CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 148/16

In the matter between:

DEPARTMENT OF HOME AFFAIRS	Applicant
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Intervening Party
and	
PUBLIC SERVANTS ASSOCIATION	First Respondent
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS	Second Respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Third Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Fourth Respondent
P M NGAKO N.O.	Fifth Respondent

Neutral citation:	*Department of Home Affairs v Public Servants Association and Others* [2017] ZACC 11
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J
Judgments:	Froneman J (unanimous)
Heard on:	28 February 2017

Decided on: 4 May 2017

Summary: Conciliation — Matters of mutual interest — Duties of conciliators — Application for leave to appeal dismissed — Application for leave to intervene dismissed

---

ORDER

It is ordered that:

1. The application for leave to appeal is dismissed.
2. The application by the Department of Public Service and Administration to intervene as second applicant is dismissed with costs.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J concurring):

Introduction

[1] Some might have harboured the hope that this judgment would clarify the distinction between so-called "rights disputes" and "interest disputes" in labour law and under the Labour Relations Act[1] (LRA/Act), and whether and to what extent the right to strike as embodied in that statute depends on the distinction. The bottom line here will disappoint. It is this: disputes about matters of mutual interest referred to conciliation must be conciliated, be they "rights" or "interest" disputes. It is not the

[1] 66 of 1995.

function of the conciliator to pronounce on whether the dispute is one of "rights" or one of "interest".

Background

[2] In March 2015 the first and third respondents, two public sector unions, referred a dispute of alleged mutual interest to the fourth respondent (Bargaining Council) for conciliation. The second respondent, also a union, joined the application. For ease of reference I will refer to the first three respondents collectively as "the unions".

[3] The dispute arose when, in February 2015, the applicant, the Department of Home Affairs (DHA), proposed changes to the scheduling of working hours for employees to introduce Saturday workdays. It adopted the position that the proposal was open to consultation, but not collective bargaining. The unions opposed the proposed changes and contended that they should be subject to collective bargaining. The parties could not come to an agreement and the DHA subsequently issued a circular confirming that the new proposal would come into effect on 23 March 2015.

[4] The dispute was set down for conciliation by the Bargaining Council on 2 April 2015. At the hearing, the DHA challenged the Bargaining Council's jurisdiction on the basis that the alleged dispute did not involve a matter of mutual interest. The panellist upheld the objection, finding that the matter referred to conciliation "is not a matter of mutual interest; consequently the [Bargaining Council] lacks jurisdiction in this matter".

[5] The unions took this decision on review to the Labour Court. The review application was successful and the Bargaining Council was "directed to enrol the dispute of mutual interest for conciliation by a [conciliator] other than the [original] conciliator". The Labour Court held that the dispute did involve a matter of mutual interest and had to be conciliated.

[6] Leave to appeal to the Labour Appeal Court was refused. The application for leave to appeal to this Court is the final step in the process.

[7] What constitutes a matter of mutual interest is not defined in the LRA. The term "serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out".[2] "Interest" and "rights" disputes are both matters of mutual interest.[3] This matter deals with reference of a dispute about a matter of mutual interest to conciliation. Whether the matter is a dispute of interest or right, and therefore whether it may legitimately form the subject of a strike, is not relevant for the determination of whether it may trigger conciliation under the LRA. It is the failure to make this distinction that led the then counsel for the DHA and, in turn, the conciliator at the Bargaining Council, astray.[4]

[8] How this happened is aptly described in the Labour Court judgment:

> "[T]he controversy regarding the reach of the term [mutual interest] stems from the fact that in the referrals for conciliation, the unions ticked the 'matters of mutual interest' box, when asked to describe the nature of the dispute. In labour law parlance, what this means in practical terms is that the unions consider the dispute to be one over which a protected strike can be called. This in circumstances where one of the defining elements of a 'strike' in section 213 of the LRA is that its purpose must be the remedying of a grievance or resolving a dispute in respect of 'any *matter of mutual interest* between employer and employee.'"[5]

---

[2] *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA* [2014] ZALCJHB 159; (2014) 35 *ILJ* 3241 (LC); [2014] 9 BLLR 923 (LC) at para 17.

[3] See generally *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* [2013] ZALAC 3; (2013) 34 *ILJ* 1120 (LAC); [2013] 5 BLLR 434 (LAC).

[4] To say simply that a "dispute of right" cannot be the subject of a protected strike may be misdirected – see paras 12-3 below. The proscription on strikes is contained in section 64(4) of the LRA.

[5] *Public Servants Association v National Union of Home Affairs* [2015] ZALCJHB 326 (Labour Court judgment) at para 17.

[9] Before the Bargaining Council conciliator, the DHA sought to frame the issue as a jurisdictional one, namely that the issue between the parties was not one of mutual interest at all. The conciliator agreed, stating that the dispute was merely about a "work practice" that falls within the employer's prerogative.[6]

[10] Disputes about matters of mutual interest may be referred to conciliation by a commissioner[7] or a bargaining council[8] under the LRA. Work practices and their alteration by management lie at the heart of employment relationships and a dispute about them would certainly qualify as matters of mutual interest capable of being referred to conciliation under the LRA.

---

[6] Section 7 of the Basic Conditions of Employment Act 75 of 1977 provides that the employer "must regulate the working time of each employee".

[7] Section 134 of the LRA provides:

> "(1) Any party to a dispute about a matter of mutual interest may refer the dispute in writing to the Commission, if the parties to the dispute are—
>
> (a) on the one side—
>
> (i) one or more trade unions;
>
> (ii) one or more employees; or
>
> (iii) one or more trade unions and one or more employees; and
>
> (b) on the other side—
>
> (i) one or more employers' organisations;
>
> (ii) one or more employers; or
>
> (iii) one or more employers' organisations and one or more employers.
>
> (2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute."

[8] Section 51(3) of the LRA provides:

> "(3) If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute
>
> (a) through conciliation; and
>
> (b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if—
>
> (i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or
>
> (ii) all the parties to the dispute consent to arbitration under the auspices of the council."

[11] That should really be the end of the matter. The Bargaining Council conciliator had jurisdiction to conciliate the matter before him. That particular consequence, in the context of strike action, is not relevant in determining whether a change in work practices is a matter of mutual interest that may trigger conciliation under the LRA.

Issues

[12] Before us, however, the DHA changed tack slightly, and subtly. Although not abandoning the jurisdictional point completely, it now concedes that the parties' dispute related to a matter of mutual interest. But it advanced the argument that the efficacy of conciliation is dependent on a correct characterisation of the kind of dispute that needs to be conciliated. Conciliating a "rights dispute" that can be resolved by law, differs from conciliating an "interest dispute", which depends for its resolution on economic power play. Without that clarity beforehand the purpose and the effectiveness of conciliation are undermined.

[13] The submission cannot be sustained. The LRA does not speak of "rights disputes" or "interest disputes". A strike about a matter of mutual interest that a party has a right to refer to arbitration or to the Labour Court under section 65(1)(c) of the LRA may not be protected, but whether it falls within that limitation neither defines the jurisdiction of a conciliator under the Act, nor does it prevent the conciliator from attempting conciliation of the "disputed" dispute. Her function is to attempt conciliation and if that fails, to certify that the dispute has not been resolved. After the expiry of the statutory conciliation period, the unions would have been entitled to strike, even if the certification was not forthcoming.[9]

[9] *City of Johannesburg Metropolitan Municipality v South African Municipal Workers' Union (SAMWU)* [2009] ZALC 103; (2010) 31 *ILJ* 1175 (LC); [2011] 7 BLLR (LC) at para 15.

Leave to appeal

[14] The proper interpretation of the LRA raises a constitutional issue, but before granting leave, the appeal must raise "important issues of principle".[10] It is on the latter score and because the matter has no prospects of success that the applicant fails to convince. It is therefore not in the interests of justice to grant leave.

[15] At a very late stage the Department of Public Service and Administration (DPSA) sought leave to intervene as second applicant and also sought to introduce new evidence on the history of the change to working hours that led to the dispute. The explanation for the late intervention was inadequate. Its perspective on the legal issues surrounding the meaning of "mutual interest" was similar to that of the DHA and the tendered evidence did not comply with this Court's rules for the admission of new evidence. The application for intervention must fail.

Costs

[16] Normally, each party pays its own cost in a labour matter. The only costs order is in relation to the DPSA's costs in the unsuccessful intervention.

Order

[17] The following order is made:

1. The application for leave to appeal is dismissed.
2. The application by the Department of Public Service and Administration to intervene as second applicant is dismissed with costs.

[10] *Rural Maintenance (Pty) Limited v Maluti-A-Phofung Local Municipality* [2016] ZACC 37; (2017) 38 *ILJ* 295 (CC); BCLR 64 (CC) at para 17; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 31; and *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) at para 4.

For the Applicant:	T Ngcukaitobi, A Msimang and L Zikalala instructed by the State Attorney, Pretoria
For the Applicant in the application for leave to intervene as Second Applicant in the main application:	T J Bruinders SC and E Richards instructed by the State Attorney, Pretoria
For the First to Third Respondents:	C Orr instructed by Bowman Gilfillan Inc