

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Date heard: **02/03/2007**
Date delivered: **09/03/2007**

Case number: **1163/2006**

In the matter between:

**SOUTH AFRICAN MUNICIPAL
WORKERS UNION
(NORTHERN CAPE PROVINCE)**
Applicant

and

SOL PLAATJE MUNICIPALITY
Respondent
**THE SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL**
(SALGBC)
Respondent
MODUTLE, J E & 7 OTHERS
Respondents

1ST

2nd

3rd to 10th

*Coram: **Lacock J***

REASONS FOR JUDGMENT

LACOCK J:

1] On 28 September 2006 this Court issued a rule nisi and

interim interdict reading as follows:

"1. That a rule nisi is issued calling upon the first Respondent to show cause, if any, on 20 OCTOBER 2006 AT 10H00 or as soon thereafter as the matter may be heard why;

11 the first Respondent should not be ordered and prohibited from, pending the finalisation of proceedings instituted by the Applicant in terms of Sections 51(8), 135 and 191 of the Labour Relations Act, 1995, to the South African Local Government Bargaining Council, to appoint any Applicant to the posts of;

- a) Political Operations Officer; Mayor's Office*
- b) Executive Mayor Office Manager; Mayor's Office*
- c) Executive Administrative Assistant; Mayor's Office*
- d) Political Administrator; Speaker's Office*
- e) Executive Administrative Assistant; Speaker's Office*
- f) Political Liaison Officer; Speaker's Office*
- g) Senior Political Officer; Speaker's Office*
- h) Senior Political Liaison Officer; Speaker's Office*

12 if any person has or have been appointed to the abovementioned posts, such appointment or appointments be stayed, pending the finalisation of the proceedings referred to in paragraph 1.1 above,

13 the first Respondent not be ordered to pay the costs of this application.

2. That the orders referred to in paragraphs 1.1 and 1.2 above shall serve as an interim order and interdict with immediate effect."

On 2 March 2007, which date was the extended return date of the rule, I discharged the rule with costs, and indicated that my reasons would follow at a later date. These are my reasons for the order made.

- 2] The applicant, a registered trade union, approached this Court on an urgent basis to prevent the first respondent

from appointing employees in the offices of the mayor and speaker of the first respondent to the posts referred to in the rule nisi. The first respondent, as well as the affected employees who had, unbeknown to the applicant and the Court when the rule nisi was issued, already been appointed to the relevant posts and who were joined as the third to tenth respondents to these proceedings, opposed the confirmation of the rule.

- 3] The first issue for determination and which was raised as a point *in limine* by the opposing respondents, is whether this Court has the necessary jurisdiction to deal with this matter. The respondents submitted that the jurisdiction of this Court to deal with a labour dispute like this is ousted by the provisions of sec. 157 (1) of the Labour Relations Act, no. 66 of 1995 (the LRA).

To fully appreciate this argument, it is necessary to analyse the nature of the dispute in question.

- 4] It is common cause that at all times relevant to this matter, the applicant, the first respondent and the Independent Municipal and Allied Trade Union were parties to and were bound by the terms and conditions of an Organisational Rights Collective Agreement (the collective agreement) as envisaged in (*inter alia*) Part B of the LRA. It is also common cause that in terms of sec. 12 of the collective agreement, a Local Labour Forum (LLF) had been established “*with equal representation from the trade unions and the employer*” (the first respondent).

See sec. 12.1 of the collective agreement.

The powers and functions of the LLF are described as follows in sec. 12.2.1 of the collective agreement:

"12.2.1 The Local Labour Forum shall have the powers and functions of negotiating and/or consulting:

12.2.11 on matters of mutual concern pertaining to the employer and which does not form the subject matter of negotiations at the SALGBC or its Divisions;

12.2.12 on such matters as may from time to time be referred to such forum by the SALGBC or its Divisions;

12.2.13 provided that it may not negotiate on any matter, which has been reserved for exclusive bargaining in the SALGBC or the divisions."

(SALGBC is The South African Local Government Bargaining Council, the second respondent.)

- 5] After it became known to the applicant that the first respondent intended to re-structure certain posts in its corporate services sector, and more particularly in the offices of the mayor and speaker, the LLF engaged in a consultative process and reached agreement on the organogram prepared by the first respondent in respect of the proposed reconstructed posts in the corporate services sector. The council of the first respondent thereafter approved the organogram and reconstructed posts *"without any grading attached to them"*. Subsequent hereto the administrative corps of the first respondent graded the posts in terms of its internal rules and

regulations, determined the salaries applicable to each post, and appointed employees to these posts. All employees thus appointed were to receive an increase in their salaries earned before the restructuring of the relevant posts.

- 6] It is common cause that the applicant was not consulted in regard to the grading of the posts and the salary scales in respect thereof. This alleged omission on the part of the first respondent forms the nub of the dispute between the parties. The applicant avers that, in terms of the collective agreement, the first respondent was bound to refer not only the organogram, but also the grading and salary scales attached to the posts to the LLF for consultation. This is denied by all the opposing respondents. The resolution of this dispute is therefore dependant upon the proper interpretation of the collective agreement.
- 7] The applicant has, on the same date on which the rule nisi was granted by this Court, referred the aforesaid dispute to the second respondent, a body established in terms of Part C of the LRA. The nature of the dispute is described in the said written referral as *"interpretation/application of collective agreement"*.
- 8] Sec. 157 (1) and (2) of the LRA reads as follows:

"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be

determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

- (a) employment and from labour relations;*
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*
- (c) the application of any law for the administration of which the Minister is responsible."*

What is also relevant is sec. 158 (1) (a) of the LRA, reading:

"(1) The Labour Court may-

- (a) make any appropriate order, including-*
 - (i) the grant of urgent interim relief;*
 - (ii) an interdict;*
 - (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;*
 - (iv) a declaratory order;*
 - (v) an award of compensation in any circumstances contemplated in this Act;*
 - (vi) an award of damages in any circumstances contemplated in this Act; and*
 - (vii) an order for costs;"*

- 9] Mr Coetzee for the applicant has, correctly so in my view, from the outset, conceded that sec. 157 (2) of the LRA is not applicable to the circumstances of the present matter, and that this Court derives no jurisdiction from the provisions of this section. The correctness of this concession is to be found in the judgments in **Mgijima v E C Appropriate Technology Unit & Another, 2000(2) SA 291 (TkHC); Fredericks & Others v MEC for Education and Training, EC, 2002 (2) SA 693 (CC)**

and **Bensingh v Minister of Education and Culture: Province of KwaZulu-Natal & Others [2003] 1 All SA 157 (D)**. No constitutional issue is relied upon in this case.

- 10] Mr Coetzee however, submitted that the Labour Court has no jurisdiction to determine a dispute in respect of the interpretation of a collective agreement, and therefore had no jurisdiction to grant the interim relief and interdict granted by this Court. He developed his argument along the following lines: The LRA makes provision for three jurisdictional or non-jurisdictional spheres: Firstly the exclusive jurisdictional sphere of the Labour Court as provided for in sec. 157 (1) of the LRA; secondly the concurrent jurisdictional sphere of the Labour Court and the High Court as provided for in sec. 157 (2) of the LRA; and thirdly the ouster of the jurisdictional sphere of the Labour Court in terms of sec. 157 (5) of the LRA. This section reads,

“(5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.”

Sec. 24 (1) of the LRA provides the procedure whereby disputes in regard to the interpretation of collective agreements are to be resolved. This section reads,

“(1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop

agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), 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.”

The collective agreement in casu in fact makes provision for a procedure to resolve a dispute in regard to the interpretation or application of the agreement as required by this section. Since provision is made in this section for the ultimate resolution of the dispute by arbitration, the Labour Court, by reason of the provision of sec. 157 (5), has no jurisdiction in this matter. Sec. 158 (2) is not applicable to the present circumstances.

[10.1] Mr Coetzee’s argument appears to me to be a double edged sword. His submission that the Labour Court has no jurisdiction to resolve a dispute in respect of the interpretation or application of a collective agreement, appears to be sound. Such disputes are to be resolved first by conciliation and if that fails, by arbitration. See **SA Motor Industry Employers’ Association & Another v NUMSA & Others, [1997] 9 BLLR 1157 (LAC) at 1160 F to J; Rustenburg Base Metal Refiners (Pty) Ltd & Another v NUM & Others, [2002] 11 BLLR 1097 (LC) at 1102 B to D; Ampofo v MEC Education, Arts, Etc., Northern Province, 2002 (2) SA 215 at 230H.**

However, by the same token is the jurisdiction of this Court ousted by the aforesaid provisions of sec. 24 of the LRA to resolve any dispute in regard to the interpretation or application of collective agreements.

“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 the Constitution.”

(Ampofo v MEC Education, Arts, Etc., Northern Province (supra) at 230 J to 231 B).

[10.2] The aforesaid argument based upon the provisions of sections 157 (5) and 24 of the LRA is therefore of no assistance to the applicant for its contention that this Court has jurisdiction to entertain this application.

- 11] The further flaw in Mr Coetzee’s argument is that this Court is not requested to resolve the dispute which had been referred to the aforesaid Bargaining Council. The relief sought is an interim interdict to maintain the *status*

quo ante pending the resolution of the dispute by means of conciliation and arbitration in terms of the LRA. Sec. 158 (1) of the LRA expressly clothe the Labour Court with jurisdiction to make an order for *inter alia* the grant of urgent interim relief or an interdict. Although an applicant in a matter like the present has to some extent to rely on the interpretation of the collective agreement to establish a *prima facie* right, the Court which has to adjudicate the interim relief is not the forum for resolving the dispute in respect of the interpretation or application of the collective agreement. That forum remains the arbitrating body (which is the Commission for Conciliation, Mediation and Arbitration – CCMA), and that function of the CCMA is not usurped by the Court considering interim relief or an interdict.

[111] If regard is had to the whole tenor of the LRA, i.e. the establishment of ways and means to resolve labour disputes and related matters, the provisions of sec. 157 (1) read with sec. 151 (2) thereof, and the provisions of sec. 145 read with sections 157 (1) and 158 (1) (g) of the LRA whereby exclusive jurisdiction is conferred on the Labour Court to review decisions of the CCMA, (**Ampofo** (supra) **at 231 C to D**), I am satisfied that the Labour Court is the only Court with jurisdiction to grant the interim relief applied for by the applicant. That the Labour Court has such jurisdiction had been decided by the

Labour Appeal Court in **SA Motor Industry Employers' Association & Another v NUMSA & Others** (supra) where the following was held:

"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.

Once the bargaining council or one or more of the parties to the bargaining council had decided to seek third party intervention in the dispute about the interpretation of the main and administrative agreements, the following procedure could have been followed:

- *the bargaining council or one or more of the parties should have initiated the procedure provided for in section 24 of the 1995 Act in order to obtain a ruling on the correct interpretation of those agreements;*
- *the employers' organisations could have sought an interim interdict from the Labour Court pending the arbitration of the dispute by the Commission and the Labour Court would have had jurisdiction to make a prima facie finding on the meaning of the agreements as part of the requirement of a prima facie right;*
- *the application for an interim interdict could have been decided on the basis of the applicable principles."*

(emphasis supplied).

(at 1160 J to 1161 C).

12] I therefore conclude that this Court had no jurisdiction to grant the relief sought by the applicant, and the rule had to be discharged.

13] Even if I am wrong in my aforesaid finding, I am of the view that the rule should in any event have been

discharged for the following reasons:

- 14] In order to succeed with its application for a temporary interdict, the applicant must show,

“(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that, if the right is only prima facie established, there is a wellgrounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.”

(LF Boshoff Investments v Cape Town Municipality, 1969 (2) SA 256 (C) at 267 B to D).

- 15] The right relied upon by the applicant is *“the right to have the First Respondent bargain and negotiate in relation to the salary grading and job evaluations in relation to the restructuring process which the first respondent had embarked on”,* as articulated in counsel’s heads of argument. This right, so it is submitted on behalf of the applicant, is entrenched in art. 12.2.1 of the collective agreement, quoted hereinbefore (par. 4). It is common cause that the matter had not been referred to the Local Labour Forum by the South African Local Government Bargaining Council or that the matter had been reserved for exclusive bargaining in the said Bargaining Council. Articles 12.2.1.2 and 12.2.1.3 of the collective agreement

are therefore not applicable to the present issue. The only provisions applicable to this matter are those contained in art. 12.2.1.1. This article is so widely and vaguely worded that one can almost label it void for vagueness. It is however, clear that no provision is expressly made for negotiating or consulting on issues in respect of grading and/or salary grading of posts by the first respondent.

- 16] The first respondent strenuously denies that the grading and/or salary grading of the posts as reconstructed falls within the ambit of the collective agreement as a matter for consultation or negotiation. On the principles laid down in **Plascon-Evans Paints v Van Riebeeck Paints, 1984 (3) SA 623 (A) at 634 to 635**, I have no reason not to accept the version of the first respondent.
- 17] The right relied upon by the applicant is therefore not a clear one but, at best for the applicant, one that is *prima facie* established though open to some doubt. It is therefore necessary to consider whether the applicant has established a wellgrounded apprehension of irreparable harm if the application fails and it ultimately succeeds in the bargaining council.

No attempt was made in the applicant's founding papers to establish any harm, let alone irreparable harm. The only averment that may remotely be described as a reference to some form of harm reads,

“Should the appointment letters be signed and issued successful candidates will be notified and will be in a position to commence employment. This would negatively impact on the dispute which is presently pending before the Second Respondent.”

This bald statement is not explained, and it is difficult to appreciate the probable correctness thereof. The subject of the dispute is the interpretation of the collective agreement. How the appointment of employees to the relevant posts could “negatively impact upon” that issue, is incomprehensible.

If the rule is discharged the third to tenth respondents will all remain in their appointed posts as restructured and will all receive their increased salaries. I can think of no harm that can be suffered by the applicant if this is to happen, and nothing had been suggested by counsel. The only persons that are likely to be detrimentally affected if the applicant is to succeed in the main dispute, are the third to tenth respondents in that they may possibly have to refund the increased portion of their salaries. This risk they are prepared to take.

I am therefore satisfied that the applicant has failed to demonstrate an apprehension of irreparable harm should the rule be discharged.

- 18] In view of my aforesaid finding, I find it unnecessary to deal with the questions of the balance of convenience and

whether the applicant had no other satisfactory remedy.

19] By reason of the aforesaid I discharged the rule with costs as per my order dated 2 March 2007.

HJ Lacock
JUDGE

<u>For the applicant:</u> Kimberley)	Adv W Coetzee & Adv J Henriques (instructed by, Engelsman, Magabane Attorneys,
<u>For the 1st respondent:</u> Kimberley)	Mr W Anderson (instructed by Mjila & Partners,
<u>For the 3rd to 10th respondents:</u> Kimberley)	Mr MD Legodi (instructed by Madisha Dennis Legodi Attorneys,