THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 565/16

In the matter between:

NUMSA OBO MEMBERS **Applicant**

and

THE MEIBC **First Respondent**

LOUIS KRUGER N. O **Second Respondent**

IEAB **Third Respondent**

AUTO INDUSTRIAL MACHINING (PTY) LTD **Fourth Respondent**

Heard: **11 October 2018**

Delivered: **18 October 2018**

Summary: A review in terms of the provisions of section 158 (1) (g) of the LRA – The function to be reviewed must be one provided for in the LRA. The jurisdiction of the Labour Court depends on whether the function performed or purported to be performed is one provided for in the LRA. The grounds upon which the function, if one provided for in the LRA, is to be reviewed is one permissible in law. Held (1) The application for review is dismissed for want of jurisdiction, alternatively on its merits. Held (2) Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This application is brought in terms of section 158 (1) (g)[1] of the Labour Relations Act[2] (LRA). The applicant seeks to review and set aside a resolution made by the third respondent and the exemption licence so issued. The application is opposed by the fourth respondent.

Background facts

[2] To a large degree the facts pertinent to this application are common cause. Briefly, they are: The applicant and the fourth respondent are parties to a collective agreement (Main Agreement). Following a national strike over wages, a collective agreement was concluded in terms of which a wage increment was to happen over a period of three years in staggering percentiles. The fourth respondent applied for exemption from the wage agreement to the first respondent. The exemption was refused. Aggrieved thereby, the fourth respondent lodged an appeal to the third respondent. Clause 23 of the Main Agreement, provides for exemptions.[3]

[1] (1) The Labour Court may – (g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds as are permissible in law. [My own underlining and emphasis].

[2] 66 of 1995, as amended.

[3] A copy of the relevant clause was not attached to the papers nor was it quoted in the founding papers. Upon independent research, a copy sourced from the internet provides thus:

23 EXEMPTIONS

1 *General*

(a) Any person bound by this Agreement may apply for exemption.

(b) The authority of the Council is to consider applications for exemptions and grant exemptions.

(c)…

(d)…

(e) The provisions of the National Exemption Policy as per Annexure K, as approved by the Council shall apply when considering exemption and appeals.

2. *Fundamental principles for considerations*

(a)…

3. *Urgent applications*

(a)…

4. *Process*

(a)…

The third respondent, after considering the appeal, resolved to grant exemption and duly issued an exemption license. Aggrieved by the resolution and the duly issued license, the applicant launched the present application.

Grounds of Review

[3] The applicant chose to launch a review application. The allegation is that the third respondent failed to apply its mind in that its conclusion is not logically connected with the overall assessment and impact of the evidence that was placed before it. The decision reached by the third respondent is not one that a reasonable decision maker can arrive at.

Evaluation

The issue of jurisdiction

[4] Almost a century ago, Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*[4] distinguished only three types of judicial reviews in South Africa. Those are, review of decisions of inferior courts; the common-law review of decisions of administrative authorities and a wider form of statutory review. The review before me is alleged to be the third type – one contemplated in terms of section 158 (1) (g) of the LRA. The precise and extent of the power in this type always depend on the particular statutory provision concerned. The

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5 *Appeals*
(a) An independent body, referred to as the Independent Exemptions Appeal Board (the Board), shall be appointed and shall consider any appeal against an exemption granted or refused by the Council, or a withdrawal of an exemption in respect of parties and non-parties.
(b) The Council's Secretary shall on receipt of an appeal against a decision of the Council, submit it to the Independent Exemptions Appeal Board for consideration and finalisation.
(c) In considering an appeal the Board shall consider the recommendations of the Council, any further submissions by the employer or employees and shall take into account the criteria set out above and also any other representations received in relation to the application.
(d)…

[4] 1903 TS 111.

standard of review for this type was set out by the Court in *Simelane v Minister of Justice and Constitutional development*[5] thus:

> 'The test to be employed in reviewing the substance of a decision of the committee is an enquiry into the presence of rational connection between the decision taken and the facts on which the decision is based, as well as the reasoning of the decision…'

[5] Thus, before a court of law exercises its judicial review powers regard must be had to the provisions of the enabling section. To my mind the review is limited to the functions provided for in the LRA. The phrase "*provided for*" means amongst others to set down as a stipulation or requirement. In other words, the function must be one stipulated in the LRA. Powers and functions of a bargaining council are stipulated in section 28(1) (a)-(l) of the LRA. My closer reading of the provisions suggests that the function to enforce those collective agreements and to prevent labour disputes come closer to the matter before me. However, it is my reading of the Main Agreement that it is not the power and function of the third respondent, whose decision is sought to be impugned, to conclude collective agreements. The power and the function resides with the first respondent. Therefore, only the first respondent is empowered to enforce the concluded collective agreements and/or to prevent and resolve labour disputes.

[6] The dispute resolution functions are to be performed by the first respondent. Those functions are stipulated in section 51 of the LRA. In terms of the Main Agreement, the second respondent is an independent body. It is not a committee of the first respondent. Its functions are stipulated in the Main Agreement. The Main Agreement is a collective agreement in terms of the LRA. Section 23 deals with the legal effect of collective agreements. Section 24 makes provision for dispute resolutions. Primarily, a collective agreement is obligated to provide for a procedure to resolve any dispute about interpretation or application of the collective agreement. The Main Agreement does provide for such a

[5] 2009 (5) SA 485 (C) at para 10. Own emphasis.

procedure. A review in terms of section 158 (1) (g) is not one such procedures.

[7] Effectively, I am of a view that considering and finalizing an appeal against a refusal or granting of an exemption is not a function provided for in the LRA. In *Shimange v Bonitas Medical Fund and others*[6], Landman J had the following to say:

> '[5] In my opinion the reference to a function or an act or omission is reference to any person or body exercising an "official activity". An exercise of administrative power such as where the CCMA decides on the condonation of a late referral to it. A dismissal although it may correctly be described as an act is not an official act. It is private law act which is governed by the LRA. It follows that an employer who dismisses an employee is not performing a function, act or omission which is susceptible to review under s 158 (1) (g).'

[8] I am in full agreement with the above statement. I venture on to say, in considering and finalizing an appeal, the second respondent was not performing a function as contemplated in section 158 (1) (g) of the LRA. Thus, in my view, the resolution and the issuing of the exemption certificates are not susceptible to review under section 158 (1) (g) of the LRA. I raised the issue of jurisdiction with the representative of the applicant. He placed reliance on *Ncungana & others v Bargaining Council for the Liquor Catering & Accommodation Trades, South Coast, Kwazulu Natal & another*[7]. In this matter, my sister Pillay J did not deal with the question whether granting of exemption from any part of the Fund Agreement was a function as contemplated in section 158 (1) (g). Unlike in the matter before, the exemption decision was taken by the Bargaining Council itself. However, the court remarked as follows:

> '[21] It is not clear from the pleadings whether the applicants were members of a trade union that was party to the Council … This issue is also relevant to deciding whether the refusal of

[6] [2000] ZALC 53 (26 June 200) at para 5.
[7] [2002] 8 BLLR 766 (LC).

> exemptions ought to have been referred to the independent exemptions body established in terms of section 32 (3) (e) of the LRA. If they were not members of a trade union that was party to the Council, then the dispute about the refusal of the exemption had to be referred to the exemptions body and this Court would have no jurisdiction.'

[9] It is apparent to me that my sister was more concerned with the binding nature of the collective agreements concluded within the bargaining council. Such agreements bind only parties to the council unless so extended to non-parties by the Minister. Section 32 (3) (e) deals with one of the requirements to be satisfied before a Minister may extend a collective agreement concluded in the bargaining council. It is unclear to me why the provisions of section 32 (3) (e) were relevant for the determination of jurisdiction.

[10] The Minister is empowered to extend collective agreements to non-parties. If the Minister is not satisfied that provision has been made in the collective agreement to be extended for an independent body to hear and decide an appeal against refusal for exemption from the provisions of the collective agreement, the Minister may refuse to extend. The application that served before Court, in *Ncungana,* was a review of a decision by the bargaining council to refuse exemption from the provision of the fund agreement. It does seem that the jurisdiction issue was more on the issue that internal remedies of appeal would need to be exhausted by non-parties. As I see it, if a collective agreement to be extended does not contain provisions for appeal by an independent body, the Minister would simply not extend such a collective agreement. The net effect thereof would be that the collective agreement so concluded in the bargaining council would not bind non-parties.

[11] It may be so that the function performed in that matter was that of enforcement of a collective agreement within the contemplation of section 28 (1). In other words, in refusing the exemption from the fund agreement, the bargaining council was enforcing the fund agreement. In *casu*, the second respondent, in my view cannot conclude a collective

agreement, thus it cannot have powers to enforce a collective agreement. To my mind, this authority does not assist the applicant. I was unable to find any other judgment that may have followed *Ncungana*.

[12] My brother, Lagrange J, in *Argent Steel Group t/a Sentech Industries v MIBCO and others*[8], referred to *Ncungama* without necessarily elevating it to being an authority that jurisdiction arose. On the issue of jurisdiction, my brother simply concluded thus:

> [1] …Consequently, the application concerns both a review of the dismissal of the appeal against original decision and the original exemption ruling itself. The court's jurisdiction to hear the reviews is derived from s158 (1) (g) of the LRA…

[13] My brother did not state why jurisdiction derives from the section. He did not say because the dismissal of appeals against exemptions amounts to a function contemplated in the section. In my judgment, determining the true nature of the function to be reviewed, is a jurisdictional fact to be established before exercising jurisdiction. It is one of the functions of this court to determine what the true dispute is before exercising jurisdiction. However, in his judgment, my brother made reference to a clause in the MIBCO agreement dealing with enforcement. He first referred to the requirements for a constitution of a bargaining council. Section 30 (1) (k) provides that the constitution must provide for a procedure for exemption from collective agreements. A constitution that does not provide for exemption in not compliant. A non-compliant constitution may lead to a refusal to register a bargaining council. Before applying for registration, parties must in terms of section 27 (1) (a) adopt a constitution that meets the requirements of section 30.

[14] A constitution of a bargaining council is not a collective agreement. It is simply a founding document. In the *Argent* matter, reference to section 30 (1) (k) was made in order to set out the legal framework. Such

[8] PR 150/14 delivered on 30 January 2018

reference has nothing to do with the jurisdiction question that concerned me in this matter. Like in this matter, an employer – *Argent* applied for exemption from paying wage increases. After its exemption was refused by the exemption board, *Argent* appealed to an exemption appeal board. The procedure for exemption and appeal was provided for in the MIBCO agreement.

[15] I am yet again of a view that the *Argent* judgment is not authority for the proposition that refusal of an exemption or an appeal of the refusal is a function contemplated in section 158 (1) (g). If it is, for reasons spelled out above, I choose not to follow it. Instead, I agree with Landman J in *Shimange.* I do find that in granting or refusing an exemption the relevant body, in this instance, the second respondent, did not perform a public function, thus not a function contemplated in section 158 (1) (g). I therefore conclude that section 158 (1) (g) cannot be invoked to find jurisdiction. Accordingly, this court lacks jurisdiction.

Is the true nature of the dispute not one involving interpretation and application of a collective agreement?

[16] The issue of exemptions is provided for in the Main Agreement. It is clear that in the applicant's view, the exemption ought not to have been granted since the requirements of granting an exemption were not met – evidence of financial hardship. Differently put, the applicant laments non-compliance with the provisions of the Main Agreement. Therefore, does that not make the dispute one of application and interpretation of a collective agreement to be dealt with in terms of section 24 (1) of the LRA.

[17] The meaning of the phrase *interpretation and application* of a collective agreement has received the attention of the judiciary and academics. Revelas J concluded that a situation of non-compliance with a collective agreement constitutes a dispute of application of a collective agreement thus justiciable in the Commission for Conciliation, Mediation and

Arbitration (CCMA).[9] In *Hospesa obo Tshambi v Department of Health: Kwazulu Natal*[10], Sutherland JA writing for the majority had the following to say:

> '[25] In my view, the phrase interpretation or application are not disjunctive terms, and ought to be read as being related, i.e., disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining.'

[18] Sutherland JA disagreed with an understanding that any alleged breach of a term of a collective agreement means the dispute is automatically one that falls within section 24 of the LRA. In an earlier decision, the Labour Appeal Court held that if the real dispute between the parties was about an interpretation and application of the collective agreement, the Labour Court lacks power to determine the matter.[11] In this matter, it is required of this Court to consider whether the provisions of clause 23 were properly applied. In order to do so, this court may be required to interpret the Main Agreement in order to establish proper application.

[19] For reasons as set out above, I am of a firm view that the real dispute is about application and interpretation of clause 23 of the Main Agreement. For this reason, too, this court lacks jurisdiction.

Merits of the review.

[20] If I am wrong on the jurisdiction issue, I continue to consider the merits of the review hereunder. In motion proceedings, a party stands and fall by its founding papers. Failure to apply one's mind entails considering irrelevant considerations and ignoring the relevant ones. In performing its task, the third respondent was guided by the provisions of clause 23 of the Main Agreement. The first thing to be considered is the recommendations of the Council. It was not pointed out to the Court

[9] See NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk [2000] 2 BLLR 196 (LC)

[10] (2016) 37 (ILJ) 1839 (LAC).

[11] Ekurhuleni Metropolitan Municipality v South African Municipality Workers Union (2015) 36 ILJ 624 (LAC).

where such recommendations occur in the record of the proceedings sought to be reviewed. It is the duty of the applicant to place before this Court a record of the proceedings sought to be reviewed and set aside. For the purposes of this judgment, I can only assume that the recommendation of the Council was not to grant exemption since the third respondent was considering an appeal against its refusal to exempt. The second thing is to consider the submissions made by employers or employees. It is not the applicant's complaint that any of its submissions were not considered.

[21] The record reveals that the appeal was considered by the third respondent at its meeting held on 16 February 2016. The minutes and the verbatim transcript of the meeting were placed before Court. The third thing is to take into account the set criteria. In its founding papers the applicant did not set out criteria to be taken into account nor did it allege that a specific criterion was not taken into account. In its supplementary affidavit, the applicant alleged that the fourth respondent did not present any financial grounds. The applicant does not allege that presenting financial grounds is one or any of the set criteria. However, what was placed before Court was an application for exemption questionnaire, which was apparently completed in July 2015. Clause 3.13 of the questionnaire deals with financial motivation. Such motivation was made supported by annexures. With that information at hand, it is unclear what the applicant means by stating that there were no financial grounds presented. If anything, this allegation of lack of financial grounds is not properly supported by anything before me.

[22] The applicant makes a bald allegation that the conclusion is not logically connected with the overall assessment and impact of the evidence. I am saying the allegation is bald because I have not been directed to any evidence placed before the third respondent which was impacted one way or another. All I was referred to was the contents of the transcript where certain members of the third respondent expressed views on the subject matter under discussion. There is no case made out to support this allegation.

[23] Further, the applicant relies on the ground as developed in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[12]. In my view, since this is not an administrative review, the test does not apply. Section 158 (1) (g), being the section upon which this application is pegged allows a review on grounds permissible in law. The principle of legality, though a permissible ground of review, does not find application in this matter. It has not been alleged that the third respondent acted in any unlawful manner. Having considered the evidence and or material placed before the third respondent, I am unable to observe any lack of connection between the material and the reasoning. Even if the *Sidumo* test is to be applied, the decision of the third respondent is not one that a reasonable decision maker cannot arrive at.

[24] Accordingly, I am unable to fault the decision of the third respondent. The review application is bound to fail. None of the grounds punted for have merit. For all the above reasons, the application is dismissed.

[25] In the results I make the following order:

Order

1. The application for review is hereby dismissed.

2. Each party to pay its own costs.

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GN Moshoana

Judge of the Labour Court of South Africa.

[12] (2007) 28 ILJ 2405 (CC).

Appearances

For the Applicant: Mr T Ntaka of Phungo Inc, Randburg.

For the 4th Respondent: Ms B Mokoetle, Employer's Organisation Official.