IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

Case no: D 428/07

D 476/07

In the matter between:

SOUTH AFRICAN MUNICIPAL
WOKERS UNION **First Applicant**

INDEPENDENT MUNICIPAL
ALLIED UNION **Second Applicant**

and

ETHEKWENI MUNICIPALITY **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL **Second Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] The first applicant for the purpose of this judgment, brought an urgent application under case number D 428/07. In that application, the second applicant for the purpose of this judgment was cited as the third respondent.

[2] The said urgent application was brought on 23 July 2007. Nel AJ made the following order:

> 2.1 The matter is adjourned to the opposed roll on 14 September 2007 for argument on final relief.
>
> 2.2 The matter will be heard together with the applications foreshadowed in the third respondent's answering affidavit.
>
> 2.3 It is recorded that the parties have agreed on dates for the exchange of further affidavits.
>
> 2.4 Costs reserved.

[3] It appears that the order was drafted by the parties and adopted by the Court. The unfortunate part with the order is that dates for the exchange of further affidavits were not specified. This led to some affidavits being filed on the eve of the hearing of the matter. During argument, the Court expressed its displeasure in

the manner in which documents were filed.

[4] On 08 August 2007, the second applicant brought its own application under case number D 476/07. The first applicant them became the third respondent in that application.

[5] The first applicant sought the following relief:

5.1 That the respondents be and they are hereby called upon to show cause why the following order should not be made:

(a) That it be and it is hereby declared that the document described as the collective agreement on Divisional conditions of service signed by the first respondent, the third respondent and the applicant and which was dated 29 march 2007 (being annexure "A" to the founding affidavit and hereinafter

called the "Divisional Agreement") is void and of no legal effect.

(b) That the first respondent be and it, is hereby interdicted and restrained from implementing the terms of the provisional agreement.

(c) That the first respondent pay the costs of this application.

5.2 That the interdict in paragraph 5.1 (b) above operate with immediate effect pending the final determination of this application.

5.3 The second applicant on the other hand sought the following orders:

a) The collective agreement on Divisional Conditions of service dated 29 March 2007 being annexure "A" to the

applicants founding affidavit in these proceedings (the agreement) is declared to be null and void and of no legal force or effect.

b) Within 30 days of the date hereof the first respondent is to:

i) Desist from implementing the terms of the agreement.

ii) Do all such things as are necessary to restore the conditions of service of its employees to such conditions as existed as at 31 March 2007.

[6] The second applicant sought other alternative reliefs, which I do not intend to quote for obvious reasons that shall appear later in this judgment.

[7] On the day of the hearing parties agreed to confine the matter to the relief sought in paragraphs 5.1(a) and (b) of the first applicant's notice of motion and paragraphs 5.3(a) and (b) (i)(ii) of the second respondent's notice of motion. The parties further agreed that whatever the outcome, the Court must not make an order as to costs.

Background facts

[8] The first respondent was formed by the amalgamation of about

forty different municipalities. As a result of the amalgamation employees of the former municipalities became employees of the first respondent.

[9] Owing to the fact that the different municipalities did not have uniform terms and conditions of employment, a situation presented itself where different terms and conditions of employment applied within the first respondent.

[10] That situation led to negotiations attempting to find uniform conditions of employment. As it is expected, during the course of negotiations various issues were raised by the applicants. Other issues were discussed separately, at Emergency Services Unit Local Labour Forum. During the course of the negotiations, the first respondent produced a draft agreement, which became the subject of discussion during several workshops. As it is expected various amendments were suggested to the draft agreement.

[11] The Emergency Services Unit Local Labour Forum discussed issues of the Fire and Emergency Services Unit. Certain proposals were made and presented to the applicants. This proposal emanated from the Labour Forum discussions.

[12] On 7 March 2007, the so-called Drakensberg workshop commenced. This workshop was attended by the applicants and the first respondent. One Mr Yunis Shaik acted as a facilitator. The workshop endured until 9 March 2007.

[13] A summary of the workshop discussion was produced (annexure

D to second applicant's founding affidavit). The facilitator as expected made certain proposals (annexure H to second applicant's papers). It appears that after some discussions with shop stewards, on 29 March 2007, the agreement under attacked was signed.

[14] Parties to the said agreement was the first respondent and the applicants. The applicants mainly raised concern that the Divisional agreement contained matters beyond its area of jurisdiction and capacity to deal with. I shall deal with this aspect in detail later.

[15] On 14 June 2007, the first respondent directed a letter to the General Secretary of the second respondent raising concerns about the collective agreement. At paragraph 10 of the said letter the National officer – Collective Bargaining Unit stated the following:

"We therefore submit that these defects go to the heart of the collective agreement in question and as such, the agreement in its entirety must be set aside and the parties recommence negotiations in accordance with the SALGBC Executive Committees resolution of 22 June 2005."

[16] It is therefore apparent that the first applicant was advised to launch an application in this Court.

The first respondent's opposition

[17] The first respondent sought to oppose the reliefs sought by the applicants. In the affidavit deposed to by the Head of Human

Resources Department on 23 July 2007 against the first respondent's application, no points *in limine* were raised. In a further affidavit by the same deponent deposed to on 11 September 2007, the two points *in limine* were raised (paragraph 6 of the aforesaid affidavit). On 30 August 2007, the said deponent deposed to an affidavit opposing the second applicant's application. In that affidavit the same points *in limine* were raised (paragraphs 7 and 8 thereof). The points *in limine* raised by the first respondent relates to lack of jurisdiction and the defence of *lis pendes.*

The issue of jurisdiction

[18] The first respondent contends that the Labour Court lacks jurisdiction to deal with the dispute as it relates to interpretation and application of a collective agreement. In that regard, the first respondent relied on the provisions of section 24 and the provisions of the Constitution of the Bargaining Council. The two applicants resisted the points and simply argued that the relief they seek is declaratory and interdictory in nature and therefore the Labour Court has jurisdiction.

[19] Advocate Van Niekerk SC strenuously argued that the matter had to do with interpretation and application of a collective agreement irrespective of the relief sought. He urged the Court to decline jurisdiction and instead defer the matter to the second respondent.

[20] Both Pillimer SC and Winchester SC argued that much as interpretation of clauses in the constitution comes into play, in

that the Court is asked by them to interpret certain clauses, which shall be dealt with later, in their favour to demonstrate the unenforceability of the agreement under attack, such does not make the matter to fall within the purview of section 24 of the Labour Relations Act.

[21] The Labour Relation Act sets out the jurisdiction of the Labour Court and its powers. Quiet often the distinction between the two (jurisdiction and power) are fudged. Although it follows in my view that once the Labour Court has powers to do certain things, it has jurisdiction to deal with any matter that would lead to it exercising a power it has.

[22] It also follows in my view that once the Labour Court lacks power, it is almost a forgone conclusion that it might not have jurisdiction.

[23] As a matter of course, the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa 1996, and arising from employment and from labour relations. (section 157(2) (a))

[24] Most importantly, the Labour Court has discretionary powers to make an appropriate order, including an interdict and a declaratory order.

[25] The applicants seek a declaratory order and an interdict. The Court fails to understand why, if it possesses the power to dispense with the relief the applicants seek it should lack jurisdiction to do so. It is so that one of the documentary evidence

to be considered by the Court is a collective agreement. The parties sought to place their own interpretation on that piece of evidence.

[26] The fact that they did so does not automatically make the dispute one of interpretation of a collective agreement as contemplated in section 24 of the Act. There is merit in the submission of Adv Winchester SC, that the same route is quiet often travelled by this Court when dealing with matters of section 189 of the Act. In most instances it is found that the procedure allegedly not followed is contained in collective agreements. That in itself may inevitably lead to the issue of interpretation and application of the aforesaid collective agreement. The fact that the Court might interpret and apply the collective agreement does not as a matter of course divest itself with jurisdiction. Section 189(1) (a) for instance creates an obligation to consult with a person set out in a collective agreement.

[27] More often than not, there may be issues of interpretation germane to the dispute of operational requirements dismissal. The fact that such inevitable occur does not mean that the Court shall be barred to deal with that because of the provisions of section 24.

[28] This is absurd and could not have been contemplated by the legislature when section 24 was inserted in the Act.

[29] Section 24 was intended to apply in instances where the collective agreement in question is not attacked (i.e. being *void ad initio*). If it were so, then the provisions of section 24 would not make sense. How does a party invoke the dispute resolution mechanism of a collective agreement it disputes?

[30] Simply put in the applicants' view there is no collective agreement therefore, the dispute resolution mechanism does not exist. Their view is to be tested and accepted or rejected by the Court in a form of issuing or refusing to issue a declarator.

[31] Section 24(1) refers to a collective agreement to contain procedure for resolution of disputes. Surely when the legislature refers to the collective agreement, it refers to a particular collective agreement entered into by the parties which should have in it built in dispute resolution procedure. It does not in the Court's view refer to any other collective agreement. So to the extend that if the very collective agreement is disputed therefore its own dispute resolution procedure is deemed not to exist unless declared valid.

[32] Section 24(2) refers to a dispute about the interpretation or application of a collective agreement. The section does not refer to a dispute about the validity of a collective agreement. Application in this instance refers to application of a valid collective agreement. For an example a dispute about whether a particular valid collective agreement apply to a category of

employees or a unit.

[33] Adv Van Niekerk SC strenuously argued that the provisions of clause 10.4 of the Constitution provides for the procedure contemplated in section 24(1) of the Labour Relations Act. He argued that the applicants ought to have invoked the process set out therein.

[34] The difficulty with that argument is that that clause caters for disputes about application and interpretation of the collective agreement in particular the constitution. The dispute of the applicants is about the validity of a divisional agreement which may be a valid collective agreement once the Court has pronounced on its validity.

[35] The Court did not understand Adv Van Niekerk SC to contend that the Court has no jurisdiction to entertain interdicts and declaratory orders. His contention was the fact that interpretation of a collective agreement comes into play then the Court lacks jurisdiction. This Court can issue a declarator and interdicts (N**UMSA v CCMA and others (2000) 21 ILJ 1634 (LC)**). (Section 158(i)(a) of the Act)

[36] Accordingly the Court has jurisdiction.

The defence of *Lis Pendes*

[37] The first respondent contents that a dispute about the interpretation

and application of a collective agreement is pending at the second respondent and accordingly the Court must refuse to entertain the matter.

[38] That contention faulters on two grounds:

[39] Firstly, in Adv Van Niekerk's SC's submission what is pending before the second respondent is a dispute about interpretation and application of a collective agreement, whereas the matter before court is about the validity of an agreement. It therefore follows that the dispute about the validity of an agreement does not pend with the second respondent.

[40] Secondly the very second respondent deferred the dispute if it was the same to this Court.

[41] The plea of *lis pendes* is competent if there is pending litigation between the same parties based on the same cause of action before the same court or another court with equal competence. (**Van As v Appolus 1993 1 SA 606 (C)**, **Cook v Muller 1973 2 SA 240 (N)**, **Mtshali v Mtambo 1962 3 SA 469 (C)** and **Nestle (Pty) Ltd v Mars Inc 2001 4 SA 315 (A)**). Accordingly the Court is not precluded to deal with this matter.

[42] The last point raised only in the heads which somewhat challenges the relief sought *per se* is that of lack of tender of return of the benefit (*restitutio in intergrum*).

[43] According to Adv Van Niekerk SC, the relief is fatally defective in that there is no tender of restitution. I do not agree. How can the applicants tender restitution when they do not know that the

Court will invalidate the agreement. If the agreement is found to be valid, then the need for restitution falls by the way side. This is not a matter where a party seeks rescission or cancellation of a valid agreement for some other reasons.

[44] Accordingly lack of tender is not bar to the relief.

Is the Divisional agreement void?

[45] The applicants contended that it is void. The first applicant argues that the agreement is invalid for want of compliance with procedure. Further and only in the alternative that it contravened clause 4.2 of the Bargaining levels Agreement in that it dealt with issues it ought not to have dealt with.

[46] On the other hand the second applicant argued in the main that the agreement is void in that it is *ultra vires* and in the alternative there was lack of process.

[47] Adv Van Niekerk SC, argued passionately that the agreement is not void. He suggested that the agreement was a duplicate of issues already dealt with by the National Council.

[48] Adv Winchester SC, disagreed and pointed out that the National Council Agreement does not deal with such issues. He pointed to the retirement age issue as an example.

[49] Adv Winchester SC argued that clause 3.1.2 should be interpreted to mean that only the council has powers to deal with three issues

(namely wages, conditions of employment and matters of mutual interest)

[50] In terms of clause 3.1.15, the council has powers to delegate any of its functions to divisions, committees or employees through collective agreement. He argued that on 5 November 2003, the council invoked the provisions of clause 3.1.15 through the Bargaining Levels Collective Agreement.

[51] He argued that clause 4.2 of the said Bargaining Levels Agreement was superfluous in that clause 3.1.2 properly interpreted caters for such.

[52] Pillimer SC pegged his submission on clause 3.2 of the Constitution of the Bargaining Council. In his submission, the division is empowered to deal with issues reserved for council provided a process is followed.

[53] Winchester's submission is that the process contemplated in 3.2 relates to an issue outside the three referred to earlier (wages, conditions of employment and matters of mutual interest). I do not agree with this interpretation particular if regard is had to the phrase "all matters of mutual interest". There exist no chance for the fourth issue. Nonetheless nothing turns on this point.

[54] Van Niekerk SC also raised the point of estoppel. He argued that by their conduct, the applicants are estopped from raising lack of

authority. He relied on the decision of **Samancor v Numsa (2000) 21 ILJ 235 (LC)**. He submitted that the applicant bargained in a *mala fide* manner.

[55] In the Court's view there is merit in the submissions of Winchester barring the one submission referred to earlier. It therefore follows that even on Pillimer's limited submission of lack of process, the agreement is in breach of the provisions of the Constitution as it stood at the time.

[56] Having accepted Winchester's argument, it follows that the divisional agreement exceeds powers delegated to it by the bargaining levels agreement. The argument by Van Niekerk SC that the agreement was simply for convenience as it documented the agreement at National Council has no merit. Other than a bold allegation that the agreement is not void, there is nothing to suggest that clause 3.1.2 properly interpreted empowers only the council unless it delegates. Further there is nothing to gainsay the fact that the delegation is limited to issues in clause 4.3. of the bargaining levels agreement. It is apparent that the document on page 348 in the second applicant's papers has no relevance to the issue set out in the Bargaining levels agreement.

[57] Therefore what remains is the consequences of such breaches and excess of power. I shall deal with that hereunder.

[58] In **Messenger of the Magistrate Court Durban v Pillay 1952**

(3) SA 678 (A) at 682, the following was said:

"The cardinal rule is still that stated in ***Standard Bank v Estate Van Ryn 1925 AD 266 at p274****: "After all what we have to get at is the intention of the legislature…" I based my decision upon the whole scope and purpose of the statute, and upon the language of the section to which I specifically referred…"*

[59] In **Sutter v Scheepers 1932 AD 165**, Wessels JA stated where the word shall is employed then there is no discretion.

[60] The matter before me calls for the consideration of the collective agreement (Constitution of the Council and Bargaining levels agreement). The matter is not about interpretation and application in the sense contemplated in section 24 of the Act.

[61] Clause 3.2 specifically states that negotiations on issues in 3.1 (wages, conditions of employment and all matters of mutual interest) shall be concluded in the central council. It is clear that the provisions are peremptory. There is no dispute that the divisional agreement dealt with conditions of employment.

[62] Clause 4.3 of the Bargaining levels agreement in particular states that in furtherance of the intent to establish uniform conditions of service the following matters shall be the subject of collective bargaining at divisional level only. Those matters are listed. It can only follow that dealing with any other matters outside 4.3 is prohibited if clause 4.3 is read in conjunction with clause 3.2 of the Constitution.

[63] In **Schierhout v Minister of Justice 1926 AD 99 at 109**, the following was said:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect"

[64] See **Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)**.

[65] In **Amalgamated Society of Woodworkers of SA and another v Die 1963 Ambagsaalvereniging 1967 (1) SA 586 (T) at 595 C**, the court held:

"In my view there is no escape from the conclusion that second plaintiff acted ultra vires when donating the R16 218, to defendant. The donation itself was therefore void ab initio".

[66] In **Abrahamse v Connock's Pension Fund 1963 (2) SA 76 (W)**, the court held that a defendant could not be estopped from denying that plaintiff was a member of the pension fund if it had entered into such a contract with him, such contract would have been *ultra vires* and the defendant could not be bound by estoppel to do anything beyond its legal capacity. It therefore follows that the estoppel point must fail.

[67] In **Amalgamated Union Building Trade v SA Mason's Society 1957 (1) 440 (A)**, the Appellate division as it then was found that the executive committee of the union was empowered by its own Constitution to enter into an agreement.

[68] In **Rootes v Mundawarara 1973 (2) SA 442 (R)**, the court in

applying the maxim *ex turpi causa non oritur actio*, refused to enforce an illegal agreement (see **Gibson v Van der Walt 1952 (1) SA 262 (A)**).

[69] In **Rugnath v Jokoy Orie 1949 (1) SA 570 (D)**, the court agreed to declare a contract null and void where there are no considerations of public policy against such a course (**Jaybhay v Cassim 1939 AD 537**). Public policy considerations were not argued by Van Niekerk SC. It was never the contention of the first respondent that Public policy demands enforcement

[70] Having considered the authorities referred to above, I am left with no option but to declare the agreement null and void *ab initio*. The Court cannot even consider severability (see **Katz v Efthimiou 1948 (4) SA 603 (O)**, and **Roffey v Catterall, Edwards and Goudre' (Pty) Ltd 1977 4 SA 494 (N)**).

Order

[71] In the result I make the following order:

1. The collective agreement on Divisional conditions of service dated 29 March 2007 is hereby declared null and void and of no legal force and effect.

2. No order as to costs.

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G N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 14 September 2007

Date of Judgement: 26 September 2007

APPEARANCES;

For the First Applicant: Pillemer SC

Instructed by: Shanta Reddy Attorney

For the Second Applicant: A Winchester SC

Instructed by: Futcher Attorneys

For the First Respondent: G Van Niekerk SC and P Schuman

Instructed by: Shepstone and Wylie Attorneys