

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2014/16

In the matter between:

MATJILA AND OTHERS

Applicants

and

SS THOKA

First Respondent

**GENERAL PUBLIC SERVICE BARGAINING
COUNCIL**

Second Respondent

**GAUTENG DEPARTMENT OF CORRECTIONAL
SERVICES**

Third Respondent

Heard: 15 January 2019

Delivered: 27 February 2019

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an application to review and set aside a Ruling issued by the first respondent under the auspices of the second respondent (the Council), dismissing the applicants' referral of an unfair labour practice.
- [2] The application for review is brought in terms of s 145 of the Labour Relations Act¹ (the LRA). The review application was filed with this Court on 27 September 2016. The application is opposed by the third respondent.

The relevant facts

- [3] The facts are largely common cause and for this reason have not been set out in any great detail herein. The applicants had referred an unfair labour practice dispute to the Council in terms of which the applicants sought to be promoted to level 6 and their salaries to be adjusted and backdated to July 2006 in accordance with level 6.
- [4] At the commencement of the proceedings on 22 July 2016, the first respondent engaged with the parties for purposes of determining the true nature of the dispute. At the conclusion of these discussions, the first respondent issued a Ruling, whereby the first respondent ruled that the applicants had referred an incorrect dispute to the Council and that as a result of the Council not having the jurisdiction to hear the dispute, dismissed the applicants' referral.
- [5] The first respondent further recorded in his Ruling that whilst attempting to narrow the issues, it became clear, notwithstanding the fact that the applicants had categorised their dispute as an unfair labour practice dispute relating to benefits, that the true nature of the dispute related to the payment of salaries and it is for this reason that the Council lacked jurisdiction.

The Review Application

- [6] Upon receipt of the Ruling, the applicants launched a review application. The grounds of review are set out in the applicants' founding affidavit.

¹ 66 of 1995, as amended.

- [7] The applicants *inter alia* contend that the first respondent committed misconduct in that the point *in limine* ruled upon by the first respondent had never been raised by the third respondent and accordingly there was no basis for the first respondent to have made a ruling in this regard. Furthermore, that the applicants during the proceedings had raised the issue relating to their promotion from post level 5 to post level 6 based on the grading structure of the third respondent and accordingly the dispute did not relate to salaries.
- [8] In response to the applicants' founding affidavit, an answering affidavit was filed by the third respondent. The answering affidavit makes reference to how the applicants were appointed. In this regard, the applicants were appointed as student correctional officers in the discipline occupational class, Grade 3, at a specific salary notch and were stationed at Baviaanspoort. The applicant's appointments were made in line with an advertisement and were further subjected to, as their appointment conditions were regulated by the Correctional Services Act², Public Service Regulations, Correctional Service Orders and collective agreements that had been concluded in the Bargaining Council and that it was the responsibility of the applicants to acquaint themselves with these conditions.
- [9] The third respondent further emphasised that notwithstanding the categorisation by the applicants in respect of the nature of the dispute, the applicants true dispute related to their salaries and accordingly the Council did not have jurisdiction to arbitrate this dispute. In this regard and with reference to the record, the applicants had stated on numerous occasions throughout the proceedings that they were currently on salary level 5 and wished to be paid on salary level 6 as a result of having completed their learnership.

Analysis

- [11] At issue in the proceedings under review is whether the applicants have laid any justifiable and valid basis for the setting aside of the Ruling.
- [12] As this review application concerns an issue of jurisdiction, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and*

² 111 of 1998.

*Others*³ does not apply. In cases such as these, where it is about whether the Council has jurisdiction, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord, by deciding *de novo* whether the determination by the first respondent on jurisdiction is right or wrong.⁴

- [13] It is trite that Bargaining Councils, like the Commission for Conciliation Mediation and Arbitration (CCMA), cannot decide upon their own jurisdiction. Equally so, there is an obligation on a commissioner to satisfy him/herself that the Council has the requisite jurisdiction to determine a dispute, irrespective of how it was referred and the election of a party to pursue a particular path in respect of that claim. Furthermore, jurisdiction is not assumed on the say-so of the parties, or the failure of a party to raise any such jurisdictional points where appropriate.
- [14] In *HOSPERSA obo Tshambi v Department of Health, KwaZulu-Natal*⁵, the Labour Appeal Court had reiterated that:

“An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)*⁶ addressed directly the question of whether the employees' characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this court held that the latter should prevail. As a result, in *Wardlaw*, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The

³ [2007] 28 ILJ 2405 (CC).

⁴ See: *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 ILJ 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 ILJ 392 (LC) at paras 5-6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others* (2012) 33 ILJ 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 ILJ 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee No and Others* (2013) 34 ILJ 1272 (LC) at para 21.

⁵ [2016] 37 (ILJ) 1839 (LAC) at para 16.

⁶ [2007] 28 ILJ 1042 (LAC).

Constitutional Court disposed of this issue in *Commercial Workers Union of SA v Tao Ying Industries and Others*⁷ where it was held that:

'A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

[15] The above principles therefore confirm that despite the applicants having framed their dispute in a particular manner, it was still necessary for the first respondent to satisfy himself that the dispute fell to be determined by way of s 186 (2)(a) of the LRA. It would therefore have been incorrect for the first respondent to determine the dispute simply in accordance with the manner with which the applicants had sought it to be determined, specifically after the first respondent had established that the dispute was one that clearly related to salaries and not to a promotion.

[16] In order to decide whether the Ruling is right or wrong, being the applicable review test, a reading of the record is critical. The reasons for this is as aforementioned, as this Court can only decide this jurisdictional issue for itself, on a *de novo* basis, with reference to the record. Upon reading of the record I am of the view that there is no merit to the applicants' review application, in

⁷ [2008] 29 ILJ 2461 (CC) at para 66.

that the record clearly sets out the true nature of the dispute⁸, which in my view relates to salary and not to a promotion.

[17] It is clear from the record that the first respondent on numerous occasions engaged with the applicants for purposes of determining the true nature of the dispute and in my view and having considered the record, it becomes clear that the applicants' dispute clearly relates to their salaries and not to a promotion.

[17] Accordingly, there is no basis for a conclusion to be reached that the Ruling of the first respondent is one which a reasonable decision maker could not have arrived at in the light of the material before him and once the first respondent had established that the dispute related to salaries, the first respondent was obliged to make the ruling that the second respondent lacked jurisdiction to determine the dispute.

[18] In regards to costs, even though I am of the view that this review application was ill-considered, upon a consideration of the requirements of law and fairness, I am of the view that each party must be burdened with its own costs.

[19] In the premises, I make the following order:

Order:

1. The applicants' application is dismissed;
2. Each party is to pay its own costs.

H. SCHENSEMA

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr Matjila (In Person)

⁸ See in particular pages 54, 55, 60, 64, 84, 88, 89, 90 and 91 of the record.

For the Third Respondent: Advocate S. Malatji

Instructed by: State Attorney

LABOUR COURT