CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 137/19

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, WESTERN CAPE	Applicant
and	
A R COETZEE AND 49 OTHERS	First to Fiftieth Respondents
UNIVERSITY OF CAPE TOWN	Fifty First Respondent
UNIVERSITY OF STELLENBOSCH	Fifty Second Respondent
MINISTER OF HEALTH	Fifty Third Respondent
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Fifty Fourth Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Fifty Fifth Respondent
D I K WILSON N.O.	Fifty Sixth Respondent

Neutral citation:	*MEC for Health, Western Cape v Coetzee and Others* [2020] ZACC 3
Coram:	Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgment:	Mathopo AJ (unanimous)

Heard on: 14 November 2019

Decided on: 20 March 2020

Summary: Labour Relations Act 66 of 1995 — Public Service Act 103 of 1994 — definition of public service — Public Health and Social Development Sectoral Bargaining Council — scare skills allowance

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court), the following order is made:

1. The application for leave to appeal is dismissed.
2. The Member of the Executive Council for Health, Western Cape must pay the costs of the first to fiftieth respondents in this Court.

JUDGMENT

MATHOPO AJ (Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Labour Appeal Court dismissing an appeal by the applicant, the Member of the Executive Council for Health, Western Cape (applicant). The central issue in this

application is whether the first to fiftieth respondents (respondents),[1] who are health professionals, are entitled to receive a scarce skills allowance in terms of the scarce skills agreement (agreement), a collective agreement concluded within the registered scope of the Public Health and Welfare Sector Bargaining Council (Bargaining Council).[2] The Bargaining Council is a sectoral bargaining council established by the Public Service Co-ordinating Bargaining Council (PSCBC) in terms of section 37 of the Labour Relations Act (LRA).[3]

Factual background

[2] It is convenient to commence with a brief description of the position of the respondents and the relevant agreements which governed their position and later deal with the legislative provisions which form the core of this appeal.

The teaching hospital agreements

[3] The matter has its origins in 1967 and 1975 when the University of Cape Town (UCT) and Stellenbosch University (collectively, the Universities) each respectively concluded teaching hospital agreements (teaching agreements) with the erstwhile Provincial Administration of the Cape of Good Hope (the Provincial Administration), now the Department of Health, Western Cape (Department). In terms of these teaching agreements, Groote Schuur Provincial Hospital would be used by UCT, and Tygerberg Hospital by Stellenbosch University, as teaching hospitals for the training of their respective faculties of medicine.

[4] The teaching agreements envisaged that the Universities and the Provincial Administration would provide staff that would run the teaching hospitals. The staff is

[1] The remaining respondents, the fifty first to the fifty sixth respondents, played a limited role in the present matter. In the course of this dispute which has spanned over more than fifteen years, a number of respondents have since passed away or retired.

[2] Now the Public Health and Social Development Sectoral Bargaining Council.

[3] Act 66 of 1995.

collectively referred to as Joint Staff.[4] The respondents are all members of the Joint Staff and are attached to the medical faculties of the respective Universities.

[5] Clause 9(a) of the UCT agreement provides that, unless otherwise agreed, the deans, deputy deans, professors and lecturers from the medical faculty, will be appointed under the conditions of service of UCT. These are UCT employees. Clause 9(b) provides that the remaining members of the Joint Staff from the medical faculty are appointed under the conditions of service of the Provincial Administration. These are Provincial employees.

[6] In terms of clause 10 of the UCT agreement, UCT shall be responsible for the payment of salaries of their employees, and the Provincial Administrator shall be responsible for the payment of the salaries of the Provincial employees.

Scarce skills agreement

[7] On 28 January 2004, the collective agreement was concluded at the Bargaining Council.[5] In terms of section 213 of the LRA, a collective agreement is an agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and (as far as it is relevant) one or more employers, on the other hand.[6]

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[4] Clause 2 of the UCT agreement defines Joint Staff as the medical and other professional staff jointly responsible to the University and the Provincial Administration in terms of the agreement and shall include all incumbents of the categories of posts specified in clause 7 of the agreement. Reference will be made to specific clauses in the UCT agreement, which is materially the same as the Stellenbosch University agreement.

[5] Agreement No. 1 of 2004.

[6] See also section 31 of the LRA which provides:

> "Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds—
>
> (a) the parties to the bargaining council who are also parties to the collective agreement;
>
> (b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
>
> (c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates—

[8] The agreement sought to provide a scarce skills allowance to health professionals in public health sector hospitals or institutions as managed by health employers. The allowance was initiated in order to attract and retain the services of skilled and knowledgeable academic staff of the Universities. The scarce skills allowance was negotiated in the Bargaining Council for the direct benefit of skilled employees such as the respondents by the public health employers in order to retain their services which are both clinical and administrative in nature, and highly beneficial to the health care system in South Africa. This was done in an effort to encourage highly qualified and experienced health professionals, such as the respondents, to remain in the employment of the State and not take up positions in private healthcare or elsewhere outside of South Africa, resulting in the loss of people with skills regarded as scarce in this country.

[9] Clause 1 of the agreement lists the following objectives:

> "1.1 To attract and retain health professionals with scarce skills on a full time basis to the Public Health Sector as managed by the Health Employer;
>
> 1.2 To institute a non-perishable scarce skills allowance for designated health professional categories working in clinical service delivery of Public Health Sector hospitals / institutions and are not part of the Senior Management Service;
>
> . . .
>
> 1.5 To agree that the scarce skills allowance be a fixed percentage linked to the annual salary notch."

[10] The scope of the agreement is set out in clause 2. The agreement applies to the employer and employees—

> (i) terms and conditions of employment; or
>
> (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."

"2.1 in the Public Health Sector as managed by the Health Employer, but excluding those health professionals in other sectors; and

2.2 fall within the registered scope of the PH&WSBC."

Legislative framework

Labour Relations Act

[11] Section 27 of the LRA envisages the establishment of bargaining councils.[7]

[12] Section 35 of the LRA provides that there will be a bargaining council for—

"(a) the public service as a whole, to be known as the Public Service Co-ordinating Bargaining Council; and

(b) any sector within the public service that may be designated in terms of section 37."

[13] Section 37 of the LRA provides that the PSCBC may designate a sector of the public service for the establishment of a bargaining council.

[14] Section 28 of the LRA sets out the powers and functions of bargaining councils which include concluding and enforcing collective agreements within their registered scope.

[15] Section 36(2) of the LRA provides:

"The Public Service Co-ordinating Bargaining Council may perform all the functions of a bargaining council in respect of those matters that—

[7] The relevant parts of section 27 of the LRA provide as follows:

"(1) One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area by—

(a) adopting a constitution that meets the requirements of section 30; and

(b) obtaining registration of the bargaining council in terms of section 29.

. . .

(4) A bargaining council may be established for more than one sector."

(a) are regulated by uniform rules, norms and standards that apply across the public service; or

(b) apply to terms and conditions of service that apply to two or more sectors; or

(c) are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector."

[16] Section 213 of the LRA defines public service as "the national departments, provincial departments and government components contemplated in section 7(2) of the Public Service Act" (PSA).[8]

Public Service Act

[17] Public service is defined in section 1 of the PSA as public service contemplated in section 8.

[18] Section 8 of the PSA provides:

"(1) The public service shall consist of persons who are employed—

(a) in posts of the establishment of departments; and

(b) additional to the establishment of departments.

(2) Subject to the prescribed conditions, any person referred to in subsection (1) may be employed permanently or temporarily and in a full-time or part-time capacity.

(3) For the purpose of this Act, in relation to employment—

(a) the word 'permanently' or 'permanent', in respect of an employee, means an employee to whom a retirement age referred to in section 16 applies; and

(b) the word 'temporarily' or 'temporary', in respect of an employee, means not permanently employed."

[19] Section 1 determines that "establishment" means the posts which have been created for the normal and regular requirements of a department.

[8] Act 103 of 1994.

Litigation history

Bargaining Council

[20] On 13 June 2006, the respondents referred a dispute on their entitlement to the scarce skills allowance, which they alleged they were deprived of by the Department, to the Bargaining Council for determination. At the conciliation proceedings, the dispute was dismissed on the ground that the Bargaining Council did not have jurisdiction to hear the matter as the respondents were employed by the Universities and not by the Department. Aggrieved by this outcome, the respondents then approached the Labour Court.

Labour Court I

[21] In the Labour Court, the parties agreed to a separation of the issues on the merits and quantum. The issues on the merits involved the determination by the Labour Court regarding which category of employees could benefit from the allowance provided for in the agreement, by interpreting the relevant clauses of the agreement. The other issue was whether the respondents were entitled to benefit from the agreement concluded in the Bargaining Council, given that they were employed by the Universities and fell outside the scope of the category of employees catered for in the agreement. The applicant adopted the stance, which it never abandoned throughout the various stages of litigation, that the respondents were not employees of the Department and fell outside the registered scope of the Bargaining Council and were consequently not entitled to the payment of the scarce skills allowance. The Labour Court, per Cheadle AJ, held that on a literal interpretation of the different definitions of employee in the LRA and the PSA, the registered scope of the PSCBC, and the scope and applicability of the scarce skills agreement, the respondents were employees in the public service and were entitled to the scarce skills allowance.[9]

[9] *Coetzee and Others v Member of the Executive Council for the Provincial Government for Health and Others*, unreported judgment of the Labour Court, Case No C751/08 (4 November 2010) (*Labour Court judgment I*) at para 53.

Labour Appeal Court I

[22] Dissatisfied with the outcome in the Labour Court, the applicant approached the Labour Appeal Court. The Labour Appeal Court upheld the appeal and set aside the orders of the Labour Court. It held that the Labour Court did not have the requisite jurisdiction in terms of the LRA to adjudicate the matter.[10]

Labour Court II

[23] Accordingly, the respondents brought an application in terms of section 158(1)(g) of the LRA before the Labour Court to review the decision of the Bargaining Council not having jurisdiction to adjudicate on issues that the respondent brought before it.[11] The Labour Court accordingly set aside the ruling and remitted the matter to the Bargaining Council for arbitration.[12] However, the parties subsequently agreed to refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA).

CCMA

[24] Two claims were referred to the CCMA. First, the demarcation dispute which related to whether the respondents fell within the jurisdiction of the Bargaining Council. Second, the dispute relating to the interpretation and application of the agreement. The disputes were consolidated and the Commissioner found that the respondents were employees within the public service and fell within the jurisdiction of the Bargaining Council. Consequently, the respondents were entitled to the scarce skills allowance provided for in the agreement.

[10] *Member of the Executive of Western Cape Provincial Health Department v Coetzee* [2015] ZALAC 35; (2015) 36 ILJ 3010 (LAC) at paras 92-4 and 101.1.

[11] *Coetzee and Others v The Public Health and Development Sectoral Bargaining Council and Others*, unreported judgment of the Labour Court, Case No C819/15 (12 July 2016) at para 1.

[12] Id at para 14.

Labour Court III

[25] The applicant then applied to the Labour Court to review the Commissioner's award. This application was dismissed on 30 November 2017. Leave to appeal was refused by the Labour Court and only granted on petition by the Labour Appeal Court.

Labour Appeal Court II

[26] In its judgment dated 3 May 2018, the Labour Appeal Court upheld the CCMA's findings, which were confirmed by the Labour Court, that the respondents were employees as defined by section 213 of the LRA.[13] It held that this section broadly defined an employee which made it possible for persons like the respondents to be employees in circumstances where they work for one institution but are paid by another.[14]

[27] On the issue whether the respondents were employees who fell within the registered scope of the Bargaining Council, the Labour Appeal Court held that the registered scope of the Bargaining Council is the public service. It considered the definition of public service in section 213 of the LRA read together with section 7(2) of the PSA and schedules 1 and 2 of the PSA, and found that because the Universities were not listed in the PSA schedules, the respondents were not in the public service.[15]

[28] However, having found them to be employees in terms of section 213 of the LRA, the Labour Appeal Court then considered whether the respondents formed part of the public service by virtue of the teaching agreements. In arriving at its decision it found that the respondents were employees who held posts on the fixed establishment and that the special contractual provisions left no doubt that the Principal and Chief Specialist positions were posts "which had been created for the normal and regular requirements" of the relevant hospital departments. Thus, the respondents were part of

[13] *The MEC for the Department of Health, Western Cape v Coetzee and Others*, unreported judgment of the Labour Appeal Court, Case No CA5/18 (3 May 2018) (*Labour Appeal Court judgment II*) at para 71.

[14] Id at para 59.

[15] Id at para 62.

the fixed establishment as defined in section 1 of the PSA.[16] It further held that these posts were central to the functioning of a teaching hospital and included clinical responsibilities on the incumbents.[17] In dismissing the applicant's appeal, the Labour Appeal Court concluded that the respondents were thus both employees of the Universities and in the public service, falling within the registered scope of the Bargaining Council.[18]

In this Court

Jurisdiction

[29] For this Court's jurisdiction to be engaged, the matter must either raise a constitutional issue[19] or an arguable point of law of general public importance which calls out for this Court's attention.[20]

[30] The applicant argued that this matter raises both a constitutional issue and an arguable point of law of general public importance. In relation to the former, it submitted that the LRA regulates and gives practical effect to the fundamental rights conferred by section 23 of the Constitution. In so doing, it provides a framework within which employees, employers and their respective representatives can, inter alia, collectively bargain to determine the terms and conditions of employment and other matters of mutual interest. In support of its contention it further relied on this Court's decision in *NEHAWU,*[21] where Ngcobo J said:

> "Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the legislature is under an obligation to respect,

[16] Id at paras 63 and 68.

[17] Id at para 68.

[18] Id.

[19] Section 167(3)(b)(i). Section 167(7) of the Constitution provides that "a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution".

[20] See section 167(3)(b)(ii) of the Constitution and also *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 35.

[21] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*).

> protect, promote and fulfil the rights in the Bill of Rights. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights."[22]

[31] The applicant maintained that the CCMA award upheld by the Labour Courts was based on a material error of law which incorrectly interpreted sections 28, 35, 36, 37 and 43 of the LRA, read with the definition of the term "public service" in section 213 of the LRA and the applicable provisions of the PSA.

[32] At the hearing, counsel for the respondents agreed that in light of *NEHAWU*, this Court's jurisdiction is engaged on the basis that all labour matters which involve the interpretation and application of the various provisions of the LRA engage this Court's jurisdiction.

[33] As already stated above, when this matter reached the CCMA, there was a consolidation of two disputes. First, the demarcation dispute which related to whether the respondents fall under the jurisdiction of the Bargaining Council. Second, the interpretation dispute which related to the interpretation and application of the agreement.

[34] During the hearing, the applicant argued that the application before this Court was a challenge to both the demarcation and interpretation disputes. The applicant relied on the CCMA award to validate the assertion, in that the Commissioner dealt with these two matters in an intertwined manner in granting the award.[23]

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[22] Id at para 14.

[23] In particular, reliance was placed by the applicant on paragraphs 56-69 of the CCMA award.

[35] This matter requires this Court to determine whether the CCMA correctly interpreted and applied the definitions of "employees" and "public service" as per section 213 of the LRA. Allied to this is whether the respondents fell within the registered scope of the Bargaining Council. The interpretation and application of the provisions of the LRA therefore raise constitutional issues. In my view the demarcation and the interpretation disputes are heavily intertwined, and cannot now be separated as the respondents suggest.

[36] The LRA gives practical effect to, and regulates, the fundamental rights conferred by section 23 of the Constitution.[24] In *NEHAWU*, this Court held that the proper interpretation and application of the LRA – which is a constitutionally mandated piece of legislation – is in itself a constitutional matter and therefore engages this Court's jurisdiction.[25] It was further held that "[o]ur constitutional democracy

[24] Section 23 of the Constitution provides:

> "(1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right—
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.
>
> (3) Every employer has the right—
>
> (a) to form and join an employers' organisation; and
>
> (b) to participate in the activities and programmes of an employers' organisation.
>
> (4) Every trade union and every employers' organisation has the right—
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[25] *NEHAWU* above n 21 at para 14. See also *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 20, where this Court confirmed its jurisdiction in labour matters by stating that it would be shirking its constitutional duty if it were to hold that it would never hear appeals from the Labour Appeal Court. In my view, so too in the present matter this Court would be shirking its constitutional duty if it were to not engage in the debate as to whether the Labour Courts properly interpreted and applied the LRA. This constitutional duty would still, however, need to be viewed against *NEHAWU* at para 18, where this Court stated that "[t]his does not mean that this Court will as a matter of course

envisages the development of a coherent system of law that is shaped by the Constitution".[26]

[37] Another issue that engages this Court's jurisdiction is whether the CCMA's award was based on a material error of law which incorrectly interpreted sections 28, 35, 36, 37 and 43 of the LRA, read with the definition of the term "public service" in section 213 of the LRA. Although not squarely pleaded or raised as such during oral argument in this Court, in essence the attack by the applicant was directed at the reasonableness of the award and the Labour Court's endorsement of the interpretation and application of the provisions of the LRA. Properly construed, this amounts to an argument that a reasonable adjudicator would not have come to the same legal conclusion. This Court has confirmed in *Duncanmec* that "the challenge of an award based on unreasonableness was regarded as raising a constitutional issue".[27]

Interests of justice

[38] The next enquiry is whether the interests of justice warrant that leave be granted. This enquiry involves the exercise of discretion on the part of this Court and entails the weighing up of various factors which include the reasonable prospects of success which, although not determinative, carries more weight than the other factors.[28]

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hear appeals against decisions of the Labour Appeal Court dealing with the interpretation and application of the LRA." Every case is to be adjudicated on its own jurisdictional merits and the interests of justice will in any event dictate whether this Court should grant leave to appeal.

[26] *NEHAWU* id at para 16.

[27] *Duncanmec (Pty) Ltd v Gaylard N.O.* [2018] ZACC 29; 2018 (6) SA 335 (CC); 2018 (11) BCLR 1335 (CC) at para 30. See also *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para 30.

[28] The other factors that are relevant in determining whether it is in the interests of justice to grant leave to appeal to the Constitutional Court include:

(a) The importance of the issue raised (see in this regard *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at para 15 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32); and

(b) The public interest in a determination of the constitutional issues raised (see in this regard *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14 and *Islamic Unity* at para 18).

[39] The primary question is whether this Court should grant the applicant leave to appeal the decision of the Labour Appeal Court. To answer this question, a determination has to be made whether the Labour Courts and arbitral tribunals which found in favour of the respondents were wrong in dismissing the applicant's case both on review and appeal.

[40] Having considered the parties' submissions and for the reasons that follow, I am of the view that it is not in the interests of justice to grant leave to appeal. In what follows hereunder, I will demonstrate that the application lacks reasonable prospects of success. It is trite that the prospects of success of an application are an important factor in this Court's determination of whether it is in the interests of justice to grant leave to appeal.[29]

Submissions on prospects of success

Applicant

[41] The applicant put up a spirited criticism of the findings of the CCMA which were endorsed by the Labour Court and Labour Appeal Court. It first sought to persuade us that the respondents are not members of any trade unions which were signatories to the agreement, but instead are members of the South African Medical Association (SAMA). It contended that since SAMA was not a party to the impugned agreement, the

[29] In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12, this Court held:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court, and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, *prospects of success, although not the only factor, are obviously an important aspect of the enquiry*. *An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal*."

See also *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 26, where this Court held:

> "'Leave to appeal' is also a requirement needed to 'protect' the process of this Court against abuse by appeals which have no merit, and it is in the 'interests of justice' that this requirement be imposed, for if appeals without merit were allowed against decisions of the Supreme Court of Appeal, justice would be delayed."

respondents are not covered by the provisions of section 23(1) of the LRA which states that a collective agreement binds members of trade unions which are parties to a collective agreement.

[42] Second, it contended that the respondents fell outside the registered scope of the Bargaining Council because they are not public servants, and are accordingly not entitled to the benefits of a collective agreement. It argued that the fact that the respondents performed some of their duties in the provincial hospitals and provided healthcare on behalf of the Department, does not necessarily mean that they are public servants or that they are employed in the public service. The applicant also contended that teaching hospitals cannot transform the respondents into public service employees when in fact they are employees of the Universities. It submitted that since the respondents hold posts as professors and lecturers in the faculties of medicine in their respective Universities, they had concluded employment contracts with the Universities and none of them were appointed in terms of written contracts concluded with the Department. The agreement is not applicable to persons not in the public service. In essence, the submission made was that nothing in the PSA or its Regulations[30] prescribes that the geographic location at which a person performs their duties determines whether they are in the public service or not.

[43] The third main contention relates to the CCMA's finding that the respondents occupy posts which are firmly established and have been so for many years and that these posts are governed by Part B of section 1 of the PSA.[31] To this main argument there were two strands. First, the applicant contended that only provincial employees serving on the Joint Staff at the teaching hospitals hold posts on the fixed establishment and the respondents are not. Second, the respondents failed to adduce evidence before all the Labour Courts and arbitral tribunals that they hold or held posts on the fixed establishment. Thus, the finding of the CCMA constitutes a material irregularity.

[30] Public Service Regulations, GN R1 GG 21951, 5 January 2001.

[31] CCMA award at para 62.

[44] Finally, the applicant argued that the Labour Appeal Court was wrong to endorse the CCMA award, where the Commissioner found that the respondents did not allege that they held posts on the fixed establishment and consequently failed to lead evidence to substantiate the averment. The applicant further argued that the Labour Appeal Court disregarded various sections of the LRA and a number of other important legislative enactments which, it contended, yields unfair results towards the applicant in that it imposed a liability on the Department where in law, no such liability exists. We were urged to accept that if the respondents had pleaded this averment, the applicant would have traversed this issue at that stage. It was emphasised that the respondents were appointed by the Universities and subject to the terms and conditions of service of their respective Universities.

The respondents

[45] The counter argument by the respondents was that the allowance was specifically negotiated for persons in their positions and the agreement binds the applicant by virtue of the fact that their trade union, SAMA, was party to the Bargaining Council. This, they said, was due to the fact that the collective agreement was negotiated by SAMA and the Democratic Nursing Organisation of South Africa (DENOSA) acting jointly for and on behalf of the respondents. The respondents further contended that the agreement was concluded for their benefit and for the benefit of similarly situated colleagues in the other provinces.[32]

[46] The respondents further argued that they are entitled to the allowance because they hold posts of Principal and Chief Specialists at the relevant public hospitals at the time the agreement was concluded. They, therefore, fall within the express scope of the agreement as they are "designated health professionals working in public sector hospitals". The high water mark of the respondents' argument was that the wording of

[32] These are colleagues who had received the allowance in accordance with the Circular of the National Acting Director-General of the Department, dated 11 February 2004, distributed to all heads of provincial departments of health, instructing them to make payment to the Principal and Chief Specialists.

the agreement is clear and unambiguously indicates that the allowance is to be paid by the provincial departments of health to all Principal and Chief Specialists without exception.

[47] To buttress their argument, the respondents relied on the *Labour Court judgment I*, per Cheadle AJ, where he said:

> "It is uncontested that the applicants occupy posts on the joint staffing establishment of the hospitals. Professors Coetzee and James for example are classified as Chief Specialists, a post in the Public Service Staffing System, and as such the head of their respective departments with responsibility for managing and supervising staff, both provincially and university appointed in their department. The fact that they also occupy the post of Professor on the University establishment does not alter the fact that they occupy a post on the establishment of the hospitals and therefore the Province."[33]

[48] Addressing the applicant's contention that the respondents held no posts on the fixed establishment, the respondents submitted that had the issue been placed in dispute on the pleadings, further evidence would have been adduced to gainsay it. They contended that it is prejudicial for the applicant to ambush them on appeal with this new ground. They averred that "a party cannot direct the attention of the other party to one issue then at the trial (or at a subsequent appeal) attempt to canvass another, especially if that causes prejudice to the other". I now look at these arguments closely.

Analysis

The respondents are members of a signatory trade union

[49] The submission that the respondents were not covered by the provisions of the LRA because they were not members of any of the trade unions who were signatories to the impugned agreement is flawed. While it is correct that they were not members of any signatory trade union to the agreement, the respondents were members of SAMA. Clause 7.2 of the constitution of the Bargaining Council permits two unions to be

[33] *Labour Court judgment I* above n 9 at para 48.

admitted as a single party to the Bargaining Council provided their aggregate membership meets the threshold.[34] Accordingly, SAMA and DENOSA entered into an agreement in terms of which both unions agreed to be admitted jointly as a single party to the Bargaining Council. In my view, the respondents are members of the registered trade union which is a party to the agreement concluded in the Bargaining Council.

Interpretation of the agreement

[50] It is clear from the wording of the agreement that the scarce skills allowance was negotiated for the direct benefit of the respondents. The Circular from the chief negotiator of the Department also confirms that the text, context and purpose of the agreement was negotiated specifically for the medical specialists employed in the public sector, in this instance, the respondents. The respondents employed their scarce skills in rendering clinical services in the public health sector for the benefit of the Department. The latter undertook liability in terms of the agreement for the payment of the scarce skills allowance. The impugned agreement sought to compensate them by way of an additional 15% on the basic remuneration for their part of the work. This additional allowance was agreed to separately from, long after, and in addition to the teaching agreements. To my mind, the sole and dominant purpose was to attract and retain principal and specialist practitioners, who are considered a rare commodity in the field of medicine, such as the respondents.[35] This was to enable them to render their specialist clinical services using their scarce clinical skills in the public health sector for the benefit of members of disadvantaged communities within the provincial hospitals catchment area to whom the Department owes service delivery.

[51] For the above mentioned reasons, it is clear that the impugned agreement granting the scarce skills allowance binds the applicant (as the employer) and the three registered trade unions on behalf of their members in the Bargaining Council which include DENOSA and SAMA. Clause 3 of the agreement identified medical specialists

[34] Clause 7.2 further requires that each constituent of the combined trade union party, on its own or acting together (as a single party), is admitted to a Sectoral Council.

[35] See [9].

as being part of the occupational group designated to be paid the allowance. The respondents performed the duties of Principal and Chief Specialists in the various medical departments within the provincial hospitals on behalf of the applicant and therefore qualified for the payment of the scarce skills allowance.

The respondents' employment status

[52] The applicant initially denied that the respondents were employees of the Department and later changed and averred that "at the very least [they] were co-employees of the Department". The undisputed evidence before Cheadle AJ reveals that the respondents are employees of the Department on the fixed establishment and thus qualify to be characterised as public servants. It is common cause that besides being professors at the Universities, the respondents were also Principal and Chief Specialists in various fields of medicine rendering clinical services for the Department and public hospitals for the benefit of the public. The Labour Appeal Court correctly found that—

> "[o]ne of the aims of the teaching hospital agreements is to bring the professors into the public service in appropriate posts to give them authority to provide clinical services to the public and to subject them to direct governmental control and accountability in relation to the provision of those services. If such were not posts on the fixed establishment of the public hospitals, then one must ask why the system of joint appointment was established by the teaching hospital agreements in the first place."[36]

[53] If the applicant was inclined to dispute this, it ought to have led evidence to disprove the respondents' case. This issue was neither raised before the CCMA nor before the Labour Courts. Another factor which militates against the applicant is its admission that the respondents were departmental employees, albeit jointly with the Universities. As a matter of common sense and logic, as a health sector employer and with the respondents assisting it in the fulfilment of its obligations to the broader public, it follows ineluctably that the respondents were employed in the health sector.

[36] *Labour Appeal Court judgment II* above n 13 at para 66.

[54] To demonstrate the fallacy in the applicant's case, one has to have regard to the chronology of the dispute between the parties which shows that at no point was it ever in contention between the parties that the respondents occupied positions on the fixed establishment of the Department or public service.[37] The contention that the onus was on the respondents to raise that point is equally unsustainable. In my view, if the Department held a contrary view, it should have specifically raised this issue. It was incumbent upon the applicant to specifically provide evidence to support its assertion, which it failed to do.

[55] Clause 6 of the UCT agreement provides that the Joint Staff shall be employed to serve jointly the University and the Provincial Administration. This clause demonstrates that the Principal and Chief Specialist posts are posts which have been created for the normal and regular requirements of the relevant hospital departments and are part of the fixed establishment as defined by section 1 of the PSA. It follows that the respondents are employees of the University and in the public service, and they fall within the registered scope of the Bargaining Council and the collective agreement applies to them. Thus, they are entitled to have the scarce skills allowance payable to them under clause 3.

The Commissioner's alleged material error of law

[56] In order to succeed with a review on this ground before the Labour Appeal Court, the applicant had to show that the alleged error of law committed by the Commissioner was one which no reasonable Commissioner would have made. The applicant contended that the award by the Commissioner is based on a material error of law which incorrectly interprets sections 28, 33, 35, 37 and 43 of the LRA. It argued that the award fails to take into account that: (a) the respondents are not public servants; (b) the respondents fall outside the scope of the Bargaining Council; and (c) the award imposes

[37] In *Kali v Incorporated General Insurances Limited* 1976 SA 179 (D) at 182A it was held that "[a] party cannot direct the attention of the other party to one issue and then, at trial [or at a subsequent appeal] attempt to canvass another."

a liability or obligation which in law does not exist. It relied on the Labour Appeal Court's decision in *Vermooten.*[38] In *Vermooten* an individual had entered into a consultancy agreement with the government and was regarded as an independent contractor and not an employee of the government department.[39] The facts in *Vermooten* are clearly distinguishable from the facts in issue before this Court and the applicant's reliance on it is clearly misplaced.

[57] Section 28 of the LRA provides that a bargaining council may only exercise the powers and functions entrusted by the section in relation to its registered scope. In other words, the contention advanced is that since the respondents do not fall within the scope of the Bargaining Council, the CCMA committed a material irregularity by conferring on the Bargaining Council powers which it did not have in terms of the statute and the constitution by which it was created. To reinforce this argument, the applicant relied on the judgments of the Labour Appeal Court in *DENOSA,*[40] *MacDonald's Transport Upington (Pty) Ltd*[41] and *NUMSA*[42] which held that the CCMA or a bargaining council which wrongly interprets a legal instrument, commits a reviewable irregularity as envisaged by section 145 of the LRA. This argument has no merit. I agree with the respondents that this belated attempt to attack the Commissioner's findings on the basis that his award misinterpreted the provisions of section 28 is opportunistic and constitutes a new argument which was not pleaded. Even if there was merit in this contention, it would be prejudicial to the respondents for this Court to allow the applicant's belated attempt to introduce new issues which were not ventilated before

[38] *Vermooten v Department of Public Enterprises* [2016] ZALAC 63; (2017) 28 ILJ 607 (LAC).

[39] Id at para 4, where it was stated:

> "The issue arose this way. The Department of Public Enterprise advertised a post for Director [of] Aviation. The appellant applied for the post and was interviewed. During the interview, he stated that he could not accept the remuneration that was offered. Later the Department of Public Enterprise offered him a contract as Specialist Aviation Consultant for a period of 12 months with effect from 9 October 2006. Further contracts followed until March 2011 when the DPE decided against renewing the contract."

[40] *DENOSA v Western Cape Department of Health* [2016] ZALAC 72; (2016) 37 ILJ 1819 (LAC) at paras 15-22.

[41] *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union* [2016] ZALAC 32; (2016) 37 ILJ 2593 (LAC).

[42] *National Union of Metalworkers of SA v Assign Services* [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC) at para 32.

the Labour Courts. This clearly amounts to an improper attempt at making this Court a court of first instance and is an ambush on the respondents.[43]

[58] There was sufficient evidence before the CCMA to justify its determination that the respondents met the requirements of the agreement. This was done not only to the extent that the agreement itself required them to be employed in the public sector, but also to the extent that the respondents fell within the registered scope of the Bargaining Council.

[59] I conclude that there was no error of law or of fact as the decision of the Commissioner took into account all the facts and evidence. He, inter alia, based his decision on the admission by the National Department in the Circular which was confirmed in evidence by Professor White that the collective agreement was concluded for the benefit of the respondents. His decision was fortified by the Labour Court, per Cheadle AJ, and the Labour Appeal Court, per Murphy AJA, when they all found the respondents to be public servants. The Commissioner applied his mind to all the arguments and motivated his decision with sound reasons. The finding that the respondents satisfied the requirements of the agreement cannot be faulted.

[60] It follows that the application lacks reasonable prospects of success and the interests of justice thus militate against the granting of leave to appeal. There is no reason why costs should not follow the outcome.

Order

[61] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. The Member of the Executive Council for Health, Western Cape must pay the costs of the first to fiftieth respondents in this Court.

[43] See *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at para 20, where it was held that "this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue".

For the Applicant:	A C Oosthuizen SC, B Joseph SC and N Gallant instructed by the State Attorney, Cape Town
For the Respondents:	R G L Stelzner SC instructed by MacRobert Incorporated