



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2461/12

In the matter between:

NOMBALILOUISA ZONDI

Applicant

And

THE CITY OF JOHANNESBURG

First Respondent

THE EXECUTIVE MAYOR OF THE CITY

OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Second Respondent

MODIEHI SELEMELA

Third Respondent

Heard: 8 July 2014

Delivered: 17 February 2015

Summary: Declaratory order: in terms of section 158 of the LRA read with section 77 of the BCA; interpretation of the employment contract, it provides for accredited private dispute resolution Agency clause over which the parties have dispute, where there is a dispute about the alternative dispute resolution clause, parties cannot be rendered forum less, parties should be wary of entering into contracts that are waiving the enjoyment of the fundamental rights in terms of the Bill of Rights as entrenched in the Constitution of the Republic of South Africa.

Jurisdiction: the alternative dispute resolution clause entrenched in the Fixed Term Performance Contract of Employment excluded the jurisdiction of other

fora and expressly excluding the jurisdiction of this Court and that of the CCMA; the private Arbitration agreement does not have the effect of ousting the jurisdiction of the Court;

Merits: the Court refused to deal with the 'Unfair Labour Practice' dispute as there are Accredited Private Dispute Resolution Agencies as envisaged by Fixed Term Performance Contract of Employment, and further that the SALGBC is capable of hearing the dispute. The parties referred back to the SALGBC for the resolution of the dispute.

JUDGMENT

RALEFATANE AJ

Introduction

- [1] This is an application for a declaratory order in terms of section 158 of the LRA¹ read with section 77 of the BCEA².

Background details

- [2] The Applicant applied for the declaratory order that the dispute be referred to Accredited Private Dispute Resolution Agency as stipulated by the Fixed Term Performance Contract of Employment (Contract) or alternatively to deal with the dispute in terms of section 158 of the LRA.
- [3] The First and Second Respondents in this matter are opposing the application (Respondents).³
- [4] The Applicant started working for the First Respondent on 01 March 2009 occupying the position of Risk Control Manager (financials), later appointed the Acting Deputy Director, Special Projects (2010 Soccer World Cup and BRT Rea Vaya) the position she held from June 2009 to July 2010. In July 2010, the Applicant was appointed to act in the position of Head: Operational

¹ Labour Relations Act 1995 (Act 66 of 1995).

² Basic Condition of Employment Act, (Act 75 of 1997).

³ Unless otherwise stated the First and Second Respondents will be referred to as 'Respondents'.

Risk and Business Continuity until about 22 June 2011, which was after 12 months of acting when the said position was advertised under circular Number 007/2011.

- [5] The Applicant responded to the vacancy advertisement where upon she was among the five shortlisted candidates therefore invited for an interview, which took place on 10 August 2011. Subsequent to this interview, there was further interview for the top four candidates and the Applicant was one of them.
- [6] The interviews for the said top four candidates were held on 14 November 2011 where the Applicant appeared before a different interviewing panel from the first panel of 10 August 2011.
- [7] On 30 November 2011, Mrs Nxumalo of the Respondents called the Applicant to a meeting to inform her of the interview results, which were negative news for her. The Applicant was unhappy with the unsuccessful results and immediately notified Mrs Nxumalo of her intention to declare the dispute.
- [8] On 13 December 2011, the Applicant lodged a grievance with the first Respondent which remained unresolved. The Applicant's dispute that led to her lodging the grievance is that the Respondent failed to promote her.
- [9] Further dispute is that for both senior positions that she has acted on, the Respondents never paid her performance bonus proportionate to the said positions and the acting allowance although those positions are two levels above her contracted position of Risk Control Manager (financials).
- [10] The Applicant was not aware that as a fixed term contractor she is also entitled to acting allowance until she discovered during the preparation for the intended action to refer the dispute to the SALGBC⁴ that other employees in fixed term contracts like her were paid acting allowances. She further discovered that even the Respondents' condition of service policy makes provision for acting allowance to all employees.

⁴ South African Local Government Bargaining (SALGBC).

- [11] Following that the Applicant declared the dispute on the following issues which she referred to the SALGBC⁵ where the conciliation failed and certified unresolved on 4 April 2012-
- a. No promotion;
 - b. No payment of acting allowance; and
 - c. No payment of bonus.
- [12] As per the advice of her legal representative, the Applicant abandoned the SALGBC⁶ process, before it can be arbitrated, and referred the dispute to this Court on the basis that the matter was viewed complex as it might involve a question of whether the acting allowance and performance bonus would be regarded as benefits in terms of section 187 of the LRA.⁷
- [13] Before referring the matter to this Court, the Applicant notified the SALGBC⁸ on 30 May 2012 in terms of section 191(6) of the LRA⁹ of her intention. The Applicant having being taken forward and backward by SALGBC¹⁰ in failing to reach the decision regarding section 191(6) of the LRA application, she was on that basis further advised by her legal representatives that her employment Contract also makes provision for alternative dispute resolution in the form of Accredited Private Dispute Resolution Agency.
- [14] On 31 July 2012, the Applicant advised the Respondents about the private arbitration clause as provided in that Contract and as per that clause also forwarded to the Respondents the list of arbitrators from which to appoint one to arbitrate the dispute. The Respondents responded on 16 August 2012 expressing disagreement to go along to the private arbitration route on the basis that there are no Accredited Private Dispute Resolution Agencies as envisaged in arbitration clause.

⁵ Para 6 footnote 3 supra.

⁶ Para 6 footnote 3 supra.

⁷ See par 1 supra.

⁸ See footnote 3 supra.

⁹ Para 1 supra.

¹⁰ See footnote 3 supra.

- [15] The parties entered into a Contract with effect from 01 February 2009 where the Applicant was appointed in the position of Manager: Risk Control Financials with termination period being the 31 January 2014. It appears that the Contract has expired however the dispute arose at the time the Contract was still valid which means that the 'right' already existed. Further that even if the contract can terminate there are certain aspects that do not terminate with the contract and this is one of them.

Accredited private dispute resolution agency

- [16] The Applicant's Contract of employment provides for alternative dispute resolution in the form of accredited private dispute resolution agency.
- [17] Clause 21 of the said Contract¹¹ is the one in issue and it provides for dispute resolution procedures as follows:

'21 DISPUTE RESOLUTION PROCEDURES

21.1 Any dispute arising out of this Agreement, and a result of following the grievance procedure as set out above, or the interpretation or application of this Agreement, shall be submitted to and determined by arbitration in accordance with the arbitration rules of an accredited private dispute resolution agency as amended. The arbitrator shall be mutually agreed upon, and shall be selected from a list of arbitrators supplied by an accredited private dispute resolution agency.

21.2 The parties shall, prior to the arbitration date, be required to meet with the arbitrator in order to determine the appropriate terms of reference for the arbitrator, and his power, and to submit an agreement in writing to the arbitrator.

21.3 This procedure shall, however, not apply to any dispute arising out of any hearing relating to misconduct, incapacity or performance, as set out in 7, 17 and 18 above, or any failure to agree on any new contract of employment once this agreement's terms have expired.

¹¹ Fixed Term Performance Contract of Employment

21.4 Any other dispute and/or any disciplinary step short of dismissal, whether relating to poor performance, misconduct, ill health, incapacity or an operational requirement dismissal, shall similarly be referred to be determined by private arbitration. The arbitrator shall, in such circumstances, be mutually agreed upon and be selected from the list of arbitrator supplied by accredited private dispute resolution agency.

21.5 Should the parties fail to agree on the identity of the arbitrator within a period of 14 days after the date of the dismissal or date of the decision to apply a step short of dismissal, either of the parties shall be entitled to request the Managing Director or Senior Manager, for the time being of such accredited private dispute resolution agency to make the appointment of the arbitrator. The Managing Director or Senior Manager of the accredited private dispute resolution agency, in making the appointment, shall have regard to the nature of the dispute, and shall have regard to the parties' requirement of speedy arbitration in the selection of arbitrators. If the appointment, shall have regard to the dispute, and shall be given to experienced attorneys or advocates on the panel of arbitrators of the accredited private dispute resolution agency.

21.6 The arbitrator shall be entitled further to determine the procedure to be followed in the arbitration, but to ensure that each party has the right to be heard, lead appropriate witnesses, submit documentation, and to argue in respect of the appropriate outcome and remedy. The arbitrator shall, in determining the procedures to be followed, be guided by the parties intention to have the dispute finally adjudicated upon within as short as possible a period from the date of the dismissal, or of the dispute, arising.

21.7 The parties shall be entitled to be represented by a representative of choice at the arbitration, and the outcome of the arbitration shall be final and binding. The employee shall be bound to the dispute resolution procedures contained herein, and shall not be able to seek relief from the CCMA, or the Labour Court, in terms of the LRA, relating to any dispute or decision short of dismissal. The parties, right, however, to seek appropriate relief, in the form of a review application, or any interim relief as provided for in the Arbitration Act, from any Court of competent jurisdiction, where such relief is justified in law, shall not, however, be excluded.

21.8 The fact that any dispute has been referred to, or is the subject of an arbitration, as well as any information submitted or furnished to the arbitrator, or in any other matter forming part of the record of any arbitration proceeding, shall be kept confidential by the parties to such proceeding’.

[18] Specific clauses in the contract are discussed as follows:

Clause 21.1 provides that:

‘Any dispute arising out of this Agreement and as a result of following the grievance procedure as set out above, or the interpretation or application of this Agreement, shall be submitted to and determined by arbitrator rules of an accredited private dispute resolution agency, as amended. The arbitrator shall be mutually agreed upon, and shall be selected from a list of arbitrators supplied by an accredited private dispute resolution agency’.

Clause 21.4 provides that:

‘Any other dispute and/or any disciplinary step short of dismissed, whether relating to poor work performance, misconduct, ill health, incapacity or an operational requirement dismissal, shall similarly be referred to be determined by private arbitration. The arbitrator shall, in such circumstances, be mutually agreed upon and be selected from the list of arbitrator supplied by an accredited private dispute resolution agency’.

Clause 21.7 provides further that;

‘...The employee shall be bound to the dispute resolution procedures contained herein, and shall not be able to seek relief from the CCMA, or the Labour Court, in terms of the LRA, relating to any dispute or decision short of dismissal’.

[19] The Respondents submitted that it is impossible to enforce clause 21 as there is no kind of accredited private arbitration agency as envisaged in the clause and submitted that the term: ‘accredited’ means private dispute resolution agency which is accredited by the CCMA in terms of section 127 of the LRA. Further that the Contract was drafted at the time when it was thought that such accreditation regularly happened and others such as Tokiso were so accredited. The Respondent went on to submit that it has been several years

that the CCMA has not accredited any private arbitration agency and until the CCMA accredits an arbitration agency, clause 21 of the Contract will remain incapable to implement because currently there are no such accredited agencies.

[20] The Respondents aver that as the Applicant's dispute relates to non-payment of acting allowance, performance bonus, and non-promotion that constitutes 'ULP' therefore this Court lacks jurisdiction in that the dispute falls within the jurisdiction of the SALGBC. In the premise, the Respondents submit that the dispute be referred back to SALGBC to be dealt with in accordance with section 191(5) (a) (iv) of the LRA. Further that section 158(2) (b) of the LRA does not cover the Applicant's dispute.

[21] It is further the Respondents' contention that the Applicant's prayer to review and set aside the appointment of the Third Respondent constitutes variation of her initial claim in as far as alleging that the Third Respondent's appointment constitutes an 'ULP'. This dispute in particular was never conciliated on therefore the Court will not have the jurisdiction over it.

Evaluation

[22] In the main prayer, the Applicant seeks declaratory order that her dispute be referred to an accredited private dispute resolution agency for arbitration in accordance with clause 21 of the Contract.

[23] In the alternative she seeks declaratory order that the Respondents pay her the acting allowance, the performance bonus, and the review and setting aside of the Third Respondent's appointment.

[24] The Court will first deal with the declaratory order in terms of the Applicant's main prayer and depending on the outcome thereof the Court will then turn to the Applicant's alternative prayer. The outcome might be to direct the parties to a forum that can deal with the matter or after evaluating the submissions decide to accept the Applicant's request to dispose of the matter. Should the decision be that the matter be referred to a certain forum then it would be not necessary to deal with the Applicant's alternative prayer.

[25] Turning to the main prayer, there is no point in liming in relation to the Court's jurisdiction and this Court is satisfied that it is well clothed with the jurisdiction to deal with the declaratory order.

[26] The Applicant's main prayer is that this Court grants an order declaring that the dispute be referred to an accredited private dispute resolution agency for arbitration as contemplated in clause 21 of the Contract.

Section 158 states as thus:

'(1) the Labour Court May-

- (a) make any appropriate order, including—
 - (i) the grant of urgent interim order relief;
 - (ii) ...
 - (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
 - (iv) a declaratory order;
 - (b) 'order compliance with any provision of this Act'.
 - (c) 'deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law'.

(2) '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-

- (a) stay the proceedings and refer the dispute to arbitration, or
- (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

(3) The reference to arbitration in subsection (2) must be interpreted to include arbitration-

- (a) Under arbitration of the Commission;
- (b) Under the auspices of the accredited council;

- (c) Under the auspices of the accredited agency;
- (d) In accordance with a private resolution procedure, or
- (e) If the dispute is about the interpretation or application of collective agreement'.

Section 157 of the LRA provides these;

'(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matter's that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

- (a) Employment and from labour relations,
- (b) Any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the state in its capacity as an employer,
- (c) ...

(3) ...

(4) (a) The Labour Court may refuse to determine any dispute other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) 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'.

- [27] In terms of clause 21 of the Contract, the parties agreed that any dispute arising out of it, shall be submitted for determination by arbitration under the auspices of accredited private dispute resolution agency.
- [28] During the subsistence of the Contract a dispute arose which is of an 'ULP' nature. The details of the dispute are already stated above in this judgment.
- [29] After the dispute arose the Applicant approached the SALGBC for the resolution. The dispute was conciliated and remained unresolved after which the certificate of unresolved was issued. The normal procedure would be to refer the dispute for arbitration upon being certified unresolved but in this case the Applicant decided to refer the matter to this Court.
- [30] Let us revise the procedure to resolve the 'ULP' claim in terms of schedule 4 of the LRA¹². After the 'ULP' dispute has arisen, the aggrieved party may refer the dispute to either the commission (CCMA) or the relevant bargaining council where the employer is a member. By virtue of the employer being a member to a bargaining council its employees, by virtue of them being employed by the employer concern, become members in which case all the disputes falling within the jurisdiction of that council will be referred thereto.
- [31] If the dispute remains unresolved after conciliation it should be arbitrated by either the CCMA or the council, whichever the case may be, unless the 'ULP' dispute relates to discrimination in which case the dispute will be referred to the Court. The council or the CCMA will subsequent to arbitration proceedings issue the award that is final and binding.
- [32] The 'ULP' dispute was conciliated on by the SALGBC and certified failure to resolve. As there was no allegation of discrimination the dispute was capable of being arbitrated by the SALGBC.

¹² Dispute Resolution Flow Diagram 14 of the Labour Relations Act 1995 (Act 66 of 1995) at page 253

[33] As per the advice of legal representatives, the Applicant applied to the SALGBC in terms of section 191(6) of the LRA declaring the intention to refer the dispute to this Court for adjudication.

Section 191 (6) provides that:

‘Despite subsection (5) (a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering

(a)

(b) whether there are questions of law raised by the dispute,

(c) the complexity of the dispute,

(d) ...

(e) the public interest.

(7) When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.

(8) The director must notify the parties of the decision and refer the dispute-

(a) to the commission for arbitration; or

(b) to the Labour Court for adjudication.

(9) The director’s decision is final and binding.

(10) No person may apply to any court of law to review the director’s decision until the dispute has been arbitrated or adjudicated, as the case may be.

(11) (a) The referral, in terms of subsection (5) (b), of the dispute to the Labour Court for adjudication, must be made within 90 days after the SALGBC or (as the case may be) the commissioner has certified that the dispute remains unresolved.’

- [34] The SALGBC failed to deal with section 191 application to the finality. Listening to how the SALGBC handled the application, one would understand the reason for the Applicant's unhappiness. The manner in which the SALGBC handled the 191 application is not the core subject matter for this Court to tackle, however, it is tempting to comment when people bestowed with the powers or statutory mandate, can play abdication. Section 191 is clear as to what is expected of a director when faced with this kind of application. In this instance the director/secretary general of the SALGBC referred the application to be dealt with by an arbitrator who considered the matter and correctly interpreted section 191 where after she found that the director/secretary general of the SALGBC is bestowed with section 191 function. As to whether the director/secretary general may delegate the powers contained in this section (as he tried to do), can be the discussion for another time.
- [35] Alternative dispute resolution fora like the CCMA or the SALGBCs are established for a good reason among others to provide speedy dispute resolution, with less costly process, less legalistic proceedings, in a fair and just manner, including alleviation of series of cases channelled to the Court. If the forum entrusted with this alleviation function, does not discharge its mandate the purpose for the establishment of such forum is meaningless and fail in the justice service.
- [36] In the absence of hope in getting assistance from the SALGBC relating to section 191 (6) application, the Applicant approached this Court relating to the above mentioned prayers.
- [37] The interpretation of the Applicant's employment Contract especially clause 21 is the departure point.
- [38] The Respondents relies upon clause 21 of the said Contract to say that no forum has jurisdiction except the CCMA accredited private dispute resolution agency. This clause expressly excludes the jurisdiction of the Court and that of the CCMA as far as the Applicant's alternative prayer is concerned and all other fora are also excluded.

Clause 21.7 provides that:

‘The employee shall be bound to the dispute resolution procedures contained herein, and shall not be able to seek relief from the CCMA, or the Labour Court, in terms of the LRA, relating to any dispute or decision short of dismissal’.

[39] It is common cause that the parties intended the accredited private dispute resolution agency as envisaged by section 127 of the LRA which provides as follows:

Section 127 (1) ‘Any council or private agency may apply to the governing body in the prescribed form for accreditation to perform any of the following functions-

(a) Resolving dispute through conciliation; and

(b) Arbitrating dispute that remain unresolved after conciliation, if this Act requires arbitration.’

[40] The arbitration clause was meant to assist the parties to resolve the dispute should it arise. However, the Applicant approached the SALGBC and the Respondent never objected to its jurisdiction irrespective of it being excluded as per clause 21 of the Contract. In fact the Respondents still content that the Applicant should allow the SALGBC to dispose of the dispute. The Respondents indicated that there are other employees who have entered into Fixed Term Employment Contracts containing arbitration clauses like that of the Applicant but they have in the past referred their disputes to the SALGBC.

[41] While the SALGBC was busy attending to the resolution of the dispute, the Applicant decided to remove the dispute to this Court. It is without doubt that if the Applicant had not withdrawn the matter from the SALGBC it would have being resolved by now.

[42] The reason for the said removal was not jurisdictionally related. The Applicant was advised by her legal representative that the non-payment of acting allowance and performance bonus are complex as the question will arise whether or not they are benefits in terms of section 187 of the LRA. This

submission does not carry weight because the SALGBC has in the past dealt with similar disputes and like other councils does have jurisdiction.

- [43] The Respondent took cognisance of the fact that there are other accredited private dispute resolution agencies which are not CCMA accredited and for that they cannot be accepted. This Court must admit that the Respondents do not advance any valid reason for not accepting any other accredited dispute resolution agency. On the pages of the contract submitted to this Court there is no explanation whatsoever as to the meaning of 'accredited private resolution agency'. There is also no express provision that the said agency is strictly referring to the agency that is CCMA accredited. Therefore literally the meaning of clause 21 would be that any accredited private dispute resolution agency was intended.
- [44] The Respondents' submission that there are no CCMA accredited agencies is not correct in that there are CCMA accredited agencies such as TOKISO, Equillore Dispute Settlement Services (Pty) Ltd, Tomnotfo Trading, and JFKS Consulting (Pty) Ltd. It is apparent that contrary to the Respondents' submission, clause 21 is capable of implementation. The delay caused in this matter was unnecessary as the parties had choices of agencies that are intended in clause 21.
- [45] The duly concluded Contract is not to be undermined reciprocally the Contract should not purport to undermine the existing laws by trying to avoid them. The intention of the parties to a Contract must be respected. The parties in the Contract must know what they are agreeing upon and more importantly the consequence thereof. In some of the cases employees do not have the choice to refuse or reject the employment Contracts when presented to them because they are in dire need of the job. In most of the cases the employers draft the employment Contracts which are in turn presented to the employees to accept the terms thereof and it goes with the truth that employers draft the Contracts in such a way that they are more favoured.

- [46] It is concerning when the Contract is in such a way that it prejudices the powerless party (employee) by providing less favourable clauses or Contracting to exclude or limit the fundamental rights as provided in the Bill of Rights. The parties to a Contract should take care when entering into a Contract not to infringe the Bill of Rights by preventing any party to exercise such rights. Section 23 of the Constitution provides that everyone has the right to fair labour practices. Arbitration agreements should not be ignored as it is the parties' choice of how they wish their dispute to be resolved unless before the decision-maker it is apparent that such arbitration agreement is likely to be prejudicial or likely to produce unreasonable result. This is to say that as much as arbitration clauses cannot be ignored, they do not mean to oust the jurisdiction of the Court and of that of the bargaining councils where parties are members in the view that there are collective agreements.
- [47] In the Appeal Cameron J, emphasised in *Brisley v Drotsky*¹³ that Courts are required to respect the freedom to contract as 'contractual autonomy informs also the constitutional value of dignity.' To simply ignore an arbitration agreement without justification would defeat the contractual autonomy which will be repugnant to the encouragement to opt for alternative dispute resolution as a means of reducing backlog of cases and to have dispute resolved quicker.
- [48] The Constitutional Court, in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*¹⁴, the Court dealt with arbitration proceedings albeit in the context of a challenge to the outcome of a review. In this case the Constitutional Court emphasised that "the decision to refer a dispute to private arbitration is a choice which as long as it is voluntarily made should be respected by the courts." Where it can be shown that an arbitration agreement was entered into freely and voluntarily by the parties, the courts will be reluctant to exercise their discretion and hear the matter before it is referred to arbitration.

¹³ [2002] (12) BCLR 1229 (SCA).

¹⁴ [2009] (6) BCLR 527 (CC).

- [49] It is of cardinal importance to note that the LRA¹⁵ specifically provides for parties to enter into agreements to resolve disputes through private arbitration and is encouraged.
- [50] South African Courts held in numerous decisions supporting the arguments that arbitration agreements do not oust the jurisdiction of the Court. It is rather a matter of a Court that has jurisdiction declining to exercise that jurisdiction in the face of privately agreed alternative dispute resolution processes. The Courts will require the parties to adhere to the processes they have chosen in their agreement before coming to a Court, however, in appropriate circumstances a Court may decide to hear the merits of the case without requiring the parties to exhaust the alternative dispute resolution process as agreed. South African Courts are however mindful of the fact that agreements properly reached should not be ignored.
- [51] *Coetzee v Comitiss*¹⁶, *Fabian McCarthy v Sundowns Football Club and Others*¹⁷ the courts support the argument that the Court can intervene and determine the disputes which had arisen without requiring arbitration as agreed between the parties.
- [52] The Court per Molahlehi J analysed the law relating to arbitration clauses and jurisdiction. Molahlehi J pointed out that as a matter of South African law arbitration clauses in general did not oust the jurisdiction of the Courts. The Court would always retain jurisdiction and oversight but that did not mean the agreement between the parties could simply be ignored. The Court went further to state that while South African Courts have jurisdiction and retain such jurisdiction irrespective of an arbitration agreement the parties will be held to their agreement save where there are special circumstances.

¹⁵ See footnote 1 supra.

¹⁶ 2001 (1) SA 538 (C).

¹⁷ (2000) JOL 10381 (LC).

[53] In the case of *Cargill Zimbabwe v Culvenham Trading (Pty) Ltd*¹⁸ the Court held that

"an arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to complement the court process in resolving disputes by engaging in an alternative dispute resolution process, but remains under the control of the courts."

The Court in *Cargill* discussed circumstances which would be taken into account by a Court exercising discretion as to whether to send the parties to adhere to their private arbitration agreement or not. Some of the circumstances to take into account is whether or not it would be prejudicial for the parties to follow the private arbitration agreement. In addition to the special circumstances discussed in *Cargill* case, it would further be important to take into consideration the time that will lapse in following such private processes, the costs involved unless the issue of costs is agreed upon in the arbitration agreement, and if the Applicant party is required in terms of that private arbitration agreement to pay or contribute towards the costs of private process, then as far as that clause it would mean that it and that the Court has been convinced by the party seeking to by-pass the agreement.

[54] The predicament is when parties realise that a certain clause in a contract is not possible to implement but still fail to come to an alternative agreement to amend such clause which causes challenges or do away with it. The inference that can be drawn is that the power is with the Respondent and it is not willing to revisit the Contract while the Applicant is frustrated. It cannot be argued otherwise that clause 21 is meant to be applied by the Applicant because employers do not necessarily declare labour disputes.

[55] The Applicant cannot be without a forum to resolve her dispute owing to clause 21 of the Contract that excludes other fora. However, irrespective of the provision of clause 21 the Applicant still approached the Council to lodge her dispute which the Respondent never objected. The Respondent still submits that the Applicant should allow the Council to finalise the matter. In

¹⁸ HH 42 – 2006.

this event where both parties agree to the jurisdiction of the SALGBC, there should not be a problem as to which forum is relevant to hear the Applicant's dispute.

- [56] The SALGBC had jurisdiction to hear this matter but the parties opted to have arbitration agreement clause which should be respected. There are more arguments in favour of enforcing private arbitration provisions as agreed by the parties, however, the decision-maker has to consider as to which forum is likely to be prejudicial or likely to produce unreasonable results. Should it be clear that the private arbitration is likely to be prejudicial the decision-maker may exercise the discretion to order the parties to refer the matter to the forum that will serve more justice.
- [57] In this case, time has already being consumed and more than that the parties have disagreement in terms of the private arbitration agency. It is found that there are private agencies as envisaged in the arbitration agreement which this Court may order the parties to refer the dispute thereto but for the mere fact that the Applicant has already successfully so referred the dispute to the SALGBC, which this Court holds that it has the necessary jurisdiction, the Applicant is required to go back to the SALGBC for it to finalise what it has started.
- [58] The Court has discretion whether to stay the proceedings and refer the matter to arbitration or hear it unless there are special circumstances justifying the Court exercising its jurisdiction to hear the matter despite the parties' agreement and the Applicant in this matter is required to refer her dispute back to the SALGBC for arbitration because there are no special circumstances compelling this Court to hear the dispute. The reasons furnished by the Applicant in support of requesting this Court to hear the dispute are not compelling and persuasive.

[59] It is evident that the jurisdiction of the Council is not in issue except that the Applicant's legal representative is of the opinion that non-payment of acting allowance and performance bonus might raise complex question which this Court is not persuaded by that opinion. The Council is well placed to deal with this matter and make determination. In the premise, it is this Court's view that the matter should be referred back to the Council for finalisation.

[60] Based on the Court's findings, it will not be necessary to deal with the jurisdictional issue as raised by the Respondent and the Applicant's alternative prayer which include the setting aside of the appointment of the Third Respondent

Order

[61] I therefore make the following order:

- a) That the Applicant refers the dispute back to the Council (SALGBC) for resolution;
- b) That there is no costs order.

Ralefatane AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Mokoena SC

Instructed by: Madikizela Nyathi Attorneys

For the Respondents: Adv. Malindi SC

Instructed by: Moodie & Robertson

LABOUR COURT