REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 315/2011

In the matter between:

ROBERTSON ABBATOIR	**APPLICANT**
AND	
CSAAWU OBO DUBE & OTHERS	**RESPONDENTS**

IN RE:

CSAAWU OBO DUBE & OTHERS	**Applicants**
and	
ROBERTSON ABBATOIR	**Respondent**

Heard: **29 July 2014**

Delivered: **31 July 2014**

Summary: Interlocutory application challenging *locus standi* of 9 employees. Dismissal dispute referred to CCMA before dismissal of employees according to employer. Union relies on termination lockout on earlier date and alleges automatically unfair dismissal in terms of LRA s 187(1)(c). That dispute conciliated and all applicants properly before court in respect of that dispute arising on 30 November 2010 but not in respect of dismissal on 23 December 2010.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an interlocutory application brought by Robertson Abbatoir, challenging the *locus standi* of nine of its former employees who allege that they were dismissed by the abbatoir and that the dismissal was automatically unfair in terms of s 187(1)(c) of the LRA.[1]

[2] The respondent in this application and the applicant in the main referral is the Commercial, Stevedoring, Agicultural, and Allied Workers Union (CSAAWU). The union acts on behalf of some 42 of its members who were dismissed by the abbatoir at the end of 2010.

[3] Central to this application is the position of nine of those employees. The abbatoir argues that the dispute about the dismissal of those nine employees has not been conciliated; therefore, they have no *locus standi* (and indeed, this Court has no jurisdiction to consider the dispute about their dismissal).

[4] That question, in turn, depends upon the union's case in the main referral. The abbatoir says the nine workers were dismissed for insubordination on 23 December 2010, after the dispute that is now before Court had already been referred to the CCMA for conciliation; the union argues that the dispute arose on 30 November and that dispute is properly before court.

[5] There are two further ancillary issues on which the parties could not reach agreement at a pre-trial meeting. Those are the need for an inspection *in loco* and the duration of the trial. The court is also asked to pronounce on those issues.

[1] Labour Relations Act 66 of 1995.

Background facts

[6] The employees who are party to this dispute, represented by CSAAWU, were all employed by the abbatoir. A dispute arose concerning their working hours and the number of carcasses they were required to slaughter per day. The union says that the workers reported for work on 30 November 2010 and that they were locked out. Its argument is that the lock-out "constituted an automatically unfair dismissal".

[7] However, it is common cause that the abbatoir held a disciplinary hearing on 30 November and dismissed the bulk of the workers on 1 December 2010. The union says that this was a "formal dismissal" but that, in fact, the abbatoir had already dismissed the workers on 30 November and that that was a "lock-out dismissal" that is deemed automatically unfair in terms of s 187(1)(c).

[8] The union referred a dispute to the CCMA on 17 December 2010. Because of defective service it referred a fresh dispute on 22 December. It did so on behalf of all the applicants in this matter.

[9] On 22 December the abbatoir held a further disciplinary hearing in respect of the nine employees who it says have no *locus standi* in this matter. It is common cause that those nine workers attended the hearing and that they were issued with notices of dismissal on 23 December. But Ms *De Vos* argued that that is not the dispute before this court; what is ultimately for this court to decide, is whether the alleged dismissal on 30 November was automatically unfair.

[10] The dispute that the union referred to the CCMA on 22 December was set down for conciliation under case number WECT 18154-10 on 15 February 2011. Sadly – and in a manner indicative of the unhealthy labour relations between the parties – neither attended. Obviously no real attempt at conciliation could take place. Nevertheless, the commissioner issued a certificate on that day indicating that the dispute (under case number WECT 18154-10) remained unresolved and that it should be referred to this court for adjudication. That dispute is an alleged automatically unfair dismissal and the union claims that it arose on 30 November 2010.

[11] Following the dismissal – to which the union refers as a "formal dismissal" – of its nine members on 23 December, the union referred a further two disputes to the CCMA on 4 January 2011 under case numbers WECT 122-11 and WECT 129-11. In these referrals it indicated that the dispute arose on 23 December in respect of those nine members. Ms *de Vos* says it did so *ex abundante cautela* – in fact, it intended to rely on the initial dispute referral under case number WECT 18154-10 referring to the lock-out of 30 November. In any event, the union withdrew referrals WECT 122-11 and WECT 129-11. It does not appear that those referrals – in respect of the dismissal of the 9 workers on 23 December – have ever been conciliated.

Locus standi

[12] This court has no jurisdiction to entertain a dispute that has not been conciliated. And if the dispute that the nine workers intend this court to adjudicate has not been conciliated, they would not have *locus standi* either.

[13] Mr *Loots* referred in this regard to a recent judgment of this court involving the same trade union.[2] In that case, the court referred to the judgment of the LAC in *Intervalve (Pty) Ltd v NUMSA*[3] where Waglay JP noted that, absent a referral of a dispute to conciliation, the Labour Court has no jurisdiction.

[14] But, having debated the question of the union's cause of action with Ms *De Vos*, the case before me cannot be equated with the one in *Steytler Boerdery.* In that case, the union's counsel conceded that it had referred a dispute to the CCMA alleging that its members had been dismissed on 8 January 2014; but in fact, they were only dismissed on 21 January 2013 after a disciplinary hearing. In fact, the union conveyed to its members that they had not been dismissed on 8 January. Yet that was the dispute that

[2] *Sambo & others v Steytler Boerdery* [2014] ZALCJHB 202. (Although the citation is given as ZALCJHB, it was heard in Cape Town under casse number C 592/13 on 2 June 2014. Judgment was handed down the following day).

[3] [2014] ZALAC 10.

was referred to conciliation. In those circumstances, the actual dispute had not been conciliated and the court did not, therefore, have jurisdiction.

[15] In the case before me, Ms *De Vos* nailed the union's colours to the mast of a termination lockout on 30 November 2010. She accepted that the nine workers in question would not have *locus standi* in respect of a dispute concerning their dismissal on 23 December, as the dispute that was conciliated and subsequently referred to this court for adjudication is a dispute in respect of the events of 30 November 2010. That dispute was referred to conciliation on 22 December 2010, i.e. before the dismissal of 23 December 2010. Ms *De Vos* argued that what she termed the "formal dismissals" of 1 December and 23 December were a sham; what the union alleges, is that its members were dismissed on 30 November. That is the dispute that was conciliated on 15 February 2011 and that is the dispute that now serves before this court. As Ms *De Vos* and Ms *Van Huyssteen* state in their heads of argument:

> "[T]he dispute was in respect of all 42 workers who had been locked out, and whose lockout was contended to constitute an automatically unfair dismissal as contemplated in section 187(1)(c) of the Labour Relations Act.
>
> That unfair dismissal of the workers (i.e. the 42 locked out employees) was referred to the CCMA by the filing of LRA 7- 11 form on 17 December 2010 and again on 22 December 2010 under CCMA case number 18154–10. The dispute is again there described as having arisen on 30 November 2010, which is the date of the lockout of the 42 employees.
>
> … There was indeed a dispute between the 42 workers and the [abattoir] : the workers alleged that they had been locked out, and that the lockout constituted an automatically unfair dismissal. That dispute was referred to conciliation."

[16] The union's counsel made it very clear in debating the matter with the court that the union was relying for its cause of action on the "lockout dismissal" of 30 November. The union described it as follows in the referral of 22 December, stating that the dispute arose on 30 November:

> "Employer dismissed employees to compel them to agree to the employer's demand, which demand is a dispute of interest concerning working hours".

[17] Mr *Loots* argued that, in fact, none of the applicants was dismissed on that date. Most of them were dismissed on 1 December and the nine remaining employees on 23 December. But the union does not accept that. Whether the union has a good claim, and if it will be able to show on the evidence that its members were indeed dismissed on 30 November, is not for this court to decide at this stage. That is what they claim. And if that is their claim, this court has jurisdiction to hear that claim and all the applicants – including the nine who, according to the abattoir, were only dismissed on 23 December – have *locus standi* before the court.

[18] As Nugent JA pointed out in *Makhanya v University of Zululand*[4]*:*

> "When the claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."

[19] In the case before me, the applicants – including the nine workers who, according to the abattoir, were dismissed on 23 December – base their claim on an automatically unfair dismissal that they say took place on 30 November 2010. That the claim might be a bad claim and might not pass muster under section 187(1)(c) of the LRA is beside the point. That claim can only be decided once all the evidence is in and once the parties have placed their arguments before the court. It does not deprive the nine workers from their *locus standi* at this stage.

Inspection *in loco*

[20] The abattoir is of the view that an inspection *in loco* will be useful in order for the court to see for itself how its production lines work and what it output capacity is. It may also serve to shorten proceedings if lengthy evidence in this regard need not be led. The union disagrees.

[4] 2010 (1) SA 62 (SCA) para 71.

[21] A decision on whether an inspection *in loco* should be held is a matter for the discretion of the court. The discretion must be exercised judicially.[5]

[22] In my view, it will be useful for the court to observe the functioning of the abattoir first-hand. It may also serve to shorten proceedings. There is a large number of applicants, most of whom live in Robertson. It will save costs for them and for the abattoir's witnesses if an inspection *in loco* could be held on the first day of trial before they travel to Cape Town for the hearing.

Length of trial

[23] That brings me to the ever unpredictable question of the envisaged length of the trial. The parties could not reach agreement at the pre-trial stage. The abattoir says it is likely to run for 20 days; the union says 10 days will be enough. It is difficult to predict who will eventually be proven correct, but both parties intend calling a number of witnesses. I think it will be safe to set aside 15 days for the hearing. I will direct the registrar to do so.

Costs

[24] I have found in favour of the union on the main question, that of the *locus standi* of nine of its members. That finding is based on its counsel's assurance that its claim is based on the alleged "lockout dismissal" of 30 November 2010. It remains to be seen whether that is a good claim; and indeed, if that consistently remains the union's stance.

[25] I think it would be premature to make an order for costs at this stage, keeping in mind the requirements of law and fairness.[6] The conduct of both parties before and during the trial; whether the matter ought to have been referred to this court as an automatically unfair dismissal, or whether it should have been referred to arbitration; and the conduct of the parties in proceeding with or defending the matter, are all issues that can only be assessed at the end of the trial. Therefore, I think it prudent to order that the cost of this application should be costs in the cause of the trial.

[5] Zeffert et al *Law of Evidence* (2003) at 710 and authorities there cited.

[6] LRA s 162.

Order

[26] I therefore make the following order:

26.1 The nine applicants referred to in paragraph 16 of the founding affidavit in this application do have *locus standi* in the main dispute under this case number.

26.2 The registrar is directed to set the matter down for trial for 15 consecutive days.

26.3 The parties are directed to arrange an inspection in loco at Robertson Abattoir commencing at 10:00 on the first day of trial.

26.4 The costs of this application are to be costs in the cause of the trial.

_____

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT (Robertson Abbatoir):	Hanri Loots (with him Lourens Ackermann)
Instructed by	Du Bois, De Vries & Kroukam, Robertson..
RESPONDENT (CSAAWU):	Anna-Marie de Vos SC (with her Elsa van Huyssteen)
Instructed by	SERI Law Clinic, Braamfontein..