THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1043/16

In the matter between:

SAMWU OBO 157 MEMBERS **Applicants**

And

PROTRANS (PTY) LTD **Respondent**

DATE HEARD: 29 March 2017
DATE DELIVERED: 29 March 2017
DATE EDITED: 30 May 2017

EX-TEMPORE J U D G M E N T

MOSHOANA, AJ: This is an application in terms of Section 145 of the Labour Relations Act in terms of which the applicant is seeking an order reviewing and setting aside a jurisdictional ruling of the 2nd respondent issued under case number RPNT2716268 and 2683 under the auspices of the 3rd respondent.

In brief the ruling is such that the Arbitrator concluded that the Bargaining Council did not have jurisdiction to entertain the dismissal dispute. The brief facts relating to this matter are not necessary to be recounted suffice to mention that about 157 employees were dismissed who are members of the union SAMWU. The reason for the dismissal is

clearly set out by the employer as being guilty of the charges that were levelled against the employees.

Those charges for example ranges from allegation of failure and/or refusal to drive the route that was issued by dispatch in accordance with the roster and so forth. Again as I say it may not be necessary to recount all those facts.

After the dismissal the employees were aggrieved and referred a dispute to the Bargaining Council for resolution. As it is required conciliation was attempted and the outcome was such that the dispute remains unresolved. The matter was then referred for arbitration and at arbitration the issue of jurisdiction was raised by the 1st respondent before me.

I may pause and make reference to the fact that at some point there was a condonation application for the late referral and that condonation was granted. Certain allegations were made in the condonation application which created the impression that the allegation is that the dismissal was as a result of participation in an unprotected strike and if that was the case on the facts the 1st respondent was well entitled in law to raise the issue of the jurisdiction before the Arbitrator and indeed the issue was raised and debated, there is a transcript that was produced in this court which led to the Arbitrator issuing the ruling that is under attack.

The applicants were unhappy with the ruling that there is no jurisdiction and approached this court. This is one of the so-called jurisdictional reviews. The test in relation to such reviews is simply one

of correctness i.e. whether on the objective facts there is jurisdiction.

In argument, one of the issues raised by Mr Memani for the applicants was that because there was a certificate issued and that certificate has not been set aside then jurisdiction was conferred as it were by the Conciliator to the Arbitrator. That argument is without merit. The Labour Appeal Court has already overturned the *Fidelity* judgment which created an impression that once there is a certificate jurisdiction is conferred.

I am still of the view that a Conciliator cannot confer jurisdiction upon an Arbitrator. The Arbitrator is duty bound to determine his own jurisdiction.

The other argument that was raised was the non-compliance with Rule 33. That argument also goes to the issue of the process. It may well be that the process was not followed but in law the Arbitrator is entitled to consider whether he or she has jurisdiction to determine a dispute and if the Arbitrator does that he or she is acting within his or her powers and accordingly that argument cannot be accepted by this court.

Mr Nguaza on behalf of the 1st respondent made the submission that the applicants in their referral alleged that the reason for the termination is that they participated in an unprotected strike and relying on the provisions of Section 191(1)(5)(b)(iii) he contended that such allegations are to be determined or dealt with by the Labour Court. Indeed that is correct however as the authorities had made it very clear that it is the duty of any administrator to determine the jurisdiction and it

appears to me that what the Arbitrator did in this matter was simply to accept the allegation of the employees that they were dismissed for participating in an unprotected strike and actually ignored what appeared to be the true reason of the dismissal, being misconduct.

On its own that is an irregularity but nonetheless as the court in *SARPU* has said when it comes to the issue of jurisdiction Arbitrators make jurisdictional rulings for convenience, it is not binding on the court. The court would have to determine on the objective facts whether there is jurisdiction. Mr Nguaza after a lengthy debate with the court conceded that on the objective facts the employees were dismissed for misconduct and in that instance the Bargaining Council would then have jurisdiction.

However he raised a complaint that if the applicants had accepted that proposition in the correspondence that was exchanged the matter would not have been before court today. He conceded of course that that goes to the issue of costs and he then submitted that if the court on the objective facts come to the conclusion that the jurisdiction is that of the Bargaining Council the court would then have to issue a cost order against the applicants because of the conduct that was displayed leading to the matter before court.

Mr Memani in response argued and made reference to certain portions of the correspondence wherein it was mentioned that the issue to be determined is the merits of the charges of misconduct levelled against the employee and that was done on the 12th of August 2016.

In the light of the submissions on the issue of costs I enquired

from both parties whether there was an ongoing relationship and I was advised that indeed there is an ongoing relationship. I may in passing remark that the conduct of both representatives did not help the situation. Mr Ndou himself as the representative at arbitration seem to have continued on the basis that the employer is actually hiding the true reason for the termination because they knew that if they provide the true reason they will have to comply with certain provisions of the law.

By way of an example if an employer has dismissed employees for operational reasons and did not comply with Section 189 and seek to hide the fact that they have dismissed the employees for operational requirements in order to avoid compliance with 189 and simply say that it was for misconduct that is the picture that Mr Ndou was painting at arbitration and of course as Mr Memani has correctly pointed out it was not for the Arbitrator to just simply accept that. The Arbitrator needed to look at the true reason and in my mind the only party to provide the true reason for termination in a dismissal dispute is the employer. The Arbitrator should not have ignored what the employer says was the reason.

Therefore I believe that as the court of equity the appropriate order in respect of costs is one that each party to pay its own costs. In the result I make the following order.

ORDER

1. The jurisdictional ruling issued by the 2nd respondent under case number RPNT271626842683 under the auspices of the 3rd respondent is hereby reviewed and set aside.
2. It is replaced with an order that the Bargaining Council has jurisdiction to determine the issue of misconduct being the reason for the dismissal of the employees.
3. Each party to pay its own costs.

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G Moshoana

Acting Judge of the Labour Court