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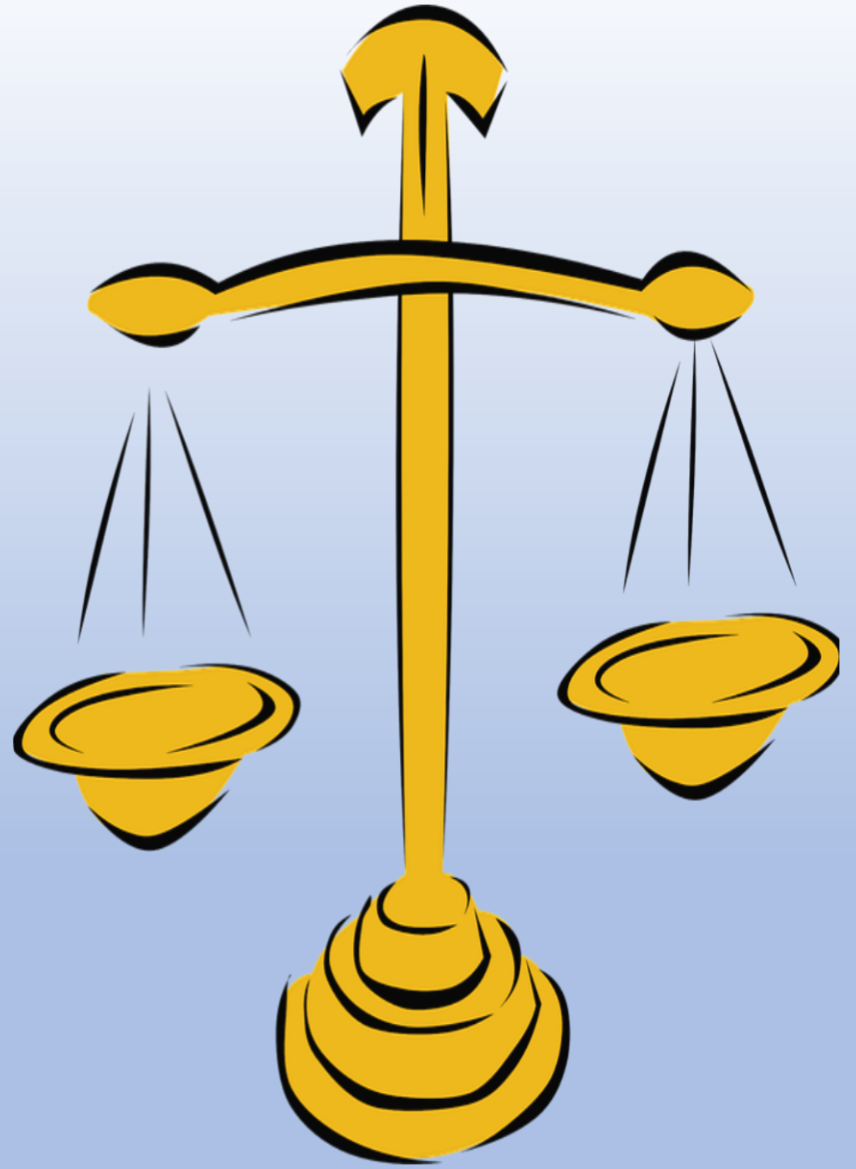
PSCBC WEBINAR

SKULPAD AND ANOTHER V DEPARTMENT OF HEALTH EASTERN CAPE AND OTHERS (PR139/21) [2024] ZALCPE 45 (30 OCTOBER 2024)

DO INDIVIDUAL EMPLOYEES HAVE THE RIGHT TO REFER A DISPUTE REGARDING THE INTERPRETATION/APPLICATION OF A COLLECTIVE AGREEMENT - SECTION 24 OF THE LABOUR RELATIONS ACT?

SKULPAD AND ANOTHER V DEPARTMENT OF HEALTH EASTERN CAPE AND OTHERS (PR139/21) [2024] ZALCPE 45 (30 OCTOBER 2024)



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INTRODUCTION

Judge AJ Kroon in his introduction stated thus–

"The Trial by Frans Kafka is a surreal tale about an ordinary bank clerk's terrifying experience with a nightmarish judicial system. He is arrested but the nature of his crime is not revealed to him. His endeavours to unravel his situation are thwarted at every turn by the opaque and mindless bureaucracy of the Law.

The claimant is perplexed as he thinks the Law should be accessible to every man at all times. At the end of his life and shortly before the man dies, the Doorkeeper closes the gate and then reveals that the gate was, all along, meant for the claimant alone.

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INTRODUCTION

Judge AJ Kroon in his introduction stated thus–

This application too, is a story of someone, an employee, who was denied access to justice in a manner Kafkaesque in its absurdity. Believing that she had suffered an injustice at the hands of her employer, the employee sought to open the gate to the Law. She was however told that she could not pursue her dispute. Another had to do that for her. A trade union (union). And not just any union. She would be told which one. Bizarrely, the union which she would be compelled to join would be the master of her litigation."

By way of jarring and outrageous paradox, her adversary, her employer, was, on the other hand, entitled to defend itself, to be a party to the suit, her suit, from whence she had been banished."

The judge made reference to Searle JP, in *Rescue Committee, DRC v Martheze,* explaining the right to be heard.

"Everyone has a right to be heard in his own cause, and no-one, save a qualified practitioner, has the right to be heard in the cause of another."

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ISSUE BEFORE THE COURT

IN ENACTING SECTION 24 OF THE LABOUR RELATIONS ACT NO. 66 OF 1995 (THE LRA), DID THE LEGISLATURE INTEND TO DIVEST AN EMPLOYEE OF HER COMMON LAW RIGHT TO INSTITUTE LITIGATION?

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BACKGROUND

- Ms Skulpad referred a dispute to the PSCBC. She sought relief against her employer, the Department of Health-EC, alleging that the employer had not applied/interpreted the provisions in a collective agreement, PSCBC Resolution 7 of 2000, when processing her application for temporary incapacity leave.

- The Arbitrator, however, mero motu, raised the issue of what he said was his jurisdiction. In his view, he was required, in the light of prevailing jurisprudence concerning disputes about the application and interpretation of collective agreements (section 24 disputes), to determine whether Ms Skulpadhad locus standi in iudicio (locus standi) to refer the dispute "… in her personal capacity".

- The Arbitrator declined to determine the merits of the dispute. He said the insurmountable hurdle facing Ms Skulpad was that she was not a party to the Resolution, so she had no locus standi.

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JURISPRUDENCE

- The arbitrator in his decision, followed the two judgments *Arends and Others v South African Local Government Bargaining Council and Others (PA6/13) [2014] ZALAC 69; [2015] 1 BLLR 23 (LAC); (2015) 36 ILJ 1200 (LAC) (6 November 2014)*and *South African Police Services v Du Preez and Others In Re: Du Preez v South African Police Services (PR157/17;P226/17) [2019] ZALCPE 3 (8 March 2019)*

Section 24 of the LRA states that -

(1) Every collective agreement … must provide for a procedure to resolve any dispute about the application and interpretation of the collective agreement.

(2) If there is a dispute about the application and interpretation of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

……

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

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JURISDICTIONAL QUESTION

Does the review application raise a jurisdictional question?

- The court determined that it was clear the Bargaining Council had jurisdiction over the dispute since it fell under section 24.
- Jurisdiction and locus standi are separate concepts, and the suggestion that the claimant lacks locus standi was dismissed as unfounded.
- When addressing the Arends interpretation, the court found the following issues:
  - It is irreconcilable with the language of section 24.
  - It unjustifiably deprives an employee of her right to pursue legal action for her own cause.
  - It leads to outcomes that are inequitable, illogical, and absurd.
  - It is inconsistent with the objectives of the Labour Relations Act (LRA).
  - It is unconstitutional.
  - It contradicts prevailing legal authorities.

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GROUND 1 – IRRECONCILABLE WITH SECTION 24

Ground No. 1: The *Arends interpretation* is irreconcilable with the language of Section 24

- The court determined that, after thoroughly examining Section 24, it could not identify any intention on the part of the Legislature to define or limit the identities of the individuals who may be involved in a section 24 dispute.

- According to the Arends interpretation, the terms “party to the dispute” and “party to the collective agreement” should be used interchangeably. However, a review of section 24, particularly sections 24(1), 24(2), 24(3), 24(5), and 24(6), shows that this conclusion is not supported by the text.

- Section 24(1), in the context of describing the applicable dispute resolution procedures, simply refers to “the parties.” In this context, this can only refer to the parties involved in the dispute.

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GROUND 1 – IRRECONCILABLE WITH SECTION 24

Ground No. 1: The *Arends interpretation* is irreconcilable with the language of section 24 -

- Arends interpretation does not merely limit an employee's remedy; it completely eliminates it. This interpretation suggests that regardless of the injustices an employee may face if her employer incorrectly interprets or applies a collective agreement, she has no legal recourse. A court is unlikely to infer such an intention.

- In the case of Arends (LC), the court did not specify the capacity in which a union may refer a section 24 dispute. It seems to have accepted that, regardless of whether the union has a legal interest in the outcome of the litigation, the union will always hold a statutory right to refer a section 24 dispute if it is a party to the collective agreement.

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GROUND 1 – IRRECONCILABLE WITH SECTION 24

Section 200 of the LRA deals with the representation of employees –

"200. Representation of employees or employers

(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of ***its members is a party*****—**

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more ***of its members*** *is a party to those proceedings."*

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GROUND 1 – IRRECONCILABLE WITH SECTION 24

- The complex issue raised by the Arends interpretation stems from its flawed foundation, which is fundamentally contradictory.

- The contradiction lies in the fact that the interpretation suggests an employee can be both excluded and included as a party in a dispute simultaneously. This confusion occurs because it fails to recognize that when a union represents an employee, it acts on the employee's behalf rather than representing its own interests.

- In simpler terms, when a union brings a dispute forward for an employee, it is advocating for the employee's rights, not the union's rights. This is why, if a union refers a dispute for its members and subsequently withdraws, the members still remain parties to the dispute.

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GROUND 2 – UNJUSTIFIABLY DIVESTS AN EMPLOYEE HER RIGHT

Ground No. 2: The *Arends interpretation* unjustifiably divests an employee of her right to institute litigation in her own cause -

- Locus standi refers to a legal person's standing to participate in litigation based on their interest in the case. It determines whether an individual can take part in legal proceedings.

- To establish locus standi, a party must demonstrate that their interests are directly affected by the actions being challenged.

- John Grogan establishes three traditional categories of collective agreements **–**

  i. The first category is called recognition agreements, which define the relationship between employers and unions. These agreements typically include provisions that outline how collective bargaining should take place, as well as details specifying the scope and extent of organizational rights.

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Collective law – John Grogan 2nd Edition at pages 174 - 176

GROUND 2 – UNJUSTIFIABLY DIVESTS AN EMPLOYEE HER RIGHT

Ground No. 2: The *Arends interpretation* unjustifiably divests an employee of her right to institute litigation in her own cause

ii. The second category includes substantive agreements. These agreements outline various conditions of employment, such as salaries and wages, work hours, overtime rates, vacation leave, and other employee benefits.

iii. The third category consists of procedural agreements, which, as the name implies, govern workplace procedures related to issues like discipline, suspension, and grievance resolution.

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GROUND 2 – UNJUSTIFIABLY DIVESTS AN EMPLOYEE HER RIGHT

Ground No. 2: The *Arends interpretation* unjustifiably divests an employee of her right to institute litigation in her own cause

- The court held that, a section 24 dispute is a regular labour dispute and not something unique.
- Employees should not have to rely on a union to guide them through claims of unfair labour practices or unfair dismissals. The same should apply to section 24 disputes.
- Concluded that the Arends interpretation is quite harsh and unfairly takes away the employees' right to have a legitimate section 24 disputes heard.

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GROUND 3 – INEQUITABLE AND ABSURD OUTCOMES

Ground No. 3: The *Arends interpretation* results in outcomes which are inequitable and absurd

Inequitable outcomes -

- There are several examples of unfair consequences, which the Supreme Court of Appeal has described as “insensible” and “unbusinesslike.” Consider the situation where Employee X is a member of Union A, which is a party to a collective agreement, while Employee Y is a member of Union B, which is not part of that agreement.

- The troubling outcome of the Arends interpretation is that Employee X can request her union to pursue a section 24 dispute on her behalf. In contrast, Employee Y is denied access to justice simply because she belongs to the "wrong" union. A similar unjust result occurs if Employee Y chooses not to join any union at all.

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GROUND 3 – INEQUITABLE AND ABSURD OUTCOMES

Ground No. 3: The *Arends interpretation* results in outcomes which are inequitable and absurd

Inequitable outcomes –

- In such situations, the unfortunate employee Y, if she remains loyal to union B, will not only lose her right to claim benefits and advantages stemming from the collective agreement but may also face prejudice.

- A collective agreement may require an employee to take actions she is unwilling to undertake.

- Therefore, it would be unjust to deny an employee the opportunity to pursue a section 24 dispute when she stands to gain some advantage if successful, it would be even more unjust to deny her the right to pursue a section 24 dispute when she faces potential prejudice.

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GROUND 3 – INEQUITABLE AND ABSURD OUTCOMES

Ground No. 3: The *Arends interpretation* results in outcomes which are inequitable and absurd

- In terms of the Arends interpretation, it is the union, as the representative, that controls the litigation, leaving the employee with no say.

- **What would happen if an employee were a member of a union that was a party to the collective agreement, but the union informed the employee that it could not take her case?**

- E.g. if the union lacked the capacity or resources to pursue the case, or if it believed the case had no merit and did not want to risk incurring a costs order. In such circumstances, the employee would be left without a remedy.

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GROUND 3 – INEQUITABLE AND ABSURD OUTCOMES

Ground No. 3: The *Arends interpretation* results in outcomes which are inequitable and absurd

- **What would happen if a union were dissolved during the arbitration process or if the employee's membership in the union was terminated?**

- The Arends interpretation further creates an unfair advantage for employers. The definition of a collective agreement indicates that only employers, not employees, can be parties to a collective agreement.

- The Arends interpretation leads to several absurd outcomes, the most significant of which is that individuals whose rights may be impacted by the sought relief are not entitled to be parties to the dispute. In contrast, representatives who have no legal interest in the outcome of the case do have such a right, which is perplexing.

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GROUND 4 – ARENDS INTERPRETATION UNCONSTITUTIONAL

Ground no.4 - the *Arends interpretation* is unconstitutional -

- Courts aim to interpret laws in line with the Constitution. The Labour Relations Act (LRA) states its rules should reflect the Constitution. The Arends interpretation is unconstitutional for at least four reasons.

- Section 34 of the Constitution ensures everyone has the right to a fair public hearing for any legal dispute. This applies to courts or, when suitable, independent groups. A Bargaining Council that resolves labour disputes falls under this section.

- However, the Arends interpretation undermines access to justice. Preventing a genuine litigant from pursuing legal action when they have a significant interest, this should only happen in rare situations.

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GROUND 4 – ARENDS INTERPRETATION UNCONSTITUTIONAL

Ground no.4 - the *Arends interpretation* is unconstitutional -

- In a democratic society that values transparency, it is troubling that some employees can suffer injustices without legal remedies.

- This discrimination is one of the worst because it oppresses minority unions, which struggle against majority unions for workplace representation since they are not recognized as bargaining agents.

- The Arends interpretation leads to unfair discrimination that is unrelated to the goals of the Labour Relations Act (LRA) and cannot be justified under section 36 of the Constitution.

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GROUND 5 – INCONSTITENT WITH THE OBJECTIVES OF THE LRA

- Arends interpretation conflicts with the goals of the Labour Relations Act (LRA), which aims to promote effective resolution of labour disputes. If a provision causes someone to lose their right to resolve a dispute, it contradicts this goal.

GROUND NO. 6 - THE *ARENDS INTERPRETATION* IS CONTRARY TO THE PREVAILING AUTHORITIES –

- There are several decisions by this Court, both before and after Arends (LC), that have recognized an employee's right to refer a section 24 dispute. However, the issue of locus standi was not raised in any of these cases.

- In Arends (LAC), there were two potential preliminary issues to consider. The first was whether the employees had the standing to pursue a section 24 dispute. The second was whether, assuming the employees did have standing, the Arbitrator had the authority to make a ruling on the dispute.

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GROUND 6 – CONTRADICTS WITH THE PREVAILING AUTHORITIES

- The main issue was whether the dispute was actually a section 24 dispute or if it was about enforcing a collective agreement. If it was the latter, the Arbitrator would not have jurisdiction. The Court did not address the first issue.

- Instead, it focused on the second issue. The Court found that there was not enough clear information for the Arbitrator to decide the true nature of the dispute because the stated case was defective.

- Consequently, the Court set aside the jurisdiction ruling, allowing the employees to continue pursuing their case.

- The judgment suggests that if the dispute is later confirmed as a section 24 dispute, the employees would be allowed to move forward with their case.

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CONCLUSION

- Section 24 does not take away employees' common law right to address disputes about collective agreements.

- At the start of this judgment, Searle JP as quoted, "everyone has the right to be heard in their own case".

- The Arends interpretation, which the arbitrator followed, goes against the above basic principle. It allows a representative, who has no legal interest in the issue, to be treated as the party involved, while the actual grievant has no remedy.

Court's findings -

- The court accepted the late filing of the review application by the First Applicant; and
- Reviewed and set-aside the ruling issued under case number PSCBC16-20/21, dated 28 December 2020, made by the 2nd respondent.

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THANK YOU

QUESTIONS & ANSWERS

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