IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Case number: C239/2004

In the matter between:

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS' UNION	First Applicant
DR. D.J. DENNIS	Second Applicant

And

PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL	First Respondent
COMMISSIONER RETIEF OLIVIER N.O.	Second Respondent
DEPARTMENT OF HEALTH-WESTERN CAPE	Third Respondent

JUDGMENT

Freund A.J.:

INTRODUCTION:

1. The Second Applicant ("the Employee" or "Dr. Dennis") referred a dispute between himself and the Third Respondent ("the Department") for arbitration before an arbitrator appointed by the First Respondent ("the Bargaining Council"). The Second Respondent ("the Arbitrator") was appointed by the Bargaining Council to arbitrate the dispute.

2. The Arbitrator did not hear evidence in relation to the underlying dispute. Instead, he heard argument on the question as to whether he had jurisdiction to arbitrate the matter and then issued a "jurisdictional ruling" in which he held that he did not have such jurisdiction.

3. This is an application by the Employee (assisted by, the First Applicant, his trade union) to review and set aside the "jurisdictional ruling" referred to above. The relief ultimately sought by the Applicants is an order referring the dispute back to the Bargaining Council for the appointment of another arbitrator to rehear the matter, including the question as to jurisdiction.

THE BACKGROUND

4. Dr. Dennis was employed by the Department as a principal dentist in its Oral Health Program at Mossel Bay. He alleges that he thereafter concluded an agreement with one Dr. Hendriks, representing the Department, amending his duties to involve more managerial work as regional co-ordinator of the Oral Health Program from the Department's regional offices in George. In support of this allegation, he produced to the Arbitrator a copy of a document entitled "Rough Draft – Provisional Agreement between Dr. Gilbert Dennis and the Provincial Administration Western Cape" containing twelve clauses. In brief, the document provides that Dr. Dennis would, as of 1 March 2000, act as regional co-ordinator and that, from 1 July 2000, he would begin to

function from George "permanently". As regards remuneration, the only relevant clause is the following:

> *"12. Additional expenses which Dr. Dennis may incur as a result of the added responsibility of the co-ordination of the Oral Health program will be borne by the South Cape/ Karoo regional office. This will include remuneration for travel and accommodation, when absent from his workstation as a result of work related activities, and expenses incurred on the basis of approved development, training and research activities."*

5. It is clear that effect was, for a time, given to this "provisional agreement". However, it is common cause that, some time in 2001, the newly appointed director in the region, Dr. Crous, embarked on a restructuring process in terms of which Dr. Dennis was required to revert to his position as principal dentist in Mossel Bay. Dr. Dennis alleges that this took place twenty-two months after the arrangement, referred to above, had been in operation.

6. The Applicant objected to what he regarded as a unilateral change to the terms and conditions of his employment. He also applied for additional remuneration for the extra work he had been doing. This

application was turned down. He filed a grievance alleging that the Department was engaging in an unfair labour practice.

7. When this was not resolved he referred a dispute to the Bargaining Council. In the referral form he described the dispute as a dispute about "unilateral change to terms and conditions of employment". Asked to summarise the facts of the dispute he stated:

> *"* - *I have a negotiated job description that I used to operate from for 22 months that was unilaterally changed by the Department*
> - *Treating workers in the organisation differently.*
> - *In executing my duties they were reduced and changed without proper negotiations."*

Asked in the referral form to state what outcome he desired, he stated:

> *"1. The reversal of unilateral decisions taken;*
> *2. Restoration of my name within the Department and programs;*
> *3. The rank promotion with the additional remuneration;*
> *4. Remuneration for the additional responsibilities for 22 months."*

Asked in the referral form to briefly outline any special features or additional information which the Bargaining Council needed to note, he stated:

> *"I had entered into an agreement with the Department of Health;*
>
> *and subsequently we have had a change of directorship."*

8. As referred to above, no evidence was led before the Arbitrator and therefore no transcript of the proceedings before the Arbitrator has been placed before the Court. However, it is stated in the "jurisdictional ruling" that the matter was referred to the Bargaining Council as a unilateral change to terms and conditions of employment, or in the alternative as an unfair labour practice. I assume that this is what the Arbitrator was told by the Employee or by his representative.

9. In his reasons for his "jurisdictional ruling" the Arbitrator took the view that the "key aspect" of the Employee's dispute was "about the change in his contract, and not in terms of an unfair labour practice". The Arbitrator also stated in his reasons that the Employee "conceded that the dispute was not about an unfair labour practice, but a dispute about unilateral change to terms and conditions of employment". In argument before the Court this assertion by the Arbitrator, as to the concession allegedly made by the Employee, was disputed. This aspect was not directly dealt with in the Founding Affidavit but, in as much as the

Founding Affidavit complains at length about the Arbitrator's failure to find that he had jurisdiction to entertain the dispute as a dispute concerning an alleged unfair labour practice, I take the view that the Applicant made sufficiently clear that he disputes that he had conceded that the dispute was not about an unfair labour practice. This was not contradicted in the Answering Affidavit. Counsel for the Applicants also referred me to the transcript of the Arbitrator's notes which form part of the record before the Court which he submitted did not bear out the assertion that the Applicant conceded that the dispute did not concern an alleged unfair labour practice. Whilst the notes are not altogether clear in this regard, it does appear to me that the Arbitrator's own notes record the Applicant as asserting that the dispute involved both a complaint about a unilateral change to terms and conditions of employment and a complaint about an alleged unfair labour practice. I shall therefore approach this matter on the assumption, which I believe to be justified, that the Arbitrator is not correct in stating that the Applicant conceded that the dispute was not, at least in part, about an alleged unfair labour practice.

THE ISSUES

10. Counsel for the Applicant submitted that the Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by ruling

that he had no jurisdiction without first hearing evidence in respect of the dispute. He submitted that the Arbitrator did have jurisdiction to arbitrate the dispute on two separate bases, namely:

10.1 as a dispute regarding an unfair labour practice as contemplated in Section 186(2) of the Labour Relations Act, 1995 ("the LRA"),

and more particularly as a dispute regarding unfair conduct by the employer relating to demotion (as contemplated in Section 186(2)(a)); and

10.2 as a dispute subject to compulsory arbitration in terms of Section 74(4) of the LRA.

11. The application before me was not formally opposed. Nevertheless, the Department (without objection) filed an "Answering Affidavit" and was represented in argument by Counsel. Counsel for the Department submitted that the Arbitrator had been correct in concluding that he did not have jurisdiction. The Department's principal concern, however, was to persuade me that, if I was of the view that the Arbitrator had erred, the matter should be remitted to the Bargaining Council for further consideration and that I should not determine the underlying dispute. The Applicants did not request that I should determine the underlying dispute and it is therefore not necessary to say anything more about this aspect.

12. I propose to deal first with the issue as to whether the Arbitrator had jurisdiction in terms of Section 74(4) and thereafter with the unfair labour practice jurisdiction issue.

RIGHT TO COMPULSORY ARBITRATION?

13. It was common cause before the Arbitrator that the Employee was engaged in an essential service (as contemplated in Sections 70 to 74 of the LRA).

14. Despite this, the Arbitrator held that the Employee was not entitled to refer the present dispute to arbitration in terms of Section 74(1) and (4) of the LRA. He pointed out that Section 74 makes it clear that a dispute may only be referred for arbitration in terms of the aforementioned provisions if the party concerned is precluded from participating in a strike or lockout because that party is engaged in an essential service. He continued:

> *"In this particular case, however, the Applicant was not precluded from striking because he was engaged in an essential service, but because he could not strike as an individual. The definition of strike in terms of Section 213 of the LRA indicates*

that "persons" (in the plural), may engage in strike action. It has become trite law that a single employee cannot engage in strike action. John Grogan indicates in Workplace Law, third edition, page 250 that "what renders their action a strike, is their common purpose: they must have agreed to act in concert"."

The Arbitrator went on to hold:

"In this instance the Applicant could not refer the matter on the basis that he was precluded from striking because he was engaged in an essential service. He could not strike as an individual, irrespective of whether he was working in an essential service, or not. The dispute referred as an unilateral change to terms of conditions of employment in terms of Section 64(4) of the LRA is therefore not arbitrable in this instance."

15. I do not agree with the Arbitrator's reasoning and I am of the view that his jurisdictional ruling falls to be reviewed and set aside. I say so for the reasons which follow.

16. Section 74(1) of the LRA provides:

"*Any party to a dispute that is precluded from participating in a strike or a lockout because that party is engaged in an essential*

service may refer the dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction." (my emphasis)

17. Section 74(4) provides:

"If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission."

18. If the Employee was a party to a dispute who "is precluded from participating in a strike … because (he) is engaged in an essential service", it is clear that he was entitled to refer the dispute for conciliation (in terms of Section 74(1)) and thereafter for arbitration (in terms of Section 74(4)). As the Arbitrator correctly recognised, the question to be determined is whether the Employee was such a party.

19. Section 65(1)(d)(i) of the Act provides as follows:

"(1) No person may take part in a strike or a lockout or in any

conduct in contemplation or furtherance of a strike or lockout if-

…….

(d) that person is engaged in-

i) an essential service;

…..”

20. It is common cause that the Applicant is a person engaged in an essential service. It follows that, in terms of Section 65(1)(d)(i), he is precluded from participating in a strike.

21. I accept that a withdrawal of labour by a single employee is not a “strike” as defined in Section 213 of the LRA. That section defines a “strike” as meaning:

> “…*the partial or complete <u>concerted</u> refusal to work, or the retardation or obstruction of work, by <u>persons</u> who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory”.* (my emphasis)

The requirement that the refusal to work contemplated in this definition must be "concerted" and that it must take place by "persons" (plural) makes it clear, in my view, that a single employee acting alone, cannot "strike".

22. I do not accept, however, that, as a matter of law, a strike (by more than one employee) cannot take place in respect of the grievance of a single employee. If a group of employees withhold their labour over the grievance of a single employee that, in my view, constitutes a "strike" as defined in Section 213 of the Act.

23. Moreover it is possible for such a strike to be a protected strike. See in this regard Section 64(1) of the Act, which provides that every employee has the right to strike if "the issue in dispute" has been referred to a council or to the Commission and the requisite further conditions set out therein are met. Nothing precludes the referral of the grievance of an individual employee as the relevant "issue in dispute" (see in this regard the definition of "issue in dispute" in Section 213 of the LRA).

24. It follows, in my view, that but for Section 65(1)(d)(i), a strike by two or more employees in support of Dr. Dennis's grievance would be

protected, provided no other provision limiting the right to strike was infringed. Dr. Dennis is prevented from striking, not because his grievance is an individual grievance, but because he is prohibited from doing so by Section 65(1)(d)(i). He is, in my view, a party precluded from participating in a strike because he is employed in an essential service, as contemplated in Section 74(1) of the LRA.

25. Despite this, it is not clear to me whether or not the Arbitrator had jurisdiction to entertain the dispute or disputes referred by the employee. For one thing, it is not clear whether Section 72(b) of the LRA has application. That section provides that the provisions of Section 74 do not apply if the essential service committee has ratified any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service. It appears from the Arbitrator's reasons that a draft, unsigned agreement of this type was handed in at the time that the jurisdictional issue was debated. Clearly a draft, unsigned agreement is insufficient to make Section 72(b) applicable but is not clear to me whether a collective agreement as contemplated in Section 72 has been ratified by the essential services committee. If such ratification has taken place, the date of such ratification may (though I do not have to decide this issue) affect whether or not the dispute referred by the employee is arbitrable in terms of Section 74.

26. Counsel for the Applicants submitted that the Arbitrator committed a gross irregularity by not hearing evidence on this and other factual issues (to be referred to below) which were relevant to determining whether he had jurisdiction. I agree. In my view that is a sufficient basis to review and to set aside his ruling.

27. The fact that I do accept the correctness of the basis upon which the Arbitrator concluded that he did not have jurisdiction is, in my view, a further basis to set aside his ruling. The Arbitrator could not deprive himself of jurisdiction by an incorrect finding that the requisite jurisdictional facts did not exist. (See e.g. Benicon Earthworks & Mining Services (Edms) Bpk vs Jacobs N.O. and Others (1994) 15 ILG 801 (LAC) at 803H2804H; Zeuna-Stärker Bop (Pty) Ltd vs National Union of Metal Workers of SA (1999) 20 ILG 108 (LAC) at p. [6]). The conclusion reached by the Arbitrator is, in my view, also not "justifiable", as contemplated in the well-known decision in Carephone (Pty) Ltd v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC).

JURISDICTION IN RESPECT OF AN UNFAIR LABOUR PRACTICE DISPUTE?

28. Section 191(5)(a)(iv) confers on the Bargaining Council jurisdiction to arbitrate a dispute concerning an unfair labour practice.

29. Counsel for the Applicants contended that the Employee's complaint concerns an unfair labour practice taking the form of unfair conduct by

the Employer relating to demotion. It is not clear to me that the Employee's case does indeed concern conduct relating to "demotion", but it may. Even if it does, it is not clear to me that the conduct complained of constitutes an "unfair labour practice" as defined in Section 186(2)(a) of the LRA. These are issues which, in my view, the Arbitrator did not adequately investigate and on which the requisite evidence is not before this Court. Assuming, as I do, that the Employee did not abandon his unfair labour practice complaint, I agree with Counsel for the Applicants that the Arbitrator's failure to hear such evidence constituted a gross irregularity. For example, it was, in my view, necessary for the Arbitrator to determine whether the agreement alleged by the Employee was in fact concluded and to determine whether the Department's unwillingness to continue to comply therewith constituted a "demotion". The Arbitrator's failure to hear evidence in this regard (or to obtain agreement from the parties as to all the relevant material facts) constituted a gross irregularity. This is a further basis upon which the "jurisdictional ruling" falls to be reviewed and set aside.

EFFECT OF JURISDICTION TO ARBITRATE AN UNFAIR LABOUR PRACTICE ON JURISDICTION TO ARBITRATE AN "INTERESTS DISPUTE" IN TERMS OF SECTION 74?

30. It is not entirely clear to me whether the Employee has referred one, or more than one, dispute(s) for conciliation and arbitration. If, in truth, he has referred a single dispute and if such dispute is, in truth a dispute concerning an unfair labour practice, it may follow that the dispute is not arbitrable in terms of Section 74 of the Act. This is because the employee might then not be a party precluded from participating in a strike "because that party is engaged in an essential service". Section 65(1)(c) provides that no person may take part in a strike if "the issue in dispute is one that a party has the right to refer to arbitration … in terms of this Act". If the dispute is a single dispute, and if it is a dispute regarding an unfair labour practice, the employee has the right to refer that dispute to arbitration in terms of Section 191(5)(a)(iv) and Section 74 may have no application. Fortunately, that is not an issue I am required to determine at this time.

CONCLUSION

31. From what is stated above, it will be apparent that, in my view, the Arbitrator's "jurisdictional ruling" falls to be set aside. I do not hold, however, that the Arbitrator in fact had jurisdiction. That is a matter which will only be determinable once all the relevant evidence in that regard has been heard by a different arbitrator.

32. In my view, this is not a matter in which it would be appropriate to grant a costs order, and Counsel for the Applicants did not submit to the contrary.

33. In the circumstances, I make the following order:

34.1 The "jurisdictional ruling" issued by the Second Respondent on 19 March 2004 in respect of Case Number: PSHS 833 is reviewed and set aside;

34.2 The First Respondent is directed to appoint a different arbitrator to consider and determine the dispute or disputes referred by the Second Applicant to the First Respondent, including the question as to his or her jurisdiction.

34.3 There shall be no order as to costs.

FREUND, A.J.

APPEARANCES:

FOR THE APPLICANT:	Adv. F. Boda, instructed by Kathrada Norval Rice Patel Attorneys
FOR THE RESPONDENT:	Adv. S.C. O'Brien, instructed by the State Attorney, Cape Town

DATE OF ARGUMENT: 9 May 2006
DATE OF JUDGMENT: 26 May 2006