REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no. D552/12

In the matter between:

HEALTH AND OTHER SERVICES PERSONNEL

TRADE UNION OF SOUTH AFRICA **First Applicant**

TM SOMERS **Second Applicant**

and

MEC FOR HEALTH KWAZULU-NATAL **First Respondent**

THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORIAL BARGAINING COUNCIL **Second Respondent**

A DORASAMY NO **Third Respondent**

Heard: 27 May 2014

Delivered: 21 August 2014

Summary:

JUDGEMENT

SHAI AJ

Introduction

[1] On the 27 May 2014, I issued an order in the following terms:

a) That the ruling by the Third Respondent issued under case no. PSHS 542-11/12 dated 30 March 2012 is reviewed and set aside.

b) That the finding of the Third Respondent is corrected by substituting it with a finding that the Second Respondent has jurisdiction to determine the dispute.

c) That the reasons for the order will follow in due course.

d) No order is made as to costs.

[2] Hereunder follows the reasons for the order:

[3] This is an application by the applicant in terms of which it seeks to review and set aside a ruling by Third Respondent under Case no PSHS 542-11/12, in which he found that the Second Respondent lacked jurisdiction to determine the dispute regarding the application and interpretation of PSHDSDB Resolution 3 2007, brought by the applicants against the First Respondent. Further, that the finding of the Third Respondent be corrected by substituting for it a finding that the Second Respondent has jurisdiction to determine the dispute. Further that, that the matter be referred back to the Second Respondent for hearing and that the costs of this application for review be paid by the party who opposes it.

[4] The applicant is opposed.

The Facts

[5] PSHSDSBC Resolution 3 of 2007 ("the Resolution") was agreed on by the State and employee parties to the PHSDSBC in 2007.

[6] The Resolution provided for the introduction of an occupational specific dispensation for three nursing categories- Professional nurse, staff nurse and nursing assistant, with effect from 1 July 2007.

[7] Paragraph 3.2.5 of the Resolution provides measures to be taken in translating, in two phases viz from the dispensation prior to the Resolution to the Occupational dispensation.

[8] The applicants are of the view that on a proper interpretation of the Resolution:

- These translation measures were peremptory and applicable to the First Applicant's members, including the Second Respondent and subject to an employee qualifying for the occupational specific dispensation satisfying certain criteria, the First Respondent is obliged in terms of the Resolution to translate such employee to a particular post, which can be ascertained *ex facie* in the Resolution with reference to such criteria as the employee in question has satisfied.

[9] Furthermore, it is the contention of the First Applicant that the Resolution applied in respect of the Second Applicant in that:

- She was employed by the First Respondent as a nurse.
- She possessed two post basic qualifications, a Diploma in Psychiatry and a Bachelor of Arts in Nursing Science (Community Nursing Science) and had 24 years appropriate experience as at 1 July 2007. She also worked in a community Health Centre.

[10] It is further contention of the First applicant that having regard to her qualifications and experience, she was entitled to translation in terms of the first phase of the translation process set out in 3.2.5. of the Resolution to the post of Professional Nurse Grade I (Speciality Nursing) and secondly that having regard to her qualifications and experience, she was entitled to

translation in terms of the Second Phase of the translation process set out in clause 3.2.5. of the Resolution to a higher salary level, namely salary notch R228 795.00.

[11] On the other hand, the First Respondent contended that the Second Respondent is not entitled to the salary that she claims.

[12] The Third Respondent in dealing with the above concluded that the Second Respondent lacks jurisdiction in that 'the applicant's main dispute is about the employer's decision not to give the employee the benefit that he seeks which would affect her salary. The subsidiary/secondary issue in dispute is the matter of the ambit of the collective agreement, the factors that the employer had to take into account etc. In any event, the employer ought to have considered the guiding principles of the collective agreement and arrived at a decision not favourable by the applicant. In reality, she was unhappy with the employer's decision not to give/favour her with the Part B translation key, based on the number of years appropriate service which is 24 years, she should have been translated to salary notch R228 795.00(pa)'.

[13] It is this decision that the applicant seeks to review and set aside.

Application for condonation

[14] The award/ruling was delivered to the applicant on the 16 April 2014 and hence the application should have been filed before the end of May 2014. The application was filed on the 18 June 2014, which is three weeks outside the prescribed six weeks in terms of section 145 of the Labour Relations Act 66 of 1995.

[15] The factors that need to be taken into account in determining an application for condonation for non-compliance with rules were stated in the well-known case of *Melane v Santam Insurance Company Limited*[1] as follows:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both parties. Among

[1] 1962 (4) SA 531 (A) at 532 C-F.

> the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'

[16] The application for condonation is three weeks late which I consider not to be excessive. The explanation is that the instructing attorney made a mistake when briefing the Counsel and on noticing this, the matter was urgently attended to. I am satisfied that once the error was noted no time was wasted to remedy the situation. I am further satisfied that the applicants have good prospects of success as I will show when I deal with the application for review. Further that, the matter appears to be important to both parties and determining the merits of the application will serve the interests of both parties. I, therefore, grant condonation.

Grounds of Review

[17] As indicated above the Third Respondent categorised the dispute raised by the applicants as being a dispute about the First Respondent's 'decision not to give the employee the benefit that she seeks which would affect her salary' and the interpretation and application of the collective agreement as the subsidiary/secondary issue in dispute. As a consequence, he found that the Second Respondent lacked jurisdiction to arbitrate the matter.

[18] The applicants contended that in reaching that conclusion the Third Respondent misdirected himself and committed an error of law in that:

18.1. The Third Respondent failed to appreciate that in referring a dispute concerning the interpretation and application of the Resolution, the Applicants were seeking to enforce the Resolution on behalf of the

Second Applicant and applying directing to latter's factual circumstances.

18.2. In brief, should the Resolution be interpreted correctly to the applicant's situation, then the latter will be entitled to the relief claimed on the basis that the Resolution be and is applied in line with the said interpretation.

18.3. The interpretation and application of the Resolution was integral to and definitive of the Applicants claim and not merely a secondary issue to be determined in the course of deciding whether the applicants were entitled to the relief claimed.

18.4. The main dispute raised by the Applicants concerned the interpretation and application of a collective agreement, namely, PHSDSBC Resolution 3 of 2007, and therefore that the Second Respondent has the jurisdiction to determine such dispute.

18.5. In reaching the conclusion that the Second Respondent lacked jurisdiction to arbitrate the dispute, the Third Respondent reached a conclusion that no reasonable decision-maker could reach.

Jurisdiction test

[19] The test applicable to a review of a jurisdictional ruling is whether the jurisdictional facts objectively exists in order to enable the Second Respondent in our case to obtain the jurisdiction, or do the jurisdictional facts obtain in order for the Second Respondent to exercise the power.[2]

[20] The court in the case of *Jonsson Uniform Solutions Pty Ltd v Lynette Brown and Others,*[3] in reliance to the above case said the following:

> 'The generally accepted view is that we have a bifurcated review standard viz. reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd*

[2] See *South African Rugby Players Association (SARPA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby (Pty) Limited v South African Rugby Players Union and Another* [2008] 9 BLLR 845 (LAC) at para 41.
[3] DA 10/2012 delivered on 13 February 2014 (not reportable) per Musi AJA at para 33.

> *and Others* as follows: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"'

[21] In assessing whether the CCMA or Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the jurisdiction to entertain the dispute.[4]

[22] The test is, therefore, not whether the arbitrator reached a conclusion a reasonable decision maker could not reach, but whether the arbitrator was correct based on facts whether the CCMA or Bargaining Council was clothed with jurisdiction.

Evaluation

[23] The applicants referred a dispute concerning the interpretation and application of a collective agreement, referred to as PHSDSBC Resolution 3 of 2007. The First Respondent raised a point *in limine* to the effect that the Second Respondent lacked jurisdiction to determine the dispute as it related to 'salary' and the Second Respondent lacked jurisdiction in matters relating to salary. This is basically the question that the court must answer.

[24] The full facts have been outlined above and I will therefore not repeat them here.

[25] Grogan,[5] defines a dispute concerning interpretation and application of a collective agreement as captured in section 24 (2) of Labour Relations Act 66 of 1995 as amended, as follows:

> 'A dispute over interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances. It is quite possible that both types of dispute may arise in the same case.'

[4] See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd SARPU* (*supra*).
[5] Grogan, J, Collective Labour Law, First Edition, (2010) Cape Town: Juta, at page 132.

[26] In the case of *Minister of Safety and Security v Safety and Security Sectorial Bargaining Council and Others*[6] the following legal issues had to be considered:

> '3.1. The parties agree that the sole issue before this Honourable Court is whether, as a matter of law, the Second Respondent was possessed of the requisite jurisdiction to determine the dispute which was referred to arbitration.
>
> 3.2. In this particular regard this Honourable Court will be required to decide whether the Second Respondent correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement.
>
> 3.3. The Third Respondent contends that the Second Respondent was correct in his categorisation of the dispute as one concerning the interpretation and application of a collective agreement.
>
> 3.4. The Applicant on the other hand will contend that although the dispute concerning the interpretation and application of a collective agreement, the real or true dispute before the Second Respondent was in fact a dispute about the fairness of the decision taken by the Applicant to refuse the Third Respondent's application for transfer (and that there was neither a dispute about the interpretation of the relevant collective agreement or whether it applied in the present circumstance.'

[27] In resolving the above legal issue, the court in *Minister of Safety and Security v Safety and Security Sectorial Bargaining Council and Others*[7] cited with approval paragraphs 14-16 of the case of *Johannesburg City Parks v Mphahlani, J NO and Others*,[8] which distinguished between a dispute and issue in a dispute:

> '[14] There are a number of areas in the LRA which contain references to disputes or proceedings, that are about the interpretation or application of collective agreement are references to the main

[6] [2010] 6 BLLR 594 (LAC) at para 2.
[7] Ibid at para 11.
[8] [2010] 6 BLLR 585 (LAC); (2010) 31 ILJ 1804 (LAC) at paras 14-16.

disputes sought to be resolved and not to issue that need to or may need to be answered or dealt with 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 dispute. One may have a situation where an employee is dismissed for operational requirements and 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 a 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 were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute.

[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 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 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 would be required to be resolved through arbitration in terms of the LRA.

[16] The proposition advanced by counsel for appellant made no distinction between a dispute, and an issue in dispute on the other hand. That is why the appellant's counsel was driven to submit that all

> disputes which are dealt with by a bargaining council are all disputes about the application of a collective agreement because procedures for dealing with such dispute 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 concerning the interpretation or application of collective agreements, proceedings concerning disputes about organizational rights, proceedings about wage disputes and proceedings concerning other disputes.'

[28] Following this reasoning the court held that the matter before the Second Respondent was a dispute concerning the fairness or otherwise the refusal to approve the Third Respondent's application or request for a transfer and the application of the provisions of a collective agreement was an issue in dispute. It was an issue which had to or may have had to be dealt with in order to resolve the real dispute. The dispute itself did not relate to an application of the collective agreement.

[29] However, the court in the case of *Public Servants Association of South African obo De Bryn v Minister of Safety and Security*[9] steered clear of the distinction between a dispute and an issue in dispute. In this case the court held that where the subject matter of a dispute falls within the ambit of a collective agreement, that dispute must be referred to arbitration in terms of Section 24 of the Labour Relations Act 66 of 1995. In this case, the applicant sought to review a decision by the employer not to grant him leave of absence. Since the question of leave of absence was regulated by PSCBC Resolution 5 of 2001, the court held that the said dispute was required to be submitted to arbitration as it concerned the application and interpretation of the provisions of the said resolution.

[30] The SCA in the case of *Johannesburg City Parks v Mphahlani, J NO and Others*[10] had the opportunity to express its view on the distinction outlined above. The court per Streicher JA captured the finding of the LAC in the *Mphahlani* case as follows:

[9] [2012] 9 BLLR 888 (LAC)
[10] (2011) 32 *ILJ* 1847 (SCA); [2012] 1 BLLR 1 (SCA).

> 'The LAC held that one should distinguish between a dispute and an issue in dispute and that the proceedings before the arbitrator about the interpretation or application of a collective agreement referred to in S 62 (3A) were intended to refer to proceedings where the main dispute between the parties was about the interpretation or application of a collective agreement. In the case under consideration so it held, the main dispute concerned the fairness of the dismissal of the Third Respondent whereas the application of the collective agreement was only an issue in that dispute. For that reason the LAC held that the section was not applicable to the arbitration proceedings conducted by the Fourth Respondent and that the appeal should be dismissed with costs.'[11]

[31] The court per Boshielo JA qualified the above distinction as follows:

> 'I do not agree with the construction of S 62 (3A) and 62 (3) and (5) as adumbrated by the LAC. I found the distinction drawn by the LAC to be more illusory than real. The nub of the enquiry is simply whether the arbitrator had the jurisdiction to arbitrate this matter or not, given the admitted fact that there was a demarcation dispute which addresses jurisdiction pending before the CCMA.'[12]

The Court went further to say that since the distinction resulted in absurdity, it should not be countenanced. Indeed, the test appear more artificial, confusing and very difficult to apply.

[32] It appears to me that the SCA advocated for back to basics. In my view, back to the basics means the return to the definition as constructed by John Grogan outlined in paragraph 25 above. It is helpful for me to repeat it here so as to provide the connection between the definition and what I intend saying below:

> 'A dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and

[11] Ibid at para 22.
[12] Ibid at para 11.

circumstances. It is quite possible that both types of disputes may arise in same case.'

[33] In our present case, the Applicants referred a dispute concerning interpretation and application of a collective agreement, PHSDSB Resolution 3 of 2007. The First Respondent raised a point *in limine* to the effect that the Second Respondent lacked jurisdiction to determine this dispute, precisely because the dispute is about a salary and that such a dispute does not fall within purview of the Second Respondent to determine.

[34] The said resolution provided for the introduction of occupational specific dispensation for three nursing categories, staff nurse and nursing assistant effectively for 1 July 2007. The resolution provided for measures for translation of employee into specific posts which will have an effect on the salaries of the qualifying person.

[35] It is the contention of the applicants that the relevant provision of the Resolution applied to the Second Applicant.

[36] It is further contention of the applicants that on a proper construction and having taken the Second Applicant's qualification and experience, the Second Applicant was entitled to translation in the first phase to post of Professional Nurse Grade 1 (Speciality Nursing) and in the second phase of the translation into a salary notch R228.795.00.

[37] As I have indicated above the contention of the First Respondent is that the Second Applicant is not entitled to such a translation and further that, that the Second Respondent lacks jurisdiction to determine the dispute as it pertains to salary.

[38] What is clear to me is that the parties are in disagreement with regard to the Second Applicant's entitlement to be translated as aforesaid. The said entitlement pertains to translation into a particular post with the resultant placement into a particular salary scale viz. R228.795.00.To do this, the said Resolution must be interpreted and it be determined if and how it applies to the Second Applicant if any. This places the dispute squarely within the

collective agreement. What the arbitrator needs to do is to interpret the Resolution to find its meaning and determine whether its application confirm the Second Applicant's claims or whether it is inconsistent therewith. The matter is, therefore, arbitrable and the Second respondent has the jurisdiction to deal with the dispute.

[39] In the premises, I make the following order:

a) That the ruling by the Third Respondent issued under case no. PSHS 542-11/12 dated 30 March 2012 is reviewed and set aside.

b) That the finding of the Third Respondent is corrected by substituting it with a finding that the Second Respondent has jurisdiction to determine the dispute.

c) No order is made as to costs.

_____

Shai, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For Applicants: Adv A L Christison

Instructed by: Llewellyn Cain Attorney

For Respondent: Adv LL Ngumle

Instructed by: State Attorney