

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1744/04

In the matter between:

THE PUBLIC SERVANTS ASSOCIATION

OF SOUTH AFRICA

APPLICANT

AND

THE MINISTER OF SAFETY AND

SECURITY

1ST RESPONDENT

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

2ND RESPONDENT

J B MTHEMBU N.O.

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside then arbitration award issued by the third respondent (the commissioner) under case number PSSS 1059 on 11 June 2005, under the auspices of the Safety and Security Sectoral Bargaining Council (SSSBC). In terms of the arbitration award the commissioner found that

the agreement concluded between the parties to the SSSBC, being the state as the employer, on the one hand and SAPU and POPCRU on the other hand was a collective bargaining agreement which was binding to the parties to that agreement and the non parties.

Background facts

[2] The background facts in this matter are fairly common cause. Initially a dispute was referred to the SSSBC concerning whether the shifting of the promotion dates of members who qualified for promotion between the period 1st August 1996 to 1st April 1998, constituted an unfair labour practice. The matter was arbitrated and the commissioner Kirsten who issued an award on the following terms:

“The Respondent and Applicant are ordered to mediate the issue of a ‘reasonable remedy’ having regard to all relevant factors. Without being prescriptive regarding the mediation process the following mediation process is suggested:

- 1. The parties must prepare themselves for the mediation within one month from date of this award.*
- 2. The parties must initially mediate the issue between themselves and if necessary, request the SSSBC to appoint an independent mediator.*
- 3. If the mediation process does not settle the issue within two months from the date of this Award, the matter must be set down for determination of "a reasonable remedy.”*

- [3] Instead of subjecting the dispute to mediation in terms of the above arbitration award the parties resolved the matter through a negotiated settlement. The relevant parts of the agreement which is recorded as agreement number 8/2002 dated 2002/10/23 reads as follow:

*“AGREEMENT: IMPLEMENTATION OF KIRSTEN ARBITRATION
AWARD SHIFTING OF RANKINGS/LACK PROMOTION DATES*

The parties to the SSSBC hereby resolve to settle the dispute, as ruled by the arbitrator pertaining to the shifting of ranking promotion dates of functional members who qualified in the period 1996-08-01 up to 1996-04-01. It is agreed upon that a once off amount of R1500-00 to all whose promotion dates have been shifted during the specified period be paid no later than 31st December 2002. This agreement is applicable to all members employed by the South African Police Service on the date of the signing of this agreement. This agreement binds the parties to the agreement and the employees who are not members of the registered trade union admitted to the Sectoral Bargaining Council as well as all members of registered trade unions admitted to the Sectoral Bargaining Council who are not parties to this agreement.”

- [4] The nature and the extent of this agreement were placed in dispute by the PSA. The matter was thereafter referred to arbitration where the commissioner was required to determine whether or not the agreement binds the members of the South African Police Services, who are members of the PSA. The PSA

contended that the agreement was only binding on SAPU and POPCRU and their members. In essence the dispute raised by the PSA concerned the legal nature and the consequence of the agreement, namely whether it is a collective bargaining council agreement or a settlement agreement.

- [5] Commissioner Mthembu found that the agreement was a collective bargaining agreement and was binding on the PSA and its members. It is that decision which the PSA is seeking to review and set aside.

The grounds for review

- [6] The PSA contended in its grounds for review that the commissioner committed both misconduct in relation to the duties of a commissioner and a gross irregularity in the conduct of the arbitration proceedings. The PSA further contended that the commissioner exceeded his powers and failed to apply his mind resulting in his award failing to give a correct interpretation of the provisions of sections 31 and 32 of the Labour Relations Act 66 of 1995 (LRA).
- [7] The PSA further argued that even though the agreement says that it binds the parties to the agreement and or employees who are not members of a registered trade union admitted to the SSSBC as well as members of registered trade unions admitted to the SSSBC who are not parties to the agreement, this can never be the case due to the fact that the provisions of section 31 as read with section 32 of the LRA, have not been complied. A further point in this regard is that the PSA, its members and other parties were at no stage party to that agreement.

The legal principles

[8] A collective agreement is defined by section 213 to mean:

“... 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 hand –

(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.”

[9] Section 31 of the LRA which deals with the binding nature of collective agreement concluded in bargaining council provides as follows:

“Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds –

(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a

registered employers' organisation that is such a party, if the collective agreement regulates –

- (i) terms and conditions of employment; or*
- (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.”*

[10] The extension of a collective agreement concluded in bargaining council is dealt with in section 32 which provides as follows:

“(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council –

- (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and*
- (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.*

- (2) *Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.”*

[11] The legal effect of a collective agreement is dealt with by the provisions of section 23 of the LRA which reads as follows:

“(1) A collective agreement binds –

- (a) the parties to the collective agreement;*
- (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;*
- (c) the members of a registered trade union and the employers who are members of a registered employers’ organisation that are party to the collective agreement if the collective agreement regulates –*
 - (i) terms and conditions of employment; or*
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;*
- (d) employees who are not members of the registered trade union or trade unions party to the agreement if –*

- (i) *the employees are identified in the agreement;*
- (ii) *the agreement expressly binds the employees; and*
- (iii) *that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.”*

Evaluation

[12] In my view the agreement in question is clearly a collective agreement in that it was concluded in writing, was for that matter signed and concerned matters of mutual interest and conditions of employment.

[13] In analyzing the definition of a collective agreement as set out in section 213 of the LRA Basson J, in case of *Eskom Holdings (Pty) Ltd v NUM and Others* [2009] 1 BLLR 65 (LC), had the following to say:

“[20] If the definition is analysed, it is clear that such an agreement comprise of three elements:

- (i) certain parties may conclude a collective agreement namely employers and employees or the accredited juristic representatives;*
- (ii) the agreement is in writing;*
- (iii) the subject matter is ‘terms and conditions’ of employment or any other matter of mutual interest.”*

[14] With reference to the provisions of sections 23 and 24 the Learned Judge in *Eskom Holdings* supra went further to state:

“These provisions support the notion that reference to a collective agreement means only a true agreement based on a defacto consensus.”

[15] In *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* [2000] 2 BLLR 196 (LC), the Court held that an agreement was a collective agreement even if the parties intended it to be a settlement agreement.

[16] The proper interpretation of section 32 is that it is designed to govern the extension of collective agreements to non parties. In general the extension designed towards bringing within the scope of a collective agreement employees who are employed by employers who were not party to the agreement but who fall within the scope of a registered bargaining council. In order to avoid the extension of the provisions of the collective agreement, non parties may evoke the provisions of section 32(3)(e) of the LRA.

[17] It was correctly argued on behalf of the first and second respondent that section 32(2) of the LRA was never intended to apply where there is only one employer in the sector. The purpose of section 32(2) of the LRA which gives the Minister the power to extend the collective agreement was intended to protect employers who are not members of a bargaining council and who are not party to a collective agreement concluded in a bargaining council from unfair competition. See *Kern-Lin Fashions CC v Brunton & Another* [2001] 1 BLLR 25 (LAC).

[18] It thus make no sense to use the provisions of section 32 to bind employees whose employer is the only employer member at the bargaining council and in

the sector. It is for this reason that in cases similar to the present the provisions of section 23 of the LRA would apply.

[19] A claim similar to the one in the present instance was made by employees in the *Sigwali & Others v Libanon (a division of Kloof Gold Mine Ltd) [2000] 2 BLLR 216 (LC)*. In that case the Court rejected an attempt by employees to avoid being bound by the provisions of section 23(1)(d)(i) of the LRA. See also *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd [1999] 4 BLLR 404 (LC)*. The above authorities are distinguishable from the case of *Early Bird Farm (Pty) Ltd v FAWU & Others [2004] 7 BLLR 628 (LAC)*, where the Court held that employees were not bound by the agreement because they were not identified in the agreement.

[20] Turning to the facts of this case it is common cause that the first respondent is the only employer both in the sector and the bargaining council and further that the applicant and its members are not members of the bargaining council neither were they parties to the agreement in question. In my view for all intents and purposes the agreement satisfies the definition of a collective agreement as defined by section 213 of the LRA and complies with the requirements of section 23 of the LRA. It is therefore a binding collective agreement in terms of the LRA.

[21] In the light of the above reasons, I am of the view that the decision of the arbitrator in the present instance was correct and accordingly the review stands to

be dismissed. I see no reason both in law and in fairness why the costs should not follow the results.

[22] In the premises the applicants' application is dismissed with costs.

Molahlehi J

Date of Hearing : 15th August 2009

Date of Judgment : 22nd December 2009

Appearances

For the Applicant : Mr CM Dell of Lovius Block Attorneys

For the Respondent: Adv B Vally

Instructed by : State Attorney-Bloemfontein