

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR 1576/07

In the matter between

ESKOM HOLDINGS (PTY) LTD

Applicant

and

NATIONAL UNION OF MINEWORKERS

First Respondent

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

Second Respondent

SOLIDARITY

Third Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Fourth Respondent

COMMISSIONER ALLI N.O

Fifth Respondent

JUDGMENT

AC BASSON, J

[1] The Applicant, ESKOM Holdings Limited, operates in an industry designated as an essential service. The Applicant has not concluded a Minimum Services Agreement with the First Respondent (the National Union of Mineworkers of SA); the Second Respondent (the National Union of Metalworkers of South Africa) and the Third Respondent (Solidarity). The First to Third Respondents wish to refer the failure to agree on the terms of a minimum service agreement as a dispute on a matter of mutual interest to the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as “the CCMA”) for conciliation, and if that fails to resolve the impasse, to refer the dispute to compulsory arbitration in terms of which process an award can be procured in respect of the designation of a minimum service which may then be taken to the Essential Services Committee for ratification. (I will refer to the First to Third Respondents collectively as “the Respondents”). This process is opposed by the Applicant. In essence the parties differ on whether or not the CCMA has jurisdiction to conciliate and arbitrate the dispute referred

to it by the Respondents. The parties do, however, agree that no useful purpose would be served in referring the matter back to the CCMA for reconsideration and requested this Court to substitute the finding of the Commissioner with its own finding.

[2] The following legal issues were before this Court:

- (i) Was it necessary for the Commissioner to make a jurisdictional finding on the questions raised by the Applicant prior to any conciliation of the dispute taking place? As I understand the argument, this Court does not have to decide this point and only has to decide on the legal point referred to this Court (see the next paragraph).
- (ii) Do the disputes arising within a designated essential service, which may be referred to the CCMA for conciliation and, if unresolved, to arbitration, include a dispute over a failure to conclude an agreement on the terms of a minimum service agreement?

CCMA Proceedings

[3] The Respondents referred the dispute (about the designation of a minimum service) to the CCMA under section 74 of the Labour Relations Act 66 of 1996 (hereinafter referred to as “the LRA”). The Respondents

contended that the CCMA is entitled to conciliate a dispute about the failure to conclude the Minimum Service Agreement and that they would, if conciliation fail, be entitled to refer the dispute to interest arbitration to compel the Applicant to agree to a Minimum Service Agreement. The Applicant raised a jurisdictional objection to the CCMA conciliating the dispute and argued that that the CCMA lacked jurisdiction to determine the dispute. It was further contended on behalf of the Applicant that if the dispute is one which is capable of determination, it is the Essential Services Committee and not the CCMA that should deal with the matter.

- [4] The Fourth Respondent (Commissioner M D Ally – hereinafter referred to as “the Commissioner”) held that the CCMA did have jurisdiction to conciliate the issue.
- [5] The Applicant filed a review under the provisions of Section 145 and/or 158(1)(g) of the LRA to review and set aside the jurisdictional ruling of the Commissioner and contended that this Court should substitute the decision by granting declaratory relief to the effect that the CCMA lacks jurisdiction to conciliate and arbitrate the dispute. On behalf of the Applicant it was argued that a review at this point in time is appropriate and that the contention of the Respondents that the aggrieved Applicant should have waited for conciliation and then arbitration and only thereafter should have reviewed the award for lack of jurisdiction is plainly wrong because any conciliation and subsequent arbitration

proceedings would be a nullity if indeed the CCMA lacks jurisdiction to determine the dispute in the first place. (See *Eskom v Marshall & Others* (2003) 1 BLLR 12 (LC)). As already pointed out, it was agreed that I need not decide this jurisdictional point.

Commissioner's Ruling

[6] The commissioner ruled as follows:

"ANALYSIS OF EVIDENCE AND ARGUMENT.-

- (1) I have before me a very complex set of legal questions related to the dispute at hand. The ruling that I am asked to make is whether the CCMA has jurisdiction to conciliate the dispute;*
- (2) In order to address the arguments before me I have to check where my powers as a commissioner come from.*
- (3) The answer to the above can be found in chapter (vii) Part C of the LRA with reference s133,1(a) and (b) which reads as follows:*

'133 Resolution of disputes under the auspices of a commissioner' and further subsection, reads:

The commission must appoint a commissioner to attempt to resolve through conciliation-

- (a) any dispute referred to it in terms of section*

134, and

(b) *any other dispute that has been referred to it in terms of this Act*

(4) *Notwithstanding the complex legal questions raised, my analysis of the above is that the CCMA has the power to conciliate any dispute that has been referred to it in terms of this Act.*

(5) *The next question is whether the issue in dispute can be termed as arising out of this Act (the LRA) and it is clear that Section 70 to 74 are provisions as provided in the LRA.*

(6) *The question as to whether the issue falls under s134 or not is not for me to decide and should be a decision of the conciliating commissioner when the commissioner is called upon to identify the nature of dispute before issuing a certificate of non-resolution.*

(7) *To answer all the legal questions raised by the parties will in my opinion mean that I will be arbitrating on these matters without having the necessary powers to do so and that these legal questions should be dealt with in an arbitration/adjudication stage.”*

RULING

I therefore rule that in terms s133,1(b) of the CCMA has the jurisdiction to conciliate the issue in dispute and therefore submit the dispute back to the CCMA for the appointment of another commissioner to conciliate. "

Broad legislative phramework

[7] Sections 70 – 74 of the LRA provide the legal phramework governing the dispute resolution processes in essential services. These sections are situated in Chapter IV of the LRA which deals with strikes and lock-outs.

[8] In terms of section 65(1)(d)(i) of the LRA, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if that person is engaged in an essential service.

Section 70 of the Labour Relations Act 66 of 1995

[9] The Essential Services Commissioner is created by the LRA. In terms of section 70(2) of the LRA the functions of the ESC are :

"(a) To conduct investigations as to whether or not the whole or part of any service is an essential service, and then to decide

whether or not to designate the whole or part of that service as an essential service.

(b) To determine disputes as to whether or not the whole or part of an any service is an essential service; and

(c) To determine whether or not the whole or part of any service is a maintenance service."

- [10] In terms of section 70(2)(a) and (b) of the LRA, the Essential Services Committee may embark on its own investigation with a view to determining whether part or all of a service constitutes an essential service, or to make such a determination arising from a dispute over the essential or non-essential character of a particular service. The end result in either case is that the Essential Services Commissioner designates part or all of the service in question as an essential one, or no designation is made at all. Section 71 sets out the procedure through which a designation is arrived at by the Essential Services Commissioner.

Section 72 of the LRA

- [11] Section 72 the LRA provides for the conclusion of a Minimum Service Agreement in the following terms:

*"The Essential Services Committee may ratify any **collective agreement**¹ that provides for the maintenance of minimum services in a service designated as an essential service, in which case:*

- (a) the agreement minimum services are to be regarded as an essential service in respect of the employer and its employees, and*
- (b) the provisions of section 74 do not apply."*

Section 73 of the Labour Relations Act

[12] Section 73 deals with *disputes* about whether a service is an essential service. The type of dispute referred to here is about whether a particular employer or employees are engaged in an essential service which has already been designated as such. This section reads as follows:

"(1) Any party to a dispute about either of the following issues may refer the dispute in writing to the Essential Services Committee-

- (a) Whether or not a service is an essential service; or*

¹ Additional emphasis.

- (b) *Whether or not an employee or employer is engaged in a service designated as an essential service."*

Section 74 of the LRA

[13] Section 74 deals with disputes in an essential service and it reads as follows:

*"**Any party to a dispute**² that is precluded from participating in a strike or lockout because that party is engaged in an essential service may refer the dispute in writing to:*

- (a) *a council, if the parties of the dispute fall within the registered scope of that council; or*
- (b) *the commission, if no council has jurisdiction.*
- (2) *The party who refers the dispute must satisfy the council or the commission that a copy of the referral has been served on all the other parties to the dispute;*
- (3) *The council or the commission must attempt to resolve the dispute through conciliation;*

² Additional emphasis.

- (4) *If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or commission".*

[14] The importance of this section cannot be overstated as it is aimed at providing an *alternative dispute resolution mechanism* to parties who are engaged in an essential service and who are prohibited in terms of section 65(1)(d)(i) of the LRA from striking.

Applicant's submissions

[15] The gist of the Applicant's contention was that the dispute resolution procedures contained in section 74 of the LRA is not applicable in the present matter and as a result the Respondents' remedy was to have referred the dispute to the Essential Services Committee if they are not satisfied with the present Essential Services Committee's declaration which designated the Applicant as an essential service. It was argued that in terms of section 70(2)(c) as read with section 73(1), the Essential Services Committee alone has the power to finally determine the current controversy.

[16] More to the point was the argument that the provisions of section 72, properly read and interpreted, only refer to a "*collective agreement*" and

not an “award”. Consequently, so it was argued, it is not possible for the CCMA by means of an “award” to impose a collective agreement (which provides for the designation of a certain portion of the Applicant as a minimum service) upon the parties because, if section 72 is properly read, it is clear that a minimum service agreement can only come into being in terms of a *collective agreement* (and not an “award”) which implies that a *consensual* process has preceded the conclusion of the collective agreement.

What is a minimum service?

[17] Section 213 of the LRA (the definitions section of the LRA) defines an “Essential Service” but contains no definition of a “Minimum Services Agreement”.

[18] If section 72 of the LRA is read, it is clear that parties (employers and employees and their respective recognized representatives) engaged in the provision of a service that has been designated by the Essential Services Commissioner (in terms of its powers contained in section 70 of the LRA) as an *essential service*, may conclude a “*collective agreement*” that provides for the maintenance of a minimum service (in the service that was designated as an essential service). Once a “*collective agreement*” has been concluded in respect of the maintenance of a minimum service, the “*collective agreement*” must be referred to the Essential Services Commission (in terms of section 72 of the LRA) and

the said Commission “*may*” then ratify the “*collective agreement*”. What is, however, also clear from a reading of section 72 is the fact that section 72 of the LRA specifically refers to the ratification of a “*collective agreement*” as the instrument in terms of which provision is made for the maintenance of a minimum service during industrial action. On behalf of the Applicant it was persuasively argued that the Court cannot disregard the exact wording used by the legislature in section 72 which (as already pointed out) speaks of the “*maintenance of minimum services*” in a service designated as essential in terms of “*any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service*”. Put differently, in light of the fact that the legislature has expressly limited the instrument in terms of which a minimum service may be created or agreed upon, the Court is bound to accept that a minimum service may only be created or established in terms of a “*collective agreement*” (and not in terms of an “*award*”).

[19] I am in agreement with this argument and I will expand on my reasons hereinbelow. Having accepted that the legislature has intended to allow a reduction of the ambit of a designation of a service as an essential service by means of a “*collective agreement*”, the next question which invariable arises is whether the term “*collective agreement*” includes an “*award*”. This question is particularly important in the context of this case and in the context of an essential service where employees are precluded from embarking on strike action. It is clear from a reading of section

65(1)(d)(i) of the LRA that the option of a strike as a mechanism to enforce or to bolster demands put forward during the collective bargaining process, is not available to essential services employees. However, should a dispute arise in respect of which the employees are precluded from participating in a strike (or lock-out) the aggrieved party may refer the dispute to the CCMA or to a bargaining council with jurisdiction. If conciliation fails, the dispute may be referred for (compulsory) arbitration and the Commissioner may issue an “award” which will dispose of the dispute and which will be binding on the parties. In effect the dispute will thus be resolved by a third party (the Commissioner). The outcome of the compulsory arbitration process will be embodied in an arbitration “award” which will have binding effect on the parties and may be enforced by either party. Once a deadlock is reached in the collective bargaining process, essential service employees are thus effectively (for justifiable reasons) precluded from enforcing their demands through strike action. For employees not engaged in the provision of essential services (subject to the limitations imposed by section 65 of the LRA), strike action is available. The outcome of strike action often results in the conclusion of a collective agreement in terms of which the parties by agreement resolve the dispute that was the subject of collective bargaining and which had resulted in strike action. In the case of essential services employees, the only route available to break the deadlock (in collective bargaining) disputes is through a process which will ultimately result in a Commissioner (a third party) resolving the

dispute by issuing an arbitration “award”. The scenario envisaged in the preceding discussion is thus where parties (engaged in essential services) cannot resolve a dispute and reach deadlock and without the option of strike action, parties have no other option than to refer the dispute to (compulsory) arbitration. The result of the arbitration process is an “award” and not a “collective agreement”. Can these terms or instruments be used interchangeably? The answer to this question is particularly pertinent in the context of section 72 of the LRA which expressly states that a “collective agreement” may provide for a minimum service and furthermore that the Essential Services Committee may ratify the “collective agreement”. A reading of this section, on the face of it, supports the contention advanced on behalf of the Applicant namely that only a “collective agreement” can contain a minimum service agreement and only a “collective agreement” (containing such an agreement) may be ratified by the Essential Services Commission and not an “award”

What is a collective agreement?

[20] A collective agreement is defined in section 213 of the LRA. If the definition is analysed it is clear that such an agreement comprises of three elements: (i) certain parties may conclude a collective agreement namely employers and employees or their accredited juristic representatives; (ii) the agreement is in writing; and (iii) the subject matter is “terms and conditions of employment or any other matter of mutual

interest". Should these (designated) parties thus conclude a minimum service agreement and provided that such an agreement is ratified by the essential services commissioner (in terms of section 72 of the LRA), the effect would be to abbreviate the initial designation of the Essential Services Commission of a particular services as an essential service to the extent provided and agreed upon in terms of the minimum service agreement. The practical effect of a minimum service agreement is therefore to exempt or release in terms of a collective agreement some workers of a designated (essential services) employer from the prohibition to strike. Another employer in the same designated enterprise and its employees would remain prohibited from resorting to industrial action as they have not concluded a collective agreement providing for an abbreviation of the initial designation. (See in general: Dhaya Pillay *Essential Service under the new LRA* [2001] 22 ILJ 1 at p27 (hereafter referred to as "Pillay")).

- [21] On behalf of the Applicant it was argued that it is significant that the only "*instrument*" that the essential services commission may ratify is a "*collective agreement*". This much is, as already pointed out, clear from a reading of section 72 of the LRA which expressly refers to the ratification of "*any collective agreement*". It was further submitted that it is significant that there is no reference of a ratification of an "*award*" in terms of section 72 of the LRA. This much is also clear from a reading of this section.

Does a “collective agreement” exclude from its ambit “an award”?

[22] On behalf of the Applicant it was argued that a literal interpretation of “collective agreement” is sustainable and argued with reference to a plethora of cases that the term “collective agreement” does *not* incorporate instruments of reciprocal binding force upon parties who have not reached true consensus on a matter regulated in the award. For this reason, it was argued, an award cannot be incorporated in the term “collective agreement” as an award³, by its very nature, imposes upon parties a decision or outcome which is not the product of an agreement.⁴

[23] The Court was also referred to other sections in the LRA which support the contention that a distinction should be drawn between collective agreements on the one hand and an award and determination on the other hand:

- (i) Sections 23 and 24 deal with the enforcement and interpretation of collective agreements. On behalf of the Applicant it was argued

³ Except, of course, where parties consent to an order. This scenario is not contemplated in the context of this judgement.

⁴ See: *SAMWU Ethekweni Municipality* [2006] 27 ILJ 225 (BCA) at [19]; *Kwazulu Natal South Coast Accommodation Association v Bargaining Council for the Liquor, Catering and Associated Trades* [2004] 25 ILJ 2211 (LC) at [32]; *Jardine v Tongaat- Hullett Sugar Ltd* [2003] 24 ILJ 1147 (LC) at [5]; *Coin Security Group (Pty) Ltd v Minister of Labour* [2001] 23 ILJ 2399 (SCA); *Fredericks v MEC, Education and Training Eastern Cape* [2002] 23 ILJ 81 (CC) at [23] & [28]; *Bader-Bop (Pty) Ltd v NUMSA* (2002) 23 ILJ 104 (LAC) at [27]; *Oil Chemical General and Allied Workers Union v Volkswagen* [2002] 23 ILJ 220 (CCMA) at p221; *NAPTOSA v Minister of Education, Western Cape* [2001] 22 ILJ 889 (C); *PSA v Provincial Administration, Western Cape* [2000] 21 ILJ 680 (CCMA); *Kem-Lin Fashions v Brunton* [2000] 21 ILJ 1357 (LC) at [25]; *IMATU v Cape Town Municipality* [1999] 19 ILJ 960 (CCMA); *SACAWU v Specialty Store* [1998] 19 ILJ 557 (LAC) *Ceramic Industries t/s Betaware Sanitaryware v NCBWU* [1997] 18 ILJ 550 (LC).

that these provisions clearly refer to “*real*” agreements and not to “*constructive*” agreements.

- (ii) Section 65 stipulates, *inter alia*, that employees may not strike where employees are bound by a collective agreement or award that regulates the issue in dispute (see sections 65(3)(a)(i) & (ii)). The Applicant argued with reference to these sections that it is significant that a distinction is made between “*an award*” and a “*collective agreement*” as the instrument that regulates the issue in dispute and that these two instruments are not used interchangeably. Where there is an award binding the person that forbids striking, that distinct source of obligation is plainly identified and distinguished from a collective agreement.

[24] With reference to these provisions it was therefore submitted that these provisions support the notion that reference to a collective agreement means only a *true agreement* based on *de facto* consensus. I am in agreement with this submission.

[25] With reference to the present set of facts and specifically with reference to section 72 of the LRA (where there is reference only and specifically to a “*collective agreement*”), it was submitted that this contemplated a reference to a “*collective agreement*” as defined in section 213 which is a

true consensual agreement, and not an award. Such an interpretation would be consistent with the core common law concept of an agreement which implies the outcome of a completely voluntary commitment to be bound which is derived from a freedom to choose to be bound or not to be bound.

- [26] This Court was also referred to the ILO's 1994 General Survey, Para 161 on "*negotiated minimum services*" in terms of which the view is advanced that such agreements should not be addressed as part of a labour dispute, but be ring-fenced so that objectivity and detachment might reign. The emphasis is, so it was argued, keenly on a true meeting of the minds which is embodied in a collective agreement.

Do disputes arising within a designated essential service which may be referred to the CCMA for conciliation and if unresolved to arbitration, include a dispute over a failure to conclude an agreement on the terms of a minimum service agreement?

- [27] I am in agreement with the general submission that orderly collective bargaining and the effective resolution of disputes are some of the core and primary objectives of the LRA. Even more important is the object of the LRA to give effect and to regulate the fundamental rights conferred by section 27 of the Constitution, Act 108 of 1996. Section 23⁵ of the

⁵ 23 Labour relations

Constitution provides that every employee has the right to strike and unions have the right to engage in collective bargaining. There is no doubt that the right to strike is an important right and that it plays a pivotal role in the collective bargaining process. See *NUMSA v Bader BOP* [2003] 2 BLLR 103 (CC) at paragraph [13]:

“[13] In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous

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- (1) Everyone has the right to fair labour practices.
 - (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
 - (3) Every employer has the right-
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
 - (4) Every trade union and every employers' organisation has the right-
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
 - (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
 - (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.”

[28] The importance of the right to strike is further reinforced by the view that the constitutional right to strike should not, in the absence of express limitations, be restrictively interpreted. See *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) at paragraphs [27] – [28]:

“[27] The arguments of both Mr van der Riet and Mr Loxton proceeded, also in my view correctly, on the premise that a proper

appreciation of the statutory provisions concerning B strikes depends on their purpose. Mr van der Riet contended that the purpose of s 64(1)'s procedural requirements is to compel employees to explore the possible resolution of their dispute through negotiations before exercising their right to strike. The concept of a protected strike presupposes such negotiations. Once that purpose has been fulfilled, no further statutory object would be served by limiting the right to strike only to employees directly affected by the demand. Instead, the restriction envisaged would place a substantive limitation on the right of non-bargaining unit union members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with the submission.

[28] The Constitutional Court has itself emphasized the general importance of the right to strike:

'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers enjoy collective power primarily through the mechanism of strike action.'

The court went to point out that the importance of the right to strike for workers has led to its being entrenched far more frequently as a fundamental right in constitutions than is the right to lock out, and that the two rights 'are not always and necessarily equivalent'

(In Re: Certification of the Constitution of the Republic of South Africa 1996 (1996) 17 ILJ 821 (CC); G [1996] 10 BCLR 1253 (CC) at 1284-5 para [66].) This is of course not to say that striking should be encouraged or unprocedural strikes condoned: but only that there is no justification for importing into the LRA, without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express.”

- [29] The right to strike may, therefore, be limited in the same manner as any other right entrenched in the Constitution but subject to the provision of the limitation clause contained in section 36(1) of the Constitution. One acceptable limitation is that on the right to strike in essential services. Although it is accepted that workers engaged in essential services may be denied the right to strike, it is equally accepted that the restriction be accompanied by an alternative process of dispute resolution such as the right to conciliation and thereafter arbitration. This approach is in line with ILO standards (see *ILO Digest* 2006 at 109 paragraph 524 and *ILO Freedom of Association and Collective Bargaining* 1994 at 70 paragraph 159). The LRA, in congruence with its ratification of ILO Convention 87 and 98, must therefore provide a dispute resolution mechanism as an alternative to strike action to essential service employees. There is a further argument which is even more compelling, and I am in agreement with Mr. Kennedy, and that is that a curtailment of the right to strike

without providing an alternative dispute resolution mechanism would be an unduly restrictive limitation on the right to strike which is provided in the Bill of Rights.

Prohibition of strike action and alternative dispute resolution

[30] It is clear that the prohibition on strike action in respect of employees engaged in essential services is a blanket one. However, this prohibition may be qualified in circumstances where a collective agreement providing for a *minimum service* has been ratified by the Essential Service Commissioner. Once ratified only those employees engaged in the minimum service will be regarded as the essential service.

[31] In line with the objective of the LRA which is, *inter alia*, to allow for the effective resolution of disputes, section 74 of the LRA provides that any party to a dispute that may not be engaged in industrial action because they are engaged in an essential service, may refer the dispute to the CCMA which must attempt to resolve the dispute through conciliation. If conciliation is successful, any party to the dispute may request the relevant body to resolve the dispute through arbitration. The outcome of the compulsory arbitration process would be an arbitration award. The commissioner will therefore effectively resolve the dispute for the parties as they are not afforded the right to enforce a resolution of the dispute by resorting to industrial action.

[32] The question which arises and which is pertinent to the present application, is whether the statutory dispute resolution mechanism as provided for by section 74 of the LRA exclude certain disputes from its ambit? On behalf of the Respondent it was argued that the disputes referred to in section 74 are identified only by the characteristic that the dispute is one which a party to it is “*precluded from participating in a strike or lock-out*” because that party is engaged in an essential service. On behalf of the Respondent it was argued that no other limitation is placed on the type of dispute that may be referred to the statutory mechanism for resolution. On this basis alone, it was submitted that the CCMA has jurisdiction over the dispute referred to it by the unions under the provisions of section 74 of the LRA which is a dispute about the designation of a minimum service with a designated essential service. I am in agreement with the submission that, on the face of it, section 74 of the LRA does not limit the type of dispute that may be referred to the CCMA for compulsory arbitration and that, at least, on the face of it, a dispute about the conclusion (and/or ambit) of a minimum service agreement may (on a reading of this section) be referred to the CCMA as a dispute over which parties may not strike and which may therefore be subjected to compulsory arbitration.

[33] There is furthermore a strong argument to be made out that it could not have been the intention of the legislature to leave essential service employees *in vacua* and without any alternative dispute resolution

mechanism where the dispute is about the conclusion of a minimum service agreement. Not only is this contrary to the purpose of the LRA which is to provide for the effective resolution of dispute, but also contrary to the obligation to provide for effective alternative resolution of disputes in circumstances where the right to embark on strike action has been limited because the employees are engaged in the provision of essential services. The argument strongly supports the conclusion that any dispute (in respect of which parties may not strike) may be subjected to the section 74 conciliation and (compulsory) arbitration process and any dispute may be resolved or form the subject matter of an “award” which embodies the decision of the Commissioner in respect of the dispute referred to it.

- [34] This argument, however, no matter how compelling and sound taking into account the purpose of the LRA which is, *inter alia*, to allow for the speedy resolution of labour disputes, does not, in my view, provide a solution to the undisputed fact that section 72 only allows for the ratification of a “collective agreement” which provides for a minimum service and not for the ratification of an “award”. The question is whether this Court should accept that this could not have been the intention of the legislature to leave essential service employees *in vacua* and without the remedy of compulsory arbitration or whether the Court should accept that the legislature might not have intended the dispute about minimum services to be arbitrated by a third party (a Commissioner or arbitrator)?

[35] In *Dudley v City of Cape Town & Another* unreported judgment of the Labour Appeal Court: CA 1/05 (21 August 2008), the Labour Appeal Court dealt with, what seemed to be an obvious and striking absence of a dispute resolution procedure in the context of Chapter III of the Employment Equity Act 55 of 1998. The learned Zondo, JP debated this omission as follows:

“[42] I have stated above that chapter III of the Act deals with affirmative action. I have above also alluded to the fact that chapter II of the EEA – which deals with the prohibition of unfair discrimination - contains a dispute resolution procedure. That dispute resolution procedure is available to “any party to a dispute concerning” that chapter. (sec 10(2)). That dispute resolution procedure culminates in the adjudication of a dispute by the Labour Court if conciliation fails to achieve a resolution. What is very striking about Chapter III is the fact that no dispute resolution procedure is provided for in that chapter. It is difficult to think that the drafters of the Act remembered to include a dispute resolution procedure in Chapter II for disputes concerning that chapter but suddenly forgot to include a dispute resolution procedure in Chapter III, when they came to the latter chapter. The more plausible explanation for their omission to include such a procedure in chapter III is that they did not forget to include it but

deliberately omitted to do so for some reason.”

[36] The learned judge therefore concluded that the more plausible explanation is not that the legislature had simply “*forgotten*” to do so, but that it was a deliberate omission for “*some reason*”. Whether or not this is a justifiable omission or whether or not this is correct to have done so, the Labour Court (and the Labour Appeal Court) cannot ignore the plain language of the legislature. See further paragraph [46] where the Labour Appeal Court in the *Dudley*-matter stated the following:

“[46] It also needs to be noted that the drafters of the EEA included a dispute resolution procedure in Part C of Chapter V. This is in sec 52. Once again how could the drafters have remembered to include a dispute resolution procedure in Chapter II, forgotten to include one in Chapter III but once again suddenly remembered to include one in Chapter V? That can simply not be! The fact of the matter is that they intended that any interested party who is aggrieved by a designated employer’s failure to comply with any of its obligations under chapter III would take steps to have the enforcement procedure provided for in chapter V invoked and they did not intend that such an interested party could simply ignore that procedure and institute court proceedings. That is the policy choice that was made by the

legislature. It may be good or it may be bad but the legislature was entitled to make that policy choice”.

[37] Although the omission by the legislature to include the ratification of an “award” (which provides for the maintenance of a minimum service in a service designated as an essential service) as one of the functions of the Essential Services Committee, appears to be in conflict with the purpose of the LRA (which is, *inter alia*, to facilitate and encourage the resolution of labour disputes) and to provide for an alternative mechanism to resolve labour disputes especially in the context of essential services where the parties do not have the right to resort to a strike, it would appear that the legislature had made a deliberate policy decision not to provide for the ratification of compulsory arbitration awards containing an award in respect of a minimum services.

[38] My conclusion in this matter is therefore that it appears from a plain reading of the LRA that the legislature had made a deliberate policy choice to exclude from the powers of the Essential Service Committee the power to ratify “awards” that provide for a minimum service (and which is the result of a compulsory arbitration process). In the result I therefore have to agree with the Applicant that the only forum that is competent to intervene in disputes about essential services (and also disputes about minimum services) is the Essential Services Commissioner. I am also of the view that an “award” cannot be what is

contemplated as a “*collective agreement*” in terms of section 72 of the LRA and is therefore not capable of ratification by the Essential Services Commissioner.

[39] I accordingly grant the order as per the joint proposal for a draft order in the event this Court finds in favour of the Applicant:

- (a) The decision of the Commissioner is reviewed and set aside;
- (b) It is declared that the CCMA does not have the jurisdiction to deal with a dispute arising from a failure to agree on the terms of a minimum services agreement.
- (c) There is no order as to costs.

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AC BASSON, J

26 September 2008

**APPLICANT'S COUNSEL: ROLAND SUTHERLAND SC FEROZE BODA KENNY
PHETO**

**FIRST TO THIRD RESPONDENTS' COUNSEL: PAUL KENNEDY SC ROBERT
LAGRANGE**