REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C409/2013

In the matter between:

TRANSPORT & OMNIBUS WORKERS UNION

(TOWU) OBO MEMBERS Applicant

and

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL First Respondent

STEPHEN BHANA Second Respondent

GREYHOUND COACHLINES A DIVISION OF UNITRANS (PTY) LTD Third Respondent

Date heard: 6 February 2014

Delivered: 15 April 2014

Summary: Review of a jurisdictional ruling; where an award dealing with the interpretation and application of a collective agreement is upheld on review by the labour court, the labour court judgment does not oust the jurisdiction of the CCMA or a bargaining council to hear a referral concerning the same aspect of the collective agreement by another union party to the agreement;

JUDGMENT

Rabkin-Naicker J

[1] This is an opposed application to review and cross review the findings of second respondent (the arbitrator) which he made in a jurisdictional ruling. The ruling concerns a jurisdictional point as to whether the first respondent (the council) has jurisdiction to arbitrate a dispute concerning the application and interpretation of a particular collective agreement. The arbitrator found that it did not.

[2] At the hearing the third respondent (the company) submitted that the council did not have jurisdiction to hear the dispute on two grounds. First that the issue, namely the interpretation of the term “ordinary hours of work" had been dealt with in two previous awards in favour of the company, albeit pertaining to the company and different unions. The second ground relied on by the company was that one of those awards had been taken on review in the Labour court unsuccessfully.

[3] The company argued that since the council was cited as the respondent in a review of a previous award dealing with the same questions, it was bound by the court's decision, as are all the parties to the main collective agreement.

[4] The arbitrator reasoned as follows having heard submissions from both parties:

> "it is common cause that similar disputes had been lodged and decided by means of arbitration awards, one of which was unsuccessfully reviewed. It is trite that I am not bound by awards made by my colleagues on the same or similar disputes. I've furthered do not agree that the doctrine of stare decisis as it relates to those awards (the policy of courts to abide by or adhere to principles established by decisions in earlier cases) applies in this case. The previous awards did not establish principles; it ruled on a dispute.
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> It is common cause however that the award involving TAWUSA and the respondent had been taken on review in the Labour Court, unsuccessfully. The powers of the Labour Court as detailed in section 158 of the LRA are quite wide but includes making an award an order of the court and it includes an award about the application and

interpretation of a collective agreement (section 158 (3) (e)).[1] It is my opinion that where the court refuses to overturn an award, on whatever grounds, that award becomes final and binding as envisaged in section 143 (1) of the LRA. Since the issue in dispute in casu is essentially the same as the one that served before the court in the TAWUSA matter, the court's decision amounts to a confirmation of that award and the issue in dispute namely the application and interpretation of ordinary working hours. I therefore find that the Council does not have jurisdiction to hear this matter."

[5] In a review directed at a finding of jurisdiction, all that an applicant need establish to succeed on review is that the finding was wrong. What is relied on to make such a decision is the objective existence of jurisdictional facts.[2] The company, in its cross review, correctly abandoned its submissions directed at establishing that *stare decisis* can apply to arbitration awards involving the interpretation of a collective agreement, given such awards are decisions of an administrative nature. However, it did submit that there was a policy basis to avoid an employer having to engage with a multiplicity of unions over workplace issues. Further, that employers should not be required to engage with unions on the same issue after that issue had been authoritatively determined.

[6] The company's submissions proceeded on the basis that because the Labour Court had found that there was no basis to review the relevant award between the company and other unions (which found that the Company's refusal to pay employees for the compulsory rest period is not contrary to the main agreement), a bargaining council arbitrator is bound by the decisions of the Labour Court. The arbitrator so they reasoned, cannot reconsider issues dealt with in awards which have been sanctioned by the Labour Court.

[7] These submissions cannot possibly stand scrutiny. This is because the Labour court is not a Court of Appeal in respect of arbitration awards but is empowered by the LRA to review such awards. It is not necessary for the

[1] In fact the meaning of this provision is that the labour court has no jurisdiction to hear a section 24 dispute.
[2] SA Rugby Players Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another (2008) 29 ILJ 2218 (LAC)

purposes of this judgment for me to deal with the various grounds of review and the jurisprudence in relation thereto. It is only in a review on a jurisdictional point that this court is engaged in examining whether an arbitrator was correct or not. But it is important to reiterate the distinction between an appeal and a review. On review, when a functionary is entrusted with a discretion, weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, it is a matter for the functionary to decide, and when he acts in good faith (and reasonably and rationally) a court of law cannot interfere. [3]

[8] As the Supreme Court of Appeal has stated in **Dumani v Nair and Another**[4] after surveying the authorities of various jurisdictions:

> "In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been — ie an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary — an 'administrator' as defined in PAJA — the material-error-of-fact ground of review does not entitle a reviewing court to reconsider the matter afresh.
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> 'Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'
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> The ground must be confined to the situation, as in the English law…… to a fact that is established in the sense that it is uncontentious and objectively verifiable."

[3] MEC for Environmental Affairs & Dev Planning v Clairison's CC 2013 (6) SA 235 (SCA) para 21
[4] 2013 (2) SA 274 (SCA) at paragraph 32

[9] On the question of policy considerations, the company has sought to convince the court that the principles of majoritarianism and speedy resolution of disputes mean that an employer should not have to sit in numerous arbitrations seeking to interpret the same collective agreement with different collective-bargaining partners. The answer to this conundrum is simply for employers to ensure that in any such proceedings, the different unions which fall under the collective agreement are joined to the dispute.

[10] In all the circumstances, I find that the arbitrator was quite incorrect in accepting the argument that he was bound by a previous award by virtue of the fact that such award had been unsuccessfully reviewed in the Labour Court. The ruling stands to be set aside and substituted with a finding that the Bargaining Council has jurisdiction to hear the dispute by virtue of the provisions of section 24 of the Labour Relations Act. I do not intend to make a costs order in this matter because of the ongoing relationship between the parties. I therefore order as follows:

1. The jurisdictional ruling under case number are RPNT1429 issued on 13 April 2013 is hereby reviewed and set aside;
2. The dispute in terms of section 24 of the Labour Relations Act may be remitted back to the first respondent for hearing by an arbitrator other than second respondent.

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Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearences:

Applicant: Mr W.D Field of Bernadt Vukic Potash & Gettz

Third Respondent: Advocate Craig Bosch instructed by Bowman Gilfillan Attorneys