IN THE LABOUR COURT OF SOUTH AFRICA

Case Number: D136/98

Before Landman J

In the matter between:

BARGAINING COUNCIL FOR THE CLOTHING INDUSTRY

Applicant

and

CONFEDERATION OF EMPLOYERS OF SOUTHERN AFRIC 1st Respondent

THE INDIVIDUAL EMPLOYERS DEPICTED ON ANNEXURE "A" TO THE NOTICE OF MOTION 2nd and Further Respondents

PRESIDING JUDGE: Landman J

ON BEHALF OF APPLICANT: M J D Wallis SC *instructed by* **Shepstone & Wylie Attorneys**

ON BEHALF OF RESPONDENT: Mr D Coetsee *of* **Coetsee Van Rensburg Inc.**

DATE OF HEARING: 29 May 1998

PLACE OF HEARING: Durban

JUDGMENT

[1] The Applicant, the Bargaining Council for the Clothing Industry (Natal), was registered as an industrial council under the Labour Relations Act 28 of 1956 (the LRA of 1956). It is deemed to be a bargaining council under the Labour Relations Act 66 of 1995 (the LRA of 1995). The first respondent, COFESA, is an employers' organisation. The further respondents are persons listed on annexure A to the papers. These persons were engaged in the clothing industry in Natal as employers employing employees in this industry. They are represented by COFESA. Since the LRA of 1995 came into operation the further respondents have continued to engage in the clothing industry but, according to them, they do so without the benefit of employees. Their former employees have concluded contracts to render independent services to them. The Bargaining Council is not proceeding against some respondents but I shall refer to the further respondents as such.

[2] The Bargaining Council however believes that the further respondents are employers employing employees in the industry and are therefore subject to the council's jurisdiction. To this end an investigation was launched and the assistance

of the Labour Court was invoked to compel attendance at inquiries convened before designated agents of the Council. On the last occasion the Bargaining Council was given leave to supplement its application. The Bargaining Council has done so and seeks the following relief:

"1.1 THAT it be and is hereby declared that the Second and Further Respondents listed on Annexure "B" hereto conduct business and are employers in the "Clothing Industry" as defined in the Main Agreement for the Clothing Industry (Natal), promulgated under Government Notice R46 dated 11 January 1980, as amended and extended from time to time ("the Main Agreement").

1.2 THAT it be and is hereby declared that the said Respondents are obliged to register as employers in terms of Clause 14 of the Main Agreement and are bound to make contributions to the Applicant in the amounts set forth in the Main Agreement.

1.3 THAT the said Respondents be and are hereby directed to register as employers in terms of the Main Agreement and to comply with their obligations thereunder.

1.4 THAT it be and is hereby declared that the said Respondents were obliged to register and to pay dues to the Applicant with effect from the relevant dates set out in Annexure "B" hereto.

1.5 THAT the said Respondents be and are hereby directed to submit returns and to pay the amounts which were due under the Main Agreement with effect from the relevant dates set out in Annexure "B" hereto to date of payment together with interest thereon at the rate of 15.5% calculated from the date when such payments were due to date of payment.

1.6 THAT the said Respondents jointly and severally, the one paying the other to be absolved, pay the costs of this application.

1.7 THAT leave is granted to the Applicant to supplement these papers further and to apply for mandatory relief as set out in paragraphs 1.1 to 1.6 hereof against the Eleventh, Twentieth and Twenty-Second Respondents."

[3] It is common cause that the agreement which the Bargaining Council believes applies to the further respondents is the Clothing Industry Main Agreement as referred to in Government Notices R46 of 11 January 1980, R2276 of 20 September 1991, R3100 of 13 November 1992, R2308 of 3 December 1993 and R4398 of 24 November 1995. These notices were promulgated in terms of s 48 of the LRA of 1956.

[4] The new Labour Relations Act of 1995 came into operation on 11

November 1996. The legal force of the main agreement, which had not expired, was preserved by item 12(1)(a) of Schedule 7 to the Act.

[5] On 13 December 1996 the Director of Labour Relations, "duly authorised by the Minister of Labour in terms of s 48 (4)(a)(ii) of the LRA of 1956", declared that the provisions of the last four of Government Notices cited above to be effective from the date of publication ie 13 December 1996 and for the period ending 10 May 1998. See GN 2072 in Government Gazette 17666 of 13 December 1996. The Director's authority to make such an order is found in item 12(1)(b) of the 7th Schedule to the LRA of 1995 as amended. This item reads:

"(b) On the request of any Council deemed by item 7 to be a bargaining council, an agreement referred to in paragraph (a) that had been concluded in that council - (i) if it expires before the end of the 18 month period referred to in paragraph (a) may be extended or declared effective in accordance with the provisions of subsection (4)(a) of s 48 of the Labour Relations Act, for a period ending before or on the expiry of that 18 month period, which provisions, as well as any other provisions of the Labour Relations Act relating to industrial council agreements extended or declared effective in terms of that subsection, will apply in all respects, read with the changes requred by the context, in relation to any agreement extended or declared effective on the authority of this subparagraph as if those various provisions had not been repealed. However, the Minister may not,

on the authority of this subparagraph declare an agreement to be effective if it expires after 31 March 1997;".

[6] COFESA and the further respondents take the point that this court has no jurisdiction to make the declaration sought by the Bargaining Council. The ground on which the respondents rely is a crisp one. It is submitted that the main agreement is a collective agreement as defined by the LRA of 1995. Accordingly any dispute regarding the interpretation or application of the main agreement must be resolved by the procedure provided for in s 24 of the LRA of 1995. Section 24 requires every collective agreement to contain a procedure for the conciliation and arbitration of such disputes. However in the absence of such a clause the dispute must be referred to conciliation by the CCMA and if that fails it must be referred to arbitration. See s 24(2) of the LRA of 1995. It is pointed out, correctly, that the Labour Court has no jurisdiction to adjudicate on a dispute which must be arbitrated. The respondents rely on **SA Motor Industry Employers Association and Others v National Union of Metal Workers of SA and other** (1997) 18 ILJ 1301 (LAC) at 13041-1305G, which held an industrial council agreement promulgated in terms of s 48 of the LRA of 1956 to be a collective agreement. It was submitted that I am bound by this decision to come to the same conclusion.

[7] Mr Wallis SC, who appeared for the Bargaining Council, submits that the **SA Motor Industry** case was incorrectly decided and that it was decided per

incuriam as it does not refer to item 13 of the 7th Schedule to the LRA of 1995. Item 13 reads:

"(1) For the purposes of this section, an agreement -

(a) includes a recognition agreement;

(b) excludes an agreement promulgated in terms of section 48 of the Labour Relations Act;

(c) means an agreement about terms and conditions of employment or any other matter of mutual interest entered into between one or more registered trade unions, on the one hand, and on the other hand -

(i) one or more employers;

(ii) one or more registered employers' organisations; or

(iii) one or more employers and one or more registered employers and one or more registered employers' organisations.

(2) Any agreement that was in force immediately before the commencement of this Act is deemed to be a collective agreement concluded in terms of this Act.

(3) Any registered trade union that is party to an agreement referred to in sub-items (1) and (2) in terms of which that trade union was recognised for the purposes of collective bargaining is entitled to the organisational rights conferred by sections 11 to 16 of Chapter III and in respect of employees that it represents in

terms of the agreement as the collective bargaining agent in those employees.

(4) If the parties to an agreement referred to in subsection (1) or (2) have not provided for a procedure to resolve any dispute about the interpretation or application of the agreement as contemplated in section 24(1), the parties to the agreement must attempt to agree a procedure as soon as practicable after the commencement of this Act.

(5) An existing non-statutory agency shop or closed shop agreement is not binding unless the agreement complies with the provisions of this item. Sections 25 and 26 of this Act become effective 180 days after the commencement of this item."

[8] Item 13(1) defines "for the purposes of this section" an agreement and in item (2) it provides that an agreement (as defined) that was immediately in force before the commencement of the LRA of 1995 is deemed to be a collective agreement. Item 13(1) expressly excludes an industrial council agreement from the ambit of an agreement and thus from being deemed to be a collective agreement.

[9] I might add that it also does not seem as if the Labour Appeal Court was referred to item 12 of the 7th Schedule which deals with the what were previously known as industrial council agreements which continue to have effect or which are

given effect to under the transitional provisions of the 7th Schedule.

[10] It is trite that a decision of a higher court is binding on a lower court even if the lower court considers the decision to be clearly wrong unless the decision is one which was pronounced per incuriam. See **Sealandair Shipping and Forwarding v Slash Clothing Company (Pty) Ltd** 1987 (2) SA 635 (W) at 639J-640A. A decision is given per incuriam, submits Mr Wallis, where the court deciding the case has not been referred to an authority which binds it in accordance with the principles of stare decisis or where it has not been referred to a statute or rule the application of which would necessarily lead to a different result. See **Youngh v Bristol Aeroplane Company Ltd** [1944]2 All ER 293 (CA) at 300B-D and **Duke v Reliance Systems Limited** [1987] 2 All ER 858 (CA) at 860C.

[11] The Labour Court is not only bound to follow the decision of the Labour Court on the basis of the loyalty which a court lower down the hierarchy owes to a higher court and according to the common law doctrine of stare decisis but also in terms of statute. Section 182 of the LRA of 1995 provides that a judgment of the Labour Appeal Court is binding on Labour Court. This, in my view, merely restates the common law. It does not seek to redefine the law regarding stare decisis. In my view a judgment of the Labour Appeal Court is binding on the Labour Court unless, for instance, it is pronounced per incuriam.

[12] As the **SA Motor Industry** case was decided without reference to the 7th Schedule it follows that it was decided per incuriam. This being so I consider, with respect, that am not bound by the decision.

[13] I am unable to find that the industrial council agreement in question is a collective agreement as defined. It was concluded before the LRA of 1995 came into operation and in terms of item 12 of the 7th Schedule it retains its own identity. It is not deemed by the LRA of 1995 to be a collective agreement. Indeed the contrary intention appears from item 13 of the 7th Schedule.

[14] I return to the question whether this court has jurisdiction to grant a declaration as sought by the Bargaining Council. Even if an industrial council agreement is not a collective agreement as defined or deemed to be one, As I have found, then it does not follow that this court has jurisdiction in this matter. This court is a creature of statute and its jurisdiction must be found within the four corners of a statute. Section 157(1) of the LRA of 1995 makes it clear that the Labour Court has jurisdiction "in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court". The 7th Schedule is of course part of "this Act". See s 213 of the LRA of 1995. It is also important to remember that this court's jurisdiction is usually an exclusive one unless it is specified that it is concurrent jurisdiction with eg that of the High

Court.

[15] An industrial council agreement promulgated under the LRA of 1956 was enforceable in a number of ways. In the first instance a breach of the agreement, in law a piece of delegated legislation, constituted a criminal offence. This offence could be tried in a Magistrates' Court and, on account of its concurrent jurisdiction, also in the High Court or Supreme Court as it was known. See s 53 of the LRA of 1956. In certain circumstances a civil action could be pursued particularly where the Attorney -General declined to institute criminal proceedings. The breach of an industrial council agreement could also have constituted an unfair labour practice. See Rycroft and Jordaan **A Guide to South African Labour Law** 2nd ed Juta 145. It was also possible to obtain a mandatory interdict in the High Court. See **Industrial Council for the Building Industry (Transvaal) v All Construction (Pty) Ltd and another** (1980) 1 ILJ 123 (W).

[16] Neither item 12 nor any other item of the 7th Schedule confers any jurisdiction on the Labour Court to deal with disputes concerning industrial council agreements. Certainly the Schedule does not take away the criminal nor civil jurisdiction of the Magistrates' court nor that of the High Court. Neither is there any transfer of jurisdiction to the Labour Court.

[17] A careful reading of item 12 indicates that what the legislature intended is

that not only should industrial councils agreements referred to in that item have enforceability but that they should be enforced through the fora provided for or referred to in (but not established by) the LRA of 1956. The LRA of 1956 has been repealed in it entirety by s 212 of the LRA of 1995 read with Schedule 6. Section 212(2) however provides that the repeal does not affect the transitional arrangements made in Schedule 7. The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of the LRA of 1995. See s 121(3) and also s 213.

[18] In **Yvonne Adonis v Western Cape Education Department** (C 124/97) my brother Mlambo J considered the effect of item 12(2) of the 7th Schedule to the LRA of 1995 which relates to agreements promulgated in terms of the Education Labour Relations Act 146 of 1993 and disputes which arose in that sector after 11 November 1996. He came to the conclusion that the old dispute resolution mechanisms did not to apply to disputes which arose after 11 November 1996. Mlambo J is of the opinion that the new mechanisms must be employed to resolve such disputes. Mlambo J was careful to confine his reasoning to the educational sector. I need not express an opinion on the correctness of the decision. It is distinguishable from the facts of the present case as it does not deal with an industrial council agreement and its enforceability.

[19] I have also studied the decision of my Brother Zondo J in **Reactor**

Clothing (Pty) Ltd v Bruce Robertson and others (unreported D 146/97) where an industrial council agreement was interpreted. It seems that the court assumed that jurisdiction had been conferred on it tacitly or by the absence of objection. There has been no consent to arbitrate in this case.

[20] In my opinion therefore this court does not have the jurisdiction to grant a declarator as requested and consequently the respondents' point in limine must be upheld with costs.

SIGNED AND DATED AT JOHANNESBURG ON THIS 15TH DAY OF JUNE 1998

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JUDGE A A LANDMAN