IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No: D 812/06

REPORTABLE

In the matter between:

JUNID MANUFACTURING CC	Applicant
and	
NATIONAL BARGAINING COUNCIL FOR THE CLOTHING, MANUFACTURING INDUSTRY	First Respondent
BRUCE ROBERTSON NO	Second Respondent
SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION	Third Respondent
INDIVIDUAL EMPLOYEES	Fourth and Further Respondents

JUDGMENT

MOSHOANA, AJ

INTRODUCTION

[1] This is an application brought in terms of Section 145 of the Labour Relations Act. The Applicant brought the application basically on two grounds namely:-

1. That the First and Second Respondent had no jurisdictional power to arbitrate the dispute that had been referred by the Third and Fourth Respondent

2. That the Second Respondent arbitrator acting under the auspices of the First Respondent reached a decision that a reasonable decision maker could not reach.

BACKGROUND FACTS

[2] On 25 January 2006 the Third Respondent referred a dispute to the First Respondent and couched same as a unilateral change to terms and conditions of employment as contemplated in Section 64 (4) of the Labour Relations Act. In summary of facts, the Third Respondent stated that the employer party decided to place plus minus sixty (60) employees on a lay off without any consultation. The Third Respondent sought the following as a relief:-

"The employer to restore the terms and conditions of employment that applied before the change".

[3] Whilst that dispute is pending as it were, the Third and Fourth Respondents brought an application to this Court for an interdict in terms of Section 64, alleging an unlawful lockout. An order on an interim basis was issued, however it was discharged on 20 March 2006. Two days after the discharging of the rule, a referral was made by the Third and Fourth Respondent's Attorneys. In that referral the dispute was categorised as:

"other remuneration issue claim for unpaid wages for period Applicants on short time (non-metro area) 12 – 01 – 06 to 10-02-06."

[4] In the summary of facts, the said referral stated that applicant told the individual employees on 10 January 2006, that they were to be laid off from 12 January 2006 to 10 February 2006, no consultation was followed. On 10 May 2006, the conciliating commissioner categorised the issue in dispute as *"Main Agreement and Arrear Wages".*

[5] The Third and Fourth Respondents then referred the matter to arbitration where upon Second Respondent was appointed as the arbitrator. On the very first day of the hearing a debate ensued

between the parties, concerning the true nature of the dispute that was placed before the Second Respondent. The Second Respondent concluded that debate on the basis that the matter falls under Section 24, since he has been called upon to interpret and apply a Collective Agreement. In terms of Section 24 of the Labour Relations Act, he has jurisdiction to hear the matter. He continued to hear the matter and came to a finding that the Applicant should apply the main agreement and ordered the Applicant to pay each of the employees listed in the attachment to the conciliation referral dated 22 March 2006 4.4 times the amount reflected against that employee's name in that attachment. He made no order as to costs.

[6] The Applicant aggrieved by the award brought an application for review.

THE ISSUE OF JURISDICTION

[7] In my view, a finding on this aspect is dispositive of the review application. It might not be necessary to consider the other grounds of review raised in this matter. The Applicant states that the true nature of the dispute is that of unilateral change of conditions of employment. Such could be confirmed with reference to the first

referral. Further traces of the true nature of the dispute could also be found with reference to the application that was brought in this Court, wherein the alleged change of terms and conditions of employment was referred to as an unlawful lockout. Further traces of that could also be found in the subsequent referral completed by an attorney acting on behalf of the Respondents. It is apparent that the Second Respondent with all such traces came to the conclusion that because the conciliating commissioner had described the dispute as Main Agreement/Arrear Wages, it followed that the dispute is about the interpretation and application of the Collective Agreement and accordingly he had jurisdiction to hear the matter.

ARGUMENT

[8] In court, the Respondent's representatives, who happens to be the person who completed the referral form, when referred to page 90, being the second referral form which had a block for Section 24(2) referrals, which was not ticked, she conceded that, that was her mistake and that she ought to have done so. She completed the referral form with reference to an award by the Bargaining Council in another matter, wherein the ruling on jurisdiction was issued on 23 June 2005. She relied on the following passage:-

"*With regard to non-metro area, the main agreement from non-metro areas, alarmingly does not contain any reference whatsoever to short time, except for a passing reference relating to the matter in which deductions are to be made from the employee's weekly wage. Accordingly, in the absence of a Collective Agreement which permits the implementation of short time in periods of slack trade or in the absence of an individual agreement with each employee, an employer who operates in his business in a non-metro area may not unilaterally place an employee on short time. Any employee who is placed unilaterally on a short time then has a claim against the employer for wages for the period that she or he was placed on short time.* ***This claim should be lodged as remuneration issue with the Bargaining Council. (Where no Bargaining Council exists this claim should be lodged with the Department of Labour as a, breach of the obligation to pay wages contained in Section 32 of the Basic Conditions of Employment Act of 1997)***"

[9] She submitted that since there was a certificate of outcome, then on the basis of the decision of the Labour Appeal Court in **Fidelity Guards**, which was subsequently followed in the decision of **EOH-ABANTU (Pty) Ltd v CCMA and Another 2008 7 BLLR 651 (LC)**, there was jurisdiction. According to her submission, once a certificate

is issued then the necessary basis for jurisdiction to arbitrate exists. She conceded on a proposition by the Court that in instances where a certificate sets out that an arbitrator can arbitrate an issue of divorce, since the arbitrator does not have powers to deal with the issue of divorce, the fact that a certificate has been issued does not necessarily cloth the arbitrator with jurisdiction and powers to determine divorce proceedings.

[10] She further made submissions in relation to the second ground of review, which I am not going to place much emphasis on, given the view I take at the end. On the other hand the Applicant's representative was steadfast on the point that the arbitrator lacked jurisdiction and the award is in any event not one which a reasonable commissioner could reach even if he had jurisdiction.

ANALYSIS

[11] As pointed out earlier in this judgment, my approach is to determine this Review Application on the first ground only. In my view the first ground is a good ground, in that the Second Respondent lacked jurisdiction to entertain the dispute. What is apparent to the court is that the Second Respondent decided on his own to label the dispute

between the parties as one of Section 24 and clothed himself with jurisdiction in terms of Section 24. As a point of departure, the Second referral was done by an attorney, who if the dispute was about the interpretation and application of the Collective Agreement would have ticked the box relating to Section 24 (2) as set out in page 90 of the Bundle of documents. It does not take the Second Respondent, because of his knowledge of the industry and the Main Agreement as submitted by the Respondent's representative, to determine what the dispute between the parties is. Considering his award as a whole, it is clear he sought to order application of the Main Agreement simply because the short time was implemented without consultation.

[11] This reasoning does not make sense and can only point to the fact that he did not have jurisdiction to determine the true dispute, which was that the Applicant had changed the terms and conditions of employment without consultation. The Second Respondent was well aware of the fact that, that being the true dispute between the parties, he did not have jurisdiction, hence an attempt to find one, by labelling the dispute as the interpretation and application of the Collective Agreement. That was not the dispute between the parties. The fact that that is so, is borne out by various instruments which were

presented before him, being the referrals and most importantly an application to this Court to challenge the said short times, albeit labelling that as unlawful lockout. All of that centres around the very first dispute referred in terms of Section 64(4). It therefore follows that the Second Respondent upon seeing the certificate that makes reference to Main Agreement, whether it is about its application or its interpretation it is not clear, concluded wrongly so that there is jurisdiction. The certificate itself was most confusing, in a sense that it refers to the main agreement and arrear wages. Surely the issue of arrear wages cannot be one arising from Section 24 of the Labour Relations Act. Accordingly in the Court's view, the First Respondent together with the Second Respondent lacked jurisdiction to entertain the true dispute between the parties. The dispute between the parties is that of unilateral change of conditions of employment and same can only be resolved by other ways other than arbitration. (See **Fraser International Removals v CCMA and Others (1999) 7 BLLR 689 (LC)** at 696 para 47, and **SARPA and Others v SA Rugby Ltd and Others (2008) 29 ILJ 2218 (LAC)** at 2230 para 41). On the other hand the Court raised an issue with the representatives whether the fact that this Court has already discharged the rule nisi, such impacted on jurisdiction as well, in the sense that what the commissioner was to determine was already determined by this

Court? This Court has found no basis to conclude that there was an unlawful lockout. In the Court's view, the dispute is the same, in the sense that the Second Respondent actually went on to conclude that because there was no consultation, referring to Section 189 of the Act, the short time in effect is unlawful and ought not to have been implemented. This is what the Respondents were seeking in this Court, albeit they called it an unlawful lockout. When that issue was raised, the Respondent's representatives contended that this Court per Pillay J directed the Respondent to refer the dispute to the Bargaining Council hence, they chose that course. I need not entertain that contention, but what matters is that on 20 March 2006, the rule was discharged and such is as good as a dismissal of the claim. Even if none of the parties at the arbitration proceedings had raised this, in **Maepe v Commission for Conciliation and Arbitration and Another 2008 29 ILJ 2189 (LAC)** Zondo JP had the following to say:-

"The answer to this argument is that where the law is that commissioner must take into account a certain factor in deciding a certain question he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take that into account. If the factor was a critical one and he

did not take it into account he may well have committed a gross irregularity justifying the reviewing of his award".

[12] In the Court's view, the fact that another forum higher than the First Respondent had already dismissed a claim, which suggest that the short time was done unlawfully is a critical factor that should have reigned supreme in the mind of the Second Respondent, particularly where he had to establish whether he had the necessary jurisdiction. The following passage in the award clearly indicates that what concerned the Second Respondent was the legality or otherwise of the short time:-

"For so long as the employment contracts were in existence, the employer could not unilaterally impose short time without the employee's consent. This is consistent with the case of retrenchment which requires an employer to legally terminate the employment contract in order to escape from obligations emanating from that contract if alternatives are not agreed. It is not in dispute in this case that no agreement existed to implement short time either in the applicable Main Agreement or in terms of the agreements reached with employees or their representatives. Had the employer engaged in meaningful consultation with employees and their representatives

it would have provided the opportunity to agree on a short time working

Arrangement. By its action, the employer in my view provided no opportunity for such agreement to be reached".

[13] Since the Second Respondent was concerned with the legality of the short time, it is clear that his contention that he has jurisdiction to determine this dispute because of Section 24 is incorrect. If indeed the dispute was about the interpretation and or application of the main agreement, I want to believe that issues relating to the legality of the short time could not have been raised. These issues of the legality of the short time are consistent with the first referral, being that there was a change of terms and conditions of employment, are consistent with the fact that employees were subjected to an unlawful lockout. All of this, it appears, did not matter to the Second Respondent when he decided to cloth himself with jurisdiction simply because a certificate exists, which vaguely refers to Main Agreement and Arrear Wages. In my view, the arbitrator did not have jurisdiction. In fact it shows that he had not taken time to consider whether he had the necessary jurisdiction, having seen the word "Main Agreement" and knowing that Main Agreement would be a Collective Agreement,

then he just thought of Section 24 and accordingly clothed himself with jurisdiction. In **SAPRA**, *supra* the LAC said:

"The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary".

CONCLUSION

[14] As I have pointed out earlier, I uphold the fact that the First and Second Respondent did not have jurisdiction and accordingly the award itself is more of a nullity in that it was issued in instances where the arbitrator did not have powers to do so. However in this matter what the commissioner did was to create a dispute on behalf of the parties so as to cloth himself with jurisdiction. That in my view he cannot do. It is a misconduct on his part actually.

[15] In **NUMSA v Driveline Technologies (Pty) Ltd and Another (2004) 4 SA 645 (LAC)** at 655, Zondo AJP as he then was stated the following:-

"What parties are bound by is the correct description of the real dispute that was referred to conciliation."

[16] As I have already found, the real dispute that was referred for conciliation was about the unilateral change of the terms and conditions of employment. Even if I were to accept that the real dispute is about the arrear wages, I find no basis upon which issues relating to arrear wages can be issues regarding interpretation and application of a Collective Agreement. The arrear wages issue could be an issue to be dealt with by the Department of Labour, regard being had to Section 32 of the Basic Conditions of Employment Act.

[17] In the result I make the following order:-

1. The award issued by the Second Respondent is hereby reviewed and set aside;
2. The First Respondent lacked jurisdiction.
3. The Third and Fourth to Further Respondents are ordered to pay the costs of this application jointly and severally the one paying absolving the other

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 11 November 2008

Date of Judgment: 18 December 2008

APPEARANCES

For the Applicant: C Haralambous from Haralambous Attorneys

For the Respondent: J Harries from Brett Purdon Attorneys