THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR2413/16

In the matter between:

BIDAIR SERVICES (PTY) LTD

Applicant

and

COMMISSIONER ALBERT MAKGOBA N.O. **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

AMCU obo MEMBERS **Third Respondent**

Heard: 31 July 2019

Judgment delivered: 1 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by first respondent, to whom I shall refer as 'the commissioner'. The award was issued consequent on the referral of a dispute by the third respondent (the union) in March 2016 characterised as one concerning organisational rights. The remedy sought is '*That the Commissioner be appointed to assist parties to conclusion of the Recognition Agreement*'. In his award, the commissioner found that the union was the most representative union at the applicant's workplace in all four of what are referred to variously as its divisions or departments (grooming services, ramp handling services, passenger handling services and executive concierge) and that the applicant should engage the union to conclude a collective agreement in terms of s 20 of the LRA that covers 'the entire departments' (sic).

[2] The context in which the dispute was referred to arbitration is set out in the award. The evidence by the union's witness, the deputy president of the union, confirmed that the applicant's business comprised four departments and that the union enjoyed all the organisational rights in terms of sections 12 to 16 of the LRA in respect of all of all four departments. What the union sought to do was to enter into a single 'collective/recognition agreement' with the applicant to cover all four departments. The applicant's attitude, conveyed through its witnesses, was that each of the departments were independent entities and that any

collective/recognition agreements should appropriately be entered into with each department.

[3] In his award, the commissioner recorded that it was common cause that the union enjoys all of the rights enshrined by sections 12 to 16 of the LRA and that union sought to conclude a collective/recognition agreement with respondent. He noted that the union was the most representative union, and it was the only union that qualified to negotiate wages and conditions of employment with the applicant.

[4] The commissioner came to the following conclusion:

> [63] The applicant is the most representative union at the respondent workplace in all four departments, and the respondent should engage the applicant to conclude collective/agreement in terms of section 20 of the LRA, that covers the entire departments.

[5] When the present matter was called, I enquired from counsel whether the CCMA had jurisdiction to consider the dispute referred to it. I did so on the basis that it seemed to me, on the papers, that the parties (and the commissioner) had confused the concepts of a 'workplace' for the purposes of a union acquiring organisational rights, and the concept of a 'bargaining unit' for the purposes of collective bargaining. In essence, it seemed to me that the dispute between the parties was in reality a dispute about the determination of the bargaining unit for the purposes of the recognition of the union as a collective bargaining agent.

[6] There are a number of indications that what the union sought to be determined by way of arbitration was to have the arbitrator rule that the universe for which it should be recognised for collective bargaining purposes comprised a single unit encompassing all four of the applicant's departments. The first is the terms in which the dispute was referred to the CCMA – what the union sought was the CCMA's assistance in concluding a recognition agreement. Prior to the referral of the dispute to arbitration, it is apparent from the papers that the parties were engaged in discussions on what was termed the 'recognition' of the union by

certain of the departments that comprise the applicant. For example, the terms of a draft agreement compiled in November 2015 in respect of the ramp handling department, for example, propose that the department recognise the union as the representative of its members in relation to 'all employment matters'. Further, the applicant agreed to recognise the union as entitled to represent its members in order to negotiate wages and conditions of employment of those employees in a defined 'bargaining unit'. The draft agreement further contemplated the tabling of demands by the union in relation to matters of mutual interest, and then a process of negotiation between the parties on the basis of those demands. Further provision was made for the election of shop stewards, time-off for shop stewards, access to workplaces and training for shop stewards. The ramp handling division ultimately recognised the union and entered into wage negotiations with it in respect of that division.

[7] The heads of argument filed by the parties in the proceedings under review are also instructive as to the nature of the dispute. The union's heads of argument, for example, record that the applicant refuses to grant organisational rights and\or to enter into a recognition agreement that encompasses the entire company, to include all of its various departments. The applicant's heads of argument assert that the issue that commissioner is required to decide is whether the applicant's departments constitute a single workplace, and whether any recognition agreement should be concluded between the union and each department, or with the entire organisation. Further, there is evidence in the form of a letter addressed by the union to the applicant prior to the arbitration in which the union demands the completion of verification exercises and that a recognition agreement be concluded by May 2016. After the award was issued, the union addressed a further letter to the applicant contending that consequent on the award, it was obliged to withdraw from the contract cleaning bargaining council on the basis that the union's members' salaries and conditions of employment should not be determined at that level. In the answering affidavit, the union avers that what it seeks is a 'common recognition agreement' in respect of the four departments in dispute. The union avers further that it is in the majority, enjoys all

of the organisational rights and therefore 'has an advantage of negotiating wages and conditions of employment, the Applicant is unreasonably withholding this benefit and advantage.' In short, the dispute referred to arbitration was one in which the union sought to be recognised for collective bargaining purposes beyond the ramp handling division to a single unit comprising all of the applicant's divisions.

[8] After some debate, I understood both parties to agree that this was indeed so. In other words, the dispute between the parties is one that s 64(2) of the LRA refers to as a dispute that concerns a refusal to bargain, in the form of a dispute about a refusal to recognise a trade union as a collective bargaining agent and/or a dispute about the definition of an appropriate bargaining unit. It should be recalled that the basic structure of the LRA is one that does not impose a duty to bargain. Rather, the constitutional right to engage in collective bargaining finds expression in a strong set of organisational rights (those referred to in sections 12 to 16 of the LRA) and the right to strike in support of a demand that a party be recognised as a collective bargaining agent, or any other element of what the LRA defines as a refusal to bargain. If the conceptual integrity of this structure is to be maintained (as it must), then commissioners (and judges) must be cautious not to confuse what are two discrete concepts and thus run the risk of imposing a duty to bargain. The structure of the LRA is one in which commissioners and judges have no role in determining whether one party should bargain collectively with another, the subject matter of any collective bargaining, the level at which bargaining should be conducted, or the identity of any bargaining partner.

[9] In summary: the true nature of the dispute between the parties is one that is contemplated by s 64(2) and thus a dispute that does not fall to be determined by arbitration, except by way of the advisory arbitration procedure referred to in s 64(2). It follows that the CCMA had no jurisdiction to issue an arbitration award in the present circumstances and on that basis, the award stands be reviewed and set aside.

[10] Adv. Cook, who appeared for the union, urged me to find that there were two components to the dispute before the arbitrator, the first of which concerned the exercise of organisational rights, and the second the definition of a bargaining unit for collective bargaining purposes. He submitted that although the commissioner clearly had no jurisdiction in respect of the latter, his determination of the dispute in respect of the exercise of organisational rights should be allowed to stand. I am not persuaded that the award under review should be partially upheld on this basis. First, it is clear to me from the papers that the parties (who were represented at the hearing by laypersons) had confused organisational rights and the right to bargain collectively and the manner in which each was to be exercised. It would be difficult, if not impossible, to unscramble the egg at this late stage and discern which elements of the award ought to be upheld and on what basis. Secondly, to the extent that it was contended that at least an element of the dispute concerned the exercise of statutory organisational rights and the definition of a 'workplace' for that purpose, it is not in dispute that the union already enjoys all of the statutory organisational rights in respect of each of the departments that make up the applicant. The union's dispute cannot therefore be one that it has been denied any organisational rights that it demands - it has been accorded all of the statutory rights in respect of all of the applicant's departments. In those circumstances, I fail to appreciate what the union seeks to achieve by having the court uphold a definition of workplace that incorporates all four of the departments that make up the entity that constitutes the applicant. Counsel was unable to point to any tangible advantage that the union might secure should the award be partially upheld on this basis. Finally, it is not clear to me that all of the procedural requirements established by s 21 of the LRA, which regulates the enforcement of statutory organisational rights, were met prior to the referral of the dispute to the CCMA. For these reasons, the award ought to be set aside in its entirety.

[11] Finally, the parties were agreed that this is a matter in which no order for costs would be appropriate. I agree that for the purposes of s 162 of the LRA, the

interests of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The arbitration award issued by the first respondent on 10 October 2016 under case number GAEK 2898-16 is reviewed and set aside.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. L Hutchison instructed by Moodie & Robertson

For the respondent: Adv. A L Cook instructed by Larry Dave Inc