IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

OF INTEREST

CASE NO **D279/02**

DATE HEARD 2003/04/22

DATE DELIVERED 2003/05/02

In the matter between:

FELTEX FOAM CONVERTING, a division of

FELTEX LIMITED Applicant

and

SACTWU First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

P STONE N.O. Third Respondent

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

ON 2 MAY 2003

FOR THE APPLICANT : MICHAEL MAESO OF SHEPSTONE & WYLIE ATTORNEYS

FOR THE RESPONDENT : BRETT PURDON OF BRETT PURDON ATTORNEYS

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JUDGMENT 2 MAY 2003

PILLAY J

[1] The background to this review is that the applicant and first respondent, the South African Clothing and Textile Workers Union ("SACTWU") entered into a collective agreement on 24 February 2002. The material terms of this agreement were the following:

"1. Scope of agreement

This agreement shall be applicable to all employees in grades A3 to B4 employed in the following operations situated in Jacobs:

*Feltex Automotive Trim - Components

- Altex

*Feltex Foam

*Security

2. ....

3. Grades

The parties agree to the implementation of a new entry-level, unskilled grade for all new employees. This grade will become a permanent grade for all new unskilled employees. Only if an employee is promoted to a position that has a higher skill requirement that has been vacated by a higher graded employee, will that employee move to the appropriate higher grade and the equivalent rate of pay.

All new employees will be subject to the same conditions of employment as current employees.

Job descriptions are to be provided upon employment for new employees employed into the entry level grade.

4. ...."

[2] At a pre-trial conference, the issues in dispute for arbitration were agreed in the following terms:

"SACTWU will furthermore ask for an order that Feltex breached the Substantive Wage Agreement dated 24 February 2000 by employing casual employees at a lower rate than the minimum wage prescribed in the agreement. It will further claim that Feltex breached the agreement by allowing casual employees to be so employed by Employ-Rite. This relief is claimed only in respect of the Feltex Foam Converters division at Jacobs."

[3] The grounds of review were based on the submission that there was no evidence of any breach of the substantive wage agreement by the applicant. This was so because the agreement was not applicable to casual employees as they were not employed by the applicant but by a labour broker, the second respondent in the arbitration.

[4] The reference to "all new employees" in the agreement could only have been to persons employed by the applicant direct. In amplification, the applicant submitted that at the arbitration, SACTWU's witnesses had testified that wage rates prescribed in the agreement were not paid to casual employees. The applicant had objected because it was not possible for it to admit or deny that evidence as the casuals had not been identified and SACTWU had provided no further details of their employment, grades or rates of pay.

[5] In these circumstances, it was submitted as a first ground of review, the Commissioner's finding that the applicant was in breach of the agreement was neither rational nor justifiable in relation to the evidence before him.

[6] At the arbitration, SACTWU's failure to identify the casuals and establish that they were its members was raised as an objection to its *locus standi* to claim a benefit for them. The applicant disputed that SACTWU had a direct and substantial interest in the relief it claimed.

[7] The thrust of SACTWU's evidence about the casuals was that the applicant had engaged persons directly as its own employees or through the labour broker, and paid them rates lower than those paid to permanent employees and agreed to in clause 4 of the wage agreement. This the applicant did, despite the fact that casuals did substantially the same work and worked the same hours as permanent employees in the equivalent grade.

[8] The purpose of leading the evidence about the casuals was to establish that the applicant had made use of a labour broker as a stratagem to avoid its obligations in terms of the wage agreement. That evidence for SACTWU was sufficient to put the applicant to its defence to that limited extent.

[9] The cause of action was the alleged breach of the wage agreement. SACTWU's concern was for the implications of that for collective bargaining in respect of the Feltex Foam Converters division at Jacobs. Its cause of action was not to claim the underpayment of wages to the individual casuals. Whether they were members of SACTWU or not was therefore irrelevant to the case made out by SACTWU.

[10] On the evidence, the Commissioner concluded as follows:

> "I, firstly, find that the scope of the agreement in question refers to 'all employees', irrespective of union membership. This is in keeping with the provisions of section 23(1)(d) of the Labour Relations Act, and therefore, I find that the applicant union does have a 'direct and substantial interest' in this matter. The purpose of such an Agreement is not only to secure fair wages for the applicant union's members, but also to regulate the internal labour market at the Jacobs site to prevent the over or underpayment, in terms of the negotiated rate, of employees undertaking the same or similar work as undertaken by union members which, in either case, would be detrimental of the applicant union and its members. MR GORDON's evidence regarding the 'temporary or casual' nature of the persons concerned is unconvincing. The agreement clearly refers to ‘graded’ employees, but clause 3 also states- 'The parties agree to the implementation of a new entry level unskilled grade for all new unskilled employees'. This

grade is clearly the product of collective bargaining and has nothing to do with the Paterson grading scheme. The purpose was to reduce the first respondent's labour costs but according to MR GORDON's evidence the first respondent attempted to reduce these costs still further by creating a 'casual or temporary' designation and subsequently by utilising a temporary employment services agency, the second respondent. There is no collective agreement in place which defines employee beyond - 'all new unskilled employees'. The evidence before me is that whether directly employed by the respondent or indirectly through the second respondent, the persons concerned have been utilised as unskilled workers by the first respondent in its Feltex Foam Converters division and must properly be classified as 'new unskilled employees'. The arrangement with the second respondent cannot be utilised as a mechanism to undermine or by-pass the first respondent's legal obligations in terms of the Agreement concluded on 24/02/2000."

[11] In my view, these conclusions of the Commissioner speak for themselves. His interpretation of the agreement is literal. If its effect is more generous than the applicant intended then the latter should have crafted the agreement to restrict its application to its own employees. It is not as though the applicant had no control over the employees of the labour broker. It could, for instance, have refused to engage its services unless it met the minimum wage rates.

[12] The Commissioner's reference to labour market "at the Jacobs site" is, however, loose and an overstatement, as other divisions of the applicant for which SACTWU enjoys no recognition also operate there. The Commissioner nevertheless restricted his award to Feltex Foam Converters division, which was consistent with his terms of reference.

[13] The casualisation of labour was a disincentive to implementing the new entry level unskilled grade in terms of clause 3 of the agreement. My view in this regard is fortified by the fact that the applicant provides no evidence that by the time of the arbitration it had employed people in the entry grade. Its evidence is that "currently", that is at the

time of delivering its replying affidavit in this review, 25 employees received payment at the entry level grade. This was in response to the evidence in SACTWU's answering affidavit filed in the review, that it had never paid the entry level grade.

[14] The conclusions of the Commissioner, I find, are eminently rational and justifiable on the basis of the material before him. The first ground of review therefore fails.

[15] The award is in the following terms:

> "On the second issue, I find that the first respondent is in breach of the Agreement concluded on 24/02/2000 and order the first respondent to implement the 'new entry grade' for all new unskilled employees employed by the second respondent at its Feltex Foam Converters division."

[16] The first part of the award is consistent with the Commissioner's terms of reference. The second part is not. His terms of reference were merely to issue a declarator. It was not to order specific performance.

[17] Furthermore, the second part is but one of the remedies available on breach. Another remedy could have been to terminate the contract of the labour broker altogether or to restrain the applicant from employing any unskilled casuals directly or indirectly.

[18] The Commissioner should have simply issued the declarator and left it to the parties to bargain the remedy. However, this was not argued before me.

[19] The second leg of the *ultra vires* ground, which I uphold, is that the applicant did not have a contract with the employees of the labour broker. As Mr Maeso for the applicant points out, in terms of section 198(2) of the Labour Relations Act 66 of 1995 (the "LRA"), the labour broker is the employer. The applicant would therefore not have been able to give effect to the award, except with the co-operation of the labour broker.

[20] In the circumstances, the award falls to be reviewed and corrected by the deletion of the second part. Accordingly,

the award is substituted with the following:

> "On the second issue I find that the first respondent is in breach of the agreement concluded on 24/02/2000."

[21] As the applicant is only partially successful, I make no order as to costs.

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PILLAY D, J
21 June 2003.