



EMPLOYMENT

Whether non-parties to a collective agreement can refer a dispute about the interpretation and application of the collective agreement?

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and Pumelela Mniki, Candidate Attorney

The issue of whether non-parties to a collective agreement can declare a dispute about its interpretation or application recently came up for consideration by the Labour Appeal Court (LAC) in *SACOSWU V Minister of Justice and Correctional Services et al.* The background of the matter is that a dispute about the interpretation of General Services Sectoral Bargaining Council (GPSSBC) Resolution 2 of 2009, which embodies a collective agreement on the implementation of an occupation-specific dispensation (OSD) for correctional services officials was referred to the GPSSBC by SACOSWU on behalf of one of its members in circumstances where neither SACOSWU nor its member were part of the impugned collective agreement. However, the binding effect of the collective agreement was extended to non-parties, including SACOSWU, in terms of section 32(2) of the LRA. An arbitrator of the GPSSBC issued an award to the effect that SACOSWU did not have *locus standi* to refer the dispute on behalf of the employee and, consequently the GPSSBC did not have jurisdiction to adjudicate the dispute.

Not satisfied with the outcome, SACOSWU launched a review application in the Labour Court to review and set aside the award of the arbitrator. The Labour Court agreed with the arbitrator that SACOSWU did not have *locus standi* to refer the dispute on behalf of the employee in question and that consequently, the GPSSBC did not have jurisdiction to adjudicate the dispute. Ultimately, the matter came before the LAC.

In considering the issue before it, the LAC referred to sections 23, 24 and 32 of the LRA, which constitute what it regarded as the architecture of the law dealing with collective agreements. Section 23 (1)(d) extends collective agreements to employees who do not belong to trade unions who are signatories to collective agreements, *at the workplace level*. Section 24(2) stipulates in part, "[I]f there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission..." (emphasis).

Section 32(1) stipulates that *a bargaining council may ask the Minister of Labour* to extend a collective agreement concluded by the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request. Subsection (2) thereof grants the Minister powers to extend the collective agreement in respect of which he/she has received a request in terms of subsection (1).

The LAC also referred to section 34 of the Constitution of the Republic of South Africa (the Constitution), which stipulates that "[E]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

After analysing the architecture of the sections dealing with collective agreements, the LAC concluded that the employee on whose behalf SACOSWU declared a dispute in terms of section 24(2) fell within the scope of the bargaining council, SACOSWU had *locus standi* to declare the dispute, and the GPSSBC had jurisdiction to adjudicate the dispute.

The LAC's conclusion seems to lean heavily on its interpretation of section 24(2) of the LRA. Our reading of its pronouncements is that its approach was that section 24(2) on its own confers on a non-party the right to declare a dispute about the interpretation or application of an impugned

collective agreement. Paragraph [23] of the judgment reads in part: "[I]f the whole architecture of all the sections dealing with collective agreements is considered carefully, there is nothing to suggest that the legislature intended to exclude employees who happen to be members of non-party unions from accessing the dispute resolution mechanism created in section 24... This is so because section 24(2) does not restrict access to the dispute resolution mechanism only to parties to a collective agreement as the legislature elected to couch the section inclusively through repeatedly using words such as any party to a dispute may refer the dispute..."

The court continues to state in paragraph [24] of the judgment that "[R]estricting the remedial processes provided for in section 24(2) would require unnecessary reading into the section of the words, "collective agreement" and cutting out the words "a dispute". Such excision and reading in would be done so as to deny some employees access to justice in the form of being able to contest for a particular interpretation or application of a collective agreement which is ordinarily available to employees through their unions which are parties to collective agreements..."

Our reading of the portions of the judgment quoted above is that the LAC seems to be saying that section 24(2) on its own is couched in broad and inclusive terms, the result of which is that even employees who do not belong to trade unions which are parties to collective agreements can avail themselves of the dispute resolution mechanism of section 24(2) even if the collective agreement has not been extended to them.

We hold a view that section 24(2) cannot be read in isolation from section 24(1). The latter gives context to the former. In its essence, the latter subsection stipulates that every collective agreement must provide for a procedure for resolving disputes about the interpretation or application of a collective agreement. It further stipulates that if the dispute is not resolved by conciliation, it must be resolved through arbitration. Only if parties to a collective agreement are not able to resolve their dispute through the dispute resolution mechanism stipulated in a collective agreement can they refer a dispute to the Commission.

It bears mention that contrary to what the judgment states at the end of paragraph [23], the wording of section 24(2) is "any party to the dispute may refer the dispute ..." (emphasis) The legislature uses the article "the" in that phrase twice to indicate that it had in mind the dispute referred to in section 24(1). And the dispute referred to in section 24(1) is between parties to a collective agreement. Non-parties do not feature in section 24(1).

Non-parties can only declare a dispute about the interpretation or application of a collective agreement if the collective agreement has been extended to them in terms of sections 23(1)(d) or 32(2). In our view, in casu, what granted SACOSWU *locus standi* to refer the dispute about the interpretation or application of the collective agreement on behalf of its member was not section 34 of the Constitution. It was the extension of the collective agreement in question to non-parties, which included SACOSWU and its members. But for the extension of the collective agreement, SACOSWU would not have been clothed with *locus standi* and, consequently, the GPSSBC would not be clothed with jurisdiction to adjudicate the dispute.

In summary, our views are that the section 24(2) dispute resolution mechanism is available to parties to a collective agreement only. The only time it will be available to non-parties is when the non-parties are brought into the ambit of a collective agreement through the sections 23(1)(d) or 32(2) extension mechanisms. We consequently hold the view that SACOSWU is not authority for the proposition that a non-party can refer a dispute about a collective agreement to the CCMA or a bargaining council with jurisdiction in circumstances where the collective agreement has not been extended to the non-party. Also, invoking section 34 of the Constitution would not help a non-party where a collective agreement is not extended to it through the sections 23(1)(d) or 32(2) mechanisms.



Sandile July

Head of Employment

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Lloyd Abraham



Peter Mosebo