IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1552/17

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	**First Applicant**
DAVID DE BRUIN	**Second Applicant**
MOKETE TSOTETSI	**Third Applicant**
MICHAEL MNISI	**Fourth Applicant**
ROBERT NDUBANE	**Fifth Applicant**
DUMISANE MASEKO	**Sixth Applicant**
MOOSA ALFONSO	**Seven Applicant**

and

MIDVAAL LOCAL MUNICIPALITY	**Respondent**

Heard: 13 December 2017

Order: 13 December 2017

Date of Reasons: 02 June 2019

REASONS FOR ORDER

MAHOSI.J

Introduction

[1] This matter served before me on 13 December 2017 wherein the applicants sought as order in the following terms:

> '1. Compelling the respondent to consider the appeal lodged by the applicants on 24 May 2017;
>
> 2. Declaring that the applicants are entitled to their remuneration from the date of dismissal up until the appeal is determined;
>
> 3. Order the respondent to pay the applicants' remuneration in accordance with paragraph 2 above pending the determination of the appeal;
>
> 4. Ordering the respondent to pay costs of this application.'

[2] Having determined the issues, I made an order in terms of which I found that this Court lacks jurisdiction to hear this matter. Subsequent thereto, the applicants requested reasons for the aforesaid order and these are my reasons.

Background

[3] A Disciplinary Procedure Collective Agreement [1] (collective agreement) was entered into between various parties including the first applicant (SAMWU) and the South African Local Government Association (SALGA), an employee organisation of which the respondent form part. It is this collectiove agreement that regulates disciplinary actions between the parties.

[4] Allegations of misconduct were levelled against the individuial applicants during their employment with the respondent, which allegations related to, *inter alia,*

[1] Index to pleadings, page 58 to 78

damage to municipal property, intimidation, violence and wielding of dangerous weapons during the course of an unprotected strike. A disciplinary hearing that was presided by an external chairperson was convened and on 22 May 2017, the individual applicants were found guilty of the misconduct. As a result, the chairperson recommended a sanction of summary dismissal. The Municipal Manager confirmed the sanction of summary dismissal and issued a dismissal notice to each individual applicant.

[5] The applicants sent a letter to the respondent through their legal representatives stating their intention to exercise their right to appeal the outcome of the disciplinary hearing. However, the respondent's stance was that the appropriate appeal procedure in this case was to refer the matter directly to the bargaining council as the nature of the proceedings do not support an internal appeal.

[6] Following a flurry of correspondence ensued between the parties in which the parties stances were canvassed, the applicants brought this application seeking an order to compel the respondent to consider the appeal they lodged on 24 May 2017, declaring that the individual applicants are entitled to remuneration from the date of dismissal until the appeal is determined and ordering such payment.

[7] In opposing this application, the respondent contended that this Court lacked jurisdiction to entertain this matter. In support of its contention, the respondent submitted that, to an extent that this application was brought in terms of section 158(1)(h) of the LRA, the applicants notice of motion does not identify any decision or act performed by the respondent capable of review, nor does it set the founding affidavit set out any grounds of review.

Legal principles

[8] Section 24 of the Labour Relations Act[2] (LRA) governs disputes regarding collective agreements as follows:

> **'24. Disputes about collective agreements**
>
> (1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded

[2] Act 66 of 1995, as amended.

in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(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.

(3) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(4) The Commission must attempt to resolve the dispute through conciliation.

(5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration

(6) If there is a dispute about the interpretation or application of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the dispute may refer the dispute in writing to the Commission, and subsections (3) to (5) will apply to that dispute.

(7) Any person bound by an arbitration award about the interpretation or application of section 25(3)(c) and (d) or section 26(3)(d) may appeal against that award to the Labour Court.

(8) If there is a dispute about the interpretation or application of the settlement agreement contemplated in either section 142(A) or 158(1)(c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.'

[9] The Labour Appeal Court (LAC) in *Rukwaya and Others v Kitchen Bar Restaurant*[3] found the following:

> "The legal basis of the appellant's claim is founded on the respondent's non-compliance with the collective agreement … the appellants were obliged to follow the dispute resolution process provided for in … the collective agreement. In terms of s 24 (1) of the LRA, all collective agreements are required to provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement through conciliation, and if the dispute remains unresolved, through arbitration."

[10] The applicants contend that the collective agreement is applicable and paramount and the fact that the respondent is failing and/or refusing to hold an internal appeal is in contravention of the collective agreement. On the other hand the respondent aver that the provisions provided for in the collective agreement is inoperative because this is a case of impossibility of performance as the process provides for an internal presiding officer and there is none within the respondent that can chair the appeal.

[11] Therefore it is clear from the papers before me that what is in dispute is the interpretation and application of the collective agreement that governs the relationship between the parties. On consideration of either version, this application is doomed to fail. The applicants' claim has its basis in the collective agreement, and therefore section 24 would find application. On any interpretation of the section 24, a matter in regard to a dispute relating to the interpretation and applicability of a collective agreement has to be conciliated and if not resolved, referred for arbitration.

[12] Further, if the respondent's version is to be accepted, then the procedures in the collective agreement were inoperative and then section 24(2)(b) would become operative, which then means that the applicants were to refer the matter to the Bargaining Council for adjudication. On the other hand, if the applicants' version is to be accepted, then section 24(2)(c) becomes operative, i.e. that the

[3] (2018) 39 ILJ 180 (LAC).

respondents are frustrating the proceedings and therefore the matter would have to be referred to the Bargaining Council for adjudication.

[13] It must be said that the submissions of the respondent are reasonable. The fact that an external presiding officer was called to chair the disciplinary hearing is an indication that there was no one internally that has the requisite skill and expertise to chair it. Therefore, if there was no one to chair the initial proceedings, and there is no manager that can sit on the appeal, it is reasonable to find that the provisions of the collective agreement are inoperative.

[14] The LAC in *Rukwaya*[4] went on to state that *"the determination of whether the respondent has contravened the collective agreement as alleged, calls for its interpretation and application."* Therefore, this matter is nothing other than a dispute on the interpretation and application of the collective agreement. This dispute had to be referred to conciliation and, if remained unresolved, to arbitration, therefore this Court lacks the jurisdiction to entertain the matter.

[15] The Court should also show its displeasure in being asked to entertain these kind of applications where clearly the applicants occupy senior positions arming them with financial means to approach this Court with meritless applications. The Court in *Mosiane v Tlokwe City Council*[5] stated the following:

> "A worrying trend is developing in this Court … Some applicants approach this Court … to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who approach this Court with fanciful arguments about why this Court should grant them relief ... An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief ... All employees are equal before the law and no exception should be made when considering such matters. Most

[4] Supra n 3.
[5] (2009) 30 ILJ 2766 (LC) at paras 15 and 16.

> employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures as laid down by the Labour Relations Act, 66 of 1995. They will also refer their disputes to the CCMA or to the relevant Bargaining Council and then approach this Court for the necessary relief."

[16] This is one such matter. The LRA is clear on what needs to be done when a dispute arises from the interpretation and application of a collective agreement, and yet, in order to circumvent their dismissals, the applicants have brought this application. Unfortunately, the dispute on the interpretation and application of the collective agreement has been overtaken by events, which in this matter is the dismissals of the applicants.

[17] The Court in *Gcaba v Minister of Safety and Security and Others*[6] said the following:

> "Once a set of carefully-crafted rules and structures have been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely-tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees."

[18] This does not close the door on the applicants. There is a dispute resolution process available to them if they wish to challenge their dismissals. The Court in *EOH Abantu (Pty) Ltd v CCMA and Others*[7] stated as follows:

> "The applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issue it would like to and a commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it would be able to seek to review the award in accordance with the LRA. This will mean that the Labour Court will have the

[6] (2010) 31 ILJ 296 (CC) at para 56.
[7] (2010) 31 ILJ 937 (LC) at para 16.

benefit of the CCMA's decision and will not become involved prematurely in matters. This will prevent a flood of similar applications."

Conclusion

[19] This matter is clearly one in which senior employees wish to flex their financial muscle to jump the queue and circumvent the well laid structures of the LRA. Therefore, the applicants must follow that which is prescribed in the LRA in order not to allow a dual system from forming in our jurisprudence. Since the overtaking of the dismissals, this is actually academic and the applicants should pursue their dispute as an unfair dismissal dispute to the correct forum.

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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For applicant:	Advocate E.M. Masombuka
Instructed by:	Madlela Gwebu Mashamba Incorporated
For third respondent:	Advocate Riaz Itzkin
Instructed by:	Cliffe Dekker Hofmeyr Incorporated