REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA16/2013

In the matter between:

Kalahari Country Club **Appellant**

and

National Union of Mineworkers **First Respondent**

Dire Phillip Mabote **Second Respondent**

Heard: **11 September 2014**

Delivered: **03 December 2014**

Summary: Right to representation by trade union – employer objecting to trade union representation- evidence showing that employee member of trade union-employee entitled to representation. Principle of a purposive approach to interpretation restated. Arbitration award set aside Labour Court's judgment upheld Appeal dismissed with costs.

Coram: Tlaletsi DJP, Hlophe AJA, Dlodlo AJA

JUDGMENT

Hlophe AJA

[1] This is an appeal against the judgment of Steenkamp J which raises the question of whether an employee is entitled to be represented at arbitration by a trade union, of which he is a member, even 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. In *casu,* the employer challenged the validity of the employee's membership of his chosen trade union, National Union of Mineworkers (NUM), on the basis that the employee's job did not fall within the scope of the union's constitution. The court *a quo* held that the employee, Mr Mabote, was entitled to representation by an official of NUM at the arbitration. Leave to appeal was granted by the court *a quo* to the Labour Appeal Court. The matter was fully argued and judgment was reserved on 11 September 2014.

[2] Briefly, the facts giving rise to this appeal were that the second respondent (Mr Mabote) was dismissed by Kalahari Country Club (the club) from its employ as an Assistant Chef on 14 August 2012. At the time of his dismissal, Mr Mabote was a member of NUM. The latter had been afforded organisational rights by the club and subscriptions were also deducted. The dispute between the parties could not be resolved at the conciliation stage and, accordingly, same was referred to arbitration. At the commencement of the arbitration proceedings, the club's representative raised a *point in limine* objecting to Mr Mabote's entitlement to representation at the arbitration by NUM.

[3] The basis of such an objection was that Mr Mabote was not eligible to be a member of NUM because he was not employed in any of the industries described in NUM's Constitution. Furthermore, that because he could not validly and lawfully be a member of NUM for the aforementioned reasons, NUM's official did not meet the requirements of Rule 25(1)(b)(3) of the Rules for the conduct of proceedings before the CCMA (the CCMA Rules) and was therefore not entitled to represent Mr Mabote. The arbitrator ruled on 04 December 2012 that NUM could not represent Mr Mabote during the arbitration proceedings and accordingly the matter was rescheduled for arbitration. The arbitrator's ruling was challenged in the Labour Court and the court *a quo* ruled that Mr Mabote was

entitled to be represented by NUM representative during the arbitration proceedings. The appellant was represented by Mr Harrison before us. The respondents were represented by Mr Cloete.

[4] Mr Harrison's argument was that the court *a quo* erred in finding that the arbitrator had exceeded his powers in holding that Mr Mabote could not be represented by NUM and that he was entitled to be represented by NUM officials in terms of Rule 25(1)(b)(3) of the CCMA Rules. The ruling of the arbitrator, so ran the argument, was one that any reasonable arbitrator could have reached on the available material and was thus not open to review. This was so because section 200(1)(b) of the Labour Relations Act 66 of 1995 (LRA) and CCMA Rules 25 (1)(b)(3) do not grant an employee and his trade union an unfettered right to be represented by such union.

[5] Furthermore, the ILO convention 87 of 1984 also does not provide an unfettered right of freedom of association as it expressly provides that the right of members to join the union is dependent on the condition that they comply with the rules of the organisation which they intend to join. In a nutshell, the argument advanced on behalf of the appellant was that it would be *ultra vires* for a trade union to admit to membership a person who is ineligible according to its constitution.

[6] There is, in my view, a short answer to Mr Harrison's submission. Firstly, the enquiry in this matter is more factual than legal. What are the facts? The facts are that Mr Mabote was a member of NUM. This much was common cause between the parties, so much so that organisational rights were extended to NUM by the club and the latter also deducted union subscription fees, even at the time when Mr Mabote was purportedly dismissed by the club.

[7] At all material times, Mr Mabote considered himself a legitimate member of NUM. Thus purely as a matter of fairness, Mr Mabote expected (and was entitled) to be represented by his trade union, NUM. The contrary is clearly untenable. It is trite that in labour law fairness is also an important consideration in addition to whatever legal requirements may be applicable.

[8] Secondly, as Mr Cloete who appeared for the respondents argued, the appellant runs a recreation club and related facility on the premises of Sishen Iron Ore Company (SIOC) and lease the premises as well as certain assets from SIOC for its purposes. The club previously belonged to and was owned and operated directly by SIOC. The main business of SIOC is that of mining and "allied" industries. Thus, even though on the face of it, appellant's business was only a recreational club, it clearly qualified as a business "allied" or "related" or "connected" to NUM's business.

[9] Thirdly, the referral form (CCMA form 7.11) and the conciliation certificate reflect that the dispute was referred as "NUM on behalf of Mr Mabote" its member. This much was common cause between the parties. Appellant did not voice any objections. Instead appellant participated in the conciliation proceedings and witnessed the outcome of such proceedings being awarded the conciliation certificate.

[10] Fourthly, the evidence clearly shows that Mr Mabote regarded himself as a member of NUM and the latter also regarded him as its member. That the latter intended to represent him during the arbitration proceedings as it would represent any of its members. Quite clearly it is the duty of trade unions to represent their members during arbitration or even during litigation for that matter. Mr Mabote was legally entitled to be represented by NUM and, at no stage, prior to arbitration proceedings, did the appellant object to NUM's right to represent Mr Mabote.

[11] Fifthly, even if I am wrong regarding what has been stated above, the present case clearly calls for a purposive interpretation rather than a restrictive interpretation. In *County Fair Foods (Pty) Ltd v CCMA,*[1] the union other than the respondent union, of which the employee was then a member, had initially referred the dispute for conciliation. The Labour Appeal Court (LAC), per Davis AJA (as he then was), held that this did not mean, however, that the withdrawal

[1] [2003] 2 BLLR 134 (LAC); (2003) 24 ILJ 355 (LAC).

of the first union ended the dispute. Both unions had merely represented the affected party i.e. the employee in question. Accordingly, the LAC ruled that the commissioner had accordingly and correctly rejected the company's objection to the employee being represented by the respondent union.

[12] See in this regard Para [17] – [18] of the *Count Fair Foods* case where Davis AJA held:

> 'In my view, Mr *Kahanovitz* has sought to place an unduly restrictive interpretation upon these sections. In the present case, FFRWSA completed LRA form 713 in terms of s 191 of the Act, the matter in dispute being described as the alleged unfair [dismissal] 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'.
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> 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 s 138(4)*(c)* as a recognized representative of Alexander.'

[13] I agree with the court *a quo* that to hold otherwise would place an unduly restrictive interpretation on Rule 25(1)(b)(ii) of the CCMA Rules. A purposive interpretation to the CCMA Rules is called for. Furthermore as Steenkamp J pointed out in the Court *a quo*, a purposive interpretation of the LRA is mandated by section 1 read with section 3(a) of the LRA. The LAC has furthermore

emphasized the link between the purpose of the LRA and section 23 of the Constitution, adding that if the LRA is to achieve its constitutional goals, the courts must be vigilant to safeguard those employees that are particularly vulnerable to exploitation.

[14] In conclusion, in all circumstances of the case, I would dismiss the appeal as a being altogether without merit.

Order

[15] The appeal is dismissed with costs.

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Hlophe AJA

I agree

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Tlaletsi DJP

I agree

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Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT: Mr Harrison

FOR THE RESPONDENT: Mr Cloete