REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 938/2011

In the matter between:

PSA (obo L LIEBENBERG) **Applicant**

and

DEPARTMENT OF DEFENCE **First Respondent**

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL **Second Respondent**

ADV WF MARITZ N.O. **Third Respondent**

Heard: **22 November 2012**

Delivered: **30 November 2012**

Summary: Application of collective agreement – jurisdiction of bargaining council. *PSA obo De Bruyn v Minister of Safety and Security* followed; *Minister of Safety & Security v SSSBC* distinguished.

JUDGMENT

STEENKAMP J

Introduction

[1] This review application is unusual in the sense that the parties agree that the arbitrator's ruling is not sustainable and should be reviewed, set aside and substituted. However, they differ as to the nature of the substituted order.

[2] The dispute turns on the question whether or not the second respondent (the Bargaining Council) had jurisdiction to entertain the dispute that the applicant referred. That question, in turn, depends on the question whether the dispute can properly be categorised as a dispute over the application of a collective agreement as envisaged in section 24 of the Labour Relations Act[1]; or whether the true nature of the dispute is one for substantive relief in which the application of the agreement is merely a matter in the dispute.

[3] Both parties seek to review and set aside a jurisdictional ruling by the arbitrator (the third respondent, Adv Bill Maritz)) in which he held that the Bargaining Council did not have jurisdiction to entertain the dispute that the applicant (the PSA acting on behalf of its member, Ms L Liebenberg) had referred to it. The PSA seeks a substituted ruling that the Bargaining Council does have jurisdiction. The first respondent, the Department of Defence, seeks a substituted ruling that the Bargaining Council does not have jurisdiction, but for different reasons from those advanced by the arbitrator.

Background facts

[4] The broader dispute between the parties turns on a collective agreement of the Bargaining Council, Resolution 7 of 2000.[2] The resolution deals with temporary incapacity leave, commonly referred to as "'TIL" by the parties.

[5] The parties have encountered a mutual problem whereby the Department is faced with a large number of applications for temporary incapacity leave from its employees.

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[1] Act 66 of 1995 (the LRA).

[2] It is common cause that the Resolution is a collective agreement as defined by the LRA.

[6] Where members of the PSA, such as Ms Liebenberg, have been unsuccessful in their applications for TIL, the PSA has referred a dispute to the Bargaining Council in terms of section 24 of the LRA as a dispute over the application of a collective agreement. It is the union's view that, where the Department fails to timeously assess and determine such applications, it amounts to a failure to apply the resolution and the Bargaining Council has jurisdiction to consider the dispute in terms of section 24 of the LRA.

[7] Section 24(1) of the LRA provides that:

> "Every collective agreement… must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration."

[8] The resolution[3] provides for the following process for TIL:

> "(a) An employee whose normal sick leave credits in the cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave on full pay, provided that:
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> (i) her or his supervisor is informed that the employee is ill; and
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> (ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance, as temporary disability, except with conditions do not allow.
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> (b) The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of schedule 8 in the Labour Relations Act of 1995.
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> (c) The employer shall specify the level of approval in respect of applications for disability leave."

[9] The parties are *ad idem* that the Department has to investigate and decide on an application for TIL within 30 days.

[3] Resolution 7 of 2000 clause 7.5.1.

[10] Ms Liebenberg exhausted her sick leave credits and applied for TIL in terms of the resolution. Her application was refused, but the Department only notified her of the refusal more than 2 ½ years after she applied (instead of 30 days). The PSA then referred a dispute to the Bargaining Council on her behalf. The nature of the dispute was described as the application of a collective agreement, i.e. PSCBC Resolution 7 of 2000. The outcome required was that TIL be approved for the period of 5 to 7 November 2008.[4]

[11] The Department raised a preliminary point that the Bargaining Council did not have jurisdiction to consider that the dispute. It argument was based on the decision of the Labour Appeal Court in *Minister of Safety & Security v SSSBC and Others*[5] *("SSSBC").* In short, the Department argued that the interpretation and application of the resolution was only an "issue in the dispute" and that the real dispute was whether it was fair for the Department to have refused Liebenberg's TIL application.

The jurisdictional ruling

[12] Under the heading, "analysis", the arbitrator came to the following conclusions:

12.1 The granting of temporary incapacity leave is discretionary. The department is entitled "to set out the basis on which it would be granted, including the procedures to be followed."

12.2 The resolution must be interpreted with regard to the additional processes introduced by the Minister.

12.3 He was bound to follow the *SSSBC* decision which, in his view, "restricts the application of section 24 to the interpretation and application of collective agreements." He found that the "necessary implication" of the judgement in SSSBC was that he was precluded from interpreting any aspect of the resolution "in so far as it has been enhanced by the Minister acting within his powers" – referring to a directive that the Minister of Public Service and Administration, acting

[4] The Department only informed Ms Liebenberg of its decision to refuse TIL on 17 May 2011.

[5] (2010) 31 *ILJ* 1813 (LAC).

in terms of section 41(3) of the Public Service Act[6], issued on 30 November 2000 in order to implement the resolution. That directive[7] confirms that the investigation and decision must take place within the 30 day period contemplated by the resolution.

12.4 Whilst the Department had not acted within the 30 day period contained in the resolution, the action taken by the employer had to be "considered to be in two phases". The arbitrator considered the "second phase" to be the investigation by SOMA[8]. He considered the 30 day period to be too short for the investigation.

12.5 Even if it was "unfair" for the Department not to revert to Ms Liebenberg within 30 days, he was not persuaded that he could make an order for compensation, "which is not based on an interpretation of the collective agreement".

[13] The arbitrator then made the following ruling:

> "1. For a proper interpretation of the process related to resolution 7 of 2000, it would be necessary to take into account the Directives of the Minister that has been made applicable to any application for temporary disability leave.
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> 2. There is no basis for finding that the directives of the Department have been incorporated into the resolution and have become part of the collective agreement.
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> 3. On that basis I am, in terms of the decision in Minister of Safety and Security v SSSBC and Others (noted above), not entitled to interpret in terms of section 24 of the LRA the entire process which is not part of the collective agreement.
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> 4. Even if I could come to the conclusion that ignoring the 30 day rule mentioned for investigations in terms of the Resolution is a contravention of the Resolution I am of the opinion that an arbitrator would not have the power to award compensation based on the very issue that he is precluded from considering.

[6] Act 103 of 1994.

[7] Clause 10.

[8] An agency to which the Department outsourced the assessment of TIL applications.

> 5. For the above reasons, I have come to the conclusion that I should uphold the objection to jurisdiction and dismiss the application, and it is ordered accordingly."

The review

[14] The parties agree that the arbitrator misconstrued the nature of the enquiry before him. They agree that the resolution is a binding collective agreement that spells out the procedure that the Department must follow when considering TIL applications. It is not in dispute that it must investigate and pronounce upon the application within 30 working days. There is no basis for the arbitrator's finding that he was precluded from considering the resolution because the directives of the Department had not been incorporated into the resolution.

[15] The fact that the Department outsourced the assessment of TIL applications to SOMA is entirely irrelevant to the dispute. The fact that the arbitrator considered the investigation period to be "too short for the investigation to be done by SOMA" was not part of the dispute before him. In considering and pronouncing upon this aspect he exceeded his powers and acted irrationally.

[16] On both of these grounds the review must succeed. The more pertinent question is whether the *SSSBC* decision in any event deprived the Bargaining Council of jurisdiction. I shall consider this question under the discussion of the application for cross-review.

The cross-review

[17] The Department agrees that the 30 day period is not discretionary; and that the *SSSBC* decision does not constitute authority for the arbitrator's finding that he was precluded from considering the directives of the Department. It also agrees that the arbitrator's finding that the 30 day period was too short for an investigation by SOMA is irrelevant.

[18] The Department, instead, advanced two[9] grounds of review in its cross-review application:

18.1 The arbitrator should have considered and upheld the Department's reason why the Bargaining Council lacked jurisdiction, namely that the true dispute that needed to be resolved was the Department's decision to refuse Liebenberg's application for TIL, and not the interpretation or application of a collective agreement.

18.2 The arbitrator should have considered and uphold the Department's submission at the Bargaining Council that the second reason why the Bargaining Council lacked jurisdiction, is because Ms Liebenberg did not initiate or exhaust the internal grievance procedure.

[19] The Department submitted that the dispositive issue for determination before this court is whether the nature of the dispute before the Bargaining Council is the application of Resolution 7 of 2000, or the Department's failure to grant Ms Liebenberg temporary incapacity leave. If the true nature of the dispute is the application of the resolution, the Bargaining Council does enjoy jurisdiction. But if the real dispute is the Department's refusal to grant Ms Liebenberg TIL, it submits that the Bargaining Council does not have jurisdiction to consider that dispute.

[20] The Department further submits that the Department's decision not to grant TIL can be brought within the scope of the unfair labour practice dispensation, in terms of section 186(2)(a) of the LRA and that the PSA should have followed that route. If it were to be correct, though, that would not deprive the Bargaining Council of jurisdiction; the Bargaining Council explicitly has jurisdiction to consider unfair labour practice disputes. Insofar as it goes to jurisdiction, therefore, this ground of cross-review is misguided.

Evaluation / Analysis

[21] I agree that the real question for determination is the true nature of the dispute; and the precedent established by the Labour Appeal Court in

[9] The third ground, relating to the Directives, became academic as the parties agree that the arbitrator was wrong in concluding that he could not consider them.

SSSBC and other cases. I also agree with both parties that there would be little point in remitting the jurisdictional question to the Bargaining Council and that this court is in a position to substitute its own decision for that of the arbitrator.

[22] This court is bound by the principle of *stare decisis*; I thus have to consider whether the *SSSBC* decision is in point, and whether the import of that decision is to oust the jurisdiction of the Bargaining Council on the facts before it in this dispute. Subsequent to the arbitration (and the filing of the parties' heads of argument), though, the LAC's judgment in *PSA obo De Bruyn v Minister of Safety & Security*[10] *("De Bruyn")* was reported. I shall also consider the import of that judgment on the facts of this case, bearing in mind that both judgments emanate from the LAC and are binding on this Court.

[23] In *SSSBC,* the employee applied for a transfer within the South African Police Services (SAPS). It was refused. He referred a dispute about the interpretation and application of a collective agreement[11]dealing with SAPS's transfer policy and procedures to the Safety & Security Sectoral Bargaining Council (SSSBC). He challenged the decision of SAPS to refuse his application for transfer. The issue before the LAC was whether the SSSBC had jurisdiction to deal with the dispute. And that issue had to be determined by how the court answered the further question, whether or not the arbitrator correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement. It was accepted by both parties that, if the dispute was a dispute about the interpretation or application of a collective agreement, the SSSBC had jurisdiction in respect of the dispute; but that, if the dispute was about the fairness of the transfer, the SSSBC did not have jurisdiction.

[24] On the same day as it handed down judgment in *SSSBC,* the LAC handed down judgment in *Johannesburg City Parks v Mpahlani NO & others*[12]

[10] [2012] 9 BLLR 888 (LAC).

[11] Safety & Security Sectoral Bargaining Council Agreement 5 of 1999.

[12] (2010) 31 *ILJ* 1804 (LAC).

("City Parks"). In *City Parks*[13] the court offered the following explanation between "a dispute" and "an issue in a dispute":

> "[14] There are a number of areas in the LRA with references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are ss 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be answered in order to resolve the main dispute. Let me make an example to illustrate the distinction that I seek to draw between *a dispute* and *an issue in a dispute*. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement are applicable and/or compiled with before the employer was dismissed is an issue necessary to be decided in order to resolve the real dispute.
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> [15] In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of, resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, where the main dispute, as opposed to an issue in a dispute, is the

[13] *Supra* paras [14] – [16].

> interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute is required to be resolved through arbitration in terms of the LRA.
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> [16] The proposition advanced by counsel for the appellant made no distinction between a dispute, on the one hand, and an issue in a dispute, on the other. That is why the appellant's counsel was driven to submit that all disputes which are dealt with by a bargaining council are disputes about the application of a collective agreement because the procedures for dealing with such disputes are provided for in a collective agreement. Obviously, this proposition can simply not be correct. In bargaining councils, proceedings are held that are about all kinds of disputes such as proceedings about dismissal disputes, proceedings about disputes concerning the interpretation or application of collective agreements, proceedings concerning disputes about organizational rights, proceedings about wage disputes and proceedings concerning other disputes."

[25] In *SSSBC*, the court applied the same reasoning. It found that the dispute that was before the arbitrator in that case was a dispute concerning the fairness or otherwise of SAPS's refusal to approve the employee's application or request for a transfer and the application of the provisions of the collective agreement was an issue in dispute. It was an issue which had or may have had to be dealt with in order to resolve the real dispute. That is the main dispute. The dispute itself did not relate to an application of the collective agreement. The court concluded that the Bargaining Council did not have jurisdiction to arbitrate the dispute because that was a dispute concerning the fairness or otherwise of the decision not to approve the employees application for a transfer.

[26] The Department pointed out that this court applied similar reasoning in *SA Onderwysersunie v Head of Department, Gauteng Department of Education & others (1)*[14] *("SAOU"),* having referred to *City Parks* and *SSSBC*, when it held:

> "It appears to me that the main dispute in this urgent application is not the interpretation and application of a collective agreement. The relief

[14] (2011) 32 *ILJ* 1413 (LC) para [38].

> sought is for the head of department to refund the money deducted from the applicants' members pending the compilation of a factually correct database. In the course of deciding whether the applicants are entitled to the relief sought, I have to consider various undertakings by the GDE, some of which are contained in collective agreements of the PSCBC. Those agreements form part of the issues in dispute; but the main dispute is not the interpretation or application of a collective agreement."

[27] The Department argues that the *SSSBC* decision is directly in point of the case before me. It argues that the dispute before Commissioner Maritz was whether the Department's refusal of Ms Liebenberg's application for TIL was unfair. The provisions of the collective agreement only had to be interpreted and applied in deciding that dispute. Therefore, the Department argues, the Bargaining Council did not have jurisdiction.

[28] The PSA has submitted that the *dictum* in *SSSBC* should be narrowly construed so as to avoid the situation where most disputes concerning the application of a collective agreement are rendered nugatory. It submitted that the clear purpose of section 24 is to resolve disputes where a party is in breach of a collective agreement by failing to apply its terms, either correctly or at all. Even though the union would be limited to a finding by the arbitrator that the Department had breached (or failed to apply) the collective agreement and a declaratory order that the Department should comply or rectify its non-application, that should not deprive the Bargaining Council of jurisdiction altogether.

[29] This line of argument appears to me to be consistent with the approach of the Constitutional Court in *Gcaba v Minister for Safety & Security.*[15] The Constitutional Court pointed out that what ultimately determined the jurisdictional divide was the manner in which the dispute was pleaded (i.e. the cause of action relied upon) and the nature of the relief sought. Jurisdiction is determined on the basis of the pleadings, as the Constitutional Court held in *Chirwa*[16], and not the substantive merits of the case.

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[15] (2010) 31 *ILJ* 296 (CC); (2010) 31 *ILJ* 1813 (LAC).

[16] *Chirwa v Transnet* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC).

[30] A similar point was made by Nugent JA in *Makhanya v University of Zululand:*[17]

> "[T]he claim that is before a court is a matter of fact. When the claimant says that the claim arises from the infringement of the common law right to enforce a contract, then, that is the claim, as a fact, and the court must deal with it accordingly. When the claimant says that the claim is to enforce a right that is created by the LRA, then, that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.
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> ...
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> We know this [ie, what the claim is] because that is what it says in the particulars of claim. Whether the claim is a good one or a bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law."

[31] Similarly, it does not seem to me that the Bargaining Council could deny the PSA access to that forum. It has jurisdiction to decide a claim based on the application of the collective agreement. Whether it is a good or a bad claim, is a different question.[18]

[32] As the Supreme Court of Appeal finally noted in *South African Maritime Safety Authority v McKenzie:*[19]

> "Once more, as in other cases that have become before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in *Gcaba v Minister of Safety & Security and Others*, the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded, but could possibly arise from the same facts."

[33] In the present case, the applicants formulated the claim before the Bargaining Council as one concerning the application of Resolution 7 of

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[17] 2010 (1) SA 62 (SCA) paras [71] and [95].

[18] For a full discussion of the jurisdictional question, see Steenkamp and Bosch, "Labour Dispute Resolution under the 1995 LRA" in Le Roux & Rycroft (eds), *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (Juta 2012).

[19] 2010 (3) SA 601 (SCA) para [7].

2000. If that was the true nature of the dispute, the Bargaining Council had jurisdiction to consider it.

[34] The decisions in *City Parks* and *SSSBC* must also be reconsidered in the light of the more recent decision of the Labour Appeal Court in *De Bruyn.* That case appears to be directly in point with the current one. The PSA also acted on behalf of its member, De Bruyn. He applied for temporary incapacity leave. The employer approved TIL for one period and disapproved did for another period. He referred an unfair labour practice dispute to the SSSBC. However, the dispute was not pursued and remained unresolved. The PSA then approached the Labour Court for the review and setting aside of the employer's decision to disapprove the application for TIL in terms of section 158(1)(h) of the LRA.

[35] The Labour Court held that temporary incapacity leave is governed by the provisions of a resolution of the PSCBC which is a binding collective agreement. The appropriate forum to challenge the decision of the employer refusing the employee temporary incapacity leave, the court held, was the Bargaining Council. It also expressed the view that the cause of action for the applicant (the PSA on behalf of its member) rested in the application and/or interpretation of the provisions of the PSCBC resolution.

[36] On appeal, Mlambo JP considered sections 158(1)(h) and 24 of the LRA and concluded:[20]

> "The appellant's complaint clearly concerns the denial of incapacity leave. The alleged right the appellant seeks to assert derived from the provisions of the PSCBC resolution as the Labour Court, correctly in our view, found. The resolution deals with leave of absence and what steps an employee should take in case of a dispute arising regarding attendant matters. There is no doubt that the aspect of leave of absence is an issue falling squarely under the PSCBC resolution. In deciding whether the relief sought ought to be granted, the court a quo had to have regard to the provisions of the resolution.

[20] *De Bruyn (supra)* paras [31] – [34].

> Therefore, the court a quo… correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organisation, is governed by the provisions of Resolution 5 of 2001 of the PSCBC which is a binding collective agreement. This means that the dispute between the parties was required to be submitted to arbitration, as it concerned the application and/or interpretation of the provisions of the PSCBC resolution.
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> …
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> It follows therefore that where an employee… is dissatisfied with a decision by the employer with regard to the issue of leave of absence… his remedy lies in the provisions of the resolution. It follows that the appellant is confined to its remedy in terms of section 24 of the LRA."

[37] That *dictum* is directly applicable to the facts of the matter before me and I am bound by that decision. Although the LAC in *De Bruyn* did not refer to its earlier decisions in *City Parks* and *SSSBC,* it appears to me that *De Bruyn* is more directly applicable to the facts of the case before me and thus to the case that served before the arbitrator. *De Bruyn* makes it clear that, in a case such as the current one, where the employee and her union are dissatisfied with the employer's refusal to grant a temporary incapacity leave, and the procedure for granting or refusing TIL is governed by the collective agreement of the Bargaining Council, her remedy lies in the referral of a dispute over the application of the resolution to the Bargaining Council in terms of section 24 of the LRA. I also take into account that *De Bruyn* is the most recent decision of the LAC on this point.

Conclusion

[38] For the reasons set out above, and given the judgement in *De Bruyn* and the principle of *stare decisis*, I hold that the Bargaining Council did have jurisdiction to entertain a dispute over the application of Resolution 7 of 2000 in terms of section 24 of the LRA.

[39] The dispute should be remitted to the Bargaining Council to convene an arbitration hearing on the merits.

Costs

[40] The parties agreed that the arbitration award should be reviewed and set aside. The dispute is in the nature of a test case. It has ramifications for the members of the PSA and other trade unions, as well as the Department. The parties referred the application for review and cross review to this court in circumstances where the guidance from the Labour Appeal Court was unclear. In law and fairness, neither party should be ordered to pay the other party's costs in these circumstances.

Order

[41] in conclusion, I make the following order:

41.1 The jurisdictional ruling made by the third respondent (the arbitrator) under the auspices of the second respondent (the Bargaining Council) on 10 October 2011 under case number PSCB 230-11/12 is reviewed and set aside.

41.2 The ruling is replaced with a ruling that the Bargaining Council does have jurisdiction over the dispute referred by the applicant (the PSA).

41.3 The dispute is remitted to the Bargaining Council for arbitration on the merits before a different arbitrator.

41.4 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	J Whyte of Cheadle Thompson & Haysom.
FIRST RESPONDENT:	J van der Schyff
	(heads of argument drafted by R M Nyman)
	Instructed by the State Attorney.