REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JA 52/10

In the matter between

THE NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY **First Appellant**

J MOSOEU **Second Appellant**

and

CARLBANK MINING CONTRACTS (PTY) LTD **First Respondent**

E FOURIE N.O. **Second Respondent**

Heard: **21 September 2011**

Decided: **20 March 2012**

Summary: Dismissal – Contract of employment - Interpretation of the Collective Agreement - Arbitration clause – Whether an arbitration clause of the contract of employment is valid – Court found clause to be invalid and Council to have jurisdiction on account of the clause permitting treatment less favourable than that prescribed by the collective agreement.

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JUDGMENT

MURPHY AJA

[1] This appeal raises important questions about the right of persons, who are subject to the terms of a collective agreement providing for dispute resolution, to opt for private arbitration in labour disputes on terms different to the provisions of the collective agreement. The determination of the issues requires interpretation of section 199 of the Labour Relations Act 66 of 1995 ('the LRA"), which *inter alia* provides that a contract of employment may not permit treatment less favourable than that prescribed by the collective agreement or waiver of the application of the provisions of the collective agreement.

[2] The first respondent, Carlbank Mining Contracts (Pty) Ltd ("Carlbank"), falls within the registered scope of the National Bargaining Council for the Road Freight Industry, the first appellant ("the NBC"), and conducts a labour broking business in the road freight industry. It employs and supplies staff to its clients in terms of labour broking contracts.

[3] The second appellant, Mr. J Masoeu ("Masoeu"), entered into a contract of employment with Carlbank during April 2007, in terms of which he was employed as a motorbike driver and placed at Railit Total Transport's MTN, one of Carlbank's clients. According to Carlbank, the contract terminated by the effluxion of time on 14 May 2007. Mosoeu maintains that he was unfairly dismissed. The issue of whether the relationship was terminated by dismissal or otherwise is however not material to the determination of this appeal.

[4] On 23 May 2007, Masoeu declared an unfair dismissal dispute against Carlbank and referred the dispute to the NBC for conciliation. Section 191(1)(a) of the Labour Relations Act 6 of 1995 ("the LRA") provides:

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> (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council.

In terms of section 191(4) of the LRA, once there has been a proper referral of the dispute, the council must attempt to resolve the dispute through conciliation. Should conciliation fail, or 30 days expire after the referral, in terms of section 191(5), the council must arbitrate the dispute at the request of the employee, provided the dispute falls into the category of disputes contemplated in section 191(5)(a), as in this case.

[5] The power of bargaining councils to perform dispute resolution functions is conferred by section 28(1)(d) of the LRA which provides:

> (1) The powers and functions of a bargaining council in relation to its registered scope include the following-
>
> (d) to perform the dispute resolution functions referred to in section 51.

[6] Section 51(3) of the LRA provides:

> 'If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute-
>
> (a) through conciliation, and
>
> (b) if the dispute remains unresolved after the conciliation, the council must arbitrate the dispute if -

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> (i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or
>
> (iii) all the parties to the dispute consent to arbitration under the auspices of the council.

Neither party in this case is a party to the Council, but it is common cause that they both fall within the registered scope of the council and that the dispute is an unfair dismissal dispute.

[7] Section 51(3) of the LRA contains a footnote, namely footnote 11, which identifies the disputes contemplated by sub-section (3) which must be referred to a council. It expressly includes disputes about unfair dismissals referred in terms of section 191 of the LRA.

[8] Section 51(9) provides that a bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in the section. The NBC, pursuant to its statutory powers and constitution, has adopted an Exemptions and Dispute Resolution Collective Agreement for, amongst other things, the resolution of disputes ("the collective agreement"). The collective agreement sets out in some detail the procedures for dispute resolution and the rights of the parties in relation to both conciliation and arbitration. I will look more closely at these provisions later in this judgment. Suffice it now to mention that the collective agreement was concluded between the employers' organisation (the Road Freight Employers' Association) and the various trade unions that are parties to the NBC. The collective agreement is binding on the parties to the present dispute because it has been extended to non-parties within its registered scope by the Minister of Labour in terms of section 32 of the LRA.

[9] Section 52(1) of the LRA obliges bargaining councils wishing to perform dispute resolution functions in terms of section 51 to apply to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for accreditation to perform those functions. It is common

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cause that the NBC has been accredited by the CCMA to conduct both conciliation and arbitration proceedings in terms of the LRA and that it has appointed persons experienced in labour relations for that purpose.

[10] The dispute referred by Masoeu to the NBC was set down for conciliation before the second respondent, Ms Emily Fourie, on 29 June 2007. At the conciliation meeting, Carlbank's representative, Mr Craig Morton, raised preliminary objections to the jurisdiction of the NBC. The first objection was that there had been no dismissal because the contract of employment was of limited duration and had expired through the effluxion of time. That point was not persisted with on review before the Labour Court, nor on appeal before us. The second objection was that the NBC lacked jurisdiction because the parties had contracted to refer any dispute arising out of or pertaining to the contract of employment to private arbitration. This point is the sole question for determination on appeal.

[11] The arbitration clause upon which Carlbank relies is contained in clause 13 of the written contract of employment concluded between Carlbank and Masoeu, which is headed: "Limited Duration Contract of Employment". Clause 13 reads:

> 'DISPUTE PROCEDURE
>
> In the event of a dispute arising as a result of this agreement, the dispute will be submitted to arbitration in terms of the Arbitration Act of 1965, by way of written notice thereof. The arbitration will be held within 2 weeks of same being requested or as soon thereafter as an appointed Arbitrator is available.
>
> The Arbitrator will be selected from the Tokiso list of panellists.

Tokiso is an established and accredited agency which provides dispute resolution services in the labour relations field.

[12] Ms Fourie rejected the points *in limine* without providing any reasons and on 29 July 2007 issued a certificate of non-resolution of dispute, a

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jurisdictional requirement in terms of both the LRA and the collective agreement for the dispute to be referred to arbitration. Carlbank filed a review application on 8 August 2007 seeking *inter alia* the following orders:

> '1. Staying any proceedings under case number D683/JHB/4302/07 and the determination of the dispute between the applicant (Carlbank) and the third respondent (Masoeu) under this case number pending final adjudication of this review application;
>
> 2. Reviewing and setting aside the certificate of outcome of a dispute referred to conciliation issued by the second respondent (Fourie) acting under the auspices of the first respondent (NBC) under case number D683/JHB/4302/07…
>
> 3. Dismissing the third respondent's referral under Council case number D683/JHB/4302/07 on the basis that:
>
> > "First respondent (NBC) has no jurisdiction to conciliate and/or determine the matter.

[13] Prior to the review application being heard by the Labour Court, Ms Fourie on 23 May 2008 furnished written reasons for dismissing the preliminary point and for accepting jurisdiction. She dealt with the point as follows:

> 4. The Applicant argued that the First Respondent does not have jurisdiction to deal with the Third Respondent's dispute due to the fact that the contract of employment between the Applicant and Third Respondent provides for any dispute arising from the employment contact to be submitted to private arbitration in terms of the Arbitration Act 42 of 1965. It was not argued that an arbitration in terms of this provision was pending or had been held, but simply that the existence of this clause on its own ousted the First Respondent's jurisdiction.

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5. I considered the preliminary point raised by the Applicant and ruled that the First Respondent retained jurisdiction to deal with this dispute. Set out below are my reasons for this ruling.

6. In the first instance I reasoned that the relevant clause of the employment contract did not expressly state that the Bargaining Council's jurisdiction was excluded by it. I appreciate that if the dispute between the Applicant and Third Respondent had been referred to private arbitration then a possible defence of *lis pendens* could arise. If the private arbitration had in fact been concluded and an arbitration award issued then the defence of *res judicata* could arise. I do not believe that the mere existence of an arbitration clause precludes a body like the Bargaining Council (or the CCMA) from hearing a dispute over which it would otherwise have jurisdiction.

7. In any event insofar as the Arbitration Agreement did attempt to oust the jurisdiction of the Bargaining Council I had regard to the provisions of Sections 199(1) and (2) of the LRA. In light of those provisions I am of the view that the Exemptions and Dispute Resolution Collective Agreement of the First Respondent would take precedence over the Arbitration Agreement if the Arbitration Agreement attempted to oust the First Respondent's jurisdiction.

8. I furthermore considered that:-

   8.1 The referral of the dispute to private arbitration would have the likely effect of being prejudicial to the employee. He would be faced with the logistical of having to locate Tokiso and complete the documentation necessary to commence an arbitration under its auspices. He could also, on the face of the contract, face possible financial difficulties in having to contribute to the costs of such arbitration.

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8.2 The LRA prescribes that there should always be an attempt at conciliation prior to the resolution of disputes through arbitration or adjudication. The arbitration clause foregoes any attempt at conciliation. The arbitration clause thus appeared to be at variance with this trend of the LRA.

[14] This line of reasoning defined the parameters of the debate on review before the Labour Court (van Niekerk J). The learned judge set the stage for the argument with the following opening remarks:

1. 'This application raises the following question: Should this court enforce a term of an employment contract that requires disputes to be referred to private arbitration, in circumstances where the parties are subject to the jurisdiction of a bargaining council that has concluded a collective agreement providing for the resolution of disputes under the auspices of the council? Put another way, can an employer and employee who are bound by a collective agreement concluded in a bargaining council 'contract out' of the agreement, at least in so far as it concerns the resolution of disputes, by agreeing to refer disputes to private arbitration? At first blush, the answer seems obvious - commonly held wisdom is that the Labour Relations Act encourages private dispute resolution, and if parties agree in a contract of employment that any disputes arising between them will be privately arbitrated, then *pacta sunt servanda*. But the LRA also promotes collective bargaining at sectoral level, and establishes mechanisms for collective agreements concluded in bargaining councils to be extended to all employers and employees in the sector for which the council is registered, and to bind them to those agreements unless an exemption has been granted by the council. Many bargaining councils that have been accredited to perform dispute resolution functions have concluded collective agreements to establish structures and processes for the resolution of disputes between parties who fall within their registered scope.

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This case raises the potential tension between these two objectives.

[15] The Labour Court was called upon to answer the question with reference to three issues. The first was whether the arbitration clause contravened section 199(1)(b) of the LRA because the clause permitted an employee to be treated in a manner, or to be granted a benefit, that is less favourable than that prescribed by the collective agreement. The second was whether the arbitration clause was invalid because it contravened section 199(1)(c) of the LRA by waiving the application of the provisions of the collective agreement. The third issue arises only if the arbitration clause is held to be valid; and that is whether the arbitration agreement excluded the jurisdiction of the NBC to determine the unfair dismissal dispute.

[16] Section 199 of the LRA reads as follows:

> ‘(1) A contract of employment, whether concluded before or after the coming into operation of an applicable collective agreement or arbitration award, may not -
>
> (a) Permit a employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;
>
> (b) Permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award;
>
> (c) Waive the application of any provisions of that collective agreement or arbitration award.
>
> (2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.

[17] Section 199 of the LRA must be read with section 23(3) which reads:

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> 'Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

[18] The two provisions together aim at advancing a primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to collective agreements above individual contracts of employment.[1] The policy is in keeping with the *ILO Collective Agreements Recommendation*[2] which states:

> 'Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.

[19] The Labour Court rejected the submissions that there had been an unlawful waiver or less favourable treatment. It found also, in effect, that the arbitration agreement excluded the jurisdiction of the NBC to determine the dispute. It therefore reviewed and set aside the ruling of the NBC that it retained jurisdiction to entertain the referral of the dispute.

[20] In both the Labour Court and on appeal, the appellants submitted that clause 13 of the contract of employment was invalid in terms of section 199(1)(b) read with section 199(2) of the LRA because it permitted less favourable treatment than that prescribed by the collective agreement. They advanced two reasons for this proposition. Firstly, the arbitration clause is silent on the question of the costs of the arbitration, which could result in the employee incurring a liability which he would not incur under the collective agreement. Secondly, the arbitration clause dispenses with the requirement of conciliation imposed by both the LRA and the collective agreement. It instead requires disputes to be referred directly to arbitration in terms of the Arbitration Act.[3] Thus, in respect of these two aspects, it was submitted, the contract of

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[1] See sections 1(d)(ii), 3(a) and 23 of the LRA.
[2] No 91 of 1951.
[3] Act 42 of 1965.

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employment permits an employer to be treated in a manner, or to be granted a benefit, that is less favourable than that prescribed by the collective agreement as contemplated in section 199(1)(b), with the result that the clause is invalid in terms of section 199(2) of the LRA.

[21] Clause 5 of the collective agreement provides that all disputes shall, if required by the Act, be referred to the council for conciliation and arbitration. It sets out in detail the procedure to be followed in respect of both processes. The envisaged conciliation process may be formal or informal. In terms of clause 5(2), a party to the dispute shall appear in person and may be represented by an industrial relations practitioner, legal practitioner or a trade unionist in any conciliation proceedings that may be held. The process may result in the conciliator issuing an advisory award if it is apparent that the employer has made no reasonable attempt to comply with the provisions of the Act or any Codes of Good Practice, or, where the dispute is found to be without merit, and having no possible prospects of success, the referral is construed as frivolous and/or vexatious. Where the conciliator makes an advisory award, he or she is obliged to inform the affected party that if the dispute proceeds to arbitration and the arbitrator's award concurs substantially with the advisory award, costs will in all probability be awarded against the affected party.

[22] The arbitration clause in the present matter does not grant an employee the benefit of such a procedure. The virtue of conciliation is in the possibility it presents for the dispute to be resolved in a less adversarial fashion by means of a consensus-seeking process. This has obvious advantages for the continuation of the employment relationship should reinstatement prove to be the appropriate remedy. The conciliation procedure in the collective agreement has the additional advantage of being an opportunity to obtain a quick non-binding award by less litigious means from a skilled independent mediator, which will allow the parties to reflect upon their options on a more informed basis. The arbitration clause in the contract of

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employment denies the employee these benefits and thus permits less favourable treatment.

[23] Mr. *Pretorius,* who appeared for the respondents*,* submitted that nothing in clause 13 prevented the parties from opting for conciliation prior to arbitration. Mr *Kennedy*, for the appellants, countered, with some justification, that the submission lies somewhat hollow in the mouth of a party who responded to the employee's referral of the dispute to conciliation with a preliminary objection to jurisdiction and the review application ultimately leading to this appeal.

[24] Moreover, clause 5(3) of the collective agreement makes it clear that where conciliation fails the Secretary of the NBC will be obliged to arrange for arbitration if any party to the dispute has requested in writing that it be resolved through arbitration. The Secretary is further obliged within 14 days of a proper request for arbitration to arrange for the signing by the parties of an arbitration agreement detailing the arbitrator's terms of reference. It is incumbent on the Secretary to appoint an arbitrator from the panel accredited by the council, to schedule the time and place for the hearing and if necessary to arrange for witnesses to be subpoenaed to attend the hearing. The NBC, it would seem, will bear the costs of the appointment of the arbitrator, the arrangement of the hearing and the subpoenaing of witnesses. The implication of the provisions dealing with the advisory award in conciliation is that the parties normally will bear their own attorney and client costs in the arbitration, unless the referral is construed to be frivolous and vexatious.

[25] In contrast to clause 5(3) of the collective agreement, clause 13 of the contract of employment, the arbitration clause, is silent or at best ambiguous in relation to these critical aspects of the arbitration process. It places no duty upon the employer or any independent third party, on request of the dismissed employee, to submit the matter to arbitration, to appoint an arbitrator or to arrange the hearing. It ambiguously provides merely that "the dispute will be submitted to

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arbitration" by way of written notice. There is no indication to whom or to what institution the notice should be submitted or of what rights a referring employee might have to compel the process. There is, in addition, no indication as to the basis for payment of the arbitrator or the costs of the process. There is also no bar to the arbitrator awarding costs against the unsuccessful party notwithstanding the referral being neither vexatious nor frivolous. In this latter respect, section 35(1) of the Arbitration Act vests the arbitrator with a discretion to award costs where an arbitration agreement is silent on costs. On these further grounds, the arbitration clause must be held invalid in terms of section 199(2) of the LRA for permitting less favourable treatment than that prescribed by the collective agreement.

[26] Carlbank has stated in the founding affidavit that it has offered and agreed to pay all costs associated with private arbitration. The appellants responded by pointing out that clause 13 does not contain any provision relating to the costs of appointing the arbitrator. In the absence of such provision it would be within Carlbank's powers in any particular matter to refuse to pay such costs. The approach it has adopted to the referral to conciliation in this case does not inspire confidence that it would not do so.

[27] In the result, the finding of the NBC's conciliator, Ms Fourie, that the employee could, on the face of the contract, face possible financial difficulties in having to contribute to the cost of such arbitration, is correct. I am accordingly unable to concur with the Labour Court that the employee was not subjected to less favourable treatment on the facts of this case. Nor was the learned judge entirely correct in his characterisation of the benefit or treatment for the purposes of section 199(1)(b) as being not the right to refer a dispute to a bargaining council, but rather "to have an employment dispute expeditiously determined by an independent third party at no costs". The rights enjoyed by the employee under the collective agreement include the right to a facilitated conciliation process and an arbitration arranged by

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and paid for by an independent body, with a limited risk of incurring an adverse costs award in instances where the referral was vexatious or frivolous; and then only when he or she has been put on notice to that effect by an advisory award. The arbitration clause in the contract of employment dilutes those rights and benefits considerably.

[28] The appellant's submission that clause 13 is invalid in terms of section 199(1)(c) because it waives the application of the provisions of the collective agreement is equally creditable. The Labour Court upheld the submission of Carlbank in this regard, namely that a proper interpretation of the operative clause of the collective agreement requiring that disputes "shall be referred to the Council *if required by the Act*" did not preclude referral to arbitration. As it saw it, since the LRA does not require or compel a referral to be made to a council, it remains open to parties who are bound by the collective agreement to refer a dismissal dispute to private arbitration, and there is no reason why this election may not be exercised on signing a contract of employment, in anticipation of any dispute that may arise in the future. The argument is predicated upon the proposition that the LRA does not compel parties to refer disputes to the CCMA, or bargaining councils. A dismissed employee has an entitlement to refer a dispute to a council, which he or she may or may not exercise. Accordingly, the Labour Court reasoned further, if a party is not compelled to refer a dispute to a council, an agreement to refer the dispute to private arbitration cannot be a waiver of the application of the provisions of the collective agreement.

[29] The reasoning of the Labour Court, supported by the respondents on appeal, in my respectful opinion, is unsustainable and rests upon an incorrect interpretation of the opening sentence of clause 5 of the collective agreement; which, to repeat it, provides that:

> 'All disputes shall, if required by the Act, be referred to Council for conciliation and arbitration.'

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The words "if required by the Act", in my view, are a reference to footnote 11 of section 51(3) of the LRA which defines the subject-matter jurisdiction of bargaining councils. In terms of the LRA, certain disputes, if and once an entitlement to refer is exercised by a party, must be referred to a council, and not to the CCMA. These are set out in footnote 11 of section 51(3) and include, *inter alia,* disputes about freedom of association; disputes that form the subject matter of proposed strikes and lock-outs; and disputes about unfair dismissals and unfair labour practices. The footnote also mentions that in terms of the LRA certain disputes may not be referred to a council. These include, *inter alia,* disputes about organisational rights; disputes about agency shops and closed shops and disputes concerning pickets.

[30] What clause 5 of the collective agreement means is that all disputes in respect of which the council has subject-matter jurisdiction shall be referred to the council for conciliation and arbitration, if and once a party exercises the entitlement to refer it, such being disputes the LRA requires the council to conciliate and arbitrate. Clause 5 is a *provision* of the collective agreement, which, by the Minister's extension of it to non-parties in terms of section 32 of the LRA, has the status of subordinate legislation. And section 199(1)(c) unequivocally provides that a contract of employment may not waive the application of any provision of the collective agreement. Any provision in a contract of employment that purports to permit such a waiver is invalid in terms of section 199(2). Clause 13 of the contract of employment purports to waive the application of clause 5 of the collective agreement which requires disputes over which the NBC has subject-matter jurisdiction to be referred to conciliation and arbitration in accordance with the provisions of the collective agreement. Clause 13 is accordingly also invalid for this reason.

[31] Since the arbitration clause in the contract of employment is invalid, the NBC was entitled to regard it as *pro non scripta*. Strictly speaking, therefore, there is no need to consider whether a valid arbitration

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clause might have operated to exclude the jurisdiction of the NBC. There however may be some benefit in commenting briefly on the point.

[32] Having found that there had been no unlawful waiver or unfavourable treatment, the Labour Court posed the question whether the bargaining council nonetheless retained a discretion to arbitrate the dispute despite the existence of a valid arbitration clause. It concluded that it did not, on two grounds. Firstly, because there is no provision similar to section 147(6) of the LRA applicable to bargaining councils; and secondly, it held, a bargaining council is a creature of statute with no inherent right of supervision over private arbitration proceedings or a discretion to prevent any private arbitration and to tackle the dispute itself.

[33] Section 147(6) of the LRA grants the CCMA the power to resolve a dispute between parties despite their having agreed to private dispute resolution. It provides:

> 'If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been resolved through private dispute resolution in terms of a private agreement between the parties to the dispute, the Commission may -
>
> (a) refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures; or
>
> (b) appoint a commissioner to resolve the dispute in terms of this Act.

Section 147(6) does not apply to any arbitration conducted under the auspices of a bargaining council by reason of section 51(8) which expressly provides that only sections 142A and 143 to 146 are applicable.

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[34] The rationale of the provision is consistent with the general proposition that the effect of an arbitration agreement is not to exclude the jurisdiction of the courts in respect of the subject dispute.[4] Where a party to an arbitration agreement commences legal proceedings in court, the opposing party who prefers to rely on the arbitration agreement may either file a special plea for the stay of the proceedings at common law, or may apply for a stay of proceedings under section 6 of the Arbitration Act. The party wishing to avoid arbitration bears the onus of persuading the court to exercise its discretion against staying the action and is required to make out a "very strong case".[5] These principles amount to an exception to the principle of *pacta sunt servanda* in that if compelling reasons exist the court may exercise a discretion to retain jurisdiction and allow a contracting party to escape its obligation under the agreement to submit to arbitration.

[35] The learned judge *a quo* was evidently alive to the relevant principles. He was of the opinion that they did not apply equally to a bargaining council, a creature of statute and not a court of law. Mr. *Pretorius* also submitted before us that the very existence of provisions like section 6 of the Arbitration Act and section 147(6) of the LRA, which confer the discretion to retain jurisdiction despite the existence of an arbitration agreement, is a clear indication that no such discretion exists at common law. That is not correct in relation to the courts. The special plea procedure is a creature of the common law granting the courts a

[4] In *Parek v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) 305 D-H Didcott J said:

> 'An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a pre-requisite to an approach to the Court for a final judgment that this should have happened …. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable dispute straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact.'

[5] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-H; and *Universiteit van Stellenboch v JA Louw* 1983 (4) SA 321 (A) at 333G - 334B.

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discretion to retain jurisdiction.[6] One is unable though to make the same claim with equal confidence in relation to administrative tribunals statutorily tasked to perform quasi-judicial functions. Then again, seeing as the arbitration clause in this instance is invalid, it is unnecessary to make any final pronouncement in relation to the issue.

[36] In the result, the appeal must be upheld. There is no reason why costs should not follow the result, which considering the importance and complexity of the issues should include the costs of two counsel.

[37] The following orders are made:

i) The appeal is upheld.

ii) The order of the Labour Court is set aside and is substituted with an order dismissing the first respondent's application for review.

iii) The first respondent is ordered to pay the costs of appeal, such costs to include the costs occasioned by the employment of two counsel.

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JR MURPHY AJA

I agree

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WAGLAY, DJP

[6] *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 26B

I agree

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DAVIS, JA

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Appearances:

For the Appellants:	Advocate P Kennedy SC with Advocate H Barnes
Instructed by:	Moodie and Robertson Attorneys
For the First Respondent:	Advocate P.J Pretorius SC with Advocate F Venter
Instructed by:	Bowman Gilfillian Inc