REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 769/10

In the matter between:

SGT PEPPER'S KNITWEAR	**First Applicant**
ABBEY ROAD FASHIONS CC	**Second Applicant**
and	
SACTWU	**First Respondent**
NATIONAL BARGAINING COUNCIL FOR THE CLOTHING INDUSTRY	**Second Respondent**
REGISTRAR OF LABOUR	**Third Respondent**
MINISTER OF LABOUR	**Fourth Respondent**

Heard: **23 February 2012**

Delivered: **29 February 2012**

Summary: Constitutional challenge – LRA s 105 – *locus standi* of employer to challenge independence of trade union in terms of LRA s 95.

JUDGMENT

STEENKAMP J

Introduction

1] The applicants challenge the constitutionality of s 105 of the Labour Relations Act.[1] That section reads as follows:

> "**105. Declaration that trade union is no longer independent.—**
>
> (1) Any registered trade union may apply to the Labour Court for an order declaring that another trade union is no longer independent.
>
> (2) If the Labour Court is satisfied that a trade union is not independent, the Court must make a declaratory order to that effect."

2] The applicants are small clothing manufacturers. They claim that the South African Clothing and Textile Workers' Union (SACTWU, the first respondent) is not independent. Although the basis for the claim is difficult to follow, it boils down to this: SACTWU is not independent because it controls a major clothing manufacturer, Seardel, through its shareholding in Hosken Consolidated Investments (HCI); HCI is the major shareholder in Seardel; and therefore SACTWU controls the Bargaining Council (the second respondent). The compliance orders issued by the Bargaining Council – which are binding on the applicants – are therefore unlawful.

3] The applicants were previously before this court (albeit in a slightly different guise in the case of the first applicant). On 19 August 2010, Basson J made an order[2] dismissing the applicants' claim on the basis that they had no *locus standi.* She also ordered the applicants to pay the respondents' costs on an attorney and client scale.

4] The reason for the applicants' lack of *locus standi* is that they are employers and not trade unions. In terms of s 105 of the LRA, only a registered trade union may apply to the Labour Court for an order declaring that another trade union is no longer independent.

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1 Act 66 of 1995 ("the LRA").

2 Case no C 323/2010, Labour Court, Cape Town, 19 August 2010.

5] The applicants now argue that the section is unconstitutional. They say that it falls foul of s 34 of the Constitution[3]. That section reads:

> "**34. Access to courts.**—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

6] In other words, the applicants can only argue their case if they have *locus standi* to do so; and in order to achieve that objective, they ask this Court to declare s 105 of the LRA unconstitutional.

7] This court has the jurisdiction to do so in terms of s 157(2) of the LRA. Whether the applicants have made out a case for the relief sought, is a different question.

8] The applicants seek the following relief:

> "1. An order that section 105(1) of the Labour Relations Act 66 of 1995 be declared invalid in terms of the Bill of Rights, section 34 of the Constitution, Act 108 of 1996 [*sic*], read with section 38 of the Constitution.
>
> 2. A declaratory order that SACTWU fails to be an independent trade union in terms of section 95(1)(d) [of the LRA], since June 2001.
>
> 3. An order that SACTWU's failure to be independent as a trade union, disqualifies the Clothing Bargaining Council as a bona fide bargaining council.
>
> 4. An order that the enforcement of the Main Agreement by the Bargaining Council is void and unlawful.
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> 5. An order that prejudice suffered by the applicants in the form of patrimonial loss since 2001, be compensated by the Bargaining Council.
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> 6. An order for interim relief that compliance with the Main Agreement not be enforced by agents of the Bargaining Council, pending verification by the Constitutional Court of the anticipated declaration of section 105(1) as invalid in terms of the Bill of Rights".

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3 Constitution of the Republic of South Africa, 1996.

9] SACTWU is cited as the first respondent and the Bargaining Council as the second respondent. The "Registrar of Labour" – clearly meant to designate the registrar of labour relations appointed in terms of s 108 of the LRA – and the Minister of Labour are cited as the third and fourth respondents respectively. Mr *Kahanovitz*, who appeared for the third and fourth respondents, informed me that the Minister opposes the application but the Registrar abides the decision of the court.

10] The respondents have raised a number of preliminary arguments. Before I deal with those, it will make for a better understanding of the dispute against a brief consideration of the background facts.

Background facts

11] The first applicant is a clothing manufacturing subcontracting business, apparently wholly owned by Mr JJ Visser, who appeared on behalf of both applicants in these proceedings. Mr Visser informed me from the bar that he is also the "managing member" of the second applicant, Abbey Road Fashions cc, another clothing manufacturing subcontracting business operating from 18 Collinwood Road, Observatory.

12] The applicants complain that SACTWU is not independent from Seardel, a major clothing manufacturer. They allege that SACTWU, through its shareholding in Seardel, has become "the de facto owners of Seardel". The applicants, though non-parties to the Bargaining Council, say they are bound by the Main Agreement reached by parties to the Council (apparently because the Main Agreement is extended to non-parties falling within the scope of the Council).

13] Their bone of contention is that SACTWU "sits on both sides of the fence", as employer and trade union, with the result that the Bargaining Council enters into agreements that are extended to non-parties and that parties such as the applicants find it difficult or even impossible to comply with. And some suppliers of work, to their credit, refuse to source garments from the applicants if they are non-compliant.

14] The applicants go so far as to allege that "the business" – without specifying whether they refer to one of the applicants – "was starved and was forced to close down". Unfortunately the applicants provide no details or proof of this state of affairs, despite having been invited to do so by the respondents in their answering affidavits. Neither do the applicants provide any details of their employees (if any), and whether they are members of SACTWU. The applicants did not file any replying affidavits, despite a number of factual and legal disputes having been raised by the respondents.

15] Mr Visser informed me from the bar that the first applicant is no longer trading; yet he states in his founding affidavit that "the business recovered and since August 2009 ... starving of the business of work by Bargaining Council officials is repeated and compliance is enforced, even though one party to the Council sits on both sides of the collective bargaining table."

The factual situation

16] In the absence of any replying affidavits, I am bound by the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[4] The factual situation that is set out in SACTWU's answering affidavit – and thus stands uncontested – is that SACTWU owns 39% of the issued share capital in HCI. HCI, in turn, owns 100% of Fulela Trade & Invest 96 (Pty) Ltd, which in turn owns 100% of Fulela Trade & Invest 81 (Pty) Ltd. The latter entity is a 70% shareholder in Seardel. Seardel is a group of companies with significant interests in the clothing and textile industry, but it is also involved in the manufacture and distribution of office automation, consumer electronics, toys, games and stationery. Apart from clothing and textiles, HCI is involved in media and broadcasting, casinos, hotels and leisure, transport, energy, food and beverages, mining, financial services, property and technology.

17] While the 39% of shares in HCI are held by SACTWU, no SACTWU official has any shares in HCI. The shareholding in HCI – and indirectly in

4 1984 (3) SA 623 (A) at 634 H-I.

Seardel – does not affect the independence of the union. There is no "sweetheart" relationship between the union and Seardel; and the union engages entirely independently from its investments, its investment trust and its investment group in the annual negotiations at Bargaining Council level.

Preliminary points

18] The respondents have raised a number of preliminary points in their answering papers. The applicants did not deal with these points in reply. Mr *Visser* nevertheless dealt with them in argument.

Locus standi

19] Quite apart from the provisions of s 105 of the LRA, the respondents raise the question of the applicants' *locus standi* in these proceedings.

20] Mr Visser, the deponent to the founding affidavit, describes each of the applicants as "a clothing manufacturing subcontracting business". The first applicant (Sergeant Pepper's[5]) purportedly "operated until April 2007" from an address in Maitland; the second applicant has its principal place of business in Observatory.

21] In his heads of argument, Mr Visser changed the citation of the first applicant to "JJ Visser trading as Sgt Pepper's Knitwear". But there was no application to change the citation in terms of rule 22. He informed me from the bar that he is the sole proprietor of Sgt Pepper's and that it is no longer in business; and that Abbey Road is a close corporation comprising three members of which he is styled as the "managing member". None of this information was backed up on affidavit or by way of annexures such as the relevant CK forms, despite invitations from the respondents in their replying papers to do so. And to add to the confusion, the first applicant was decribed in the previous case[6] that served before Basson J as

5 From the names of the businesses Mr Visser appears to be an ardent Beatles fan. He confirmed this in argument.

6 C 323/2010.

"Golden Rewards cc t/a Sgt Pepper's".

22] As Mr *Kahanovitz* pointed out, it appears that Mr Visser retains in his stable a number of entities that seem to suffer from multiple personality disorder. The court has no information before it to show that the applicants are indeed involved in the clothing manufacturing industry and fall within the scope of the Bargaining Council ; that the Main Agreement has been extended to them; or any details of their employees.

23] I am nevertheless loathe to close the doors of the court to the applicants on these grounds alone. Mr Visser was unrepresented; I am therefore prepared to accept, based on his explanation from the bar, that he is the sole proprietor of the first applicant (albeit that it is no longer in business). I am also prepared to accept that he appears on behalf of the second applicant as its member. In terms of s 162 of the LRA:

> " In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by—
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> (a) a legal practitioner;
>
> (b) a director or employee of the party;
>
> (c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation;
>
> (d) a designated agent or official of a council; or
>
> (e) an official of the Department of Labour."

24] I would read the reference to "a director" of a party (i.e. a company) to include a member of a close corporation. I therefore accept that Mr Visser appears as the sole proprietor of the first applicant and as a member of the second applicant; and that both entities have standing to bring the application.

Once and for all

25] Mr *Visser* is clearly an ardent Beatles fan, judging from the names of the applicants (Sergeant Pepper's and Abbey Road). But as far as the previous judgment of this court involving the same parties is concerned, he could not "let it be".

26] Basson J has made a ruling in the application that was brought on the same substantive issues that the applicants have now referred to court afresh. That judgment was disposed of on the grounds that the applicants did not have *locus standi* in terms of s 105 of the LRA; hence the further application now before court to have that section declared unconstitutional.

27] Our courts are not in favour of a piecemeal approach to litigation. Hence the "once and for all" has developed, expressed as follows[7]:

> "The 'once and for all' rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract (see *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-D). Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action (see *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Custom Credit Corporation (Pty) Ltd v Shembe (supra* at 472). This rule appears to have been introduced into our practice from English law (see *Coetzee v SAR & H* 1933 CPD 565 at 574; Prof CFC van der Walt *Die Sommeskadeleer en die Once and for All – Reël"* (doctoral thesis) at 304, 329, 378-9). Its introduction and the manner of its application have been subjected to criticism (see *Van der Walt (op cit* at 425-85)), but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of action and to ensure that there is an end to litigation."

28] I accept that this principle must also apply to applications in this Court. And in any event, the applicants also purport to seek delictual damages

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7 *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835 A-E.

(although this Court does not have the jurisdiction to award it)[8]. The facts, legal context, events and circumstances have not changed between the time the applicants launched their first application – which Basson J dismissed – and this one.

29] Strictly speaking, therefore, the Court need not entertain this application again. Nevertheless, the applicants have raised a novel constitutional issue; and in circumstances where they are not legally represented, I will consider the application. The question of its merits (or lack thereof), and whether they should have brought a second application, can be considered in the allocation of costs.

30] Unfortunately, interesting as it is, the Court should not consider the constitutional point raised, given the merits of the application.

The constitutional point is moot

31] It is a well-established principle of constitutional law and practice that a constitutional point should not be considered if it is not necessary in order to dispose of the case. As Kentridge AJ said in *S v Mhlungu:*[9]

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

And Chaskalson P echoed these sentiments in *Zantsi:*[10]

> "The same principle underlies the provisions of section 102(5) which require appeals from a provincial or local division of the Supreme Court to be dealt with first by the Appellate Division and, where possible, to be disposed of by that Court without the constitutional issue having to be addressed. It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the

8 *Mohlaka v Minister of Finance & Others* (2009) 30 *ILJ* 622 (LC) para [46]: "[N]othing in s 157 confers jurisdiction on the Labour Court to try a claim for delict."

9 1995 (3) SA 867 (CC); 1995 (10) BCLR 1424 para [59].

10 *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC); 1994 (6) BCLR 136 (CC) paras [2] – [5].

constitutional issue should be dealt with first by this Court. It will only be necessary for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the interest of justice for a constitutional issue to be decided first, where there are compelling reasons that this should be done.

This rule allows the law to develop incrementally. In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."

32] The current application can be disposed of on the merits without deciding the constitutional question. I turn now to those merits.

The merits

33] As I have set out above, on the evidence before me SACTWU is, as a fact, independent of Seardel.

34] But in any event, the applicants' case is misconceived. If they were to have *locus* standi (i.e. if s 105 were to be held to be unconstitutional), they seek a declaratory order that SACTWU is no longer independent. That contention is based on the application of s 95(2) of the LRA. That subsection reads as follows:

"(2) A trade union is independent if—

(a) it is not under the direct or indirect control of any employer or employers' organisation; and

(b) it is free of any interference or influence of any kind from any employer or employers' organisation."

35] In other words, a trade union will be considered no longer to be independent if it is shown to be "under the direct or indirect control of any employer or employers' organisation" or if it is subject to "any interference or influence of any kind from any employer or employers' organisation."

36] Neither of these scenarios is raised by the applicants on their papers,

even if the factual allegations made in the founding affidavit were to have been uncontested.

37] The applicants allege the contrary: they allege that Seardel is "under the control" of SACTWU, and not the other way round. That contention is based on the applicants' mistaken assertion that SACTWU has a controlling shareholding (via HCI) in Seardel.

38] The mischief intended to be addressed by the legislature from a policy point of view in enacting s 95(2) is clear: it is to prevent the formation and proliferation of "sweetheart unions" that are formed to advance the employer's interests rather than those of workers. That is why a trade union is empowered to approach the court to seek an order that a rival union is no longer independent.

39] The contrary scenario – that a rival employer is controlled by a trade union – is not envisaged by the Act. Neither is a declaratory order in circumstances such as those raised by the applicants in this case covered by the provisions of s 95(2).

40] In these circumstances, the applicants have not made out a case on the merits of their application and the constitutional point is moot.

Costs

41] The general rule is that unsuccessful constitutional litigants who have raised meritorious issues of substance should not be mulcted in costs. Furthermore, this court is enjoined to take into account considerations of both law and fairness in considering whether to award costs.[11] In doing so, the Court must take into account:

> "the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."

11 LRA s 162.

42] With regard to constitutional matters, Ackermann J noted in *Motsepe v CIR:*[12]

> "In my view one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks."

43] In the current case, the conduct of the applicants becomes significant. They brought an unmeritorious application to this Court, not once, but twice. They were not deterred by a punitive costs order made by Basson J in the first round. The second application was distinguished only by the novel constitutional ground raised; but because of the fact that the application had no merit in itself, that ground was doomed to fail. The applicants were warned of the consequences of continued litigation; yet they continued regardless.

44] In these circumstances, despite the fact that the applicants are not legally represented and that they purported to raise a constitutional issue, costs should follow the result. I am not inclined to award punitive costs, as the respondents invited me to do, though.

45] Given the unclear nature of especially the first applicant's legal personality, I will accept Mr *Visser's* assurance from the bar that he is its sole proprietor. Therefore ,Mr Visser must be held jointly and severally liable for costs.

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12 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) para [30].

Order

46] The application is dismissed with costs, such costs to be paid by the applicants and Mr JJ Visser jointly and severally, the one paying, the other to be absolved.

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Steenkamp J

APPLICANTS:	Mr JJ Visser.
FIRST RESPONDENT:	Adv E Tolmay (heads of argument having been drafted by Adv TMG Euijen) Instructed by Cheadle Thompson & Haysom.
SECOND RESPONDENT:	Adv GA Leslie (heads of argument having been drafted by Adv P Farlam SC) Instructed by Herold Gie Inc. Adv CS Kahanovitz SC Instructed by the State Attorney.