IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 2228-13

Reportable

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU) — **First Applicant**

INDEPENDENT MUNICIPAL AND ALLIED WORKERS UNION (IMATU) — **Second Applicant**

and

CITY OF JOHANNESBURG — **First Respondent**

MD ALLY, *N.O.* — **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC) — **Third Respondent**

Heard: **31 May 2017**

Delivered: **2 February 2018**

Summary: **Transfer of business - collective agreements - sections 197(5) and 197(6) of the LRA – Main/Sectoral Agreements trump plant level collective agreements covered by section 197(5)**

JUDGMENT

WHITCHER, J:

Introduction

[1] The applicant seeks to have reviewed and set aside the arbitration award issued by the second respondent on 2 September 2013.

[2] The first respondent submitted in its answering affidavit that the review application stands to be dismissed because of a significant and unexplained delay in its prosecution from when it was instituted on 16 October 2013. An incomplete record was filed 14 months late on 9 March 2015 and the missing part was filed 5 months later on 19 August 2015, with no condonation application.

[3] In response, the applicants did not file a substantive condonation application and instead tendered an explanation for the delay in its *replying affidavit,* which is not a proper way to apply for a condonation.

[4] They further failed to provide a detailed and reasonable explanation for the delay.

[5] Moreover, as submitted by the respondent, the applicants' conduct of this review is seriously prejudicial to the respondent because the issue which gave to the dispute occurred more than 4 years ago, in June 2013, and any decision which will require the respondent to alter that decision will have serious repercussions – the nature of the dispute is such that it ought to have been prosecuted throughout with a sense of urgency to avoid the consequences of the respondent having to alter a major decision it took more than 4 years ago.

[6] I decided, however, to consider the merits of the review, considering it deals with an important and novel subject matter.

The material facts

[7] The affected employees were previously employed by one of two municipal entities, City Power (Pty) Ltd or Johannesburg Water (Pty) Ltd (the “MOEs”) which were wholly owned by the first respondent. At the time, the affected employees’ terms and conditions of employment were governed by collective agreements concluded between the applicants and City Power or Johannesburg Water, as the case may be (the “old collective agreements”).

[8] During 2006, the first respondent decided to integrate all its revenue collection and customer relations management functions. This decision led to the transfer of the affected employees from the MEO’s to the first respondent. During December 2009, the first respondent sent letters to the employees informing them that they would be transferred to the first respondent on terms and conditions of employment that are on the whole not less favourable to the employees than those on which they were employed by the old employer with effect from 1 January 2010.

[9] The affected employees were transferred to the first respondent in January 2010, in accordance with section 197 of the LRA. Their terms and conditions of employment continued to be governed by the old collective agreements.

[10] On 17 September 2012 the first respondent gave formal notice to the applicants that the terms and conditions of employment of the transferred employees would be determined by the SALGBC’s Main Collective Agreement from the 1st January 2013. However, implementation was delayed to allow the parties to negotiate at the Local Labour Forum. The discussions deadlocked.

[11] On 18 April 2013 the first respondent issued a further notice of its intention to impose the SALGBC’s Main Collective Agreement on the applicants’ members.

[12] During June 2013, the affected employees’ terms and conditions of employment were altered so as to conform to those under the Main Agreement.

[13] A table indicating the differences between the old collective agreements and the Main Agreement, which formed part of the evidence before the arbitrator indicates, for instance, that City Power and Johannesburg Water female employees enjoyed 4 months' paid maternity leave whereas at the first respondent female employees are entitled to only 3 months' paid maternity leave.

[14] It is important to note that the parties to this dispute are parties to the Main Agreement and their members immediately on their transfer fell within the registered scope of the Main Agreements of the SALGBC and SALGBC.

[15] On perusal thereof, I noted that a stated objective in all the Main Agreements concluded from 2007 through to 2015 is to establish common and uniform conditions of service for employees falling within the registered scope of the Council and to establish common and uniform procedures and monitoring processes for employers and employees falling within the registered scope of the Council.

[16] The Agreements further provide that all previous conditions of service relating to matters covered by the agreements are replaced by the conditions of service contained in the agreements.

<u>The award</u>

[17] The arbitrator formulated the issues for determination, as set out in the pre-arbitration minute:

> *The CoJ contends that the affected employees' terms and conditions of employment are those determined by the collective agreements of the SALGBC [SALGBC's Main Collective Agreements].*
>
> *The applicants contend that on a proper interpretation of section 197, in particular section 197(5), the terms and conditions of the affected employees should be determined by the collective agreements applicable to the [MOEs].*
>
> *Which of the terms and conditions of employment and/or collective agreements are <u>applicable</u> to the employees transferred from the MOE's to the CoJ?*

[18] The arbitrator concluded that the terms and conditions of the transferred employees are determined by the SALGBC's Main Agreement, i.e. that the SALGBC's Main Agreement has application.

[19] He reasoned that if regard is had to the factors listed below, the SALGBC's Main Agreement supersedes the transferred collective agreements:

(i) Sections 23(3) and 31 of the LRA.

(ii) The primary objective of the LRA, as enshrined in Section 1, namely to provide a framework within which orderly collective bargaining can take place, with preference being given to collective bargaining at a sectoral level.

(iii) The stated objectives of the sectoral collective agreements which is to ensure uniformity and consistency of conditions of employment, procedures and monitoring processes in an organized industry.

(iv) The fact that the parties to the dispute are parties to the SALGBC's Main Agreement and their members fall within the registered scope of the agreement and the SALGBC.

[20] The arbitrator reasoned that the stated objectives of the LRA and the Main Agreements would be negated where employees who fall under the scope of the Main Agreement and bargaining council were governed by different collective agreements.

[21] He reasoned that the employees' terms and conditions of employment became varied once they fell within the scope of the Agreement and council.

<u>The grounds of review</u>

[22] The applicants contend that the arbitrator *wrongly* interpreted the LRA. He failed to appreciate that, in the absence of an agreement to the contrary in terms of section 197(5)(b) and 197(6), section 197 (5) obliges the new employer to abide by collective agreements which bound the old employer and further provides the affected employees continuity of employment on the

terms set out in these collective agreements. At the time of the transfer the affected employees did not contract out of this protection in terms of section 197(5)(b) and 197(6). Had the arbitrator properly appreciated these provisions, he would have concluded that the affected employees' conditions of service are regulated by the old collective agreements; not the SALGBC's Main Agreements.

A legal framework

[23] One of the primary objectives of the LRA, as enshrined in Section 1, is to provide a framework within which orderly collective bargaining can take place, with preference being given to collective bargaining at a sectoral level.

[24] Section 3 of the LRA provides that any person applying the LRA must interpret its provisions to give effect to its primary objects.

[25] This means the interpreter is enjoined to adopt a purposive approach. When encountering two possible meanings, the interpreter must choose the one more consonant with the objects of the Act. An interpretation which limits rights should be avoided unless the contrary appears expressly or by necessary implication from the words of the Act, read in its context.[1]

[26] In *Ceramic Industries Ltd t/a Beta Sanitary Ware v NCBAWU and others,*[2] the Court remarked that:

> '[w]here constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed.'

[27] Section 23 of the LRA deals with the legal effect of collective agreements:

1. A collective agreement binds-

    a. the parties to the collective agreement;

[1] Grogan *Collective Labour Law* (1st ed), referring to *NUMSA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC).
[2] (1997) 6 BLLR 697 (LAC).

b. each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;

c. the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-

i. terms and conditions of employment; or

ii. the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

d. employees who are not members of the registered trade union or trade unions party to the agreement if-

i. the employees are identified in the agreement;

ii. the agreement expressly binds the employees; and

iii. that trade union or those trade unions have as their members the majority of employees employed by the employer in the work-place.

2. A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

3. Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

4. Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

[28] Section 31 stipulates that a collective agreement concluded in a bargaining council binds the members of registered trade unions that are parties to the

collective agreement and the employers who are members of the registered employers' organization.

[29] A bargaining council is empowered in terms of s33A of the LRA to enforce the collective agreements which it has concluded.

[30] Section 197 reads as follows:

(1) …

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pensions Funds (Act 24 of 1956), are satisfied.[3]

(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by –

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32, unless a commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between –

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

[31] It has been held that the consequences of section 197(5)(b), that the new employer is bound by old collective agreements, may be avoided or varied only by an agreement that complies with section 197(6). With reference to section 189(1), section 197(6) establishes a strict hierarchy of bargaining partners with whom “contracting-out” agreements may be concluded. Section 197(6) is intended to ensure that any rights under section 197(5) that are compromised are compromised only after a process of negotiation and agreement with a properly authorised and legitimate representative body. In

[3] Section 14(1)(c) of the Pension Fund Act requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice.

any negotiations to conclude an agreement to vary rights under section 197(5), the employer is required to disclose all relevant information that will enable the relevant party to engage effectively in the course of the negotiations. [4] In the absence of an agreement contemplated by section 197(6), the new employer may seek, post-transfer through a process of collective bargaining, to align the conditions of employment of the transferred employees with those of existing incumbents.[5]

Analysis and findings

[32] The primary purpose of section 197 is to protect employees against unfair job losses, i.e. provide security of employment;[6] not to immunize old collective agreements against the ordinary law regulating collective bargaining and collective agreements.

[33] As stated earlier on, it has been held that in the absence of an agreement contemplated by section 197(6), the new employer may seek, post-transfer through a process of collective bargaining, to align the conditions of employment of the transferred employees with those of existing incumbents.

[34] To my mind, the above alignment may also occur where the transferred employees migrate into a sector regulated by a bargaining council and Main Agreements concluded therein, which binds them and regulates conditions of service.

[35] At the time of their transfer, the employees' terms and conditions were guaranteed by, essentially, plant level collective agreements with the MoEs. Section 197 would have protected them from unilateral variation by the new employer. However, when starting work at the first respondent, the employees entered a contractual regime governed by a species of collective agreement that, interpreting the LRA purposively, trumped the old employer's collective agreement. No new bargaining had to happen with them to effect these changes as, once they became employees of the new employer, they became

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[4] See generally paragraph [14] in *SAMWU v SALGA* [2010] 8 BLLR 882 (LC)
[5] See generally paragraph [17] in *SAMWU v SALGA (supra)*
[6] *NEHAWU v University of Cape Town & others 2003* (3) SA 1 (CC) at para 53

subject to the Main Agreement. Bargaining council agreements, such as Main Agreements, enjoy the status of subordinate legislation[7] and ought to apply above the collectives agreements concluded between the applicants and the MOEs.

[36] In terms of the schema of the LRA, old collective agreements only guarantee the continuance of old conditions of service to the extent that a superseding Main Agreement is not in place at the new employer. Parties wishing to protect more beneficial terms and conditions in an old plant level collective agreement ahead of a transfer of business would have to do so in terms of variations or exemptions introduced into the sectoral agreement into whose ambit they are transferring. To the extent that this weakens the protections afforded by section 197, it, on the other hand, underscores the primacy of central collective bargaining and I am satisfied that any conflict between the provisions of section 197 and section 23 of the Labour Relations Act should be resolved with the latter prevailing.

[37] That this must be so if one considers what the situation would naturally have been, for example, had the maternity leave provision been less generous at the MoEs and more generous at the first respondent. There is no way the employer could have resisted the application of the Main Agreement to the new employees on the basis that they would faithfully comply with section 197 of the LRA in applying the less beneficial terms and conditions stipulated in the old collective agreement until the affected employees succeeded through bargaining in attaining the more beneficial terms.

[38] A crucial factor in this dispute is that the parties to the dispute are parties to the SALGBC Main Agreement and their members [the affected employees] fall within the registered scope of the SALGBC Main Agreement. Where employees fall within the scope of two conflicting agreements, the Main Agreement must apply to them considering its status.

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[7] See in this respect *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SATAWU and another* (2010) 31 ILJ 2037 LAC paragraphs [41] to [46]

[39] Finally, if pre-existing rights and benefits are reduced to a bargained common denominator, those affected have no legal recourse because the LRA promotes a model of majoritarianism that contemplates these sorts of results for the sake of the commonwealth.[8]

[40] I conclude that the arbitrator's interpretation and findings are correct.

Order

[41] In the premises, the following order is made:

1. The late filing of the record is not condoned.
2. The review application is dismissed.
3. There is no order as to costs

Benita Whitcher

Judge of the Labour Court of South Africa

[8] Thompson and Benjamin *South African Labour Law* Vol 1 AA1-138 to AA1-139

APPEARANCES:

For the applicants:	Mr R Daniels of Cheadle Thompson & Haysom Attorneys
For the first respondent:	Adv. N.H Maenetje
Instructed By:	Moodie & Robertson Attorneys