166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: **J190/99**

In the matter between:

WESTERN CAPE WORKERS ASSOCIATION Applicant

And

GANSBAAI MARINE Respondent

JUDGMENT

STELZNER AJ

1. This is an opposed application to have the arbitration award issued by the CCMA in favour of the applicant made an order of this court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the Act").

2. The issue in dispute between the parties at conciliation and the subsequent referral to arbitration, concerned whether or not the applicant had sufficient representation within respondent's work force for the purposes of applicant obtaining the organisation rights referred to in section 13 of the Act, namely the right to have trade union subscriptions or levies deducted from its members wages.

3. It was common cause that the applicant represented 11.8% of respondent's workforce and respondent's argument at the CCMA was that this was not sufficient representation in the context of all the applicable circumstances. It was also common cause that the Food & Allied Workers Union was the majority union at respondent's workplace representing 52.9% of the employees.

4. In terms of the arbitration award of 7 December 1998, which applicant seeks to have made an order of this court, the respondent was ordered to grant to applicant and its members the organisational rights set out in section 13 of the Act.

5. Subsequent to the granting of the aforesaid arbitration award respondent entered into an agreement with the Food & Allied Workers Union, being the majority union, on or about 12 March 1999, in terms of the provisions of section 18 of the Act. The provisions of section 18 of the Act read as follows:

"18 Right to establish thresholds of representativeness:

An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of

representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection."

6. A copy of the agreement (hereinafter referred to as the "threshhold agreement") was annexed to respondent's opposing papers. It is clear *ex facie* the agreement that same complies with the provisions of section 18 of the Act, nor was the applicant's representative able to dispute this in the submissions made at the hearing of the matter.

7. The crisp question before me is thus whether or not the rights afforded to parties by virtue of the provisions of section 18 of the Act can be exercised after an arbitration award has been issued on the subject matter sought to be regulated by the threshhold agreement.

8. Mr Nieuwoudt, who appeared on behalf of the respondent, made the general submission that no arbitration award in respect

of organisational rights can operate in perpetuity. It is quite apparent that facts can change subsequent to the issuing of an award which would either alter the effect of the award or render the award redundant. For example, if a union ceases to be registered then its ability to enforce an award in terms of which it is granted organisational rights will stop despite the fact that a provision to that effect had not at the time been written into the arbitration award. The award ceases to have effect by operation of the law. Mr Nieuwoudt submitted that, in the same way, rights accorded by an arbitration award may cease by operation of the law if an agreement is concluded in terms of section 18 of the Act, provided of course that said agreement complies with the provisions of section 18. I have already mentioned that it is clear that the threshhold agreement in this matter does comply with the requirements of section 18.

9. This court is given a statutory discretion to exercise the various powers conferred upon it by section 158 of the Act, including the power to make an arbitration award an order of court. (See *Jeremiah v National Sorgum Breweries* (1999) 20 ILJ 1055 (LC) at 1058A).

10. In the *Jeremiah* case it is also confirmed that the onus of

persuading the court that such an order is justified rests on the applicant. (At 1059H-I).

11. In this case Mr Nieuwoudt submitted that I should exercise my discretion against making the award an order of court in the light of the threshold agreement subsequently entered into between the respondent and the Food & Allied Workers Union. Mr August, who appeared on behalf of the applicant, argued that it was clear that this agreement had been entered into deliberately in order to frustrate the operation of the arbitration award in that it ought not to be allowed to do so. He thus requested that I nevertheless exercise my discretion in favour of making the award an order of court.

12. The threshold agreement which has been entered into between the respondent and the Food & Allied Workers Union is one sanctioned by the provisions of the Act. It has been accepted that this Act promotes collective bargaining and, further, that the Act encourages collective bargaining in particular between employers and majority unions, or unions acting jointly for this purpose. This principle is endorsed, for example, in the decision which was referred to me by Mr August on behalf of the applicant, namely, *Hospersa & Zuid Afrikaans*

Hospital, CCMA Arbitration, GA637, 3 February 1997, Commissioner Shear. Indeed, the provisions of section 18 of the Act are a prime example of this philosophy of the Act.

13. In the circumstances it appears that it would be inappropriate to exercise my discretion in favour of making the award an order of court. In the first instance such award would have no legal consequences. Secondly, to do so would constitute a waste of the court's time and money, in much the same way as it would be a pointless exercise to make an award an order of court where the facts showed that the award has in fact been complied with. (See the *Jeremiah* decision at 1058C).

14. Mr Nieuwoudt indicated that respondent did not seek a costs order against applicant in this matter. This would appear, in any event, to be pertinently the sort of case where it would be inappropriate to make an award of costs particularly as there is an ongoing relationship between the parties.

15. In the circumstances I made the following order on 19 August 1999:

15.1 The application in terms of section 158(1)(c) is refused.

15.2 There is no order as to costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 19 August 1999

DATE OF ORDER: 19 August 1999

DATE THAT REASONS SUPPLIED:

APPEARANCE FOR APPLICANT: Mr Z August

OF: The applicant union

APPEARANCE FOR RESPONDENT: Mr H Nieuwoudt

OF: