IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1965/2005

In the matter between:

JOHN PHILLIP BOTHA	APPLICANT
and	
BLUE BULLS COMPANY (PTY) LIMITED	1ST RESPONDENT
THE SOUTH AFRICAN RUGBY UNION	2ND RESPONDENT

JUDGMENT

NEL, AJ:

[1] I have issued my order herein earlier and these are the reasons therefore. The Applicant herein approached this Court on an urgent basis for the following relief:

> "1. That in accordance with Rule 8 of the Rules for Conduct of Proceedings in the Labour Court this Honourable Court dispense with the time periods stipulated in Rule 7 thereof and order that this application be dealt with as a matter of urgency.

2. That, in terms of Section 158(1)(a)(iv) of the Labour Relations Act, 66 of 1995, a declaratory order in the following terms be made:

2.1 the contract entered into between the Applicant and the First Respondent on 18 September 2006 be and is hereby declared void *ab initio.*

alternatively to prayer 2.1.

2.2 the contract entered into between the Applicant and the First Respondent on 18 September 2006 be and is hereby declared voidable at the instance of the Applicant.

alternatively to prayer 2.2

2.3 the contract entered into between the Applicant and the First Respondent on 18 September 2006 be and is hereby declared to have been cancelled by the First Respondent on 26 February 2007.

alternatively to prayer 2.3

2.4 the contract entered into between the Applicant and the First Respondent on 18 September 2006 read with the SPC 2007 be and is hereby declared to have been

rendered incomplete and therefore unenforceable on 26 February 2007.

alternatively to prayer 2.4

2.5 the Applicant is a free agent and is entitled to cancel the contract entered into between the Applicant and First Respondent on 18 September 2006 on:

2.5.1 7 days written notice to the First Respondent, in terms of clause 2.1.2 of the 2007 CA;

alternatively

2.5.2 4 weeks written notice to the First Respondent, in terms of clause 2.1.2 of the 2007 CA read with Section 37(1)(c)(i) of the Basic Conditions of Employment Act 75 of 1997.

alternatively to prayer 2.5

2.6 on 10 days written notice to the First Respondent in terms of clauses 18.1.1 and 18.2 of the SPC 2007 to remedy the breach and the First Respondent's failure to so do the Applicant is entitled to cancel the contract entered into between the Applicant and the First Respondent on 18 September 2006.

alternatively to prayer 2.6

2.7 the First Respondent has, through its conduct, rendered the Applicant's continued employment by the First Respondent intolerable as contemplated in clause 18.1.2 of the SPC 2007, thereby entitling the Applicant to terminate the contract entered into between the Applicant and the First Respondent on 18 September 2006.

3. That the First and Second Respondents be ordered to furnish the Applicant with a clearance which conforms with the requirements for the issuance thereof in accordance with Appendix 1 of Regulation 4 of the International Rugby Board Regulations.

4. That the First Respondent be ordered to pay the costs of this application.

5. Further and/or alternative relief."

[2] The matter was to be heard on 30 April 2008, but, by prior agreement between the parties, was postponed to 30 May 2008. The parties also agreed on the dates for the exchange

of papers. The First Respondent reserved all its rights, particularly in terms of the urgency of the matter.

[3] Whilst the Second Respondent ("SARU") filed their notice of intention to abide the decision of this Court, it filed an affidavit together with annexures, as it regarded it as "important to ensure that the Honourable Court is possessed of all the relevant facts, when adjudicating the matter".

[4] Mr Wallis SC appeared before me on behalf of the Applicant ("Botha"). Mr Maritz SC appeared for the First Respondent ("the Blue Bulls") with Mr Van Graan SC. By the time that argument concluded, there were disputes of fact in regard to some of the relief sought by Botha that could not be resolved in motion proceedings without oral evidence being heard. For that reason, and some others not necessary for me to deal with, Mr Wallis indicated that Botha only persisted in seeking the relief prayed for in prayer 2.1, alternatively 2.5 of the notice of motion together with the relief sought in prayers 3 and 4 thereof.

Urgency

[5] I turn to first deal with the question of urgency. In summary, Botha alleged that the matter was urgent because in terms of

Section 22 of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution"), he was guaranteed the right to freely choose his trade, occupation or profession. He contended that he was being unlawfully precluded by the Blue Bulls from taking up employment with a different employer and this violated his stated fundamental right to choose his trade, occupation or profession freely.

[6] In addition, Botha alleged that the Blue Bulls were violating his constitutional rights in terms of Section 13 of the Constitution, not to be subjected to forced labour. He said that he was being forced to tender his services to the Blue Bulls by reason of it refusing to issue him with a clearance certificate under circumstances where, based on the facts and law applicable herein, it had no lawful grounds upon which to enforce his continued service to it.

[7] Botha further, in support of his allegations that the matter was urgent, said that he had been offered employment with a rugby club in Toulon, France, and that he wished to accept such offer of employment. His acceptance, he said, had been made conditional upon him being issued with a clearance in accordance with Regulation 4 of the International Rugby Board's Regulations. The refusal of the Blue Bulls to issue

such clearance precluded Botha from taking up employment with the rugby club in Toulon, France, according to Botha.

[8] Mr Maritz argued that Botha had not made out a case for urgency. He criticised Botha for not disclosing the terms of the offer he had received from the club in France. Under these circumstances, he argued that the Court was unable to assess the urgency. He submitted that in the absence of the terms of the contract, I could not assess what Botha's commitments were and when these were to commence.

[9] Mr Maritz further contended that such urgency as may have now come about was entirely self-created by Botha. In this regard he reminded me that Botha, as early as 7 February 2008, had requested the Blue Bulls to be released from his contract. The application herein was issued more than two months later, on 22 April 2008. It was submitted by Mr Maritz that Botha's explanations for the delay provided no justification for bringing this application as an urgent matter and for placing the Blue Bulls under extreme pressure by affording it only four days within which to file its answering affidavit.

[10] As I said, agreement was in the event reached between the parties that the Blue Bulls would file its answering affidavit on 12 May 2008. Botha replicated by 23 May 2008.

[11] Mr Wallis contended that the initial application sought that the time period stipulated in Rule 7 of the Rules of this court be attenuated. However, because of the arrangement in respect of the filing of papers, the Blue Bulls were afforded more than the ten days provided for in Rule 7(4)(b) of the rules of this court to deliver its notice of opposition and its answering affidavit. Therefore, according to Mr Wallis, the issue of urgency had fallen away.

[12] As far as urgency remained relevant, he further contended that there were a number of reasons why it was appropriate that the matter should be dealt with urgently. He said that it was highly desirable that there should be clarity about whether Botha was bound by his contract of employment. That, he suggested, was particularly so herein as the effect of a delay in determining the matter may mean that the opportunity afforded to Botha to take up employment with a club in France would disappear if the matter could not be resolved before the commencement of the next rugby season in Europe. This, Mr Wallis said would be particularly harsh on someone whose working life in his chosen career was

necessarily limited and who must exploit his skills during that period in order to secure his financial future.

[13] Mr Wallis further urged me to consider the fact that at present Botha was compelled to continue playing for the Blue Bulls in order both to maintain employment and his fitness and skill levels so as to exploit his contract with the national team. It was submitted that Botha was not in a position where he could simply withhold his services. He argued that it was therefore desirable that the Court should clarify the matter as soon as possible, in the interest of both parties. That would also enable the Blue Bulls to make its plans for the future, an aspect which it stressed was important to it.

[14] Had the matter been heard on the original date of set down of 30 April 2008, and the Blue Bulls had argued that the Applicant's papers, as it then stood, did not establish urgency, I am of the view that it may very well have been successful on that point at that time. Botha did not, in my view, make out a clear case for the degree of urgency within which he then wanted the matter to be heard. Botha sensibly gave the Blue Bulls sufficient time to file its answering papers. Botha has replicated. I am of the view that the matter is now ripe for hearing within the present timeframe and that sufficient cause now exists to dispose of the matter.

Background

[15] Botha first concluded a contract with the Blue Bulls for a fixed term from 1 November 2002 to 31 October 2005. Before the term of that contract had expired, at the request of Botha, a second fixed term contract was concluded between the parties covering a three year period from 1 November 2004 to 31 October 2007. It is apparent that this second contract was at a far greater remuneration than Botha's first fixed term contract with the Blue Bulls had required Botha's employer to pay him.

[16] During the course of the second year of Botha's second fixed term contract, he again sought a revision of his contract. Another rugby union, the Sharks, was apparently willing to offer Botha more than the Blue Bulls. Botha, according to the Blue Bulls, wanted security as far as his future was concerned, and he again claimed an increased remuneration. Although Botha's second contract still had more than a year of its term to run, the Blue Bulls again accommodated Botha. The parties then entered a new third fixed term contract, this time covering a five year period from 1 November 2006 to 31 October 2011. The Blue Bulls allege that, as a result of Botha's specific request, it was the first time that it had ever

contracted a player for such a lengthy period. Again Botha's remuneration was substantially increased from the level he was earning in terms of his then still current second fixed term contract.

[17] It is this third fixed term contract which is the subject matter of the application before me. Mr Bernard Habana, the father of one of Botha's teammates, negotiated this contract with the Blue Bulls on behalf of Mr Botha. This contract was executed by the parties on 18 September 2006. I will further refer to this contract as the September 2006 contract. I will revert to the relevant clauses of the September 2006 contract in due course.

[18] Botha alleges that he continued to render services to the Blue Bulls in terms of the September 2006 contract although one issue relating to the terms and conditions of his employment in respect of the use of his image by the Blue Bulls and its sponsors remained outstanding. As there was a factual dispute between the parties on this issue, Botha did not pursue the relief he sought in respect hereof. Botha said that during the course of January 2008 he had received an offer of employment from a rugby club in Toulon, France. For him to take up such offer he was obliged to obtain a clearance from both the Blue Bulls and the SARU. As the playing of

professional rugby is governed by the rules and regulations of the International Rugby Board (the "IRB"), Botha and the Blue Bulls are bound by the IRB's regulations. IRB Regulation 4 in essence requires both the SARU and the Blue Bulls to provide Botha with a clearance before he would be able to take up employment with another Rugby Union also falling under the jurisdiction of the IRB.

[19] As Botha wanted to take up the employment offered by the French club, he approached the Blue Bulls. He made an oral request to be released from his contract and followed it up in writing on 7 February 2008. Some controversy surrounded the question whether Botha was asked to submit his request in writing. Nothing turns on this. Botha stated the following in his request:

> "Na aanleiding van ons gesprek gistermiddag, rig ek my versoek dat ek van my kontrak met die Blou Bulle Rugby Unie onthef word.
>
> Weereens en om op die rekord te plaas, die rede vir hierdie versoek is dat ek 'n aanbod gekry het wat my familie se toekoms finansieel sal verseker. Ek sal graag die opheffing van die 1ste April van krag wil maak.

> Ek wil ook beklemtoon dat hierdie versoek geen betrekking het tot my verhouding met die Bloubul familie en nog minder my begeerte om nog voortans (*sic*) vir die Springbokke te speel. (Dit is alleen 'n finansiële besluit).
>
> Ek wil julle bedank vir die afgelope 7 jaar. Ek het net goeie herinneringe en dit was die moeilikste besluit wat ek tot dusver nog oor my loopbaan moes neem."

[20] On 11 February 2008, the Blue Bulls advised Botha in writing that his request to be released from his contract was refused. Reference was made a few times in this reply to the fact that Botha had a five-year fixed term contract with the Blue Bulls and that they intended holding Botha to the contract, which engaged his services with the Blue Bulls until 31 October 2011.

[21] Botha was only able to consult his lawyers on 21 February 2008 in order to obtain legal advice regarding his September 2006 contract. Numerous communications took place between the legal representatives of the parties. Various issues were raised therein with claims and counterclaims being made on

behalf of the parties, the details of which are not relevant hereto. By way of summary only, as most of the issues traversed need no longer be determined by me, the matters raised ranged from Botha claiming that the Blue Bulls, in breach of its contractual obligations, owed him 125 days accumulated leave, and with Botha demanding that the breach be remedied.

[22] It was denied on behalf of the Blue Bulls that it was in breach of its leave obligations. It further directed Botha's attention to the dispute and grievance procedure clauses of the prevailing players agreement, directing Botha to seriously consider these procedures before threats of civil action were made to his employer.

[23] The Blue Bulls also indicated that it would reluctantly consider Botha's release from his September 2006 contractual duties subject to the negotiation and payment of an acceptable transfer fee. Botha elected to approach this Court, as he put it, "in order to enforce (his) rights."

Collective Agreements

[24] Before I turn to deal with Botha's two specific remaining claims, it is necessary to record the contractual framework,

which in my view is applicable between the parties herein. Botha is a member of the South African Rugby Players Association ("SARPA"). The Blue Bulls in turn is a member of the South African Rugby Employer's Organisation ("SAREO"). As such it was common cause between the parties that Botha and the Blue Bulls are bound by the terms of collective agreements resulting from centralised collective bargaining between SARPA and SAREO on behalf of their respective employee and employer members.

[25] It was also common cause between the parties that the collective agreements concluded between SARPA and SAREO during 2005 ("the 2005 CA") and on 26 February 2007 ("the 2007 CA") were binding on both Botha and the Blue Bulls. The parties were however not in agreement on the interpretation of some of the relevant clauses of particularly the 2007 CA. I will revert to this later.

[26] Clause 3 of the 2005 CA has the specific heading "**Standard Players Contract 2005**". Clause 3.1 of the 2005 CA reads:

> *"The parties have agreed on standard terms for the employment of professional rugby players by the Provinces during the year 2005. These terms are embodied in a standard contract (hereinafter "the*

Standard Player Contract 2005") which forms Annexure "A" to this agreement.

The 2005 CA then continues (in clause 3.2) to stipulate the minimum monthly remuneration the specific provinces should pay to a stipulated minimum number of players. Clause 3.3 of the 2005 CA states that:

"For the purposes of Clause 3.2 a player is considered employed under the Standard Players Contract 2005 if the player is contracted for at least 12 months and earns at least the minimum remuneration."

The 2005 CA has attached to it, as Annexure "A" thereto, a Standard Player Contract 2005 which requires the insertion of numerous details, such as the identity of the parties, personal details of the player entering the agreement, the club to which the player is affiliated and commencement and termination dates of the agreement. Numerous clauses contain instructions as to its deletion in respect of certain Provinces. Then there are also a number of schedules attached to the SPC 2005, one requiring certain disclosures personal to the player. Another schedule requires the player's salary package, match fees, incentive- or win bonuses to be filled in

by the parties together with the specific player's identification and other details.

[27] The 2007 CA does not specifically refer to a Standard Player's Contract in the body of the collective agreement itself (as does the 2005 CA). Clause 2 of the 2007 CA appears to be the one in effect replacing clause 3 of the 2005 CA. Clause 2 of the 2007 CA reads as follows:

> *"2.* ***Contracting of Players by the Provinces***
>
> *2.1 A Province may contract a Player –*
>
> *2.1.1 on the terms set out in this Agreement and in the form of Schedule 1; or*
>
> *2.1.2 on any other basis, in which event the Player shall, notwithstanding anything to the contrary contained in any contract between the Province and the Player, be a 'free agent' and entitled to terminate his employment with the Province on 7 day's notice to the Province.*

2.2 Any term in any contract other than the Standard Player Contract, whether such term is written or oral, express or implied, which has the effect directly or indirectly of restraining the Player from terminating his employment other than as contemplated in sub-clause 2.1.2 of this Agreement shall be of no force and effect between the parties."

[29] The 2007 CA does not have a Standard Player Contract as an annexure with schedules, but instead has a Schedule 1, which is headed *"Employment Contract"*. On the first page it leaves the name of the province and the full names of the player with whom the employment contract is to be entered into to be filled in. Schedule 1 in turn refers to a number of annexures, which are attached thereto. In addition, by way of example, the number of years or months that the employment contract would endure, the commencement– and termination dates are to be filled in on Schedule 1 by the parties. Elsewhere in Schedule 1, specific clauses are indicated which should be deleted from the contract by stipulated provinces. The first

six annexures to Schedule 1 all require declarations, disclosures and various bits of personal information to be made and supplied by a player.

[30] The parties have referred to the Standard Player Contract attached as Annexure "A" to the 2005 CA as "SPC 2005" and to Schedule 1, attached to the 2007 CA, as "SPC 2007". I continue to do so herein.

[31] As appears from the September 2006 contract, it expressly regulates the applicability of both the SPC 2005 and the SPC 2007. Clause 5 of the September 2006 contract reads as follows:

> *"5.* ***STANDARD PLAYERS' AGREEMENT***
>
> *5.1 The additional detailed conditions valid for this agreement will be in accordance with the stipulations contained in the SARPA Standard Players' Agreement, with the understanding that, in the event that the Company, as a member of SAREO, is bound to it, this agreement will be replaced by one or more standard agreements for the respective rugby*

competitions, subject to the condition that the compensation arising from such agreements may not, in total, be less than the compensation mentioned in paragraph 1.

5.2 It is recorded that the 2007 Standard Player Contract (hereinafter referred to as "2007SPC") is currently under negotiation between the South African Rugby Employers' Organisation and the South African Rugby Players' Association and that it will be completed and signed by 30 September 2006. Pending signature by (sic) the 2007SPC and subject to clauses 1, 2, 3 and 4 of this offer, the Player shall be employed on the terms and conditions set out in the 2005 Standard Player Contract, which is annexed to this offer as Annexure "A".

5.3 The Parties agree that once the 2007SBC (sic) has been completed and signed it will, save for the provisions of clauses 1, 2, 3 and 4 of this offer, replace this agreement in its entirety

and the Player irrevocably agrees to be bound by the terms and conditions set out therein."

[32] It is, as I said, common cause between the parties that the 2007 CA applied to them at all relevant times herein by operation of law from the date it was concluded between the respective employer- and union organisations. The question whether the terms of the SPC 2007 (Schedule 1 to the 2007 CA) without more also applied to players is, however, far from settled. The question is whether the SPC 2007 and its annexures had to first be filled in by the parties where it contained blank spaces and where a number of other specific details and undertakings personal to a particular player had to be provided, and then be signed by the parties, before it could be regarded as binding on the parties? I will also deal with this question in determining whether to grant Botha any of the relief he still claims.

<u>The Effect of Clause 9 of the 2007 CA on Botha's claim that his September 2006 contract is void *ab initio*.</u>

[33] As I said, it is common cause between the parties that a collective agreement binding on them had been entered into on 26 February 2007. The 2007 CA contains a dispute

resolution procedure in clause 9 thereof in the following terms:

*"9. **Disputes***

9.1. Any dispute between

9.1.1. the parties to this Agreement; or

9.1.2. a Province and a Player –

arising out of the interpretation, application or implementation of this Agreement, or of an Agreement between a Province and a Player shall, unless otherwise resolved amongst the parties to the dispute, be referred to, and determined by, final and binding arbitration in terms of this clause.

9.2. The terms of reference of the arbitration are those provided in sub-clause 9.3 to 9.6 of this agreement;

9.3. A dispute contemplated in sub-clause 9.1 must be referred to Tokiso Dispute Settlement (Pty) Limited ('Tokiso').

9.4. The parties shall attempt to agree on an arbitrator on Tokiso's panel of

Arbitrators to arbitrate the dispute and if they are unable to do so either party may request the Director of Tokiso to appoint an arbitrator, in which event the Director's decision will be final and binding on the parties.

9.5. The Arbitrator appointed in terms of clause 9.4 will have the power –

9.5.1. to attempt to mediate the dispute prior to the arbitration with the parties' consent;

9.5.2. to make an appropriate award with due regard to the issue/s in dispute, the facts of the case and the law;

9.5.3. to decide upon the procedure that will be used at the arbitration;

9.5.4. to make a costs award, on application of a party, that the arbitrator considers appropriate. A cost award can be made for reasons allowed by law. Examples of reasons include a party's non-appearance or late

appearance at the arbitration proceedings or, if the arbitration is delayed, cancelled or postponed or adjourned either through the fault of a party or at the request of a party;

9.6. The parties will share equally the cost of arbitration.

9.7. The arbitrator's decision shall be final and binding on the parties."

[34] Mr Maritz submitted that it was common cause on the papers that the Blue Bulls is a "Province" and Botha is a "Player" as contemplated by clause 9 of the 2007 CA. He contended that by reason of the use of the word "shall" in clause 9, it was peremptory that a party must invoke it. The Blue Bulls in its answering affidavit alleged that as Botha failed to follow the dispute resolution procedure, he was in law precluded from approaching this Court for the relief claimed.

[35] Mr Maritz further contended that the binding nature of the dispute resolution procedure contained in clause 9 of the 2007 CA was specifically raised and "pleaded as a special defence" in paragraph 4 of the answering affidavit of the Blue Bulls. This, he argued, was permissible in law and in

accordance with longstanding practice. He referred me to the matter of Delfante v Delta Electrical Industries Limited 1992 (2) SA 221 (CPD) at 226 E - H and the authorities referred to at 226H, where the Court stated:

> *"It is incumbent upon a defendant seeking to invoke such a clause [arbitration clause] to file a special plea ... or to raise it as a defence on affidavit... . Thus, while the language used in s 6(1) of the Arbitration Act 42 of 1995 is suggestive of a substantive application, in compliance with Rule 6(5)(a), or at least Rule 6(11), it would seem to me that Joubert (ed) Law of South Africa vol. 1 para 467 correctly contends that:*
>
> > *'(t)he procedure provided in the (A)ct is not obligatory but permissive and does not derogate from the practice of pleading the submission clause either by way of a preliminary special plea or by way of defence'.*
>
> *That practice is evidenced by cases such as The Rhodesian Railways Limited v Mackintosh 1932 AD 359 at 371 ...".*

[36] Mr Maritz accordingly suggested that it was for Botha to have brought an application that the agreed dispute resolution procedure not be given effect to.

[37] Mr Wallis drew my attention thereto that the contention of the Blue Bulls in this regard was set out in the following terms in its answering papers (paragraph 108.2 thereof):

> *"..... the dispute under this claim falls within the ambit of clause 9 of the 2007 collective agreement in terms of which a reference of the dispute to arbitration is peremptory. Applicant is, accordingly, not in law entitled to approach this Honourable Court for relief under this claim."*

Based on these submissions, the Blue Bulls contended that Botha's application fell to be dismissed. Mr Wallis contended that the approach of the Blue Bulls herein was in law erroneous. He relied for this proposition on what Friedman, J (as he then was) stated in Yorigami Maritime Construction Co Limited v Nissho-Iwai Co Limited 1997 (4) SA 682 (C) at 692 E – H where he stated the following:

> *"In our law an arbitration clause does not oust the jurisdiction of the Court and, if a party to an*

agreement seeks to rely on an arbitration clause when sued on that agreement, the Court has a discretion as to whether or not it should itself determine the dispute or whether it should order the proceedings to be stayed pending the arbitrator's decision.... .

As an arbitration clause in a contract does not preclude the jurisdiction of the Court, it is incumbent on a defendant, who seeks to rely on such a clause, to file a special plea and ask that the action instituted by the plaintiff be stayed pending the determination of a dispute by arbitration. What this Court has to decide is whether any grounds exist upon which the Court's jurisdiction is ousted. The fact that grounds exist on which a trial court would probably order a stay of proceedings does not mean that the Court has no jurisdiction in the action which Nissho has instituted."

[38] Mr Wallis submitted that a situation such as the present one is dealt with in Section 6(1) of the Arbitration Act 42 of 1965, which provides that:

"If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings."

[39] Mr Wallis argued that the Blue Bulls had not sought a stay under Section 6 of the Arbitration Act, nor had it sought a stay by way of its prayer for relief in these proceedings. He submitted that that was important because, had the Blue Bulls done so, Botha would have been entitled to set out the grounds upon which he contended that it would be inappropriate to grant a stay. He argued that these grounds would have covered matters such as the urgency of resolving the dispute between the parties; the fact that the issues in dispute were in substantial respects legal issues that were more appropriate for resolution by a Court; the fact that some of the issues (including the claim for rectification of both the 2007 CA and the SPC 2007) were plainly not within the Arbitration Clause; and the likelihood that the legal issues

would in any event be referred to a court in terms of Section 20 of the Arbitration Act. Mr Wallis accordingly contended that as a stay was not asked for by the Blue Bulls, all that was effectively raised by it was an outright challenge to the jurisdiction of the Court on the basis that its jurisdiction was excluded by the arbitration clause. Mr Wallis therefore submitted that the only case that Botha had to meet was the allegation by the Blue Bulls that the jurisdiction of this court to hear the matter was ousted by the arbitration clause. He submitted that this proposition was in and by itself not correct but that the position was, as described by Didcott, J (as he then was) in Parekh v Shah Jehan Cinemas (Pty) Limited and Others 1980 (1) SA 301 (D) at 305 F – H, where he stated the following:

> *"Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the*

latter, the case is resumed, continued and completed before it, like any other."

[40] As I said, Mr Maritz contended that it was sufficient for the Blue Bulls to invoke the arbitration clause by raising it as a defence in its affidavit. In addition, he argued that it was for Botha to bring an application to the effect that the agreed dispute resolution procedure, as contained in the 2007 CA, should not be given effect to. Mr Maritz further suggested that this Court in any event ought not to entertain the matter. It was on the papers before me, so he submitted, clear that Botha had made no attempt whatsoever to resolve the disputes between him and the Blue Bulls first through conciliation. In this regard, he relied on Section 157(4) of the LRA, which provides that this Court may refuse to determine any dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. He further argued that the very aim and purpose of the LRA was to advance labour peace and the primary objects of the Act included "the effective resolution of labour disputes". Mr Maritz submitted that the entire structure of the LRA was built on the foundational theme of the dispute resolution procedure enacted in Chapter VII of the LRA, the starting point of which was conciliation. He accordingly submitted that if I were to not refuse to determine Botha's disputes with his employer,

the very purpose of the idea of conciliation would be negated. He also drew my attention to the fact that clause 9 of the 2007 CA provided that the arbitrator would have the power to attempt to mediate between the parties. Therefore, he submitted that I should, in the proper exercise of my discretion, refuse to adjudicate Botha's claims contained in prayers 2.1 and 2.2 of his notice of motion. The second of these claims has been abandoned on behalf of Botha. It is only his claim that the September 2006 contract contains an agreement to agree, and that it is accordingly void *ab initio,* which I, in the exercise of my discretion, really had to decide whether this Court should entertain it. This claim is particularly one involving questions of law.

[41] Having regard to the deadlock between the parties on this issue, as appears particularly from the correspondence between the legal representatives of the parties, I do not believe that this issue would have been resolved through conciliation. The dispute resolution procedures, on which the Blue Bulls rely, do not specifically make provision for matters to be heard on an urgent basis. I further am of the view that it was for the Blue Bulls, and not Botha, to have made out a case why I should grant a stay of these proceedings in order to allow the matter to proceed to arbitration. Save for merely stating that the jurisdiction of this Court was excluded by the

arbitration clause binding on the parties, the Blue Bulls did not in my view, on the papers before me, make out a case justifying that I, in the exercise of my discretion, should stay these proceedings. This is so particularly in respect of Botha's claim based on the allegation that the September 2006 agreement contains an inchoate clause.

[42] I am accordingly, particularly as far as Botha's claim as contained in prayer 2.1 of his notice of motion is concerned, of the view that no case has been made out for me to stay these proceedings and to allow arbitration proceedings to first take place. I am therefor satisfied that this Court has jurisdiction to entertain such claim. (As will appear later, I have come to a different conclusion relating to referring the matter to arbitration as far as Botha's claim in prayer 2.5 of his notice of motion is concerned).

Botha's Claim 1 : Inchoate Clause (rendering the contract void *ab initio).*

[43] I turn to deal with the relief sought by Botha in prayer 2.1 of his notice of motion. I will further refer thereto as claim 1, and will refer to the relief he seeks in terms of prayer 2.5 of his notice of motion, as claim 5.

[44] The September 2006 contract of employment clearly states in paragraph 5.1 thereof that *"(t)he additional detailed conditions valid for this agreement will be in accordance with the stipulations contained in the SARPA Standard Players' Agreement, with the understanding that, in the event that the (Blue Bulls), as a member of SAREO, is bound to it, this agreement will be replaced by one or more standard agreements for the respective rugby competitions, subject to the condition that the compensation arising from such agreements may not, in total, be less than the compensation mentioned in paragraph 1 (of the September 2006 contract)".*

[45] Clause 5.2 of the September 2006 agreement confirms that the SPC 2007 was at the time of entering into the September 2006 agreement under negotiation between SAREO and SARPA. It should be noted that, without more, the contract makes the whole of the SPC 2005 applicable to the parties *"subject to clauses 1, 2, 3 and 4 of the offer .... ."* In fact, the SPC 2005 was annexed as an annexure to the offer.

[46] Clause 5.3 of the September 2006 contract is different to clause 5.2 in the sense that it states that *"(t)he parties agree that once the 2007SBC (sic) has been completed and signed it will, save for the provisions of clauses 1, 2, 3 and 4 of this offer, replace this agreement in its entirety and the Player*

irrevocably agrees to be bound by the terms and conditions set out therein."

[47] It is apparent from the wording of clause 5.3 that the parties anticipated completing and signing the SPC 2007. Only once that had been done would a new contract have come into existence, in effect replacing the September 2006 agreement with the terms of the SPC 2007, save for clauses 1, 2, 3 and 4 of the September 2006 agreement. This new contract, as I understand clause 5.3 of the September 2006 agreement, would have incorporated all the terms of the SPC 2007 together with the provisions of clauses 1, 2, 3 and 4 of the September 2006 contract.

[48] It is common cause between the parties that the SPC 2007 was never completed and/or signed in respect of Botha. I am of the view that neither the SPC 2005 nor the SPC 2007, merely by operation of law, could be a binding employment contract applying to all and any player, the moment the 2005 CA, or as the case may be, the 2007 CA, was entered into between SARPA and SAREO. The SPC 2005 and the SPC 2007 is an annexure or a schedule attached to the 2005 CA and the 2007 CA respectively. The 2005 CA dictates, as I said, that the various categories A, B, and C provinces were compelled to contract and pay players not less than the

stipulated minimum monthly remuneration and to do so in respect of at least a stipulated minimum number of players under the SPC 2005. Clearly, what the 2005 CA required was that the various provinces (as employers) and the various players (as employee's) should complete the SPC 2005, and only once that had been done and the agreement signed, would and could it become a binding agreement on the particular parties who had completed, and signed such SPC 2005 (or SPC 2007, as the case may be). By way of example only, the duration of the SPC 2005, and the remuneration an employer would pay its employee were to be filled in. Patently, SPC 2005 could not by reason of a collective agreement having been concluded between SARPA and SAREO, operate as binding contracts between employers and employees generally to whom the terms of the 2005 CA applied. SPC 2005 only applied, in my view, once it had been completed and signed by an employer province on the one hand and a particular player on the other and then obviously only to such parties – and not, as I have said, to all the parties bound by the collective agreement. I hold the same view as far as it relates to SPC 2007.

[49] As I said, the Blue Bulls incorporated the terms of the SPC 2005 in the offer of September 2006 to Botha. By him accepting this offer, he also accepted the terms of the SPC

2005 as binding on him, subject only to clauses 1, 2, 3 and 4 of the offer.

[50] However, as far as the SPC 2007 was concerned, I am of the view that its terms would only become applicable to, and binding on the parties (Botha and the Blue Bulls), once the SPC 2007 has been completed and signed by the Blue Bulls on the one hand and Botha on the other. This never happened. I am therefore of the view that the terms and conditions of employment at the moment still binding on the parties, exactly as the September 2006 offer from the Blue Bulls to Botha stipulates, are those set out in the 2005 Standard Player Contract, which was annexed to the offer, together with clauses 1, 2, 3 and 4 of the September 2006 offer by the Blue Bulls to Botha. This conclusion of mine must not be understood as me also concluding that the terms of the 2007 CA do not apply to these two parties. By operation of law they do, and as such Botha is entitled to seek an interpretation of this collective agreement in relation to his rights to terminate his employment contract with the Blue Bulls. I deal with this issue later.

[51] It was argued on behalf of Botha that clause 2 of the September 2006 contract dealt with bonuses and that such bonuses formed a significant part of a rugby player's

remuneration. Clause 2 of Botha's employment contract entitled him, in addition to his salary, to receive appearance bonuses in Currie Cup-, Super 14 semi-final- or final games. He was also entitled to certain further bonuses in the event of him reaching a certain number of games played for the Blue Bulls in the ABSA Currie Cup series, and/or the Super 14 Series, respectively. Clause 2.4 of the September 2006 agreement provided that:

> *"The bonuses payable by the Province to the Player in terms of clauses 2.2.1 and 2.2.2 above shall be determined through negotiations between the Province and all the Players prior to commencement of each ABSA Currie Cup and Super 14 season, subject to confirmation by the Board of Directors of the Province."*

[52] It is clear that the contract does not itself fix the bonuses. Mr Wallis accordingly argued that clause 2.4 was an agreement to agree upon bonuses in the future on an annual basis. He further contended that if agreement was not reached in any year on the bonuses payable to the players, there were no tie-breaking mechanisms for resolving a dispute about the level of bonuses. Mr Wallis further submitted that, as remuneration was a fundamental element of a contract of employment, a

failure to agree on that remuneration, or on a definitive method of determining it, meant that the contract was deficient and incomplete. Therefore, Botha's contract was inchoate, which rendered it void *ab initio* on the grounds of vagueness in respect of its material terms.

[53] An agreement to agree in the future on material terms of a contract is unenforceable in the absence of a deadlock-breaking mechanism. Schutz, JA, speaking for the Court, said the following (at 431 G –H) in Premier, Free State and Others v Firechem Free State (Pty) Limited 2000 (4) SA 411 (SCA):

> *"An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree."*

[54] Mr Wallis referred me to what Ponnan, AJA said (at paragraph [70], page 211 E-F) in Southernport Developments (Pty) Limited v Transnet Ltd 2005 (2) SA 202 (SCA), where the case dealt with an undertaking to agree on certain issues in a lease where the matter was to be submitted to arbitration if the parties failed to reach agreement:

"..... what elevates this agreement to a legally enforceable one and distinguishes it from an agreement to agree is the dispute resolution mechanism to which the parties have bound themselves. The express undertaking to negotiate in good faith in this case is not an isolated edifice.

It is linked to a provision that the parties, in the event of their failure to reach agreement, will refer such dispute to an arbitrator whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable, what would otherwise have been an unenforceable preliminary agreement."

[55] Mr Wallis contended that in the present case there was no such tie-breaking mechanism and therefore the contract was dependant upon the future agreement of the parties in respect of one of its most basic terms, namely remuneration. Therefore he submitted that the agreement was unenforceable.

[56] I am, however, not persuaded that no such tie-breaking mechanism exists in Botha's employment contract. I have already concluded that the terms of the contract between

Botha and the Blue Bulls are those contained in both the offer of September 2006 by the Blue Bulls to Botha and the terms and conditions set out in the SPC 2005 (as they were expressly incorporated in the offer, and in fact, as I said, attached thereto). The SPC 2005 contains, in clause 24 thereof, a very clear dispute resolution stipulation. It reads as follows:

> *"24. **Disputes***
>
> *24.1 Any dispute between the Player and the Province involving the interpretation, application or implementation of this agreement, or of any employment law, or any other dispute arising out of the employment of the Player by the Province or determination of such employment shall unless otherwise resolved amongst the parties to the dispute, be referred to and determined by final and binding arbitration in terms of this clause.*
>
> *24.2 Any party to this agreement may demand that a dispute be determined in terms of sub-clause 24.1 by written notice given to the*

other party.

24.3 The dispute shall be submitted to –

24.3.1 ……

24.3.2 An attorney or advocate of the High Court with background in sports law if the dispute is primarily one concerning promotional activities, other employment, or is of a more technical nature; or

24.3.3 An auditor if the dispute is primarily one concerning finance and/or tax.

24.4 …

24.5 The arbitrator shall be entitled to make any appropriate award which will give effect to the provisions of this agreement, any agreement between the Province and the Player, or any other employment law, as well as rule on the procedures applicable to the hearing.

24.6 The parties agree that the decision of the arbitrator shall be final and binding upon the parties.

…….

…….

……. .”

[57] Quite clearly the parties have bound themselves to this dispute resolution mechanism. In the event of the parties not agreeing on the bonuses to be determined through negotiations, they are bound by the dispute resolution procedures contained in clause 24 of the SPC 2005.

[58] As I have said, it is common cause between the parties that they are all parties to, and bound by such collective agreements as are from time to time reached between SARPU and SAREO on behalf of their members. Accordingly, both the 2005 CA and the 2007 CA was for its duration by law binding on both Botha and the Blue Bulls. Both these collective agreeements contain compulsory arbitration clauses, compelling the parties to refer to arbitration any dispute arising out of the interpretation, application or implementation of the collective agreement, or any dispute arising out of the employment of a player by a province. Such arbitration shall determine the dispute in full and be binding on the parties. Both the SPC 2005 as well as the 2005 CA and the 2007 CA contain clear and express procedures for the submission of such disputes to arbitration.

[59] I am therefore of the view that this ground on which Botha relies, namely that the agreement is inchoate, should fail. If agreement can on any occasion not be reached between the province and the concerned players (in this case, between Botha and the Blue Bulls) on the bonuses payable by the Blue Bulls to Botha, Botha's contract of employment, as well as the collective agreements binding on the parties at all the relevant times herein, contain a clear mechanism whereby such dispute shall be resolved. The final and binding nature of the arbitrator's decision will render certain and enforceable what would otherwise have been an unenforceable preliminary agreement.

Claim 5 : Collective Agreement (Entitlement to cancel on notice)

[60] I turn to deal with the only other remaining claim in respect of which Botha seeks an order form this Court. This relief is premised on the proposition that, in terms of clause 2.1.2 of the 2007 CA, Botha should be regarded as a free agent and entitled to terminate his employment with the Blue Bulls on 7 days notice to the Blue Bulls.

[61] Mr Maritz argued on behalf of the Blue Bulls that Section 24 of the LRA has application herein as it involved a dispute about the interpretation or application of a collective agreement. He therefore contended that this Court accordingly did not have jurisdiction to adjudicate the dispute relating to this part of Botha's claim. In support of his argument that the Court has no jurisdiction to hear this part of Botha's claim, I was referred to what Myburgh, JP (as he then was) had to say on this issue in South African Motor Industry Employers' Association and Another v NUMSA and Others [1997] 9 BLLR 1157 (LAC) at page 1160 D and further:

> *"The scheme of section 24 is to compel the parties to a collective agreement to resolve a dispute about the interpretation or application of the collective agreement by conciliation, and if that fails, by arbitration, either in terms of an agreed procedure or, in the absence of an agreed procedure, by the Commission. In terms of section 157(5), '[e]xcept as provided in Section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires that the dispute be resolved through arbitration'. Section 138(2) provides:*

'If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.'"

Myburgh, JP continued (at page 1160H) to state;

"It follows that the Labour Court did not have jurisdiction to interpret the main and administrative agreements and accordingly it had no power to grant the declaratory order sought by the bargaining council.

The relief sought by the employers' organisations in paragraph 3 of the counter application required an interpretation of the main and administrative

agreements, a task which was the sole preserve of the Commission. The Labour Court had no jurisdiction to do so.

Except as provided for by section 158(2), the Labour Court cannot assume, nor can the parties by agreement confer, jurisdiction on the Labour Court to determine a dispute which falls to be resolved by the Commission by conciliation or arbitration.

[62] In Denel Informatics Staff Association & Another v Denel Informatics (Pty) Ltd (1999) 20 ILJ 137 (LC) Basson, J (at page 139, paragraph [13] & [14]) said:

"[13] Further, if the dispute is about a collective agreement (as was argued on behalf of the applicants), s 24 of the Act applies. Section 24(2) stipulates that where there is a dispute about the interpretation or the application of a collective agreement, any party of the dispute may refer such dispute, in writing, to the CCMA or otherwise deal with the dispute in terms of the procedures provided for in an operative collective agreement which must include conciliation and

arbitration procedures (in terms of s 24(1) of the Act). In the case where such dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration (in terms of s 24(5) of the Act).

[14] Once again, it is clear that the Labour Court does not acquire jurisdiction in terms of the Act to adjudicate a dispute concerning the interpretation or the application of a collective agreement as such dispute must be resolved by way of arbitration. It is thus not a matter to be determined by the Labour Court".

[63] It is also useful to consider how the High Court approached this jurisdictional issue when it was raised before it in Ampofo v MEC Education, Arts, Culture, Sports and Recreation, Northern Province, and Another 2002 (2) SA 215 (TPD). A full bench of the TPD (Ngoepe JP, Hussain J *et* Basson J) stated the following (at pages 230 – 231, paras. [40] – [47]):

"Reliance on a collective agreement

[40] The applicants also relied for their contention that they were permanent employees of the department on the provisions of a collective agreement emanating from the Education Labour

Relations Council, entitled Resolution 6 of 1998 (Resolution 6) and which was attached to the papers. ……. .

The applicants contend that properly interpreted and applied, the resolution has converted the applicants' status from temporary to permanent employees. This is disputed by the department. The latter argues that the clause 'who meets the requirements for appointment' militates against automatic permanent appointment; it implies that the department still has to consider each applicant to ensure that such person meets the requirements. Moreover, the 'requirements' are not stipulated.

[41] It is common cause between the parties that Resolution 6 is indeed a collective agreement as defined in s 213 of the Labour Relations Act 66 of 1995 (the LRA). Against this background, the Department has argued in limine that the High Court has no jurisdiction to decide a dispute on the interpretation or application of a collective agreement such as Resolution 6 as such a dispute falls to be determined by the fora created in terms of the LRA.

[42] Section 157(1) of the LRA states that

'subject to the Constitution and s 173 and except where [the LRA] provides otherwise the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of [the LRA] or in terms of any other law are to be determined by the Labour Court'

[43] In terms of s 24 of the LRA, a dispute about the interpretation or application of a collective agreement is a matter that may be referred to arbitration by a party who wants to enforce it. The fact that arbitration is required for such a dispute ousts the jurisdiction of the Labour Court (s 157(5) of the LRA). This despite the fact that the Labour Court has authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a High Court has in relation to matters within its jurisdiction (s 151(2) of the LRA read together with s 166(e) of the Constitution of the Republic of South Africa Act 108 of 1996).

[44] The Commission for Conciliation, Mediation and Arbitration (the CCMA) deals with disputes referred to arbitration under its auspices. The Labour Court and the CCMA are therefore the separate fora created by the LRA for the purpose

of dealing with labour law disputes. Where, therefore, the LRA provides for dispute resolution by way of arbitration, such as in terms of s 24 of the LRA, resort to the ordinary courts of law for dispute resolution is excluded. There is thus no merit in the argument presented on behalf of the applicants that the jurisdiction of the High Court should not be ousted in favour of a mere administrative tribunal. Such process of arbitration is sanctioned by s 34 of the Constitution. Moreover, the purpose of the LRA is to make provision for the expeditious resolution of labour disputes through a simple and inexpensive procedure of arbitration, preceded by conciliation (s 1 (d) (iv) and ss 135(2), 136(b) and 138(7) of the LRA).

[45] Furthermore the Labour Court, in terms of its exclusive jurisdiction, is the reviewing Court of all arbitration proceedings when arbitration is conducted under the LRA in respect of any dispute that may be referred to arbitration in terms of the LRA, regardless of the fact whether arbitration is under the LRA or the Arbitration Act 42 of 1965 (s 145, s 146 and s 157(3) of the LRA).

[46] The result is that the LRA has created a separate and specialised set of fora in terms of which labour disputes are resolved. Further, the procedures and remedies under the LRA are in substitution of and not in addition to the common law ones available in the High Court (Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others 1991 (2) SA 234 (T)).

[47] The dispute between the parties is about the interpretation and application of clause 3.8 of Resolution 6, which is a collective agreement as contemplated in s 24 of the LRA; Resolution 6 impacts on the status of the applicants as employees. For the reasons discussed above, such dispute falls to be determined, in terms of the express provisions of the section, by the separate fora created for this purpose by the LRA. This Court therefore has no jurisdiction to hear the dispute about the interpretation or application of clause 3.8 of Resolution 6. It is not for this Court to enforce the resolution. The point in limine raised by the department must accordingly be upheld."

[64] Mr Maritz filed supplementary heads of argument. Therein, without abandoning the jurisdictional point raised by the Blue Bulls, he advanced an alternative argument as to what the court's approach should be, in the event of it embarking on an interpretation of the relevant clauses of the 2007 CA. As a result of the conclusion I reached in respect of this part of Botha's claim, it is not necessary to deal with this part of Mr Maritz's argument at all.

[65] I, after the hearing of argument, requested Mr Wallis to submit supplementary heads of argument in respect of the jurisdictional point raised by the Blue Bulls, and argued by Mr Maritz during the hearing of this matter. As I understood Mr Wallis' argument, it is that the dispute between the parties herein is whether Botha's employment contract is binding upon him. He further argued that this dispute comes before me in terms of the jurisdiction conferred upon this court in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA"). The BCEA does not require, argued Mr Wallis, that a dispute such as this one (whether Botha's employment contract is binding on him) be referred to arbitration. Mr Wallis further suggested that the claim of the Blue Bulls that the dispute must be referred to arbitration is based upon the arbitration clause 9 contained in the 2007 CA. He repeated his argument that such an arbitration agreement

did not oust the jurisdiction of this court and that therefore, clause 9 of the 2007 CA did not oust the jurisdiction of this court in terms of section 77(3) of the BCEA.

[66] Mr Wallis further urged upon me to consider the fact that when sections 157(5) and 158(2) of the LRA were enacted, this court did not have the jurisdiction that is being invoked in the present case in terms of section 77(3) of the BCEA. He accordingly suggested that it was necessary to construe these provisions in the light of the additional jurisdiction now conferred upon this court by the BCEA. When that was done, the focus according to Mr Wallis must rest upon the question of whether the present dispute is one that "ought" to have been referred to arbitration. Mr Wallis submitted that the ordinary meaning of the word "ought" according to the Shorter Oxford English Dictionary, 6th ed., p2036, is to be under a duty or obligation. He submitted further that a person bound by an arbitration agreement is not under a duty or obligation to refer a matter to arbitration. They are entitled to do so if they so wish but they are only obliged to do so if a court before which they bring their dispute for resolution stays the proceedings and directs that they proceed to arbitration.

[67] The line of argument adopted by Mr Wallis is premised on the basis that, if Botha had, for instance, brought these

proceedings in the High Court, as he is entitled to do, the invocation of the arbitration clause in the 2007 CA could and would have been met by the contention that it was not appropriate to stay the proceedings with a view to arbitration. Mr Wallis submitted that, as the jurisdiction of this Court was concurrent with that of the High Court, it has precisely the same power. Accordingly, he argued, that before a Court reached the alternatives in subparagraphs (a) and (b) of section 157(2) of the LRA, it must decide whether the dispute is one that "ought" to have been referred to arbitration. In other words, so he submitted, it must decide whether the dispute is such that the arbitration clause should be enforced.

[68] This line of argument, as raised by Mr Wallis, may in my view be applicable to a situation where the parties have entered into an agreement containing an arbitration clause and, as happened herein, the one party approaches a Court, rather than to refer the matter to arbitration, as dictated by the agreement between the parties. I have dealt with that situation as it relates to the question whether the Court, in the exercise of its discretion, should stay the proceedings to allow arbitration to take place. The issue now under consideration herein is in my view a totally different one. It is indeed whether the matter "ought" to be referred to arbitration in the sense that a party is under a duty or obligation to do

so. I understood Mr Wallis to suggest section 24 of the LRA does not find application herein as Botha's application had been referred to this Court in terms of Section 77(3) of the BCEA. This section reads as follows:

> *"The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."*

[69] As Mr Maritz pointed out, Botha's claim 5 concerns his purported entitlement, in terms of clause 2.1.2 of the 2007 CA, to be regarded as a free agent, and therefore entitled to give the Blue Bulls 7 days notice of his intention to terminate his employment. Botha further alleges that clause 2.2 of the 2007 CA applies to the termination clause contained in his contract of employment with the Blue Bulls. Botha expressly asks that this Court should find that clauses 2.1.2 and/or 2.2 of the 2007 CA should find application in relation to his employment with the Blue Bulls. Mr Maritz, therefore, argued that the relief sought by Botha is to declare that Botha is a free agent (as provided for in clause 2.1.2 of the 2007 CA) and that Botha is entitled to cancel his contract of employment either in terms of clause 2.1.2 of the 2007 CA or in terms of section 37(1)(c)(i) of the BCEA. Mr Maritz also contended that this was not relief claimed based on a contract of employment as contemplated in Section 77(3) of the BCEA, but on a

collective agreement as defined in Section 213 of the LRA. He therefore persisted with his argument that this Court did not have jurisdiction to consider the relief sought as it hinged on Botha's interpretation of clauses 2.1.2 and 2.2 of the 2007 CA. The Blue Bulls, in its answering affidavit, expressly contended for a different interpretation of clause 2.2 of the 2007 CA than the one that Botha urges upon the Court to arrive at.

[70] Mr Wallis, in addition attempted to persuade me that, in reality, there was no dispute as to the plain meaning of the language in clause 2 of the 2007 CA, and as such, there was nothing that could be the subject of arbitration proceedings. He referred me to what Didcott, J said (at 304 E – G) in Parekh v Shah Jehan Cinemas (Pty) Limited and Others (supra):

> *"Arbitration is a method for resolving disputes. That alone is its object and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is nothing then for the arbitrator to decide. He is not needed, for instance for a judgment by consent or default. All this is so obvious that it does not*

surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise."

[71] Clearly, a dispute alleged by a party must be genuine and not merely one alleged by a party to exist. Botha's September 2006 contract, as well as the 2007 CA, are in my view not models of clarity. It is apparent that, at least since the 2005 CA, the bargaining parties attempted to standardise all the employment contracts of players employed by the various provinces. It is especially clear that certain minimum conditions of employment were agreed on at central bargaining level between the parties. It is noted that the 2005 CA contains no clause such as clause 2 of the 2007 CA.

[72] As I said, when the Blue Bulls offered to employ Botha in September 2006, it expressly included all the terms and conditions contained in the SPC 2005 in its offer, in addition, and subject to, clauses 1, 2, 3 and 4 of its offer. (One wonders why in this case the employer did not simply take the existing SPC 2005 and amended it by the inclusion, for example, of clauses 1, 2, 3 and 4 of the offer which the Blue Bulls made to Botha, plus whatever else it wanted to have as additional terms not covered by the SPC 2005. Having done so, it could have presented a properly completed SPC 2005,

as amended, to Botha, in order to record special circumstances for his consideration, and if he accepted it, for his signature).

[73] It is equally clear from the offer made by the Blue Bulls to Botha in September 2006 that the Blue Bulls intended the terms of the SPC 2007 to become applicable to its relationship with Botha, once the SPC 2007 had been centrally bargained on and agreed to. The parties did, however, as I have earlier said, expressly agree that only once the SPC 2007 had been completed and signed by them would it replace the September 2006 agreement with the exception of clauses 1, 2, 3 and 4 thereof. Herein, in my view, lies the very essence of the question to be determined herein. The 2005 CA refers in the heading to clause 3 to a "*Standard Players Contract 2005*". "*Standard Players Contract*" is nowhere defined in the 2005 CA. Annexure "A" to the 2005 CA is specifically headed "*Standard Player Contract 2005*". Notably, the 2007 CA no longer has a specific heading in which reference is made to the "*Standard Players Contract*". Clause 2.1 of the 2007 CA states:

> *"2.1 A Province may contract a Player –*
>
> *2.1.1 on the terms set out in this agreement and in the form of Schedule 1; ...."*

It is noticeable that provinces may contract players "in the form of Schedule 1" – not "on the terms contained in Schedule 1". Why were these specific words chosen? What did the parties mean by the words "in the form of Schedule 1?" Is a contract one "in the form of Schedule 1" if it contains additions to Schedule 1 to the 2007 CA such as clauses 1, 2, 3 and 4 of the offer, as intended by the Blue Bulls? Does the addition of these additional clauses to Schedule 1 make it a contract "on any other basis" as per clause 2.1.2. of the 2007 CA? Notably, clause 2.2 of the 2007 CA states "Any term in any contract other than the Standard Player Contract ... ." Why does it not refer to "Any term in any contract other than one in the form of Schedule 1"? All these questions will have to be resolved in arriving at a proper interpretation and application of the 2007 CA.

[74] The Blue Bulls contend, in paragraph 110.4 of Van Graan's answering affidavit, that on a proper interpretation of clause 2.2 (of the 2007 CA), "the reference to 'the standard player contract' was intended to include an existing fixed-term contract in respect of which, up to that point, all of the terms contained in the Standard Player Contract 2005 to the collective agreement 2005 were applicable and binding". As I understand this proposition, the Blue Bulls contend that

Botha's contract of employment is one which conforms to the SPC 2005, and therefore that it is not an agreement "other than the Standard Player Contract" or, for that matter, that it is not a agreement contracted between a province and a player "on any other basis" than the form of Schedule 1 or of the Standard Player Contract.

[75] Botha, in his replying affidavit (paragraph 139), states that the interpretative contention advanced by the Blue Bulls in paragraph 110.4 of its answering affidavit was plainly incorrect. He further contended that the Standard Player Contract referred to in clause 2.2 of the 2007 CA was manifestly the one attached to the 2007 CA as Schedule 1, namely SPC 2007. There can be no doubt that the parties are in serious dispute on the interpretation of the 2007 CA.

[76] As I have concluded that this Court does not have jurisdiction to interpret the collective agreement entered into between the parties in 2007, I do not intend doing so. I do, however, feel it appropriate to say this much particularly as it has a bearing on the question whether there is an arbitrable dispute between the parties. Clearly, the Blue Bulls intended its agreement with Botha, with the exception of the inclusion of clauses 1, 2, 3 and 4 of its September 2006 offer, to accord

fully with both the SPC 2005 and the SPC 2007. As I am of the view that the applicable agreement between the Blue Bulls and Botha could be described as consisting of the terms and conditions contained in the 2005 Standard Player Contract plus the contents of clauses 1, 2, 3 and 4 of the September 2006 offer, can this be construed that the Blue Bulls contracted Botha "in the form of Schedule 1" (attached to the 2007 CA)? As I said, the contracting parties did not require the employer/employee parties to contract "in the terms of" but "in the form of" Schedule 1. Clearly, Botha was aware that the Blue Bulls intended the SPC 2007 to also apply to his employment, once they had signed it. Had the Blue Bulls presented Botha with such SPC 2007, incorporating clauses 1, 2, 3 and 4 of the September 2006 offer, could it then be construed that they had contracted "in the form of Schedule 1"? Or would that amount to them having contracted "on any other basis", simply because of the addition of these clauses 1, 2, 3 and 4 from the original offer into the terms of a contract otherwise fully compliant with the form of Schedule 1 to the 2007 CA?

[77] Whatever the answers to these questions may be, quite clearly a dispute exists between the parties about the interpretation or application of a collective agreement, in this case the interpretation of clause 2 of the 2007 CA. This is a

dispute as is contemplated in section 24 of the LRA, which directs that such a dispute must be resolved first through conciliation, and, if the dispute remains unresolved, then to resolve it through arbitration. In this respect, Botha is under a duty or obligation to first refer the dispute to conciliation, and if the dispute remains unresolved, to arbitration. He "ought" to refer the dispute about the interpretation or application of the 2007 CA to arbitration. I am accordingly of the view that this Court has no jurisdiction to interpret the collective agreement entered into between the parties in 2007. I accordingly do not have the power to grant the relief sought by Botha under claim 5. The interpretation of a collective agreement is the sole preserve of the CCMA and this Court has no jurisdiction to do so. In terms of Section 158(2) of the LRA, I may stay the proceedings and refer the dispute to arbitration. As the parties have not first referred the dispute to conciliation, I am disinclined to stay these proceedings and refer the dispute to arbitration. The parties have also not consented to me sitting as an arbitrator.

[78] Botha's claim 5 accordingly falls to be dismissed on the basis that the Labour Court has no jurisdiction to resolve any dispute about the interpretation or application of the collective agreement between the parties concluded in 2007.

The parties were in agreement that costs should follow the

result. Mr Wallis did, however, argue that it was not warranted for the Blue Bulls to have employed two senior counsel. Mr Maritz argued that I should consider the importance of the matter as well as its complexity. He also submitted that the large volume of papers filed necessitated the employment of two senior counsel. The First Respondent, according to Mr Maritz, were under extreme pressure with it initially only having had four days to file replying papers. The fact that both contract – and employment law issues had to be dealt with made the employment of two senior counsel a necessary and reasonable precaution, according to Mr Maritz. Botha employed both senior and junior counsel. His junior counsel, however, suffered an injury and also, sadly, lost his mother in the week of the hearing of the matter. Accordingly, Mr Wallis sought a cost order, in the event of Botha being successful, of two counsel where two counsel were employed.

[79] Having considered the issue of costs, I am of the view that costs of two counsel should be allowed, but only of a senior and junior counsel, and not of two senior counsel. I accordingly made the following order which, as I said, I have already issued. For the sake of completeness, I repeat the order already issued herein:

1. The Applicant's claims 1 and 5 (as contained in prayers 2.1 and 2.5 of his notice of motion) are dismissed (the other claims/prayers having been abandoned in these proceedings).

2. The Applicant is ordered to pay the First Respondent's costs of suit, such costs to only include the costs of senior and junior counsel.

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DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 30 May 2008

Date of Judgment: 27 June 2008

Appearances:

For the Applicant: Advocate M Wallis SC, instructed by Edward Nathan Sonnenbergs.

For the First Respondent: Advocates M C Maritz SC and E S J van Graan SC, instructed by Roestoff Venter & Kruse.