THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: J1882/2017

In the matter between:

UASA OBO JM JONKER AND OTHERS Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY Defendant

Heard: 13 November 2024

Delivered: 17 January 2025

Summary: Claim for contractual brought under section 77 of the BCEA. Court having no jurisdiction. Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] Seven employees launched an action against their employer, the defendant, the Ekurhuleni Metropolitan Municipality or the City of Ekurhuleni

(hereafter "the Municipality" or "the City"). For ease of reference, the employees will be referred to as the plaintiffs.

[2] The plaintiffs allege that this court is clothed with jurisdiction by virtue of section 77, read with section 77A, of the Basic Conditions of Employment Act No. 75 of 1997 as amended (hereafter the "BCEA"). The defendant raised a preliminary issue relating to jurisdiction, as is discussed following a brief summary of the facts.

Material facts

[3] The plaintiffs were all employed in senior positions until their transfer to the City. Four of the plaintiffs were employed by the Brakpan Town Council ("Brakpan Council") while the other three were employed by the Kempton Park Metropolitan Local Council ("Kempton Park Council"). The plaintiffs explain that their conditions of employment were considered to be "contractual to incumbent" which means that their benefits and remuneration could not be diminished or reduced during their employment.

[4] The City, initially referred to as the Greater East Rand Metro (the "Metro") was established in terms of section 12(1) read with section 14(2) of the Local Government: Municipal Structures Act No. 117 of 1998. The establishment of the Metro was promulgated in Provincial Notice No. 6768 of the Provincial Gazette Extraordinary No. 141 dated 1 October 2000 (the "Provincial Gazette"). Through the Provincial Gazette, on the effective date[1] the Brakpan Council and the Kempton Park Council were disestablished, but continued to perform their functions as part of the Metro, as demarcated.

[5] The Provincial Gazette provided as follows:

[1] The effect date is the date on which the results of the first election of the Council are declared.

5.1 Part 5 clause 14(1) provided that the Metro would be the successor in law to several disestablished municipalities including that of the Brakpan Council and the Kempton Park Council.

5.2 Clause 21(1) provided that: "A person who, on the effective date is an employee of a disestablished municipality referred to in clause 11 becomes an employee of the Greater East Rand Metro".

5.3 Clause 21(2)(b) provided that the employment of the employees transferred to the Metro from the disestablished municipalities were subject to section 197 of the Labour Relations Act No. 66 of 1995 as amended (hereafter the "LRA").

[6] Prior to their transfer to the City, the seven plaintiffs all participated in the transport scheme applicable in the disestablished municipalities. The four plaintiffs formerly employed by the Brakpan Council, had participated in what they called the Brakpan Transport Scheme. The other three plaintiffs formerly employed by the Kempton Park Council had participated in what they termed the Kempton Park Transport Scheme.[2]

[7] A few years earlier, during 1997, the role players in local government, established the Interim South African Local Government Bargaining Council (the "Interim Council"). The parties to the Interim Council included a single employer organisation, the South African Local Government Association (hereafter "SALGA") and two unions, the South African Municipal Workers Union and IMATU. The South African Local Government Bargaining Council (the "SALGBC" or "the Bargaining Council") was registered thereafter.

[2] This Transport Scheme was established by a collective agreement concluded between the Kempton Park Council and the Independent Municipal and Allied Trade Union ("IMATU"). Clause 8.2 of the collective agreement provides as follows: "*Amendments of the AA – tables and salary are automatically implemented with effect from the first day wherein such amendments are applicable respectively*."

[8] The transport allowance previously applied to the plaintiffs by the two disestablished municipalities contemplated two components, a fixed cost component and a running cost component. The fixed cost component corresponded with the tables released by the Automobile Association of South Africa (hereafter "the AA"), which was dependent on the purchase price of the employee's vehicle, which was dependent on the salary of the employee. When an employee's salary increased beyond R400 000, 00 per annum, the employers were required to apply the formula at the bottom of the AA tables. The AA discontinued the issuing of adjusted tables during 2001 because these tables were available on its website.

[9] The plaintiffs continued to receive their transport allowances after their transfer to the City. Between 1998 and 2001, their transport allowances were adjusted in accordance with the AA tables.

[10] However, with effect from February 2001, after the plaintiffs salaries had increased beyond R400 000, 00 per annum the City refused to further increase their transport allowance in accordance with the AA tables. As a result, say the plaintiffs, they suffered damages.

[11] On 15 July 2003, the City entered into a collective agreement with IMATU and SAMWU which created the Ekurhuleni Transport Allowance Scheme. The scheme provided that those employees who had previously received an allowance from the disestablished municipalities would continue to receive such benefits.

[12] Both parties referred to and attached a number of letters and circulars as evidence of the resolutions which had been adopted by the SALGBC. In the papers, reference was made to the following:

12.1 A letter issued by the SALGBC, dated 10 May 1999[3] in which the Acting General Secretary advised that the Central Council had adopted a

[3] Annexure L to the Founding Affidavit

resolution on 9 – 10 July 1998. The resolution stated that the transport allowances must be adjusted twice each year, and SALGA would assist the Council to update the allowances.

12.2 A circular dated 21 June 1999,[4] in which SALGA advised its members (the municipalities) of the resolution adopted by the Central Council on 9 – 10 July 1998. In the circular, SALGA stated: "*it is not management's prerogative to decide whether to adjust the scheme or not as this is a decision of a Central Council and only the Central Council can changed this decision*". The circular does not purport to convey that the Council resolved that it (the Council) was the only body with authority to "adjust the scheme".

12.3 A circular issued by the Council's Acting General Secretary dated 29 September 2000.[5] In the circular, the Secretary refers to the resolution of the Central Council adopted on 9 – 10 July 1998. The Secretary advised that there was a need to review the transport allowances, which would be considered and determined by the Executive Committee in due course.

12.4 A letter dated 20 February 2001[6] from the General Secretary to the various divisions of the Bargaining Council, advising that the Executive Committee had resolved that: (a) the annual amendment of transport allowances must be suspended with immediate effect, (b) the Council Secretary would arrange a meeting with Oxbridge Consultants to advise on the development of a "personalized scheme", and (c) in the interim the status quo must remain. It should be noted that the personalized scheme never came to fruition.

[13] During 2014, the plaintiffs launched a claim based on the same cause of action against the defendant under case number JS455/14. The plaintiffs

[4] Annexure M to the Founding Affidavit

[5] Annexure COE1 to the Answering Affidavit

[6] Annexure N to the Founding Affidavit

obtained default judgment, and the judgment was satisfied. In this dispute, the plaintiffs claim that they have suffered damages as a result of the defendant's refusal to pay the correct value of their transport allowance since 1 June 2014. The damages allegedly suffered by the plaintiffs are calculated from 1 June 2014 to the date when the dispute was launched in this court, on 6 October 2017.

<u>Legal submissions</u>

Plaintiffs' submissions

[14] Plaintiffs claim that they have suffered contractual damages because the City has refused to pay them in accordance with the adjusted AA tables. They further contend that the decision of the Executive Committee is not binding on them, because only the Central Council is capable of amending its own resolutions. The plaintiffs concede that, in general, the resolutions of the SALGBC are binding on the parties to the Bargaining Council.

[15] Unfortunately, the plaintiffs did not see fit to attach the constitution of the SALGBC to its papers. This unfortunate omission creates some difficulty in resolving the dispute of whether the Executive Committee is authorised to amend a resolution of the Central Council. As I understand it, the parties agreed that both bodies (i.e. the Executive Committee and the Central Council) are formal structures of the Bargaining Council with representatives of the employers (represented by SALGA) as well as the unions. The only area of disagreement is the powers of the Executive Committee.

Defendants' submissions

[16] The defendant denies breaching the plaintiffs employment contracts.

[17] The defendant contends that the Executive Committee is entitled amend the resolutions of the Central Council, because it has the powers of Central Council between meetings of the Central Council. Unfortunately these details

are only submitted in its heads of argument. Nevertheless, in its answering affidavit, despite the absence of detail, the defendant denied plaintiffs' allegation that the Executive Committee cannot amend a resolution of the Central Council.

[18] The defendant alleges that the plaintiffs are members of IMATU[7] and are therefore bound by resolutions of the Bargaining Council because IMATU is a party to the Bargaining Council. The plaintiffs filed no replying affidavit disputing this.

Jurisdiction of the Labour Court

[19] Plaintiffs argued that this Court has jurisdiction to hear and determine the dispute because the dispute relates only to their employment contracts. The plaintiffs earn above the threshold in section 6 of the BCEA and, presumably for that reason, do not rely on section 73A(3) of the BCEA.

[20] The defendant contends that the Court has no jurisdiction to hear and determine the dispute because the dispute is about the interpretation, application, or enforcement of a collective agreement. Such disputes ought to be resolved through arbitration. Section 157(5) of the LRA provides that "… *the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any other employment law requires the dispute to be resolved through arbitration*."

[21] Two decisions of the appeal court deal directly with the jurisdiction of this Court concerning the enforcement of conditions of employment (prior to the introduction of section 73A) as contained in collective agreements namely *Ekurhuleni Metropolitan Municipality v SAMWU on behalf of members* ("*Ekurhuleni*")[8] and *Rukwaya and others v Kitchen Bar Restaurant* ("*Rukwaya*").[9] In summary, the appeal court held:

[7] Para. 7.1 of the Answering Affidavit

[8] (2015) 36 ILJ 624 (LAC)

[9] (2018) 39 ILJ 180 (LAC)

21.1 The Labour Court has no jurisdiction where the claim arose from a collective agreement and, because collective agreements have primacy, it is proper that the collective agreement is enforced. Furthermore, in that matter, the resolution of the dispute would require an interpretation of a collective agreement.[10]

21.2 The Labour Court has no jurisdiction where the claim is formulated as a breach of the employment contract, but the true dispute relates to non-compliance with a collective agreement.[11]

[22] The plaintiffs, who were engaged by the Kempton Park Council appear to have missed the fact that they rely on the collective agreement between IMATU and their former employer, the Kempton Park Council, to establish their right to a transport allowance. In my understanding, where the alleged conditions of employment arise from a collective agreement, *Rukwaya* holds that the plaintiffs must enforce the collective agreement.

[23] The plaintiffs, while accepting that the resolutions of the Bargaining Council are binding on municipalities, appear to have overlooked the fact that these resolutions are themselves collective agreements. The resolutions, whether adopted by the Central Council or the Executive Committee, are written agreements concluded between representatives of the employer organisation and the unions relating to matters of mutual interest. It is trite that even the constitution of a Bargaining Council may constitute a collective agreement because it meets the definition of a collective agreement.[12]

[24] In order for the plaintiffs to succeed in their claim, they would have to show that the collective agreement, as reflected in the resolution of the

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[10] *Ekurhuleni* at paras 21, 22, 25, and 26

[11] *Rukwaya* at paras 8 – 10

[12] *Wallenius Wilhelmsen Logistics Vehicle Services v National Union of Metalworkers of SA & others* (2019) 40 ILJ 1254 (LAC) at para 27

Executive Committee, was either invalid[13] or does not apply to them. If the collective agreement is valid, and does apply to them, issues of interpretation arise. For example, one might ask, what does the agreement mean when it states "in the interim" the status quo must apply? Given that the "personalised scheme" did not come to fruition, how was the agreement to be interpreted and applied?

[25] In my view, for the above reasons, the dispute between the parties relates both to the enforcement of a collective agreement (or collective agreements) and the interpretation and application of such agreement(s). The proper route for the plaintiffs to have followed (which they may still follow) was to refer a dispute to the Bargaining Council in terms of section 33A of the LRA and require the Bargaining Council to invoke its dispute processes to resolve the dispute. Fortunately for the plaintiffs, an arbitrator appointed by the Bargaining Council in terms of section 33A of the LRA may deal with enforcement disputes as well as interpretation and application disputes. This Court has no jurisdiction to hear and determine the dispute. Neither party vigorously pursued costs. In any event, in labour disputes, costs do not necessarily follow the result.

Conclusion

[26] In the circumstances, this court has no jurisdiction to hear and determine the plaintiffs' claim and the defendant's jurisdictional point must be upheld. The application is struck from the roll for lack of jurisdiction and there is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

[13] The appeal court closely considered the constitution of the SALGBC in *SALGA v IMATU and others* [2014] 6 BLLR 569 (LAC) holding at para 36 that a practice can never trump the express and unambiguous terms of a constitution.

For the Plaintiffs:

Adv V Masinga

For the Defendant:

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