



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Of interest to other judges

Case no: P 524/10

In the matter between:

KOUGA MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER N NQAMANA

Second Respondent

SAMWU obo LPR MXUBE

Third Respondent

Heard: 22 November 2011

Delivered: 2. November 2011

Summary: Review: challenge to jurisdiction of SALGBC to deal with
section 57 Municipal Systems Act employees: Application Dismissed

JUDGMENT

GUSH J

The applicant, a municipality governed by the Municipal Systems Act¹ (the Act), dismissed the third respondent for misconduct. The third respondent had prior to his dismissal been employed by the applicant as the municipal manager in accordance with section 57 of the Act.

The third respondent referred a dispute concerning his dismissal to the first respondent where it remained unresolved after conciliation. When the dispute was referred to arbitration, the applicant challenged the jurisdiction of the first respondent to entertain the dispute. The second respondent, the commissioner appointed by the first respondent to consider the matter, after hearing argument from the applicant and the third respondent, dismissed the applicants 'point in *limine*' relating to the first respondent's jurisdiction and ruled that the

'the SALGBC² does have jurisdiction to entertain dispute, including disputes of municipal managers and all those managers directly accountable to municipal managers, employed in terms of s 57 of the municipal systems act of 2000'

The applicant in this matter applies to review and set aside this jurisdictional ruling made by the second respondent and to have it substituted with an order 'in terms of which it is determined that the third respondent member's dispute should be heard by the commission for conciliation, mediation and arbitration (CCMA) and not the first respondent.'

Employers and employees in 'local government undertakings' are subject to the provisions of the SALGBC Main Collective Agreement, which in turn was entered into in accordance with the SALGBC constitution and the provisions of the Labour Relations Act³.(LRA)

The relevant provisions of the SALGBC Main Collective Agreement provide:

"Part A: APPLICATION:

¹ Act 32 of 2000

² South African Local Government Bargaining Council.

³ Act 66 of 1995

2. Exclusion from this agreement.

2.1 Municipal managers and persons appointed as managers directly accountable to municipal managers in terms of section 57 of the municipal systems act, 32 of 2000 shall be excluded from this agreement except for the following provisions-

2.1.6 Part D, Section 2, where applicable.”

Part D Section 2 regulates inter alia:

Conduct of conciliation and arbitration proceedings before the Council (clause 2)

Conciliation of disputes (clause s2.10 – 2.16)

Con-Arb in terms of section 191 (5A) of the Act (LRA)⁴ (clause 2.17)

Arbitrations (clauses 2.18 – 2.23); and

Rules that apply to Conciliations, Arbitrations and Con-Arbs.

"Part K: APPLICATION OF COUNCIL COLLECTIVE AGREEMENTS TO MUNICIPAL MANAGERS AND THOSE MANAGERS DIRECTLY ACCOUNTABLE TO MUNICIPAL MANAGERS IN TERMS OF SECTION 57 OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 2000: "municipal managers and those managers directly accountable to municipal managers in terms of section 57 of the local government: municipal Systems act 32 of 2000 shall be excluded from all collective agreements concluded under the auspices of the Council unless expressly indicated otherwise of a specific collective agreement".'

In support of its application to have the award set aside, the applicant argued that despite the provisions of Part K read with Part A of section 2 and Part D, section 2 of the main collective agreement, the first respondent does not have the jurisdiction to consider the matter for the reasons that the constitution of the first respondent and in particular clause 13 thereof (which clause empowers the Council to conduct arbitrations in respect of disputes in respect of dismissals) is silent as regards the specific inclusion of section 57 managers.

⁴ Labour Relations Act 66 of 1995

The applicant's argument essentially was that the constitution of the SALGBC was a collective agreement and therefore the provisions of part K should be interpreted to apply to the constitution. As the constitution did not specifically empower the council to conduct arbitrations in respect of section 57 employees and as the dispute resolution function contained in the main collective agreement arises from the constitution, the specific provisions of the main collective agreement which stipulate that section 57 managers are not excluded from the arbitration provisions do not apply.

Apart from the somewhat confused logic in arguing that despite specifically being included in the arbitration provisions of the main collective, section 57 employees are excluded, the applicant's argument is also dependant on the constitution being a collective agreement.

The LRA defines a 'collective agreement' as follows: 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

- (a) one or more employers;
- (b) one or more registered employers' organisations; or
- (c) one or more employers and one or more registered employers' organisations;'

The LRA further allows 'one or more registered trade unions and one or more registered employers' organisations [to] establish a bargaining council for a sector and area by-

- (a) Adopting a constitution that meets the requirements of section 30; and
- (b) Obtaining registration of the bargaining council in terms of section 29.⁵

⁵ Section 27 of the LRA.

The constitution adopted by the parties pursuant to the establishment of a bargaining council is not a collective agreement. It is merely a means whereby a bargaining council is created and which regulates the powers which a bargaining council may exercise.

One of the specific powers given to a duly established bargaining council is the power to conclude collective agreements, which is precisely what the first respondent did in concluding the main collective agreement.⁶

The applicant further argued that the test on review in this matter was not whether the second respondent was correct or not or whether result was wrong but whether the second respondent committed a gross irregularity in the conduct of the arbitration proceedings. The applicant argued that the second respondent's conclusion could not be said to be a decision that a reasonable decision-maker could reach based on the material placed before him.

This is not the test to be applied in matters such as this. Whatever the merits or demerits of the second respondent's award and ruling on jurisdiction may be, the test to be applied by the court when considering a review of an award concerning the jurisdiction of a Bargaining Council or CCMA is not whether the award of the arbitrator was reasonable, justifiable — (the reasonable decision-maker test). The question the court must determine is simply whether or not on the facts the bargaining council has jurisdiction.⁷

In this matter, the question of jurisdiction is dealt with clearly and unequivocally in the applicable collective agreement. The main collective agreement specifies in the very first section of the agreement dealing with its application that it shall not apply to section 57 employees except for that part of the agreement that governs the handling of disputes referred to conciliation and arbitration by the council.

Even if this was not clear enough, Part K of the main collective agreement states: 'municipal managers and those managers directly accountable to

⁶ Section 28 of the LRA.

⁷ *Rugby Players Association & and Others V SA Rugby (Pty) Ltd & and Others* (2008) 29 ILJ 2218 (LAC) and *Chabeli V Commission Ffor Conciliation, Mediation & Arbitration & and Others* (2010) 31 ILJ 1343 (LC).

municipal managers in terms of section 57 of the Local Government: Municipal Systems Act 32 of 2000 shall be excluded from all collective agreements concluded under the auspices of the Council unless expressly indicated otherwise of a specific collective agreement’.

It is clear from the facts that the first respondent has jurisdiction to deal with disputes involving employees employed by municipalities in accordance with section 57 of the Act.

As regards costs given the relationship between the parties viz the applicant and the third respondent (the union representing Mr Mxube), I am of the view that a cost order would not be appropriate.

In the circumstances I make the following order:

The applicant’s application is dismissed;

The first respondent has jurisdiction to arbitrate the dispute;

There is no order as to costs.

D H GUSH

Judge

APPEARANCES

APPLICANT: Adv M Grobler

Instructed by van der Walt Attorneys

SECOND RESPONDENT: Adv J Grogan

Instructed by Wheeldon Rushmere and Cole

LABOUR COURT