IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

REPORTABLE

Case Number : D1684/2000

D1214/2002

Revised

In the matter between

M. MHLONGO & OTHERS **APPLICANTS**

and

FOOD & ALLIED WORKERS UNION **1ST RESPONDENT**

SOUTH AFRICAN BREWERIES LIMITED **2ND RESPONDENT**

JUDGMENT

1. The applicants filed an application to review and to set aside a Settlement Agreement concluded between their trade union (the first respondent) and the second respondent (their former employer). The basis of the claim is that although they were members of the first respondent and the first respondent represented them in their dispute, the first respondent had no mandate to settle the dispute on their behalf.

2. The applicants were employed by the second respondent and were

dismissed at various periods. They were all members of the first respondent. The first respondent is a registered trade union. Its members comprise the majority of the second respondent's employees throughout the country.

3. The first respondent instituted unfair dismissal proceedings on behalf of its members. The members on whose behalf the proceedings were instituted included the present applicants. Proceedings were instituted in Durban, Cape Town and Johannesburg.

4. On 26 May 2005, the Legal Aid Board sent a letter to the attorneys acting for the respondent and indicated that its clients had instructed it to take over the matter. The letter further requested to know if the attorneys had any objection. The attorneys responded to the letter on 3 June 2005 and indicated that the first respondent had not terminated their mandate and that they will continue to act on behalf of the union.

5. On 17 August 2005 the Legal Aid Board sent a letter to the second respondent to hold a meeting with the respondent and to establish whether the matter could be settled. A meeting was held between the Legal Aid Board represented by attorney Mr Ngcongo and Mr Kruger representing the second respondent. The meeting was held on 6 September 2005. Some of the applicants attended the meeting. No settlement was reached. The applicants never terminated their membership with the first respondent.

6. On 24 October 2005, the first respondent acting on behalf of its members including the applicants concluded a Settlement Agreement with the second respondent. Some of the applicants accepted the benefits arising

from the Settlement. The first respondent thereafter withdrew the action instituted.

7. The applicants have made three allegations. They have alleged that the third respondent did not have a mandate to negotiate on their behalf. They have further stated that the first and second respondents acted in bad faith by concluding a Settlement Agreement and that the Agreement is not binding on them.

8. I have mentioned that the first issue raised by the applicants is that the union did not have the mandate. This is based on the fact that the termination of mandate was sent together with the list of those people who had terminated the mandate. In terms of Section 200 of the Labour Relations Act, a registered trade union may act on behalf of its members in any dispute. The union is also entitled to be a party to any proceedings if one or more of its members is a party to those proceedings.

9. It was submitted on behalf of the applicants that the right of the union to represent its members is not absolute and therefore limited by Section 23 of the Constitution and that if such right is not limited, it will be open to abuse. It was again submitted that the applicants were not fairly represented. The applicants did not allege in their founding affidavit that they have been unfairly represented by the first respondent in settling the matter. They have not alleged any prejudice. These issues were not foreshadowed in the founding affidavit and cannot be raised in argument. The applicants are bound by the pleadings.

10. The applicants have not pleaded that the right of the union to represent its parties is limited by Section 23 of the Constitution and that if that right is

not limited, it will be subject to abuse. That may well be the case but there is no allegation that the first respondent has abused the provisions of Section 200 which would then require the court to limit such powers. The applicants were granted 12 months compensation in terms of the agreement. The applicants have not demonstrated how the union abused its right.

11. In paragraph 4 of the founding affidavit, the first applicant Mr Mhlongo, alleges that all the applicants were members of the first respondent. In paragraph 6 he alleged that they decided to terminate the mandate of the first respondent. I questioned Mr Ngcongo as to when the mandate was terminated. The response was that it was when the members sent a signed letter with the list of those who were terminating the union's mandate. I then enquired if the applicants ever terminated their membership with the first respondent. His response was that they did and that when the mandate was terminated, the implication was that the membership was also terminated.

12. It is not the applicant's case on the pleadings that the union membership was terminated. The termination of membership must be in accordance with the Constitution of the Union. The termination of mandate cannot imply the termination of the union membership. I reject the submission that the union membership was ever terminated. Mr Ngcongo further submitted that the applicants were no longer members of the union because they had been dismissed and were no longer paying any dues. I reject this submission. Firstly because no Constitution of the Union was produced to indicate if non payment of the membership fees automatically terminates the membership. Secondly, it was the applicants' case that they were members of the union and that the union acted for them. If they were not

members as a result of their dismissals and non payment of the membership fees, as argued by Mr Ngcongo, the union could not act on their behalf. It would then follow that any action instituted by the union on their behalf was invalid as the union acted without a mandate when instituting proceedings.

13. It was submitted that the applicants chose to leave the union and instructed another representative. The problem with this argument is that the applicants did not terminate their membership with the union and that left it open for the union to act on behalf of its members. The termination of mandate did not have an effect as long as the applicants were still members.

14. The union was not an agent of the applicants as one would terminate the authority of an attorney. The union representation is based on the principle of majoritarianism. The employer negotiates with the majority unions. If employees are members of the union, the employer is not required to negotiate with individual employees in addition to negotiating with the union. The applicants now want the company to deal directly with them whilst remain members of the union. The employer is entitled to refuse to deal with them directly.

15. In a matter where the employees are members of the union and the membership has not been terminated, the employees are not entitled to negotiate on their own on certain issues unless the union has refused to act on their behalf or their membership has been terminated. The employer deals with the employees in a collective manner. The submission that the employer could have dealt with the applicants individually is accordingly rejected as having no merit.

16. Mr Bingham submitted that the Settlement Agreement is a Collective Agreement and therefore binds the applicants as members of the first respondent. Mr Ngcongo submitted that the Collective Agreement was concluded after the applicants had been dismissed. A Collective Agreement is defined in Section 213 of the LRA as meaning a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the other hand
    (a) one or more employers
    (b) one or more registered employers' organisation
    (c) one or more employers and one or more registered employers' organisation.

17. The Act does not specify what can be included in a Collective Agreement or what types of agreements qualify to be regarded as Collective Agreements. The Settlement Agreement signed was a product of negotiation dealing with the settlement of disputes pending in various courts. The document dealt with the employment of the applicants. A Collective Agreement binds every person who was a member of the union at the time it became binding. Whether that person continues to be a member of the trade union or employers organisation. In my view, a Settlement Agreement qualifies to be a Collective Agreement.

18. The argument that the respondents acted in bad faith by concluding the agreement cannot stand because the applicants were still members of the union and the union was entitled to act on behalf of its members. In *Mzeku and others v Volkswagen SA (Pty) LTD & others (2001) 8 BLLR 857 (LAC)* at page 857 para 55, the Court stated:

> ‘‘It seems to us that, until an employee has resigned as a member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, generally speaking, entitled, and obliged, to regard the union as the representative of the employee and to deal with it on that basis… even if an employee has resigned as a member of a union, such union remains entitled to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee…”

19. In the light of what I have said, there was no bad faith on the part of the respondents in concluding the agreement. There is no merit in the argument that the agreement is not binding. If the Agreement is binding on the union which was a representative bargaining unit of the employees, it is also binding on the applicants. There was no obligation to consult with the applicants in addition to the union. (See *Baloyi v M.P. Manufacturing (2001) 4 BLLR 389 (LAC)*).

20. The union is entitled to decide how best to protect the interest of its members in general without excluding the others. The union therefore decided that in the circumstances of the matter the best solution was to negotiate compensation and not the reinstatement. It seems to me that to the union, in the best interest of its members, there was no point in insisting on reinstatement. The union cannot be faulted for taking this attitude.

21. In the light of this, the applicants are not entitled to repudiate the collective agreement or escape the consequences thereof by resigning from the union or terminating the mandate when the negotiations do not go in their

favour. The application must therefore fail. The agreement is binding on the applicants.

22. The order I make is the following:

    (a) The application is dismissed.

    (b) The applicants are ordered to pay costs on party and party basis.

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Ngcamu AJ

Date of hearing:	20 October 2006
Date of judgment:	1 November 2006
For the applicant:	Mr A. Ngcongo (Durban Justice Centre)
For Respondent:	Adv Bingham (instructed by Brett Purdon Attorneys)