Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 344/2016

In the matter between:

IMATU	**Applicant**
and	
CCMA	**First Respondent**
JOSEPH WILLIAMS N.O.	**Second Respondent**
MATUSA	**Third Respondent**
SAMWU	**Fourth Respondent**
SALGA	**Fifth Respondent**
STELLENBOSCH LOCAL MUNICIPALITY	**Sixth Respondent**

Heard: 18 November 2016

Delivered: 31 January 2017

Summary: Review – organisational rights – LRA ss 145 and 21(8C) – misconceiving nature of inquiry – arbitration award reviewed and remitted.

JUDGMENT

STEENKAMP J

Introduction

[1] The Independent Municipal and Allied Trade Union (IMATU) seeks to have an arbitration award reviewed and set aside in terms of s 145 of the LRA.[1] In terms of the award, Stellenbosch Local Municipality[2] was ordered to grant organisational rights to a rival trade union, MATUSA.[3]

[2] MATUSA was formed as a breakaway union from the South African Municipal Workers' Union (SAMWU). The Registrar of Labour Relations initially refused to register it after an objection by IMATU. MATUSA appealed to this Court in terms of s 111(3) of the LRA. The appeal was successful. In terms of a judgment handed down on 1 September 2015[4], the decision of the registrar refusing to register MATUSA was set aside. The registrar was ordered to register MATUSA as a trade union in terms of section 96 of the Labour Relations Act and to issue a certificate of registration in its name within 14 days of the order. He did so.

[3] IMATU was granted leave to appeal to the Labour Appeal Court. The appeal[5] was argued on 10 November 2016, one week before this matter. The parties to this dispute agreed that it would be prudent to hold over this judgment until the beginning of the 2017 term, as it would be rendered moot if the LAC upheld the further appeal and ruled that MATUSA should be deregistered. However, at the start of the 2017 term the LAC judgment had not yet been handed down and I deemed it in the interests of justice and expeditious dispute resolution to hand down this judgment in its absence.

---

[1] Labour Relations Act 66 of 1995.

[2] The sixth respondent.

[3] The Municipal & Allied Trade Union of South Africa (the third respondent). The South African Municipal Workers Union (SAMWU) and the South African Local Government Association (SALGA) were cited as the third and fourth respondents respectively. Only MATUSA opposes the review application.

[4] *Municipal and Allied Trade Union of South Africa (MATUSA) v Crouse N.O and Another* [2015] ZALCCT 56; [2015] 11 BLLR 1172 (LC); (2015) 36 *ILJ* 3122 (LC).

[5] CA 20/15.

Background facts

[4] MATUSA sought to obtain organisational rights at the Stellenbosch Local Municipality (the sixth respondent).

[5] The parties could not reach agreement. MATUSA referred a dispute to the CCMA in terms of s 21(8C) of the LRA. That subsection[6] reads:

> 'Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if—
>
> (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
>
> (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.'

The arbitration award

[6] The arbitrator correctly identified the dispute. Quite simply, he had to decide whether to grant MATUSA organisational rights at the Municipality.

[7] The parties had conducted a verification exercise. The various unions have the following membership percentages at the municipality:

7.1 IMATU 29%

7.2 SAMWU 25%

7.3 MATUSA 15%.

[8] It was common cause that the municipality had entered into a collective agreement with IMATU and SAMWU. The South African Local Government Association (SALGA) has also entered into a national agreement establishing a 15% membership threshold for registered trade unions seeking organisational rights in the local government sector. That agreement was entered into after this Court had ruled that MATUSA

[6] Inserted by Act 6 of 2014.

should be registered as a trade union in terms of sections 95 and 96 of the LRA.

[9] MATUSA now wanted to obtain organisational rights at Stellenbosch Municipality. It did so by relying on s 21(8C).

[10] The arbitrator considered the new provision in s 21(8C) in the following context:

> "The rationale for the new amendments of section 21 of the LRA is an attempt to adopt a more holistic approach by broadening/adjusting the scope to grant organisational rights to unions that do not enjoy a majority at the workplace. The amendments give effect to the principles of freedom of association in that employees have the right to choose their representation and that minority unions can approach the CCMA where they have not been granted organisational rights. The amendments are also an attempt to provide for the recruitment and protection of workers in atypical forms of employment taking cognisant of the ideal of decent work."

[11] The arbitrator accepted that MATUSA is a registered trade union and that its representivity at the workplace – being the municipality, rather than its representivity nationally – was 15%.

[12] In this context, the arbitrator held:

> 'I have considered [SAMWU's and IMATU's] submissions and whilst I respect that they are bound by the collective agreement concluded in the Bargaining Council as parties to the council, I'm not persuaded that I do not have the powers in granting section 12, 13 and 15 rights to [MATUSA]. I am I have persuaded that section 21 of the LRA and in particular section 21(8A) empowers commissioners to grant organisational rights at the workplace when applicant does not meet the threshold as per the collective agreement. I'm further persuaded that Stellenbosch Municipality is an independent entity and that it constitutes the workplace and that [SAMWU and IMATU] are not the majority at the workplace, and thus as per section 21(8A) grant organisational rights to [MATUSA] in this matter. I'm further not persuaded by [SAMWU's and IMATU's] submissions that if section 12, 13 and 15 rights are granted to [MATUSA], that it would undermine the collective bargaining system at the council level. [MATUSA] has not applied for bargaining rights and has applied for organisational rights which are in line with section 21 of the LRA, including giving effect to the principles of

freedom of association in allowing members of a trade union to exercise their rights as provided for in the LRA.

I have considered the submissions by [MATUSA] including those of [SAMWU and IMATU] and decided that as per section 21(8A-C), that despite the threshold agreement that was concluded in the Bargaining Council and that the new amendments make provision for a Commissioner to granting organisational rights to a minority union who has a significant interest in the workplace [*sic*]. I do find that [MATUSA] has a significant interest in the workplace with a 15% membership at the Stellenbosch Municipality and that it would be prudent to granting [MATUSA] organisational rights in terms of section 12, 13 and 15. And, in addition, these rights will also be subject to the submissions that [the three trade unions] made to me in the arbitration hearing. The [Municipality] shall deduct and pay over union levies to [MATUSA] commencing from 15th day of the new month together with a schedule of deductions made to the union as per section 13 of the Act.'

Review grounds

[13] Mr *Myburgh* argued that the Commissioner had misconceived the nature of the enquiry. He was tasked with having to decide whether MATUSA should be granted organisational rights, despite not having met the threshold of representivity established in the national threshold agreement. He also failed to recognise that the operation of section 21(8C) is "subject to the provisions of subsection (8)", and thus did not undertake the enquiry envisaged by that subsection.

Evaluation / Analysis

[14] MATUSA's quest for organisational rights must be considered in the context of the LRA and of the collective bargaining regime in the local government sector.

[15] The current parties to the South African Local Government Bargaining Council (SALGBC) are SALGA (representing the employers); and IMATU and SAMWU. They have agreed in the Council's constitution that another registered trade union – such as MATUSA – may be admitted as an additional party to the Bargaining Council "provided… that such trade

union has a membership equivalent to not less than 15%… of the total number of employees within the scope of the Council".

[16] On 9 September 2015 the parties to the Bargaining Council concluded a main collective agreement for the period 1 July 2015 to 30 June 2020. The main agreement includes a threshold agreement for the purpose of organisational rights, confirming that threshold as 15%. It concludes that any registered trade union with fewer members than the threshold of 15% "will not qualify for any rights set out in sections 12, 13 and 15 of the Act".

[17] As Mr *Myburgh* pointed out in his argument, the whole of section 21(8C) – in terms of which MATUSA sought organisational rights at the municipality – is "subject to the provisions of subsection (8)". Section 21(8C) empowers the commissioner to grant organisational rights to a trade union that does not meet the thresholds of representativeness established by the main agreement if the trade union represents "a significant interest, or a substantial number of employees, in the workplace". But those considerations are still "subject to" the provisions of subsection (8) as a whole. And that subsection includes the following considerations:

> "(8) If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner—
>
> (a) must seek—
>
> (i) to minimise the proliferation of trade union representation in a single work-place and, where possible, to encourage a system of a representative trade union in a work-place; and
>
> (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;
>
> (b) must consider—
>
> (i) the nature of the workplace;
>
> (ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;
>
> (iii) the nature of the sector in which the workplace is situated;

(iv) the organisational history at the work-place or any other work-place of the employer; and

(v) the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part-time employees or employees in other categories of non-standard employment."

[18] In this case, the arbitrator based his decision to grant MATUSA organisational rights solely on his finding that the union had a "significant interest" in the workplace, i.e. the Municipality. He had no regard to the other considerations set out in subsection (8).

[19] I agree with Mr *Myburgh* that, properly interpreted, the requirements of s 21(8C)(b) of "a significant interest or a substantial number of employees" serves as a basis for a commissioner to override a threshold agreement; but it does not, without more, serve as a basis to grant a minority union organisational rights. The commissioner may only grant those rights (set out in ss 12, 13 and 15) if he or she has considered the other factors set out in s 21(8).

[20] That means that the commissioner in this case should, amongst other things have considered the following factors:

20.1 He should have sought to minimise the proliferation of trade union representation in a single workplace, i.e. the Stellenbosch Municipality [s 21(8)(a)(i)];

20.2 He should have sought to minimise the financial and administrative burden on the Municipality to grant organisational rights to a third trade union [s 21(8)(a)(ii)];

20.3 He should have considered the nature of the workplace, being a single municipality within the local government sector;

20.4 He should have considered the nature of the organisational rights that MATUSA seeks to exercise; for example, the deduction of trade union subscriptions in a workplace where there is already an agency shop agreement in place;

20.5 He should have considered the nature of the local government sector;

20.6 He should have considered the organisational history at the workplace, e.g. the Municipality's and SALGA's agreements with IMATU and SAMWU; and

20.7 He should have considered the composition of the workforce.

[21] The arbitrator considered none of these factors. He was compelled to do so by s 21(8) read with s 21(8C). His failure to do so means that he misconceived the nature of the enquiry. That is a reviewable irregularity.

[22] IMATU led evidence at the arbitration on the factors that the commissioner had to consider in terms of s 21(8). It also addressed those factors in its heads of argument. Yet the arbitrator failed to consider those factors.

[23] One of the issues that IMATU raised pertinently is that MATUSA members would continue to be bound by the agency shop agreement. Yet the commissioner failed to consider that factor at all.

[24] In *Herholdt*[7] the Supreme Court of Appeal found that a commissioner commits a gross irregularity if he, through an error of fact or law, misconceived the whole nature of the enquiry, and thus undertook the enquiry in the wrong manner. And where a commissioner misconceives the nature of the enquiry (and thus commits a gross irregularity) this, in itself, is a basis for review, without having to consider the reasonableness of the outcome.[8]

[25] In *Xstrata*[9] the LAC applied *Herholdt* as follows:

> "In *Herholdt v Nedbank Ltd*, the Supreme Court of Appeal held that a review of an award is permissible in terms of section 145 of the LRA if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA, including the ground of "gross irregularity" in section 145(2)(a)(ii). For a defect in the conduct of the proceedings to amount to

[7] *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA) paras 10, 19 and 21.

[8] *Herholdt* para 25; *Head of Department of Education v Mofokeng* (2015) 36 *ILJ* 2802 (LAC) para 33; *Toyota SA Motors (Pty) Ltd v CCMA* (2016) 37 *ILJ* 313 (CC) para 118.

[9] *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha* [2016] ZALAC 25; (2016) 37 *ILJ* 2313 (LAC) para 12 [per Murphy AJA].

> such a gross irregularity, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. In this case, the arbitrator failed to grasp the meaning of the term "not reasonably practicable", took irrelevant considerations into account and ignored relevant factors. His interpretation constituted a material error of law resulting in a misconception of the enquiry which prevented a fair and proper determination of the issue of reasonable practicability."

[26] As appears from the commissioner's *ratio decidendi* quoted in his award in para [12] above, he did not consider the factors and considerations listed in sections 21(8)(a) and (b). He decided that the mere fact that the parties to the threshold agreement had been given an opportunity to participate in the arbitration proceedings and that MATUSA, in his view, represented a "significant interest" in the workplace was in itself sufficient basis to grant it organisational rights.

[27] In doing so, the Commissioner misconceived the nature of the enquiry and undertook the enquiry in the wrong manner. He did not ask himself the questions he ought to have asked in order to decide the matter, taking into account the peremptory factors set out in subsection (8).

Conclusion

[28] The Commissioner's failure to take into account the peremptory factors set out in s 21(8)(a) and (b) makes the award reviewable.

[29] The award should be set aside. However, this court is not in a position to substitute its decision for that of the Commissioner. Another commissioner will have to consider afresh the evidence and submissions of all three trade unions and the Municipality before applying his or her mind to all the factors set out in s 21(8) and s 21 (8C).

[30] A costs award is not appropriate in law or fairness. The dispute has to be considered afresh and MATUSA merely sought to defend its rights arising from the arbitration award in these proceedings.

Order

[31] I therefore make the following order:

31.1 The arbitration award under case number WECT 15859-15 dated 22 March 2016 is reviewed and set aside.

31.2 The dispute is remitted to the CCMA for a new arbitration before a Commissioner other than the second respondent.

_____

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Anton Myburgh SC instructed by Savage, Jooste & Adams Inc.
THIRD RESPONDENT: (MATUSA)	Adrian Montzinger instructed by Hannes Pretorius Bock & Bryant.