REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C664/2022

In the matter between:

UPN (UNIVERSAL PRODUCTS NETWORKS (PTY) LTD) Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

COMMISSIONER MARTIN RABIE Second Respondent

SACCAWU obo MEMBERS Third Respondent

Date heard: 3 May 2023

Delivered: 5 July 2023 by means of email; deemed received at 10 a.m. on the 8 July 2023.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an Award under case number WECT15492-22. The dispute was referred to the CCMA by the third respondent (the union), under section 21 of the LRA seeking organizational

rights in the work place. The union already had section 13 rights when it referred the dispute i.e. deductions of subscriptions as a representative union within the applicant (the company). Although a separate corporate entity, the company has only one customer for whom it distributes goods, being Woolworths. The second respondent (the Commissioner) made the following Award:

" 33. The 'in limine' application of the Respondent, challenging the jurisdiction of the CCMA, is dismissed.

34. SACCAWU, as a majority union is granted sections 12, 13, 4, 15 and 16 organisational rights.

35. The manner in which the Applicant would exercise access would be to conduct union meetings on the premises of the Respondent, on reasonable notice of 48 hours.

36. The Applicant would conduct half of the meeting time outside working hours and the other half within working hours.

37. The Award must be implemented by no later than 20 December 2022."

[2] A jurisdictional issue was raised by the applicant (the employer) at the hearing of the arbitration. The Award records:

"3. Geldenhuys on behalf of the Respondent raised a jurisdictional issue about the scope of SACCAWU in relation to the nature of the Respondent's business.

4. I made a determination that the parties should address me on jurisdiction and on the substantial merits of the case. Should I find that the jurisdictional challenge is upheld, it is the end of the matter. If not, I would then deal with the merits of the application."

[3] The challenge, it would appear, was brought with the Constitutional Court judgment of *National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others*[1] in mind. In that judgment, the Constitutional Court found that NUMSA's definition of its scope is binding upon it and that it follows that it could amend its scope of

[1] (2020) 41 ILJ 1846 (CC)

membership, without limitation, provided it follows its prescribed amendment procedures.[2] The Constitutional Court upheld the LAC approach in this regard:

"[9] The Labour Appeal Court found that the LRA requires unions to determine in their constitutions which members are eligible to join and, by necessary implication, precludes them from admitting as members, employees who are not eligible to be admitted in terms of the union's registered constitution. If it is shown that the persons concerned are precluded by the union's constitution from becoming its members, any purported admission of such employees as members is ultra vires the union's constitution and invalid."

[4] In this case, the union applied to amend its constitution in 2008 to include workers employed in the "Commercial Distributive Trade and/or Wholesale & Retail". The amendment (amongst others) was duly implemented by the Registrar of Labour Relations. The definition of the "Commercial Distributive Trade and or Wholesale & Retail" in the amended constitution reads as follows:

"means the Trade in which employers and Employees are associated for the purpose of conducting a shop, and *includes all operations incidental thereto*. Commercial Distributive Trade shall be deemed to include the sale and distributing of books, newspapers, periodicals, diaries, calendars and greeting cards as well as the Wholesale and Retail as defined by the W&R Sectoral Determination." (emphasis mine)

[5] Given that the Commissioner decided a jurisdictional point in limine in the award, it is trite that this reviewing Court must decide whether he was correct in law and fact in his finding. Having heard the submissions of the company that it does not fall within the ambit of wholesale and retail, as it is not in the business of a shop, the Commissioner dealt with the interpretation of the union's constitution and correctly, with respect, stated as follows:

"A plain and ordinary meaning would rather be, that to be in a trade associated for the purpose of conducting a shop, does not in itself implies (sic) that the Respondent must actually conduct a shop. It is associated with

[2] At paragraph 46

Woolworths who is conducting the shop and it is involved in the distribution operations of Woolworths. That amounts to actions incidental thereto…"

[6] The issue raised *in limine* by the applicant that the scope of the constitution of the union did not permit it to have organizational rights within the Company was correctly dismissed by the Commissioner. I note that the applicant also referred to Sectoral Determination 9 in submission before him, and argued that the parties did not fall under it. This issue is one, if duly raised, that must be dealt with in terms of Section 62 of the LRA and falls outside of the jurisdiction of a Section 21 dispute. Section 62 provides in material part as follows:

"62 Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers….."

[7] This type of dispute was not before the Commissioner and furthermore cannot be determined by the Labour Court as an adjudicator of first instance.[3] The determination of this issue was not necessary for the purposes of these review proceedings in my view[4] and this Court will not refer a demarcation dispute to the CCMA.

[8] Both the parties before me agreed that the decision by the Commissioner contained in Paragraph 36 of his Award stood to be set aside given the provisions of section 12(2) of the LRA.

[3] Section 62(3) of the LRA
[4] Section 62(3)(b) of the LRA

[9] I therefore make the following Order, which given the relationship between the parties does not include any order as to costs.

Order

1. The Award under case number WECT15492-22 is reviewed only in respect of Clause 36 thereof which is set aside in its entirety.
2. There is no order as to costs.

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: ME Attorneys

Third Respondent: B. Prinsloo instructed by Haffegee Roskam Attorneys