BREACH OF A COLLECTIVE AGREEMENT: DOES THE LRA PROVIDE A REMEDY IN SECTION 24?

Minister of Safety and Security v Safety and Security Sectoral Bargaining Council [2010] 6 BLLR 594 LAC

1 Introduction

In a recent judgment of the Labour Appeal Court the application of section 24 of the Labour Relations Act (66 of 1995, hereinafter "the LRA") was considered, and curtailed. In this case note the judgment of *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council* ([2010] 6 BLLR 594 LAC, hereinafter "*Minister of Safety and Security*") is evaluated. In addition, an amendment to section 24 is proposed with a view to clarifying the ambit of the dispute-resolution procedure contained in that section of the LRA.

2 Background and facts

The third respondent (hereinafter "the employee") worked as a police officer. She requested a transfer from one division to another from the Provincial Commissioner's Office in Zwelitsha to the Community Service Centre at Mount Road Police Station, Port Elizabeth.

The Regional Commissioner turned down the application for transfer on the basis of the service-delivery needs of the South African Police Services (hereinafter "SAPS"). The employee consequently referred a dispute regarding the interpretation or application of a collective agreement to the Safety and Security Sectoral Bargaining Council (hereinafter "the SSSBC") in terms of section 24 of the LRA.

At the arbitration proceedings the employee contended that SAPS and particularly the Regional Commissioner had breached Resolution 5 of 1992, a collective agreement concluded under the auspices of the SSSBC. It was argued that the commissioner had failed to give proper or any consideration to the respondent employee's interests *vis-à-vis* the interests of SAPS as regulated in the applicable collective agreement. The categorization of the dispute as a dispute about the interpretation and application of a collective agreement as envisaged in section 24 of the LRA was not placed in dispute at the arbitration proceedings.The arbitrator found that the decision of the

Regional Commissioner not to approve the application for a transfer was capricious, illogical and irrational and accordingly invalid *ab initio.*

3 The review judgment of the Labour Court

The arbitration award was taken on review to the Labour Court. The Labour Court corrected the award only to the extent that the arbitrator had declared the decision void *ab initio.* The rest of the award was not set aside and the consequence was that the review application was in essence dismissed. The award was also made an order of the Labour Court.

4 The Labour Appeal Court judgment

SAPS appealed against this judgment to the Labour Appeal Court. The only challenge before the Labour Appeal Court was whether the arbitrator had had the requisite jurisdiction to determine the original dispute referred to arbitration. In this regard the issue was whether the dispute had been correctly classified as a dispute concerning the interpretation or application of a collective agreement as envisaged in section 24 of the LRA.

It was contended on behalf of SAPS that, although the dispute was referred as a dispute concerning the interpretation and application of a collective agreement, the real or true dispute before the arbitrator was in fact a dispute about the fairness of the decision taken by the Regional Commissioner to refuse the employee's application for a transfer. It was contended further that the present dispute did not concern the interpretation of the relevant collective agreement. Nor was the issue as to whether or not it applied in the present circumstances disputed.

Referring to *Johannesburg City Parks v Mphahlani* NO ([2010] 6 BLLR 585 LAC) the court distinguished between a main dispute and an issue in dispute and concluded that the dispute that was before the arbitrator in this case was the fairness of the decision of the Regional Commissioner to refuse the request of the employee to be transferred. One issue in dispute that arose in this case concerned the application of the relevant collective agreement. It was an issue that might have had to be dealt with in order to resolve the real dispute. The main dispute did, however, not relate to an application of the collective agreement.

The court accordingly concluded that the abitrator had no jurisdiction to deal with the refusal to transfer the employee as a dispute concerning the interpretation and application of a collective agreement envisaged in section 24 of the LRA. The appeal was accordingly upheld and the review application was granted. The arbitration award was consequently set aside.

5 Disputes about the Interpretation and Application of Collective Agreements

A collective agreement is defined in section 213 of the LRA as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other had a) one or more employers; b) one or more registered employers' organisations; or c) one or more employers and one or more registered employers' organisations".

Section 24 of the LRA provides that every collective agreement, excluding an agency shop or closed shop agreement, must contain a procedure to resolve any dispute through conciliation and, if the dispute remains unresolved, to determine it by means of arbitration. A dispute of this nature may be referred to the CCMA if the collective agreement does not provide for a dispute-resolution procedure required in the section, or the procedure is not operative, or any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

It is in terms of the procedure contained in the collective agreement that the employee in the present case referred a dispute to the SSSBC for conciliation and arbitration.

6 The meaning of "Interpretation and Application" of Collective Agreements

There exists a dispute about the interpretation of a collective agreement if the parties to the agreement disagree over the meaning of "particular provision or provisions".

It follows that a party to a collective agreement cannot refer a dispute in terms of section 24 concerning the interpretation of a collective agreement when both parties agree on the terms of the agreement (*PSA v Provincial Administration Western Cape* 2001 5 BALR 497 (CCMA)).

A dispute concerning the application of a collective agreement typically arises when the parties to the agreement disagree over whether the agreement applies to a particular set of facts or circumstances (Grogan *Collective Labour* (2010) 132).

A wider interpretation of "application" is to be found in *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* ([2000] 2 BLLR 196 (LC)), where Revelas J held that:

> "a 'dispute about a collective agreement' applies to the situation where there is non-compliance with a collective agreement and one of the parties wished to enforce its terms".

Brassey (*Employment and Labour Law – Commentary on the Labour Relations Act* A3-33) also opines that an application dispute is wider and

covers disputes over application in both its senses: the applicability of a section and the manner in which it should be applied.

Prior to the present judgment of the Labour Appeal Court arbitrators generally adopted the approach to order compliance with collective agreements in terms of section 24, thereby adopting the wider meaning of the word "application" (see, *eg*, *Bargaining Council for the Furniture Manufacturing Industry v Manisanker t/a LR Craft* (2001) 22 ILJ 1431 (CCMA)).

7 Enforcement of compliance of Collective Agreement by Bargaining Councils

Section 33A of the LRA provides that despite any other provision of the LRA, a bargaining council may monitor and enforce compliance of its collective agreements by authorizing a designated agreement to issue a compliance order. Any unresolved dispute concerning compliance with any provision of a collective agreement may thereafter be referred to arbitration by an arbitrator appointed by the bargaining council. Section 33 provides for the appointment and duties of designated agents of bargaining councils.

The consequence of section 33 and 33A is that bargaining councils may establish a procedure for the compliance with bargaining council collective agreements. Collective agreements of such bargaining councils may accordingly be enforced by means of arbitration.

It is required of a bargaining council to request the Minister of Labour to appoint designated agents before this compliance procedure may be used, and the arbitration procedure of section 33A to enforce compliance may be resorted to. Not all bargaining councils have requested the Minister for the appointment of designated agents, however. In the public service, for example, only the Education Labour Relations Council, has requested the Minister to appoint a designated agent, its General Secretary. The other public-service bargaining councils have not utilized sections 33 and 33A.

8 The position before the present judgment

It is apparent that section 24 of the LRA adequately provides for the resolution of interpretation disputes of collective agreements. It also adequately provides for application disputes in the narrower sense, namely whether or not a collective application applies to a particular set of facts or circumstances.

If there is breach or non-compliance with a bargaining council agreement, such non-compliance may be referred to abitration in terms of section 33A of the LRA, if the Minister of Labour has appointed a designated agent or agents upon request of the bargaining council as envisaged in section 33A. Such a remedy is not availiable in the case of breach of collective agreements not concluded at a bargaining council, or bargaining council agreements where the council has not requested the appointment of a

designated agent or agents, or such request was refused by the Minister of Labour.

In the light of the different interpretations of the word “application” it is submitted that, in order to achieve certainty, section 24 of the LRA be amended so as to include disputes about “compliance” in addition to disputes about the “interpretation” or “application” of a collective agreement.

Such an amendment will have the effect of granting an enforcement opportunity of collective agreements in terms of section 24 in instances where section 33A does not apply. Compliance with collective agreements by means of arbitration will thereby be assured.

9 The effect of the judgment of the *Minister of Safety and Security*

The LAC judgment still casts a shadow on section 24, even amended as suggested as above. The court distinguished in the judgment between the *main dispute* as opposed to an *issue in dispute*. In this matter the main dispute was regarded by the LAC as the fairness of a decision not to transfer the employee.

An issue in dispute might have been, according to the LAC, the application of the collective agreement.

In essence, what the LAC said is that in this case where the fairness of the transfer is challenged as main dispute, an issue that could arise as an issue in dispute was whether the Regional Commissioner had complied with the requirements of the applicable collective agreement. In this regard it appears that the court gives the wider meaning to application, and not the narrower meaning suggested by Grogan. It is submitted that this view of the LAC is flawed.

It is submitted that the same set of facts may give rise to different causes of action. If the Regional Commissioner failed to comply with the requirements agreed to a collective agreement, it amounts to breach of the collective agreement and a dispute may be couched in such terms.

On the facts of *Minister of Safety and Security* this is what the employee did. In our view the only problem that faced her at arbitration should have been whether the breach or non-compliance of the Regional Commissioner amounted to a dispute about the *application* of the agreement or not.

It is incorrect for the LAC to suggest that the arbitrator should have decided that the main dispute concerned alleged unfair action about a decision not to transfer and then to conclude that he or she had no jurisdiction concerning the application of the collective agreement regulating the decision.

In the present case the consequence is that the employee may have no remedy. The unfair labour-practice definition in section 186 (2) of the LRA does not include a transfer, and the employee may only rely directly on

section 23(1) of the Constitution if she challenges the constitutional validity of section 186(2) of the LRA on the basis that it limits the Constiutional right to fair labour practices.

What she asked, and what the arbitrator determined, was that SAPS should have complied with the applicable collective agreement. The employee was denied this right by the LAC when the court proposed the unnecessary distinction between a *main dispute* and an *issue in dispute*.

The Supreme Court of Appeal explained the position of different causes of action on the same facts in *South African Maritime Safety Authority v Mckenzie* ([2010] ZASCA 2) with reference to the Constitutional Court judgment of *Gcaba v Minister of Safety and Security* ([2009] 12 BLLB 1143 (CC)) as follows:

> "the question … is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts …"

It is submitted that the LAC should have approached the present case on this basis, and should only have determined whether the dispute concerned the *application* of the relevant collective agreement as envisaged in section 24. An interpretation of the word "application" would have been more useful and necessary with a view to presenting certainty in regard to whether or not the narrower or the wider approach to the meaning of the word should be adopted by arbitrators appointed in terms of section 24 of the LRA.

10 Conclusion

It is submitted that the distinction suggested in *Minister of Safety and Security* between a main dispute and an issue in dispute in cases concerning compliance with a collective agreement is unnecessary and unhelpful.

The same set of facts may give rise to different causes of action, and, should the challenge amount to a challenge of non-compliance of a collective agreement, jurisdiction of the arbitrator in terms section 24 of the LRA is established, even if the same facts may also establish an unfair labour practice or any other claim (like an unfair dismissal which was the case in *Mphahlani supra*). It is unnecessary for the arbitrator to determine whether there exists another ("main") dispute as suggested by the LAC. The only question is whether the facts establish jurisdiction of the arbitrator over the particular referred dispute.

Finally, in order to establish certainty about whether or not compliance or enforcement disputes of collective agreement may be dealt with in terms of section 24 of the LRA it is proposed that section 24(1) be amended as follows:

> "(1) Every *collective agreement* excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any

dispute about the interpretation or application of or compliance with the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration" (underlined words to be inserted in amended section 24).

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