

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JA31/08

In the matter between

Johannesburg City Parks

Appellant

And

Mphahlani, J NO

1st Respondent

The South African Local Government

Bargaining council

2nd Respondent

SAMWU obo MAGUVHE

3rd Respondent

Commissioner Chairman Webb, NO

4th Respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal against a judgment and order of the Labour Court in terms of which a review application that had been brought by the appellant in that Court for an order reviewing and setting aside an arbitration award of the fourth respondent would be reviewed and set aside. As an alternative to the reviewing and setting aside of the arbitration award, the appellant sought an order reviewing and setting aside a decision made by the first respondent under the auspices of the second respondent refusing to rescind the

arbitration award. The arbitration award related to a dispute between the appellant and the third respondent about the fairness or otherwise of the dismissal of Mr F Maguvhe, a member of the third respondent which is a registered trade union, by the appellant. The leave to appeal was granted by the Labour Court.

The background

- [2] Mr Maguvhe was employed by the appellant but was dismissed. A dispute then arose between the appellant and the third respondent about the fairness of that dismissal. The third respondent referred that dispute to the second respondent for, initially, conciliation, and, later, arbitration when conciliation failed. After the conciliation process had failed, the dispute was referred to arbitration. The second respondent was assigned to arbitrate the dispute.
- [3] On the 16th September 2005 the appellant sent a letter to the second respondent informing the latter that it did not fall within the jurisdiction of the second respondent and that, for that reason, it would not attend the proceedings. The appellant also informed the second respondent that there was a demarcation dispute pending at the CCMA and that until that dispute was finalised it would not be bound by any decision of the second respondent and its employees were free to refer “**disciplinary matters**” to the CCMA which the company would attend. The letter was brought to the second respondent’s attention. The letter did not provide any substantiation for the point taken by the appellant that the second respondent had no jurisdiction to deal with the dispute. The fourth respondent seems to have then given the third respondent’s representative an

opportunity to make submissions as to the jurisdictional point taken by the appellant which the third respondent's representative then made. The fourth respondent thereafter decided to proceed with the arbitration. Obviously, she was not satisfied that she had no jurisdiction to arbitrate the dismissal dispute. That is why she proceeded to arbitrate that dispute.

- [4] Evidence was led by the third respondent on the dismissal dispute. In the end the fourth respondent issued an arbitration award in which she found that Mr Maguvhe's dismissal was substantively unfair and ordered the appellant to reinstate him in its employ retrospectively from the date of dismissal. As indicated earlier, the appellant elected not to take part in the arbitration proceedings. Accordingly, the only evidence that was led in the arbitration was the evidence that was led on behalf of Mr Maguvhe. Subsequent to the issuing of the arbitration award by the fourth respondent, the appellant brought an application before the second respondent for the rescission of the arbitration award of the fourth respondent. That application was dismissed.

Proceedings in the Labour Court

- [5] Subsequent to the first respondent's dismissal of the appellant's rescission application, the appellant brought an application before the Labour Court to have the award or alternatively the rescission application reviewed and set aside on the ground that the fourth respondent should have adjourned the proceedings after it had been brought to her attention that there was a demarcation dispute pending in the CCMA. The review application was brought to Court without compliance with the time limits prescribed for the

bringing of such an application. The appellant made an application for the condonation of its failure to bring the review application within the prescribed time period. The condonation application was incorporated in the founding affidavit of the review application. The third respondent opposed both the review application and the condonation application.

- [6] The review application came before Hendricks AJ in the Labour Court. The learned Acting Judge dismissed the application for condonation. The explanation that the appellant had given in its founding affidavit for its failure to bring the review application within the prescribed time-limit was that the delay was due to the fact that it had initially pursued a rescission application. The Labour Court found this to be an unsatisfactory explanation. As already stated earlier, the Labour Court subsequently granted the appellant leave to appeal against its judgment and order.

The appeal

- [7] Before us Counsel for the appellant contended that the fourth respondent had no jurisdiction to arbitrate the dispute because sec 62(3A) of the Labour Relations Act, 1995 (“**the LRA**”) was applicable to the proceedings before her and, once the fact that a demarcation dispute had been referred to the CCMA had been brought to her attention, she was obliged to have adjourned the proceedings in accordance with the provisions of sec 62(3A). In order to understand the provisions of sec 62(3A) properly, it is necessary to first quote sec 62(1)(a) and (b) of the LRA. Sec 62(1) (a) and (b) read as follows:-

“(1) Any registered trade union, employer, employee,

registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to –

- a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area:
- b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.”

Sec 62(3A) reads as follows:

“In any proceedings before an arbitrator about the interpretation or application of a *collective agreement*, if a question contemplated in subsection (1)(a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that –

- (a) the question raised –
 - (i) has not previously been determined by arbitration in terms of this section; and
 - (ii) is not the subject of an agreement in terms of subsection (2); and
- (b) the determination of the question raised is necessary for the purposes of the proceedings.”

Sec 62(2) will be referred to later and for that reason I may as well quote it now. It reads:

“If two or more councils settle a dispute about a

question contemplated in subsection (1)(a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.”.

- [8] I specifically asked Counsel for the appellant whether in contending that the second respondent did not have jurisdiction his jurisdictional point was only based on the provisions of sec 62(3A) or whether his point was not necessarily based upon sec 62(3A). Counsel’s answer was that his argument on jurisdiction was founded upon the provisions of sec 62(3A). He submitted that his point depended upon whether or not sec 62(3A) was applicable to the proceedings before the fourth respondent. This means that, if it was found that sec 62(3A) was of no application to the proceedings before the fourth respondent, the appeal would have to fail.
- [9] In effect Counsel for the appellant argued that sec 62(3A) enjoined the fourth respondent to adjourn the proceedings that were before her once she had become aware that a demarcation dispute had been referred to the CCMA and was still pending. Counsel for the appellant submitted that, pending the finalisation of the demarcation dispute, it was not competent for the fourth respondent to have proceeded with the arbitration of the dispute. It seems to me that this point is not a point about jurisdiction in the true sense. It is rather about whether or not, in the light of the provisions of sec 62(3A), it was competent for the fourth respondent to arbitrate the dispute while the demarcation dispute was still pending at the CCMA. There is no dispute that, absent the

pending demarcation dispute, the fourth respondent would have been entitled to arbitrate the dispute.

- [10] Counsel for the third respondent's answer to the appellant's Counsel's contention was that sec 62(3A) did not apply to the proceedings before the fourth respondent because sec 62(3A) applied to proceedings that, as sec 62(3A) itself says, are **“about the interpretation or application of a collective agreement”**. In this connection Counsel for the third respondent drew our attention to the provisions of sec 62(3) and (5) of the LRA. It is necessary to quote both provisions. Sec 62(3) reads:

“In any proceedings in terms of *this Act* before the Labour Court, if a question contemplated in subsection (1)(a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that –

- a) the question raised-**
 - (i) has not previously been determined by arbitration in terms of this section; and**
 - (ii) is not the subject of an agreement in terms of subsection (2); and**
- b) the determination of the question raised is necessary for the purposes of the proceedings.”.**

Sec 62(5) reads:

“In any proceedings in terms of *this Act* before a commissioner, if a question contemplated in subsection (1)(a) or (b) is raised, the commissioner must adjourn the proceedings and consult the *director*, if the commissioner

is satisfied that –

- (a) the question raised –
 - (i) has not previously been determined by arbitration in terms of this section; and
 - (ii) is not the subject of an agreement in terms of subsection (2); and
- (b) the determination of the question raised is necessary for the purposes of the proceedings”.

[11] From the above it will be seen that there is a lot of similarity between the provisions of sec 62(3) and the provisions of sec 62(5). It will also be seen that the marked difference between the wording of sec 62(3) and 62(5), on the one hand, and the provisions of sec 62(3A), on the other, is that sec 62(3) and (5) have no express limitation in terms of the proceedings which must be adjourned pending the outcome of a dispute about, for example, demarcation whereas sec 62(3A) has an express limitation in this regard. The proceedings which sec 62(3A) requires to be adjourned are proceedings “**about the interpretation or application of a collective agreement**” whereas the proceedings that sec 62(3) and (5) require to be adjourned are “**any proceedings**” and they are not qualified in any manner.

[12] Confronted with the proposition that sec 62(3A) did not apply to the proceedings over which the fourth respondent presided as an arbitrator because those proceedings were about the fairness or otherwise of a dismissal and, therefore, not about the interpretation or application of a collective agreement, Counsel for the appellant submitted that all disputes that are dealt with by a bargaining

council are disputes about the application of a collective agreement because they are all required to be dealt with in terms of a collective agreement. In this regard Counsel for the appellant pointed out that an arbitrator who deals with any dispute under the auspices of a bargaining council deals with a dispute that is “**about the application**” of a collective agreement because in resolving the dispute he or she is required to apply a collective agreement. He said that it was for this reason that sec 62(3A) referred specifically to proceedings about the application of a collective agreement.

[13] Counsel for the third respondent was not able to suggest the reason why the LRA has a limitation in sec 62(3A) but not in sec 62(3) and (5) and yet all these three subsections deal with how the same situation should be dealt with. Counsel for the appellant asked what reason there would have been for the Legislature to have dealt with the situation differently in sec 62(3A) from the way that it requires the same situation to be dealt with under sec 62(3) and (5).

[14] There are a number of areas in the LRA with references to dispute or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolutions. Some of the sections of the LRA which contain such references are 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 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 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 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 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.

[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 all 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 organisational rights, proceedings about wage disputes and proceedings concerning other disputes.

[17] If the submission by Counsel for the appellant that all disputes that come before a bargaining council are disputes about the application of a collective agreement since all the disputes with which bargaining councils deal are dealt with in terms of its collective agreement were correct then the article that comes before the words "**collective agreement**" in sec 62(3A) would not be "**a**" but "**the**" because it would be the same collective agreement that is applied in every case.

[18] In response to the contention advanced by Counsel for the third respondent that the scope of application of sec 62(3A) is narrower

than that of sec 62(3) and (5), Counsel for the appellant asked why the Legislature would have intended sec 62(3) and (5) to have a wider scope than sec 62(3A). Counsel for the third respondent could not proffer a suggestion on this point but emphasised that the Legislature quite clearly did make such a distinction. In this connection he submitted in effect that the Legislature deliberately sought to make such a distinction because otherwise the difference in the wording of sec 62(3) and (5), on the one hand, and that of sec 62(3A) would be inexplicable. Counsel submitted that that distinction must be given effect to. Counsel for the third respondent pointed out that initially the LRA had sec 62(3) and (5), quoted above, but did not have sec 62(3A) and said that sec 62(3A) was inserted afterwards as an amendment. The effect of this is that the Legislature deliberately sought to make the distinction reflected in the difference in the wording between sec 62(3) and (5), on the one hand, and, sec 62(3A), on the other. Accordingly, Counsel for the third respondent is in right submitting that effect must be given to that distinction.

[19] In the light of the above I hold that sec 62(3A) was of no application to the arbitration proceedings concerning the unfair dismissal dispute that came before the fourth respondent. The result of this conclusion is that it has not been shown that the fourth respondent should have adjourned the proceedings over which he presided in this matter. On this ground alone the appellant's appeal falls to be dismissed.

[20] Apart from the requirement in sec 62(3A) that the proceedings that must be adjourned must be proceedings "about the interpretation or

application of a collective agreement”, the duty to adjourn the proceedings only arises if the conditions set out in sec 62(3A)(a)(1) to (b) are present. The arbitrator is required to adjourn the proceedings only “**if [he] is satisfied that –**

- (a) the question raised –**
 - (i) has not previously been determined by arbitration in terms of this section; and**
 - (ii) is not the subject of an agreement in terms of subsection (2); and**
- c) the determination of the question raised is necessary for the purposes of the proceedings.”**

[21] In any event, if the appellant sought to attack the award on the basis that the arbitrator’s failure to adjourn the proceedings constituted a reviewable irregularity, it was incumbent upon the appellant to show that the arbitrator was satisfied or ought reasonably to have been satisfied as required by paragraphs (a) and (b) of sec 62(3A). That is that the arbitrator must first have been satisfied that:

- (a) the question raised –**
 - (i) had not previously been determined by arbitration “in terms of” sec 62; and**
 - (ii) was not the subject of an agreement in terms of subsection (2); and**
- b) the determination of the question raised was necessary for the purposes of the proceedings.**

Without showing that the arbitrator was so satisfied or ought reasonably to have been so satisfied, the appellant cannot even

begin to criticise the arbitrator's conduct in not adjourning the proceedings. In the founding affidavit the appellant did not state whether or not the arbitrator was so satisfied or ought reasonably to have been so satisfied. Indeed, on the appellant's own version, the position is that the appellant boycotted the arbitration proceedings before the arbitrator. The appellant only sent a letter which said that the second respondent had no jurisdiction over it and would, therefore, not attend the arbitration proceedings and that there was a demarcation dispute pending at the CCMA. The letter but did not deal with the issues referred to in sec 62(3A)(a) and (b) so as to ensure that the arbitrator was satisfied as to such issues as required by sec 62(3A)(a) and (b).

[22] Without having placed information before the arbitrator which addressed those issues, there can be no basis in law upon which the appellant could conceivably be contended that the arbitrator should have adjourned the proceedings as required by sec 62(3A), not to speak of a contention that her failure to so adjourn the proceedings was unreviewable or constituted a reviewable irregularity. In these circumstances the appellant has failed to show that the arbitrator should have or was obliged to have adjourned the proceedings. The appellant has failed to bring its case within the ambit of sec 62(3A). Accordingly the appeal should fail.

[23] With regard to costs it seems to me that it would accord with the requirements of the law and fairness that the appellant should pay the third respondent's costs.

[24] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Patel JA

I agree.

Sangoni AJA

Appearances:

For the appellant:	Adv T Bruinders SC
Instructed by:	Sim and Botsi Attorneys
For the respondent :	Adv J.G Van der Riet SC
Instructed by :	Cheadle Thompson & Haysom
Date of judgment :	29 January 2010