Arbitration Award

Case Number: *GATW11592-16*
Commissioner: *Werner Paul Kruger*
Date of Award: *25-Nov-2019*

In the **ARBITRATION** between

Solidariteit / Solidarity obo Members
(Union/Applicant)

and

South African Police Services, SAPU , POPCRU and PSCBC
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

[1] This is the award in the arbitration between Solidarity obo Members, the employees, and the South African Police Services, the employer.

[2] The arbitration was held under the auspices of the CCMA and the award was issued in terms of ***Section 138(7)*** of this Act.

[3] The following parties were joined to these proceedings –

3.1. South African Policing Union (SAPU) – Second Respondent

3.2. Police and Prisons Civil Rights Union (POPCRU) – Third Respondent

3.3. Public Service Coordinating Bargaining Council (PSCBC) – Fourth Respondent

3.4. Safety and Security Sectoral Bargaining Council (SSSBC) – Fifth Respondent

[4] Adv Engelbrecht represented the Applicant and Adv Bruinders represented the Employer. Adv Van Eetveldt represented the Second Respondent; Adv Cook represented the Third Respondent; Mr. Van Wyk represented the Fourth Respondent and Mr. Carr represented the Fifth Respondent.

[5] The arbitration was held over several days and finalized on 18 November 2019 at the National Offices of the CCMA at 28 Harrison Street Johannesburg.

ISSUE TO BE DECIDED

[6] I must decide if Solidarity represents a significant interest of the employees in the workplace and as such entitled to organizational rights. The Applicant are seeking organizational rights in terms of ***Section 12, 13 and 15 of the Labour Relations Act***.

[7] I must therefore determine if the applicant Solidarity, should be granted organizational rights conferred by ***Part A in Chapter III of the Act***, bearing in mind the requirements as set out in ***section 21(8) of the Act***. If I find that the Applicant should be granted these rights, I must make an appropriate award in this regard, if not then the matter before the CCMA will be dismissed.

BACKGROUND TO THE DISPUTE

[8] On 10 June 2016, the Applicant informed the Respondent that Solidarity represents a significant interest in the workplace and that they seek to exercise organizational rights in terms of ***Section 12, 13 and 15 of the Labour Relations Act***.

[9] On 30 August 2016 the Applicant referred the matter to the CCMA, alleging that the Respondent refused to grant the Applicant (Union) organizational rights.

[10] The dispute was conciliated on 3 October 2016 and remained unresolved. A certificate to that effect was issued on the same date.

[11] The Applicant then asked that this dispute be resolved through arbitration.

VERIFICATION EXERCISE

[12] On 25 September 2019, Solidarity and the South African Police Services agreed that Solidarity had 5889 members within the South African Police Services. To place this in context –

12.1 On 12 July 2019 the South African Police Services confirmed that they had a total component of 191 780 employees;

12.2 POPCRU has 126 872 members;

12.3 SAPU has 75 248 members;

12.4 PSA has 4894 members;

[13] On 19 July 2019, the South African Police Services confirmed that Solidarity's representation amongst the different race groups were as follows –

13.1 664 – African

13.2 1063 – Coloured

13.3 4016 – White

13.4 98 - Indian

THE APPLICANT'S EVIDENCE AND SUBMISSIONS

[14] Johan Kruger testified under oath that Solidarity represented a specific interest and that they have engaged with the South African Police Services on issues such as employment equity and affirmative action. Another issue is that false claims of racism was made against employees and no one is willing to assist these employees. On 29 July 2014, he sent a letter to the Employer to consult about the

Employment Equity Plan for the period 2014- 2019. On 23 March 2016, Solidarity obtained an interdict against the Employer and interdicted the appointments and promotions of SAPS members pending the Constitutional Court's pronouncement on the validity of the ***Employment Equity Plan***. After the interdict the parties entered into a settlement and in the settlement it was amongst others agreed that –

"The parties agreed that the current EE Plan (2015- 2019) needs to be amended, taking the Constitutional Court judgement in ***Solidarity v Department of Correctional Services*** *into consideration. It is therefore agreed that the Union's written input, as handed over to the employers' representative on 26 July 2016, will be taken into consideration when the plan is amended. The union will also be engaged with regarding the implementation and monitoring of the EE Plan."* [1]

[13.1] He testified that after the settlement agreement a significant number of individual cases were settled in favour of Solidarity members. On 6 February 2017 he addressed a letter to Major General Motubatsi and extend his gratitude for *"confirming that Solidarity is a stakeholder to be consulted with on the issue of employment equity and how it is applied in the SAPS"*[2]

[13.2] Mrs. Barnard testified under oath that she applied for a position and after the interview was finalized she was found to be the best candidate. Instead of appointing her the National Commissioner withdrew the post and nobody was appointed. She asked SAPU to assist her but they refused. After she resigned from the South African Police Services, she joined Solidarity. She does recruiting and some of the members that were interested to join Solidarity were African. These members felt excluded from the transformation process due to political affiliation.

[13.3] She testified that PSA has recognition in the PSCBC and therefore has organizational rights in terms of ***Section 12 and 13.***

[13.4] Mrs. Oosthuizen testified that she disciplined two members. Thereafter the members made allegations of racism against her and accused her of using the K word. At the time of the incident she was a member of POPCRU. POPCRU refused to help her and did not even discuss the matter with her. She was found not guilty at the disciplinary hearing. In cross examination Adv Cook stated that POPCRU could not assist her because there was a conflict of interest.

[1] Page 209 of bundle B
[2] Page 220 Bundle B

[13.5] Adv Engelbrecht submitted that one must move away from numbers and assessing the influence of the minority union in the workplace. Solidarity represents an important interest as is evident from the SAPS'S engagement with Solidarity over time.

THE RESPONDENT'S EVIDENCE AND SUBMISSION

[14] Mr. Gerber testified that he is a legal advisor at SAPU. He attends to members' complaints which includes grievances, disciplinary hearings and arbitrations. He is also giving legal advice to SAPU members. Most of the arbitrations that he deals with are either unfair dismissals or promotion disputes. He is obliged to deal with every dispute that is referred to him even if he thinks that the merits are weak. He will not differentiate on race if he assists a member. He confirmed that it would be unethical. He also testified that if two members has a dispute, he cannot act for both because that would be a conflict of interest. In such a case he would act for the one member and refer the other member to an outside attorney.

[14.1] Of importance he testified that –

"*..... And luckily for us, and thanks to Solidarity that previous equity plan was declared null and void and there is currently no equity plan on the table. So there is no targets.....*

.....

You cannot use the incorrect benchmark to determine whether a person should be promoted.....

So I am quite successful with that argument"

[14.2] All the Respondents filed Heads of Argument and I am not going to repeat it in this award. Mr. Bruinders submitted that Solidarity did not represent a significant interest. According to Mr. Bruinders a trade union may be granted basic organizational rights where it is entitled to act or speak on behalf of a distinct identifiable class of employees whose ability to carry out their job functions is impacted by peculiar concerns and or issues, not experienced by the general body of employees. Solidarity formulated a neutral group and this group or concern is not a significant interest. Adv Cook submitted that POPCRU did not have racialized policies and practices. There was no evidence presented that POPCRU and SAPU are not able to represent the interest of these employees.

[14.3] Adv Van Eedtveld submitted that SAPU is willing to assist minorities. SAPU has elected not to embark on fruitless and expensive litigation and their approach has been more effective than the Solidarity approach. SAPU represent individual employees at the SSSBC on the basis of unfair labour practices.

[14.4] Mr. Van Wyk submitted that Solidarity did not show that it represents a class or a group of persons. The alleged minority groups who wish to disassociate themselves from the alleged racial policies of SAPU and POPCRU are not a class or a group of persons that have some other unique characteristic. Solidarity failed to identify a class or a group of employees which is distinctive and identifiable. Mr. Carr submitted that a significant interest is discreet and of consequence within the class of employee.

ANALYSIS OF EVIDENCE AND ARGUMENT

[15] In terms of ***Section 21(8)a*** *of the* ***LRA*** the Commissioner must seek to -

I. *"To minimize the proliferation of trade union representation in a single workplace and where possible, to encourage a system of a representative trade union in a workplace; and*

II. *To minimize the financial and administrative burden of requiring an employer to grant organizational rights to more than one registered trade union"*

[16] *Section 21 (8)b* further requires the commissioner to consider the following additional considerations –

I. The nature of the workplace;

II. The nature of the sector in which the workplace is situated;

III. The nature of the particular organizational rights which the trade union is seeking to exercise;

IV. The organizational history at the workplace or any other workplace of the employer;

V. The composition of the workforce in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part time employees, or employees in other categories of non-standard employment.

[17] In terms of the explanatory memorandum[3] -

'Arbitrators may award organisational rights to a trade union that does not meet a threshold established by a collective agreement concluded in terms of ***Section 18*** *of the LRA between the employer and a majority trade union. The* ***commissioner may overlook a threshold of this kind*** *if applying it would unfairly affect another trade union* ***and the trade union seeking the rights represents a significant interest*** *or number of employees* ***in the workplace.*** *A commissioner applying the new provision will need to draw an appropriate balance between the rights of the trade union wishing to exercise organisational rights and the rights of the majority trade"*

[3] http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf

[18] In ***SA Clothing and Textile Workers Union v Sheraton Textiles (Pty)Ltd*** [4] the Commissioner ruled that sufficiently representative is if it can influence negotiations. The Commissioner must have regard to the interests represented by the trade union and not just the numerical representativeness of the employees. Also in ***National Union of Mineworkers and others v Western Platinum (Pty) Ltd and others***[5] the Commissioner made the point that:[6]

> *'the recent amendments to the LRA, in particular the insertion of section 21(8C), is a departure from the mere count of numbers as envisaged, as such an approach has the potential to lead to unfairness since the granting of organisational rights only to*
> *Unions which meet the representative threshold may constrain the ability of another union(s) to operate, which represents* ***significant, important, meritorious interests of members****. As held by the LAC in the POPCRU judgment, a distinction in levels of*
> *representation should not deprive minority Unions of the essential means for defending the occupational interests of their members, organising their administration and activities and formulating their programs.'*

[19] The Labour Relations Act does not define a significant interest. In terms of the Oxford Dictionary *"significant"* means *"Extensive or important enough to merit attention"* and *interest* to *"include a group having a common concern"*. According to Solidarity this means

"a reference to the common concern of a group that is extensive or important enough to merit attention"

And according to the South African Police Services –

"A trade union may be granted basic organizational rights where it is entitled to act or speak on behalf of a group having a common concern, noteworthy enough, to merit attention within the SAPS"

[20] Mrs. Oosthuizen testified that she disciplined members and this resulted in her being accused of racism. Although she was an active member of POPCRU, they refused to assist her. POPCRU did not even consider her version. Adv Cook did not apologize for it but put it to her that if POPCRU assisted her there would have been a conflict of interest. In effect this means that POPCRU will choose a side and if that decision is against you then such an employee is on its own. However, even if organizational rights were granted this would not help Oosthuizen as Solidarity would not be able to represent her either in disciplinary hearings or in grievance procedures.

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[4] (1997) &3 SALLR 48 CCMA
[5] [2019] 1 BALR 71 (CCMA).
[6] At p 79. Emphasis supplied.

[21] The purpose of an ***employment equity plan*** is to enable the employer to achieve reasonable progress towards employment equity, to assist in eliminating unfair discrimination in the workplace, and to achieve equitable representation of employees from

designated groups by means of affirmative action measures. In order to achieve these goals one must consider the views of the different interest groups and in doing so an employment equity plan must be fair and reasonable. Obviously there will be conflicting views and interests and these views and interests needs to be considered. Solidarity was able to do it without organizational rights and the South African Police Services did engage with them. I will deal later in this award if the rights of minorities on its own could be seen as a significant interest that needs to be considered in the granting of organizational rights.

[22] Mr. Kruger testified that Solidarity brought an interdict against the South African Police Services to set aside the employment equity plan. As a result of the subsequent settlement agreement Solidarity was able to settle various disputes in favour of their members. Mr. Van Eedtveld submitted that SAPU elected not to embark on fruitless and expensive litigation and that they represent members at the SSSBC on the basis of unfair labour practices. As testified by Gerber, SAPU'S, own witness, this avenue was open to them because Solidarity was successful at the labour court. The undisputed evidence before me is that individual members of both Solidarity and SAPU benefited from the court case and subsequent settlement agreement. The question is if this is enough to prove a significant interest. The employment equity plan and affirmative action measures does not hinder freedom of association and the employees are still free to join Solidarity. In fact, Solidarity almost double their membership since 2016. In terms of ***Section 21 (8)(b)*** one must consider the nature of the workplace. Solidarity needs to prove that they represent a significant interest in the workplace that would distinguish them from the other unions. As was stated in ***Municipal and Allied Trade Union of South Africa v Saldana Bay Municipality and Others*** [7] the interest that is being represented is an interest group such as artisans. Minority groups that disassociate them with the policies of the South African Police Services are not a class or a group of persons with some other unique characteristic.

[22] There is no evidence before me that to grant Solidarity organizational rights would create an administrative or a financial burden on the South African Police Services. However, Solidarity would in any event not be able to represent employees at hearings and grievance procedures. They do not represent a specific class or group of people that is distinguishable from other employees at the workplace and does therefore not qualify for organizational rights.

AWARD

[23] The Applicant is not entitled to organizational rights.

[24] The application is dismissed.

[25] There is no order as to costs

Signature: _____

Commissioner: ***Werner Paul Kruger***

Sector: ***Parastatals***