REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C819/15

Not Reportable

In the matter between:

A R COETZEE & 49 OTHERS **Applicant**

And

THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL (FORMERLY THE PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL) **First Respondent**

FAITH NCUMISA BANTWINI N.O. **Second Respondent**

THE MEC OF THE WESTERN CAPE PROVINCIAL GOVERNMENT HEALTH DEPARTMENT **Third Respondent**

Heard: **February 18 2016**

Delivered: **July 12 2016**

JUDGMENT

RABKIN-NAICKER, J

[1] The applicants seek the setting aside of the Second Respondent's ruling made on 5 December 2006 under case number PHS139/06/07. The ruling was made in the wake of a conciliation hearing and found that the first respondent did not have jurisdiction to hear applicants' dispute. Applicants are now asking this court to direct the first respondent to issue a certificate that the dispute could not be resolved at conciliation and should be referred to arbitration for determination. The background to this application is set out below.

[2] On 13 June 2006 Professor Andreas Retief Coetzee and his colleagues referred a dispute to the first respondent (the Bargaining Council), on the basis that the third respondent failed to implement a collective agreement which entitled them to a non-pensionable scarce skills allowance.

[3] The second respondent dismissed the referral on grounds that the Bargaining Council did not have jurisdiction to conciliate the dispute. Her decision is recorded as follows:

"*Conciliation proceedings were scheduled for 13 November 2006 at Eben Donges Hospital in Worcester. The Respondent was represented by Mr J Barends while Applicants were represented by Mr GJ Rossouw and Professor A*

Coetzee from the University of Stellenbosch. Professor Andre Coetzee, one of the applicants, made some representations on behalf of his colleagues.

The dispute relates to non-payment of rural/scarce skills allowed by the Respondent, Department of Health as cited in the referral.

Mr Barends' counter argument was that the Applicants were not employees of the Department of Health and as such he does not have jurisdiction to represent the University of Stellenbosch who is the employer. All employees are currently employed by Stellenbosch University. Professor Coetzee's argument was that 49% of the Applicants' remuneration is paid by the Department of Health and the balance is paid by the University. This situation entitles them to be employees of the Department of Health.

On the facts before me, I have no legal basis to conciliate the matter as Applicants are contractually employed by the University not by the Department of Health

Ruling

1. *The Public Health and Welfare Sectoral Bargaining Council does not have jurisdiction over the matter.*
2. *The case is dismissed."*

[4] Instead of reviewing the second respondent's decision, the applicants, acting on legal advice, caused a Statement of Claim to be issued out of the Cape Town Labour Court under case number C751/2008 on 14 October 2008. The trial

proceeded in two parts: first on the merits before Acting Justice Cheadle on 5 March 2010, followed by a special plea of prescription before me three years later, on 20 March 2013.

[5] On the first issue, Cheadle AJ, purportedly sitting as an arbitrator, determined that the Applicants were entitled to the scarce skills allowance. On the second issue, I dealt with the special plea of prescription which related to the Applicants' claims for payment of the allowances, and determined that the Prescription Act did not apply to claims under the Act. The said judgments were appealed to the Labour Appeal Court

[6] The Labour Appeal Court delivered its judgment on 24 August 2015[1]. It concluded its judgment by:

a. Upholding the Third Respondent's appeal (on the basis that the Labour Court had no jurisdiction in the matter); and

b. Setting aside Cheadle AJ and my orders and replacing them with the following order:

"No order is made in respect of the Applicants' claim and no costs order is made."

[7] The LAC held as follows:

"[92] The real dispute between the appellant and the respondent is about the interpretation and application of the collective agreement. In particular, the respondents contend that they are covered by the terms of the collective

[1] Member of the Executive Committee of the Western Cape Provincial Government Health Department v Coetzee & others (2015) 36 ILJ 3010 (LAC)

agreement and the appellant denies it. The only manner of resolving that dispute is to interpret the collective agreement itself. That this is so is also apparent from Cheadle AJ's judgment on the merits. It was mainly, or fundamentally, about the interpretation of the collective agreement.

[93] In Ekurhuleni, this Court has held that the Labour Court is not empowered under the LRA or the BCEA to interpret and decide on the application of a collective agreement, particularly in circumstances where the interpretation (and the issue of application) is pivotal and fundamental (as in this case) and not merely incidental, to the resolution of the real dispute between the parties."

[8] The LAC found that it is for the forum and/or structures with jurisdiction to decide on the interpretation and application of the scarce skills agreement. I note that the LAC further noted, having found that the Labour Court had no jurisdiction in this matter, the following:

"[95] In the light of the conclusion, it is not necessary to deal with the other points in respect of which the parties were to address this Court, namely, the applicability of sections 62(3) and 62(3A) of the LRA. I, nevertheless consider that those sections may have constituted obstacles to the Labour Court whether properly sitting as such, or as arbitrator."

[9] Section 62 of the LRA provides in material part as follows:

"62 Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.

(2) If two or more councils settle a dispute about a question contemplated in subsection (1) (a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.

(3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1) (a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(3A) In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1) (a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings……"

[10] I invited the parties to address me on the issue of whether the section 62 route was the most appropriate one to follow *in casu*. Neither side advocated same. The third respondent argued that I should not grant condonation for the late filing of the review application. If I nevertheless did, they submitted that the second respondent was correct in law when she dismissed the applicants' referral in

2006. For the applicants, it was argued that condonation should be granted in view of the history and circumstances of this case, that the ruling should be set aside and the matter should be remitted to the bargaining council for arbitration.

[11] I am inclined to grant condonation to the applicants for the late filing of this review application, given the history of this matter. It is in the interests of justice to do so. However I am mindful that if this court were to set aside the ruling and engage in substituting it and addressing the merits of the real dispute between the parties, it would be treading into waters already traversed by Cheadle AJ, on subject matter already found by the LAC to be outside of this court's jurisdiction. I am also of the view that the essence of this dispute may well lead to a referral to the CCMA under section 62 of the LRA (something which can be done by either of the parties should they so elect, or by an arbitrator.)

[12] The ruling in question is of a very brief nature, with no reference to the documentary evidence that served before the second respondent. There is further no indication that the second respondent applied her mind to the interpretation of the collective agreement in question, in coming to her decision. The review of a jurisdictional ruling is generally substituted given it is concerned with whether the decision maker was correct on all the evidence before her. However, it is my view that where the record of the proceedings together with the ruling, does not reveal the basis for the decision in respect of the real issue in dispute, as in this case, it is preferable that the matter be remitted for re-hearing. The setting aside of the ruling does not constitute a finding on whether the first respondent has jurisdiction or not. That question if raised, will be dealt with in

arbitration proceedings before the first respondent. Given the history of this matter it is certainly preferable that as the LAC has held, the appropriate forum and/or structure delves into the real issue in dispute.

[13] A conciliation process has taken place in which there was no settlement between the parties and there is no need for me to direct the issuing of any certificate by the bargaining council as prayed for by the applicants. The ruling stands to be set aside. I make the following order:

[14] Order

1. Condonation is granted for the late filing of the review.
2. The ruling under case number PHS139/06/07 is reviewed and set aside.
3. The dispute is referred to the first respondent to be arbitrated by an arbitrator other than second respondent.
4. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicants: Rob Stelzner SC instructed by Mc Roberts Attorneys

Respondents: A Oosthuizen SC and B Joseph instructed by the State Attorney