IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA8/2018

In the matter between:

LUFIL PACKAGING (ISITHEBE)

(A division of Bidvest Paperplus (Pty) Ltd) **Appellant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

LEON PILLAY *N. O.* **Second Respondent**

NATIONAL UNION OF METAL

WORKERS OF SOUTH AFRICA (KZN) **Third Respondent**

Heard: **15 May 2019**

Delivered: **13 June 2019**

Summary: Dispute concerning organisational rights – union seeking to exercise its rights by requesting employer to deduct membership fees from its members- employer disputing union organisational rights on the basis that it falls outside the registered scope of union and that employees not eligible under the union's constitution to be members for the purposes of assessing a union's representativeness in terms of Chapter III of the LRA. Employer further argues that because the claimed members are precluded by the union's constitution from becoming its members, any purported admission of such employees as members is *ultra vires* the union's constitution and invalid. Union contending that that as a registered trade union, representative of the majority of the workers, it has legal standing to claim organisational rights.

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Held that

A trade union cannot create a class of membership outside the provisions of its constitution, and if they purport to do so they act in excess of their powers and the act has no validity. A purported decision by a union to admit a member who is not eligible under its constitution to become a member is not a mere internal decision which is immune from attack by an affected employer. Such a decision is *ultra vires* and invalid and, as such, susceptible to challenge by the employer from whom organisational rights – based on the membership concerned – is sought. Arbitration award and Labour Court set aside and appeal upheld with costs.

Coram: Musi JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] This is an appeal against the judgment of the Labour Court (Gush J) dismissing two consolidated review applications brought by the appellant ("Lufil") to set aside a preliminary ruling and an award granting the third respondent ("NUMSA") organisational rights. The appeal is with the leave of the Labour Court.

The facts

[2] The material facts are common cause, and the matter turns on the correct interpretation of the applicable law.

[3] Lufil manufactures printed and plain paper bags and associated paper or paper-derivative-based packaging products.

[4] On 27 January 2015, NUMSA wrote to Lufil asking it to provide stop orders for the deduction of union fees for its (alleged) members who were employees. Lufil responded to this letter on 3 February 2015, stating *inter alia*:

> 'Subsequent to receiving your request and in considering your request, the Company sought legal opinion as it did not believe that your constitution

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allowed you to organise within the operations of our business, as it fell outside the scope of your Union. Our counsel confirmed our understanding and we wish to respond accordingly as follows:

1. The core business of Lufil Packaging falls within the definition of the Printing and Packaging Sector and it does not form part of your union's revised scope that was approved by the department of labour on 12 December 2014.

2. For purpose of rights to recruit members and organise within a particular workplace, we would like to refer you to your Union's Constitution as with specific reference to Annexure B (as amended on 12 December 2014) which sets out the Scope of the Union. Taking into account clarity about the industry to which we belong as stated above and that it does not fall within the scope of the Union we wish to point out that in recruiting members from our operations, you acted *ultra vires* your constitution.

3. In perusing your constitution and its appendices you will have to agree with us that you do not have the right to organise within our industry.

In view of the above, the Company thus acts within its rights not to recognise NUMSA and we therefore will not be in a position to action your request to implement union stop order deductions in our workplace.'

[5] Chapter 2(2) of NUMSA's constitution provides:

'All workers who are or were working in the metal and related industries are eligible for membership of the Union subject to the discretion of the relevant Shop Stewards Council …'

[6] Annexure B of NUMSA's constitution deals with "the scope of the Union" and provides that "the Union shall be open to all workers employed in any of the following industries". The annexure lists 21 different industries including: the Iron, Steel, Engineering and Metallurgical Industry; the Electrical Engineering Industry; the Plastics Industry; the Automobile Manufacturing Industry; the Motor Industry; and various others. The list does not include the packaging industry. Lufil falls under the ambit of the Statutory Council for the Printing, Newspaper and Packaging Industries ("PNPI"). NUMSA is not a member

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union of the PNPI and does not participate as such in the PNPI. NUMSA conceded in an affidavit in the initial proceedings before the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), that the nature of Lufil's operations are not specified in the scope of the Union. It argued, however, that such did not preclude NUMSA from organising or representing its members who fall outside its specified scope.

[7] NUMSA referred an organisational rights dispute to the CCMA. Section 21(1) of the Labour Relations Act[1] ("the LRA") provides that any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by Part A of Chapter III of the LRA in a workplace. The rights in Part A include: rights of trade unions access to the workplace; deduction of trade union subscriptions or levies; the election of shop stewards; leave for trade union activities; and the disclosure of information. Where the parties are unable to conclude a collective agreement in respect of the exercise of the claimed organisational rights, either party may refer the dispute to the CCMA in terms of section 21(4) of the LRA. NUMSA's referral to the CCMA was postponed on various occasions, for different reasons.

[8] On 13 March 2015, Lufil filed an application, in terms of Rule 31 of the CCMA rules, alleging that because the members NUMSA claimed to have in Lufil's employ were not eligible under NUMSA's constitution to become members, NUMSA did not have the requisite *locus standi* to refer the dispute to the CCMA ("the jurisdictional application"). It was agreed by the parties that the application would be decided on the papers.

[9] The second respondent, ("the commissioner") handed down a ruling on the jurisdictional application on 19 June 2015. The commissioner held that the point raised by the appellant did not go the CCMA's jurisdiction but that there was nonetheless a preliminary issue whether NUMSA could organise the employees of Lufil when the activities and operations of Lufil do not fall within NUMSA's registered scope, as stipulated in its constitution. The commissioner concluded that a union has standing to seek organisational rights in workplaces that are not included within the scope of its constitution and

[1] Act 66 of 1995.

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dismissed the preliminary point. The CCMA was directed to set the dispute down for arbitration in terms of section 21(7) of the LRA. Lufil launched proceedings to review the ruling on 31 July 2015 and sought to postpone the arbitration. The application for a postponement was refused and the arbitration proceeded.

[10] A pre-arbitration minute was concluded by the parties in which Lufil agreed to certain organisational rights being granted but conditional upon the outcome of the review of the commissioner's ruling. The arbitration hearing took place on 1 March 2016. The commissioner found, on the basis of his interim ruling and the fact that NUMSA had as members approximately 70% of Lufil's employees, that NUMSA's application for organisational rights should be granted.

[11] The commissioner directed Lufil to grant the union access to the canteen hall on 72 hours' notice to Lufil and to deduct union fees from members and pay such dues to NUMSA with immediate effect. He ordered additionally that NUMSA shall be entitled to three trade union representatives, who shall cumulatively be entitled to six days of paid time off and that NUMSA was entitled to disclosure of information in terms of section 16 of the LRA.

[12] Lufil filed an application to review this award on 6 May 2016. The two matters were consolidated and the hearing of both applications took place on 23 November 2017. The Labour Court dismissed the reviews, holding that NUMSA had 70% of Lufil's employees as members and was thus entitled to organisational rights.

The submissions of Lufil on appeal

[13] Counsel for Lufil, Mr. Freund SC, submitted that the narrow issue at the heart of the appeal is whether, for the purposes of being awarded organisational rights by the CCMA in terms of Part A of Ch III of the LRA, a union can rely on employees who purport to be its members, if those employees are not eligible to be members of the union in terms of its constitution. Lufil submits that a union is bound by its constitution; and that a union cannot have as members,

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employees who fall outside of the eligibility for membership requirements contained in its constitution.

[14] All of the organisational rights in Chapter III of the LRA, if the requisites of entitlement are met, must be granted by employers to *representative* trade unions.[2] Section 11 of the LRA provides that in Part A of Chapter III, unless otherwise stated, a representative trade union means a registered trade union or two or more registered trade unions acting jointly, "that are sufficiently representative of the employees employed by an employer in a workplace". However, for the purposes of obtaining the organisational rights in section 14 of the LRA (the election of shop stewards) and section 16 of the LRA (disclosure of information) "representative trade union" means a registered trade union or two or more registered trade unions acting jointly, "that have as members the majority of employees employed by the employer in a workplace".

[15] Mr. Freund SC submitted that it is implicit in these provisions that a union can only be "representative" of employees employed by an employer if it has *as its members* a sufficient number of the employer's employees. The representativeness of a union seeking organisational rights is defined with reference to the number of "employees employed by an employer in a workplace" who are members of the union concerned.[3] Persons who are not eligible under a union's constitution to be members of that union are not members of the union, for the purposes of assessing a union's representativeness in terms of Chapter III of the LRA.

[16] It follows, counsel argued, that an employer is entitled to dispute whether claimed members are indeed members. If it is shown that the persons concerned are precluded by the union's constitution from becoming its members, any purported admission of such employees as members is *ultra vires* the union's constitution and invalid, and as a matter of law they are incapable of becoming members and the union's claim of representativeness must fail.

[2] Organisational rights are personal rights of the union and not of the members.
[3] See Fergus and Godfrey "*Organising and Bargaining across Sectors in South Africa: Recent Developments and Potential Problems*" (2016) 37 ILJ 2211 at 2220.

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[17] In this case, it is common cause that, in order to be eligible to be a member of NUMSA, an employee is required by its constitution to work in an industry which falls within its scope, as defined in its constitution; and that the employees in question worked at a workplace which did not fall within that scope. In purporting to have as members Lufil employees who were, in terms of its own constitution, not entitled to be its members, counsel submitted, NUMSA acted *ultra vires* its own constitution. These employees are not members and cannot be counted as such. For this reason, NUMSA is not entitled in terms of Chapter III of the LRA to any of the organisational rights which it sought, as it has no validly admitted members at Lufil's workplace.

[18] Therefore, it was submitted that both the ruling and the award of the commissioner were based on a material error of law and are decisions to which a reasonable decision-maker could not have come in the circumstances and that the Labour Court erred in not setting aside both the ruling and the award.

NUMSA's submissions

[19] NUMSA contends that as a registered trade union, representative of the majority of the workers, it has legal standing to claim organisational rights. Section 21(1) of the LRA provides that any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by Part A of Chapter III and may refer any dispute in that regard to the CCMA in terms of section 21(4) of the LRA. Section 22(1) of the LRA provides that any party to a dispute about the interpretation or application of any provision of Part A may refer the dispute in writing to the CCMA. Thus NUMSA had *locus standi.* It relied in this regard on *NUMSA obo Mabote v CCMA and Others*[4] where Steenkamp J stated:

> '…however it cannot be correct that the union lacks *locus standi* to refer the matter simply because its constitutional scope does not cover employees in that sector. At worst it could mean that if the union decides to refer this dispute to arbitration once conciliation fails, the union may fail to prove that it is entitled to the relief it is seeking.'

[4] (2013) 34 ILJ 3296 (LC)

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[20] The determination of whether the union is entitled to organisational rights, according to NUMSA, requires consideration of both the Constitution, the supreme law, and NUMSA's constitution. Section 23(2)(a) of the Constitution entrenches the right of workers to form and join a trade union and section 18 enshrines every person's right to freedom of association. Section 4(1)(b) of the LRA provides that every employee has the right to join a trade union and gives effect to the constitutional right. It, however, contains the proviso that the right is subject to the constitution of the trade union.

[21] Counsel for NUMSA, Mr Pillay SC, submitted that the constitutional rights must be interpreted generously to afford the widest ambit of protection. The LRA and the union's constitution, in so far as they impinge on these rights, must be restrictively interpreted. Lufil's interpretation that membership is restricted to those eligible in terms of the union's constitution, Mr Pillay SC argued, unduly limit's the employees' constitutional rights. The argument that the proviso to section 4(1)(b) of the LRA limits the unions to which an employee may apply and permits the employer to object to membership of a particular union where the union's scope does not cover that particular area of employment, he said, is at odds with a rational common sense interpretation of section 4(1)(b) of the LRA. The section regulates the relationship between the union and its members - namely that the member may join if he/she satisfies requirements under the union's constitution. This allows the union (not the employer) to restrict members at its behest or for that matter to exclude a particular member if the member does not observe the rules of the union's constitution. It does not lie for the employer to raise an objection. The relationship is between union and member. Parties to a contract are not obliged to impose every letter of that contract.

Evaluation

[22] An element of confusion was introduced in this matter early on by Lufil's challenge to NUMSA's *locus standi*. The commissioner correctly held that the point was more akin to a preliminary point requiring determination of whether the union could organise employees of the employer if the activities and operations of the employer do not fall within the registered scope of the union,

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as stipulated in its constitution. The subsequent arbitration proceeded on the common assumption that in terms of the preliminary ruling NUMSA was entitled to count as its members all the employees who had purported to join it, regardless of the fact that this was not permitted by NUMSA's constitution. The Labour Court also accepted that "the crisp issue to be decided …. was whether the LRA entitled the third respondent to represent its members in an application for organisational rights and whether it was entitled to those rights."

[23] Lufil correctly concedes that it may have been inaccurate for it initially to have characterised the question as being whether NUMSA had *locus standi* to apply for organisational rights. NUMSA is allowed to challenge the decision of Lufil denying it organisational rights as it clearly has a personal interest in the legality of that refusal and is a party to a dispute as contemplated in section 21 of the LRA. However, in the final analysis standing is not the issue. The fact that NUMSA has standing enabling it to apply for organisational rights and refer a dispute in that regard to the CCMA does not mean it has an entitlement to those rights in terms of the legal requirements of the LRA. The decisive issue throughout, as the commissioner appreciated in both his ruling and the award, was the contention that NUMSA could not qualify to be granted the organisational rights because Lufil employees are ineligible to be members. That remains the fundamental question to be determined in this appeal, which must be decided first and foremost with reference to the governing provisions of the LRA.

[24] The right of trade unions to obtain organisational rights is a legitimate intrusion upon an employer's proprietal and entrepreneurial autonomy. It, accordingly, is circumscribed by functional legislative requirements ensuring that it is exercised by sufficiently representative unions, properly compliant, acting in the interests of employees in accordance with the policy imperatives of orderly collective bargaining at sectoral level.[5]

[25] Section 95 of the LRA is concerned with the requirements for the registration of trade unions or employer's organisations. Section 95(1)(b) provides that a

[5] Section 1(d) of the LRA.

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trade union may apply for registration (and thus obtain the benefits of registration) if, *inter alia,* it has adopted a constitution that meets the requirements of sections 95(5) and 95(6) of the LRA. Section 95(6) provides that the constitution of any trade union may not include any provision that discriminates against any person on the grounds of race and sex. The provision reflects the legitimate interest of the Registrar in ensuring compliance with fundamental values in trade union criteria for membership. Section 95(5) of the LRA is concerned with more prosaic matters such as membership, rules for meetings, decision-making, the election of office bearers and officials, and so on. Section 95(5)(b) is of particular relevance. It provides that the constitution of any trade union or employer's organisation that intends to register must prescribe qualifications for and admission to membership.

[26] The Registrar must apply his mind to whether the requirements for registration have been met.[6] He is obliged to register the trade union once satisfied that there has been compliance.[7] If after affording the applicant trade union the opportunity to remedy any defect in its application or constitution he concludes there has not been compliance, he must refuse registration.[8]

[27] One of the most meaningful benefits of registration is the right of a registered trade union to obtain organisational rights under Part A of Chapter III of the LRA. Only a registered trade union may apply for the exercise of those rights and for the relief to obtain and enforce them.

[28] Section 101 of the LRA regulates amendments by trade unions of their constitutions. A registered trade union may resolve to change or replace its constitution.[9] However, to do so effectively it must send the Registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.[10] The Registrar will only register the amendment if it meets the requirements for registration under sections 95 and

[6] Section 96 of the LRA.
[7] Section 96(3)(b) and section 96(5) of the LRA.
[8] Section 96(6) of the LRA.
[9] Section 101(1) of the LRA.
[10] Section 101(2) of the LRA.

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96 of the LRA.[11] The amendment will only take effect from the date that the resolution is endorsed by the Registrar, certifying that the amendment has been registered.[12]

[29] NUMSA's constitution may be amended only by a vote of two-thirds of the members of its National Congress[13] - though annexures to the constitution, such as Annexure B, may be amended by the Central Committee.[14] It is common cause that there has been no amendment of the scope of the union, as stipulated in Chapter 2 or Annexure B of the Constitution of NUMSA, in order to include the packaging industry within it.

[30] Section 4(1)(b) of the LRA provides that every employee has the right to join a trade union, subject to its constitution. The obvious implication of this provision is that the right to join a trade union will be circumscribed by the membership eligibility criteria in the trade union's constitution as adopted by the trade union's relevant decision-making body and registered by the Registrar.

[31] The submission of Mr. Pillay SC that section 4(1)(b) of the LRA was unconstitutional, because it infringes the fundamental rights in section 18 and 23(2)(a) of the Constitution, is unsustainable. Besides the fact that no constitutional challenge to section 4(1)(b) of the LRA was pleaded or canvassed adequately in evidence, the limitation is reasonable and justifiable. Section 23(5) of the Constitution provides that national legislation may be enacted to regulate collective bargaining. Such legislation, the LRA, has been enacted. To the extent that the legislation may limit a right in Chapter 2 of the Constitution, the Bill of Rights, including the rights of freedom of association in section 18 and section 23(2)(a) of the Constitution, the limitation must comply with section 36(1) of the Constitution and be reasonable and justifiable in an open and democratic society having regard *inter alia* to the nature of the right, and the nature, purpose and extent of the limitation. The requirement that eligibility to join a trade union be determined by the provisions of its

[11] Section 101(3)(a) of the LRA.
[12] Section 101(3)(b) read with section 101(4) of the LRA.
[13] Chapter 14 read with chapter 6(1)(d) of the Constitution of NUMSA.
[14] Chapter 6(2)(d)(xiv) of the Constitution of NUMSA.

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constitution, as adopted by its own decision-making body and registered by the Registrar, gives effect to the legitimate government policy of orderly collective bargaining at sectoral level. The means of implementation, involving supervision of the scope of union activity by the Registrar, are minimally restrictive and are carefully tailored to the purpose of achieving the policy. Section 4(1)(b) of the LRA is accordingly consistent with the Constitution.

[32] Trade unions at common law have only those powers and capacities that are conferred on them by their constitutions. The LRA requires unions to determine in their constitutions which employees are eligible to join them and by necessary implication precludes them from admitting as members' employees who are not eligible to be admitted in terms of the trade union's registered constitution. If it is shown that the persons concerned are precluded by the union's constitution from becoming its members, any purported admission of such employees as members is *ultra vires* the union's constitution and invalid.[15]

[33] In *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*[16] Landman J held correctly that a union acts *ultra vires* its own constitution when it allows membership of individuals who are not allowed to be members of that union in terms of the union's own constitution. A trade union cannot create a class of membership outside the provisions of its constitution, and if they purport to do so they act in excess of their powers and the act has no validity.[17] A purported decision by a union to admit a member who is not eligible under its constitution to become a member is not a mere internal decision which is immune from attack by an affected employer. Such a decision is *ultra vires* and invalid and, as such, susceptible to challenge by the employer from whom organisational rights – based on the membership concerned – is sought.

[34] The *ultra vires* rule is of both practical and policy value. There is a direct relationship between the conception of the trade union as a distinct legal entity and the rule that it may not legally carry out any activity which is not

[15] *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC) at 910 F-G; *Grundling v Beyers and Others* 1967 (2) SA 131 (W) at 139H – 140B, 149D-F and 151C.
[16] [1997] 7 BLLR 906 (LC) at 910.
[17] *Martin v Scottish TGWU* [1952] All ER 691 (HL) at 695.

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authorised by the LRA and the powers and capacities provided in its constitution. The LRA grants trade unions specific powers and capacities to act within a particular scope and does so in furtherance of a contemplated constitutional and policy framework. The principle of legality requires observance of that framework and its purposes may not be arbitrarily dissipated.[18] NUMSA is accordingly not permitted in terms of the common law or the LRA to allow workers to join the union where such workers are not eligible for admission in terms of the union's own constitution. As such, it is not entitled to any of the organisational rights contained in respect of Lufil's workplace.

[35] Mr Freund SC drew an instructive analogy with the administrative law doctrine of a permissible "collateral attack" arguing that a similar principle applies in the present matter. The doctrine was explained by the Supreme Court of Appeal in *Oudekraal Estate (Pty) Ltd v City of Cape Town and others*[19] as follows:

> 'But just as some consequence might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act –that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act….It will generally avail a person to

[18] The reliance placed by the commissioner on *NUM obo Mabote and Others* [2013] 10 BLLR 1030 (LC) is misplaced. That case dealt with the right of an employee to be represented by a trade union representative during CCMA proceedings which differs to a union wishing to operate and organise members at a workplace. Likewise, the Labour Court in *Bidvest Food Services (Pty) Ltd v National Union of Mineworkers SA and others* (2015) 36 ILJ 1292 (LC) was also seized with a distinguishable issue. In that case, the question was whether employees are precluded from engaging in a strike to obtain organisational rights for their union at a workplace that does not fall within the scope of that union's constitution. In essence, the question was whether the strike demand was unlawful. The Labour Court held that an employee has the right to strike if he has followed the relevant procedures in terms of the LRA, whether that employee belongs to a union or not.

[19] [2004] 3 All SA 1 (SCA) para 32 et seq.

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> mount a collateral challenge to validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend on the legal validity of the administrative act in question…..While the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the State cannot generally be used against the subject unless the initiating act is legally valid.'

[36] In applying to the CCMA to be granted organisational rights, NUMSA sought to invoke the coercive power of the state. The CCMA cannot impose upon Lufil its coercive power, in granting NUMSA the organisational rights it seeks, if the basis for seeking these rights (the employees' purported membership) is not legally valid (because the union acted *ultra vires* its own constitution in allowing these employees to be its members).

[37] The correct legal position, therefore, is that NUMSA had to show that it was sufficiently representative. The employees on which it relied in alleging it was sufficiently representative could not be and thus were not, in law members of NUMSA, as they did not fall within the scope of the union in terms of NUMSA's constitution. As such, NUMSA was not sufficiently representative of the employees at the workplace and therefore was not entitled to any organisational rights. The commissioner erred in not coming to that conclusion and committed a material error of law, which resulted in an unreasonable decision.[20] The Labour Court erred equally in not setting aside the award on that basis.

[38] Although the parties agreed not to seek costs in the Labour Court, both sought the costs of the appeal.

[39] The following orders are made:

39.1 The appeal is upheld with costs, including the costs of senior counsel.

[20] *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & Others* (2016) 37 *ILJ* 1819 (LAC); *Head of Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at para 33; and *Opperman v Commission for Conciliation, Mediation & Arbitration and Others* (2017) 38 *ILJ* 242 (LC).

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39.2 The order of the Labour Court is set aside and substituted with the following:

'The arbitration award of the second respondent, under case number KNDB 14987-14 and dated 14 March 2016, in relation to the dispute between the third respondent and the applicant is reviewed and set aside.'

_____

JR Murphy

Acting Judge of Appeal

I agree

_____

C Musi

Judge of Appeal

I agree

_____

K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:	Adv A Freund SC
	Instructed by ENSafrica
FOR THE THIRD RESPONDENT:	Adv I Pillay SC

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