

1

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Durban

Case no: PA2/09

In the matter between

Minister of Safety and Security

And

Safety and Security Sectoral
Bargaining Council

John Cheerie Robertson NO
Adri Badenhorst

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	Appellant
(3) REVISED.	
29/01/10 DATE	<i>Martin</i> SIGNATURE

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

ZONDO JP

[1] This matter comes before this Court as a special case as provided for in Rule 5(16) of the Rules of this Court by agreement between the appellant and the third respondent. The background to the facts of the matter appear from a statement of facts agreed to between the parties. I take the agreed facts from that statement. They are as follows:

“2.1 The parties accordingly agree that the appeal can be decided on the following common cause facts:

- 2.1.1 The Third Respondent made an application for a transfer from Information and Management System Management (ISM), Provincial Commissioner's Office, Zawelitsha to Community Service Centre, Mount Road Police Station, Port Elizabeth.**
- 2.1.2 The Appellant, in the person of Commissioner Dlanı disapproved the Third Respondent's application for transfer on the basis of the service delivery needs of the Appellant.**
- 2.1.3 The Third Respondent (being aggrieved at Commissioner Dlanı's decision) lodged a dispute about the interpretation and application of a collective agreement, challenging the decision taken by the Appellant to disapprove the application for a transfer.**
- 2.1.4 At the arbitration proceedings the Third Respondent argued that the Appellant and more particularly Commissioner Dlanı had breached Resolution 5 of 1992 and in particular clause 10 thereof in that the Appellant had failed to give any or proper consideration to the Third Respondent's interests vis-à-vis the interests of the Appellant. The Third Respondent argued that having regard to the facts of the matter the reason for the refusal of the application**

for a transfer namely that of "*service delivery needs*" was neither logical nor rational.

2.1.5 In short the Third Respondent argued at the arbitration proceedings that Commissioner Diani had failed to apply her mind to the factors which were listed in clause 10 of Resolution 5 of 1999 when coming to her decision to refuse the transfer.

2.1.6 The dispute between the aforementioned parties was ultimately arbitrated by the Second Respondent under the auspices of the First Respondent.

2.1.7 The Second Respondent in his arbitration award found that the decision of the Applicant not to approve the Third Respondent's application for a transfer was capricious illogical and irrational and hence invalid.

2.1.8 Although the arbitrator dealt with the categorisation of the dispute (as being a dispute about the interpretation and application of a collective agreement) the categorisation of the dispute was not placed in dispute by either of the parties at the proceedings.

2.1.9 The Court a quo corrected the Second Respondent's arbitration award only to the extent that it had declared the decision to disapprove the application for a transfer

invalid *ab initio*. The Court a quo set this finding aside. The Court a quo however effectively dismissed the application for review and thereafter made the arbitration award an order of Court."

- [2] The parties set out the legal issue before this court in par 3 of the document containing the special case. Par 3 of that document reads as follows:

"3. The Legal Issue

3.1 The parties agree that the sole issue before this Honourable Court is whether, as a matter of law, the Second Respondent was possessed of the requisite jurisdiction to determine the dispute which was referred to arbitration.

3.2 In this particular regard this Honourable Court will be required to decide whether the Second Respondent correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement.

3.3 The Third Respondent contends that the Second Respondent was correct in his categorisation of the dispute as one concerning the interpretation and application of a collective agreement.

3.4 The Appellant on the other hand will contend that although the dispute may have been dressed up as a dispute concerning the interpretation and application of a collective agreement, the real or true dispute before the

Second Respondent was in fact a dispute about the fairness of the decision taken by the Appellant to refuse the Third Respondent's application for a transfer (and that there was neither a dispute about the interpretation of the relevant collective agreement or whether it applied in the present circumstances)."

- [3] The issue before us is whether or not the Safety and Security Sectoral Bargaining Council ("**the SSBC**"), which is the first respondent in these proceedings, had jurisdiction to deal with the dispute that resulted in the arbitration award which was the subject of the proceedings in the Labour Court. That issue will be determined by how we answer the further question whether or not the second respondent correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement. In this regard the appellant contends that in substance the dispute was about the fairness of the third respondent's transfer whereas the appellant contends that it was a dispute about the interpretation or application of a collective agreement. The collective agreement to which the first respondent was referring was a document bearing the heading: **AGREEMENT REACHED By the Safety and Security Sectoral Bargaining Council**. It is also reflected as: "**agreement NO 5 of 1999 dated 8 October 1999**". It deals with the transfer policy and procedures.
- [4] The contents of the collective agreement apply both to the cases where a transfer is initiated by the employer as well as where the transfer is at the request of the employee. The collective agreement

) provides for the procedure to be followed in the processing of transfers and the factors that must be taken into account in deciding whether an employee is to be transferred or not. It also deals with the officials who have the authority to make decisions on transfers in various circumstances.

) [5] It was accepted by both parties' Counsel 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 and, therefore, the appeal would fall to be dismissed but that, if the dispute was about the fairness of the transfer, the SSSBC did not have jurisdiction and the appeal would have to be upheld.

) [6] In support of his contention that the dispute was about the interpretation or application of the collective agreement, Counsel for the first respondent drew our attention to various provisions of the collective agreement to emphasise the various factors which he submitted were either not taken into account by the official who made the decision to refuse the third respondent's request for a transfer or to show that the relevant official did not or could not have attached any weight to such factors or some of the factors. He submitted that that showed that the dispute was about the application or interpretation of the collective agreement.

) [7] I drew the attention of Counsel for the third respondent to the contention that had been advanced by Counsel for the appellant the previous week in this Court in the case of **Johannesburg City Parks v Mphahlanjani, J NO & others**, case no. JA31/08 in respect of which judgment had been reserved and had not yet been handed

down at that stage. In that case an employee who was aggrieved by his dismissal had referred an unfair dismissal dispute to the Local Government Bargaining Council at a time when a certain demarcation dispute had been referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). In that case the arbitrator arbitrated the dispute and issued an award in favour of the employee. In a subsequent review application brought by the employer, it was contended on behalf of the employer that the Local Government Bargaining Council had had no jurisdiction to arbitrate the dispute because the dispute was about the interpretation and application of the collective agreement containing the dispute procedure of the bargaining council and sec 62(3A) of the Labour Relations Act, 1995 was to the effect that proceedings about the interpretation and application of a collective agreement had to be adjourned whenever a question arose in such proceedings about a demarcation dispute. In that case Counsel for the employee had argued that the arbitration proceedings pursuant to which the arbitration award had been issued had not been in regard to a dispute about the application or interpretation of a collective agreement as required by sec 62(3A) of the LRA and that, accordingly, sec 62(3A) had no application. The argument presented on behalf of the employer in that case was that every dispute that is dealt with by a bargaining council in terms of its dispute procedure is a dispute about the application of a collective agreement.

- [8] Counsel for the appellant in the present matter was asked whether he would submit that the dispute that was before the arbitrator in the Johannesburg City Parks matter was a dispute about the

fairness of the dismissal of the employee or whether he would associate himself with the submission that it was a dispute about the application of a collective agreement as had been submitted by Counsel for the appellant in that case. Counsel for the appellant in the present case said that he could not associate himself with the submission that in that case the dispute before the arbitrator was a dispute about the application of a collective agreement. He submitted that the dispute in that case was a dispute about the fairness of a dismissal.

- [9] In the light of his answer, Counsel for the appellant in the present matter was asked why it could not be said that in the present matter the dispute that was before the second respondent was not a dispute about the application of a collective agreement but a dispute about the fairness of Commissioner Dlani's decision to decline the third respondent's request or application for a transfer. Although Counsel did not make any concession in this regard, he had considerable difficulty in making submissions on why the reasoning that persuaded him that the dispute before the arbitrator in the Johannesburg City Parks matter was a dispute about the fairness of a dismissal and not a dispute about the application of a collective agreement should not apply with equal force to the present case with the result that we should conclude that the dispute before the second respondent was about the fairness or otherwise of the transfer and not about the application of a collective agreement.

- [10] We see no distinction of any materiality in the two cases. Accordingly, we shall refer to the reasoning in the judgment of this

Court in the Johannesburg City Parks' case to decide the present appeal. I am of the view that a recognition of the distinction between a dispute, on the one hand, and, an issue in a dispute, on the other, is determinative of this matter.

[11] Judgment in the Johannesburg City Parks matter is to be handed down on the same day as this judgment but just before this one is handed down. At par 16 of the judgment of this Court in the Johannesburg City Parks matter the following explanation of the difference between a dispute and an issue in a dispute appears:

“[18] There are a number of areas in the LRA which contain references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolutions. Some of the sections of the LRA which contain such references are sections 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 or dealt with 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 collective agreement are applicable and or were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute.

- [19] 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 would be required to be resolved through arbitration in terms of the LRA.

- [20] 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 all 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 organisational rights, proceedings about wage disputes and proceedings concerning other disputes."

In my view this explanation applies to the present case. The dispute that was before the second respondent in this case was a dispute concerning the fairness or otherwise of Commissioner Dlan's refusal to approve the third respondent's application or request for a transfer and the application of the provisions of the collective agreement was an issue in a 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.

[12] In the light of the above I conclude that the first and second respondents had no jurisdiction to arbitrate the dispute in this case because that was a dispute concerning the fairness or otherwise of commissioner Dlani's decision not to approve the third respondent's request or application for a transfer and the first and second respondents had no jurisdiction to deal with such a dispute. Accordingly, the Court a quo erred in not granting the appellant's application for review.

[13] With regard to costs, Counsel for the appellant did not press for costs. In my view Counsel for the appellant adopted the correct approach in this regard.

[14] In the premises I make the following order:

1. The appeal is upheld.
2. There is to be no order of costs on appeal.
3. The order of the Labour Court is hereby set aside and, for it, the following order is substituted:

“(a) The review application is granted.


(b) It is hereby declared that the first and second respondents had no jurisdiction to arbitrate the dispute concerning commissioner Dlani's decision not to approve the third respondent's request or application for a transfer.

(c) There is to be no order as to costs.


(d) The arbitration award issued by the second respondent is hereby reviewed and set aside and, for it, the following ruling is substituted:

“(i) The Safety and Security Sectoral Bargaining Council has no jurisdiction to deal with this dispute and the referral thereof to this Council is dismissed.

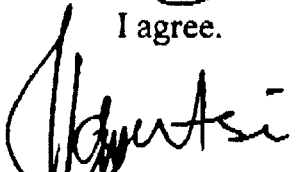
(ii) There is no order as to costs.”


Zondo JP

I agree.


Sangoni AJA

I agree.


Tlaletsi AJA

Appearances:

For the Appellant: Mr Kroon

Instructed by: State Attorney

For the Respondent: Mr M Grobler

Instructed by: J Gruss Attorneys

Date of judgment: 29 January 2010