REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C484/2012

In the matter between:

THE INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION obo GP BEZUIDENHOUT Applicant

and

WITZENBERG MUNICIPALITY First Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL Second Respondent

SINGH-BHOOPCHAND N.O. Third Respondent

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Date heard: October 10 2013

Date delivered: 22 January 2014

Summary: Review application iro a ruling that a Bargaining Council lacks jurisdiction to entertain a dispute pertaining to an 'occupational detriment' short of dismissal.

JUDGMENT

Rabkin-Naicker J

[1] The review before me concerns the following question: does the LRA afford a party an election between a referral to the Bargaining Council/CCMA and the Labour Court when that party alleges an unfair labour practice concerning an 'occupational detriment' other than dismissal. The third respondent found that the bargaining council lacked the requisite jurisdiction to entertain such a dispute. The application was brought substantially late. Because it is important that the questions raised by the review are pertinently dealt with by this court, I grant condonation for the matter to be heard.

[2] Given that this is a review of a jurisdictional ruling it is trite that this court must simply decide whether the arbitrator was correct or not. She found contrary to the applicants argument before her that : "it has not been the practice to interpret section 191(13)(a) to mean that an employee has a choice between referring such matters to arbitration or adjudication."

[3] Section 186 of the LRA includes the following in its definition of an unfair labour practice:

"(6) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."

[4] Section 191of the LRA deals with disputes about unfair dismissals and unfair labour practices. The applicant relies on the following subsections to found its argument:

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" (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-

(a) the council or the Commission must arbitrate the dispute at the request of the employee if-

…….

(iv) the dispute concerns an unfair labour practice;or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

……..

……..

(13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5) (b)."

[5] On a reading of the above sections the applicant submits that in terms of section 191 (5)(a)(iv) a bargaining council or the CCMA must arbitrate (in the peremptory sense) an unfair labour practice dispute if so requested by an employee. It further argues that the LRA does not state that an unfair labour

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practice in Section 186(2)(d) is excluded from the above section and neither is section 191(5)(a)(iv) qualified. In addition, whilst section 191(5)(a)(iv) is couched in peremptory language, section 191(13)(a) simply states that an employee "may" refer a dispute concerning a section 186(2) (d) unfair labour practice dispute to the Labour Court for adjudication.

[6] Following from the above Mr Niehaus for the applicant submits that:

> " With respect, there cannot be any question that based on the plain wording of the LRA an employee has an election to refer an unfair labour practice dispute concerning an alleged occupational detriment other than dismissal to either the Labour Court or arbitration."

[7] In a unanimous judgment of the Supreme Court of Appeal[1] Wallis JA recently summarized the current approach to statutory interpretation as follows:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

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made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[8] Taking the above approach into account I note as follows:

[8.1] section 195 (a) (iv) deals with an obligation on the CCMA to arbitrate a dispute if certain conditions are met;

[8.2] section 191(13)(a) deals with the right of an employee to refer a dispute to the labour court after it has been conciliated or 30 days have passed since the referral to the CCMA. As submitted on behalf of the first respondent the word **'may'** in this context means that an employee has a choice whether to refer the matter or not;

[8.3] where the LRA deals with the right of an employee to refer a dispute it uses the word 'may' because evidently it would be ludicrous if a statute obliged employees to refer all labour disputes to tribunals or to this court.[2]

[8.4] section 186 (2) (d) was added to the LRA in the 2002 amendments to the LRA in the wake of the promulgation of the Protected Disclosures Act 26 of 2000 – the material known to the drafters in its production. Section 4 of the PDA provides as follows:

"4 Remedies

(1) Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may-

(a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief; or

(b) pursue any other process allowed or prescribed by any law.

[2] See subsections 191(1) (a); (2)(a) and (12) which provides :(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

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(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-

(a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication." (my emphasis)

[8.5] it is clear from the above that the PDA contemplates a distinction between the unfair labour practices which were contained in Schedule 7 and now, subsequent to the 2002 amendments are provided for in section 186(2)(a), (b) and (c) of the LRA – the distinction being that an unfair labour practice in terms of section 186 (2) (d) may be referred to the labour court while the original ULP disputes may be referred to arbitration.

[9] Given all of the above, and in addition that Section 191(13) of the LRA contains a deeming provision[3] i.e. that a referral in its terms is deemed to be one made in terms of section 191(5)(b) - the provision dealing with disputes in which the labour court has jurisdiction and not the CCMA or a bargaining council, I am left in no doubt that the application in this matter must fail. Applicant's submissions that a purposive constitutionally sensitive

[3](a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5) (b).

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interpretation be given to the provisions in question, (while laudable, in that the purpose being that this would assist indigent litigants), cannot be sustained. The LRA reserves certain matters for adjudication in the labour court including and these deal with matters where constitutionally enshrined rights come into play. I do not believe this is a matter where a costs order should be granted.

[10] I therefore make the following order:

1. The application for condonation is granted
2. The review application is dismissed
3. There is no order as to costs

Rabkin-Naicker J

Judge of the Labour Court

Appearances:

For the Applicant: Mr M Niehaus of Minaar Niehaus Attorneys

For the Respondent: Ms A de Wet instructed by Marieke van Rooyen Attorney

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