IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case No: **PR139/21**

In the matter between:

MONICA SKULPAD	First Applicant
PUBLIC SERVICE COORDINATING BARGAINING COUNCIL	Second Applicant

and

DEPARTMENT OF HEALTH (EASTERN CAPE)	First Respondent
JOHN CHEERE ROBERTSON N.O.	Second Respondent
MEMBER OF EXECUTIVE COUNCIL: DEPARTMENT OF HEALTH (EASTERN CAPE)	Third Respondent

Heard: 26 June 2024 – virtually at 14h00.

Supplementary submissions received from the Applicants on 10 July 2024

Delivered: This judgment was handed down electronically by circulation to the parties by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 12h00 on 30 October 2024.

JUDGMENT

KROON, AJ

Introduction

[1] The Trial by Frans Kafka[1] 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. One day a prison chaplain narrates to him a parable[2] which tells of a Doorkeeper who guards a gate to the Law. Behind him, more powerful Doorkeepers guard other gates. In the allegory, a man from the country comes seeking admittance to the Law, but the Doorkeeper will not let him in even though he waits in front of the gate his entire lifetime. 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.

[2] 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 dint of a perversion of the law, the union, ordinarily donning the mantle of a representative, would itself be the party. The employee, on the other hand,

[1] Published by Max Brod in 1925.
[2] First published as "*Before the Law*" in an independent Jewish weekly, *Selbstwehr*, in 1915.

was forbidden to be a party to her own dispute. She was to remain on the periphery as a spectator. This state of affairs left her bewildered since she did not need someone else to conduct her case. She was perfectly capable of doing so herself. But alas, the fate of her dispute, inclusive of whether it would be pursued at all, was to be left in the hands of an entity she did not know, and which had no interest in her plight. The cruellest revelation was yet to come. 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. No interloper was going to be allowed to hijack its defence. So much for the notion of simple justice between man and man, between employee and employer, she thought. The gate to the Law having been shut on her, the stranded employee has reached out to this Court for help asking that she be allowed to have her proverbial day in court.

[3] Almost a century ago Searle JP, in *Rescue Committee, DRC v Martheze,*[3] explained that:

> "*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.*"

[4] In enacting section 24 of the Labour Relations Act No. 66 of 1995 (the LRA)[4], did the Legislature intend to divest an employee of her[5] common law right to institute litigation? That is the question which the Court must tackle. The two Applicants say that the Legislature harboured no such intention. They have brought a review application to set aside a ruling (the Ruling) barring the First Applicant (Ms Skulpad) from pursuing her dispute. It was issued by the Second Respondent (the Arbitrator) under the auspices of the Second Applicant (the Bargaining Council). The application is opposed by the First and Third Respondents (collectively referred to as the Department).

---

[3] 1926 CPD 300
[4] All references to legislation in this judgment are references to the LRA unless otherwise specified.
[5] The feminine gender is used for the sake of conciseness. References to the feminine gender include, where appropriate, the masculine gender.

[5] The backdrop to the matter is that Ms Skulpad referred a dispute to the Bargaining Council. She sought relief against her employer, the Department, contending that it had misinterpreted a provision in a collective agreement, namely PSCBC Resolution 7 of 2000 (the Resolution) when processing her application for temporary incapacity leave. She engaged an attorney and counsel, the same attorney and counsel who appeared before me, to prosecute her referral. The parties were ready to proceed. 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 Skulpad had *locus standi in iudicio* (*locus standi*) to refer the dispute "… *in her personal capacity*".

[6] Ms Skulpad contended that she should be allowed to proceed with her Section 24 dispute. It was, after all, her dispute. The Department, unsurprisingly, adopted a contesting view. The Arbitrator declined to determine the merits of the dispute. The insurmountable hurdle facing Ms Skulpad was, so he said, that she was not a party to the Resolution. For that reason she had no *locus standi*. In reaching his conclusion, he found that, constrained by the doctrine of *stare decisis*, he was bound to follow two judgments handed down in the Gqeberha (formerly Port Elizabeth) Labour Court. The decisions which drove him to his determination were *Arends and Others v South African Local Government Bargaining Council and Others*[6] and *SAPS v Du Preez and Others*[7]. The former has been the subject of an appeal. For the sake of convenience, I will refer to the Labour Court judgment as (*Arends (LC)*) and the Labour Appeal Court judgment[8] as (*Arends (LAC)*).

[7] As to the *ratio* which underpinned the Ruling, the Arbitrator expressed himself as follows:

---

[6] [2013] 5 BLLR 465 (LC); (2013) 34 ILJ 2560 (LC)
[7] (PR 157/17 & P226/17) [2019] ZALCPE 3 (8 March 2019)
[8] *Arends and Others v South African Local Government Bargaining Council and Others* [2015] 1 BLLR 23 (LAC); (2015) 36 ILJ 1200 (LAC)

"*11. In the current matter the applicant has personally referred her dispute concerning the application and interpretation of PSCBC Resolution 7/2000 to the PSCBC. The Labour Court has held, as set out in Arends and SAPS above, that individual employees, as opposed to their trade unions acting on their behalf, are excluded in terms of section 24 of the LRA from referring disputes concerning the application and interpretation of a collective agreement to a bargaining council. Only trade unions may refer application and interpretation disputes on behalf such employees who may have claims in terms of such collective agreement, the Labour Court has interpreted the provisions of section 24 as set out above and I am bound by the decision* (sic) *of the Labour Court and I must accordingly rule that the PSCBC does not have jurisdiction to hear the applicant's dispute as referred, as the applicant does not have locus standi to refer such dispute on her own behalf…"* (own emphasis)

[8] Ms Skulpad submits that the Ruling stands to be reviewed and set aside because the two judgments on which reliance was placed were wrongly decided. The Bargaining Council (which was joined as an applicant in the proceedings on 31 May 2022)[9] also challenged the Ruling on the basis that the jurisprudence relied on by the Arbitrator was flawed. It, in addition, had an alternative argument, based on the powers of parties to a collective agreement in a Bargaining Council to afford employees the right to refer Section 24 disputes. Reliance was furthermore placed, by it, on Section 33A. I touch on the alternative arguments at the end of this judgment. Shorn of all elaboration, the primary issue is whether an employee is entitled to pursue a Section 24 dispute.

Section 24

[9] Section 24 provides that a party to a dispute about the application and interpretation of a collective agreement may pursue such dispute in terms of

[9] In line with *Kruger and others v Aciel Geomatics (Pty) Ltd* (JA87/2014) [2016] ZALAC 92 (14 June 2016), Lallie J ordered, on 31 May 2022, that the Bargaining Council be allowed to participate in the proceedings as an applicant given that it had, as it were, switched sides and joined forces with Ms Skulpad.

the dispute resolution mechanism contained in the collective agreement itself, alternatively, if certain conditions are met, the party may refer it to the Commission of Conciliation, Mediation and Arbitration (the CCMA) for determination. As a reference point for the analysis which follows, the relevant portions of Section 24 are reproduced here:

> "*(1) Every collective agreement … must provide for a procedure to resolve any dispute about the application and interpretation of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.*
>
> *(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-*
>
> *(a) the collective agreement does not provide for a procedure as required by subsection (1);*
> *(b) the procedure provided for in the collective agreement is not operative; or*
> *(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.*
>
> *(3) 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.*
>
> *(4) The Commission must attempt to resolve the dispute through conciliation.*
>
> *(5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.*
>
> *(6) If there is a dispute about the application and interpretation of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the dispute*

may refer the dispute in writing to the Commission, and subsections (3) to (5) will apply to that dispute." (own emphasis)

Does the review application raise a jurisdictional question?

[10] An observation needs to be made, at the outset, as to the nature of the Ruling. The Arbitrator described it as a "***JURISDICTIONAL RULING***". This was a mischaracterisation. The Bargaining Council self-evidently had jurisdiction over the dispute because it was a Section 24 dispute. The Arbitrator can however be forgiven for his description. He did no more than adopt the terminology of *Arends (LC)* and *Du Preez* which held that, where a party lacks *locus standi*, the claim falls to be dismissed for want of jurisdiction.[10]

[11] *Arends (LC)* and *Du Preez* however err in this regard. Jurisdiction and *locus standi* are discrete concepts. While both are access mechanisms over which a court has authority, they should not be conflated. To say that because a claimant does not have *locus standi,* the claim falls to be dismissed for want of jurisdiction is a *non sequitur*. At the risk of stating the obvious, the claim, in those circumstances, falls to be dismissed for want of *locus standi*, not jurisdiction. *Locus standi* is concerned with whether a legal person has the standing to bring a claim, not whether the forum in question has jurisdiction over the claim. In answering the question of whether *locus standi* has been demonstrated, there must be an enquiry into whether the party seeking to enforce the legal right has sufficient interest in the relief claimed. Jurisdiction, on the other hand, is concerned with whether the forum has the power in law to adjudicate on the cause of action embraced by the claim and thus to dispose of it.[11] To illustrate, there may be proceedings over which a forum has jurisdiction instituted by two applicants, one who possesses *locus standi* and one who does not.

[10] *Arends (LC)* at para [38] and *Du Preez* at para [10]
[11] *Ewing McDonald and Co Ltd v M and M Products* 1991 (1) SA 252 (A) at 256 G

Arends (LC)

Introduction

[12] I turn now to the case law relied on by the Arbitrator, namely *Arends (LC)* and *Du Preez*. In my view, the approach taken in these two judgments, that employees have no *locus standi* to refer Section 24 disputes and that it is only unions which may do so, is fundamentally unsound. For the sake of convenience, I will refer to the interpretation of Section 24 by the Court when it comes to the question of *locus standi* as the *Arends Interpretation*.

Does Arends (LC) *fall to be disregarded?*

[13] A natural point of departure is to examine the reasoning behind the *Arends Interpretation*. Before doing so, I will deal with a preliminary argument made by Mr Nzuzo, who appeared on behalf of Ms Skulpad. He submitted that, because *Arends (LC)* had been overturned, it could have no legal significance. The submission goes too far. Whilst it is correct that a judgment which has been upset by an Appellate Court is no longer binding, it does not follow that a Court is not permitted to have regard to a portion of that judgment which was not disturbed by the Appellate Court. A Court is entitled to assess the cogency of the reasoning contained in the section in the judgment which, as it were, remains intact. It may do so with a view to establishing whether that part has persuasive value and whether guidance may be sought from it, in the same way guidance may be sought from a portion of a minority judgment with which the majority had no quibble. In *Du Preez*, the Court however held that because *Arends* (*LAC*) had not joined issue with it on the point of *locus standi* it followed, as a matter of course, that it must have agreed with it. It reasoned as follows:

> "*[11] The matter of Arends was taken on appeal. On appeal, the LAC did not upset the above finding. By necessary implication, the findings were approved by the LAC. It must therefore follow that Du Preez had no locus standi to refer a dispute to the Bargaining Council...*" (own emphasis)

[14] The proposition, without qualification, that if an Appellate Court sets aside a decision but does not deal with part of the *ratio* underpinning it, it thereby necessarily endorses the unaddressed reasoning, is without merit. Taken to its logical conclusion, it would mean that, every time an Appellate Court did not express a view on an argument embraced by the Court *a quo*, it should be taken to have agreed with such argument. This reasoning cannot be correct. It is not how the doctrine of *stare decisis* works. More often than not, it means no more than that it was unnecessary for the Appellate Court to consider it in order to come to its conclusion.

Analysis of Arends (LC)

[15] A group of employees referred a Section 24 dispute to the South African Local Government Bargaining Council. The issue was whether the collective agreement in question permitted the particular municipality to reduce the employees' remuneration. The Court found that *locus standi* was to be determined with reference to the definition of a collective agreement as contained in the LRA. It held that it is only the parties to a collective agreement which may refer Section 24 disputes. Accordingly, it was only the unions (which were parties to the collective agreement), not any employees, which had a right to refer such disputes.

[16] It reasoned as follows:

> "*[15] What is immediately discernible is that the section spells out the nature of the dispute contemplated. The dispute ought to be about application and interpretation of a collective agreement. If a dispute is not about application and interpretation of a collective agreement, then that dispute does not resort under section 24. Further, the section limits the dispute to be between the parties. The section affords parties a discretion to refer a dispute to the Commission. In my mind, a party is a person who would have entered into a collective agreement. This thinking is fortified by the definition afforded to the term collective agreement in section 213 of the LRA. It refers to one concluded by one or more registered unions, on the one hand and, on the other hand-one or more employers; one or more*

registered employers' organisations; or one or more employers and one or more registered employers' organisations.

[16] It must follow axiomatically that an individual employee cannot be a party to a collective agreement. A party can either be a registered trade union or an employer or employer's organisation. If the legislature contemplated employees, it could have used the phrase one employee or more employees as it did with employers. The issue of who a party is is (sic) *distinct from the binding nature of the agreement. Alive to the concept of stipuatio alteri* (sic)*, the legislature introduced section 23 (c)-(d). Employees can derive benefits from a collective agreement even if not parties. To my mind employees only derive benefits from a collective agreement and are not parties to the agreement. In Thal v Baltic Timber Co, Sutton J said- 'the Baltic Timber Co to show* (sic) *before it can recover under the contract, that it was either a party to the contract or that as a third party for whose benefit the stipulation had been made it had accepted it.' (my underlining).*

[17] According to Christie's, The Law of Contract in South Africa 6th Edition 2010, the identity of the parties is as essential a term of the contract as is the subject matter. I conclude by saying that a non party cannot refer a dispute in terms of section 24 of the Act. Since employees are generally non parties but beneficiaries, they cannot in my view refer a dispute in terms of section 24.

…

[38] A further difficulty with the applicants claim lies in the fact that they are not parties to the collective agreement. Although the second respondent did not refuse jurisdiction on this basis, this court is perfectly entitled to raise it in considering the objective facts. More appropriately because the point was raised and argued. … To my mind disputes in terms of section 24 can only be referred by parties to the collective agreement in question."

[17] After careful consideration of the above paragraphs, I have found the reasoning difficult to follow and am unable to align myself with the observations made and inferences drawn by the Court. The Court commences its analysis by baldly stating that Section 24 "… *limits the dispute to be between the parties*". That is, however, to state the obvious. A dispute or *lis* is self-evidently always only between the parties. The Court then, abruptly and in seemingly precipitous fashion, pronounces that a party to a dispute must mean a party to a collective agreement. It provides no justification for this conclusion. As appears from the detailed analysis of Section 24 below, there is none. Having concluded that only a party to a collective agreement may refer such a dispute, the Court then states, by way of circular reasoning, that its conclusion (that only parties to the collective agreement can be parties to the dispute) is "*fortified*" by the definition of a collective agreement as contained in the LRA which precludes employees from being parties to such agreements. But the definition of a collective agreement does not purport to dispose of, or even deal with, the question of *locus standi*.

[18] The Court then refers to *Christie's, The Law of Contract in South Africa* as authority for the proposition that the identity of the parties is an essential term of a contract, as is the subject matter. It does not explain how this principle has a bearing on *locus standi*. What thereafter follows is an elaborate reference to a common law contract, a *stipulatio alteri*. The Court intimates that the inspiration for Sections 23(c) to (d) is the *stipulatio alteri*. In a *stipulatio alteri* parties conclude a contract (*stipulatio*) for the benefit of a third party (*alteri*). For a contract to rise to the level of a *stipulatio alteri*, the third party must be given an election to accept the benefit (the stipulation). Accepting the benefit may, in turn, carry with it corresponding obligations. On acceptance of the benefit, the beneficiary becomes a party to the contract. The beneficiary is thereupon vested with an enforceable right and a *vinculum juris* is created. Because an *alteri* may be saddled with legal obligations on acceptance of the benefit, she may also be sued in terms of the contract.[12]

[12] *McCullough v Fernwood Estate Ltd* 1920 AD 204, pages 205-206

[19] The finding, in effect, that a collective agreement is akin to a *stipulatio alteri* is, in my view, misplaced. Section 23 embodies a legislative policy choice. It was one of the Legislature's ways of giving its *imprimatur* to the principle of majoritarianism and granting collective agreements a statutory *vires* with a view to promoting stable industrial relations and orderly collective bargaining.[13] The view that collective agreements and commercial contracts are not cut from the same cloth aside,[14] the drawing of an analogy between a collective agreement and a *stipulatio alteri* has its limitations. When it comes to a collective agreement, the intention or state of mind of the non-parties is irrelevant. The provisions are binding on them by operation of law. Accordingly, contrary to what was found in *Arends (LC),*[15] the question whether the third party has *animus contrahendi* and accepts the benefit does not arise. Indeed, a waiver of a benefit contained in a collective agreement is proscribed.[16] A collective agreement does not only provide benefits to employees. It may impose obligations or detriments on them. It may even take away benefits. The parties are not permitted to sue the non-parties and *vice-versa*. The incongruence of the comparison aside, ironically, if anything, equating a collective agreement with a *stipulatio alteri* would support, not weigh against, the proposition that employees may refer Section 24 disputes. In a *stipulatio alteri,* the beneficiary does have *locus standi* to institute litigation should the stipulator refuse to comply with its obligation to provide the promised benefit.

[20] Given the absence of a contractual nexus between non-party employees bound by the collective agreement and the parties to the collective agreement, it has been said that a collective agreement has the DNA of subordinate legislation. In this context, it has been observed that resolution by a majority is the basis of all legislation in a democracy.[17] There is high authority to support the view that a collective agreement is a form of subordinate legislation.[18] It is

[13] *Kem-Lin Fashions CC v Brunton & Another* [2001] 1 BLLR 25 (LAC) at para [19]; *AMCU and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) at para [43]
[14] Cf. *North East Cape Forest v SA Agricultural Plantation* 1997 18 ILJ 971 (LAC) at 980
[15] At para [37]
[16] Section 199
[17] As per *Mokgoro J* in *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655; 1998 (1) SA 745 at para [28].
[18] *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v South African Transport and Allied Workers Union (SATAWU) and Another* (2010) 31 ILJ 2037 (LAC); [2010] 10 BLLR 1038 (LAC) at para

an argument which can be made in louder tones in respect of collective agreements which have been promulgated.[19] Some have said that a collective agreement is a *sui generis* phenomenon, a hybrid possessing both contractual and legislative attributes[20], the contractual element manifesting itself in the consensus between the parties and the legislative element finding expression in the circumstance that non-parties are bound by the agreement and in some instances the collective agreement is enacted. In so far as a collective agreement is to be equated to subordinate legislation (and there is much to be said for this proposition), it needs only to be stated that, if a person's rights are affected by the application or interpretation of subordinate legislation, that person would have *locus standi* to institute litigation to vindicate such rights. Why not then an employee whose rights have been affected by an employer's application or interpretation of a collective agreement?

[21] In an apparent attempt to come to the rescue of the employees, the Court indicated that, if employees have a complaint which has its genesis in a collective agreement, their remedy was rather to pursue contractual disputes.[21] This finding loses sight of the fact that it is for the employees, as *domini litis*, to formulate their disputes as they deem fit[22], whether their claims be good or bad, subject to the duty of an arbitrator, objectively, to guard against mischaracterisation and wrong labelling. More importantly, if a dispute is in truth a dispute about the application and interpretation of a collective agreement, it is not permissible to dress it up as a contractual dispute.[23] It is only when employees seek, *simpliciter*, to enforce the terms of a collective agreement that such an exercise may be undertaken in the fora of the Labour

---

[42]. Cf. *Appels v Education Labour Relations Council (ELRC) and Others* [2019] 10 BLLR 985 (LAC); (2019) 40 ILJ 2284 (LAC) at para [12].

[19] *Unitrans Fuel and Chemical (Pty) Ltd v TAWUSA and another* (2010) 31 ILJ 2854 (LAC) at para [14]. *Platinum Mile Investments* at paras [41] and [46].

[20] An analogy may be drawn with a business rescue plan which is *quazi*-contractual in nature and which is published and is, in terms of Section 152(4) of the Companies Act 71 of 2008, binding on creditors irrespective of whether they voted in favour of it. Such creditors have legal remedies.

[21] At para [39]

[22] *James and Another v Eskom Holdings SOC Ltd and Others* (2017) 38 ILJ 2269 (LAC); [2017] 10 BLLR 979 (LAC) at paras [16] to [20] and *Monare v South African Tourism and Others* [2016] 2 BLLR 115 (LAC); (2016) 37 ILJ 394 (LAC) at para [22]

[23] *Ekurhuleni Metropolitan Municipality v SAMWU obo Members [2015] 1 BLLR 34 (LAC);* (2015) 36 ILJ 624 (LAC) para [25] – [26]. *Aucamp v South African Revenue Services* [2013] ZALCJHB 266; [2014] 2 BLLR 152 (LC) at paras [21] – [22]

Court and the Civil Courts.[24] Thus, in so far as it was suggested by the Court that employees have an alternative remedy when it comes to Section 24 disputes, this is not correct.

[22] I turn now to the individual grounds on which I base my conclusion that, providing employees can demonstrate a direct and substantial interest, they have *locus standi* to pursue Section 24 disputes. In so doing, I am mindful of the approach to be taken when a court embarks on an exercise of statutory interpretation. It is a unitary exercise not to be undertaken mechanically. Whilst the text and its ordinary grammatical meaning serve as the starting point, context and purpose, which elucidate the language used, must be taken into account as a matter of course irrespective of whether the wording admits of any uncertainty. A resort to general values to support an interpretation untethered from the text is not allowed. Looming over any exercise of statutory interpretation is the imperative that the favoured interpretation should, as far as possible, comport with the values of the Constitution.

[23] In coming to my conclusion, I rely on six grounds. They are that the *Arends Interpretation*:

[23.1.] is irreconcilable with the language of Section 24;

[23.2.] unjustifiably divests an employee of her right to institute litigation in her own cause;

[23.3.] results in outcomes which are inequitable, illogical and absurd;

[23.4.] is inconsistent with the objects of the LRA;

[23.5.] is unconstitutional; and

[23.6.] is contrary to the prevailing authorities.

[24] *MEC for Economic Development, Environment and Tourism: Limpopo v Leboho* (2022) 43 ILJ 2695 (SCA)

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

[24] Despite a thorough examination of Section 24, I have been unable to discern any intention, on the part of the Legislature, to define or limit the identities of the persons who may be parties to a Section 24 dispute. Section 24 is to be contrasted with other provisions in the LRA which regulate *locus standi*. By way of illustration, Section 200 governs the circumstances in which a union may participate in litigation. Section 191(1) identifies which persons may refer unfair labour practice or unfair dismissal disputes. I agree with the comments made by Commissioner Le Roux in *SA Commercial Catering & Allied Workers Union v Crown Furnishers*[25]*,* the only decision, other than *Arends (LC)*, which I could locate wherein there was an attempt, albeit a fleeting one, to interrogate *locus standi* point. The Commissioner commented that:

> "*Section 24 does not seem to indicate that the mechanisms for resolving disputes about collective agreements are available only to the parties to the agreement*"[26]

[25] In terms of the *Arends Interpretation*, the expressions *party to the dispute* and *party to the collective agreement* are to be used interchangeably. An analysis of Section 24 and in particular Sections 24(1), 24(2), 24(3), 24(5) and 24(6) demonstrates that this conclusion is not supported by the text. As is elaborated on below, the Legislature clearly intended to distinguish between parties to the collective agreement and parties to the dispute.

[26] Section 24(1), against the backdrop of a description of the applicable dispute resolution procedures, refers simply to "*the parties".* Contextually, this can only mean the parties to the dispute. The section echoes other dispute resolution mechanisms provided for in the LRA wherein a party to a dispute means exactly that, namely a party to a dispute and not a party to a collective

[25] (1998) 19 ILJ 663 (CCMA)
[26] At page 677 F to G

agreement.[27] Section 24(2) (introductory portion) refers to "*any party to the dispute*" (not any party to the collective agreement) who may refer a Section 24 dispute. Section 24(3) refers to the "*party*" who refers the dispute and explains that a copy of the referral must be served on all other "*parties to the dispute*" (not the parties to the collective agreement). Section 24(5) similarly provides that "*any party to the dispute*" (not any party to the collective agreement), may request that the dispute be resolved through arbitration. Section 24(6) deals with agency shop agreements and likewise refers to "*any party to the dispute*".

[27] There is much to be said for the broad sweep of the adjective "*any*" in Sections 24(2) and 24(5). "*Any*" in this context means the widest possible interpretation must be given to the pool of potential parties. Furthermore, there are several places in the LRA where, when the Legislature intends to refer to the parties to a collective agreement, it does so.[28] This is to be distinguished from the places in the LRA where, when the Legislature intends to refer to a party to a dispute, again it conveys that intention.[29] In terms of the broader scheme of the LRA, there is thus a clear distinction drawn between a party to a dispute and a party to a collective agreement. It is significant that Section 24(2)(c) provides that "*any party to the dispute*" may refer the dispute to the CCMA if any "*party to the collective agreement*" has frustrated the resolution of the dispute in terms of the collective agreement. Thus Section 24 itself contains a juxtaposition of the notion of a party to the dispute against that of a party to the collective agreement. I would add that, if a party to a dispute is literally to be equated with a party to the collective agreement, then it would mean, absurdly so, that all the parties to the collective agreement (in Ms Skulpad's matter there were some ten unions), irrespective of whether any of them had any interest in the dispute, would be legally obligated to participate in both the conciliation and arbitration proceedings.[30]

[27] See Sections 22, 63, 94 and 198D
[28] Sections 23(1)(a), 23(1)(b), 23(1)(c), 23(4), 24(2)(c), 31(a), 31(b) and 31(c)
[29] Sections 22(1), 51(b), 61(10), 63(1), 69(8), 73(1), 74(1), 94(1), 115(2), 134(1), 145(1), 148(1) and 149(1)
[30] Section 24(1)

[28] I emphasise that the *Arends Interpretation* does not only limit the remedy of an employee; it extinguishes that remedy. It says to her, no matter what injustices she may suffer when her employer wrongly interprets or wrongly applies a collective agreement, she has no legal recourse. A Court will not readily infer such an intention. If the Legislature intends to make inroads into a cardinal right, such as the right to access justice, it ordinarily will say so and say so in the clearest of terms. To illustrate, where, in the LRA, the Legislature has sought to circumscribe (not even extinguish) legal remedies, it has done so expressly.[31]

[29] In *Arends (LC)* the Court did not specify the capacity in which a union may refer a Section 24 dispute. It appears to have simply been accepted that, irrespective of whether the union in question has a legal interest in the outcome of the litigation, that union will always have a statutory right to refer a Section 24 dispute if it is a party to the collective agreement. It is apparent from the award that the Arbitrator assumed, logically so, that a union would have to refer a Section 24 dispute on behalf of the employee where the dispute is that of the employee. Curiously, no reference is made in *Arends (LC)* to Section 200. This section governs the manner in which unions may participate in litigation when representing employees. It provides as follows:

> *"**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."*

[31] Cf. Sections 137(6), 158(1B) and 191(10)

[30] Section 200 removes the uncertainty which previously plagued the *locus standi* of unions. At common law, as a general rule, save for certain exceptions, a representative is not imbued with *locus standi*. It cannot sue or be sued on an obligation between the representative's principal and the other party[32]. Prior to the advent of the LRA, consistent with this principle, there was precedent that a union lacked *locus standi* to institute litigation on behalf of its members. Section 200(1) subsumes the common law, certainly when it comes to registered unions,[33] in the same way that it has been held that the common law grounds of review have been subsumed under the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). Thus, if a registered union wishes to act on behalf of one of its members, it must do so in terms of Section 200(1), which gives the union a right to represent any of its members in one of the three capacities set out therein. The Legislature has, in Section 200(1), carefully chosen the word "*acts*" which is to be distinguished from the word "*party*" in Section 200(2). It is thus clear that when a union participates in litigation contemplated by Section 200(1), it does not do so as a party but as a representative, or to utilise words endorsed by the Constitutional Court, as a "*spokesperson*".[34]

[31] Importantly, a union may only participate in litigation in terms of Section 200(1) if its member is a party to the litigation. This requirement is in the nature of a jurisdictional fact. It is a *sine qua non*[35] or condition precedent. The *Arends Interpretation,* inexplicably so, is based on the polar opposite premise, namely that when a union refers a Section 24 dispute on behalf of its member, the member is prohibited from being a party. It is thus plainly contrary to Section 200(1). The ineluctable, but mindboggling, outworking of the *Arends Interpretation* is that even unions which are parties to the collective agreement are not permitted to act on behalf of their members in Section 24 disputes. The unpalatable denouement is that no employee may ever pursue a Section 24

[32] *Sentra Koop Handelaars Bpk v Lourens and Another* 1991 (3) SA 540 (W)
[33] Unions which are not registered may be permitted to institute action on any basis recognised by the common law.
[34] *AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Limited) v National Union of Metalworkers South Africa and Others* (CCT 188/22) [2024] ZACC 13; 2024 (9) BCLR 1111 (CC); (2024) 45 ILJ 1937 (CC); 2024 (5) SA 576 (CC); [2024] 10 BLLR 999 (CC) at paras [39] and [40].
[35] Without which nothing

dispute. All of this is aggravated by the fact that, as our jurisprudence shows, it is employees who most need to refer Section 24 disputes, the terms and conditions of employment as contained in the collective agreements being the most contentious issues when it comes to litigation.

[32] This intractable conundrum which the *Arends Interpretation* brings in its train arises from its flawed understructure. It is an understructure which fractures in two because of a tectonic illogicality. The illogicality is that the *Arends Interpretation* contemplates an employee being precluded from being a party and, simultaneously, being a party. The illogicality arises from a failure to appreciate that, when a union represents an employee, the union is not the party and the dispute remains a dispute between employee and employer.[36] Expressed differently, when a union refers a dispute on behalf of an employee it asserts the rights of the employee, not those of the union.[37] That is why if a union has referred a dispute on behalf of its members and then withdraws, the members remain as parties to the dispute.[38] The incoherency is that the *Arends Interpretation* stipulates that an employee is not permitted to be a party yet, in the same breath, allows a union to bring a dispute on behalf of an employee which is the same as saying that an employee may be a party.

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

[33] As mentioned earlier, the common law position is that *locus standi* depends on the nature and, in particular, the sufficiency, of a legal person's interest in litigation. It is determinative of whether the person will be allowed to participate in legal proceedings. In order to demonstrate *locus standi*, a party must show that her interests are directly affected by the challenged conduct. In *Gross and*

[36] *National Union of Mineworkers v Hernic Exploration (Pty) Ltd* (2003) 24 ILJ 787 (LAC). *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) AT 910 TO 912. Section 200(1) is, at least to a degree, a codification of the legal position set out in *Hernic* and *Amalgamated Engineering*.

[37] *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others* (2016) 37 (ILJ) 2593 (LAC); [2017] 2 BLLR 105 (LAC) at paras [32] to [36]

[38] *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 355 (LAC)

others v Pents[39], Harms JA explained as follows:

> "…*The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party (Wessels en Andere v Siziodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS 1978 (3) 5A 716 (A) 725H; Cabinet of the Transitional Government for the (Territory of South West Africa v Eins 1988 (3) SA 369 (A) 388B-E). The sufficiency of interest is "altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergele word vir die beantwoording van die vraag nie ..."(Jacobs en 'n Ander v Waks en Andere [1991] ZASCA 152; 1992 (1) SA 521 (A) 534D). The general rule is "that it is for the party instituting proceedings to allege and prove [my underlining] that he has locus standi, the onus of establishing that issue rests upon the applicant. It is an onus in the true sense; the overall onus ..." (Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A) 575H-I). It follows from this that the question cannot always be settled in initio and that it is an inherent risk of litigation that it may only at the end of the matter be established whether locus standi was present or not. (The issue may, obviously, be capable of separate resolution in terms of rule 33.) I am unaware of a rule of law that allows a court to confer locus standi upon a party, who otherwise 'has none, on the ground of expediency and to obviate impractical and undesirable procedures …*"[40],

[34] In Collective Labour Law[41] it is explained that, whilst the parties to a collective agreement are naturally at liberty to decide on its subject matter (providing of course there is compliance with the wide definition of the subject matter which is to be contained in a collective agreement), traditionally there are three categories of collective agreements. The first category consists of so-called recognition agreements which govern the relationship between employers and unions. They would typically contain provisions stipulating how collective bargaining is to take place as well as provisions delineating the ambit and scope of organisational rights. The second category consists of what are

[39] 1996 (4) SA 617(A)
[40] At page 632
[41] John Grogan Second Edition at pages 174 to 176

generally known as substantive agreements. They provide for conditions of employment such as salaries and wages, hours of work, overtime rates, vacation leave, all manner of benefits and the like. The third category consists of procedural agreements which, as the name suggests, regulate workplace procedures relating, *inter alia*, to discipline, suspension and grievance resolution.

[35] Although there can be no inflexible rule and each case must be adjudged according to its peculiar facts, it would seem logical that, when it comes to the first category, it will be the rights of unions which are most likely to be affected. When it comes to the second category, it is likely that it will be the employees who will have a direct and substantial interest in litigation conducted in terms of Section 24 because such agreements concern their terms and conditions of employment as negotiated by the unions on their behalf. When it comes to the third category, it seems that both employees and unions may have a direct and substantial interest in decisions taken by the employer as to how procedures are to be applied and interpreted. By way of illustration, if there is a dispute concerning whether a collective agreement, properly interpreted, allows legal representation in a disciplinary hearing then, on the face of it, both the accused employee as well as the union representing the employee would have a legal interest in the outcome of such a dispute. I stress, however, that each case will have to be adjudged on its own facts and the mere fact that an employee has a direct and substantial interest in the outcome of a Section 24 dispute does not necessarily mean that the union will not also have one, and *vice versa*.

[36] Thus, depending on the nature of the Section 24 dispute, sometimes employees will have a legal interest and sometimes unions will have a legal interest and sometimes both will have a legal interest. The general rule is that every person with full legal capacity should be allowed to litigate, providing that such person can demonstrate *locus standi.* That being so, there is a question which cries out for an answer. For what conceivable reason would the Legislature decide that employees have no *locus standi* to pursue Section 24 disputes when they are possessed of *locus standi* in respect of all other labour

disputes where their rights are affected? There is no magic to a Section 24 dispute. It is a garden variety labour dispute. No one has ever suggested that it should be obligatory for an employee to have a union, acting as some type of legal guardian, holding her hand should she wish to pursue an unfair labour practice or unfair dismissal dispute. It should be no different for a Section 24 dispute. To pertinently illustrate the arbitrariness, when it comes to disputes about collective agreements, in terms of the *Arends Interpretation*, an employee has no *locus standi* to complain about an employer's application or interpretation of a collective agreement but she, inexplicably, does have *locus standi* to pursue a dispute about the enforcement of the terms of that same collective agreement.

[37] The test to establish whether a person qualifies for a hearing is self-evidently based on notions of fairness and justice, and it also provides a mechanism for excluding busybodies and professional litigants who have no right to meddle in litigation which does not concern them. It is only in the most exceptional of circumstances that a person, who has *locus standi*, will be barred from initiating court proceedings. One illustration would be a person who has been declared mentally ill and requires a curator *ad litem*. No such exceptional circumstances exist in this matter. The *Arends Interpretation* is, in truth, draconian in its effect. It unjustifiably, indefensibly, deprives employees of their right to have legitimate Section 24 disputes ventilated.

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

Inequitable outcomes

[38] There are several illustrations of inequitable consequences or, to utilise the words of the Supreme Court of Appeal, consequences which are "*insensible*" and "*unbusinesslike*"[42]. Take the scenario where employee X is a member of union A which is party to the collective agreement whereas employee Y is a

[42] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para [18]

member of union B which is not. The unpalatable consequence of the *Arends Interpretation* is that employee X can impress upon her union to pursue a Section 24 dispute on her behalf, whereas employee Y will be denied access to justice on the arbitrary basis that she has joined the wrong union. The same untenable result will occur if employee Y elects not to join a union at all.

[39] In such circumstances the unfortunate employee Y, if she remains loyal to union B, will not only forfeit the right to claim benefits and advantages flowing from the collective agreement, but will furthermore potentially suffer prejudice. This is because collective agreements may also contain provisions which are perceived to be disadvantageous to employees. A collective agreement may place an employee under an obligation to do something which she does not want to do. It may require her to be vaccinated or searched before entering the workplace, to disclose her criminal record, to contribute to a newly established fund, to adapt to a new shift system, to forfeit a performance or annual bonus in certain circumstances, to meet certain requirements before being allowed to participate in a scheme, such as producing proof of ownership of a motor vehicle, to follow a grievance procedure before referring a dispute to a Bargaining Council and so the list goes on. I mention this because, whilst it will certainly be unjust not to allow an employee to pursue a Section 24 dispute where she stands to gain some advantage should she be successful, it would be all the more unjust to refuse an employee the right to pursue a Section 24 dispute where she stands to be prejudiced.

[40] At a practical level, the *Arends Interpretation* also renders the pursuit of any Section 24 dispute by a union on behalf of an employee freighted with a host of imponderable vicissitudes which have the potential to frustrate, impede and derail the intended litigation. First and foremost, in terms of the *Arend Interpretation,* it is the union, the representative, which is in control of the litigation and the employee has no say. What would happen if an employee was a member of a union which was a party to the collective agreement but the union, nonetheless, says to the employee that it is unable to take her case because, for example, it lacks the capacity or resources to do so or because it is of the view that the case has no merit and it does not want to be mulcted

with a costs order? In such circumstances, the employee would be without a remedy. What would happen if a union, mid-stream the arbitration, was wound up or the membership of the employee of the union was terminated? What would happen if the union was conflicted or, worse still, was being sued, by the member it was required to represent. In such circumstances the litigation pursued on behalf of the employee would flounder. The *Arends Interpretation* compels an employee, it would seem in the capacity of a bystander, to travel a torturous road and, throughout, live with the spectre of her dispute being decided, not in terms of its merits, but by arbitrary events irrelevant to and unconnected with litigation itself, events which Shakespeare might refer to as the slings and arrows of outrageous fortune.

[41] The *Arends Interpretation* also gives an unfair advantage to employers. The definition of a collective agreement provides that employers, not employees, may be parties to a collective agreement. Thus, providing that the employer is a party to a collective agreement, as in this case where the State is such a party, it would that, in the event of the existence of a Section 24 dispute, the employer (the Department) may refer it to the Bargaining Council, whereas the employee (in this case Ms Skulpad), may not. This inequity is exacerbated by the circumstance that, in the majority of Section 24 disputes, it will be the employee who will most need to exercise the right to refer a Section 24 dispute because it is ordinarily within the province of the employer to decide how a collective agreement will be applied or interpreted.

Absurdities which flow from the Arends Interpretation

[42] The *Arends Interpretation* leaves a number of absurdities in its wake, chief of which is that those persons whose rights may be affected by the relief sought, are not entitled to be parties to the dispute, or to the *lis*, but unfathomably, the representatives, which have no legal interest in the outcome of the matter, do possess such a right. The failure of logic in such an arrangement is surpassed only by its lack of substance. It brings to mind Lewis Carroll's Through the

Looking-Glass[43] where everything is inverted, including logic and where, for example, running helps one remain stationary, whilst walking away from something brings one towards it. The *Arends Interpretation* is, in short, irreparably tainted because it is based on a perversion of the common law. At common law, the principle is that the case is that of the client and not the representative. A representative should not take control of or commandeer the client's case. As has often been said, a client is entitled to say to her representative that she has been engaged for her advice and her litigation skills, not for her judgment; that she would prefer the judgment of the Court.

[43] This primary absurdity gives birth to others. If an employer, which is not a member of an employer's organisation, is not permitted to be a party to the litigation because it is not a party to the collective agreement, how is that employer going to defend itself against a claim by a union, made on behalf of an employee? Furthermore, any award issued affecting the employer's rights will be a nullity and no pronouncement to that effect will be necessary because the employer would not have been cited[44]. Similarly, if an employee is precluded from being a party to a dispute, on what basis can an arbitrator then grant the employee (the non-party) relief, or worse, issue an award adverse to her? Again, the award would be a nullity because judicial pronouncements only bind the parties. It is no answer to say that, although the union has referred the dispute, the real party is still the employee. Such a contention would make a mockery of the central plank of the *Arends Interpretation,* which is that employees are not permitted to be parties to Section 24 disputes. It would also bring to the fore the obvious question, why, if an employee was the true party all along, is she then barred from referring a Section 24 dispute in the first place?

Ground No. 4: The *Arends Interpretation* is unconstitutional

[44] When interpreting a statute a Court will lean, as far as possible, towards giving

[43] Published Macmillan & Co. in 27 December 1871.
[44] Cf *The Master of The High Court (North Gauteng High Court, Pretoria) v Motala No and Others* 2012 (3) SA 325 (SCA) at para [12]

the legislation an interpretation which is aligned with the Constitution[45]. The LRA itself provides that its provisions must be interpreted in the light of the Constitution.[46] The *Arends Interpretation* is unconstitutional for at least four reasons.

[45] I will evaluate it firstly through the lens of Section 34 of the Constitution. It provides that everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. In short, everyone is entitled to due process. It has been authoritatively held that a Bargaining Council which determines a labour dispute falls within the purview of Section 34 of the Constitution.[47] The *Arends Interpretation* erodes, nay eviscerates, the right of access to justice. Barring a *bona fide* litigant from instituting legal proceedings where she has a direct and substantial interest in the outcome of litigation will only, in the most exceptional of circumstances[48], pass Constitutional muster. See the Prescription Act No. 68 of 1969 which denies, justifiably so, access to justice after the passage of time[49].

[46] But telling a group of employees, that they have no right to have their disputes determined is irreconcilable with the constitutional duty of the Court to ensure that *bona fide* litigants are afforded access to the administration of justice. There is something very wrong where, in an open and democratic society based on values of transparency and accountability, there can be a category of employees which may suffer wrongs and injustices and which is without a legal remedy. Somyalo AJ said it like this:

> "*[22] …* [U]*ntrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of*

[45] Section 39(2) of the Constitution. *National Commissioner of SA Police Services and Others v Phopho* [2021] 8 BLLR 749 (LAC); (2021) 42 ILJ 1666 (LAC) at para [59] and [60]
[46] Section 3(b)
[47] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC); 2018 (1) SA 38 (CC) at paras [23], [24], [72] and [73]
[48] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA)
[49] *Makate v Vodacom (Pty) Ltd* 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para [90]

the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory…"[50]

[47] In *Beinash and Another v Ernst & Young and Others*[51] Mokgoro J, noted that the right of access to a Court is, by nature, a right that requires "*active protection*" by Courts[52]. But the opposite happens when the *Arends Interpretation* is endorsed by a Court. The Court, which is supposed to be the guardian of the right to access to justice, becomes complicit in its negation. Insofar as Section 33 of the Constitution is implicated because the task of the arbitrator is administrative in nature, similar arguments may be made when it comes to the right to administrative justice and in particular the right to administrative action which is procedurally fair[53].

[48] Secondly, as Mr Masher, who appeared on behalf of the Bargaining Council, trenchantly set out in his heads of argument, the *Arends Interpretation* is patently unconstitutional because it infringes the right of an employee to freedom of association as guaranteed in terms of Section 18 of the Constitution. At the risk of stating the obvious, the *Arends Interpretation* penalises or handicaps employees who have exercised their constitutional right to join a union which is not a party to a collective agreement or, for that matter, not to join a union at all. As to the latter election, self-evidently a right to associate with a union incorporates a right to be protected from forced or involuntary association. Expressed differently, choosing not to associate at all is an exercise of the right of the freedom of association.[54]

[49] Allied to this, the *Arends Interpretation* infringes the right of an employee to join a union as contained in Section 23(2)(a) of the Constitution as confirmed in Section 4(1)(b). This is because, as per the reasoning in *New Nation*, the

---

[50] *Moise v Greater Germiston Transitional Local Council; Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curi)* 2001 (4) SA 491 (CC) at para [23]

[51] 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC)

[52] At para [17]

[53] It is debatable as to whether this is indeed the case. See *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* [2014] 1 All SA 125 (SCA); 2014 (2) SA 321 (SCA); (2013) 34 ILJ 2779 (SCA) at para [20]

[54] *New Nation Movement NPC and others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) at paras [22] and [58]

right to join a union must surely embrace the right to join a union of the employee's choice as well as the right not to join a union at all. Yet the *Arends Interpretation* all but compels an employee (it presents her with Hobson's choice), not only to join a union, but to join a specific union i.e. a union which is a party to the collective agreement.

[50] Thirdly, the *Arends Interpretation* is riven with discrimination. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. There is no reason why employees, who are members of unions, which happen to be parties to the collective agreement, should be more equal than others, when it comes to access to justice. It is surely discriminatory to say to an employee that if she does not join the right union, she will not have the protection of the law.

[51] Section 9(2) contains a prohibition against discrimination. The implementation of the *Arends Interpretation* plainly results in discrimination between employees and employers. This is because, providing that they are parties to the collective agreement, employers are entitled, as of right, irrespective of whether they have *locus standi,* to pursue Section 24 disputes. Employees, on the other hand, may never possess such a right, even if they have *locus standi.* This is egregiously unfair particularly given that, as mentioned, it would be the employees who would ordinarily have a greater claim to pursue Section 24 disputes, the employer being in control, generally, of how a collective agreement will be applied or interpreted. There can be no imaginable rationale to justify this disparity.

[52] There is a further level of discrimination which goes hand in hand with the *Arends Interpretation*. It is discrimination against unions. There is no justifiable basis for the giving of approval to a state of affairs where minority unions, which have not been recognised by an employer and accordingly have not been part of the negotiation process and are not parties to the collective agreement, are further penalised by way of the imposition of a ban on them when it comes to the right to represent their members in Section 24 disputes. The effect of the *Arends Interpretation* is to say to such minority unions that they can represent

their members in all labour disputes except Section 24 disputes. That privilege is reserved for majority unions which, to use Hollywood parlance, are the A-listers when it comes to collective bargaining given their status as parties to the collective agreement. It is difficult to think of a situation where a minority union is treated more unfairly than as a result of the application of the *Arends Interpretation.* In *Hernic* the Court poignantly explained the position as follows:

> "*[41] …The primary function of a trade union is to act as the representative of its members. Without that capacity it is doubtful whether a trade union can survive*…" (own emphasis)

[53] This level of discrimination seems to me to be discrimination of the worst kind because it serves as an instrument of oppression of minority unions which, because they are not recognised as bargaining agents, are already at a disadvantage when competing with majority unions for a presence in the workplace. In my view, the *Arends Interpretation* effectively sanctions an abuse of the principle of majoritarianism because it says that given that majority unions have achieved the status of being parties to a collective agreement, they should, inexplicably, enjoy a further (unfair) advantage when it comes to Section 24 disputes.[55] Leaving aside the clear wording of Section 200, the natural question which arises is, why should a powerful recognised union have more rights to represent its member in a labour dispute than a minority union? One would have thought that, if anything, it would be the

[55] In *National Union of Metal Workers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 2 BLLR 159 (LC); (2023) 44 ILJ 594 (LC) I had occasion to comment on the reach of majoritarianism and the rights of minority unions as well as the obligations of Courts to ensure the justice is done between majority and minority unions. I quote:

"[74]...The apex Court has made it clear that, when balancing the rights of freedom of association (an individual right), the right to organise (a union right) and the right to bargain collectively against the principle of majoritarianism which looms over the LRA, majoritarianism is not intended to operate in an uncompromising and exclusive way that smothers the voices of minority unions or consigns these unions to an oubliette in the workplace. Naked collective self-interest which has as its aim either the subjugation of aspirant minority unions or the absolute monopolisation of the workplace (which was the goal of NUMSA and Volkswagen in OCGAWU) is not what is envisaged by the LRA. Underdogs they may be, but minority unions are to be afforded, as of right, sufficient space within which to organize and mobilize solidarity. The entitlement of minority unions, on the platform of duly acquired legislated organisational rights, to represent their members, to strive to forge collective agreements through the vehicle of skillful negotiation and in the crucible of strategically employed industrial action and, perchance, one day, who knows, to joust for supremacy and to challenge the sovereignty of powerful and embedded, but possibly complacent and inefficient, majority unions, should not, in our Constitutional democracy, be rendered illusory." (own underlining)

members of minority unions, who had had no say in the negotiation of the terms and conditions which are contained in the collective agreement, who would have the greater claim to be heard.

[54] Section 5 of the LRA prohibits the prejudicing of an employee because of trade union membership. It proscribes any person compelling an employee not to be a member of a trade union, not to become a member of a trade union and to give up membership of a trade union. In my view, and as per the reasoning in *New Nation*, such a prohibition would incorporate a ban against prejudicing in an employee on the basis of her lack of union membership. In a matter where the boot was on the proverbial other foot,[56] an employer offered non-union employees pay increases on the condition that they did not join the union and withheld increases for union members until the next negotiated increase. The Court held that, while the LRA permits a plurality when it comes to collective bargaining, such conduct amounted to unfair discrimination because the employer failed to justify the differential treatment. The Court in essence held that there had been discrimination against union members because non-union employees had been unjustifiably favoured. In this case it is the members of the union parties to the collective agreement which have been favoured above other employees. One of the concerns of the Court was that the conduct had the potential to undermine the union as a bargaining agent. It is difficult to see how the *Arends interpretation* would not have the effect of encouraging employees to join powerful recognised unions (because as parties to collective agreements they have greater powers of litigation), and discouraging them from joining minority unions which are not recognised, thus undermining the minority unions which seek to achieve representative status and the concomitant right to participate in collective bargaining. The *Arends Interpretation* thus legitimizes a form of anti-union discrimination as proscribed by Section 5(2)(c) and Section 5(3).

[55] In the light of all the above, it follows that the *Arends Interpretation* brings with it discrimination which is irrational, entirely unconnected which any of the

[56] *Safcor Freight (pty) Ltd t/a Safcor Panalpina v South African Freight and Dock Workers* [2012] 12 BLLR 1267 (LAC)

purposes for which the LRA was enacted and which is the type of discrimination which cannot conceivably be justified in terms of Section 36 of the Constitution.

[56] Fourthly, there is the right enshrined in Section 23 of the Constitution not to be subjected to unfair labour practices. The LRA gives the loudest voice to this right.[57] The effect of the *Arends Interpretation* is not only to emasculate the constitutional right of employees to fair labour practices. It renders it illusory insofar as Section 24 disputes are concerned.

Ground No. 5: The *Arends Interpretation* is inconsistent with the objects of the LRA

[57] The *Arends Interpretation* is inconsistent with the objects of the LRA. Firstly, it sits uneasily with the requirement that there be "*democratisation*"[58] within the workplace. In the context of Section 24 disputes its effect is, so to speak, to disenfranchise employees. More to the point, the LRA has, per Section 1(d)(iv), as one of its imperatives, the promotion of effective labour dispute resolution. An interpretation of a provision in the LRA which leads to an arbitrary deprivation of a right to have a labour dispute resolved is self-evidently irreconcilable with this object.

Ground No.: 6: The *Arends Interpretation* is contrary to the prevailing authorities

Introduction

[58] There are a number of decisions by this Court, both prior to and post *Arends (LC)*, which have accepted that an employee may refer a Section 24 dispute, although the *locus standi* point was not argued in any of them.[59] There are two such decisions in the Labour Appeal Court which I have located. Not too

[57] Section 1(a)
[58] Section 1 (introductory portion)
[59] *Ngcobo v KwaZulu Natal Health Service* (D228/98) [1998] ZALC 112 (13 November 1998); *Botha v Blue Bulls Company (Pty) Limited and Another* (2009) 30 ILJ 544 (LC)*; Botha v Blue Bulls Company (Pty) Limited and Another* (2009) 30 ILJ 544 (LC)*; Frasenberg v Transnet Freight Rails and Others (C* 848/17 (2)) [2021] ZALCCT 4 as handed down on 15 February 2021 at paras [34] and [36]*; Bierman and Others v MEC Free State Department of Health* (PR59/21) [2024] ZALCPE 13 (15 April 2024). See *Aucamp* (*supra*)

long ago in *Herbert v Head Education - Western Cape Education and Others*[60] the Court had no difficulty with an employee referring a Section 24 dispute, although, as with the Labour Court judgments, the point was not argued. *Arends (LC)*, itself, relied on *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others*[61], in which an employee (not a union) had referred a Section 24 dispute. *Locus standi* was not an issue, although the point was also not argued. Three decisions by the Labour Appeal Court bear mentioning.

Ekurhuleni

[59] *Ekurhuleni* held that a union (acting on behalf of employees) may refer a Section 24 dispute. As set out above, in terms of Section 200(1)(b) a union may only represent employees if the employees themselves are a party to the dispute. Ergo, *Ekurhuleni* implicitly accepted that employees may be parties to Section 24 disputes.

Rukwaya

[60] Mr Nzuzo referred to *Rukwaya and Others v Kitchen Bar Restaurant*[62] submitting that it was dispositive of the *locus standi* issue. *Rukwaya*, in turn, refers to *Ekurhuleni*. *Rukwaya* does not directly address the question of whether an employee may refer a Section 24 dispute. It does however find that a dispute resolution procedure, as contained in a collective agreement contemplated in terms of section 24(1), may provide that employees are entitled, indeed bound, to refer Section 24 disputes to the applicable Bargaining Council for determination[63]. In *Appels*, it was held that a collective agreement may only alter procedural rights. The right to refer a dispute for determination is, however, a substantive right. How that right may be exercised is, on the other hand, a matter of procedure. It must follow then that *Rukwaya*,

[60] (2022) 43 ILJ 1618 (LAC)
[61] [2010] 6 BLLR 594 (LAC). Although not apparent from the citation, the Third Respondent (the employee) was one Adri Badenhorst.
[62] (2018) 39 ILJ 180 (LAC); [2018] 2 BLLR 161 (LAC)
[63] At para [13]

in pronouncing that employees may refer Section 24 disputes in terms of a dispute resolution procedure contained in a collective agreement, accepted that such rights must be sourced in Section 24 because, as held in *Appels*, substantive rights cannot be generated through the vehicle of a collective agreement.

Arends (LAC)

[61] In *Arends* (*LAC*), there were two potential preliminary points. The first was whether the employees had *locus standi* to pursue a Section 24 dispute. The second was whether, assuming the employees had *locus standi*, the Arbitrator had the jurisdiction to make a pronouncement on the dispute. As to the latter, the issue was whether the dispute was in truth a Section 24 dispute or whether it was a dispute about the enforcement of a collective agreement, in which case the Arbitrator would have no jurisdiction. The Court did not address the first point. It focused on the second, holding that, because of a defective stated case, there was insufficient material properly before the Arbitrator for him to have determined the true nature of the dispute. The Court then simply set aside the jurisdictional ruling, leaving it open to the employees to continue with the prosecution of the dispute. In my view, it is implicit in the judgment that, if the dispute was ultimately established as constituting a Section 24 dispute, then the employees would have been permitted to proceed with their case.

[62] It is trite that judgments may contain findings which, although not expressly stated are, nonetheless, implicit.[64] Guidance may be sought from *Score Supermarket v Kente*[65]*.* In that matter it was argued that because a condonation application was not mentioned in the judgment, this in turn meant that the Court had failed to decide it. The Court disagreed and explained as follows:

> "*[10] ... It is contended in the alternative that the statement of case was filed*

[64] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1; 1999 (10) BCLR 1059 at para [81]. See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para [9]
[65] [1999] 12 BLLR 1261 (LAC)

> *late and that, although it was accompanied by an affidavit seeking condonation, condonation was not granted. My view is that where the court dealt with the dispute without explicitly granting condonation it must be considered to have been implicitly granted.*" (own emphasis)

[63] Applying the above dictum, although the Court did not mention the issue of *locus standi*, in my view it is fair to say that it accepted that the employees had *locus standi*. I say this because the Court is unlikely to have gone to the trouble of writing the judgment it did, debating the true nature of the dispute and the adequacy or otherwise of the evidence before the Arbitrator if, on the employees' own version, their referral was, invalid by reason of a lack of *locus standi*. It is trite that a Court will seek to achieve finality in litigation and thus avoid unnecessary litigation[66]. If the Court was of the view that there was merit in the point about *locus standi* as expounded in *Arends (LC)*, then it could simply have recorded that the dispute is a non-starter, on the employees' own version, because only parties to a collective agreement have *locus standi* in Section 24 disputes. Instead it kept the door open for the employees. By way of illustration, in *Mulaudzi v Head Office: Vuwani Magistrate Office and Others*[67] the Court was faced with a number of preliminary points but found it unnecessary to pronounce upon them owing to the lack of *locus standi* of the claimant. Even if I am wrong on this point, in my view, at best, the Court found it unnecessary to deal with the aspect of *locus standi*.

Alternative arguments advanced on behalf of the Bargaining Council

[64] In the light of the conclusion to which I have come, it is unnecessary to consider, in any depth, the alternative arguments put forward on behalf of the Bargaining Council. As I understood it, it was submitted, assuming the *Arends Interpretation* to be correct, that a dispute resolution mechanism embodied in a Bargaining Council collective agreement may, in and of itself, give an employee a right to refer disputes in terms of Section 24. I have reservations about this argument because, distilled to its essence, it amounts to a

[66] Cf *Bloem Water Board v Nthako NO and Others* [2017] 11 BLLR 1073 (LAC) at para [11]
[67] (291/2015) [2017] ZALMPTHC 3 (21 February 2017) at para [23].

contention that the parties to a collective agreement may contract out of a provision of the LRA, namely Section 24, which *Arends (LC)* found to contain a prohibition against employees pursuing Section 24 disputes. Not even a Court with inherent jurisdiction can make an order contrary to the statute, all the more so parties to a collective agreement[68]. As mentioned above with reference to *Rukwaya*, it was held in *Appels* that a collective agreement may alter how a substantive right is exercised but may not alter the right itself. On the face of it, the thrust of the alternative argument is to contend that the Resolution affords employees a (substantive)[69] right to refer a Section 24 dispute in circumstances where they otherwise would have none. Without wishing to belabour the point, if an employee has no statutory right to refer a Section 24 dispute, parties to a collective agreement cannot, by way of agreement, clothe that employee with such a right. This argument, if accepted, would also result in an arbitrary distinction between employees who are entitled to refer Section 24 disputes in terms of a collective agreement and those not so fortunate and who are obligated to approach the CCMA but only with the aid of a union which is a party to the collective agreement.

[65] It was also submitted, if I understood it correctly, on behalf of the Bargaining Council that Section 33A lends support to the argument that employees have *locus standi to* refer Section 24 disputes. Section 33A, however, houses a separate dispute resolution infrastructure which may be set in motion by a Bargaining Council, not an employee. It concerns the enforcement of collective agreements, not their application or interpretation.

End observations

Are employers permitted to refer Section 24 disputes?

[66] This judgment concerns the plight of employees. However, in my view, there is no reason why the sentiments expressed above would not apply, *mutatis*

[68] *National Education Health and Allied Workers Union v MEC: Department of Health, Eastern Cape* (2013) 34 ILJ 2626 (LC)
[69] As held by in *Pents*, *locus standi* is not only a matter of procedure, it is also a matter of substance.

mutandis, to employers which may wish to pursue Section 24 disputes and which are not parties to the collective agreement or which are not members of an employer's organisation which is party to the collective agreement. If an employer can demonstrate that it is possessed of a direct and substantial interest in the outcome of the Section 24 dispute, then I can see no reason why it should not be permitted to refer Section 24 disputes. The phenomenon of an employer referring a Section 24 dispute will, in practice, rarely happen.[70] This is for the reason that it is within the province of the employer to implement its preferred interpretation of a collective agreement, as it is the prerogative of an employer to implement the rules and policies within its organisation in a manner it views as being correct. Once the employer has taken a decision regarding the application or interpretation of a collective agreement and implemented that decision, it will then be open to the employee, if she disagrees with the employer's interpretation, to refer a Section 24 dispute.

Characterisation of the dispute

[67] During argument, I mooted whether the dispute could not be characterised as an unfair labour practice dispute. If it were, then the *locus standi* objection would, in any event, fall away. There was considerable reluctance to debate this issue which, in my view, was fair enough given that it was not an issue which had been canvassed or foreshadowed in the papers. The Court in *Arends (LAC)* warned against determining the real nature of the dispute in the absence of sufficient evidentiary material. Matters on this point are not assisted by the fact that the dividing line between what constitutes an unfair labour practice dispute and what constitutes a Section 24 dispute is not always easy to draw and the jurisprudence on this issue is not harmonious.[71] There is also

[70] Although, ironically, an employer would have more scope to refer such a dispute given that it is not possessed of alternative remedies such as that of referring an unfair labour practice. Cf. *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC) at para [27].

[71] Cf *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another* [2012] 9 BLLR 888 (LAC); (2012) 33 ILJ 1822 (LAC) where the Court appeared to conclude that where a collective agreement governs the issue at hand then the legal remedy is a referral in terms of Section 24 of the LRA and *Tshambi* where the Court held that the mere fact that there is an alleged breach of a collective agreement does not make the dispute one concerning the interpretation and application of a collective agreement. See also *Herbet* where the Labour Appeal Court assumed, without analysis, that the dispute was a Section 24 dispute.

the circumstance that, whether the dispute was a Section 24 dispute or an unfair labour practice dispute, would, in my preliminary view, not affect the Arbitrator's jurisdiction to determine it, rendering any such debate academic.[72]

Conclusion

[68] Properly interpreted, Section 24 does not strip employees of their common law right to refer disputes about the application and interpretation of collective agreements. At the beginning of this judgment, I quoted Searle JP. He stated what we all know. Every person is entitled to be heard in her own cause. The *Arends Interpretation*, as followed by the Arbitrator, turns this fundamental principle on its head. The representative, who has no legal interest in the matter, becomes the party whilst the grievant is without a remedy.

[69] Given the injustices which would inevitably have been caused by its application over the years, not only to employees but to minority trade unions, it is regrettable that the *Arends Interpretation* has achieved the longevity which it has. In *IMATU v South African Local Government Bargaining Council and others* [73] the Court held that *Arends (LC)* was still good law and repeated the erroneous view the *Arends Interpretation* had been endorsed by Labour Appeal Court[74]. In a judgment handed down earlier this year, *Minister of Justice and Constitutional Development v DS Panza and Others*[75], the Court, uncritically, followed *Du Preez* and *Arends (LC).* It agreed that *Arends (LAC)* had endorsed the *Arends Interpretation.* It also mistakenly confused *locus standi* and jurisdiction.[76]. I quote from it as follows:

> "*[59] I agree with the above sentiments* [as set out in *Arends (LC)* and *Du Preez*]*. It is common cause that the Respondents were not a party to the collective agreement and therefore the Resolution. It therefore stands to*

[72] *Tshambi* held, albeit implicitly, that had the dispute, which had been incorrectly characterized, been timeously referred then notwithstanding its mischaracterization, the Bargaining Council would have had jurisdiction and the Arbitrator could have corrected the description of the dispute.
[73] [2019] JOL 45971 (LC)
[74] Para [9] read with footnote 7
[75] (JR2449/13 & J2080/16) [2024] ZALCJHB 158 (25 March 2024)
[76] At para [58]

> *reason that they did not have the locus standi to refer a section 24 dispute and neither did the Arbitrator and the GPSSBC have the jurisdiction to determine the dispute before it. Because, in my view, the Award was issued without the necessary jurisdiction and the Respondents did not have locus standi as they were not parties to the Resolution, the Award is a nullity and therefore stands to be reviewed and set aside*."

[70] *Panza*, referred to, indeed relied on, *Herbert,* apparently not appreciating that the Labour Appeal Court had, in that decision, accepted that an employee may refer a Section 24 dispute. So, what is to become of Ms Skulpad's dispute? It cannot be overemphasized that it was not suggested that Ms Skulpad did not have a direct and substantial interest in the outcome of her dispute, nor could it have been so suggested. It follows that she has suffered an injustice. She was, arbitrarily, denied her right to due process. This needs to be undone. The Ruling is unsustainable because, at its foundation, it is tainted by a material error of law. The Arbitrator should not have the last say when it comes to the interpretation of Section 24 and the failure by him to properly interpret Section 24 constituted a gross irregularity rendering his decision grossly unreasonable and irrational. The Ruling must be set aside and the gate to the Law must be opened for Ms Skulpad.

[71] This judgment should not however be seen as a criticism of the Arbitrator who, at the time, did no more than follow precedent as he was duty bound to do. Even if the Arbitrator had been of the view that *Du Preez* had wrongly interpreted *Arends (LAC)* as having endorsed *Arends (LC)*, he would still have been bound by *Du Preez*. In *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*[77] the Court, addressing a situation where the High Court had been of the view that the Supreme Court of Appeal had misinterpreted a decision of the Constitutional Court, held that the High Court, even if it had misgivings about how the Supreme Court of Appeal had interpreted the Constitutional Court judgment, was, nonetheless, bound by that

[77] 2002 (4) SA 613 (CC)

interpretation.[78] Whilst the Arbitrator is not disqualified from continuing with the matter, he is not seized with it. It will be for the Bargaining Council to appoint an arbitrator, should Ms Skulpad request that her dispute be re-enrolled for determination.

Joinder, condonation and costs

[72] The Bargaining Council, having due regard to the provisions of the State Liability Act No. 20 of 1957, sought, by way of interlocutory application, an order joining the Member of the Executive Council: Eastern Cape Department of Education (the MEC) as a respondent in the proceedings, a government department not *per se* having legal personality. There was, correctly so, no opposition given the absence of any prejudice, the State Attorney being in a position to represent the MEC.

[73] The review application brought by Ms Skulpad was out of time. The delay was not insubstantial and more could have been said by way of explaining it. Mr Dwayi, who appeared on behalf of the Department, constructively left the decision as to whether condonation should be granted in the hands of the Court. This is a case where the prospects of success are sufficient to salvage the condonation application and, in my view, it is in the interests of justice that condonation be granted and that Ms Skulpad be allowed, together with the other parties, to present her case on what is an important legal issue.

[74] This is not a matter where the making of a costs order would be appropriate. Although the Applicants have been successful, it cannot be said that the opposition was unreasonable having particular regard to the degree of disharmony which has lingered in the jurisprudence surrounding the issue at hand.

[78] At 646 E to F

Order:

1. The Member of the Executive Council: Department of Health (Eastern Cape) is joined as the Third Respondent.

2. The late bringing of the review application by the First Applicant is condoned.

3. The ruling dated 28 December 2020 with case number PSCBC16-20/21 by the Second Respondent is reviewed and set aside.

4. The First Applicant may request the Second Applicant to re-enrol her dispute, if so advised.

5. The parties are responsible for their own costs.

P. N. Kroon
Acting Judge of the Labour Court of South Africa

Appearances:

For First Applicant	:	Adv Nzuzo
Instructed by	:	NE Mbewana Attorneys
For Second Applicant	:	Mr D Masher of ENS Attorneys
For First and Third Respondents	:	Adv N Dwayi
Instructed by	:	The State Attorney (Gqeberha)