



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J1383/21

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION

o.b.o LORATO MOGALE

Applicant

and

MEC DEPARTMENT OF HEALTH, GAUTENG

Respondent

Heard: 23 October 2025

Delivered: 03 August 2026

JUDGMENT

SETI-BAZA, AJ

Introduction

- [1] In this application, the applicant (SAMA), acting on behalf of Dr Lorato Mogale (Dr Mogale), its member, has brought this application in terms of section 77A(e) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) where it seeks an order: (i) declaring the respondent's conduct of discounting Dr Mogale's rural allowance be declared unlawful and in breach of the employment contract between Dr Mogale and the respondent; (ii) that

the respondent is not precluded from paying a rural allowance to Dr Mogale in terms of the collective Resolution 2/2004 entered between SAMA and the respondent; and (iii) Directing the respondent to resume payment of rural allowance at R6 763.61 per month to Dr Mogale effective as from April 2014.

- [2] In the alternative, SAMA seeks an order declaring that the arbitration award of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) under case number PSHS912-14/15 and/or the judgment of the review application in the matter between *MEC: Department of Health v SAMA obo Matlebyane and 4 Others* is equally applicable to Dr Mogale as one of the affected employees affected by the discontinuation of the rural allowance, thereby ordering. As such ordering the respondent to pay Dr Mogale a just and fair rural allowance as entitled in the aforementioned award.

Background facts

- [3] The material background facts are largely common cause, save where indicated. Dr Mogale is a medical doctor in the employ of the Department of Health, Gauteng and is based at Refentse Community Health Centre, Stinkwater, in Hammanskraal, Pretoria.
- [4] The facility where Dr Mogale worked in Hammanskraal was demarcated as qualifying for rural allowance in terms of Resolution 2 of 2004, which came into effect on 1 July 2003 (the Resolution), which governs payment of rural allowances in the public sector.
- [5] The listed objectives of the Resolution, amongst others, are:
- 5.1. Attract and retain health professionals on a full-time basis to the Public Health Service as managed by the Health Employer in the rural areas;
 - 5.2. Effect payment in respect of rural allowance in terms of the 13 ISRD (Rural Nodes) identified as priority;
 - 5.3. Revise the current non-pensionable recruitment allowance, referred to as 'the rural allowance', equating to 18% of a medical officer's monthly

salary, payable to medical officers, dentists, specialists and medical and/or dentist superintendents working in PSCBC designated hospitals and/or institutions in underserved rural areas; and

5.4. Allow for the Provincial Heads of Health to determine and designate the other inhospitable health institutions with definite recruitment and retention needs, dependent on the availability of funds.

[6] The payment of the rural allowance would be reviewed or terminated in the following cases:

6.1. In the event of transfer/promotion, the allowance would be terminated, provided that on transfer/promotion, the allowance was being paid; and

6.2. In the event of reclassification of the institution, the allowance would be reviewed or terminated after giving the affected employees three (3) months' notice.

[7] In April 2014, Dr Mogale's rural allowance was terminated by the respondent on the basis of a change in policy in the National Department of Health, which reclassified Dr Mogale's workplace as urban as opposed to rural. In other words, because of the change in policy, Dr Mogale's workplace now fell under the Gauteng Province, and the Gauteng Province was omitted from the list of inhospitable and rural areas in the Resolution.

The pleadings and submissions

The BCEA claim: Breach of employment contract

[8] The legal basis upon which SAMA engages this Court's jurisdiction is in terms of section 77 A(e) of the BCEA which provides that this Court may make any appropriate order including making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3) of the BCEA, which determination for the present purpose SAMA submits include the grant of an order of specific performance being to declare as invalid and unlawful the termination of Dr Mogale's rural allowance in terms of the employment agreement concluded with the respondent.

[9] SAMA's complaint is that the respondent breached Dr Mogale's employment contract in that it terminated Dr Mogale's rural allowance without notice. SAMA further submits that, notwithstanding the reclassification of Dr Mogale's workplace, the benefit of rural allowance ought to have attached to her in terms of section 197 of the Labour Relations Act 66 of 1995 (the LRA) when her workplace was incorporated into the Gauteng Province. SAMA then concludes that the respondent's conduct in this regard was in contravention of Dr Mogale's contract of employment, read together with the provisions of the Resolution, which is binding on both SAMA and the respondent.

[10] As a remedy, SAMA seeks a declaratory order, declaring the respondent's conduct of discontinuing Dr Mogale's rural allowance in breach of her contract of employment and that the respondent be directed to resume payment of rural allowance at R6763.61 to Dr Mogale, effective as from April 2014, being the outstanding amount since the date of termination of Dr Mogale's rural allowance.

[11] SAMA's cause of complaint is pleaded as follows in the founding affidavit:

'In accordance with my contract of employment, I was paid a rural allowance by virtue of my place of employment demarcated as qualifying for rural allowance. Though I cannot locate my initial contract of employment, I attach a letter of appointment and a sample of my payslip confirming my employment and previous payments of rural allowance.

The Payment of rural allowance in the Public Sector is regulated by a collective agreement, Resolution 2 of 2004, which came into effect on 1 July 2003. The purpose of the Resolution is to provide for the payment of rural allowance to public sector health professionals working in hospitals and/or institutions as managed by the Health Employer in ISRD Nodes and Rural Areas.

In April 2014, my rural allowance was terminated by the respondent without notice. The reasoning of the respondent in its conduct was that my workplace had fallen under Gauteng. The Gauteng province is omitted on the list of inhospitable and rural areas in the Resolution.

I thus submit that the conduct of the respondent was in contravention of my contract of employment, read together with the provisions of the Resolution which is binding on respondent and SAMA- myself, by extension.'

- [12] In opposing the BCEA claim, the respondent's defence rests solely on its preliminary point of jurisdiction. The respondent contends that this Court lacks jurisdiction because SAMA's complaint falls squarely within the ambit of unfair labour practice and is classified as an unfair labour dispute, which ought to have been first referred to the Bargaining Council and not to this Court. In addition, the respondent contends that there are no exceptional circumstances expressed in SAMA's founding affidavit that would warrant that its application be dealt with in terms of section 77A(e) and 77(3) of the BCEA.

The Declaratory Order

- [13] The basis of SAMA's alternative claim, in the form of a declaratory order is as follows: (i) the issues raised in the arbitration award and subsequently in the review judgment pertaining to payment of rural allowance are similar to Dr Mogale's issues and therefore the arbitration award and/or review judgment ought to equally extend to Dr Mogale, (ii) in reply SAMA contends that the decision to terminate rural allowance has been vitiated by a legal process through the arbitration award and the judgement of the review application. Such vitiation of a decision is not only limited to certain doctors.
- [14] In opposing the declaratory relief sought, the respondent contends that (i) Dr Mogale was not part of the proceedings before Judge Witcher (the review application). The judgment does not include any other employees but was granted in favour of the parties which were before the court; (ii) the applicant has not provided evidence demonstrating that Dr Mogale referred her dispute to the bargaining council and/or the decision of the bargaining council evincing its refusal to adjudicate the referral based on *res judicata*; and (iii) the applicant could not have referred Dr Mogale's dispute to bargaining council because the referral was out of the 90 days' rule in terms of the LRA.
- [15] The respondent further contends that the termination of Dr Mogale's rural allowance was lawful because the institution in which Dr Mogale is employed

and based was subsequently reclassified under Gauteng Province as urban. Due to the aforesaid reclassification, so the argument of the respondent goes, Dr Mogale became ineligible for the rural allowance as per the provisions of the Resolution. It is on this basis that the respondent submits that there are no valid grounds raised that warrant the decision to be declared unlawful and invalid.

[16] In addition to the aforesaid defences, the respondent in its heads of argument has subsequently raised several points of law in its heads of argument which include *inter alia*, prescription of SAMA's claim, non-joinder of the Minister(s) of Health and Finance and the MEC for Finance. In this regard, the respondent contends that such points of law are foreshadowed in the papers filed before this Court and thus is entitled to advance such points.

[17] It is only appropriate that this Court first determines whether it possesses the requisite jurisdiction prior to commencing the determination of the remainder of the issues.

Jurisdiction of the Labour Court

[18] Section 77(3) of BCEA provides that:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

[19] In terms of this section, any claim that has to do with a dispute over a contract of employment, which could be brought in a civil court, falls within the jurisdiction of the Labour Court.

[20] In *Gcaba v Minister for Safety and Security and Others*¹ (*Gcaba*), the Constitutional Court held that:

'Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the court's jurisdiction being

¹ 2010 (1) SA 238 (CC); [2009] ZACC 26 at para 75.

challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.'

[21] In *Gcaba*² the term 'jurisdiction' was defined as "*the power or competence of a court to hear and determine an issue between the parties*".

[22] It is trite that the case the Court is required to decide in the case of motion proceedings is determined by the notice of motion and the founding affidavit. In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*³ it was held that:

'It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers. Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*, puts the matter thus:

"In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet'..."

[23] The Supreme Court of Appeal in *Makhanya v University of Zululand*⁴ stated that the pleadings of a case were definitive:

'... the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly...'

[24] SAMA, in asserting Dr Mogale's right based on breach of her contract of employment, simply alleges that Dr Mogale was paid a rural allowance in accordance with her contract of employment and concludes that the respondent's conduct of terminating the rural allowance thus contravenes Dr Mogale's contract of employment. These are, in essence, the alleged facts that seek to invoke this Court's jurisdiction. In my view, there can be little

² Supra at para 74.

³ 2008 (5) SA 339 (SCA); [2008] ZASCA 78 at para 29.

⁴ [2009] ZASCA 69; 2010 (1) SA 62 (SCA).

doubt that the case as pleaded by SAMA in effect has nothing to do with the cause of action based on breach of contract. On the facts as pleaded, there are a number of reasons for this, which I elaborate on below.

- [25] Firstly, SAMA has made no reference whatsoever to the terms of Dr Mogale's contract of employment. SAMA has referred to no provisions in the said contract, let alone provisions that could have been breached. The attachment of Dr Mogale's appointment letter and her payslip is not of assistance either. The aforesaid documents do nothing more than to confirm Dr Mogale's employment by the respondent and the breakdown of her salary.
- [26] In *Mbanjwa v Minister of the National Department of Public Works and others*⁵ the Court held as follows, which equally applies to the applicant *in casu*:

'Where a claim is predicated on a contract, a party relying on such a contract must state whether the contract is in writing or oral; when, where and by whom it was concluded and if the contract is in writing a true copy thereof or the part relied on in the pleading shall be annexed to the pleading. A contract of employment being a contract, in a claim in terms of s 77(3) a party must plead in accordance with rule 18(6) of the Uniform Rules. The applicant did not plead accordingly...'

- [27] In order to sustain a claim based on breach of a contract of employment more is required, than merely asserting that an employee was paid a certain benefit in terms of a contract of employment.
- [28] Secondly, the substance of SAMA's complaint, when considered holistically, is the respondent's failure to pay the rural allowance regulated by the collective agreement, Resolution 2 of 2004. SAMA in fortifying its complaint then pleads the listed objectives of the Resolution, which include but are not limited to:

28.1. Effect payment in respect of rural allowance in terms of the 13 ISRD (Rural Nodes) identified as priority; and

⁵ (2021) 42 ILJ 2244 (LC); [2021] ZALCJHB 132 at para 15.

28.2. Allow for the Provincial Heads of Health to determine and designate the other inhospitable health institutions with definite recruitment and retention needs, dependent on the availability of funds.

- [29] SAMA avers that Dr Mogale was paid the rural allowance due to the fact that her workplace was demarcated as rural and/or inhospitable by the North West and/or Limpopo province as per the Resolution. Pertinently SAMA pleads that *this was the basis upon which Dr Mogale received the rural allowance*. SAMA further states that the collective agreement is binding on the respondent, itself and by extension Dr Mogale.
- [30] Subsequent to the conclusion of the Resolution, SAMA claims that the National Government and/or State effected changes to certain provincial boundaries, the aforesaid resulted in Dr Mogale's workplace which previously fell under the Northwest and/or Limpopo province incorporated into the Department of Health, Gauteng Province. In April 2014, Dr Mogale's rural allowance was terminated by the respondent without notice. The reasoning of the respondent in this regard, so SAMA alleges, is that Dr Mogale's workplace had fallen under the Gauteng province. The Gauteng Province is omitted on the list of inhospitable and rural areas in the Resolution.
- [31] The pinnacle of SAMA's complaint is located in paragraphs 31 and 32 of the founding affidavit, wherein it is pleaded, *"I have been advised that the benefit of rural allowance is attached to me in terms of section 197 of the LRA. As such, it ought to have been attached to me when I was being incorporated into Gauteng Province. I thus submit that the conduct of respondent was in contravention of my contract of employment, read together with the provisions of the Resolution which is binding on the respondent and SAMA-myself, by extension"*.
- [32] Applying the substance over form principle, I have no hesitation in finding that the real issue in dispute is the respondent's breach and/or non-compliance with the provisions of the Resolution, and not, as SAMA want to characterise the dispute, a breach of Dr Mogale's contract of employment.

- [33] The dispute is clearly not about Dr Mogale not getting the rural allowance, which was contractually agreed between her and the respondent. The basis on which Dr Mogale was paid the rural allowance emanates from the provisions of the Resolution. The alleged breach by the respondent equally follows from the Resolution. The real dispute *in casu* is whether the respondent, in terminating the rural allowance, breached the provisions of the Resolution. The aforesaid enquiry requires proper interpretation of the Resolution.
- [34] But even accepting for the purposes of argument that the terms of the Resolution were incorporated into Dr Mogale's contract of employment for purposes of approaching that court in terms of s 77(3) of the BCEA, the aforesaid practice was criticised and expressly by the Labour Appeal Court in *Ekurhuleni Metropolitan Municipality v SA Municipality Workers Union on behalf of Members*⁶ on the following basis:

'This argument, in my view, which is made to overcome the difficulty which the jurisdictional point presents to the respondent, ignores the primacy of collective agreements under the LRA. One could equally argue that the court a quo was interpreting the main agreement and that the dispute was about the main agreement which was the source of the relevant clauses. For this argument, respondent's counsel purportedly relied on s 23(3) of the LRA, which provides: 'Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.' That provision is likely to apply to all collective agreements where reciprocal rights and obligations of employers and employees are dealt with. But it is not correct that if clauses in the collective agreement, by which the employment contract is varied, are interpreted, that it is in fact an interpretation of the employment contract and not of the collective agreement. The interpretation is certainly of the relevant clauses in the collective agreement and by implication, also the relevant clauses in the employment contract.

Collective agreements are to be accorded primacy. In *National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts*

⁶ (2015) 36 ILJ 624 (LAC); [2014] ZALAC 61 at paras 25 and 26.

(Pty) Ltd & another, this court held that the purpose of s 199 of the LRA, read together with s 23(3) of the LRA, is to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements above individual contracts of employment. Section 199 provides, inter alia, in essence that contracts of employment may not disregard or waive collective agreements.

The fact that it was agreed that the rights, duties and obligations pertaining to full-time shop stewards were to be reduced to a collective agreement at Bargaining Council or sectoral level is indicative of the intention to create and maintain uniformity in the sector in respect of those matters. The meaning to be given to each clause in the collective agreement was therefore also clearly intended to be uniform throughout the sector and at both Bargaining Council and plant levels. To distinguish between the collective agreement and the individual contracts of employment in respect of those aspects when interpreting the relevant clauses, could be subversive, firstly, because of the very intention of maintaining uniformity, because there is a possibility that different meanings could be given to the very same clauses by the different parties to the agreement if they were allowed definitively to interpret the clauses at plant level. Such an approach would also weaken the collective agreement to the point of rendering it ineffective. Further, such an approach would be inconsistent with one of the other main objectives of the LRA, namely, to ensure orderly and effective collective bargaining. The said objective of the LRA and the collective agreement can only be maintained if the collective agreement, i.e. the main agreement, itself is interpreted.'

[35] Section 24 (1) of the LRA provides that 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. Clause 5 of the Resolution *in casu* provides for such a procedure. It provides as follows: "*This agreement will be binding on the Parties and any disputes about its interpretation or application shall be dealt with according to the dispute Resolution procedure of the PH & WSBC*".

[36] The bargaining council is empowered in terms of s 33A of the LRA, to enforce a collective agreement, which it has concluded. The dispute Resolution

procedure provided for in clause 5 of the Resolution seeks to do precisely that. It is binding on both the SAMA, by extension Dr Mogale and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by the other party.

Conclusion

[37] In summary, the respondent's objection *in limine* of jurisdiction must be upheld on the following basis:

37.1. SAMA failed to plead its claim of breach of contract of in accordance with rule 18(6) of the Uniform Rules.

37.2. I therefore conclude that, upon a proper interpretation of the pleadings as they stand, SAMA's case concerns a breach of the Resolution and not a breach of the contract of employment. The purported reliance on the contract of employment was a clearly contrived stratagem intended to escape the prerequisites of the applicable dispute resolution procedures.

[38] In the circumstances, the order is as follows:

Order

1. The application is dismissed.
2. There is no order as to costs.

M Seti-Baza

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv T Mosiliki

Instructed by: Madiba Mostai Masitenyane & Githiri Attorneys

For the Respondents: Adv L Monnakgotla

Instructed by The State Attorney

LABOUR COURT