IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA19/18

Leon Logan Appels	**Appellant**
and	
Education Labour Relations Council (ELRC)	**First Respondent**
North West Department of Education And Sport Development	**Second Respondent**
South African Democratic Teachers Union	**Third Respondent**
National Professional Teachers' Association of South Africa (NAPTOSA)	**Fourth Respondent**
Suid-Afrikaanse Onderwysunie (SAOU)	**Fifth Respondent**
National Teachers' Union (NATU)	**Sixth Respondent**
Professional Educators' Union	**Seventh Respondent**
Public Servants' Association	**Eighth Respondent**

Health and Other Service Personnel Trade

Union of SA (HOSPERSA) **Ninth Respondent**

Dr AD Abdool **Tenth Respondent**

The Registrar of Labour

Relations **Eleventh Respondent**

Heard: **16 May 2019**

Delivered: **10 July 2019**

Summary: Whether a bargaining council through a collective agreement can vary time period for referral stipulated for by the LRA- principle that subordinated legislation subject to empowering legislation restated- distinction must be drawn between substantive and procedural rights- subordinated legislation cannot alter substantive rights- court held that clause 9.1.3 of the constitution the ELRC that reduces the time period for referral from 90 days to 30 is clearly not in conflict with the LRA. By reducing the time period to 30 days for the sake of celerity ELRC does not take away the right of the referring party to be heard. Labour Court's judgment upheld – appeal dismissed.

Coram: Waglay JP, Jappie and Coppin JJA

JUDGMENT

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[1] This is an appeal to determine whether a bargaining council, empowered in terms of the Labour Relations Act 66 of 1995 (LRA) to establish through a collective agreement its own dispute resolution procedure, may vary the time limit as stipulated for by the LRA for referral of a dispute to it. This issue arose from the unfair labour practice dispute referred by the appellant to the Education Labour Relations Council (ELRC).

[2] The appellant, employed at the Alabama Secondary School in Klerksdorp, applied for the vacant position of principal at the school during 2016. He was unsuccessful. He immediately raised a grievance about his non-appointment which was not resolved. He thereafter referred an unfair labour practice dispute to the ELRC, being the bargaining council which has jurisdiction to entertain the dispute. The dispute was referred after the expiry of 30 days, but before the expiry of 90 days since the appellant became aware of the employer's decision not to appoint him to the principal's post.

[3] The ELRC took the view that the appellant's referral was defective as it was referred outside the 30 day-period as prescribed in its constitution. The ELRC's constitution provides that all disputes related to promotion should be referred to it within 30 days from the date on which the employee became aware of the decision not to promote him/her. The ELRC requested the appellant to file an application to condone the late referral as a referral outside the time limit did not constitute a total bar of the referral. The appellant refused to do so and applied to the Labour Court for an order declaring that the 30 day time period prescribed by the ELRC was of no force because it was in conflict with the 90 day time period prescribed by the LRA. The appellant's stance is that ELRC's constitution cannot vary the timeframe set out in the LRA.

[4] The Labour Court (Van Niekerk) took the view that the constitution of ELRC is a collective agreement to which the appellant is a party and as such in terms of section 23(1) of the LRA, the collective agreement binds the appellant and all who fall within the sector over which the ELRC has jurisdiction. The Labour Court

held that the appellant could not contend that clause 9.1.3 of the collective agreement, which prescribed the 30 day time limit, was of no force and effect as the 30 day-period within which to refer a promotion dispute was an agreed period to which the appellant was bound.

[5] The Labour Court held further that even though bargaining councils were creatures of statutes and must act within the confines of the empowering legislation, there was nothing in the LRA that enjoins the bargaining council not to deviate from the statutory timeframe of the LRA. The court then held that there was, nothing to suggest that bargaining councils may not establish procedures that deviate from those established by the LRA. The Labour Court thus found that collective agreements concluded in bargaining councils that regulate dispute resolution should be given primacy because section 51 of the LRA empowers bargaining councils to establish procedures to resolve disputes and in doing so, to design their own procedures that address the exigencies of the sector for which they are registered and to ensure efficient and cost-effective dispute resolution, and that these procedures may deviate from those established by the LRA.

[6] Before this Court are two sections of the LRA. The first is section 191(1)(b)(ii) of the LRA which provides that:

> '(1)
>
> (a)
>
> (b) A referral in terms of paragraph *(a)* must be made within –
>
> (i)…
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the *employee* became aware of the act or occurrence.

The second is section 51 (9) (a) of the LRA which reads:

'(9) A *bargaining* council may, by collective agreement-

(a) establish procedures to resolve any dispute contemplated in this section.'

Pursuant to section 51(9) of the LRA, ELRC adopted its constitution which provides at clause 9.1.3 that:

'9.1 A party may refer a dispute to the General Secretary…

9.1.3 In the case of promotions, within 30 days from the date on which the employee became aware of the employer's final decision not to promote the employee'.

[Emphasis added]

[7] The appellant contends that the provisions of section 191 of the LRA are peremptory and that section 51(9) must be interpreted to the extent that the right conferred upon a party by the LRA cannot be taken away. In short, the appellant challenges the lawfulness of clause 9.1.3 of the ELRC's on the grounds that it conflicts with the provisions of s191(1)(b)(ii) of the LRA. In support of this contention, the appellant relied on *Premier Gauteng and Another v Ramabulana NO and Others*[1] in which case, this Court found that the LRA must prevail when the provisions in the rules applied by the Commissioner for Conciliation Mediation and Arbitration (CCMA) were in conflict with the provisions of the LRA. The appellant further argued that the distinction that the ELRC seeks to make between substantive and procedural rights is unwarranted as all rights regardless of their nature provided by the LRA are on the same footing: there is no distinction of rights between substantive and procedural rights to the extent that the former cannot be altered and the latter can be altered by a collective agreement.

[8] The ELRC, on the other hand, argues that a bargaining Council may by virtue of s51(9)(a) establish its own procedures to resolve disputes, which includes

[1] [2008] 4 BLLR 299 (LAC) (*Ramabulana*).

determining its own time period for the referral of an unfair promotion dispute. It argues that a distinction should be drawn between a right and a procedure to enforce that right. Time period prescribed by the LRA is a procedural issue and not a substantive right. Adding that when it determined its procedure to enforce the unfair labour practice disputes, it considered various factors, these included: the need for an expedited dispute resolution process in respect of promotions as 318 394 educators fall within the registered scope of ELRC and the number of promotional disputes referred to it were in 2014/2015 - 109; in 2015/16 - 248; and in 2016/17 – 225. It was therefore compelled to provide for the expeditious resolution of such disputes because it is in the best interests of learners that their education should not in any way be compromised and that the Department of Education meets its constitutional duty to provide learners with basic education as a delay in resolving such disputes would compromise the education provided to learners; that it is in the interest of all stakeholders that such disputes are resolved as quickly as possible; that it is in the nature of a promotion dispute that there exists at the time of the decision a vacancy which must be filled, failure to fill the position pending the resolution of a dispute has the consequences that teaching would be compromised because in every instance where a dispute is raised the position would most likely remain vacant pending the completion of dispute resolution processes; that where there is an opportunity for promotion, the successful educator is placed in the position, often such a promotion involves not only an increased salary but also relocation. Such disputes must also be resolved expeditiously as the consequences of a reversal of an unfair promotion where a dispute is lodged, must have as a consequence, the reversal of salary and possibly even relocation and learners will then have to start with a new incumbent and the other incumbent may well then be required to revert to his or her previous position and like the wheels of the bus the cycle will go on. All of these consequences in respect of disputes related to promotion compelled the need for a truncated dispute resolution process.

[9] The Court in *Ramabulana*, held that the CCMA is a creature of statute which derives its powers from the LRA and from its rules governing the dispute

resolution process that it is empowered to undertake. The court held that CCMA's rules should not be in conflict or inconsistent with provisions of the LRA, and where those rules are in conflict, the LRA will prevail and such rules would be *ultra vires*.[2]

[10] The *Ramabulana* matter is distinguishable from the present matter. That is a matter which deals with the CCMA and not with a bargaining council. The CCMA is not empowered in terms of s51(9) to establish a dispute resolution procedure by way of a collective agreement as it is not a bargaining council, nor is it limited to serve a particular sector.

[11] There is no dispute that the ELRC's constitution is a collective agreement concluded in terms of section 51(9) of the LRA. There is also no dispute that ELRC is a creation of statute which is empowered by the LRA to design its rules and dispute resolution process, but unlike the CCMA it can only operate within the sector for which it is registered.

[12] In designing its constitution, ELRC adopted a subordinate legislation. This is so because the collective agreement of ELRC is concluded pursuant to the provisions of the LRA. The LRA is, therefore, the empowering legislation. It is trite that subordinate legislation or delegated legislation may not be in conflict with the empowering legislation.

[13] Since subordinate legislation is always subject to empowering legislation, it cannot take away any rights entrenched in the empowering legislation. A distinction must, however, be drawn between a right and the process to enforce that right. The substantive right that is of relevance in this matter that is guaranteed by the LRA and which cannot be compromised by the subordinated legislation is the right not to be a victim of an unfair labour practice. This is guaranteed by the Constitution of the ELRC. The issue of time limits relates to the process. While it is correct that the LRA provides that disputes about unfair labour practice must be referred to a bargaining council which has jurisdiction to

[2] At para 10.

entertain the dispute "within 90 days…", this, in my view, would apply where the bargaining council has not itself provided a procedure which has to be followed to refer the unfair labour practice to be determined by it.

[14] The LRA specifically provides in s51(9)(a) that the bargaining council may by collective agreement establish the procedure to resolve any dispute. What this section contemplates is that there has to be a collective agreement which sets out the procedure to be followed in resolving a dispute, but more than that, implicit in this section is the recognition that procedures may differ between councils and between the CCMA and councils and that councils must put into place procedures that will best suit the sector it serves while giving effect to the principal objects of the LRA which is to resolve disputes effectively, efficiently and swiftly and do this without compromising the rights enshrined in the LRA.

[15] In this matter, there is no dispute that the procedure to resolve disputes which includes clause 9.1.3 of the ELRC's Constitution was a product of a collective agreement and that the appellant as a member of a trade union was party to the agreement and consented to that clause. The factors which were considered demonstrate the need for a truncated time limit clause. This clause might limit the time period for referral of an unfair labour practice about promotion but does not take away the appellant's right to refer his unfair labour practice dispute to the council, and where the referral is made outside the period prescribed by the ELRC, condonation may be granted on good cause shown for the delay.

[16] In my view clause 9.1.3 of the ELRC's constitution that reduces the time period for referral from what is prescribed in the LRA is not in *ultra vires*. By reducing the time period for the sake of celerity, the ELRC does not take away the right of the referring party to be heard. The limitation serves to deal with the reality that the education sector deals as it does with educating the youth and must not drag its feet in resolving disputes as expeditiously as it can, lest it prejudices the very sector it seeks to serve.

[17] In the circumstances, the appeal must fail however I am of the view that this is also a matter where in the interest of law and equity there be no order as to costs.

[18] In the result, I make the following order:

The appeal is dismissed.

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Waglay JP

I agree

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Jappie JA

I agree

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Coppin JA

APPEARANCES:

FOR THE APPELLANT:	W P Schöltz of Schöltz attorneys
FOR THE RESPONDENTS:	Adv G Hulley
	Instructed by Solomonholmes Attorneys