REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1010/12

In the matter between:

NUM obo MABOTE	**Applicant**
and	
CCMA	**First Respondent**
BRYAN PIETERSEN N.O.	**Second Respondent**
KALAHARI COUNTRY CLUB	**Third Respondent**

Heard: **11 June 2013**
Delivered: **21 June 2013**

Summary: Right to representation by trade union member at arbitration. CCMA rule 25(1)(b). Review. Employer alleging that membership not within scope of trade union's constitution.

JUDGMENT

STEENKAMP J

Introduction

[1] Is an employee entitled to be represented at arbitration by a trade union of which he is a member, if the employer objects to the validity of his membership on the basis that his job does not fall within the scope of the union's constitution?

[2] In this case the employer challenged the validity of the employee's membership of his chosen trade union on the basis that his job did not fall within the scope of the union's constitution.

Background facts

[3] The applicant employee was dismissed by the third respondent, the Kalahari Country Club (the Club). He is a member of the National Union of Mineworkers (NUM) and the NUM referred an unfair dismissal dispute to the CCMA (the first respondent) on his behalf.

[4] Conciliation failed. At the arbitration, the employee was represented by NUM. The Club was represented by Mr Johannes van der Merwe, a representative of an employer's organisation known as CAESAR. At the commencement of arbitration, for the first time, the CAESAR representative objected to the employee being represented by NUM. He stated his objection as follows:

> "Commissioner, the applicant is represented by the National Union of Mineworkers, which is a registered trade union. It is the respondent's submission that the National Union of Mineworkers does not have locus standi to represent the applicant in this matter, reason being that – the following…."

[5] The representative of the employer's organisation then referred to the constitution of the NUM, where it deals with the scope of membership. He pointed out that clause 1.3 states that: "The union will operate as a trade union in the mining, energy, construction and allied industries." Clause 2.1 of the NUM constitution, under the heading "eligibility", states:

> "Subject to the approval of the branch committee which has jurisdiction, membership of the union is open to all workers who are:
>
> employed in the mining, energy, construction and allied industries."

[6] The NUM constitution defines “mining, energy, construction and allied industries” as those industries engaged in mining, extracting, processing or refining minerals, including those undertakings, workplaces, services and operations which are ancillary or incidental to the mining industry.

[7] Van der Merwe then submitted that the club falls within the hospitality sector:

> “So, therefore, Commissioner, the submission is that as Kalahari Country Club’s scope of operation falls within the stipulations of sectoral determination 14 and as the constitution of the National Union of Mineworkers does not make provision for membership, their scope, as well the membership does not make provision to organise in this sector on – and for that reason, the NUM does not have locus standi to represent the applicant in this matter.”

[8] The NUM representative requested time to submit documentation and pointed out that the Club uses the addresses of Anglo American and that it is linked to the Sishen mine. He also pointed out that the employer deducted stop orders on behalf of NUM. However, it appears that the NUM representative did not submit further documentation.

[9] In these proceedings, though, the Club admitted that its members are “employees and ex-employees of the Sishen Iron Ore Company”. It included a copy of the Club’s constitution. The following clauses are relevant:

> “Kalahari Country Club” is defined as “the Kalahari Country Club of Sishen Iron Ore Mine”.
>
> “The Chairman” is the chairman of the Board of Directors of the Kalahari Country Club in the person of the General Manager of Sishen Iron Ore Mine.
>
> “The Chairman of the Board of Clubs” is the Financial Manager of Sishen Iron Ore Mine.
>
> “The Company” is Sishen Iron Ore Company (Pty) Ltd.

[10] The aims of “the Company [i.e. Sishen Iron Ore] for the Kalahari Country Club: are set out as follows in the Club’s constitution:

> "The club facilities are made available by the Company with the aim of attracting suitable employees, as well as to promote spiritual and bodily health and good relationships and friendships outside the workplace, and by so doing, contribute to the overall well-being of the mine and community."
>
> " All employees and officials of the Sishen Iron Ore Company and its affiliate is or related companies and organisations are eligible for voluntary membership."
>
> "Any ordinary SIOC member who is no longer employed by the company or any of its affiliate and associated companies or organisations will cease with immediate effect to be an SIOC member of the Kalahari Country Club."

The award

[11] The arbitrator's award is summarised in the following paragraph:

> "The union may not therefore organise in the hospitality sector, as was proven by the employer's representative. It must be noted that the union failed to provide the additional documents as promised, and I can therefore only deal with the submissions before me. The argument that Anglo-American control the employer is of no consequence, as the employer in this matter is not involved in the mining of minerals, in the energy construction or any functions associated with the industry, but does fall within the prescripts of Sectoral Determination 14, the hospitality sector. The reasoning is clear in that they operate a bar, restaurant and or sport club and this is their main business. Based on the above, I accordingly find that the employee may not be represented by NUM."

[12] The union seeks to have that award reviewed and set aside on the basis that the arbitrator exceeded his powers by enquiring into the scope of the union. Dr *Cloete* argued that the arbitrator dealt with the dispute as one over organisational rights rather than representation.

Evaluation / Analysis

[13] The Constitution[1] guarantees the right to fair labour practices.[2] That right, in turn, includes the right of every worker to join a trade union; and every trade union has the right to determine its own administration.

[14] Section 233 of the Constitution enjoins a court, when interpreting legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law. And section 1 of the LRA specifies:

> "**1. Purpose of this Act.**—The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the work-place by fulfilling the primary objects of *this Act*, which are—
>
> (*a*) to give effect to and regulate the fundamental rights conferred by section 27[3] of the Constitution;
>
> (*b*) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;
>
> (*c*) to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can—
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (*d*) to promote—
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the work-place; and
>
> (iv) the effective resolution of labour disputes."

[15] The effective resolution of labour disputes by the CCMA includes the right to be represented by a trade union official.

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[1] Constitution of the Republic of South Africa, 1996.

[2] Section 23 of the Constitution.

[3] The reference to s 27 of the Interim Constitution must be read as a reference to s 23 of the final Constitution: *Business SA v COSATU* [1997] 5 BLLR 511 (LAC) at 517 A-B.

[16] ILO Convention 87 of 1948[4] contains the following articles:

> "Article 1
>
> Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.
>
> Article 2
>
> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
>
> Article 3
>
> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

[17] The ILO considers the right to be represented by trade union officials to be encompassed by Convention 87.[5]

[18] South Africa ratified the Convention on 19 February 1996. Those obligations under international law and the Constitution are embodied in the LRA. Section 4(1)(b) reads:

> "4. Employees' right to freedom of association.—(1) Every *employee* has the right—
>
> (*a*) to participate in forming a *trade union* or federation of *trade unions*; and
>
> (*b*) to join a *trade union*, subject to its constitution.

[19] But does that mean that an employee may only be represented by a trade union of his choice at arbitration if that union's constitution covers the scope of the workplace where the employee is employed?

[20] The right to representation at the CCMA was previously governed by section 138(4)(c) of the LRA. It is now set out in CCMA rule 25(1)(b)(iii):

> "In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by:

[4] Convention concerning Freedom of Association and Protection of the Right to Organise.

[5] ILO *Freedom of Association and Collective Bargaining* (1994) at 57.

(i)...

(ii) ...

(iii) any *member*, *office-bearer* or official of that party's registered *trade union* or a registered *employers' organisation*."

[21] The phrase 'a registered trade union' refers to the status of the trade union as a registered trade union and not to its scope.[6]

[22] "Trade union" is defined as follows:[7]

"**'trade union'** means an association of *employees* whose principal purpose is to regulate relations between *employees* and employers, including any *employers' organisations*."

[23] Section 200 of the LRA specifically deals with the representation of employees by trade unions:

"**200. Representation of employees or employers.**—(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party—

(a) in its own interest;

(*b*) on behalf of any of its members;

(*c*) in the interest of any of its members.

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings."

[24] There is no dispute that NUM is a registered trade union. It is also not disputed that the employee paid membership dues to NUM; that the employer deducted those subscriptions on NUM's behalf; and that, at the time of the employee's dismissal, the employer recognised NUM as the bargaining agent for its employees. The Club also did not raise any objection to NUM referring the unfair dismissal dispute to the CCMA on behalf of its member or to its representation at conciliation. Indeed, the

[6] *Da Gama Textile Co Ltd v Divisional Inspector, Dept of Manpower (Port Elizabeth) and Another* 1989 (3) SA 641 (ECD) at 644H; 1991 (3) SA 530 (A) at 532 A-G; *PPWAWU v Pienaar NO* (1993) 14 *ILJ* 1187 (A).

[7] LRA s 213.

NUM is still the applicant (on behalf of its member) before this Court and before the CCMA. But at arbitration, for the first time, the Club – represented by an employer's organisation – objected to a NUM official representing the employee.

[25] Section 200(1)(b) and CCMA rule 25(1)(b)(iii), on the face of it, grant an employee and his or her chosen trade union – such as the applicant in this case – an unfettered right for the union to represent the employee in arbitration proceedings. That right is in line with the right to freedom of association guaranteed in the LRA, the Constitution and ILO Convention 87.

[26] What, then, to make of the restriction in s 4(1)(b) of the LRA that an employee may join a trade union "subject to its constitution"?

[27] That restriction appears to me to regulate the relationship between the trade union and its members *inter se*. It is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party – such as an employer's organisation – to deny a worker that right, based on the trade union's constitution.

[28] The NUM constitution makes it clear that eligibility for membership is "subject to the approval of the branch committee which has jurisdiction". It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.

[29] An employee may join a trade union to represent him at arbitration even after dismissal[8]. And in *County Fair Foods (Pty) Ltd v CCMA*[9] a union other than the respondent union, of which the employee was then a member, had initially referred the dispute. The Labour Appeal Court held that this did not mean, however, that the withdrawal of the first union

[8] *TGWU v Coin Security Group (Pty) Ltd* [2001] 4 BLLR 458 (LC) para [161].

[9] [2003] 2 BLLR 134 (LAC); (2003) 24 *ILJ* 355 (LAC).

ended the dispute. Both unions had merely represented the employee, who was the affected party. The commissioner had accordingly correctly rejected the company's objection to the employee being represented by the respondent union. Davis AJA[10] remarked:

> "Mr Kahanovitz contended that the section which was dispositive of the present dispute, was section 138(4)(c) of the Act which provides that, in any arbitration proceedings, a party to a dispute may appear in person or be represented only by any member, office-bearer or officer of that party's registered trade union or registered employers' organisation. The reference to "union" in section 138(4)(c) was to a union which hitherto represented the employee party in the dispute.
>
> In my view, Mr Kahanovitz has sought to place an unduly restrictive interpretation upon these sections. In the present case, FFRWSA completed LRA Form 7.13 in terms of section 191 of the Act, the matter in dispute being described as the alleged unfair misconduct of Mr Joseph Alexander to be resolved through arbitration. It meant that there was a dispute between appellant and the union, which concerned another party, being Joseph Alexander. Indeed, in the certificate of outcome of dispute referred for conciliation, the dispute is described as being between "FFRWSA obo Joseph Alexander and appellant".
>
> Accordingly, FFRWSA had done no more than represent a member in a dispute. When third respondent assumed that role, after FFRWSA withdrew, it did no more than represent the affected party to the dispute, being Mr Alexander. For this reason I find there to be no merit in the objection by appellant, namely that second respondent had committed an error of law by admitting third respondent to the proceedings, which error would justify a successful application for review. In short, there is no basis on which it could be said, within the context of the facts of the present dispute, that third respondent did not fall within section 138(4)(c) as a recognised representative of Alexander."

[30] Similarly, in this case, it would place an unduly restrictive interpretation upon these same sections – i.e. s 200 and the repealed s 138(4)(c), now contained in CCMA rule 25(1)(b)(iii) – to hold that NUM is not entitled to represent the employee.

[10] (as he then was) at paras [16] – [18].

[31] A purposive approach to the interpretation of the LRA is mandated by section 1, read with section 3(a) of the LRA. The Labour Appeal Court has emphasised the link between the purposes of the Act and section 23 of the Constitution, adding that if the LRA is to achieve its constitutional goals, courts have to be vigilant to safeguard those employees who are particularly vulnerable to exploitation.[11]

Conclusion

[32] In holding that the employee could not be represented by the NUM, the commissioner exceeded his powers. The employee was entitled to be represented by an official of the NUM, his registered trade union, in terms of CCMA rule 25(1)(b)(iii).

[33] As a result the ruling has to be reviewed and set aside. There is sufficient evidence before this Court for it to substitute its ruling for that of the Commissioner. It would also be more expedient to do so. It would only cause further delays to remit the matter in order for another Commissioner to decide the same point afresh. It is in the interests of justice to have the matter remitted to the CCMA for the arbitration on the merits.

[34] It is so that intervention in uncompleted proceedings must be limited to exceptional cases.[12] This is such an exceptional case. The alternative would have been for the employee to continue with the arbitration without the assistance of his chosen trade union representative, while the Club was being represented by an official of its chosen employer's organisation. At the end of the arbitration the employee would then have to review the arbitrator's ruling disallowing his trade union representation. Were the court to rule in his favour at that stage, the matter would have to be remitted to the CCMA for a full arbitration hearing afresh. That would not have been in line with the LRA's commitment to expeditious resolution of labour disputes, or to finality.

[11] *"Kylie" v CCMA* [2010] 7 BLLR 705 (LAC) para [41]. See also *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); [2003] 2 BCLR 182 (CC) para [37].

[12] *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 *ILJ* 2513 (LC) para [4]; *Workforce Group (Pty) Ltd v National Textile Bargaining Council* [2011] 11 BLLR 1136 (LC) para [17].

[35] With regard to costs, I take into account that the arbitration is ongoing; and that this application raised a constitutional issue. Neither party should be ordered to pay the other's costs, including the costs of the initial urgent application.

Order

The ruling of the Commissioner (the second respondent) under case number NC 2002-12 of 4 December 2012 is reviewed and set aside. The dismissal dispute is remitted to the CCMA for arbitration on the merits before a commissioner other than the second respondent. The employee, Mr Mabote, is entitled to representation by an official of the NUM at arbitration.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Dr Neville Cloete (attorney), Kimberley.
THIRD RESPONDENT:	Stuart Harrison of Edward Nathan Sonnenbergs, Cape Town.