

**IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE**

**COURT APPEAL CIVIL APPEAL NO CACLB-80-09
INDUSTRIAL COURT CASE NO I86/2009**

In the matter between:

**NATIONAL AMALGAMATED LOCAL &
CENTRAL GOVERNMENT WORKERS UNION**

APPELLANT

and

BOTSWANA POWER CORPORATION

1ST RESPONDENT

and

LESEGO PULE N.O

2nd RESPONDENT

**Attorney T. Rantao for the Appellant
Attorney S.A. Ziga, with him T.K. Mvungama
for the 1st Respondent**

No appearance for the 2nd Respondent

J U D G M E N T

**CORAM: McNALLY A.J.P
 FOXCROFT J.A
 KIRBY A.J.A**

McNally A.J.P

1. The Trade Unions and Employers' Organisations Act, (Cap 48:01) provides in Part III for the registration of Trade Unions, and in Part XI for the recognition of Trade Unions. For the purposes of this case it is important to bear in mind the difference between

registration and recognition. The Act requires that every Trade Union be registered. Recognition, on the other hand, is limited, in terms of Section 48 of the Act, to Trade Unions which represent at least one third of the employees of an employer. Such Trade Unions have particular powers and privileges set out in Part XI and in Section 32 of Trade Disputes Act, Cap 48:02

2. I should mention in passing that something seems to have gone awry in the drafting of these two Acts, Cap 48:01 and Cap 48:02. A few examples will suffice:

- a) Section 34(2) of Cap 48:02 refers to Section 50A of Cap 48:01. There is no such section. Perhaps it is intended as a reference to section 48A
- b) Section 33(1) of Cap 48:02 refers to section 50(6) of Cap 48:01. The reference is clearly wrong. Perhaps it means Section 48(6), or 48(8).
- c) Section 33(4)(B) (i) of Cap 48:02 refers to Section 50(B) of Cap 48:01. It must mean Section 48(B).

Section 33(1) of Cap 48:02 allows an employer to apply to the Commissioner to withdraw recognition of a Trade Union on certain grounds. But section 48(8) of Cap 48:01 allows the employer to apply to the Industrial Court for the same relief, on apparently the same grounds.

3. Fortunately the problem before us does not require us to fight our way through this legislative maze. We are concerned with the apparently straight-forward question whether

the Appellant, the Union, meets the requisite one third threshold for recognition by the 1st respondent, the Botswana Power Corporation (BPC). Does it have, as its members, one third or more of the employees of BPC? And was the procedure by which the answer to this question was produced a proper and unimpeachable one?

4. An exercise was carried out to determine this question, but the parties were unable to agree on the validity of the answer produced. After further manoeuvring before the Industrial Court, the parties eventually agreed on an Order by Consent which was duly made an order of court by the Industrial Court. The order reads as follows:-

“Consent Order”

1. Respondent’s purported withdrawal of Applicant’s workplace recognition is hereby declared null and void;

2. Applicant is entitled to enjoy from the Respondent all recognition and organizational rights to which a recognized union is entitled in

terms of the Trade Unions and Employees’ Organisations Act (Cap 48:01)

3. Respondent is hereby interdicted and restrained from continuing to implement the terms of the early exit scheme on the membership of the Applicant;

4. In order to regulate the exercise of the Applicant’s organizational rights; it is hereby

ordered as follows:

- 4.1 ...
- 4.2 ... [immaterial]
- 4.3 ...
- 4.4 ...

5. In view of the fact that Applicant does not at present meet the threshold for recognition, Applicant shall be given a 90 calendar day grace period, from the date hereof, to enable it to attain the threshold for recognition.

- 6. The parties shall meet on 29 May 2009, to ascertain whether Applicant has been able to reach the threshold necessary for recognition. In the event that the parties are in agreement that the Applicant does not meet the threshold necessary for recognition, Respondent's recognition shall lapse.
- 7. If at the meeting of 29 May 2009, there is a dispute as to whether Applicant meets the threshold for recognition, same shall be determined by the Labour Commissioner on/or before 12 June 2009, and if needs be he shall conduct a ballot as envisaged in Section 33 (4) (a) of TDA, and his decision shall be final..” (hereinafter referred to as “the Consent Order”)

5. Certain features of this consent order are of importance. Paragraph 5 constitutes a recognition by the Union that it did not “at present (i.e. on 26 February 2009) meet the threshold for recognition.” In consequence, and in accordance with the provisions of section 33 (4) (ii) of Cap 48:02, the Union was given “a 90 calendar day grace period, from the date hereof, to enable it to attain the threshold for recognition.” In other words it was given an opportunity to recruit new members so as to bring its membership up to the

required level.

6. The grace period expired at the end of Wednesday 27 May 2009. On Friday 29 May the parties were to meet “to ascertain whether Applicant (the Union) has been able to meet the threshold necessary for recognition.”

7. For various reasons the parties were unable to meet on 29 May. They met on 12 June and 17 June. They were unable to agree and the matter was referred to the Labour Commissioner. Obviously she was unable to give her determination by 12 June 2009, as provided in paragraph 7 of the Consent Order. However she did so on 6 July 2009 on which date she wrote:-

“Consequent of (sic) the above findings, it is hereby confirmed that the membership of the NALCGPWU falls below the threshold for recognition. The recognition of NALCGPWU with BPC will lapse with effect from July 7th 2009”.

5. The Union protested vigorously at this finding. It contended that the Commissioner should have-

- i) compiled the submissions of the parties;
- ii) circulated the said submissions;
- iii) allowed representations to be made and if necessary rebuttals by way of oral submissions;
- iv) made a determination based on the oral submissions and if necessary determined the matter by way of ballot exercise.

The 1st Respondent in reply contended that the Commissioner's decision was final and binding in terms of the consent order.

6. The Commissioner responded to the appellant on 7 July 2009 by saying, inter alia:-

“However, due to fact that there was a failure to serve both the parties with the copies of evidence received from each other, we wish to detract from the last sentence of the letter of July 6th 2009 which reads as follows “ the recognition of NALCGPWU with BPC will lapse with effect from July 7th 2009.”

The effect of this correction is that, as was agreed in the meeting this morning, copies of the evidence will be sent both to the Union and to BPC and a review of the findings will be done in the meeting scheduled for July 15th, 2009, after which a determination on the issue of recognition will be made.”

10. At the meeting on 15 July the Commissioner concluded that the Union's membership was 32% of the employees of the employer – an increase of 1% from her determination of the previous week, but still 1% short of the required figure. – See the Minutes of the Proceedings at the meeting of 15 July, Annexure AA 18 at p 239 of the record.

Accordingly the Commissioner determined that:-

“the recognition of the National Amalgamated Local and Central Government and Parastatal Workers Union will with effect from July 14th 2009 lapse.”

11. The Commissioner did not apparently consider holding a ballot. She was entirely justified in this, for two reasons. First, the Consent Order provides only that “if needs be” he (sic) shall conduct a ballot. Second, I am not convinced, despite the argument,

that a ballot could meaningfully take the matter any further. It was a question of counting heads. How could a ballot assist in such a matter? There have been no regulations made in this regard, nor does the Act give any guidance on the form of ballot to be held, or the question to be asked

12. The Union challenged this determination before the Industrial Court. That court decided the matter against the Union on two grounds –

- a) The Court, having made an order in the matter by consent, had given effect to a compromise between the parties. It had thus fulfilled its mandate and was *functus officio*.
- b) The parties, having agreed to refer their disputes to the Commissioner, and having agreed that her decision would be final, could not now challenge the Commission's decision in the absence of an allegation of bias, *mala fides* or fraud. This was so whether one looked at the Commission's decision of 6 July or that of 15 July, since both favoured the 1st respondent.

13. The Union noted an appeal to this court. The grounds of appeal are set out in paragraph 3 of the Notice and Grounds of Appeal as follows:-

“3. The Appellant relies upon the grounds set out hereunder to appeal against the whole ruling:-

- 3.1 The court ought to have found that the doctrine of *functus officio* does not preclude a court from exercising review jurisdiction and to the contrary it justifies the exercise of review jurisdiction where grounds for review have been made out;
- 3.2 The Court's finding results in the absurdity that even if the Commissioner's determination was marred by fraud or bias, it is not reviewable.
- 3.3 The Court erred in failing to recognize that, because the Commissioner was exercising a quasi-judicial discretion, she was burdened with all the requirements of natural justice, which in the first instance required that if the parties together with the Commissioner agreed to a procedure for making the determination, such procedure was to be followed in making the determination. In the second instance natural justice required that the Commissioner follow a procedure that will afford both parties a meaningful hearing before her.
- 3.4 The court erred in finding that the public interest in finality of litigation outweighed (sic) the public interest in having a determination that is (not) marred by fraud, bias or any other reviewable irregularity, being subject to review.
- 3.5 The court committed an irregularity, in that it directed the parties to limit their address to the points in *limine* but delved into the merits of the application. This it did, by finding that the Appellant was not prejudiced by the irregularities alleged by it. This finding was made despite the allegations of bias made by the Appellant in its founding affidavit.
- 3.6 The Court ought for the purposes of determining the points in *limine* to have accepted everything set out in the Applicant's founding affidavit as true and correct.
- 3.7 The Court failed to appreciate that the issue before it was whether there were reasonable prospects of having the Commissioner's Determination set aside on review and/or appeal before the Industrial Court, thereby entitling the Appellant to a stay of the Determination. Issues of the Consent Order constituting compromise and *res judicata*, discussed by the Court at length, were accordingly irrelevant to the issue of whether the

Commissioner's Determination is susceptible to review."

14. The real issue here is whether the Commissioner was entitled in terms of the Consent Order to come to a determination in the way that she did, and whether that determination can be taken on appeal (this point was later abandoned) or review. If the determination is indeed final, then the other criticisms of the Industrial Court's judgment are not relevant, and this appeal must be dismissed. I turn therefore to consider that question.

15. I would initially make two points. First, the determination to be made by the Commissioner was to be made in her capacity as an Arbitrator or Mediator, rather than officially as the Commissioner for Labour. In her determination she describes herself as "Mediator". I would think she was acting more as an arbitrator. Secondly, the issue she was called upon to determine was an unusually straight-forward one. It was almost a simple arithmetical one. She had to determine the number of employees of BPC. Then she had to determine the number of those who were members of the Union. And finally she had to determine whether the members of the Union amounted to one third of the employees or not.

16. In order to achieve this determination she had both written and oral submissions from the parties. Before her second meeting with the parties she had made the written submissions of each party available to the other. Finally she heard oral submissions at the second meeting on 15 July, after each party had had an opportunity to study the submissions of the other. She therefore, it seems to me, complied with the demands of

the Union set out in paragraph 9 above, save in so far as they demanded a ballot. I have explained in paragraph 11 above why a ballot would have been pointless. Apart from that she was procedurally completely fair.

17. Curiously, in its supplementary heads of argument filed on 13 January 2010, the Union stated, in paragraph 6

“The finality of the 15 July 2009 determination by the Commissioner which formed the subject matter of the dismissed application, is also not disputed.”

And at paragraph 7 –

“The Appellant did not seek in the dismissed application to in any way challenge the Consent Order of 26 February 2009, or to raise again the issues that were settled by the Consent Order”.

18. They then go on to contend, in paragraph 20 of their Final Heads of Argument that –

“By providing in paragraph 7 of the consent order that the Commissioner’s determination was to be final, the parties did not thereby exclude the Industrial court’s review jurisdiction, which it enjoys in terms of Section 18(1)(c) of the Trade Disputes Act, and generally over functionaries enforcing its orders.”

19. When parties to an agreement (or a Consent Order) agree that the decision of the Arbitrator/Mediator is to be final, they are generally held to mean that it is unappealable.

In WADE & FORSYTH’s “ADMINISTRATIVE LAW” 9th Edition (The 10th is not available to me) it is stated at p713-

“If a statute says that the decision or order of some administrative body or Tribunal ‘shall be final’ or ‘shall be final and conclusive to all intents and purposes’ this is held to mean merely that there is no appeal; judicial review of legality is unimpaired.”

And lower on the same page

“The normal effect of a finality clause is therefore to prevent any appeal.”

20. Review however differs from appeal in that it concerns itself with the procedure by which the decision was reached, rather than with the correctness or otherwise of the decision. That is why the reviewing court will look to see whether the person or body making the award was motivated or influenced by fraud or *mala fides* or was acting ultra vires. See JOHANNESBURG CONSOLIDATED INVESTMENTS CO. vs. JOHANNESBURG TOWN COUNCIL 1903 TS III AT 115, and TIKLY & OTHERS vs. JOHANNES & OTHERS 1963(2) SA 588 (T) at 590 in fine.

21. In South Africa the law has been stated as follows by NESTADT JA in BLUE CIRCLE LTD. v VALUATION APPEAL BOARD, LICHTENBURG 1991 (2) SA 772 (AD) at 787 I to 788F in the following terms:

“It will be apparent from what has been said that the broad issue before us is whether there were good grounds for the review of the proceedings of the valuation appeal board or, more specifically, whether the Court a quo’s decisions in this regard were correct. Now there is no appeal against the valuation appeal board’s decision which in terms of s 20(1) is final. The review is of the second type referred to in Johannesburg Consolidated Investment Co v Johannesburg City Council 1903 TS 111 at 115.

Relief cannot therefore be granted merely because the valuation appeal board’s valuation is considered to be wrong. Nor would it suffice that it made a mistake on a point of law in relation to the merits (Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551 at 557 and 560-1; South African Broadcasting Corporation v Transvaal Townships Board and Others 1953 (4) SA 169 (T) at 177A-C). The principle is correctly stated by De Villiers JP in Harpur and Others v Steyn NO 1974 (1) SA 54 (O) at 56G-56 in fin. The learned Judge said:

“The mere fact that a quasi-judicial body comes to a wrong conclusion in regard to a question of law which it was its duty to consider in arriving at a decision on the merits of the matter before it, does not afford a ground for setting aside its decision on review. Its decision can only be set aside if the mistake is in respect of the

law which prescribes its duties with the result that it failed to apply its mind to an issue which it had to consider. Thus it was said in Doyle v Shenker & Co. Ltd 1915 AD 233 at 236:

Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear”.

One or more of the recognized grounds of review (in the sense indicated) would accordingly have to be established. Insofar as the facts of the present matter are concerned, this means showing that the valuation appeal board so misconceived the nature of the enquiry postulated by the ordinance or its functions there under that it failed properly to apply its mind to the true issues. In this event there would have been a gross irregularity resulting in a fair trial not having taken place.”

22. Finally I would rely on the clear and simple words of PONNAN J.A. in paragraph 23 of his judgment in LUFUNO MPHUPHALI & ASSOCIATES v ANDREWS & ANOTHER 2008 (2) S.A 448 (A) where he says-

“Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it.”

23. This is precisely what the authority cited by the Union says. In LEIPEGO v. MOAPARE & ANOTHER 1993 BLR 229 at 235 D, **Amissah JP** said-

“There are decisions of respectable lineage which say that ouster clauses must be jealously regarded by the courts, and that they do not take away the jurisdiction of the courts where the action complained of was taken *mala fide* or where there is fraud, or the action was ultra vires”

It is true that His Lordship was speaking of ouster of jurisdiction of the courts by a

statute rather than by a Consent Order, but the principle is the same. See also TELECORDIA TECHNOLOGIES INC. v TELKOM SA LTD. 2007 (3) SA 266 at paragraph 32 on p287 et seq.

24. I agree with the Union's contention that the finality of a mediator/arbitrator's decision may be challenged by way of review in terms of the provisions of section 18(1) (c) of the Trade Disputes Act even when it purports to be final, and in so far as the learned judge a quo decided otherwise I would respectfully disagree. But the finality of a decision purporting to be final may only be challenged when there are substantial grounds for contending that the decision was tainted by fraud or *mala fides*, or was ultra vires. That is what LEIPEGO v MOAPARE says.

25. I do not, with respect find anything in MKHISE v SWEMMER 1967 (1) SA 186 or NGQULUNGA v MINISTER OF LAW & ORDER 1983 (2) SA 696, to contradict this.

26. I conclude therefore that the finality of the Commissioner's determination may, given the agreement in the Consent Order, be questioned only where there is fraud, *mala fides* or ultra vires. None of these arise in the present case. There is a suggestion by the appellant Union that there is some indication of bias, but I regard that as totally unfounded.

27. I conclude therefore that the Commissioner's finding is unimpeachable. She found that the Union's membership did not attain the minimum percentage of employees of the employer. She ruled that the recognition of the appellant Union lapsed on 15 July 2009. That ruling must stand. The judgment of the Industrial Court, albeit for somewhat different reasons, is affirmed. The appeal is dismissed with costs.

N.J. McNALLY
ACTING JUDGE PRESIDENT

I AGREE: -----
J.G. FOXCROFT
JUDGE OF APPEAL

I AGREE: -----
I.S. KIRBY
ACTING JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 29TH DAY OF JANUARY 2010