THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. JR 1028/06

In the matter between:

JOHANNESBURG CITY PARKS **Applicant**

And

ADVOCATE JAFTA MPHAHLANI N.O. **1ST Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **2ND Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS UNION obo S KOK **3RD Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award that the first respondent made by default on 1 November 2005.

[2] The facts giving rise to the application are not in dispute. The applicant is a section 21 company, established during 2000 by the City of Johannesburg Metropolitan Municipality. The City appointed the applicant to maintain parks, cemeteries and the like within the Greater Johannesburg area. The second respondent is the South African Local Government Bargaining Council (the bargaining council), a body registered as such in terms of the Labour Relations Act (the LRA) on 1 March 2001. The registered scope of the bargaining council extends to "the local government undertaking in the Republic of South Africa".

[3] The applicant is not a party to the council - it contends that its operations are of such a nature that it does not fall within the registered scope of the bargaining council. The South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU) represent most of the applicant's employees. SAMWU and IMATU contend that the applicant falls within the definition of "local government undertaking" contained in the bargaining council's constitution, and that it is therefore bound by those of the council's collective agreements that have been extended to non-parties by the Minister in terms of section 32 of the LRA.

[4] During 2004, a demarcation dispute was referred to the CCMA in terms of s 62 of the LRA. This dispute required the CCMA to determine whether the applicant and its employees are engaged in the municipal services sector. I do not intend to canvass the parties' respective positions in those proceedings. The demarcation was pending at the time the arbitrator made his award, and it appears that despite the lapse of some 5 years since the referral of the dispute, it remains pending.

[5] The applicant employed the third respondent, Kok, as a head gardener in Patterson Park, until his dismissal in November 2004. An unfair dismissal dispute was eventually set down for arbitration on 26 October 2005. On 13 October 2005, the applicant addressed a letter to the bargaining council stating *inter alia* that it would not attend the arbitration hearing as it was not subject to the council's jurisdiction. The later states:

> "*Johannesburg City Parks does not fall within the jurisdiction of the South African Local Government Bargaining Council and as a result it will not attend arbitration* (sic) *to be held on the 26th October 2005 at 09h30.*
>
> *There is a demarcation dispute pending at the CCMA case no*

SA 18299/04. Until this matter is finalized by the CCMA Johannesburg City Parks will not be bound by any decision of the Bargaining Council and our employees are free to refer disciplinary matters to the CCMA, which the company duly attend(sic)*"*

[6] The arbitration commenced in the absence of the applicant. At the hearing, the arbitrator is recorded as having said the following:

"*...I intend to proceed with this matter in the absence of City Park as they have failed to attend the arbitration hearing; instead they have sent a letter dated 13 October 2005, advising the Council that they do not recognise it and therefore they would not make any representation or attend today's arbitration hearing.*
I will therefore exercise my discretion in terms of section 138(5) of the Labour Relations Act 66 of 1995 as amended and proceed to hear the matter in absentia"

The arbitration award

[7] On 1 November 2005 the first respondent issued an award in terms of which he found, on the uncontested evidence before him, that Kok's dismissal was substantively unfair. The applicant was ordered to reinstate Kok on or before 15 November 2005 and to pay him 10 months' salary. In his award, the arbitrator makes no mention of the jurisdictional issue, save to record that the matter proceeded "in the absence of the respondent who apparently refused to attend the hearing".

The application to rescind the arbitration award

[8] The applicant thereafter brought an application in the bargaining council to rescind the arbitration award on the basis that the award had

been erroneously granted since the applicant did not fall within the bargaining council's registered scope, and that the demarcation dispute remained pending. On 17 March 2006, the arbitrator issued a ruling in which he dismissed the rescission application. In his ruling, the arbitrator avoided the jurisdictional issue and found that the applicant was aware of the date of the arbitration hearing, and that it ought to have attended the hearing to raise its jurisdictional point. On this basis, he found that the applicant had been in willful default and had failed to establish that the award was erroneously granted. The applicant then filed this application, seeking to review and set aside both the default arbitration award and the rescission ruling.

The application for review

[9] In these proceedings, in support of the application to review and set aside the arbitration award, the applicant submits that the bargaining council did not have jurisdiction to adjudicate the unfair dismissal dispute. The applicant submits further that in arbitrating the dispute referred to the bargaining council, the arbitrator was applying a collective agreement concluded under the auspices of the bargaining council relating to the rules and conduct of proceedings before the council. The agreement *inter alia* makes provision for the referral of disputes to the council (including unfair dismissal disputes) and for the conduct of arbitration proceedings. This being so, and given that the demarcation dispute remained pending, the arbitrator was required in terms of s 62 of the Act to adjourn the arbitration proceedings and his failure to do so amounted to a failure to comply with a statutory duty and a misconception of that duty. In addition, in terms of the applicable agreement, the arbitrator was obliged to require the referring party to prove that the council had jurisdiction to arbitrate the dispute. The terms of the agreement are such that the referring party bears an onus to establish jurisdiction. The arbitrator's failure to require the third respondent to discharge that onus amounted to a reviewable irregularity. Finally, the applicant submits that the arbitrator was in any

event under a duty to enquire whether he had jurisdiction, given the content of the applicant's letter. His failure to do so amounted to a failure to apply his mind to the issues before him, including the requirements of the LRA and the agreement.

[10] Mr. van der Riet SC, on behalf of the respondent, referred to a judgment by this Court (per Hendricks AJ) in *Johannesburg City Parks v Mphahlani NO and others* (JR 1114/06, 13 December 2007) where in a similar application, the Court concluded that an application for the condonation of the late filing of the application for review should be refused. The basis of the refusal to grant condonation appears to be that the applicant had chosen to bring an application for the rescission of an arbitration award in the bargaining council in circumstances where in the arbitration proceedings, it had denied that it was subject to the council's jurisdiction. In relation to the application for review, the Court held that the arbitrator had correctly decided that she was seized with the matter and that she had the necessary jurisdiction to arbitrate the dispute. In support of this conclusion, the Court referred to *Johannesburg City Parks v SAMWU & others* [2006] 7 BLLR 659 (LC), where the Court (per Revelas J) refused to interdict a strike in circumstances where the dispute giving rise to the strike had been referred to the bargaining council and a certificate of outcome issued and the applicant had contended that it was not subject to the council's jurisdiction.

[11] The difficulty presented by the judgment of Hendricks AJ is the absence of any reference to the provisions of s 62 of the LRA. Section 62 deals not only with demarcation disputes but also with demarcation issues that arise during the course of proceedings under the Act. The section must be read in the context of the manner in which the LRA promotes and regulates sectoral bargaining, and the importance that is attached to the registered scope of a bargaining council for a number of purposes under the Act. Sections 27 and 28 provide that a bargaining council may be established for a sector and area, and that a

bargaining council may exercise its statutory powers and functions in relation to its registered scope, which must be specified on registration (see s 29(15)(a). Section 51 regulates the dispute resolution functions of a council, and provides for the resolution of disputes by a council only in respect of parties to the council and those non-parties that fall within its registered scope. Section 51(4) requires that if one or more parties to a dispute referred to a council do not fall within the registered scope of the council, the council must refer the dispute to the CCMA. Section 62 regulates demarcation disputes (in the form of a dispute about whether a party is or was employed within a sector or area, or whether any arbitration award, collective agreement or wage determination is or was binding.)

[12] Section 62 (3), (3A) and (5) deal with the question of the effect of a pending demarcation dispute on proceedings initiated in terms of the Act. Section 62(3) regulates proceedings before this Court, and requires the Court, in any proceedings, subject to the conditions set out in subsection (a), to adjourn those proceedings and refer the demarcation issue to the CCMA for determination. Section 62(4) regulates proceedings before the CCMA, and requires it, in the same peremptory fashion, to adjourn the proceedings pending the further resolution of the demarcation issue. Section 62(3A) regulates proceedings before an arbitrator, and provides as follows:

> "*In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1) (a) or (b) is raised,*[1] *the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-*
>
> *a) the question raised-*
>
> *i) has not previously been determined by arbitration*

1 Section 62(1) (a) refers to a demarcation dispute about whether an employee, employer, or a class of employers or employees is or were engaged in a sector or area.

in terms of this section; and

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

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

[13] In the proceedings under review, the arbitrator derived his powers from the agreement concluded in the bargaining council on 3 February 2004, an agreement that was in force at the date of the arbitration award under review. The agreement makes provision *inter alia* for the referral of disputes (including dismissal disputes) to arbitration and for the conduct of the arbitration of those disputes. Whether the applicant was engaged in the sector for which the bargaining council was registered was a matter that had pertinently been raised before the arbitrator. In my view, it was incumbent on him therefore to have adjourned the arbitration proceedings and to have referred the matter to the CCMA. A reasonable decision maker would have enquired into whether he or she had jurisdiction, faced with the available information on the demarcation dispute. The arbitrator's failure to do so constituted a failure to comply with a statutory obligation, and therefore warrants intervention by this Court. In any event, it is clear from the record and the terms of the arbitrator's award that he failed, as he was obliged to do in terms of part 4 of the collective agreement, to require Kok to prove that the bargaining council had jurisdiction to arbitrate the dispute.

[14] In so far as the application for condonation for the late filing of the review application is concerned, the reason proffered by the applicant for its delay is the abortive application for rescission. It seems to me that having regard to the reasonableness of the explanation for delay and particularly to the merits of the application, that condonation ought to be granted. Finally, given the existence of a collective bargaining relationship between the parties, the interests of fairness dictate that no costs order should be made.

I accordingly make the following order:

1. The application for condonation is granted.
2. The first respondent's arbitration award dated 1 November 2005 is reviewed and set aside.
3. There is no order as to costs

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 15 September 2009
Date of judgment: 10 December 2009

Appearances:

For the applicant: Adv T Bruinders SC
Instructed by: Sim & Botsi Attorneys Inc.

For the respondent: Adv J van der Riet SC
Instructed by Cheadle Thompson and Haysom Inc.