REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1015/12

In the matter between:

CAPE CLOTHING ASSOCIATION **Applicant**

and

C DE KOCK, N.O. **First Respondent**

THE NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY (CAPE CHAMBER) **Second Respondent**

SACTWU **Third Respondent**

Heard: **30 May 2013**
Delivered: **11 June 2013**

Summary: Review – interpretation and application of collective agreement (LRA s 24) – rectification of agreement. Striking out of evidence on affidavit.

JUDGMENT

STEENKAMP J

Introduction

[1] Are the words “consequent to” of any consequence?

[2] The dispute in this case turns on the interpretation and application of a clause in a collective agreement starting with those words. The dispute was referred to the Bargaining Council (the second respondent) in terms of section 24 of the Labour Relations Act[1] after a preliminary skirmish in this court. The arbitrator (the first respondent) found in favour of the third respondent, the South African Clothing and Textile Workers’ Union (SACTWU). The applicant, the Cape Clothing Association (CCA), wishes to have that award reviewed and set aside.

[3] The applicant maintains that the arbitrator’s interpretation of the vexed clause in the collective agreement is unreasonable and thus reviewable. Alternatively, it seeks rectification of the agreement.

Background facts

[4] SACTWU and the CCA represent, generally speaking, the employees and employers in the South African clothing industry and they bargain collectively within the National Bargaining Council for the Clothing Manufacturing Industry (the Council) for the industry. The parties are governed by a Main Agreement for the industry. The main agreement in turn, has various region specific parts, part F governing the Western Cape.

[5] The question of leave pay applicable to SACTWU members during the annual leave period (mid December to mid January) has been a contentious issue for some time. This mainly pertains to the payment regime that ought to apply when public holidays during the annual leave period fall either on a Saturday or a Sunday.

[6] SACTWU argued that, where a public holiday fell on a Sunday during the annual leave period, the period of annual leave must be extended by an additional paid day’s leave. In December 2005 Pillay J rejected that argument.[2]

---

[1] Act 66 of 1995 (the LRA).

[2] *Cape Clothing Association v P van Staden & ors* (Labour Court C 766/05, unreported).

[7] Having lost on its stance regarding the interpretation of the agreement, SACTWU sought to bargain a better regime through annual collective bargaining for the industry (which takes place nationally). The parties agree that the ultimate goal was to achieve parity of position with regard to the various regions. However, interim arrangements were struck for each year pertaining to the Western Cape in order to cater for the historical anomaly pertaining to public holidays on Saturdays or Sundays during the annual leave period. Clause 5 of the substantive agreement for 2010/2011 records that the "parity dispensation" would become binding with effect from the 2011/12 annual leave period. With regard to the 2010/2011 leave period, the parties agreed that employees in the Western Cape would receive one additional day's paid leave for 27 December 2010; and that the cost of the additional paid day's leave would not form part of the total labour cost for 2010/2011.

[8] During the negotiations for the 2011/2012 year, SACTWU sought a premium payment for two days because two public holidays fell on Sundays during the annual leave period. It is common cause that SACTWU compromised on its stance regarding Saturdays. Whether the parties reached agreement with regard to Sundays for the 2011/2012 year is in dispute.

[9] The agreement is recorded as follows in the 2011/2012 substantive agreement:

> "5.1 The Western Cape collective agreement to be amended to reflect the wording of the KwaZulu Natal metro agreement wording on payment of public holidays falling during the shutdown of the industry. This parity dispensation shall become binding with effect from the 2011/2012 annual leave period.
>
> 5.2 Consequent to the implementation of the provisions of subclause 5.1 above, Western Cape employees shall be paid an additional two (2) days' paid leave for the 2011/2012 annual leave period."

[10] SACTWU interpreted the agreement to mean that, despite the fact that the parties had agreed to a "parity dispensation" for that year, SACTWU members in the Western Cape were still entitled to be paid for two days over and above the leave pay paid to other employees in the industry. The

CCA disputes that interpretation and argues that that was not what it had agreed to.

[11] The parties tried to resolve the impasse by way of an expedited arbitration on agreed terms of reference during late 2011. This process failed as the parties could not agree to the terms of reference. SACTWU then gave notice of strike action, relying on section 64(4) of the LRA. The CCA successfully interdicted the planned strike action. This court found that the dispute between the parties was, in reality, one concerning the interpretation and application of the substantive agreement (a collective agreement), and had to be referred to the Council in terms of section 24 of the LRA.[3]

[12] Consequent to this court's finding, SACTWU referred a dispute to the Council regarding the interpretation and application of the 2011/2012 substantive agreement in terms of section 24 of the LRA. This time around, the parties did agree terms of reference, including the following:

12.1 The arbitrator would be required to interpret clause 5 of the agreement.

12.2 The arbitrator had to decide whether clause 5.2 of the agreement correctly sets out the common intention of the parties.

12.3 The arbitrator had to decide whether he had the power to rectify the agreement; and if so, whether clause 5.2 of the agreement should be rectified to read:

> "Consequent to the implementation of the provisions of subclause 5.1 above, Western Cape employees shall not be paid any further additional days paid leave for the 2011/2012 annual leave period."

12.4 The parties agreed that oral evidence may be led at arbitration.

[13] The arbitration took place on 15 November 2012. The CCA led the evidence of its executive director, Johann Baard. He was its chief negotiator during the 2010/2011 and 2011/2012 annual negotiations. SACTWU did not call any witnesses.

---

[3] *Cape Clothing Association v SACTWU* (2012) 33 *ILJ* 1643 (LC) [interim order]; [2012] 11 BLLR 1145 (LC) [final order].

[14] Baard testified as follows:

14.1 During the 2010/2011 negotiations, the parties agreed that the payment to Western Cape employees in respect of public holidays falling in the year end shutdown period would be placed on par with the payments made to KwaZulu Natal employees. The parties agreed that this parity dispensation would only be implemented in 2011/2012.

14.2 For 2010 only, Western Cape employees would be paid an additional day's paid leave for the end of year shutdown period. The cost of that additional day would not form part of the total labour cost for 2010/2011.

14.3 He had a discussion with SACTWU's provincial secretary, Aziza Kannemeyer, regarding the two days specified in the draft form of clause 5.2 of the 2011/12 agreement. Ms Kannemeyer told him that the extra two days were necessary in order to place the Western Cape employees on par with the KwaZulu Natal employees. He did not independently check whether that was the case, and accepted in good faith what she had told him.

14.4 Both parties reiterated that they had agreed to parity between the Western Cape and KwaZulu Natal with effect from the 2011/2012 period.

[15] Both parties were legally represented at the arbitration (by the same legal representatives who appeared in these proceedings). SACTWU did not call Kannemeyer – who was present at the arbitration – as a witness, and did not cross-examine Baard about his testimony regarding the conversation with her.

<u>The arbitration award</u>

[16] The arbitrator found that:

16.1 The parol evidence rule is applicable.

16.2 There is no ambiguity in clause 5.2.

16.3 Mr Baard's evidence should not have been led and he will not rely on it.

16.4 The parties were in agreement that Western Cape employees would be paid an additional two days' paid leave for the 2011/2012 annual leave period.

16.5 Based on that conclusion, it was not necessary for him to pronounce on his powers as an arbitrator to rectify the agreement. However, he was not convinced that an arbitrator has the powers to rectify collective agreements: "Such powers of rectification lies with an appropriate forum such as the civil and or the Labour Courts and not with arbitrators during an arbitration process regarding the interpretation or application of a collective agreement."

[17] The arbitrator ordered the CCA and its members to pay the additional two days' paid leave to SACTWU's members.

Grounds for review

[18] The CCA argues that the decision reached by the arbitrator is not one that a reasonable decision-maker could have reached.[4] It also argues that the arbitrator failed to have regard to material facts in arriving at his award, which constitutes a reviewable irregularity.[5]

[19] The CCA submitted that clause 5.2 is ambiguous and had to be interpreted, with consideration to Baard's evidence. But the better approach, submitted Mr *Oosthuizen*, would be to rectify the agreement. And in this regard he further submitted that the arbitrator misapplied the law and committed a reviewable irregularity when he decided that he did not have powers of rectification.

[20] Before considering those submissions, the court has to deal with an application to strike out.

[4] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[5] *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC) paras 38-41.

The application to strike out

[21] As I have stated in the summary of background facts, SACTWU's provincial secretary, Ms Aziza Kannemeyer, did not testify at the arbitration. In these proceedings, she delivered an answering affidavit (mistakenly titled a "founding affidavit") in which she sets out her understanding of the collective agreement, and specifically clause 5 thereof; the negotiating process that led to the agreement; as well as her version of the conversation that took place between her and Baard.

[22] The CCA has applied to have those paragraphs of Kannemeyer's affidavit struck out on the basis that it would be manifestly unfair to allow her to put up facts in answering affidavit which he did not place before the Commissioner.

[23] It is well-established that courts have the power to strike irrelevant matters from the pleadings or papers, both in trial actions and in motion proceedings.[6] A court of review can seldom if ever have regard to material not introduced into evidence before the arbitrator which one of the parties subsequently seeks to incorporate into the papers in the review application.

[24] Kannemeyer was present at the arbitration. So was her attorney. He did not challenge Baard's evidence under cross-examination or give him the opportunity to respond to Kannemeyer version of events. Kannemeyer did not testify. Kannemeyer now seeks to introduce evidence before this court that was not place before the arbitrator, even though it was available at arbitration. This court is asked to review the decision of the arbitrator based on the evidence that was before him. This court cannot take into account evidence that was available but was not placed before the arbitrator in order to decide whether he properly applied his mind to the evidence before him.[7]

[25] I agree with Mr *Oosthuizen* that Kannemeyer's attempts to introduce the additional evidence at this stage is not an impermissible but unfair to the applicant for the following reasons:

[6] Cf *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm).

[7] Cf *Director of Hospital Services v Mistry* 1979 (!) SA 626 (A) at 635F – 636D.

25.1 The belated attempt to introduce evidence before this court that was never put to Baard in cross-examination violates the fundamental rule of fairness, applicable to cross-examination generally, that a witness should be given an opportunity of commenting on any facts upon which an opposing party will subsequently rely in order to discredit such witness.[8]

25.2 The additional evidence that Kannemeyer not seeks to introduce makes a mockery of the duty resting on parties at arbitration – especially when both parties legally represented – to produce all relevant evidence available to them at the time. It would also defeat the applicant's right to have the disputed determined expeditiously.

25.3 If this court were to allow SACTWU and Kannemeyer to place the additional evidence before it, it would deprive the CCA of the right to cross-examine her.

[26] The following paragraphs are struck from Kannemeyer answering affidavit:

26.1 The following statement in paragraph 11:

> "… and it was always SACTWU's intention, and understood as such by the CCA, that the extra day was to compensate employees for a past injustice arising, SACTWU saw it, from the Pillay judgement."

26.2 Paragraphs 14 to 16, 18 and 44.

Evaluation of the merits

[27] The genesis of this dispute may lay in bad drafting. The union argues that the agreement as drafted does not give effect to the intention of the parties. The CCA, on the other hand, argues that it does. The problem is that clause 5.2 pertinently records that:

> "Consequent to the implementation of the provisions of subclause 5.1 above, Western Cape employees shall be paid an additional two (2) days' paid leave for the 2011/2012 annual leave period."[9]

[8] *President of the RSA v SARFU* 2000 (1) SA 1 (CC) paras [61] – [63].

[9] My underlining.

[28] The New Shorter Oxford English Dictionary[10] defines "consequent to" as:

> "Following as an effect or result; following as an inference or logical conclusion";
>
> And the noun as:
>
> "The second part of a conditional proposition, dependant on the antecedent".

[29] The words "consequent to" in clause 5.2 in the collective agreement cannot be meaningless. The parties must have included those words for a purpose. It is not simply superfluous verbiage that should be held to be *pro non scripto.* Clearly, it refers back to clause 5.1. And, as is clear from the definitions quoted above, it follows on clause 5.1 and it is dependent on the antecedent proposition contained in clause 5.1. That proposition is that the Western Cape collective agreement will be amended to achieve a "parity dispensation" with KwaZulu-Natal, binding with effect from the 2011/12 annual leave period. And the OED defines "parity" as:

> "The state or condition of being equal; equality of rank, status, or pay."

[30] The logical sequence is clear. The parties committed themselves to parity between the leave pay dispensation applicable to workers in KwaZulu-Natal and those in the Western Cape. Consequent to that in principle decision – i.e., following from that conditional proposition – the logical result of that antecedent proposition could not be that Western Cape workers would receive an additional two days' pay for the same leave period, i.e. the period for which the parties had agreed that a parity dispensation would apply. On the contrary, such a payment would mean that Western Cape workers would be paid more than KZN workers; in other words, the exact opposite of what the parties had agreed to.

Interpretation and ambiguity

[31] As can be seen from the above discussion, clause 5 is far from clear. The two subclauses contain an inherent contradiction. At worst for SACTWU, it clearly provides for parity; at best, and in order not to disregard the

[10] Oxford University Press, 1993.

wording of clause 5.2 together, it is ambiguous. Clause 5.2 simply does not follow logically "consequent to" the implementation of the parity dispensation recorded by agreement in clause 5.1.

[32] With respect to the arbitrator, I cannot understand how he came to the conclusion that there is no ambiguity in clauses 5.1 and 5.2, read together. It is precisely because the two subclauses contain an inherent ambiguity that the dispute had to be referred to arbitration in terms of section 24 of the LRA.

[33] The two subclauses cannot unambiguously coexist. The parties are *ad idem* that clause 5.1 is unambiguous: they agreed that the "parity dispensation" means that employees in the Western Cape and in KwaZulu Natal would receive the same payment for public holidays falling during the shutdown of the industry; and that this would be binding with effect from the 2011/2012 annual leave period. They also agree that an extra two days' payment for Western Cape employees would not lead to parity, but would mean that those employees get paid for two days more than they counterpart in KwaZulu Natal. The CCA says that was never intended; SACTWU says that it was intended, and it cannot explain the inclusion of the words "consequent to".

[34] The arbitrator's finding that clause 5 as a whole is unambiguous is unreasonable and cannot be sustained. Given the obvious uncertainty as to what clause 5.2 was meant to achieve, the arbitrator should have had regard to evidence regarding "the background circumstances which explain the genesis and purpose of the contract"; and to evidence regarding "previous negotiations and correspondence between the parties".[11] Indeed, that is what the parties themselves envisaged in the agreed terms of reference.

[35] In this regard, Baard's uncontested evidence is of paramount importance. That evidence can be summarised as follows:

35.1 During the 2010/2011 negotiations, the parties agreed that the payment to Western Cape employees in respect of public holidays

[11] *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E to 768E.

falling in the year-end shutdown would be placed on par with the payments made for such public holidays to KwaZulu Natal employees.

35.2 The parties agreed that this parity dispensation would be implemented with effect from the 2011/2012 annual leave period and would be binding on them.

35.3 For 2010 only, employers in the Western Cape would pay their employees an additional day's paid leave for the end of year shutdown period. That payment would not form part of the total annual labour cost. Baard described it as a "sweetener to clinch the deal and not risk a national dispute".

35.4 In the course of the 2011/2012 negotiations one of the facilitators, commissioner Ronald Bernickow, held discussions with both parties regarding SACTWU's demands. He (Bernickow) clarified that he had tested the understanding of the union leadership and that SACTWU sought to capture "the commitment that had been made in the previous year that the Cape public holiday payment dispensation would be on par and reflect, or mirror, the dispensation in the KwaZulu-Natal region." SACTWU did not demand that the parity dispensation should be changed or revoked.

35.5 Baard specifically had a discussion with Kannemeyer that led to the inclusion of clause 5.2. Kannemeyer said:

> "... that it was important that we reflect the payment of two additional days to the Western Cape workers for that year in the wording of the agreement, because that was important for the union leadership in terms of how they sold, or obtained a mandate, from their membership in the Western Cape to sign off on the agreement. I had asked her for the background to the two additional days and I was led to believe, and accepted in good faith what she had explained to me, that that related to her calculation that for that year's annual leave period there would be two additional days payable in the context of the parity of wording that we had committed, which otherwise, in the absence of the commitment to parity of wording would not have been due and payable to the workers in the Western Cape. Given the pressure we were under, in terms of time pressure to sign off and draft the

agreement, I didn't check it out independently myself, but accepted in good faith what she had said to me."

[36] This evidence was unchallenged in cross-examination. In those circumstances, the ambiguity in clause 5.2 was cleared up by Baard. The underlying intention of the parties was to achieve a parity dispensation between Western Cape and KwaZulu-Natal workers with effect from the 2011/2012 annual leave period. It was not the intention that Western Cape workers would receive any payment additional to that which applied to KwaZulu-Natal workers.

[37] Given this uncontested evidence, the arbitrator should have found that the entire clause 5.2 should be regarded as *pro non scripto*; or he should have rectified the agreement. It is to that argument that I now turn.

Rectification

[38] Mr *Oosthuizen* submitted that the better approach would have been that of rectification. I agree.

[39] In holding that he did not have the power of rectification, the arbitrator misapplied to the law and thus committed a reviewable irregularity.

[40] It is not disputed that the Labour Court may grant rectification. That right was expressly recognised in *Annandale Building Materials (Pty) Ltd v NUM.*[12] In my view, the CCMA or a bargaining council is not precluded from deciding on the rectification of a collective agreement. Section 24 of the LRA confers jurisdiction on those bodies to arbitrate "a dispute about the interpretation or application of a collective agreement". In the previous skirmish between these two parties in this court, it was held that the CCMA [or the Bargaining Council] has the necessary jurisdiction to correct any erroneous interpretation of a collective agreement.[13] A dispute about the interpretation or application of a collective agreement must include the question whether the written agreement encapsulates the actual

[12] (2003) 24 *ILJ* 528 (LC).

[13] *Cape Clothing Association v SACTWU* (2012) 33 *ILJ* 1643 (LC) para [11]; [2012] 11 BLLR 1145 (LC) para [24].

agreement intended by the parties, i.e. a claim for rectification.[14] In this regard, I respectfully disagree with the view of the learned acting judge in *UTATU v Jammy NO.*[15]

[41] Where parties concluded a written agreement which incorrectly reflects a prior common intention which came into existence between them, the court may on application grant rectification of that contract. The court must be satisfied that the agreement recorded is not the same as the actual agreement arrived at.[16] The mistake relied upon may be the result of a *bona fide* mutual error, an intentional act by one of the parties, or a mistaken acceptance by the parties that the written agreement did not exclude an earlier agreement from operating together with the written agreement. It is not necessary to prove that the written agreement does not correctly reflect the oral agreement because of a mutual error or mistake. What is necessary is to prove that there was a prior common continuing intention which is not reflected in the agreement.[17] It is not a prerequisite that there should be any ambiguity. The mistake may even be caused intentionally by one of the parties.[18]

[42] The only evidence before the arbitrator – that of Baard – establishes the intention of the parties to be exactly what it says in clause 5.1: that the parity dispensation will be binding with effect from 2011/12, in other words that the workers in the Western Cape will be paid the same way as their counterparts in KZN for public holidays during the shutdown period. In order for clause 5.2 to give effect to that parity dispensation – "consequent to" its implementation – it must be rectified to reflect the intention of the parties as embodied in clause 5.1.

---

[14] Cf *Kathmer Investments Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 502H – 503H, referred to in *CCA v SACTWU* [2012] 11 BLLR 1145 (LC) para [16].

[15] *United Transport & Allied Trade Union v Jammy NO & others* (2010) 31 *ILJ* 2189 (LC) para [25].

[16] *Office Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd* 1987 (4) SA 24 (C) 27 D-E.

[17] *Benjamin v Gurewitz* 1973 (1) SA 418 (A); *Mouton v Hanekom* 1959 (3) SA 35 (A); *Brits v Van Heerden* 2001 (3) SA 257 (C) 267E to 269E.

[18] *Benjamin v Gurewitz (supra)* at 426A; *Mouton v Hanekom (supra)* at 39H.

Conclusion

[43] It is clear from the inherent contradiction between clauses 5.1 and 5.2, read with Baard's uncontested evidence, that the collective agreement must be rectified to reflect the true intention of the parties, i.e. to give effect to the implementation of the parity dispensation between the Western Cape and KwaZulu-Natal with effect from 2011/12. In deciding that the Bargaining Council did not have the jurisdiction to do so, and disregarding Baard's evidence, the arbitrator misapplied the law; did not consider the evidence before him; and committed a reviewable irregularity.

Remit or substitute?

[44] This court need not remit the dispute – one that has already wound its way through two appearances in this court and one before the Bargaining Council – when sufficient evidence has been presented to enable the court to take the decision.[19] The relevant evidence has been led at arbitration. A transcript of that evidence is before the court. The court has, twice before, had the opportunity to consider the provisions of the collective agreement. This court is in as good a position as a new arbitrator to decide the dispute on the merits. It would only lead to further costs and delays to remit the dispute to arbitration, contrary to the stated aims of the LRA.

Costs

[45] This dispute has had a long history arising from the national collective bargaining process between the parties. The poor drafting of the agreement has led to the dispute that has now hopefully been finally determined by this court. There is an ongoing relationship between the parties, both at regional and at national level. In law and fairness, neither party should be held liable for the other's costs.

[19] *Commuter Handling Service (Pty) Ltd v Mokoena & ors* [2002] BLLR 843 (LC).

Order

I order that clause 5.2 of the 2011/2012 of the substantive agreement between the CCA and SACTWU is rectified to read:

> "Consequent to the implementation of the provisions of subclause 5.1 above, Western Cape employees shall not be paid any further additional days' paid leave for the 2011/2012 annual leave period."

_____

Steenkamp J

APPEARANCES

APPLICANT:	AC Oosthuizen SC
	Instructed by Norton Rose.
THIRD RESPONDENT:	J Whyte of Cheadle Thomson & Haysom.