THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Of interest to other Judges

CASE NO: JR2881/17

In the matter between:

TASWU obo LEGODI & 3 OTHERS	Applicant
and	
E.T VAN KERKEN *N.O.*	First Respondent
SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL	Second Respondent
STABUS TOURS CC	Third Respondent

Date enrolled: 14 August 2020 (By agreement, decided in Chambers)

Date of judgment: 20 August 2020. Judgment distributed by email by 16:00

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a ruling made by the first respondent, to whom I shall refer as 'the panellist'. In her ruling, the panellist held first, that in

the interest of fairness, she ought not to conciliate the dispute referred to the second respondent (the bargaining council) in circumstances where the terms of the referral failed to identify individuals who had an interest in the matter and whose names were not disclosed to either the third respondent or the panellist. Secondly, the panellist held that the bargaining council had no jurisdiction to entertain the referral by virtue of non-compliance with clause 9.1 of appendix B to the bargaining council's constitution. That clause provides that a party must appear in person at the dispute proceedings before the bargaining council, but may, in addition, be represented by a legal representative and other persons. In the present instance, the panellist held that the failure of the employees to appear in person without any acceptable explanation, in consequence, the bargaining council lacked jurisdiction.

[2] The material facts are not in dispute. On 31 August 2017, the applicant union on behalf of 'members' referred a dispute to the bargaining council. The referral form makes provision for the referring party to indicate the nature of the dispute. This part of the form is left blank. However, in list of possible unfair dismissal disputes, the union ticked 'operational requirements'. Asked to summarise the facts of the dispute, with additional paper if necessary, the union simply wrote 'Respondent applied sec 189 without proper consultation with the other party'. The dispute was said to have arisen on 31 August 2017. Under the heading 'Result required' the union simply wrote 'Respondent to comply'. In that part of the form which requires the referring party to set out any additional information, the union wrote 'More details will be heard in the arbitration process.'

[3] The matter was set down for conciliation on 9 November 2017. The next day, the panellist issued the ruling referred to above. The panellist made reference to *NUM v Hernic Exporation (Pty) Ltd* (2003) 24 *ILJ* 787 (LAC) where the Labour appeal Court held that the fact that a union does not furnish the names of dismissed employees does not affect the jurisdiction either of the CCMA or this court. The court went on to note that it was best practice for the union to give the names of the employees concerned, so that the employer knows which employees are

engaged in the proceedings. The court confirmed that in terms of section 200 (1) a trade union was entitled to refer dismissal dispute relating to the dismissal of its members to the CCMA for conciliation and to this court for adjudication, without citing its dismissed members as co-applicants.

[4] The panellist went on to note that while the law does not oblige an applicant union to list the names of the individuals on whose behalf it refers a dispute, she considered that considerations of fairness entitle a bargaining council to refuse to entertain a matter where the referral lacks sufficient particularity. In relation to the present matter, she listed 10 reasons why the bargaining should not be inclined to conciliate the dispute. More specifically, she held that fairness requires a respondent to be placed in a position to state its case, particularly since it ultimately bears the onus of proof in relation to the fairness of a dismissal. A failure to properly identify individuals has the consequence, she stated, that a respondent party cannot prepare and state its case. No reason had been furnished by the union for the failure to identify the individuals on whose behalf the dispute had been referred and on whose behalf it wished the bargaining council to entertain the matter. The union had also not contended or suggested that it was entitled to represent all of those employees whose employment was terminated on 31 August on the basis that they were all members of the union. It further remained unknown which of the individual employees had retained an interest in the matter. Further, there was no detail in the referral form as to precisely how the respondent was contended to have failed to properly consult prior to retrenching employees. In a retrenchment dispute, individual circumstances may differ and it would be difficult for an arbitrator to assess liability and remedies for different individuals in circumstances where they are simply not identified in the referral. In regard to the separate issue of a failure of the individual employees to appear in person, as I have indicated, the panellist found that she had no jurisdiction to entertain the referral in circumstances where none of the employees said to have been dismissed were in attendance.

[5] In the founding affidavit, the union's general-secretary submits that the panellist arrived at conclusions and made findings that are incorrect. In particular, he submits that the panellist had to determine whether the sanctions for the applicants was settled prior to the disciplinary hearing and not whether a settlement agreement was concluded'. This submission is nothing less than nonsensical given that the referral form clearly cast the dispute as one concerning an unfair retrenchment. Further, the union submits that the panellist committed a gross irregularity in finding that the union's failure to cite the list of members amounted to the referral being invalid and thereby ousting the jurisdiction of the bargaining council. It should be recalled that the panellist's conclusion in relation to the failure to cite the individuals affected by the dispute was one that went to fairness. The panellist did not decide that the bargaining council had no jurisdiction on this account – the basis for that decision was entirely different, being a failure to appear in person.

[6] Be that as it may, and dealing first with the panellist's ruling on jurisdiction, the dispute referred to conciliation concerned an alleged unfair dismissal. This much is discernible from the referral by reference to the terse statement that the respondent 'applied Sec 189 without proper consultation with the other party'. The bargaining council therefore had jurisdiction to conciliate the dispute – it is a dispute concerning a subject matter that is required to be the subject of conciliation by the CCMA or a bargaining council with jurisdiction (see s 191 (1) (a)). There is no dispute that the parties fall within the bargaining council's scope. But it does not follow that because an individual affected by the dispute fails to appear in person as required by clause 9.1 of the appendix to the bargaining council's constitution, that the bargaining council has no jurisdiction. The failure to appear is personal to the employee concerned; a default that may have the consequence of the referral being dismissed. In other words, the bargaining council retains jurisdiction by virtue of the nature of the dispute referred, but it may deal with any failure by a party to appear at a conciliation hearing in the terms provided in its constitution. The panellist's conclusion that a failure to personally be present at conciliation without

an acceptable explanation deprives the bargaining council of jurisdiction is thus incorrect, and stands to be reviewed and set aside.

[7] Insofar as the panellist's decision that the bargaining council ought properly to refuse to entertain a matter in circumstances where the identities of the individuals who had an interest in the matter remain undisclosed, I fail to appreciate on what basis it can be said that the decision is incorrect. The panellist was faced with a poorly drafted referral that contained no information concerning the nature of the dispute, and, as she observed, the identity of the individual employees affected by it. The process that served before the panellist was one of conciliation. I fail to appreciate how it can be expected of any panellist to conciliate the dispute where no indication whatsoever is given of the numbers of employees involved, their identities, the basis on which substantive and procedural fairness is alleged, and the like. Indeed, the union appears to have been content to have the facts emerge during the arbitration process. This is fundamentally subversive of the process of conciliation. The panellist was faced with a situation not unlike a referral to this court where the nature of the claim is such that the court is clothed with jurisdiction, but where the pleadings failed to comply with the requirements that the material facts and conclusions of law on which the applicant intends to rely are properly disclosed. I am fully aware that it is not incumbent on a party referring a dispute to either the CCMA or a bargaining council to file a pleading as one would in a court, but the terms of a referral ought necessarily to reflect at least a record of the parties to the dispute, the nature of the dispute, the facts and legal conclusions relied on and the remedy sought. Where a union refers a dispute, it is of course entitled in terms of section 200 to represent its members, but it must necessarily record the names of the members whom it represents, or at least identify those members with sufficient precision for the respondent to be able to appreciate the nature of the case against it, and prepare for conciliation. This minimum threshold of information also enables the presiding commissioner or panellist to discharge the statutory functions associated with conciliation.

[8] In this instance, in the absence of identified employees, and with a wholly deficient description of the nature of the dispute, the facts and legal principles on which the union relied, and the result required, the dispute was simply not capable of conciliation. She was quite correct to observe that a fair outcome, both in conciliation and arbitration proceedings, cannot be achieved where a dispute is referred without identifying the individuals concerned, and that the bargaining council ought to refuse to entertain a matter where the identities of the individuals who have an interest in the matter are undisclosed to the respondent and the panellist. An order of dismissal or striking off would acknowledge that the dispute fell within the jurisdictional purview of the bargaining council, but that the terms of the referral were such that conciliation was not possible.

[9] For the above reasons, I would set aside the panellist decision to dismiss the referral on the basis of a lack of jurisdiction, and remit the matter to the panellist to make an appropriate ruling.

[10] Finally, in relation to costs, the interests of the law and fairness are best satisfied by there being no order as to costs.

I make the following order:

1. The first respondent's jurisdictional ruling issued under case number RPNT 4330 on 10 November 2017 is reviewed and set aside.
2. The matter is remitted to the first respondent to make an appropriate ruling having regard to the individual employees' failure to attend the conciliation meeting and the failure by the applicant to properly identify those of its members engaged in the dispute, and the unfairness on which it relies.

André van Niekerk

Judge of the Labour Court of South Africa