REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 381/12

In the matter between:

PSA obo STRAUSS & 7 others **Applicant**

and

MINISTER OF PUBLIC WORKS N.O. **First Respondent**

GPSSBC **Second Respondent**

I DE VLIEGER-STEYNHAVE N.O. **Third Respondent**

Heard: **21 February 2013**
Delivered: **20 March 2013**
Summary: Jurisdiction of bargaining council – fairness of collective agreement.

JUDGMENT

STEENKAMP J:

Introduction

[1] Does a bargaining council have jurisdiction to decide on the fairness of a collective agreement?

[2] This dispute arose in the context of a collective agreement styled as an Occupation Specific Dispensation for engineers. That collective agreement was embodied in a resolution, Resolution No 2 of 2009 ("the Resolution"). The applicants, represented by their trade union, the Public Servants Association of South Africa (the PSA) referred a dispute to the second respondent, the General Public Service Sectoral Bargaining Council (GPSSBC or "the bargaining council"). The issue in dispute was described as whether the applicants were unfairly demoted or whether their subordinates were unfairly promoted in terms of section 186(2)(a) of the Labour Relations Act.[1] The third respondent (the arbitrator) found that the true nature of the dispute was about the fairness of the Resolution. She had no jurisdiction to entertain that dispute. The applicants seek to have that ruling reviewed and set aside in terms of section 145 of the LRA.

[3] The Minister also sought condonation for the late filing of the answering affidavit. I granted condonation *in limine* and gave reasons extemporaneously.

Background facts

[4] The individual applicants, members of the PSA, are all employed as Chief Construction Project Managers in the Cape Town Office of the Department of Public Works.[2]

[5] The majority trade unions (including the PSA) entered into a collective agreement with the public service as employer on 18 August 2009. That agreement is known as the "Occupation Specific Dispensation for Engineers" ("the OSD") and is embodied in the Resolution.

[6] The OSD provided for a new system of differentiated salary scales for engineers. It provided for employees to be "translated" to "appropriate posts and salary grades in accordance with the posts that they occupy at the time of translation".

[1] Act 66 of 1995 (the LRA).

[2] The Minister of Public Works is cited as the first respondent in his official capacity as the minister responsible for that department.

[7] The applicants were all "translated" to the post and salary grade of "Chief Construction Manager Grade A". They do not dispute that the translation took place in terms of the collective agreement. However, they felt that the manner in which it occurred had a "peculiar result": their subordinates, the project managers, were translated to the same job grade. The applicants are of the view that they, being more senior, should have been translated to Grade B. They raised a grievance but it was not resolved. They then referred a dispute to the bargaining council.

[8] The dispute was referred as an unfair labour practice dispute in terms of section 186(2)(a) of the LRA. The applicants averred that they had been demoted. In their view, the dispute fell under s 186(2)(a):

> **"Unfair labour practice"** means any unfair act or omission that arises between an employer and an *employee* involving—
>
> *(a)* unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an employee.

The award

[9] Both parties – the PSA and the Department – led evidence at the arbitration. The arbitrator noted that the first issue she had to determine, was "what this dispute is about". She found that the translation in terms of the OSD did not constitute a promotion or demotion: the applicants' job descriptions remained the same and everyone received an increase in salary in terms of the OSD. The OSD is a collective agreement negotiated and agreed to by both parties. It is binding on them.

[10] The arbitrator also noted that the correct implementation of the Resolution was not in issue. Finally, she found:

> "Although I have jurisdiction in terms of the application and interpretation of a collective agreement, I have no jurisdiction to decide on the fairness of the Resolution. Based on the above, the Council has no jurisdiction to arbitrate this matter."

Grounds of review

[11] On review, the applicants argue that the arbitrator had jurisdiction to arbitrate in terms of section 24 of the LRA. They also submit that the applicants were in fact demoted, and although the OSD is a collective agreement, "it is the manner in which it was applied and implemented which forms the basis of the dispute."

Evaluation / Analysis

[12] Neither party disputed the jurisdiction of the bargaining council to arbitrate a dispute over the interpretation and application of a collective agreement in terms of s 24 of the LRA. The problem is that that is not the dispute that the applicants referred to it. They referred an unfair labour practice dispute in terms of s 186(2)(a). Having assessed the evidence, though, the arbitrator concluded that the real dispute was about the way in which the OSD had been implemented. Indeed, that is what Mr Strauss says in his founding affidavit in this review application:

> "[I]t is the manner in which it was applied and implemented, which forms the basis of this dispute."

[13] The arbitrator correctly found that the real issue in dispute was the fairness of the Resolution in the way that it impacted on the applicants. At the arbitration, it was common cause that the OSD had been correctly applied. The applicants nevertheless argued that it was unfair. In his opening address, the applicants' attorney explained the implementation of the OSD and added that "that is what the applicants allege brought about the unfairness"; and in his heads of argument submitted to the arbitrator he also explained what the alleged "unfairness" was.

[14] Ms *Harvey*, for the first respondent, correctly submitted that the conduct complained of in this case arose from the correct implementation of the OSD, a collective agreement. The applicants' real complaint, as the arbitrator found, is that it impacted unfairly on them.

[15] The arbitrator had no jurisdiction to deal with any unintended consequences of the agreement. As this court held in *IMATU v SALGBC & others*[3]*:*

> "An elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. ... The bargain, however, stands, unless it is manifestly unconstitutional, a submission not made in these proceedings."

[16] In *Mzeku & ors v Volkswagen South Africa & ors*[4] this court confirmed that a collective agreement is binding on all union members, even those who are in dispute with their own union about its terms. The only limitation on the primacy of collective agreements is where a term is unlawful or unconstitutional. Thus, in *SACCAWU v Shakaone & others*[5] the Labour Appeal Court held that a collective agreement may not override statutory provisions; and in *Larbi-Odam v MEC for Education*[6] the Constitutional Court held that, where the effect of an agreed provision was to unfairly discriminate, its origin in a collective agreement would not constitute a justification.

[17] Even where a party had referred an interpretation and application dispute to a bargaining council, it was incumbent on the arbitrator to decide what the real dispute was. In *Minister of Safety & Security v SSSBC and Others*[7] the employee applied for a transfer within the South African Police Services (SAPS). It was refused. He referred a dispute about the interpretation and application of a collective agreement[8] dealing with SAPS's transfer policy and procedures to the Safety and Security Sectoral Bargaining Council (SSSBC). He challenged the decision of SAPS to refuse his application for transfer. The issue before the LAC was whether the SSSBC had jurisdiction to deal with the dispute. And that issue had to be determined by how the court answered the further question, whether or

[3] (2010) 31 *ILJ* 1407 (LC) para [13].

[4] [2001] 8 BLLR 857 (LC).

[5] [2000] 10 BLLR 1123 (LAC).

[6] 1998 (1) SA 745 (CC).

[7] (2010) 31 *ILJ* 1813 (LAC).

[8] Safety & Security Sectoral Bargaining Council Agreement 5 of 1999.

not the arbitrator correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement. It was accepted by both parties that, if the dispute was a dispute about the interpretation or application of a collective agreement, the SSSBC had jurisdiction in respect of the dispute; but that, if the dispute was about the fairness of the transfer, the SSSBC did not have jurisdiction.

[18] On the same day as it handed down judgment in *SSSBC,* the LAC handed down judgment in *Johannesburg City Parks v Mpahlani NO & others*[9] *("City Parks").* In *City Parks*[10] the court offered the following explanation between "a dispute" and "an issue in a dispute":

> "[14] There are a number of areas in the LRA with references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are ss 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be answered in order to resolve the main dispute. Let me make an example to illustrate the distinction that I seek to draw between *a dispute* and *an issue in a dispute*. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the

[9] (2010) 31 *ILJ* 1804 (LAC).

[10] *Supra* paras [14] – [16].

collective agreement are applicable and/or compiled with before the employer was dismissed is an issue necessary to be decided in order to resolve the real dispute.

[15] In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of, resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, where the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute is required to be resolved through arbitration in terms of the LRA.

[16] The proposition advanced by counsel for the appellant made no distinction between a dispute, on the one hand, and an issue in a dispute, on the other. That is why the appellant's counsel was driven to submit that all disputes which are dealt with by a bargaining council are disputes about the application of a collective agreement because the procedures for dealing with such disputes are provided for in a collective agreement. Obviously, this proposition can simply not be correct. In bargaining councils, proceedings are held that are about all kinds of disputes such as proceedings about dismissal disputes, proceedings about disputes concerning the interpretation or application of collective agreements, proceedings concerning disputes about organizational rights, proceedings about wage disputes and proceedings concerning other disputes."

[19] In *SSSBC*, the court applied the same reasoning. It found that the dispute that was before the arbitrator in that case was a dispute concerning the fairness or otherwise of SAPS's refusal to approve the employee's application or request for a transfer and the application of the provisions of the collective agreement was an issue in dispute. It was an issue which had or may have had to be dealt with in order to resolve the real dispute. That is the main dispute. The dispute itself did not relate to an application of the collective agreement. The court concluded that the Bargaining Council did not have jurisdiction to arbitrate the dispute because that was

a dispute concerning the fairness or otherwise of the decision not to approve the employees application for a transfer.

[20] This court applied similar reasoning in *SA Onderwysersunie v Head of Department, Gauteng Department of Education & others (1)*[11], having referred to *City Parks* and *SSSBC*, when it held:

> "It appears to me that the main dispute in this urgent application is not the interpretation and application of a collective agreement. The relief sought is for the head of department to refund the money deducted from the applicants' members pending the compilation of a factually correct database. In the course of deciding whether the applicants are entitled to the relief sought, I have to consider various undertakings by the GDE, some of which are contained in collective agreements of the PSCBC. Those agreements form part of the issues in dispute; but the main dispute is not the interpretation or application of a collective agreement."

Conclusion

[21] In the case before me, the arbitrator applied her mind to the real dispute before her. She found that the dispute was the fairness or otherwise of the way in which the OSD had been implemented. The bargaining council did not have jurisdiction to arbitrate that dispute. That reasoning, given the precedent I have referred to, appears to me to be both reasonable and correct. It is not open to review.

[22] Both parties asked that costs should follow the result. I see no reason in law or fairness to disagree.

Order

[23] The application for review is dismissed with costs.

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Steenkamp J

[11] (2011) 32 *ILJ* 1413 (LC) para [38].

APPEARANCES

APPLICANTS:	F Cronjé attorney.
FIRST RESPONDENT:	S Harvey Instructed by the State Attorney.