



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: DA2/2017

In the matter between:

MTHASHANA FET COLLEGE

Appellant

and

THE EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

MLUNGISI SABELA N.O.

Second Respondent

CUTHBERT THEMBINKOSI BUTHELEZI

Third Respondent

Heard: 14 May 2020

Delivered: 14 July 2020

Summary: Practice and Procedure---Jurisdiction---Education Labour Relations Council's jurisdiction to arbitrate residual unfair labour practice----scope of bargaining council in terms of its constitution and collective agreement limited to disputes concerning educators----employee assistant campus manager not an educator---Education Labour Relations Council not having jurisdiction. Appeal upheld.

Coram: Waglay JP, Phatshoane ADJP, and Murphy AJA

JUDGMENT

PHATSHOANE ADJP

- [1] This is an appeal, with leave of this Court, against part of the judgment and order of the Labour Court (*per* Cele J), handed down on 26 May 2016, dismissing the review application with costs and making an arbitration award, issued on 31 March 2014 under Case No: ELRC009/13/14KZN by Commissioner Mlungisi Samela (“the commissioner”), the second respondent, an order of the Labour Court.
- [2] The appeal was initially set down for 21 August 2019 but was struck off the roll with costs due to a defective record that had been filed by the appellant. On 18 October 2019 the appellant lodged an application for the reinstatement of the appeal because it was of the view that it had corrected the disorderly filed record. However, not much has changed because the record is still in a troubling state of disarray. To mention but few:
- 2.1 Contrary to Rule 5(12) of the Rules of this Court the record contains written heads of argument filed during the arbitration proceedings at the Education Labour Relations Council (“the ELRC”) and the transcribed oral argument during the Labour Court review;
 - 2.2 Some of the important documents, for example, the whole Constitution of the ELRC, Collective Agreement No: 1 of 2006 does not form part of the record;
 - 2.3 The replying affidavit in the review is also not before us i.e. if it was ever filed;
 - 2.4 The letter written by General Secretary of the ELRC dated 04 November 2014 referred to in the judgment of the Labour Court, purportedly clarifying the issue of jurisdiction, is missing from the record.

The paucity of information and the manner in which this was presented by the appellant is deserving of stern deprecation. There can be no excuse, particularly where the appellant was afforded, on its own volition, two months to rectify the substandard record.

- [3] Ms Naidoo, for Mr Cuthbert Thembinkosi Buthelezi, the third respondent, challenged the sloppy record of this appeal on multiple grounds and urged that the reinstatement of the appeal be refused. Her other objection is that the Notice of appeal was not properly served on Mr Buthelezi albeit it forms part of the record before us.

- [4] The appeal lies within a narrow scope which concerns the jurisdiction of the ELRC to determine the unfair labour practice dispute filed with it by Mr Buthelezi. I am of the view that this pure legal or technical issue can be disposed of on the record as it stands. It is in the interest of justice that this appeal be finally determined and allow substance to trump form. I can also conceive of no prejudice in reinstating the appeal. It is so ordered.

- [5] Mr CT Buthelezi, the third respondent, took up employment with Mthashana FET College, the appellant, on 02 May 2012 as an assistant campus manager Kwa-Gqikazi Campus including, later on, Nongoma Campus. On 26 September 2012 he was appointed an acting campus manager/principal of the appellant.

- [6] Approximately seven months later, on 16 April 2013, Mr Buthelezi was placed on precautionary suspension with full pay pending an investigation and a disciplinary hearing into allegations of misconduct which included absenteeism and maladministration. On 08 May 2013 he, aggrieved by this suspension, lodged an unfair labour practice dispute in terms of s186(2)(b) of the Labour Relations Act, 66 of 1995 ("the LRA") with the ELRC. The dispute was conciliated pursuant to which process it came before the Commissioner for arbitration. Belatedly, in its closing submission at the arbitration, the appellant challenged the jurisdiction of the ELRC to determine the dispute on the basis that Mr Buthelezi, as a campus manager, did not fall within the purview of its registered scope.

- [7] On 31 March 2014 the Commissioner issued an award in which he concluded that the word “staff” in s 54(1) of the Continuing Education and Training Act (previously known as Further Education and Training Colleges Act), 16 of 2006 (“CET Act”) was inclusive of support staff. Furthermore, that the ELRC and the Public Service Coordinating Bargaining Council (PSCB), as contemplated in s 54(3) of the CET Act, continued to be the bargaining councils that determined salaries and conditions of employment of the employees until such time as the parties would have agreed to establish a new structure relevant to the public colleges. In any event, the Commissioner found that the appellant was a signatory to various collective agreements within the ELRC and ought to have been knowledgeable that the parties to these agreements: *“Have not yet agreed to an establishment of a new structure relevant to public colleges. Therefore, the Education Labour Relations Council has jurisdiction to deal with the dispute.”*
- [8] On the merits of the dispute, the Commissioner found that the appellant did not provide reasons for the suspension of Mr Buthelezi and thus committed an unfair labour practice against him. The Commissioner awarded him six months’ remuneration as compensation and costs of the arbitration.
- [9] Displeased with the outcome of the arbitration the appellant lodged an application for the review and setting aside of the Commissioner’s award with the Labour Court. In the main, it persisted with the attack on the jurisdictional finding by the Commissioner which the Labour Court found no basis to upset. Similarly, the Labour Court concluded that the ELRC was clothed with the necessary jurisdiction to resolve the dispute between the parties. Consequently, it held that the review was without any merit and dismissed it with costs.
- [10] Before us it was contended, for the appellant, that the Labour Court erred in concluding as it did. The review standard, in this case, which hinges on the jurisdiction, is one of correctness as opposed to the reasonableness of the Commissioner’s decision.

[11] The Commissioner's ruling, which found favour with the Labour Court, is largely predicated on s 54(1)(3) of the CET Act as support for the conclusion that the ELRC had the requisite jurisdiction to determine Mr Buthelezi's unfair labour practice dispute. Section 54 falls under Chapter 9 of the CET Act which governs transitional and other arrangements. It provides:

'54 Staff:

- (1) The principal, vice-principal, lecturers and support staff employed by the State continue to be so employed until appointed in terms of this Act.
- (2) Section 197 of the Labour Relations Act applies to the appointment or transfer as contemplated in subclause (1).
- (3) The Education Labour Relations Council and the PSCBC continue to be the bargaining council to determine salaries and conditions of employment until the parties agree to establish a new structure relevant to public colleges.'

[12] What is immediately striking is that, on the plain reading of s 54, nothing is expressly mentioned pertaining to the authority of either the PSCBC or the ELRC to determine the dispute of the kind referred by Mr Buthelezi to the ELRC. Properly construed s 54 enjoins the PSCBC and ELRC to determine salaries and employment conditions of the employees. Nothing more. The statutory architecture for dispute resolution under the CET Act is contained in s 21 which provides in part:

'21 Dispute resolution between college, lecturers and support staff:

- (1) If a dispute arises about the payment or employment conditions of a member of the staff, employed in terms of section 20 (4), any party to the dispute may refer the dispute in writing to-
 - (a) a bargaining council established in terms of the Labour Relations Act, if the employer or employee parties to the dispute fall within the registered scope of a bargaining council; or

(b) the Commission for Conciliation, Mediation and Arbitration established by section 12 of the Labour Relations Act, if no bargaining council has jurisdiction.’

- [13] To buttress her argument that the ELRC had jurisdiction, Ms Naidoo, counsel for Mr Buthelezi, relied on Clause 8.4 of the ELRC Collective Agreement No: 5 of 2013 which stipulates that “lecturers” refers to staff employed to perform a teaching function and includes office-based specialists and a campus manager. She further argued that the ELRC Collective Agreement No: 1 of 2010 and Collective Agreement No: 5 of 2008, as it were, conferred jurisdiction upon the ELRC to resolve the dispute between the appellant and Mr Buthelezi.
- [14] The primary function of bargaining councils is to regulate relations between management and labour in the sectors over which they have jurisdiction by concluding collective agreements. The bargaining councils are also entrusted with the responsibility to settle disputes between parties falling within their registered scope.¹ A Constitution of a bargaining council should capture a set of fundamental principles which governs it.² A bargaining council derives its jurisdictional mandate, to resolve and/or determined disputes referred to it, from its Constitution.
- [15] In this case the persons over whom the ELRC has jurisdiction appear in Clause 6 of its Constitution, Collective Agreement No:1 of 2006 as follows:

‘6. Constitutional scope

The registered scope of the Council extends to the State in its capacity as employer and those employees in respect of which the Employment of Educators Act, 1998, applies.’

- [16] It should be borne in mind that the registered scope of the ELRC is also echoed in Schedule 7 Part D Item 16(2) of the LRA, in these terms:

¹ John Grogan, Workplace Law, 13th Ed, 2020, Chapter 20-p 353, (Jutastat e-publications).

² Section 31 of the LRA outlines what must be provided for in a Constitution of every Bargaining Council.

'2 The *registered* scope of the Education Labour Relations Council is the State and those employees in respect of which Educators' Employment Act, 1994 (Proclamation 138 of 1994) applies.'³

- [17] In the definition section of the Constitution of the ELRC, Collective Agreement No: 1 of 2006, an 'Employee' means an educator as defined in the Employment of Educators Act 76 of 1998 ("EOEA"). The EOEA does not define the word employee. However, the purpose of the EOEA, as set out in its preamble, is "to provide for the employment of educators by the State; for the regulation of the conditions of service, discipline, retirement and discharge of educators; and for matters connected therewith". In light of this, it can safely be concluded that the employees referred to in the constitutional scope of the ELRC are educators. An educator is defined in the EOEA as *"any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act."*
- [18] It follows that the ELRC can only deal with disputes involving educators as defined. Mr Buthelezi admitted that he was neither a lecturer or an educator but was employed as an assistant campus manager, therefore part of the "support staff". The so-called support staff are not included in Clause 6 of the Constitution of the ELRC.
- [19] I am of the view that the ELRC's Constitution supersedes other collective agreements concluded in its chamber. Ordinarily, a collective agreement must be concluded in consonance with the Constitution of a bargaining council and ought not to be in conflict with it. The various collective agreements referred to by Ms Naidoo cannot be construed as purporting to confer jurisdiction on the ELRC which it otherwise does not have. There is no provision in Collective Agreement No: 1 of 2006 that extends the definition of an employee to other categories of

³ The Educators' Employment Act, 1994 (Proclamation 138 of 1994), is the precursor of the Employment of Educators Act 76 of 1998 ("EOEA") and was repealed in terms of s 37(1) of the EOEA.

employees other than the educators. To hold differently may render the Constitution of the ELRC an emasculate legal instrument. The ELRC could not act as a dispute resolution forum in respect of parties that fell outside its constitutional registered scope as in this case.

[20] It is important to mention that the ELRC's Constitution, Collective Agreement No:1 of 2006, lapsed on 23 August 2016. It was replaced by the Collective Agreement No 6 of 2016. In the latest Constitution the constitutional scope of the ELRC in Clause 6 has been extended to include *inter alia*, "*the State in its capacity as the employer as represented by Department of Higher Education & Training (DHET) and employer/s in the Technical Vocational Education & Training (TVET) sector and those employees (the educator/management categories of employees) of which the Further Education & Training Colleges Amendment ACT (FETCA) 2012, applies.*"

[21] The new Constitution does not alter the position relating to this appeal. The Collective Agreement No: 1 of 2006 reflected the terms and conditions which applied when the dispute between the appellant and Mr Buthelezi was determined by the ELRC in March 2014. The collective agreements are binding as set out in s 31 of the LRA. They ought to be enforced and given effect to by the courts and arbitrators. In *SA Local Government Association v Independent Municipal & Allied Trade Union & others*,⁴ this Court emphasised the importance of adhering to the Constitution. It held:

'[36]....(A) practice cannot trump the express and unambiguous terms of a constitution. The decisions taken by the drafting team clearly have far-reaching implications, financial and otherwise. If this degree of deviation from the express provisions of the constitution is tolerated it would effectively write the decision-making requirements set out in clause 16 out of existence. The constitution of the third respondent should not, without justification, be frittered away by practice or judicial decree. This would indeed be a dangerous path to take because the parties testified that the intention was always to request the Minister of Labour to

⁴ (2014) 35 ILJ 2811 (LAC) at 2820 para 36.

extend the agreement to non-parties to the agreement that are within the registered scope of the third respondent.’ (My own emphasis)

[22] On the basis of the foregoing analysis, it follows that the Labour Court was incorrect in holding that the ELRC had jurisdiction to determine Mr Buthelezi’s unfair labour practice dispute as at 31 March 2014 when the ELRC adjudicated upon the dispute.

[23] The question of costs in this Court is determined according to the requirement of the law and fairness. Even though the appellant has achieved substantial success, it should be deprived of its costs in respect of the proceedings in the Labour Court and in this Court because of its gross ineptitude in the filing and presentation of a proper record of the proceedings. I make the following order.

Order

1. The appeal is upheld with no order as to costs;
2. The order of the Labour Court is set aside and substituted with the following:
 - “1. The arbitration award issued on 31 March 2014 under Case No: ELRC009/13/14KZN by Commissioner Mlungisi Samela, the second respondent, under the auspices of the Education Labour Relations Council (“the ELRC”) is reviewed and set aside on the basis that the ELRC lacked jurisdiction to conciliate and arbitrate the unfair labour practice dispute referred to it by Mr Cuthbert Thembinkosi Buthelezi.
 2. No order is made as to costs.”

MV Phatshoane ADJP

Waglay JP and Murphy AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Adv T Kadungure Instructed by Thusini Attorneys
FOR THE THIRD RESPONDENT:	Ms A Naidoo Instructed by Angeni Naidoo Law Firm