



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA3/2011

In the matter between:

THE MEC OF THE WESTERN CAPE PROVINCIAL

GOVERNMENT HEALTH DEPARTMENT

Appellant

And

PROF A R COETZEE & 49 OTHERS

Respondents

Heard: 17 July 2014

Delivered: 24 August 2015

Summary: Main dispute about interpretation and application of collective agreement- Labour Court not empowered to sit as arbitrator in terms of section 158(2)(b) of the Labour Relations Act- where matter had to be referred to conciliation (arbitration) and a party, deliberately and with knowledge of such fact, nevertheless, does not refer the matter to the appropriate forum for arbitration, but brings the claim directly to the Labour Court and requests the court to sit as arbitrator . The parties' consent does not give the Labour Court the power or confer on it the jurisdiction to sit as arbitrator in the circumstances-Sections 77(3) and 77a of the Basic Conditions of Employment Act does not give the Labour Court the jurisdiction or the power to resolve that dispute.

Coram: Tlaletsi DJP, Ndlovu et Coppin JJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against judgments and orders of the Labour Court (Cheadle AJ and Rabkin-Naicker J) with the leave of that court.
- [2] The judgments and orders were in respect of different aspects of this matter. The judgment of Cheadle AJ, which was handed down in November 2010, deals with the interpretation and application of a collective agreement (*“the scarce skills agreement”*) which introduced a scarce skills allowance and in terms of the judgment, in essence, it was held that the collective agreement applied to the respondents and that the appellant was obliged to pay to them the scarce skills allowance.
- [3] The judgment of Rabkin-Naicker J dealt with the issue of prescription raised by the appellant in response to the respondents’ claims for payment of the scarce skills allowances in terms of the scarce skills agreement and it held, in essence, that the claims had not prescribed. That judgment was handed down on 20 March 2013.
- [4] At all material times, 28 of the respondents have been professors in the medical faculty of the University of Stellenbosch and 21 of those respondents have been professors in the medical faculty of the University of Cape Town. In terms of arrangements, the details of which are captured in agreements between the respective universities and the erstwhile Provincial Administration of the Cape of Good Hope, they provided various medical services at hospitals in the Cape Province, including at the Tygerberg and Groote Schuur Hospitals and also utilised the hospital facilities for teaching purposes.
- [5] The agreements between the universities and the erstwhile provincial administration deal with the funding and other resources to be provided by the

respective universities and the provincial administration for the running of the so-called “teaching hospitals” and with the manner in which medical staff attached to the universities and rendering services at those hospitals will be appointed, disciplined, deployed, etc.. The Stellenbosch University agreement is in Afrikaans and the University of Cape Town agreement is in English, but they are similar in content and it was common cause that there is no relevant or material difference between them. The latter agreement was, in fact, for convenience used in evidence and argument in the Labour Court, but more specifically, as being reflective of what was provided in both agreements.

- [6] Of significance, the agreements stipulate that each member of the “joint staff” discharges duties toward both the (respective) University and the Province. The duty toward the University is essentially an academic duty of teaching and researching, and that toward the Province, includes, providing and administering medical services in the Province’s designated hospitals. They are all appointed on the conditions of employment of the university they are attached to and the (respective) university is responsible for the payment of their salaries. In respect of appointments, the university essentially advertises the position and having followed its appointment procedure nominates the appointee. The appointment is then made with the approval of the Province. In respect of their salaries, the Province makes a contribution to their salary costs. In terms of those agreements, disciplinary action against “joint staff” would be in terms of the respective university’s disciplinary code. It is common cause that the appellant is the successor in title of the erstwhile Provincial Administration and represents the Province.
- [7] On 28 January 2004, this scarce skills agreement was concluded in the Public Health & Welfare Sector Bargaining Council (also referred to in the judgment as the “PH & WSBC” and “the Bargaining Council” or “Council”). The agreement provided for the payment of non-pensionable scarce skills allowances, calculated by a formula in that agreement. Of significance to this matter – this collective agreement provided that it applies to “*the Employers and Employees*”:

2.1 *In the Public Health Sector as managed by the Health Employer, but excluding those health professionals in other sectors; and*

2.2 *falls within the registered scope of the PH & WSBC.*¹

- [8] Beside the appeal, there is an application by the appellant to condone the late lodging of the record of the appeal and the appellant seeks reinstatement of the appeal.
- [9] The appeal itself deals, *inter alia*, with the following issues, namely, whether Cheadle AJ (and subsequently Rabkin-Naicker J) who, purportedly sat as arbitrator in the matter in terms of section 158(2)(b) of the Labour Relations Act No 66 of 1995 (*“the LRA”*) had the power to do so. Or whether the Labour Court otherwise had jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act No 75 of 1997 (*“the BCEA”*) to entertain the matter and make the orders being appealed against given the facts and circumstances of the matter. (Similar questions would also pertain to the basis upon which Rabkin-Naicker J entertained the matter and gave the judgment or order appealed against.). Secondly, if it were to be found that it was not correct for the Labour Court to have entertained the matter, whether this Court should nevertheless exercise its power in terms of the latter part of section 174 of the LRA and decide the merits of the appeal.
- [10] The parties addressed us on condonation, the jurisdictional aspects, as well as the merits. I shall first deal with the issue of condonation.

¹ Concerning the PH & WSBC - the powers of a Bargaining Council in relation to its registered scope, in terms of section 28 of the Labour Relations Act 66 of 1995 (*“the LRA”*), includes the power to conclude collective agreements, to enforce them, to prevent and resolve labour disputes and to establish and administer a fund to be used for resolving disputes. In terms of section 213 of the LRA the term *“registered scope”* is defined as meaning: *“(a) in the case of the Public Service Co-ordinating Bargaining Council, the public service as a whole, subject to section 36; (b) in the case of bargaining councils established for sectors in the public service, the sector designated by the Public Service Co-ordinating Bargaining Council in terms of section 37(1); (c) in the case of any other council, the sector and area in respect of which it is registered in terms of this Act.”* (Emphasis added).

In terms of section 37(1) of the LRA the Public Service Co-ordinating Bargaining Council may, in terms of its Constitution and by resolution, *inter alia*, designate a sector of the public service for the establishment of a bargaining council. In terms of section 37(2) such a council must be established in terms of the Constitution of the Public Service Co-ordinating Bargaining Council and it has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State, as employer in that sector, has the requisite authority to conclude collective agreements and resolve labour disputes. It is common cause that the PH & WSBC is such a bargaining council, designated for the public health and welfare sector.

Condonation

- [11] The appellant seeks condonation in terms of Rule 12(1) of this Court for its failure to timeously deliver an appeal record within the time period stipulated by Rule 5(8) and for the reinstatement of the appeal to the extent that such reinstatement is required.
- [12] In terms of Rule 5(17), if the appellant fails to lodge an appeal record within the prescribed period, that is within 60 days of the date of the granting of leave to appeal (as stipulated in LAC Rule 5(8)), the appellant will be deemed to have withdrawn the appeal, unless within that period, the appellant has requested the respondent (or its representative) to consent to an extension of the period (and such consent was given), or if it was refused, has applied to the Judge President (in chambers) on notice of motion, within that period, for an extension of the period within which to file the record.
- [13] Even if Rule 5(17) was not complied with, this Court, in terms of Rule 12(1), has the power to condone the late filing of the record. The rule provides that this Court may “*for sufficient cause shown*” excuse parties for a failure to comply with any of the rules.
- [14] This Court has a wide discretion which it has to exercise judicially in light of all the facts. In essence, the question whether to excuse non-compliance is a matter of what would be fair in the circumstances. Facts of obvious relevance, although there is no closed or exhaustive list, would be the degree of non-compliance, and particularly, in the case of lateness, the degree of lateness, the explanation for the non-compliance or lateness, the prospects of success, the importance of the issues in the case, the need for finality, and any prejudice, but overall, the interests of justice.
- [15] The above factors are not individually decisive and are interrelated.² As indicated earlier, essentially two main issues were brought to the Labour

² See and compare *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC); *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-E; *Queenstown Fuel Distributors CC v Labuschagne NO and Others* 2000 (21) ILJ 166 (LAC) at 53H-J; *NEHAWU on behalf of Mofokeng and Others v Charlotte Theron Children’s Home* 2004 (25) ILJ 2195 (LAC); also referred to in *Keevy NO v National Union of Metal Workers of SA and Others* 2010 (31) ILJ 354 (LAC) para [20].

Court for determination, namely, whether the respondents are entitled to payment of the scarce skills allowance in terms of the scarce skills agreement (i.e. the collective agreement) and if so, whether their claims to such payment had prescribed.

- [16] The parties agreed to separate the two issues. The first was dealt with by Cheadle AJ and the second by Rabkin-Naicker J in a subsequent hearing. Cheadle AJ handed down judgment in favour of the respondents in respect of the merits on 4 November 2010. The appellant applied for leave to appeal against that judgment and such leave was given on 29 November 2010.
- [17] However, because it was anticipated that there would be a further appeal if the prescription point was to be decided in favour of the respondents, the parties agreed that the prescription issue had to be decided before the appeal and that the matter could be expedited by proceeding with all the appeals at the same time.
- [18] The prescription and quantum issues were set down for argument, but due to a delay in establishing the quantum of the respondents' claims, the parties agreed to provisionally only argue the point of prescription. This issue was heard by Rabkin-Naicker J on 10 August 2012 and judgment on the issue was handed down on 20 March 2013. The quantum of the respective claims was subsequently agreed between the parties and a written minute to that effect was filed in the Labour Court on 21 September 2012.
- [19] On 30 October 2012, while awaiting Rabkin-Naicker J's judgment on the issue of prescription, the respondents' attorney in writing, requested the state attorney to proceed with the preparation of the part of the record relating to the proceedings before, and the judgment of, Cheadle AJ.
- [20] On 3 December 2012, the state attorney commenced to have part of the record prepared and informed the respondents' attorney accordingly. The transcript of the proceedings, before Rabkin-Naicker J, were prepared and were received by the state attorney on 25 January 2013, i.e., before the judgment of Rabkin-Naicker J which was handed down on 20 March 2013. Leave to appeal against that judgment was granted on that same day.

- [21] It is common cause that the entire record of appeal (both parts) was to be delivered within 60 days of the order of Rabkin-Naicker J granting leave to appeal, i.e., by no later than 19 June 2013.
- [22] In the meantime, the record of the proceedings before Cheadle AJ had not been completely transcribed by Legal Transcriptions CC, despite an assurance from it that it had completed the transcription of that record on 29 April 2013.
- [23] As a result of the inability of Legal Transcriptions to complete the record, another transcription service, Veritas Transcribers (“Veritas”), had to be engaged to prepare the record on an urgent basis. It was anticipated that the record would be completed by 21 May 2013 and the state attorney advised the respondents’ attorneys accordingly.
- [24] However, it became apparent that the first transcription service had in fact not transcribed any portion of the proceedings before Cheadle AJ, but had, instead, only transcribed the proceedings before Rabkin-Naicker J. As a result, the disc containing the record of the proceedings before Cheadle AJ had to be requested so that it could be given to Veritas to transcribe. The request was made on 12 June 2013.
- [25] However, because Veritas was too busy to do the transcription of the proceedings before Cheadle AJ, the state attorney had to revert to the first transcription service, Legal Transcriptions CC and requested that they do the transcription urgently. The state attorney avers that the attorneys for the respondents were aware of these challenges and developments.
- [26] It took Legal Transcriptions CC one month to complete the transcription of the proceedings before Cheadle AJ. This was then delivered on 15 July 2013 to Veritas, which was preparing the appeal record. Veritas could only complete the record on 29 July 2013. The state attorney served and filed the record that same day.

- [27] So, instead of having filed the record, as per their agreement, by 19 June 2013, the record of appeal was only filed on 29 July 2013, almost six weeks later.
- [28] The state attorney attributes the delay, in filing the record timeously, to the poor service it got from the first transcriber, namely, Legal Transcriptions CC, and to the time it took both transcription services to complete their respective parts of the record. She, in turn, attributes the delay of the transcribers to their workload.
- [29] The state attorney, in requesting condonation, highlighted that the respondents, save for three or four who have retired, remained in gainful employment, that the appeal raises important points of law that require determination by this Court; that the respondents have not been prejudiced and that, if it were to be found that the respondents were indeed entitled to judgment of the scarce skills allowance, they would not have been prejudiced in their claims, because their claims bear interest at the statutorily prescribed rate.
- [30] The respondents cannot deny the importance of the issues raised, but contend that the delays are lengthy and that they have not been explained adequately or at all, because the state attorney had already been requested to commence with the preparation of the record of the proceedings before Cheadle AJ on 30 October 2012.
- [31] While admitting that the transcription service transcribed the wrong part of the record, the respondents submit that the transcribers were only instructed to transcribe the correct part of the record a week before the record was due. The respondents also alleged general prejudice as a result of the delays and in particular averred that some of the respondents have passed away in the interim "*without the benefit of their allowance due to them*" in terms of the collective agreement as ordered by the Labour Court (Cheadle AJ). It is furthermore submitted that the appellant has shown disdain for the rules of this Court and that the reinstatement of the appeal was not in the interest of justice or the proper administration of justice.

- [32] It is indeed so that condonation is not for the asking and that good cause must be shown. Having considered, *inter alia*, the explanation for the delay (i.e. just more than a month), the prospects of success, the importance of the issues, the necessity of finality and the interest of justice, I am of the view that the appellant has shown good or sufficient cause for condonation. The late delivery of the record is therefore condoned and the appeal is reinstated. Fairness and the law dictate that the parties should bear their own costs in respect of the condonation application.
- [33] I am of the view that the opposition to the application was not reasonable and therefore would not order the appellants to pay the costs of the condonation application of the respondents.

Jurisdictional issues

- [34] A decision on the jurisdictional issues in this matter, as I will explain in due course, may be dispositive of this appeal. Accordingly, I need to deal with them at the outset. We were furnished with heads of argument and supplementary heads of argument in respect of the jurisdictional issues.
- [35] On the eve of the day the matter was set down for argument before us, we were provided with certain documents that were supposed to be included in the record. They include a record of proceedings in the PH & WSBC; the dispute procedure of that Council and other correspondence.
- [36] The documents related mainly to what preceded the application that was brought in the Labour Court by the respondents and which is the subject of this appeal. It appears from those documents that on or about 6 June 2006, the respondents had referred a dispute to the PH & WSBC and had requested conciliation, failing which, arbitration.
- [37] In their documents in that forum, the respondents had described the dispute as “*a failure to implement the [collective agreement]*” and in a short summary of the facts stated that the Provincial Administration of the Western Cape failed to pay the non-pensionable retention allowance (i.e. scarce skills allowances) for certain categories of health personnel.

[38] The conciliation proceedings under the auspices of the PH & WSBC were scheduled for 13 November 2006. Most of the respondents were applicants in those proceedings and the appellant was a respondent in those proceedings, where they made submissions.

[39] Following the submissions, the panellist in the conciliation at the PH & WSBC held that on the facts before her, she “*had no legal basis to conciliate the matter as applicants are contractually employed by the University and not by the Department of Health*”. The panellist (an arbitrator) then went on to make the following ruling in her report which is dated 5 December 2006:

‘1. The Public Health and Welfare Sectoral Bargaining Council does not have jurisdiction over the matter.

The case is dismissed.’

[40] Despite that result, the respondents did not seek to review the ruling, but instead, launched the proceedings that are the subject of this appeal in the Labour Court in Cape Town.

[41] In their statement of claim, the respondents (applicants in the court *a quo*) sought a declarator and payment of the scarce skills allowance (or payment of that portion of the allowance that was (alleged to be) due to each of them respectively. In light of the referral to the Bargaining Council and the manner in which the matter was brought to the Labour Court, we requested the parties to address this Court on the following points:

- a. Whether this was an appropriate case for the application of section 158(2)(b) of the LRA and in particular, because it was known by the parties at the outset, before the dispute was referred to the Labour Court, or before the hearing before Cheadle AJ, that this was a dispute that had to be referred to arbitration and that this did not only become apparent after the dispute had been referred to the Labour Court?;
- b. Whether Cheadle AJ, sitting as arbitrator, assuming he could validly do so in terms of section 158(2)(b) of the LRA, had the power to proceed

and determine the dispute in the face of the ruling made by the panellist of the PH & WSBC that the council did not have jurisdiction in the matter and that the case was dismissed, bearing in mind that in terms of section 158(2)(b) of the LRA, the judge sitting as arbitrator, could only have made such order as the arbitrator would have been entitled to make in the circumstances?;

- c. Allied to the question in the previous subparagraph, whether it was not incumbent upon the respondents to have first set aside the decision of the panellist and whether the failure to do so did not present a bar to the arbitration and by implication the continuation of the proceedings under section 158(2)(b) of the LRA?
- d. Whether, in any event, this was not, as contemplated in section 62(3) or 62(3A) of the LRA, a case where a question had arisen whether the respondents were employed in a particular sector and whether the collective agreement applied to them and to the appellant? And if so, whether Cheadle AJ should not, as contemplated in those subsections, nevertheless, have adjourned the proceedings before him and had referred those questions to the PH & WSBC, alternatively, to the Commission for Conciliation Mediation and Arbitration ("CCMA") for determination.

[42] I shall now briefly in turn consider these questions and the parties' submissions in respect of them. Overall, counsel for the parties seemingly made common cause arguments in support of the validity of, or in justification of the proceedings before Cheadle AJ and subsequently, before Rabkin-Naicker J. Both parties were adamant that whatever the outcome on the jurisdictional aspects, this Court should, nevertheless, decide the merits of the appeal.

[43] In brief, in respect of the first question, the appellant submitted that the parties to a collective agreement are (a) registered trade union(s), (an) employer(s) or (an) employer's organisation(s) and not employees. The respondents, being mere employees, were not parties to the collective agreement and therefore

could not refer their dispute in terms of section 24 of the LRA to the PH & WSBC³ for either conciliation or arbitration.

- [44] According to the appellant, the panellist's approach, to first determine the existence of an employer-employee relationship before conciliating the dispute, was correct⁴ and her determination that the PH & WSBC did not have jurisdiction, because the respondents were not employed by the Department of Health but by the universities, was reviewable.⁵
- [45] It was further submitted that the fact that the parties consented in terms of section 158(2)(b) of the LRA to the continuation of the proceedings in the Labour Court before Cheadle AJ, did not extend the scope of the powers which the judge in the Labour Court could have exercised under that section. Accordingly, Cheadle AJ could only exercise as arbitrator those powers which a Bargaining Council Commissioner could have exercised in respect of a dispute which was validly referred to the Bargaining Council.
- [46] It was further submitted that since the dispute was *res judicata* after the Commissioner's determination,⁶ it was not open to the arbitrator to revisit the issue unless the Commissioner's determination was reviewed and set aside.⁷
- [47] Accordingly, so it was argued, the panellist's determination of no jurisdiction stood unless and until it was reviewed and set aside. Absent such review, the arbitrator, or in this case, the Labour Court judge, purporting to act in terms of section 158(2)(b) of the LRA, could not revisit the jurisdictional issue or assume jurisdiction.

³ In support of this argument, the appellant's counsel referred to the decision in *Arends and Others v SA Local Government Bargaining Council and Others* 2013 (34) ILJ 2560 (LC) paras [13]-[17]; *NUMSA v CCMA and Others* 2000 (21) ILJ 1634 (LC); *Etschmaier v CCMA and Others* 1999 (20) ILJ 144 (LC); *Sapekoe Tea Estates (Pty) Ltd v Maake NO and Others* 2002 (23) ILJ 1603 (LC) and *Virgin Active SA (Pty) Ltd v Mathole NO and Others* 2002 (23) ILJ 948 (LC).

⁴ Reference was made to *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others* 2013 (23) ILJ 1419 (LC) para [13].

⁵ See *Eoh Abantu (Pty) Ltd v CCMA and Another* 2008 (29) ILJ 2589 (LC) para [90].

⁶ Reference in this regard was made to the decision in *Johnson v CCMA and Others* 2005 (26) ILJ 1332 (LC) para [11].

⁷ In this regard reference was made to the decision in *Eoh Abantu (Pty) Ltd v CCMA and Another* (*supra*) particularly paras [15], [20], and [23]. It was submitted that even though that decision dealt with the dispute referred to the CCMA the same position applied to proceedings before a bargaining council: see *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others* 2008 (29) ILJ 650 (LC).

- [48] It was argued further that because section 24(1) of the LRA, read with clause 3.1(c) of Schedule 2 of the Constitution of the PH & WSBC, required disputing parties to conciliate before arbitrating the dispute and there had been no conciliation in this case, the proceedings before Cheadle AJ (i.e. in terms of section 158(2)(b) of the LRA) were rendered incompetent.
- [49] Notwithstanding, so it was argued on behalf of the appellant, this Court should deal with the merits, because there are other grounds upon which the Labour Court could have dealt with the matter “*which render it competent for the parties to bring the matter before this Court*”.
- [50] The argument on behalf of the appellant then goes on to suggest the other grounds. The main contention being that section 77(3) of the BCEA gives the Labour Court the requisite jurisdiction to “*hear and determine any matter concerning a contract of employment ...*”; and that section 77A of the BCEA vests the Labour Court with the power to make any “*appropriate order*”, including the power to make “*any determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3)*”.
- [51] The appellant’s counsel went on to submit that the appellant does not dispute that the matter was properly brought before the Labour Court in terms of section 77(3) and 77A(e) of the BCEA and that the Labour Court had the requisite jurisdiction to determine the merits. A point is made with reference to what was decided in *Makhanya v University of Zululand*,⁸ namely, that if a claim as formulated by the claimant is enforceable in a particular court then the claimant is entitled to bring it before that court.
- [52] It was further contended on behalf of the appellant, seemingly in the alternative, that if this Court finds that Cheadle AJ incorrectly dealt with the matter under section 152(2)(b) of the LRA, then this Court, should nevertheless deal with the issue of whether the respondents fell within the scope of the Bargaining Council. They rely in this regard on what this Court held in *NUMSA on behalf of Sinuko Powertech Transformers (DPM) and*

⁸ 2010 (1) SA 62 (SCA) para [34].

*Others*⁹ with regard to finalising matters on appeal before it, instead of remitting them back to the Labour Court.

- [53] The respondents made common cause with the appellant in respect of the jurisdictional points and submitted that the respondents' claims as formulated gave the Labour Court jurisdiction by virtue of section 77(3) read with section 77A of the BCEA.
- [54] The respondents further submitted that the Labour Court also had jurisdiction because of section 158(2)(b) of the LRA and "*even if its powers in that regard were those of an arbitrator, it still sat as the Labour Court exercising these powers*".
- [55] Relying on the decisions in *Makhanya* and *SA Maritime Safety Authority v McKenzie*,¹⁰ the respondents submitted that their pleaded claim was one under the BCEA and that determined whether the Labour Court had jurisdiction in the matter. This despite what appears on the record in that regard,¹¹ but submitted further that insofar as section 24(5) of the LRA applied, the parties had agreed before the hearing that "*the court a quo determined the matter sitting as arbitrator*" and furthermore "*that in doing so the parties ... clothed the court with jurisdiction insofar as this was necessary to interpret the collective agreement in determining the contractual claim. Section 158(2)(b) of the LRA permitted them to do so*".
- [56] According to the respondents' argument, the Labour Court was "*called upon to determine under either section 77(3) [of the BCEA] or section 158(2)(b) of the LRA or under both – alternatively, it is submitted that this court has 'the jurisdiction and power to deal with the issues presented to it in this appeal' for the reasons given by the appellant in its heads of argument*". As stated earlier, the appellant had submitted that even if it were to be found that Cheadle AJ incorrectly dealt with the matter under section 158(2)(b), this Court should nevertheless deal with the issue whether the respondents fell outside the

⁹ [2014] 2 BLLR 133 (LAC).

¹⁰ 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA).

¹¹ The respondents in their supplementary heads of argument made a point of stating that they do not concede that section 24(5) of the LRA applies in this case.

scope of the Bargaining Council and that this Court should do so on the same basis as discussed in the *Sinuko* matter.

[57] It was further submitted on behalf of the respondents that the matter “*did not go to the arbitration route (even though the respondents attempted to do so at first) because a conciliator of the Bargaining Council ruled at the conciliation stage already that the Bargaining Council had no jurisdiction over the parties with the result that the respondents approached the Labour Court on the above basis*”. The respondents point out further that the relevant Bargaining Council has been invited to join in these proceedings before the Labour Court but had declined to do so and that the relevant Minister was joined as a party (i.e. as the fifth respondent before the court *a quo*) at the instance of the appellant, but that the Minister had elected to abide the outcome of the proceedings in the court *a quo*.

[58] It was further submitted in supplementary heads of argument filed on behalf of the respondents that the short answer to the questions posed was the following:

- a. Cheadle AJ had jurisdiction to hear the matter “*by virtue of section 77(3) of the BCEA and/or section 158(2)(b) of the LRA*;
- b. There was an attempt by the current respondents, save for one who was joined later as a party by agreement between the parties, to refer the matter to conciliation;
- c. There was no need to refer the contractual dispute to conciliation;
- d. The appellant’s objection to the Bargaining Council’s jurisdiction and the Bargaining Council’s “*incorrect jurisdictional determination amounted to a finding that the parties could not resolve the dispute before the Bargaining Council*”. (Emphasis by respondents’ counsel).

[59] In respect of the point that Cheadle AJ had jurisdiction to hear the matter under section 77(3) of the BCEA and section 158(2)(b) of the LRA, the respondents in their supplementary heads, elaborated on this point and, in

support of it, made the following submissions. That it was expressly pleaded by the respondents that the appellant had refused to acknowledge, accept or admit that the respondents were entitled to or qualified for the scarce skills allowance and for payment of amounts due in respect of such allowance as and when they fell due *“in terms of the scarce skills agreement read with the UCT agreement and/or the Stellenbosch agreement as the case may be”*; furthermore, that the appellant refused to pay those amounts; that, consequently, the appellant was *“in breach of its contractual obligations vis-à-vis each of the respondents”*; further, that the dispute was referred to conciliation in accordance with clause 3.5 of Part C of Schedule 2 of the Constitution of the PH & WSBC on 13 June 2006; that the PH & WSBC, however, ruled that there was no basis to conciliate the matter because the respondents were not contractually employed by the Department of Health, but by the university; that it was alleged that the claim was one concerning *“the applicants’ contracts of employment”*; that in terms of section 77(3) of the BCEA, the Labour Court had concurrent jurisdiction with civil courts *“to determine any matter concerning a contract of employment”*; that insofar as section 24(5) of the LRA applied, which was not conceded by the respondents and insofar as it required the dispute to be referred to arbitration, the respondents had sought the appellant’s consent that the Labour Court determine the matter sitting as arbitrator in terms of section 158(2)(b) of the LRA; furthermore, that *“this was done because the dispute pertaining to the parties’ contracts of employment also required the interpretation of a collective agreement which was incorporated in their contracts of employment”*. Lastly, of significance, it was further submitted that the parties’ consent *“clothed the court with jurisdiction insofar as this was necessary to interpret the collective agreement in determining the contractual claim. Section 158(2)(b) of the LRA permitted them to do so”*. I should just mention that no authority was cited for this proposition.

Discussion

[60] Due to its length, I shall not quote the entire statement of claim here. It suffices to state that the respondents' claim is essentially based on the collective agreement. Even though it is stated in paragraph 94 of the statement of claim that *"the present claim concerning the applicants' contracts of employment in terms of section 77(3) of the Basic Conditions of Employment Act this Honourable Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning their contract of employment"* and even though it is further alleged in paragraphs 95 and 96 as follows:

'95 Insofar as section 24(5) of the LRA applies (which is not conceded) and insofar as it requires the dispute to be referred to arbitration (which is also not conceded), the applicants sought the consent of the parties (in particular of the first respondent) on 30 September 2008 that this Honourable Court determine the matter sitting as arbitrator. A copy of this request is annexed marked annexure 'SOC'.

96 Insofar as the first respondent does not so consent and insofar as it is required that the matter be referred to arbitration, the applicants respectively pray that this Honourable Court stays these proceedings and refers the dispute to arbitration.'

[61] In their claim under the heading, *"The legal issues that arise from these facts"*, the respondents (who are referred to as the applicants in the statement of claim) alleged that the issues were as follows:

'97. Whether the applicants are entitled to the benefits provided for in the scarce skills agreement read with the UCT and/or the Stellenbosch agreements.

98. Whether the first respondent is obliged to discharge its obligations, arising from the scarce skills agreement read with the UCT agreement and/or the Stellenbosch agreements, as the case may be, to the respective applicants.

99. Whether the first respondent is obliged to pay the applicants the equivalent of 15% of their annual basic salary, payable monthly on a pro rata basis, with effect from 1 July 2003, alternatively, as from the date of their

employment, whichever was the later, and for as long as the applicants have remained in the employ of the first respondent.'

- [62] The relief sought in the statement of claim is, firstly, a declaratory order that the respondents (i.e. the applicants in the court *a quo*) “*qualify for payment by the appellant*” of the scarce skills allowance as determined by the scarce skills allowance agreement read with the UCT agreement and/or the Stellenbosch agreement, as well as consequential relief, namely payment of the allowance in respect of each of them in a specific amount, plus interest, both past and future as well as costs.
- [63] In response to paragraph 95 of the respondents’ statement of claim, the appellant only admitted that it was a dispute that had to be referred to arbitration and denied the remainder of the allegations in that paragraph. With regard to the allegations in the subsequent paragraphs of the respondents’ statement of claim, the appellant denied that the respondents were entitled to any of the relief that they claimed. The appellant denied that it was “*a health employer*” as envisaged in the scarce skills agreements in particular in relation to the respondents.
- [64] More importantly, the appellant in its response to the respondents’ statement of claim, raised three special pleas. The first being that the Labour Court lacked jurisdiction to entertain the respondents’ claim, because the “*claims flow from a dispute about the interpretation or application of a collective agreement*” which, in terms of section 24(5) of the LRA, has to be resolved through arbitration under the auspices of the CCMA and secondly, that the claims of the respondents had prescribed in terms of section 12 read with section 11(d) of the Prescription Act, No 68 of 1969 and thirdly, raised a special plea of non-joinder, more particularly alleging that the Minister of the Department of Public Service Administration was a necessary party and that the respondents’ failure to join the Minister precluded them from being granted the relief which they sought.
- [65] On 5 March 2010 at the hearing in the Labour Court before Cheadle AJ, counsel for the respondents (i.e. the applicants in that court) informed the

court with regard to the special plea on jurisdiction that the appellant (i.e. the respondent at that hearing) now consented to the Labour Court hearing the matter in terms of section 158(2)(b) of the LRA,¹² alternatively, had consented to the Labour Court's jurisdiction. Counsel for the appellant confirmed the agreement on the procedural issues.

- [66] Section 158(2)(a) of the LRA provides that if at any stage after a dispute has been referred to the Labour Court it becomes apparent that the dispute ought to have been referred to arbitration, the court may, with the consent of the parties and if it is inclined to do so, continue with the proceedings with the court sitting as arbitrator in which case, the court may only make any order that a commissioner or arbitrator would have been entitled to make.
- [67] In his judgment handed down on 4 November 2010, Cheadle AJ does not state in what capacity he sat in the proceedings, but it is clear from the judgment that his determination was based on an interpretation and application of the collective agreement. Cheadle AJ formalised the critical issue for determination to have been whether the respondents *“who were employees of the Western Cape Provincial Government”* and *“as such fell within the registered scope of the Public Health Bargaining Council and entitled to the allowances under the scarce skills agreement”*. Cheadle AJ concluded that *“as far as the literal wording of the different definitions of ‘employee’ in the LRA and the PSA and the registered scope of the PSCPC and the Public Health Bargaining Council and the scope of the applicability of the scarce skills collective agreement is concerned the [respondents] are employees in the public service and entitled to the allowances contained in the agreement and the province is obliged under that agreement to ensure that the applicants receive those allowances”*.
- [68] Having considered further that a more restrictive interpretation of the different definitions and scope of the collective agreement was not appropriate, Cheadle AJ went on to conclude that the respondents were entitled to the scarce skills allowance and that the Provincial Government was obliged to

¹² The record refers to section 158(2)(a) but counsel clearly intended to refer to section 158(2)(b) of the LRA.

either pay the allowance to each of the respondents directly or to ensure that it was paid to them by the universities. The issue of prescription was to be dealt with subsequently and was indeed dealt with before Rabkin-Naicker J at a subsequent hearing.

[69] However, before Rabkin-Naicker J, counsel for the respondents (i.e. applicants in that hearing) again made it clear that the parties had agreed that, even though the Bargaining Council had jurisdiction in terms of section 24(1) of the LRA in respect of a dispute about the interpretation and application of a collective agreement (i.e. the scarce skills agreement), the court could sit as arbitrator as contemplated in section 158(2)(b) of the LRA if it was amenable to do so.

[70] Counsel explained to Rabkin-Naicker J that Cheadle AJ had assumed jurisdiction in terms of section 158(2)(b) of the LRA and that before Rabkin-Naicker J it was a continuation of those proceedings; that Cheadle AJ simply decided what the collective agreement provided for and that the *“exercise is one which would have been done by the arbitrator in the Bargaining Council had he accepted he had jurisdiction. He said he did not have jurisdiction at the conciliation stage, but after conciliation it was then referred to the Labour Court in this manner, and the [appellant] agreed that it could continue in this manner”*. Rabkin-Naicker J, thus understood that she too was to continue sitting as arbitrator in the matter in terms of the provisions of section 158(2)(b) since the proceedings commenced before Cheadle AJ on the same basis.

[71] Section 157(5) of the LRA provides:

‘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.’

[72] I have quoted section 158(2) earlier. The specific section relied upon by the respondents is section 158(2)(b) and they seem to place much emphasis on the fact that the parties had consented to the Labour Court (i.e. Cheadle AJ) acting as arbitrator as contemplated in that section.

- [73] The consent of the parties cannot clothe the Labour Court with jurisdiction it does not have. The wording of section 158(2) is plain and unambiguous. It only applies in matters before the Labour Court “*if at any stage after the dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration*” (Emphasis added).
- [74] This was clearly not a case where it only became apparent after the referral to the Labour Court that the matter had to be referred to arbitration. This was a known fact before the referral to the Labour Court. The respondents had started off by referring the matter for conciliation failing which arbitration.
- [75] In the circumstances, the Labour Court (Cheadle AJ) could not have properly exercised the discretion, which is clearly circumscribed in section 158(2) “*to continue with the proceedings with the court sitting as arbitrator*”. The court was requested at the outset to sit as arbitrator. There was no “*continuation*” of the proceedings in the sense contemplated in that section, but a request at the outset that proceedings be conducted with the court sitting as arbitrator.
- [76] It is clear from the section that the parties’ consent for the court to sit as arbitrator had to be strictly within the circumstances prescribed and contemplated in section 158(2)(b). The section was not intended to give parties a choice at the outset, to avoid the forums or structures where arbitrations are normally to be conducted in terms of the LRA, in favour of opting for the Labour Court to sit as arbitrator.
- [77] It is not the Labour Court’s normal function to sit as arbitrator. Section 158(2)(b) is intended to cover exceptional circumstances where it was not apparent before the matter that it had to be referred to arbitration.
- [78] The respondents deliberately abandoned the referral to arbitration in the PH & WSBC and chose, of their own accord, for the Labour Court to sit as an arbitrator, instead. The LRA does not allow for that. This was clearly an instance of forum shopping, which is completely undesirable.¹³

¹³ See *Gcaba v Minister of Safety and Security and Others* [2009] 12 BLLR 1145 (CC) at 1161E-F, para [57], also referring to what was stated in *Chirwa v Transnet Limited and Others* 2008 (3) SA BCLR 251 (CC); 2008 (4) SA 367 (CC) paras [66] and [124].

- [79] In *Gcaba v Minister of Safety and Security and Others*, Van der Westhuizen J warns that “one may especially not want litigants to ‘relegate’ the LRA dispensation because they do not ‘trust’ its structures to do justice as much as the high court could be trusted”.¹⁴ Similarly, one does not want litigants to relegate certain provisions of the LRA that provide for certain procedures in certain forums or structures created by or in terms of the LRA – because they do not trust those structures or forums to do justice, and which they perceive the Labour Court (sitting as arbitrator) could do. Those structures or forums were especially created to deal with such arbitrations.
- [80] On this point then, in my view, the Labour Court, in the circumstances of this case, was not empowered to sit as arbitrator as contemplated in section 158(2)(b) of the LRA. Another aspect of section 158(2)(b) of the LRA would, in any event, not have been complied with, even if the Labour Court had validly decided to sit as arbitrator – it could only have made the order which the Commissioner or arbitrator, to which the matter otherwise had to be referred – would have been entitled (i.e. empowered) to make. If the matter had been referred to arbitration in circumstances where the order made by the panellist of the PH & WSBC or Bargaining Council, had not been set aside, the arbitrator would not have been empowered to proceed with the arbitration and make an order on its merits, until the order of the panellist had been set aside. The Labour Court by the same token, if it had properly sat as arbitrator, could not do anything more than what that arbitrator in the Bargaining Council could have done in the circumstances.
- [81] The next point to consider is whether the Labour Court had jurisdiction in terms of section 77 of the BCEA. In my view, it clearly did not.
- [82] It is not disputed that the scarce skills agreement is a collective agreement. Furthermore, it is not and cannot be contested that a dispute about the interpretation or application of a collective agreement must be resolved by conciliation failing which arbitration, under the auspices of the CCMA or the Bargaining Council having jurisdiction. Section 24 of the LRA specifically provides accordingly.

¹⁴ *Supra* at 1161 para [57].

[83] The respondents have been equivocal and ambivalent about the basis upon which the Labour Court could have had jurisdiction. In argument before us they straddled sections 158(2)(b) of the LRA and section 77(3), as an alternative basis upon which the Labour Court could have exercised jurisdiction. I have already dealt with the former basis. In respect of the latter, the argument is that the respondents' claim was formulated as a breach of the individual respondents' employment contracts and therefore the court had jurisdiction in terms of section 77(3) of the BCEA.

[84] Section 77(3) of the BCEA provides:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

[85] The section mainly confirms the jurisdiction of the Labour Court *vis-à-vis* other civil courts to determine any matter concerning a contract of employment. However, the section does not and does not purport, to give to the Labour Court jurisdiction or power that it does not have in terms of the LRA.¹⁵

[86] In terms of section 77A of the BCEA, the Labour Court has not been given powers in relation to the interpretation and application of collective agreements.¹⁶

[87] If the real dispute on the pleadings is about the interpretation and application of a collective agreement, the Labour Court had no jurisdiction, in the circumstances, to resolve it. Section 24 of the LRA is applicable in those circumstances. This Court has held accordingly in *Ekurhuleni*.¹⁷

[88] The respondents have argued that the case they made out on the pleadings was about the breach of the collective agreement, i.e., the scarce skill allowance agreement read with their contracts of employment. This, in my view, does in any event not clothe the Labour Court with jurisdiction.

¹⁵ See *Ekurhuleni Metropolitan Municipality v South African Municipal Workers' Union* [2015] 1 BLLR 34 (LAC); (2015) 36 ILJ 624 (LAC) para [30].

¹⁶ See *Ekurhuleni* para [30].

¹⁷ (*Supra*) para [31].

- [89] It is now trite that the jurisdiction of the Labour Court to resolve a dispute is determined from the pleadings.¹⁸ But the pleadings cannot be taken at face value. They need to be properly construed to ascertain what the legal basis of the applicant's claim is.¹⁹ If the claim properly interpreted is not about a breach of the individual contracts of employment, but about the interpretation and application of the collective agreement then the Labour Court has got no jurisdiction and cannot derive any jurisdiction from section 77(3) of the BCEA concerning the interpretation and application of that agreement.
- [90] In this matter, the pleadings properly construed reveal that the legal basis of the claim of the respondents is indeed about the interpretation and application of the collective agreement as I pointed earlier, when discussing the pleadings.
- [91] There is absolutely nothing in the UCT and/or Stellenbosch agreements that deal with the scarce skills allowance. Those are in any event not the individual contracts of employment that are envisaged in section 77(3) of the BCEA, but are the agreements entered into between the Provincial Administration (now represented by the appellant) and the two universities. The universities themselves are not parties to the litigation. The individual contracts of employment can only be amended as envisaged in terms of section 23 of the LRA if the collective agreement, properly construed, applies to the respondents.
- [92] The real dispute between the appellant and the respondents is about the interpretation and application of the collective agreement. In particular, the respondents contend that they are covered by the terms of the collective agreement and the appellant denies it. The only manner of resolving that dispute is to interpret the collective agreement itself. That this is so is also apparent from Cheadle AJ's judgment on the merits. It was mainly, or fundamentally, about the interpretation of the collective agreement.

¹⁸ See *Gcaba v Minister for Safety and Security and Others* (*supra*) at 1167 para [75]; *Ekurhuleni* (*supra*) para [21].

¹⁹ See the cases referred to in the previous footnote.

- [93] In *Ekurhuleni*, this Court has held that the Labour Court is not empowered under the LRA or the BCEA to interpret and decide on the application of a collective agreement, particularly in circumstances where the interpretation (and the issue of application) is pivotal and fundamental (as in this case) and not merely incidental, to the resolution of the real dispute between the parties.²⁰
- [94] These conclusions in respect of the respondents' (and to some extent the appellant's) reliance on section 158(2)(b) of the LRA and section 77(3) of the BCEA, is decisive of the appeal. The Labour Court (Cheadle AJ and Rabkin-Naicker J) had no jurisdiction in this matter.
- [95] In the light of the conclusion, it is not necessary to deal with the other points in respect of which the parties were to address this Court, namely, the applicability of sections 62(3) and 62(3A) of the LRA. I, nevertheless consider that those sections may have constituted obstacles to the Labour Court whether properly sitting as such, or as arbitrator.
- [96] The parties have submitted that even if we are not persuaded by their submissions in respect of the jurisdictional issues, this Court, should, nevertheless, deal with the matter in terms of the latter part of section 174(b) of the LRA and as discussed in *Sinuko*.
- [97] The respondents in argument on this point went as far as submitting that this Court is "*legally competent to deal with this matter*" notwithstanding, its conclusions on the jurisdictional issues. I disagree.
- [98] The latter part of section 174(b) of the LRA was never intended to give this Court jurisdiction to deal with issues in circumstances where it held that the Labour Court had no jurisdiction to deal with such issues. The power in that section is also discretionary. This is a wholly inappropriate case for the exercise of that power.
- [99] Since the question of jurisdiction is decisive of the appeal, we need not and clearly should not consider and comment upon the Labour Court's decision on

²⁰ See *Ekurhuleni* para [30].

the merits of the dispute. It is for the forum and/or structures with jurisdiction to decide on the interpretation and application of the scarce skills agreement (i.e. the collective agreement).²¹

[100] There is no reason why, given the circumstances, particularly, where the appellant appears to have made common cause with the respondents in respect of the jurisdictional points which were decisive of this appeal, that each party should not bear its own costs of the appeal.

[101] In the result:

101.1 The appeal is upheld (on the basis that the Labour Court had no jurisdiction in this matter).

101.2 The orders of the court *a quo* (Cheadle AJ and Rabkin-Naicker J) are set aside and replaced with the following order:

“No order is made in respect of the applicants’ claim and no costs order is made.”

P Coppin

Judge of the Labour Appeal Court

Tlaletsi DJP and Ndlovu JA concurred in the judgment of Coppin JA.

²¹ See *Ekurhuleni* para [30].

APPEARANCES:

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FOR THE RESPONDENTS: R G L Stelzner SC

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LABOUR APPEAL COURT