

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Case No JA 11/05

In the matter between

**BROADCASTING ELECTRONIC MEDIA AND
ALLIED WORKERS UNION**

Appellant

and

SOUTH AFRICAN BROADCASTING CORPORATION

Respondent

JUDGMENT

KRUGER AJA:

[1] Appellant is the Broadcasting, Electronic Media and Allied Workers Union, a registered trade union. Respondent is the South African Broadcasting Corporation, a registered company and, a public broadcaster in terms of the Broadcast Act 4 of 1999. The appellant and the respondent are herein after referred to as BEMAWU and the SABC respectively.

[2] There are two main disputes between the parties to this appeal. The one is a forum dispute and the other a substantive dispute, namely whether the SABC properly terminated a collective agreement termed a "Relationship Accord" (the "accord") between itself and BEMAWU. We are not asked to decide the latter dispute. The forum dispute raises the question: Must the substantive dispute go to private arbitration in terms of the accord or to the Commission for Conciliation, Mediation and Arbitration ("the CCMA")?

[3] In February 2004 BEMAWU applied to the Labour Court for relief relating to the accord, which BEMAWU had concluded with the SABC on 18 May 1994. The application was brought because the SABC took the view that the accord had been cancelled, while BEMAWU contested the validity of the SABC's purported cancellation of the accord. At the hearing before the Labour Court BEMAWU submitted a draft order to the court as to the relief sought. The following relief was sought therein:

- 1 "All unresolved disputes that arose between the applicant and the respondent before 1 February 2004 shall be resolved in accordance with clause 9 of the Relationship accord concluded between the applicant and the respondent on 18 May 1994 ("the Relationship accord").

- 2 The dispute between the applicant and the respondent relating to the cancellation of the Relationship Accord by the respondent with effect from 1 February 2004 shall be resolved in accordance with clause 9 of the Relationship Accord.
- 3 The applicant and the respondent are ordered to take such steps as might be necessary in terms of the Relationship Accord to enable the disputes referred to in paragraphs 1 and 2 to be resolved in accordance with clause 9 of the Relationship Accord.
- 4 The respondent is ordered to pay the applicant's costs of the application."

[4] At the hearing before the Labour Court the SABC contested the Labour Court's jurisdiction to grant the appellant the relief sought. Jurisdiction in the present context means the power vested in a Court by law to adjudicate upon, determine and dispose of a matter. The Labour Court upheld the respondent's argument in this regard. Tshiqi AJ found that the Labour Court lacked jurisdiction to grant the appellant the relief that it sought and on that basis dismissed BEMAWU's application with costs. BEMAWU appeals to this Court against the judgment of the Labour Court, with the leave of that Court.

The history of the dispute between the parties

[5] On 31 October 2003 the SABC delivered a notice to BEMAWU in terms of clause 16.4 of the accord communicating the SABC's intention of withdrawing from and terminating the accord

with effect from 1 February 2004, being the end of the contemplated three month notice period. Clause 16.4 of the accord states:

"A minimum of three (3) months notice of intention to withdraw from the accord must be given in writing, stating fully the motivations for such withdrawal. Neither party will withdraw from the accord without good reason recognised in law and without affording the other party a reasonable and fair opportunity to rectify any problems or breach which may have initiated the notice."

[6] The SABC's notice dated 31 October 2003 states *inter alia*:

"The SABC hereby gives BEMAWU three (3) months' notice of its intention to withdraw from and cancel the Relationship Accord signed by the parties on 18 May 1994. This means that the Relationship Agreement will cease to operate from 1 February 2004.

As a result of the recent threat of strike action over wages and other conditions of employment and in view of the recent decisions by the Labour Court and Labour Appeal Court in **Columbus Joint Venture t/a Columbus Stainless Steel vs NUMSA** (1999) 10 BLLR 1292 (LC) and in **County Fair Foods (Pty) Ltd v FAWU and Others** (2001) 5 BLLR 494 (LAC), the SABC is of the view that the necessity for such a recognition has become superfluous. The Labour Relations Act, 66 of 1995, as amended ("the LRA") can more than adequately regulate the relationship between the parties in a simple and efficient manner. It is our view that the LRA contains practical and effective procedures to regulate such relationship. Thus for instance, the provisions of the LRA dealing with, *inter alia*, the following:

- Organisational rights;
- Workplace forums;
- Restructuring;
- Protected industrial action; and

- Dismissal procedures

which are prescriptive and would govern the relationship between the parties.

The Relationship Accord is unnecessary and the SABC hereby exercises its right to terminate the accord by giving 3 months written notice as per the provisions of the same accord."

[7] On 10 November 2003 BEMAWU declared a dispute that the SABC had unprocedurally and without reasons cancelled the relationship accord. The SABC responded on 13 November 2003, proposing that a dispute resolution meeting be held on 19 November 2003. It raised no objection to private arbitration at that stage. On 3 February 2004 BEMAWU proposed names of possible arbitrators and dates. On the same day the SABC wrote a letter stating that it would respond on 6 February 2004.

[8] On 6 February 2004 the SABC wrote to BEMAWU, stating that the SABC considered the accord to be at an end, and that cancellation thereof took effect on 1 February 2004. It added: "It is not possible for your request for arbitration to be processed in terms of the Accord where that Accord no longer exists." Thereupon BEMAWU applied to the Labour Court for an order that all outstanding disputes arising before 1 February 2004 be resolved in accordance with the accord, and that the dispute

regarding the cancellation of the accord be resolved in accordance with clause 9 of the accord. That meant that such dispute should go to private arbitration in accordance with the accord. The Labour Court, per Tshiqi AJ, found that the Labour Court lacked jurisdiction to grant the appellant the relief that it sought because neither the Labour Relations Act, 1995 (Act 66 of 1995) (“the Act”) nor the Arbitration Act conferred such jurisdiction on it.

The forum dispute

[9] Counsel for BEMAWU submitted that this Court must determine the arbitral body which must arbitrate the dispute. He submitted that there is a dispute whether the CCMA or a private arbitrator must arbitrate the dispute, and, in such case a third party, the Court, must decide the issue. Counsel for BEMAWU submitted that, because the SABC maintains that the accord no longer exists, this is not a dispute about the interpretation or application of an agreement as contemplated in s 24(2) of the Act. He submitted that an arbitration agreement is regarded as distinct from the main agreement, a fact recognised by s 3(1) of the Arbitration Act 42 of 1965. Thus the determination of the arbitration clause is an *a priori* dispute.

[10] Counsel for the SABC submitted that the dispute is whether the agreement is operative or not. That appears from prayer 2 of the draft order submitted to the Court *a quo*. He submitted that a dispute about whether an agreement is operative or not, is covered by s 24(2) of the Act. He also submitted that, on the assumption that the SABC was frustrating the terms of the arbitration agreement as contemplated by s 24(2)(c) by failing to submit the substantive dispute to arbitration or has rendered it inoperative (as contemplated in s 24(2)(b)) the CCMA has jurisdiction to arbitrate the dispute.

The legal position

[11] The relationship accord is a collective agreement as defined in sec 213 of the Act. That is so because of s 13(2) of Schedule 7 which provides that any agreement that was in force immediately before the commencement of the Act is deemed to be a collective agreement concluded in terms of the Act. The accord comprises 57 pages and covers a wide range of topics. Section 24(1) and (2) of the Act provide as follows:

"24. Disputes about collective agreements

(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.

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if—

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement."

Section 24(2)(a)

[12] Sec 24(2) makes it clear that a dispute about the interpretation or application of a collective agreement has to go to the CCMA in the event of any one of the situations set out therein.

In **Independent Municipal and Allied Trade Union v Northern Metropolitan Substructure and Others** 1999 (2) SA 234 (T) at 238E-239A it is pointed out inter alia that under common law courts did not easily bypass an arbitration clause. Such clause, when it is contained in a collective agreement, would deprive the CCMA of jurisdiction.

[13] Having regard to s 24(2)(a), the question is whether the relationship accord provides for a procedure to resolve the dispute. Clause 9 of the relationship accord provides a comprehensive and detailed dispute resolution procedure that applies to a "dispute" as defined in clause 1.8 of the accord: Clause 1.8 reads:

"1.8 'Dispute' means a continued disagreement between the parties to this accord regarding any work-related matter which may affect the relationship between the parties, or materially disturb the structures and procedures established to maintain this relationship"

Clause 16.5 provides that an alleged breach of the accord is to be dealt with in terms of clause 9. Clause 16.6 provides that the accord shall not be "released, modified or discharged except in accordance with the procedures contained therein". Since the accord does have a dispute resolution procedure which covers disputes about the interpretation or application of a collective agreement, sec 24(2)(a) does not apply.

Section 24(2)(c)

[14] Having regard to s 24(2)(c), the question is whether the SABC has "frustrated" the resolution of the substantive dispute. The essence of the verb "frustrate" in this context is to "make

ineffectual; counteract; foil, annul; invalidate" (*Shorter Oxford English Dictionary* s.v. "frustrate"). Frustration in law is defined as "the premature termination of a contract by circumstances that make performance as envisaged by the terms of the contract impossible" (*loc cit*). The SABC has done nothing of the kind. It has simply advanced a contention, less than novel, that a private arbitrator lacks jurisdiction. That contention is either good or bad, but it does not amount to frustration of the arbitration procedure.

Did the arbitration clause survive the alleged termination?

[15] An arbitration clause is often not binding where a party contends that the principal contract was void or voidable *ab initio*. The reason for this is that if the contention is sound, then there would have been no binding arbitral stipulation in the first place. The qualification to this proposition is that the language of the arbitration clause may be wide enough to cover even such a dispute (see **Van Heerden en Andere v Sentrale Kunsmis Korporasie (Emds) Bpk** 1973 (1) SA 17 (A) at 30F-H). Where the parties mutually agree to cancel or terminate a contract, an arbitration clause also falls away unless the parties provide otherwise. However, where one party repudiates a contract, and the other party challenges the validity of that repudiation (and

whether or not it accepts the repudiation), the approach of the courts is to hold that the arbitration clause both survives the repudiation and governs the issue of repudiation. Again, this is subject to the language of the arbitration clause itself (see **Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical** 1992 (1) SA 296 (A) at 305 B-C).

[16] In the present case, as we have seen, the SABC purported to terminate the accord in terms of clause 16, and BEMAWU challenges that termination. The consequent substantive dispute (which we may call “the termination dispute”) is akin to a repudiation issue in the sense mentioned above. We should accordingly adopt the approach that the arbitration clause survives the alleged termination and governs that dispute unless the language of the clause provides otherwise. It is clear to me that the termination, if unwarranted, would “materially disturb the structures and procedures established to maintain this relationship” (clause 1.8). The relevant language thus reinforces the foregoing approach rather than restricts it. I am therefore of the view that the termination dispute is referable to arbitration.

[17] In reaching this conclusion it may be argued that I interpret and apply a collective agreement in conflict with section 24(2) read with sections 157 and 158 of the Act. The case of **South African Motor Industry Employers' Association and Another v NUMSA and Others** (1997) 9 BLLR 1157 (LAC) is distinguishable. There this court held that the collective agreements under consideration contained no dispute-resolution procedure as contemplated by section 24. It followed that the CCMA, and not the Labour Court, had jurisdiction to resolve the substantive issue between the parties.

[18] As was pointed out in that case the scheme of section 24 is that disputes relating to collective agreements should be resolved by conciliation, failing which by arbitration. It is only where the desired arbitration procedure is absent or fails that such disputes are referred to the CCMA. I have already shown:

- (a) that the accord does provide for an arbitration procedure;
- (b) that such procedure is operative; and
- (c) that the SABC has not "frustrated" the resolution of the termination dispute by arbitration.

In these circumstances section 24(2) read with sections 157 and 158, does not constitute a bar to the Labour Court determining the

proper forum for the resolution of the substantive (i.e. the termination) dispute, as distinct from itself resolving that dispute. The parties were not required to approach an arbitrator or the CCMA first for a provisional ruling on jurisdiction. They were entitled to approach the Labour Court for a declarator as to the proper forum. The elements of interpretation and application involved in the court determining the procedural dispute are not outlawed by the foregoing sections of the LRA.

[19] In one respect BEMAWU goes too far. It asks that "all unresolved disputes" that arose before 1 February 2004 be referred to arbitration. As we are not furnished with particulars of those disputes, it would not be wise for us to make an order in regard to them. The declarator will be confined to the termination dispute.

[20] As to costs, BEMAWU has achieved substantial success. It seems to me that it would accord with the requirements of the law and fairness that BEMAWU be awarded its costs in this Court and in the Labour Court.

[21] In the result the appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by the following:

- "(a) It is declared that the dispute relating to the cancellation of the Relationship accord between BEMAWU and the SABC be heard and determined by a private arbitrator in terms of clause 9 of the Relationship Accord;
- (b) The respondent is to pay the costs of this application."

Kruger AJA

I agree

Zondo JP

I agree

Comrie AJA

Counsel for appellant:
Attorneys for appellant:

Adv FG Barrie
Assenmacher Attorneys

Counsel for respondent:
Attorneys for respondent:

Adv N A Cassim SC and
Adv F A Boda
Leppan Beach Inc

Date of judgment:

15 June 2007