first respondent introduced something akin to an interlocutory application . In this application first respondent requested third respondent to issue a declaratory order that he had a right of appeal, to the applicant's National Conference,which was to meet in three days from then.

[7] Having heard argument on both sides about whether he was empowered to make the declaratory order requested and whether first respondent had a right of

appeal to the National Conference, the third respondent made a declaratory order to the effect that:

declared that Mr Ernest Buthelezi has a right to be heard by the NC at its national conference of June 1997 before it decides wether or not to confirm the decision of the NEC to ratify his dismissal as AGS of the Union."

After this declaratory order was issued first respondent addressed representations to the National Office Bearers (NOB) basically requesting an audience by the National Conference to present his case.

[8] The applicant convened a special NEC on 29 June 1997 to consider first respondent's request. The special NEC decided that it was not possible to allow first

respondent to be heard by the NEC. This decision was based on the applicant's constitution and past practices of not discussing disciplinary matters at National Conference.

B. Review of arbitration awards of the Commission.

[9] The first issue I consider is the review of arbitration awards issued under the auspices of the Commission. Applicant's review application was initially brought under the provisions of sections 158(1)(g). However, in argument Mr Bozalek, counsel for applicant, correctly submitted that the grounds relied on by applicant in this application fell within the parameters of section 145(2)(a). That is, that third respondent exceeded his powers in making the declaratory order and erred in finding that first respondent had a right to be heard at the applicant's National Conference.

[10] Mr Arendse, counsel for the first respondent is correct that the review grounds relied on by applicant were justiciable under section 145. Hence, I remark that the concession was correctly made that this Court should consider the present application

as if it is one brought under the provisions of section 145. The question whether arbitration awards of the Commission are capable of review in terms of section 158(1)(g), did not therefore arise. Suffice to say that I stand by my views in RAYMOND LINDA NTSHANGANE v SPECIALITY STORES CC case number J656/97 that the Act expressly provides for the review of arbitration awards made under the auspices of the Commission in terms of section 145. Section 158(1)(g) provides for the review of anything else performed in terms of the Act. The review of arbitration awards is not permissible under section 158(1)(g).

C. Jurisdiction to issue a declaratory order

[11] Did the third respondent exceed his powers when he made the declaratory order? Mr Bozalek argued that:

1. The third respondent exceeded his powers in terms of section 138(1) in that he did not deal with the substantive merits of the dispute; and that

2.In terms of section 138(7) he exceeded his powers by issuing a declaratory award which did not determine the dispute.Section 142 deals in general with the powers of Commissioners appointed to resolve disputes. Although no distinction is made between conciliation and arbitrationthe powers set out therein are not of assistance in this case.

[12] The following provisions, however, are perhaps relevant to the present inquiry.

Section 138(1) provides that:

"The Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

Section 138(7) provides that:

"Within 14 days of the conclusion of the arbitration proceedings -

(a) the Commissioner must issue an arbitration award with brief reasons, signed by that Commissioner;

(b) ...

(c) ..."

Section 138(9) provides that:

"The Commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award -

(a) that gives effect to any collective agreement;

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes or, is in the form of, a declaratory order."

[13] An interpretation of section 138(1) read with section 138(7) would, in a sense, mean that once a Commissioner, arbitrating a dispute is seized of the matter, he must determine it to finality. This in effect is the effective dispute resolution purpose of the Act.

Section 138(9)(c) however makes it permissible, for Commissioners arbitrating disputes to issue declaratory orders. This should be read with the introductory part of sub rule (9), that the declaratory order must be appropriate.

[14] A careful consideration of the above provisions leads me to the conclusion that Commissioners arbitrating disputes do not simply have to go through the motions in parrot-like fashion in complete ignorance of surrounding circumstances. Commissioners should adopt a purposeful and common sense approach in arbitration proceedings and should consider each and every issue brought before them and dispose of same in a manner appropriate. I am of the view that to deny Commissioners such flexibility will have the effect of straight-jacketing them. This would be unduly restrictive and would lead to undesirable consequences which would defeat the primary objects of the Act.

[15] Whatever Commissioners do should, however, be appropriate in each given situation. When first respondent initiated what may be viewed as an interlocutory

application, third respondent, as Commissioner, had to consider and dispose of it in a manner appropriate under the circumstances. Appropriate would assume the meaning of enhancing the resolution of the dispute.

[16] Presented with such a situation the Commissioner will be guided by what is appropriate under the circumstances and whether the decision he is called upon to make at that point in time gives effect to the primary objects of the Act, such as the effective resolution of disputes.
In such a situation I cannot rule out the possibility of a Commissioner making a declaratory order before he considers the substantive merits of the dispute. I do not therefore agree that the third respondent exceeded his powers when he made a declaratory order before considering the substantive merits of the dispute. It was appropriate under the circumstances to do so.

D Right of appeal to the National Conference

[17] Did the Commissioner however exceed his powers when he issued a declaratory order that first respondent had a right to be heard by the National Conference? The answer, as surmised by third respondent, lies in the applicant‘s constitution.
The applicant utilised the provisions of clause 32 of its constitution when it took disciplinary action against first respondent. I accept that in all disciplinary proceedings initiated by applicant in terms of this clause a final right of appeal lies with the NEC, whose decision is final.

First respondent was aware that he could appeal to the NEC but he elected not to. He was therefore aware of his right and he elected not to exercise it. He accordingly waived his right of appeal to the NEC. Third respondent was correct when he found that applicant’s constitution did not provide for a right of appeal to the National Conference in disciplinary matters.

[18] However clause 7.6 of the applicant's constitution provides that:

"7.6 POWERS

A conference may decide on all matters

submitted to it for consideration. A special conference shall decide on the matter for which the conference was called. A conference shall have the powers of the NEC and the right to vary or reverse any decision of the NEC, or of a regional or a branch meeting.

7.6.1 The agenda of the National Conference shall include the following matters:

7.6.1.1 ...

7.6.1.6 Election of president, first vice-president second vice-president, general secretary, assistant general-secretary and treasurer.

7.6.1.7 Any matter that Conference agrees to discuss."

Third respondent relied on this clause when he found that first respondent had a right to be heard by the National Conference. I accept that the National Conference of the applicant is the supreme law-making structure within the applicant. This structure can reverse or affirm or even vary any decision of any other structure of the applicant such as the NEC.

See Ernest Theron & others v Food and allied Workers Union& Others, Unreported judgment of the Labour Court, case No C52& 53/97 . It is also clear that a reading of clause 7.6 reveals that anything can be tabled for discussion and decision by the National Conference.

[19] A constitution of a union should provide guidance to a member and/or employee of the union about his rights in that organisation. The constitution therefore takes precedence over any other procedure or process developed independently of that constitution. The National Conference as supreme law-making body in the applicant

can have an agenda and issues are placed there in terms of a procedure. Clause 7.6, however, does not limit the agenda issues hence it provides for anything that could be tabled before it for consideration.
Any member or employee should be entitled to bring to the National Conference any issue he feels is important to be considered by the National Conference. The National Conference has a right to consider any matter brought before it for consideration.

[20] It appears to me that the first respondent also had a right for his matter to be considered by the National Conference in the way it considers anything that is brought before it for consideration. Furthermore first respondent's matter originated from discipline. Even though the National Conference might not deal with it as if it is an appeal from a disciplinary verdict and sanction, but as a matter that directly affected first respondent's status and reputation within the applicant, as well as his livelihood, it is implicit that the rules of natural justice have to b adhered to, in particular the *audi alteram partem* rule.
See Theron & andere v Ring van Wellington NG Sending Kerk SA 1976(2) SA 1 (A).
I therefore do not agree that third respondent exceeded his powers when he ruled that first respondent had a right of hearing by the applicant's National Conference.

[21] In dealing with both arguments in general terms, the Court is of the view that because some sections of the Act do permit Commissioners to suspend or stay either a conciliation or an arbitration in an effort to resolve a dispute by other means, in a sense what the third respondent did by issuing the declaratory order, before considering the substantive merits of the matter, was to stay the arbitration proceedings pending whatever happened at the National Conference.

[22] In view of the fact that I do not agree with the arguments raised against the decision of the third respondent the application for review stands to be dismissed with costs.

[23] I now proceed to deal with the application in terms of section 158(1)(c). In this application, first respondent seeks to have third respondent's declaratory order made an order of court. If successful, the applicant also requests this Court to order the applicant to convene a special National Conference to consider his matter.

The purpose of section 158(1)(c) is to enable parties to enforce arbitration awards in their favour where they are not complied with. If the award has already been complied with, it would make no sense to make it an order of court. If an award in itself is a nullity, it can also not be made an order of court. The declaratory order in the present matter was made at a point in time where it was appropriate to do so, that is, the National Conference was to be held shortly, therefore it was aimed for that National Conference. The fact that applicant's NEC blocked first respondent's matter from being considered by the National Conference had the effect of frustrating the award.

[24] That National Conference is now history. It is my view therefore that the declaratory order at this point in time is of academic interest only and it is incapable of enforcement unless the Court also orders that the applicant convene a Special National Conference.

The applicant relies on its Constitution to convene Special National Conferences, and the Constitution also provides mechanisms how National Conferences are to be held and when Special National Conferences should be held.

For this Court to order the applicant to convene a

Special National Conference would, in my view, amount to undue and unwarranted interference in the applicant's affairs.

The drafters of the Act that established this Court could never have contemplated that this Court should also have the right to interfere in the affairs of domestic tribunals to the extent that I am requested to do.

I am therefore of the view that the award is no longer capable of being made an order of court, as it was effectively blocked by the applicant's NEC from being considered by

the National Conference. The effect of this blockade denied first respondent of the opportunity of having his matter considered by the National Conference.

[25] It can, however, still be argued by first respondent in the arbitration that still has to ensue, that his dismissal was procedurally unfair because his matter was effectively blocked from consideration by the National Conference by the applicant.

In the final analysis I am not disposed to making this declaratory order an order of court and I therefore dismiss the application.

[26] Regarding the issue of costs of this application, in particular, the Court must voice its displeasure at the applicant's conduct of deliberately frustrating the effect of the declaratory order. In this instance I point out that at that point in time the applicant had not applied for review of the said declaratory order and therefore had no cause to knowingly disrespect it.
I therefore make no order as to costs relating to
the second application.
I further order that the arbitration proceedings be continued by the Commission before another Commissioner, who should be Senior Commissioner

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HONOURABLE JUDGE D.MLAMBO

For the Applicant: Mr L.J Bozalek
Instructed by Cheadle, Thompson & Haysom Attorneys
For the First Respondent: Mr N.M Arendse instructed

By Chennels Albertyn Attorneys

Date of hearing : 19 February 1998

Date of order : 27 February 1998

Date of full reasons: 6 March 1998