



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR OF SOUTH AFRICA COURT, JOHANNESBURG
JUDGMENT

Reportable

Case No:JS 797/10

In the matter between:

STEVEN MOIR & 12 OTHERS

Applicant

and

AUTOPAX PASSENGER SERVICES (PTY) LTD

t/a TRANSLUX AND CITY-TO-CITY

Respondent

Heard: 25 November 2013

Delivered: 25 March 2014

Summary: Statement of case –unfair dismissal. Points in limine – Court lacks jurisdiction- as dispute concerns interpretation and application of a collective agreement. Collective agreement concluded prior to the dismissal of the employees. The life span of the collective agreement extend beyond the dismissal of the employees.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] The applicants in this matter claim that they were unfairly dismissed by the respondent and it is for that reason they have filed a statement of case in terms of which they are seeking for reinstatement.
- [2] The respondent has raised two points *in limine* all of which are related to the jurisdiction of this court to entertain the dispute. The first point relates to the contention that the issue in disputes concerns the interpretation and application of the agreement which the parties concluded in resolving the dismissal dispute of 122 employees who had prior to the dismissal of the applicants participated in an unprotected industrial action. The 122 employees are , hereinafter referred to as “the first group.”
- [3] It is common cause that the first group participated in an unprotected strike action during January 2010 and were for that reason charged with misconduct which resulted in their dismissal. In instituting disciplinary proceedings the applicant divided the employees into two groups one group consisting of 105 employees and the second group 17 employees. The first group of employees was dismissed following the disciplinary enquiry conducted by a third party.
- [4] Thereafter, the respondent and SATAWU embarked in the process of negotiations regarding the dismissal of the first group which resulted in a settlement agreement in terms of which employees in the first group were reinstated. The terms of that agreement for the purposes of this judgment is discussed later.
- [5] The second group of employees consisting of the applicants were also charged for misconduct arising from the same strike action. They were charged with misconduct relating to inciting strike action, intimidation and threatening behaviour. They were found guilty and dismissed.
- [6] The relevant part of the agreement which also forms the main part of the respondent’s contention that this Court does not have jurisdiction to entertain this dispute reads as follows:

'1.4.1.10 This agreement is in full and final settlement of the issues pertaining to the unprotected industrial action that commenced on 6 January 2010 as well as the subsequent suspension and dismissal of employees.

And clause 2.5 of the agreement reads as follows:

'Duration of the agreement shall be from 1 April 2010 to 31 March 2011.

Clause 5 deals with the issue of dispute resolution and reads as follows:

'5.1 Any dispute arising out of the interpretation and /or application of this agreement, both while in force and after termination, shall be submitted and be determined by arbitration. It is agreed that the parties agree to refer disputes to private arbitration...'

- [7] The two main issues raised by the respondent in this matter concern:
1. The interpretation and application of the collective agreement.
 2. The ousting of the Court's jurisdiction by the provision of the agreement requiring that disputes that arise out of the agreement should be referred to private arbitration.
- [8] It is common cause that at the time of the conclusion of the agreement the second group of employees consisting mainly of the applicants were still employed by the respondent. The respondent contends that the agreement does not for that reason apply to the applicants.
- [9] Although they concede that they were indeed still in the employ of the respondent at the time the agreement was concluded, the applicants contend that the agreement was still in operation at the time of their dismissal and further that their dismissal arose from the same facts and circumstances as those of the first group.
- [10] In relation to the contention that the agreement provides for the referral of disputes to private arbitration it was argued on behalf of the

applicants that that proviso was on the authority of *National Bargaining Council v Karl Bank Mining Centre*,¹ invalid. In that case the issue that the LAC dealt with, arose in the circumstances where the employer and the employee concluded an agreement that the disputes arising between them would be referred to private arbitration, opting out of the bargaining council agreement. The question which thus presented itself before the Court on review was whether the arbitration clause contravened the provisions of section 199 (1) (b) of the Labour Relations Act of 1995 'because the clause permitted the employee to be treated in a manner, or be granted a benefit that is less favourable than that prescribed by the collective agreement. The other issue related to the validity of the agreement in that it amounted to a waiver of the rights of the employee provided in terms of section 199(1) (b) of the LRA.'

- [11] The Labour Court in *Karl Bank Mining Centre*,² found that the employee had not been subjected to a lesser treatment to that contemplated in section 199 (1) (b) of the LRA. That decision was overturned on appeal by the Labour Appeal Court which found the arbitration clause to have been invalid because the LRA which provides that the provisions of collective agreements cannot be waived by parties.
- [12] The key issue in the present case, in my view relates to the interpretation and application of the agreement. It is trite that the issue concerning interpretation and application of collective agreements in terms of section 24 of the Labour Relations Act of 1995, falls within the jurisdiction of the CCMA or a bargaining council.
- [13] The case of the applicants in the present instance is that the provisions of the agreement cater for their situation and therefore they are protected from dismissal in the same way as the first group. It should be noted that the applicants do not dispute that at the time the

¹ [2012] 11 BLLR 110 (LAC).

² (2010) 31 ILJ 2076 (LC).

agreement was concluded they were still in the employ of the respondent.

- [14] The respondent on the other hand contends that the agreement was intended to address those employees who at the time the agreement was concluded were dismissed for participating in the unprotected industrial action. The applicants were according to the respondent dismissed long after the agreement was concluded and therefore the agreement does not apply to them.
- [15] Although it is common cause that the applicants were dismissed long after the conclusion of the agreement, it would appear that the dismissal arose from the issues related to the unprotected strike action which the agreement sought to address. It is also important to note that although the applicants were dismissed after the conclusion of the agreement, the duration of the agreement as provided for therein extends to the period after their dismissal.
- [16] The above analysis in my view reveal that this is a dispute which was envisaged by the provisions of section 24 (2) of the LRA,³ which provides that disputes about interpretation of collective agreements be referred to the CCMA for resolution unless the agreement provides otherwise.
- [17] In light of the above, I agree with the respondent that this Court lacks jurisdiction to entertain the matter. In other words the dispute should have been referred to the CCMA as a dispute concerning interpretation and application of the agreement. It should have been referred there to determine whether the agreement applies to the applicants even though it was concluded before their dismissal.

³ Section 24 of the LRA provides as follows: '(2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if -

- (a) the *collective agreement* does not provide for a procedure as required by subsection (1);
- (b) the procedure provided for in the *collective agreement* is not operative; or
- (c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement*.

[18] Having found that this Court lacks jurisdiction to entertain the applicants' dispute it is not necessary, in my view, to deal with the issue of the referral of the dispute to private arbitration. It should, however, be pointed out that the facts of this case are distinguishable from those in *Karl Bank Mining Centre* relied upon by the applicants. In the present instance the requirement that the dispute be referred to arbitration in terms of the agreement does not contravene the provisions of section 199(1) of the LRA which reads as follows:

'199. Contracts of employment may not disregard or waive collective agreements or arbitration awards

(1) A contract of employment, whether concluded before or after the coming into operation of any applicable *collective agreement* or arbitration award, may not -

(a) permit an *employee* to be paid *remuneration* that is less than that *prescribed* by that *collective agreement* or arbitration award;

(b) permit an *employee* to be treated in a manner, or to be granted any benefit, that is less favourable than that *prescribed* by that *collective agreement* or arbitration award; or

(c) waive the application of any provision of that *collective agreement* or arbitration award.

(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.

[19] In the present instance the agreement in question is not an employment contract but a collective agreement which is in line with the provisions of section 24 of the LRA and provided for a dispute resolution mechanism in the form of private arbitration in the event of a dispute arising between the parties.

[20] It follows from the above that this Court does not have jurisdiction to entertain the dispute filed by the applicants and accordingly, the jurisdictional point raised by the respondent is upheld. It does not however, appear that the applicants acted unreasonably in instituting these proceedings and therefore it would not be appropriate in my view to allow the costs to follow the results.

Order

[21] In the premises, the applicants' statement of case is dismissed with no order as to costs.

Molahlehi

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Advocate Molobedi

Instructed by: Ntimane Attorneys

For the Respondent: Advocate L Pillay

Instructed by: Ledwaba Mazwai Attorneys