IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 1696/14

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION (IMATU) **Applicant**

and

EKURHULENI METROPOLITAN MUNICIPALITY **First Respondent**

ADVOCATE T BOYCE N.O. **Second Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Third Respondent**

THE SOUTH AFRICAN MUNICIPAL WORKER'S UNION (SAMWU) **Fourth Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA) **Fifth Respondent**

MOGALE CITY LOCAL MUNICIPALITY **Sixth Respondent**

Heard: 17 July 2018

Delivered: 02 April 2019

Summary: Review Application – Review of Jurisdictional Ruling – Provisions of Transitional Arrangements relating to Industrial Council Agreements – Whether Industrial Council Agreement is a collective agreement

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JUDGMENT

KENT, AJ

Introduction

[1] This matter concerns an application to review and set aside an arbitration award issued by the Second Respondent (the Arbitrator) dated 18 July 2014 under case number GPD031311 (the Award). The application is brought in terms of section 158(1)(g) read with section 145 of the Labour Relations Act[1] (the 1995 LRA).

[2] The application is opposed by the First Respondent and by the Sixth Respondent, who was joined to the proceedings after being granted leave to intervene in the application.

Background to the Review Application

[3] In 2013, the Applicant referred a dispute to the Third Respondent (the Bargaining Council) relating to the interpretation and application of the Conditions of Employment Agreement: Transvaal (the Transvaal Agreement).

[1] 66 of 1995, as amended.

[4] The matter came before the Arbitrator for arbitration on 7 July 2013. The First Respondent (the Ekurhuleni Municipality) raised a preliminary point to the effect that the Bargaining Council lacked jurisdiction to interpret and/or apply the Transvaal Agreement.

[5] The Arbitrator upheld the preliminary point and found that the Transvaal Agreement had expired by no later than 11 May 1998, and that the Bargaining Council accordingly had no jurisdiction to interpret and/or apply the agreement.

[6] It is this finding regarding the Bargaining Council's jurisdiction that the Applicant seeks to review and set aside.

The Transvaal Agreement

[7] The Transvaal Agreement was concluded on 3 June 1994 in the Industrial Council for the Local Government Undertaking.

[8] The parties to the Transvaal Agreement were, on the one hand, the Municipal Employers' Organisation and the Employers' Organisation for Local Authorities, and the South African Association of Municipal Employees on the other.

[9] The Transvaal Agreement provided that it would come into effect on a date fixed by the Minister of Labour in terms of section 48 of the Labour Relations Act[2] (the 1956 LRA) and would remain in force until 31 December 1997 or such period as determined by the Minister.

[10] The Minister promulgated the Transvaal Agreement in the Government Gazette in terms of section 48(1)(a) of the 1956 LRA on 28 October 1994. On 11 November 1996 the 1995 LRA came into operation.

[11] Clause 12(1)(a) of Schedule 7 to the 1995 LRA provides:

[2] 28 of 1956

"Any agreement promulgated in terms of section 48, an award binding in terms of sections 49 and 50, and any order made in terms of section 51A, of the Labour Relations Act and in force immediately before the commencement of this Act, remains in force and enforceable, subject to paragraphs (b) and (c) of this subitem, and to subitem (5B), for a period of 18 months after the commencement of this Act or until the expiry of that agreement, award or order, whichever is the shorter period, in all respects, as if the Labour Relations Act had not been repealed."

[12] Clause 13 of Schedule 7 to the 1995 LRA provides:

"(1) For the purposes of this section, an agreement –
  (a) includes a recognition agreement;
  (b) excludes an agreement promulgated in terms of section 48 of the Labour Relations Act;
  (c) means an agreement about terms and conditions of employment or any other matter of mutual interest entered into between one or more registered trade unions, on the one hand, and on the other hand –
    (i) one or more employers;
    (ii) one or more registered employers' organisations; or
    (iii) one or more employers and one or more registered employers' organisations.

(2) Any agreement that was in force immediately before the commencement of this Act is deemed to be a collective agreement concluded in terms of this Act." (own emphasis)

[13] Both of these clauses will be collectively referred to as the Transitional Arrangements.

The Relevant Review Test

[14] It is generally accepted that the test on review in respect of a jurisdictional ruling is one of correctness, and not whether the decision is one that a reasonable decision maker could make[3]. An arbitrator either has jurisdiction to hear and determine a

[3] See: *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC).

dispute or he/she does not. Further, it is trite that the Labour Court is entitled, if not required, to determine the issue of jurisdiction of its own accord.

[15] In the matter of *Trio Glass t/a The Glass Group v Molapo NO and Others*[4] the Court stated:

> "The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong."

[16] Recently, in the matter of *Macdonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and others*[5] the Labour Appeal Court, per Sutherland JA, held:

> "In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a bargaining council forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged in section 145 of the LRA, i.e. a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations. If not, 'correctness' as a distinct test is necessary to address such matters. However, on either basis, the ruling in this case must be set aside."

[17] In light of the effect of the Court's finding in *MacDonald's Transport* above, it is not necessary to deal with the applicable review test in unnecessary detail, as an incorrect interpretation of instruments by an arbitrator is either *per se* unreasonable and therefore reviewable, or reviewable in terms of the test of correctness.

[18] It is therefore necessary to determine: (1) Whether the Transvaal Agreement is a collective agreement in terms of the 1995 LRA and thus capable of interpretation and/or applicable by the Bargaining Council; and if so (2) Whether the Transvaal Agreement is still in force.

[4] (2013) 34 ILJ 2662 (LC) at para 22.
[5] (2016) 37 ILJ 2593 (LAC) at para 30.

[19] If the answer to both of the above questions is in the affirmative, then the Bargaining Council did in fact have jurisdiction to interpret and/or apply the Transvaal Agreement and the Arbitrator was incorrect to find that the Bargaining Council lacked jurisdiction, in which instance the Award will stand to be reviewed and set aside.

Analysis

[20] It is common cause that the Transvaal Agreement was entered into for what was originally intended by the parties thereto to be a fixed-term period.

[21] The clause of the Transvaal Agreement in terms whereof the referral to the Bargaining Council was made (clause 15.6.1) makes reference to the matter being referred to the Industrial Council for "consideration". The Industrial Council no longer exists, and has not existed for in excess of two decades. "Consideration" is no longer a concept that is used in our employment law.

[22] Similarly, the parties to the Transvaal Agreement no longer exist. The "councils" to whom the terms of the Transvaal Agreement applied were disestablished and reconstituted between 1998 and 2000. Further, the province of the Transvaal, in which geographical area the Transvaal Agreement was applicable, was abolished along with the other former provinces in 1994.

[23] The Applicant contends that despite the operation of the Transitional arrangements, it is possible for a promulgated Industrial Council Agreement to be enforced as a collective agreement in terms of the 1995 LRA mechanisms after the expiry of the transitional period if the agreement "in some other way" remained in force. As a general proposition, I accept that this may be possible.

[24] On 2 September 1997 (i.e. before expiry of the Transvaal Agreement), the Establishment Agreement was entered into between the parties to the Third Respondent. The First Respondent was a member of the Fifth Respondent – the employers' organisation party to the Third Respondent.

[25] Clause 3.5 of the Establishment Agreement provides:

> "All existing collective agreements, whether concluded in a Bargaining Council or any other collective bargaining forum (including the National Labour Relations Forum) shall, to the extent that they are not in conflict with the Constitution, be deemed to be of full force and effect until amended or repealed by the SALGBC."

[27] The Applicant concedes that the Transvaal Agreement was not deemed to be a collective agreement for the purposes of the Transitional Arrangements. However, the Applicant contends that the Transvaal Agreement survived on account of being an "existing collective agreement" within the meaning of clause 3.5 of the Establishment Agreement.

[28] The Applicant also contends that the Transvaal Agreement, at the time of the conclusion of the Establishment Agreement was "clearly" a collective agreement within the definition of section 213 of the 1995 LRA. The Applicant further contends that, as the Transvaal Agreement has not been amended or repealed by the Third Respondent, it remains "of full force and effect" and is accordingly binding upon both the Applicant and the Ekurhuleni Municipality.

[29] The Respondents, on the other hand, admit that the Transvaal Agreement remained operative by virtue of the Transitional Arrangements, but that this survival of the Transvaal Agreement was temporary, and along with the temporary survival of existing legislation, dispute resolution processes and fora, was intended to allow for a smooth transition to the new dispensation.

[30] In support of its proposition that the intention of the Transitional Arrangements was to provide for <u>temporary</u> persistence of existing collective agreements, the First Respondent relies on the following from *CUSA v Tao Ying Metal Industries and Others*[6]*:*

[6] 2009 (2) SA 204 (CC) at paras 94 and 100.

> "The LRA envisaged that the agreements that were in force at its commencement would remain in force for a period of 18 months after the commencement of the LRA or until their expiry date, whichever occurred first. Similarly, exemptions that were in operation when the LRA came into effect had a limited lifespan; they remained in operation either for a period of 18 months after the LRA came into effect or for the period for which they were granted, whichever occurred first. The legislature clearly intended that both the main agreement and the exemptions granted in respect of that agreement that were in operation when it came into operation, would have a limited lifespan… the legislature, while providing for a limited lifespan for all industrial council agreements…"

[31] The First and Sixth Respondents dispute the assertion made by the Applicant that the Transvaal Agreement is or was a "collective agreement" as defined in section 213 of the 1995 LRA. They also dispute that it is possible for the Transvaal Agreement to be enforced in terms of the mechanisms created by the 1995 LRA.

[32] In support of their position that the Transvaal Agreement does not constitute a collective agreement in terms of the 1995 LRA, the Respondents cite *Coin Security Group (Pty) Ltd v Minister of Labour & Others*[7], wherein the SCA stated as follows:

> "The court a quo gave no reason for its findings that the agreement was deemed to be a collective agreement and that the Labour Court had exclusive jurisdiction in respect of previously undetermined demarcation disputes. It was wrong in both respects. It is clear from s 62 of the new LRA, to which the court a quo referred, that the Labour Court has no jurisdiction to decide a demarcation dispute. Furthermore, nowhere in the new LRA is it stated that an industrial council agreement promulgated in terms of s 48 of the old LRA would be deemed to be a collective agreement. Clause 1A of the agreement provided that it would come into operation on such date as might be fixed by the first respondent in terms of section 48 of the old LRA and that it would remain in force until 31 December 1996 or for such period as the first respondent might determine. The first respondent could only act in terms of s 48 at the request of the second respondent, who could only request him to declare the agreement binding if authorised to do so by a decision to that effect voted for by not less than two-thirds of the representatives who were present at the meeting at which the decision was taken (s 27(2) to (7)). In *S v Prefabricated*

[7] [2001] 11 *BLLR* 1193 (SCA) at para 10.

Housing Corporation (Pty) Ltd and Another 1974 (1) SA 535 (A) this court held that such an agreement was not a contract in the legal sense. Trollip JA said at 539G-540B:

> 'It is true that the type of document now under consideration is termed under the Act and in industrial parlance an 'agreement', and it is said to be 'negotiated' or 'entered into', but technically it is not a contract in the legal sense. The parties to the industrial council are the employer(s) or employers' organisation(s) and trade union(s) or their representatives (see sec. 18). They do not contract inter se to produce the measure. They (or those of them concerned in the matter cf. sec. 48 (1)) may 'negotiate' or 'enter into' 'the agreement', but it is the industrial council as the corporate body that decides (a majority vote of two thirds of those present and entitled to vote sufficing sec. 27 (2) to (7)) whether to adopt it and transmit it to the Minister for consideration and promulgation. Moreover, it only becomes effective if and when the Minister deems it expedient to declare it binding by notification in the Gazette (sec. 48 (1)). It is noteworthy, too, that it is the Minister who fixes the period of its duration, and that he can also declare it (or parts of it) to be binding on employers and employees in the industry other than those who entered into the agreement and for an area additional to the area for which the industrial council is registered (sec. 48 (1) (b) and (c)).
>
> From all those provisions it is clear, I think, that an industrial agreement is not a contract but a piece of subordinate, domestic legislation made in terms of the Act by the industrial council and the Minister. (See the clear and concise summary of the position given by DOWLING J. in South African Association of Municipal Employees (Pretoria Branch) and Another v Pretoria City Council 1948 (1) SA 11 (T) at p. 17).'

In the light of this decision the legislature would have made it clear in the new LRA if it intended the phrase "collective agreement" to include industrial council agreements such as the one we are concerned with. Not having done so the definition of a "collective agreement" in the new LRA should be interpreted so as not to include such agreements." (own emphasis)

[33] The Constitutional Court, in *Fredericks & Others v MEC for Education & Training Eastern Cape & Others*[8], referred to this reasoning with approval, albeit *obiter dictum.*

[34] In light of what is expounded above, the following is apparent:

34.1. The parties agree that the Transvaal Agreement survived in terms of clause 12.1 of the Transitional Arrangements;

34.2. The parties agree that that the Transvaal Agreement was excluded from what is provided in clause 13 of the Transitional Arrangements;

34.3. The effect of being included in terms of clause 12 but excluded in terms of clause 13 is that the Transvaal Agreement's survival by way of the Transitional Arrangements was for a temporary period only;

34.4. Where the parties disagree therefore is on the issue of whether the Transvaal Agreement survived beyond this temporary period in some other way. The Applicant contends that it was incorporated in the terms of the Establishment Agreement. The Respondents dispute that this is what occurred.

[35] With regard to the Applicant's assertion that the Transvaal Agreement was incorporated by inference in terms of the Establishment Agreement, the Sixth Respondent points out that the parties in this matter were not party to the Transvaal Agreement – the implication being that the reference to "all existing collective agreements" would not have been intended by the parties to include an agreement to which they were not party.

[36] The First Respondent alleges that all of the provisions of the Transvaal Agreement have been superseded by other agreements. I accept the Applicant's argument that there is no evidence before the Court to substantiate this claim.

[37] While on the one hand, the Respondents, relying on *Coin Security* and *Fredericks supra,* have illustrated why they hold the view that the Transvaal Agreement is and

[8] [2002] 2 *BLLR* 119 (CC).

was not a “collective agreement” in terms of the 1995 LRA, the Applicant merely states that it is “clearly” a collective agreement.

[38] The Applicant has not provided convincing reasons why it claims that the Transvaal Agreement is a collective agreement for purposes of the 1995 LRA, other than to state that it meets the 1995 LRA definition as a matter of substance. This argument does not deal with the findings and remarks in the two aforementioned judgments. It appears to me that this Court is bound by the findings of the SCA that an agreement promulgated in terms of section 48 of the 1956 LRA is not a collective agreement.

[39] If the Transvaal Agreement is not a “collective agreement” then the Bargaining Council does not have jurisdiction to interpret or apply it. If it is accepted that the Transvaal Agreement is not a collective agreement, then it stands to reason that the parties to the Establishment Agreement could not have incorporated the Transvaal Agreement by inference when it referred to “existing collective agreements.” In this regard I agree with the finding of the Arbitrator made at paragraph 4.6 of the Award.

[40] That being the case, the Establishment Agreement (to the extent that it was ever even intended to) was not effective in incorporating the Transvaal Agreement. The Transvaal Agreement, in the absence of evidence that the Bargaining Council ever requested its extension in terms of 12(1)(b)(i) of the Transitional Arrangements, did in fact expire on 31 December 1997 (being the earlier of the possible dates referred to in clause 12.1 of the Transitional Arrangements).

[41] Had the parties to the Establishment Agreement intended to incorporate the Transvaal Agreement or any of its terms, they needed to have been explicit in this regard. The Applicant’s interpretation which purports to perpetuate the Transvaal Agreement is not a tenable one.

[42] The Award withstands scrutiny on either review test, given that the Arbitrator’s decision regarding the absence of jurisdiction of the Bargaining Council is correct. Accordingly, the application must fail.

Costs

[43] Both Respondents argued that costs ought to follow the result. The First Respondent argued that costs of two counsel were warranted.

[44] The Applicant indicated that this was something of a test case given that this Court had not been called upon to deal with clause 3.5 of the Establishment Agreement before, and did not press for costs with any vigour, and indicated that it would leave the issue of costs to the Court.

[45] While it is correct that there does not appear to be any case law directly on the issue relating to clause 3.5, what is clear is that the SCA has pronounced upon whether an Industrial Council Agreement promulgated in terms of the old section 48 is a collective agreement or not. The finding of the SCA in this regard firmly puts to bed the Applicant's contention that the Transvaal Agreement was incorporated in terms of the Establishment Agreement, as it could not have been. I see no reason that costs should not follow the result.

[46] In the circumstances, the following order is made:

Order

1. The application is dismissed.
2. The Applicant must pay the First Respondent's and Sixth Respondent's costs, including the costs of two counsel where two counsel were utilised.

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J. Kent

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv J G Van Der Riet SC
Instructed by:	Francois Du Plessis Attorneys
For the First Respondent:	Adv G Fourie SC and Adv Z Ngwenya
Instructed by:	Tshiqi Zebediela Inc
For the Sixth Respondent:	Adv H W Sibuyi SC
Instructed by:	Phungo Incorporated