REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 515/2011

In the matter between:

THE DEPARTMENT OF THE PREMIER, WESTERN CAPE	**Applicant**
and	
SAM PLAATJIES N.O.	**First Respondent**
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
COLIN DICKINSON	**Third Respondent**
JULIAN THOPS	**Fourth Respondent**
MICHAEL PRINCE	**Fifth Respondent**
KYLE REINECKE	**Sixth Respondent**
J P ZIMEMA	**Seventh Respondent**
ILZE MATHESE	**Eighth Respondent**
VUYO TUTSHANA	**Ninth Respondent**
ALAN SMALL	**Tenth Respondent**
MONGAWELI KWETA	**Eleventh Respondent**

SISA MAKABENI	**Twelfth Respondent**
MALUSI NCOLO	**Thirteenth Respondent**
NOMVU NGCENGE	**Fourteenth Respondent**
PHUMELA NGEMA	**Fifteenth Respondent**
MONWABISI NGUQU	**Sixteenth Respondent**
NTOMBEBANDLA MNYIKISO	**Seventeenth Respondent**
DESIREE SWART	**Eighteenth Respondent**
THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION OF BATU PELE HOUSE	**Nineteenth Respondent**
THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Twentieth Respondent**

Heard: **8 March 2013**

Delivered: **11 April 2013**

Summary: Review – jurisdiction of bargaining council. Implementation of collective agreement and unfair labour practice.

JUDGMENT

STEENKAMP J:

Introduction

[1] Can compliance with the terms of a collective agreement be attacked under the provisions of the unfair labour practice jurisdiction of the Labour Relations Act[1]?

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[1] Act 66 of 1995 (the LRA).

[2] This review application concerns the jurisdiction of the second respondent, the General Public Service Sectoral Bargaining Council (GPSSBC or "the Bargaining Council") over a dispute arising from a collective agreement in the form of an Occupational Specific Dispensation ("OSD") for legally qualified employees in the Department of the Premier of the Western Cape and the Department of Justice and Constitutional Development, respectively.

The parties

[3] The applicant is the Department of the Premier of the Western Cape. It asks the Court to review, set aside and correct an award by the first respondent ("the arbitrator"), a panellist of the second respondent (the GPSSBC). The third to ninth respondents are employed by the Department of the Premier. They were applicants in the proceedings under review. I shall refer to them as "the Dickinson respondents". The tenth to eighteenth respondents are employed by the Department of Justice and Constitutional Development. They were also applicants in the proceedings under review. I shall refer to them as "the Small respondents". The Small respondents do not oppose the relief sought in this application. The Dickinson respondents do not oppose the relief sought with regard to two of the points raised in the review application, but they do oppose the argument on the remaining jurisdictional point. They agree, though, that this Court should decide on the jurisdictional point instead of remitting any jurisdictional disputes to the Bargaining Council.

The dispute

[4] The applicant initially raised three grounds of review. It only pursued the third point in oral argument, namely that compliance with the terms of a collective agreement by an employer cannot be attacked under the provisions of the unfair labour practice jurisdiction of the LRA.

Background facts

[5] The OSD embodied in Resolution 1 of 2008 deals with the "translation" of legal professionals from one dispensation to another.

[6] The Dickinson respondents complain that they were incorrectly "translated". On 30 April 2009 they lodged a grievance with the following complaints:

Complaint 1

[7] The employer has failed to implement the OSD collective agreement.

Complaint 2

[8] In respect of senior state legal advisors:

> "The employer committed an unfair labour practice ... in that it decided to translate senior state legal advisors on level 12 (MMS)[2] to LP8 on the new OSD for legally qualified employees, which is an entry level for state legal advisors. The translation amounts to a demotion in rank and status since senior legal advisors are translated from a middle management level to an entry level for legally qualified employees."

[9] In respect of state legal advisors (i.e. below the level of senior state legal advisors):

> "The employer further committed an unfair labour practice in that it decided not to promote state legal advisors on level 10 to the new post levels of at least LP7 on the OSD. The OSD introduces a new uniform salary dispensation for all legally qualified employees and repeals the old salary and post dispensation. In terms of the new salary dispensation (OSD) the entry levels for state legal advisor are LP7 or LP8, which is the appropriate scale to translate level 10 state legal advisors."

[10] Complaint 3

> "The OSD agreement is being interpreted and applied incorrectly in that the employer fails to:
>
> 1. recognise that employees should be translated to a level similar in rank and status as the ones that they currently have;
> 2. recognise that the first translation leg for level 12 senior state legal advisors to LP9 can be done under the OSD scales; and

[2] Middle Management Service.

3. adhere to the spirit of the OSD agreement which aims to introduce new work streams for state legal advisors, irrespective of their current post level, by excluding level 10 state legal advisors."

[11] On 29 July 2009 the Dickinson respondents referred a dispute to the bargaining council over the interpretation and application of the collective agreement. In the alternative, they pleaded that they were victims of an unfair labour practice.

Proceedings before the bargaining council

[12] The parties agreed to file pleadings. The Dickinson respondents did so, and so did the Department of the Premier, but the Department of Justice did not.

[13] The Department of the Premier raised three points *in limine* at the Bargaining Council:

13.1 There was no valid referral of the case by the individual applicants, other than Dickinson, as the other eight applicants had failed validly to refer a dispute.

13.2 Trade union members not represented by the union did not have *locus standi* to litigate an alleged breach of a collective agreement concluded on their behalf by the union without the assistance of the union in the proceedings.

13.3 If the employer had not breached the collective agreement, it could not be contended that, even though it had complied with the terms of the collective agreement, its conduct could still be found to be an unfair labour practice.

[14] The Department abandoned the first point – relating to a valid referral – in the course of the proceedings before the Bargaining Council. At the commencement of oral argument in these review proceedings Mr *Kahanovitz*, for the Department, also informed the court that it would only pursue the third point, namely that compliance with the terms of a collective agreement by an employer cannot be attacked under the provisions of the unfair labour practice jurisdiction.

[15] The Dickinson respondents submitted to the Bargaining Council that they had been "incorrectly translated" in terms of the OSD. Under the heading of "legal issues to be determined", they did not specifically style that as a dispute about the interpretation or application of a collective agreement in terms of section 24(2) of the LRA. However, they ticked the box relating to "interpretation and/or application of a collective agreement" in the referral form. They pleaded in the alternative:

> "Alternatively, and in the event that it is found that the [Department's] interpretation and application of the aforesaid resolutions do not amount to a breach, then the applicants contend that the respondents' conduct of translating them to legal advisers LP8 amounts to a demotion, which constitutes an unfair labour practice in terms of the Labour Relations Act 66 of 1995."

[16] The relief sought by the Dickinson respondents was that they be translated from senior legal adviser level 12 to OSD LP 9.

[17] The Department adopted the view that most of the evidence that the employees intended leading related to the argument that their placements under the collective agreement had been unfair, instead of basing their cases on the limited issue of whether or not the outcome of the placement process constituted a breach of the collective agreement.

The award

[18] The arbitrator stated that the dispute was one about the interpretation or application of a collective agreement. He also noted that the applicants had referred an unfair labour dispute and he recorded the points *in limine* that I outlined above. However, he made no rulings on the second and third points *in limine.* He simply ruled:

> "After considering argument of the parties to this dispute, the relevant case law and legislation referred to, I hereby rule that the point in limine of the first and second respondents be dismissed and that they are not entitled to the relief they sought in the application."

[19] The parties in the review application agree that the arbitration ruling should be reviewed and set aside on the basis that the arbitrator failed to

decide the two issues before him that he was required to decide and only decided an issue that he was not required to decide, as the Department had abandoned it.

[20] The parties also agree that the Bargaining Council has jurisdiction to decide a dispute about the interpretation and application of a collective agreement. The only remaining question is whether the Bargaining Council has jurisdiction to hear an unfair labour practice claim as pleaded by the Dickinson respondents in the alternative.

[21] In these review proceedings, the parties have requested the court to decide the remaining jurisdictional point.

In limine: condonation

[22] The applicant did not file the record within the time periods contemplated in rule 7A(8). It only delivered the record and supplementary affidavit a year after it had launched the review application.

[23] The applicant launched the review application on 21 July 2011. On 4 September 2012 the Dickinson respondents brought an application to compel the Department file the record and its supplementary affidavit. Only thereafter – a day after the application to compel had been delivered – did the Department deliver the record and supplementary affidavit contemplated by rule 7A(8).

[24] The Department blames the delay largely on the Bargaining Council. However, a large part of the delay – at least three months – is attributable to the negligence of the state attorney's Mr Leon Manuel.

[25] On 21 July 2011, the state attorney delivered the notice of motion calling on the Bargaining Council to dispatch the record to the registrar within 10 days, as contemplated by rule 7A(2)(b). On 18 August 2011, the registrar of this Court notified the state attorney that the Bargaining Council had filed the record, comprising a compact disc and the contents of its file. On 22 August 2011 Mr Manuel sent a letter to the Bargaining Council in the following terms:[3]

[3] Grammar as in original.

> "Kindly indicate what is contained on the CD filed, more specifically which of the proceedings are contained since there had been a number of hearing, does the CD filed contain the recording of the proceedings of 10 May 2011?"

[26] Why Mr Manuel could not have listened to the CD to ascertain what was on it, he does not explain. Nevertheless, on 26 August 2011 – a week after he had received the record – Mr Manuel instructed a legal transcription service to transcribe the recording. Those transcribers informed him -- he does not say when – that the recording related to proceedings of 26 November 2010, and not to the relevant hearing on 6 May 2011. On 1 September 2011 Manuel wrote to the Bargaining Council again, and asked it for the correct CD containing the recording of the proceedings of 6 May 2011. He also pointed out that some of the pleadings, and the Dickinson respondents' bundle of documents comprising 339 pages, had not been delivered. On 18 October 2011 the Bargaining Council's Lulu Malatji sent Manuel an email saying:

> "Kindly note that the Commissioner Sam Plaatjies is struggling to copy recordings on to a CD, therefore he suggests we conduct reconstruction of incomplete record, can I schedule the matter for reconstruction?"

[27] Manuel offers no explanation for his failure to conduct such a reconstruction exercise over the course of the next two months. Instead, he says:

> "In due course and on 14 December 2011, the registrar informed our offices that a further CD had been filed with the registrar. However, the remaining documents listed at paragraph 4 of [Manuel's letter of 1 September 2011] were still not filed by the [Bargaining Council]."

[28] Manuel then suggests that "given the time of the year" he could only instruct transcribers to transcribe the recording of the proceedings on 5 January 2012. He does not explain why this should be so, for example, whether the transcribers' offices were closed. Thereafter, he says, "counsel was briefed to prepare the supplementary affidavit without the 'documents portion' of the record." He does not say who that counsel was, nor why it should have taken more than two months to draft a supplementary affidavit comprising six pages. He claims that the

supplementary affidavit was finalised by 13 March 2012; however, he "did not immediately file it as the record was still deficient" since the Bargaining Council had not filed the documents he had asked for previously. Not only did Mr Manuel not file the record "immediately", though, he did nothing more to reconstruct it. He says somewhat coyly in his affidavit:

> "It however seems that I neglected to do this for some months until the Dickinson applicants' newly appointed attorneys Webber Wentzel contacted me after 25 July 2012, when they came on record, calling upon the applicant to file the record. It would seem that unfortunately due to the work pressure emanating from my litigation practice in which I am the attorney of record in several hundred matters proceeding with this task had somehow slipped through the cracks."

[29] Astonishingly, even after Webber Wentzel had alerted him to his inaction, Mr Manuel remained in automatic mode. By the time the Dickinson respondents filed the application to compel on 4 September 2012, he had still done nothing further, other than having obtained the Dickinson respondents' documents from their attorney, Mr Deon Visagie, "during August 2012" – but still he did not file the record. He only did so after the application to compel had been delivered.

[30] In the circumstances of this case, the lengthy delay will not lead to any particular prejudice to the respondents. The parties are *ad idem* that the arbitration ruling should be reviewed and set aside and that this Court should substitute its own ruling for that of the arbitrator. To the extent that the negligence of the applicant's attorney has prevented the matter from proceeding expeditiously, this can be addressed by an appropriate costs order.

[31] Condonation is granted for the late filing of the record and supplementary affidavit.

Evaluation of the merits

[32] The respondents do not take issue with the contents and terms of the relevant collective agreement. Their complaint is that the applicant had

incorrectly interpreted or applied the agreement in relation to their translation.

[33] The applicant argues that the Bargaining Council did not have jurisdiction to consider this question. Its argument is that the question before the arbitrator was an unfair labour practice claim and that the jurisdictional facts which must be present before the arbitrator can hear such a claim relating to a promotion or demotion were absent.

[34] The question of jurisdiction must be determined on the pleadings, as recently discussed by this Court in *PSA obo Liebenberg v Department of Defence & Others.*[4] As Van der Westhuizen J stated in *Gcaba:*[5]

> "Jurisdiction is determined on the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case."[6]

[35] A similar point was made by Nugent JA in *Makhanya v University of Zululand:*[7]

> "[T]he claim that is before a court is a matter of fact. When the 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. When the claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.
>
> ...
>
> We know this [ie, what the claim is] because that is what it says in the particulars of claim. Whether the claim is a good one or a bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law."

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[4] Case No C 938/11, 30 November 2012.

[5] *Gcaba v Minister of Safety & Security and Others* 2010 (1) SA 238 (CC); [2009] 12 BLLR 1145 (CC) para [75].

[6] See *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC); [2008] 2 BLLR 97 (CC).

[7] 2010 (1) SA 62 (SCA) paras [71] and [95].

[36] And, as the Supreme Court of Appeal noted in *South African Maritime Safety Authority v McKenzie*:[8]

> "Once more, as in other cases that have become before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in *Gcaba v Minister of Safety & Security and Others*, the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded, but could possibly arise from the same facts."

[37] Could the Bargaining Council deny the PSA access to that forum, based on the referral to it? It has jurisdiction to decide a claim based on the application of the collective agreement. Whether it is a good or a bad claim, is a different question.[9] But was this referral framed as an application dispute?

[38] In the present case, the Dickinson respondents formulated the main claim before the Bargaining Council as one concerning the application of Resolution 1 of 2008, although it was somewhat imprecisely formulated in their statement of claim. If that was the true nature of the dispute, the Bargaining Council had jurisdiction to consider it in terms of section 24 of the LRA.

[39] The alternative claim of an unfair labour practice is the more contentious one. If the OSD has been correctly applied, *caedit questio.* If the effect is unfair – and even if it leads to the unintended consequence of a *de facto* demotion for the PSA's members – that is the consequence of a bad bargain that the trade union had struck with the employer. Its members must live with the consequences, good or bad.

[8] 2010 (3) SA 601 (SCA) para [7].

[9] For a full discussion of the jurisdictional question, see Steenkamp and Bosch, "Labour Dispute Resolution under the 1995 LRA" in Le Roux & Rycroft (eds), *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (Juta 2012).

[40] As this Court recently found in an analogous case[10], the arbitrator had no jurisdiction to deal with any unintended consequences of the agreement. In *Strauss*, I referred to this *dictum* in *IMATU v SALGBC & others*[11]*:*

> "An elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. ... The bargain, however, stands, unless it is manifestly unconstitutional, a submission not made in these proceedings."

[41] In *Mzeku & ors v Volkswagen South Africa & ors*[12] this court confirmed that a collective agreement is binding on all union members, even those who are in dispute with their own union about its terms. The only limitation on the primacy of collective agreements is where a term is unlawful or unconstitutional. Thus, in *SACCAWU v Shakaone & others*[13] the Labour Appeal Court held that a collective agreement may not override statutory provisions; and in *Larbi-Odam v MEC for Education*[14] the Constitutional Court held that, where the effect of an agreed provision was to unfairly discriminate, its origin in a collective agreement would not constitute a justification.

[42] Even where a party had referred an interpretation and application dispute to a bargaining council, it was incumbent on the arbitrator to decide what the real dispute was. In *Minister of Safety & Security v SSSBC and Others*[15] the employee applied for a transfer within the South African Police Services (SAPS). It was refused. He referred a dispute about the interpretation and application of a collective agreement[16] dealing with SAPS's transfer policy and procedures to the Safety and Security Sectoral Bargaining Council (SSSBC). He challenged the decision of SAPS to refuse his application for transfer. The issue before the LAC was whether

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[10] *PSA obo Strauss & others v Minister of Public Works & others* (Case No C 381/12, 20 March 2013).

[11] (2010) 31 *ILJ* 1407 (LC) para [13].

[12] [2001] 8 BLLR 857 (LC).

[13] [2000] 10 BLLR 1123 (LAC).

[14] 1998 (1) SA 745 (CC).

[15] (2010) 31 *ILJ* 1813 (LAC).

[16] Safety & Security Sectoral Bargaining Council Agreement 5 of 1999.

the SSSBC had jurisdiction to deal with the dispute. And that issue had to be determined by how the court answered the further question, whether or not the arbitrator correctly classified the dispute before him as one concerning the interpretation and application of a collective agreement. It was accepted by both parties that, if the dispute was a dispute about the interpretation or application of a collective agreement, the SSSBC had jurisdiction in respect of the dispute; but that, if the dispute was about the fairness of the transfer, the SSSBC did not have jurisdiction.

[43] On the same day as it handed down judgment in *SSSBC,* the LAC handed down judgment in *Johannesburg City Parks v Mpahlani NO & others*[17] *("City Parks").* In *City Parks*[18] the court offered the following explanation between "a dispute" and "an issue in a dispute":

> "[14] There are a number of areas in the LRA with references to disputes or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are ss 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be answered in order to resolve the main dispute. Let me make an example to illustrate the distinction that I seek to draw between *a dispute* and *an issue in a dispute*. One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether the dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for

[17] (2010) 31 *ILJ* 1804 (LAC).

[18] *Supra* paras [14] – [16].

operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement are applicable and/or compiled with before the employer was dismissed is an issue necessary to be decided in order to resolve the real dispute.

[15] In the above example it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of, resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It would be different, however, where the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute is required to be resolved through arbitration in terms of the LRA.

[16] The proposition advanced by counsel for the appellant made no distinction between a dispute, on the one hand, and an issue in a dispute, on the other. That is why the appellant's counsel was driven to submit that all disputes which are dealt with by a bargaining council are disputes about the application of a collective agreement because the procedures for dealing with such disputes are provided for in a collective agreement. Obviously, this proposition can simply not be correct. In bargaining councils, proceedings are held that are about all kinds of disputes such as proceedings about dismissal disputes, proceedings about disputes concerning the interpretation or application of collective agreements, proceedings concerning disputes about organizational rights, proceedings about wage disputes and proceedings concerning other disputes."

[44] In *SSSBC*, the court applied the same reasoning. It found that the dispute that was before the arbitrator in that case was a dispute concerning the fairness or otherwise of SAPS's refusal to approve the employee's application or request for a transfer and the application of the provisions of the collective agreement was an issue in dispute. It was an issue which had or may have had to be dealt with in order to resolve the real dispute. That is the main dispute. The dispute itself did not relate to an application of the collective agreement. The court concluded that the Bargaining

Council did not have jurisdiction to arbitrate the dispute because that was a dispute concerning the fairness or otherwise of the decision not to approve the employees application for a transfer.

[45] This Court applied similar reasoning in *SA Onderwysersunie v Head of Department, Gauteng Department of Education & others (1)*[19], having referred to *City Parks* and *SSSBC*, when it held:

> "It appears to me that the main dispute in this urgent application is not the interpretation and application of a collective agreement. The relief sought is for the head of department to refund the money deducted from the applicants' members pending the compilation of a factually correct database. In the course of deciding whether the applicants are entitled to the relief sought, I have to consider various undertakings by the GDE, some of which are contained in collective agreements of the PSCBC. Those agreements form part of the issues in dispute; but the main dispute is not the interpretation or application of a collective agreement."

[46] In the case before me, the main dispute is the application of Resolution 1 of 2008. The Bargaining Council had jurisdiction to deal with that dispute. It did not have jurisdiction to deal with the alternative claim of an unfair labour practice involving a demotion. If the OSD was applied correctly, the Bargaining Council cannot determine whether it was unfair. It is a collective agreement and the parties are bound by its terms.

Conclusion

[47] In my view, the Bargaining Council would not have jurisdiction to consider whether the OSD – a collective agreement and the product of collective bargaining – was implemented fairly; however, it would have jurisdiction to consider whether it was applied correctly. That is a dispute about the interpretation or application of collective agreement envisaged by section 24 of the LRA.

[48] In general, of course, the Bargaining Council does have jurisdiction over unfair labour practice disputes in terms of section 186(2)(a). If a party refers an unfair labour practice dispute to the Bargaining Council, that

[19] (2011) 32 *ILJ* 1413 (LC) para [38].

party will have to establish whether the employer did commit an unfair act relating, for example, to the promotion or demotion of the employee. In this case, that is what the Dickenson respondents alleged in the alternative. But that alleged unfairness arose from the implementation of the collective agreement itself. If the OSD was correctly applied, the arbitrator did not have jurisdiction to decide whether it amounted to an unfair labour practice.

Costs

[49] Although some of the delay in delivering the record and supplementary affidavit in terms of rule 7A can be ascribed to the Bargaining Council, much of it is due, as I have set out under the heading of "condonation", to the state attorney, and specifically Mr Leon Manuel. It led to the Dickenson respondents having had to bring an application to compel the applicant to comply with the rules. In those circumstances, the applicant should, at the very least, be ordered to pay the costs of the application to compel. I shall leave it to the applicant and the state attorney to decide whether those costs should be paid by the Department or by the state attorney; in either event, unfortunately, it is the taxpayer that will bear the brunt.

[50] There is a further aspect relating to costs, and that is the prolix documentation filed by the applicant. The record comprises more than 500 pages. Very little of that was relevant to the review application, given that this application was mainly argued on a crisp legal point. Having trawled through more than 500 pages of record and 200 pages of pleadings, the Court was referred to no more than about five pages in the record that were relevant to this application.

[51] Rule 7A(5) specifically addresses the question of the portion of the record to be filed[20]:

> "The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct."

And rule 7A(6) reiterates that:

[20] My underlining.

> "The applicant must furnish the registrar and each of the other parties with a copy of the record or a portion of the record, as the case may be, and a copy of the reasons filed by the person or body."

[52] Rule 7A(7) contemplates that the costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause. Given the failure of the applicant and its attorneys to apply their minds to which portions of the record were necessary, and then blaming their delay in filing the record on waiting to obtain documents that were largely irrelevant, the applicant must pay the costs contemplated by rule 7A(7), regardless of the overall cost order I intend to make.

[53] With regard to the costs of this application for review, no costs order would be appropriate as the parties agreed that the arbitration award should be reviewed and set aside and that this Court should replace its own ruling for that of the arbitrator.

Order

I therefore make the following order:

53.1 The arbitration ruling of the first respondent dated 10 May 2011 is reviewed and set aside.

53.2 The ruling is replaced with a ruling that the Bargaining Council does not have jurisdiction to arbitrate an unfair labour practice dispute arising from the application of Resolution 1 of 2008. The Bargaining Council does have jurisdiction to arbitrate a dispute over the interpretation and application of that Resolution in terms of section 24 of the Labour Relations Act.

53.3 The applicant is ordered to pay the costs occasioned by the third to ninth respondents in their application to compel of 4 September 2011, as well as the costs contemplated by rule 7A(7).

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AJ Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	CS Kahanovitz SC Instructed by the State Attorney.
THIRD TO NINTH RESPONDENTS:	TJ Golden Instructed by Webber Wentzel.
TENTH TO EIGHTEENTH RESPONDENTS:	Adams & May attorneys.