REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

D305/2013

In the matter between:

SERGEANT BHEKITHEMBA DUMISANI MADONDO **Applicant**

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

R M LYSTER N.O. **Second Respondent**

PUBLIC SERVICE CO-ORDINATING

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

Heard: 7 January 2015

Delivered: 28 January 2015

Summary: Bargaining Council arbitration proceedings -Review of proceedings. Decision of arbitrator on jurisdictional issue- test for review-not limited to the Sidumo test-Determination as to whether decision right or wrong-Determination of issues *de novo.*

Bargaining Council Agreement- Provisions requiring exhausting of internal remedies-The duty to exhaust internal remedies - a valuable and necessary requirement in our law.

Procedure-Allowing a party to raise a new cause of action in argument-Court has a discretion in review proceedings to consider same-Principle involved in exercising discretion is one of fairness-Discretion exercised against allowing new cause of action to be raised at argument stage.

JUDGMENT

PRIOR, AJ**:**

Introduction

[1] This matter concerns an application in terms of section 158 (1) (g) of the Labour Relations Act [1] read with section 145 (2) (a) (ii) for the review of an award handed down by the second respondent ("the arbitrator") on the 13th March 2013 wherein the arbitrator upheld a point *in limine* in favour of the third respondent that no appeal had been lodged by the applicant against his dismissal and that in essence this internal procedure had to be exhausted before the first respondent would have jurisdiction to arbitrate the dispute.

[2] The applicant seeks an order setting aside the award and in his notice of motion sought an order setting aside the award and referring the matter back to the bargaining council ("the first respondent") for arbitration to be conducted by an arbitrator other than the second respondent.

The Material Facts

[3] The issue for determination is a very narrow one. The dispute between the parties relates to a provision in a collective agreement which specifies certain procedures to be followed by a party referring a dispute of right (including one relating to an unfair dismissal) for arbitration before the bargaining council.

[4] It is common cause that on the 13th October 2010 and after the conducting of a disciplinary hearing which lasted several days the applicant was dismissed by the third respondent for serious misconduct. It appears from the record that despite the dismissal on that day the dismissal was only confirmed by the third respondent's Provincial Commissioner on the 18th November 2010.

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

[5] The facts relating to the fairness or otherwise of the dismissal are not relevant for the purposes of this review.

[6] By way of a pre-arbitration agreement entered into between the applicant's legal representatives and the third respondent's in house legal representative the parties agreed that the second respondent would be called upon to decide two issues, namely (i) whether an appeal was lodged to the third respondent's appeal authorities, following the applicant's dismissal in October 2010 and (ii) if it was not lodged, whether the first respondent assumed jurisdiction to entertain the matter.

[7] Evidence was led by the parties in respect to the first question and argument was addressed to the arbitrator in respect of the second question.

The third respondent's case at the arbitration as to whether an appeal was lodged.

[8] The third respondent led two witnesses to show that the applicant did not lodge an appeal as provided for in the SAPS Disciplinary Regulations which specified that an aggrieved employee was to lodge an appeal within ten (10) days of being aware of the decision to dismiss.

[9] One of the witnesses that were called by the third respondent was one Constable S Khoza ("Khoza") an official with POPCRU, the applicant's trade union, who represented the applicant at the latter stages of the disciplinary hearing.

[10] Khoza's evidence was to the effect that:-

10.1 Despite advising the applicant immediately after him being advised of the dismissal that he had the right of appeal the applicant appeared singularly disinterested in doing so advising Khoza that "the people he was going to drive with were in a hurry to leave."

10.2 Khoza heard nothing from the applicant until he much later received a telephone call from the applicant's wife who enquired whether he had received a call from someone from the Magistrates Court's Maintenance Office enquiring into the applicant's dismissal. Khoza advised the applicant's wife that he had not received a call and that he

had not seen the letter of confirmation dealing with the applicant's dismissal.

10.3 Khoza was later contacted by a Mr Shangase, an attorney, who enquired as to whether an appeal was lodged by him and when he stated that he had not done so Khoza avers that Mr Shangase suggested to him that he, Khoza, should state that he had lodged an appeal and that it had got lost in provincial office. Khoza refused to accede to this request.

10.4 The upshot of Khoza's evidence was that he had been a trade union representative since 2008, had assisted many employees in their disciplinary hearings and appeals, that the applicant would have been required to sign an appeal form and that the applicant neither signed an appeal form nor instructed him to lodge an appeal.

[11] The second witness called by the third respondent was Captain E. Singh who worked in the Provincial Discipline Unit and was responsible to closely monitor disciplinary cases including the receipt of appeals whereupon a file would be opened and an appeal tribunal convened.

[12] Singh's evidence was to the effect that:-

12.1 He had issued a letter on the 25th November 2010 confirming that the applicant had lodged an appeal and that the applicant was to continue to receive salary pending the outcome of the appeal.

12.2 He explained however, that he had made an error in that when he had received the information that the applicant had been dismissed he assumed, wrongly, that the applicant had appealed. The situation was later rectified when he realized his error and a further letter was sent out on the 7th November 2011 advising that the applicant had not appealed.

[13] The gravamen of Singh's evidence was that the first letter confirming that an appeal was lodged was sent out in error and that to his knowledge no appeal had been lodged by or on behalf of the applicant.

[14] It appears from the record that these witnesses were not taxed at all under cross examination.

The applicant's case at the arbitration as to whether an appeal was lodged.

[15] The applicant gave evidence which can be summarized as follows:

15.1 Khoza had represented the applicant for at least two days of the disciplinary hearing but that he was confused as to which part of these proceedings this was as Khoza was speaking in legal terms to the chairperson.

15.2 The applicant was adamant, however, that Khoza was not present when the dismissal was announced to him.

15.3 The applicant telephoned Khoza after the dismissal and was advised by Khoza that he was not to worry and that an appeal had to be made, that the appeal was usually within ten days and that he would lodge the appeal on the applicant's behalf.

15.4 The applicant admits that he did not follow up with Khoza and that it was only after his pay stopped that the applicant started making enquiries with the third respondent as to what had transpired.

15.5 In following up the matter the applicant received the letter of November 2010 advising him that an appeal had been lodged and that his pay should continue.

15.6 The applicant advises that despite this letter his pay had stopped and that was when he contacted Khoza to get his pay reinstated and on this occasion that the applicant alleges he was advised by Khoza that he was awaiting the outcome of the appeal.

15.7 When the applicant received the letter in November 2011 countermanding the first letter and advising that an appeal had not been lodged he was shocked and that was when the applicant decided to lodge a dispute with the first respondent.

15.8 Strangely and despite the events preceding the lodgement, the dispute that was lodged on the 31st January 2012 was in respect of a dispute

relating to incapacity issue and was lodged on the applicant's behalf by a Ms. Gama, the applicant's friend.

[16] The second witness that was called by the applicant was the applicant's wife, Ms. K Mazibuko.

[17] Mazibuko's evidence related to the apparent exchanges with Khoza over the telephone in connection with a maintenance hearing at the Magistrates Court and in essence this had little or no probative value.

[18] Both parties then proceeded to address the second respondent on the provisions of the first respondent's constitution in respect of which it appeared that the parties were *ad idem* constituted a collective agreement.

The third respondent's position with regard to the issue of law, "the exhausting of internal remedies*."*

[19] The third respondent's argument was as follows:-

19.1 The SSSBC collective agreement was binding on the parties.

19.2 The wording in the dispute resolution provisions state categorically that employees must exhaust their internal remedies before lodging a dispute.

19.3 The relevant wording in clause 3.2 of the schedule to the constitution was peremptory.

The applicant's position with regard the issue of law "the exhausting of internal remedies."

[20] The applicant's argument in contradistinction was that neither the LRA or the collective agreement made it peremptory for the applicant to first lodge an appeal before referring a dispute to the bargaining council and that the collective agreement only provided guidelines which were not binding on the parties.

The award

The question of whether an appeal was lodged.

[21] The arbitrator found that:-

21.1 The evidence showed that the applicant had no knowledge as to whether in fact an appeal was lodged. There was no evidence led by the applicant that he had met with Khoza to traverse the grounds of the appeal or to sign a notice of appeal.

21.2 Khoza was a good witness and that his evidence was to the effect that he had not lodged an appeal and that without the applicant's signature to the notice he could not advance the appeal himself. Khoza testified that the Applicant did not seem interested in appealing.

21.3 As a member of the trade union POPCRU and representing the applicant there was no rational reason for Khoza to lie and turn his back on the applicant to give evidence to the effect that he not lodged the appeal when he had.

21.4 The explanation given by Captain Singh as to the error in writing the first letter confirming that the applicant had filed an appeal was accepted. There was no rational reason for Captain Singh to lie about the receipt of an appeal.

21.5 As a consequence, the arbitrator found that it was overwhelmingly improbable that an appeal was lodged.

The question of the issue of law "the exhausting of internal remedies*."*

[22] The arbitrator found that:-

22.1 There was no doubt that the collective agreement was binding on the parties. Section 31 read with section 32 of the LRA specifically provides that a collective agreement binds the parties to the bargaining council and by extension non-parties.

22.2 Clause 2 of Schedule 8 to the LRA recognizes the primacy of a collective agreement and that the Code is not intended as a substitute to disciplinary codes and procedures that are the subject of collective agreements.

22.3 Clause 3.2 read with clause 1.5 (b) and (c) of the collective agreement uses mandatory language which obliged the applicant to exhaust his internal remedies by way of the appeal before proceeding further.

[23] The arbitrator found in essence therefore that the applicant was bound to lodge an appeal before proceeding with his referral to the bargaining council.

The applicants' case in the review

[24] The applicant's complaint is that the award is not one a reasonable arbitrator would make in that:-

24.1 A reasonable decision maker would not have solely relied on the binding effect of a collective agreement when there are authorities which allow a departure from a collective agreement.

24.2 There exists a dichotomy between the Code of Good Practice: Dismissal contained in Schedule to the LRA and the collective agreement where the Code does not prescribe that an appeal must be lodged prior to a disputant exercising his or her right to refer a dismissal dispute to arbitration and that accordingly the LRA should take precedence.

24.3 The second respondent should not have adopted a stringent and legalistic approach on a technical point and that for considerations of fairness he ought to have dismissed the point *in limine.*

[25] In its supplementary heads the applicant raised for the first time the issue that clause 1.5 (c) of the collective agreement has an added provision, which had to be given effect to and which reads:

"Or the time period as stipulated in the relevant prescripts has lapsed."

[26] The applicant argue that this provision makes it clear that it is not peremptory for the applicant to have lodged a notice of appeal before proceeding to arbitration before the first respondent and that the second respondent should have had regard to the entire provision of clause 1.5 (c) before making his decision.

[27] It is apposite to note that in his founding affidavit the applicant does not attack the arbitrator's finding that no appeal was lodged and I submit correctly so as will become apparent in my analysis of the matter hereunder.

The third respondent's case in the review

[28] In contrast to the applicant's view, the third respondent claims that:-

28.1 The collective agreement was binding on the parties.

28.2 The provisions relating to the procedure to be followed in disciplinary matters were peremptory.

28.3 The second respondent was correct in confirming this in his award and that the applicant's legal submissions with regard to the unreasonableness of the award are unfounded and bad in law.

[29] The third respondent denies that the award is not one a reasonable arbitrator would not make.

Analysis and Evaluation

The finding in respect of the lodging of an appeal.

[30] The applicant correctly in my view does not challenge the arbitrator's finding on the question as to whether an appeal was lodged.

[31] The third respondent's witnesses gave evidence in a cogent and clear manner. They were not taxed at all under cross examination.

[32] On the other hand, the applicant was confused and unclear as to what transpired at the disciplinary hearing and certainly in connection with what transpired thereafter in relation to the noting of an appeal.

[33] On the evidence before him the arbitrator correctly found that the probabilities clearly favoured the third respondent's version and accordingly the arbitrator's finding that no appeal had been lodged was more than reasonable.

The question of the issue of law "the exhausting of internal remedies relates to a matter concerning jurisdiction

[34] What was the nature of the issue of law debated at the arbitration?

[35] It is evident from the Dispute Procedure contained in schedule 1 of the collective agreement that:-

35.1 the procedure applied to all disputes between parties and non-parties to the bargaining council [Clause 1.1];

35.2 the procedure applies to all disputes including disputes with reference to unfair dismissal or disciplinary measures short of dismissal, after the internal appeals procedure has been exhausted, or the time period as stipulated in the relevant prescripts has lapsed [Clause 1.5 (c)];

35.3 prior to any dispute of right being referred to the Council, the aggrieved employee must have exhausted all internal procedures as set out in clause 1.5 (b) and (c) above [Clause 3.2];

35.4 if a party intends raising a jurisdictional point a statement wherein the jurisdictional is raised must be served on the opposing party [Clause 3.5.1 (e)];

35.5 if during the arbitration proceedings a jurisdictional issue has not been determined, the panellist must require the parties to prove that the Council has jurisdiction to arbitrate the dispute [Clause 3.5.1 (k)].

[36] In the pre-arbitration minute filed of record the parties agreed that the application of Clause 1.5 (c) read with Clause 3.2 related to a question of jurisdiction [2].

[37] In order for the arbitrator to be able to proceed with the dispute, the agreed procedure contained in the collective agreement enjoined him to determine whether by virtue of the provisions of Clause 1.5 (c) read with Clause 3.2 he was entitled to do so.

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[2] *p.62 at para 2.1 of the record bundle*

[38] Having regard to the above considerations and despite the view that the provisions of above Clauses are more akin to a procedural bar by applying a common sense approach I am of the view that the question of law raised *in limine* at the arbitration in this matter nevertheless relates to a question of jurisdiction.

[39] The meaning of 'jurisdiction' was set out in *Graaff-Reinet Municipality v Ryneveld's Pass Irrigation Board* [3] wherein the court held that:

> 'Jurisdiction means the power or competence of a court, to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties, etc…..The best way in which a statute can indicate the jurisdiction of a court, is by stating categories of persons in respect of which it has jurisdiction, the geographical area in which such a court has jurisdiction and finally but very importantly, the matter such a court may entertain and deal with'.

[40] It is trite law that institutions such as the CCMA and bargaining councils are creatures of statute and are not Courts of law. As a general rule, they cannot decide their own jurisdiction.

[41] In *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others*[4], the Labour Appeal Court stated as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act'.

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[3] *1950 (2) SA 420 (AD) at p.424*

[4] *(2008) 29 ILJ 2218 (LAC) paras 39 to 40*

[42] In *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd*[5] it was held that:

> 'Generally speaking a superior Court always has the power to determine whether the preconditions for the exercise of a statutory power to act have been met 'even in the absence of any statutorily provided remedy by way of an appeal or review' (per Marais JA in Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A) at 751G . Where the precondition is an objective fact or a question of law, its existence is objectively justiciable in a Court of law and if the public authority made a wrong decision in this regard the decision may be set aside on review *(Minister of Public Works v Haffejee NO* at 751F-G; *Hira and another v Booysen and another* 1992 (4) SA 69 (A) at 93A-B'.

[43] The court concluded that [6]:

> 'Generally speaking, a public authority is obliged to determine the scope of its own powers before it can act (cf Baxter Administrative Law at 452). In doing so it cannot finally determine its competence, because if it wrongly decided that it had jurisdiction, its decision may be reviewed on objectively justiciable grounds. This kind of jurisdictional review does not depend on any statutorily provided remedy by way of appeal or review (Minister of Public Works v Haffejee NO at 751G-H). But, as noted above (paragraph [23]), the determination of the existence of a jurisdictional precondition may be left to the public authority itself to determine and the nature and extent of judicial review of its decision will then depend on whether the determination was left to its subjective discretion in terms of the empowering statute, or whether the determination had to be made on objective grounds'.

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[5] *(1998) 19 ILJ 557 (LAC) at para 24, [also reported at [1996] 4 All SA 355 (A); [1997] JOL 256 (A) – Ed])*

[6] *id at para 28*

[44] In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA*[7], it was said:

> '…The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds…'.

The relevant review test

[45] Snyman AJ in the matter *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abraham Mongatane and Others*[8] dealing with a jurisdictional issue held:

> 'The issue as to whether a dismissal exists is a jurisdictional fact. If there is no dismissal, then the CCMA will have no jurisdiction to determine the matter. Because of this, the review test as enunciated in *Sidumo and another v Rustenburg Platinum Mines Ltd and others* does not apply…'

[46] In the Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration*[9] *and Others* specifically interpreted the review test as determined in *Sidumo* and held as follows:

> 'Nothing said in *Sidumo*, means that the grounds of review in section 145 of the Act are obliterated The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise...'

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[7] *(1999) 20 ILJ 108 (LAC) at para 6: See too Global Outdoor Systems Ltd V Du Toit (2011) 32 ILJ1100 at para 18 and MECS Africa (Pty) Ltd v CCMA & Others (2014) 35 ILJ 745 (LC) at para 25 to 26*

[8] *[2014] JOL 31668 (LC) at paras [24] to [29]; see too Kusokhanya Electrical Constructions CC v Themba Hlatswayo N.O.& Others ZALCJHB 227 (16 September 2013) at paras [9] to [12]*

[9] (2008) 29 *ILJ* 964 (LAC) at para 101

[47] In *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen* and Others, [10] the court held:

> 'Anomalous as this may seem, I am bound by the authority in *SA Rugby*. This court also applied *SA Rugby in Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others*. In that case, dealing with a constructive dismissal, Basson J explicitly held that the question of whether a dismissal had taken place goes to jurisdiction and that the review test as laid down in *Sidumo* does not find application in reviewing a jurisdictional ruling. The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the commissioner correctly found that Van Rooyen had been dismissed'.

[48] Simply put in a matter of jurisdiction the test for review is one in which the question that is asked is whether the arbitrator was right or wrong in making that decision as opposed to test of reasonableness as set out in *Sidumo.*

[49] Accordingly, I must decide whether the arbitrator in holding that the failure to lodge an internal appeal precluded the applicant from proceeding with the referral was right or wrong. Snyman J in the *Kusokhanya Electrical* matter suggests that I am enjoined to consider the issue *de novo* and I see no reason to deviate from that guidance.

[50] Having come to the conclusion that I have, it is nevertheless common cause that this matter was argued on the basis of the reasonableness test set out in *Sidumo*.

[51] What has occupied my mind is whether a distinction can be drawn within the concept of jurisdiction as to whether an issue of jurisdiction can be divided into those issues governed by the application of substantive law and those issues which relate to a simple procedural bar to which the parties are bound in terms of an agreement such as a collective agreement and whether that

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[10] *(2012) 33 ILJ 363 (LC) at paras 22-23*

distinction would dictate which review test to apply. The notion would be that for substantive jurisdiction issues the test would be whether the decision was right or wrong whereas for a procedural bar issue the test would be whether the decision was reasonable.

[52] The concept of distinguishing between substantive and procedural jurisdictional issues is not novel. In the matter of *Sekunjalo Investments Ltd v Mehta and Others*[11] the Court held:

> 'The other approach is found in the view that the bar to raising a jurisdictional point is limited only to where the conciliating commissioner in issuing the certificate had discretion to exercise over any jurisdictional point that may have been in existence, like granting condonation as was the case in *Fidelity Guards*. Thus in my view the approach adopted in *Fidelity Guards* applies in instances involving what I would refer to as procedural jurisdictional points. The issue raised by the applicant concerns the substantive issue of whether or not there existed an employment relationship between it and the first respondent. Thus the jurisdictional point raised in this matter is different to the one which was raised in *Fidelity Guards*, (*supra*)'.

[53] In an analogous situation relating to prescription/limitation statutes in the matter *Society of Lloyd's v Price: Society of Lloyd's v Price* [12] the Supreme Court of Appeal held:

> **'**A distinction has traditionally been drawn, in both South African and English law, between two kinds of prescription/limitation statutes: those which extinguish a right, on the one hand, and those which merely "bar" a remedy by imposing a procedural bar on the institution of an action to enforce the right or to take steps in execution pursuant to a judgment, on the other. Statutes of the former kind are regarded as substantive in nature, while statutes of the latter kind are regarded as procedural'.

[54] It would appear to be correct therefore to hold that the issues of jurisdiction in the above cases namely *SA Rugby Players Association, SA Commercial*

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[11] *[2010] ZALCJHB 25 at paras 15 and 17*

[12] 2006 (5) SA 393 (SCA) at para 10

Catering and Allied Workers Union, Zeuna-Starker Bop (Pty) Ltd and Asara Wine Estate and Hotel (Pty) Ltd related to the application of substantive law and that the issue of jurisdiction in these cases was not adjectival in nature.

[55] Having regard to the cases above and applying the principles enunciated there from I am of the view that the jurisdictional issue contained in Clause 3.2 read with Clause 1.5 (c) is distinguishable from the statutory precepts one encounters in the LRA which relate to jurisdiction and which are substantive in nature.

[56] In all of the instances above non-compliance ousts the jurisdiction of either the CCMA, bargaining council or the Court.

[57] I am of the view therefore that the jurisdictional issue in Clause 3.2 read with Clause 1.5(c) 'merely constitutes a bar to a remedy' and is akin to the imposition of 'a procedural bar on the institution of an action to enforce the right' as enunciated in the case of *Society of Lloyds ibid*.

[58] The effect of having to exhaust internal remedies as provided for in the above provisions does not extinguish the applicant's right to proceed to the bargaining council to determine the alleged unfair dismissal, it simply required the applicant to take a compulsory procedural step before doing so.

[59] In section 191 (10) of the LRA an example of a procedural bar is encountered. When dealing with the powers of the director of the CCMA to decide upon whether a dispute should be referred to the Labour Court for adjudication or arbitration no person may apply to any court of law to review this decision until such time as the matter may be adjudicated upon or arbitrated. In the matter of *MTN (Pty) Limited vs Pravin Pragraj and Another*[13] the Labour Appeal Court found that this section did not fall into the category of ouster clauses proper but that:

> 'In my view s 191 (10) does not fall within this description, it merely prescribes the procedure which has to be followed'.

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[13] *[2002] ZALAC 2 (1 Feb 2002) at para 5*

[60] In essence the award handed down by the arbitrator did not and does not extinguish the applicant's right to file an appeal (obviously with the requisite application for condonation) [14] against his dismissal and then proceed to lodge his referral to the bargaining council. Whereas the applicant's prospects of success at first blush appear doubtful, the merits of the condonation would have to be determined by the third respondent's appeal tribunal.

[61] Having established that despite the fact that the Courts have distinguished between substantive and procedural issues of jurisdiction there does not appear to be any cases (which I have found) which hold that the test for review should be different from the test enunciated in cases *SA Rugby Players Association, SA Commercial Catering and Allied Workers Union, Zeuna-Starker Bop (Pty) Ltd and Asara Wine Estate and Hotel (Pty) Ltd.* Accordingly, I will proceed to deal this matter under the question as to whether the arbitrator's decision was right or wrong.

Was the arbitrator's decision right or wrong?

[62] Applying the test, I am of the view that the arbitrator was right in coming to the decision he did. I say so for the reasons that follow hereunder.

[63] The SSSBC collective agreement bound the parties to the said agreement including the applicant and the collective agreement has primacy[15].

[64] The duty to exhaust internal remedies before proceeding to determination of a dispute or cause of action is well settled in our law.

[65] In the matter of *Koyabe and Others v Minister of Home Affairs and Others,*[16] the Constitutional Court in dealing with the requirement to exhaust internal remedies as provided by the Promotion of Administration Act 3 of 2000 ("PAJA") held:

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[14] *Regulation 17(5) of the SAPS Disciplinary Regulations of 2006 published under R643 in GG 28985 on the 3rd July 2006*

[15] *Sections 31, 32 and Item 1 (2) of Schedule 8 of the LRA*

[16] *2010 (4) SA 327 (CC) at paras [38] to [39]*

> 'The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny.
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> PAJA recognises this need for flexibility, acknowledging in section 7(2) (c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue…'

[66] In the matter of *Dengetenge Holdings (Pty) Limited v Southern Sphere Mining and Development Company Limited and Others*[17] the Constitutional Court held:

> 'Section 96(3) and section 7 of PAJA are framed in peremptory terms, which is an indication, in my view, that their requirements should be observed, except in circumstances where an exemption is granted. With regard to section 7 of PAJA, Hoexter says: "These are stringent provisions cast in peremptory language. Review is prohibited unless any internal remedy provided for in any other law has been exhausted. The court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty only in exceptional circumstances where it is in the interests of justice to do so'.

[67] In the matter of *Nichol and Another v Registrar of Pension Funds and Others*[18] the Supreme Court of Appeal held:

> 'Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted. However, as is pointed out by Iain Currie and Jonathan Klaaren, 'by imposing a strict duty to exhaust domestic

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[17] *2014 (5) SA 138 (CC) at para [132]*

[18] *2008 (1) SA 383 (SCA) at para [15]*

remedies, [PAJA] has considerably reformed the common law'. It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(c).

Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given'.

[68] In the matter of *Kgotso v Free State Provincial Government and Another*[19] Francis J as he then was held:

'In keeping with these provisions, annexure A to the constitution of the Bargaining Council provides special machinery for dispute resolution within a specialist forum. This procedures are designed to be expeditious and inexpensive. They form part of a collective agreement deliberately entered into between parties to the Bargaining Council. In the matter of *IMATU v Northern Pretoria Metropolitan Substructure and Others* 1999 (2) SA 234 (T) the court examined comprehensively the status of the agreements and procedures of this kind. The court conducted a careful analysis of the position' at common law of a private arbitration agreement and held inter alia, that the creation by the Legislature of specialist dispute resolution for a created a system that was all embracing and left no room for intervention of another court. There are a number of Labour Court decisions that indicate that the dispute resolution procedures of the Bargaining Council should be followed. In this regard see *Dladla V MEC for Gauteng Department of Education* [2001] 9 BLLR 1051 (LC); Koka v Director General: Provincial Administration, North West Government [1997] 7 BLLR 874 (LC). I align myself with the abovementioned decisions'.

[69] The Applicant relied on the decision of *Highveld District Council v CCMA and Others,* [20] in an attempt to persuade me that the collective agreement is

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[19] [2006] 7 BLLR 664 (LC) At paras 18-20 (see also *Mgijima v Eastern Cape Appropriate Technology Unit & A* 2000(2) SA 291 (Tk) at 302G-H; *Ampofo & Others v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province & Another* 2002 (2) SA 215 (T) at paragraph [46]).

[20] *(2002) 12 BLLR 1158 (LAC)*

merely a guide to the dispute resolution process and that a deviation therefrom was permissible especially where such agreed process is unfair.

[70] I decline the applicant's invitation. Firstly the Labour Appeal Court in the *Highveld District Council* matter dealt with the issue of whether an agreed collective agreement procedure was fair or not, which is not germane to the issue in dispute in this matter and secondly it has never been the applicant's case that the requirement to exhaust an internal procedure was unfair.

[71] I find therefore, there exist no exceptional circumstances in this matter to hold that the parties to the collective agreement are not bound thereby. There is a specific purpose to parties agreeing internal procedures which are designed to be expeditious and inexpensive. To regard the internal procedures contained in the SSSBC collective agreement as merely being a guideline would not be in the correct nor in the interests of justice. I accordingly, find that the applicant was obliged to exhaust his internal remedy of an appeal before launching proceedings before the bargaining council.

[72] It is necessary to deal with the ground raised by the applicant in its heads of argument for the first time, namely that the second respondent failed to have regard to the entire provision of Clause 1.5 (c) which contains a further sentence which reads, 'or the time period as stipulated in the relevant prescripts has lapsed'.

[73] I need to decide whether the applicant should be permitted to raise this issue which was not raised or argued at the arbitration and not raised in the applicant's founding or replying affidavits but raised for the first time in the applicant's supplementary heads of argument.

[74] I believe that in deciding this issue, I have a discretion to allow this ground of review which discretion I must exercise judicially taking into consideration all the circumstances in this matter.

[75] In the case of *SA Police Service v Solidarity obo Barnard and Others*[21] the Constitutional Court referred, with approval, to the judgment in the matter of *Fischer v Ramahlele*[22] where the Supreme Court of Appeal held:

> 'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i) it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct proceedings…'

[76] The Constitutional Court went on to add: [23]

> 'Allowing a party to raise a new cause of action on appeal is a matter of discretion. The court of appeal may exercise its discretion to permit a party to do so if it will not be unfair to the other parties. Permission will ordinarily be granted where the cause of action was foreshadowed by the pleadings and established by facts on record. This is not the position here.
>
> The pleadings did not cover the review of the National Commissioner's decision on the grounds that he failed to take into account Ms Barnard's personal circumstances or that the reasons given for the decision were insufficient. This matter was also not canvassed fully in evidence because Ms Barnard had pursued an equality claim and not the review of the impugned decision.
>
> On what basis then may this Court allow her to raise a different and new cause of action? I am unable to find any. In *Barkhuizen*, this Court affirmed the principle of fairness on the exercise of discretion. Here is the formulation of the principle:

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[21] *(2014) 35 ILJ 2981 (CC) at para 210*

[22] *2014 (4) SA 614 (SCA) at para 13.*

[23] *SA Police Service v Solidarity id at para [213] to [214]*

> 'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial'.

[77] It is self-evident from the material before me, including the record and the pre-arbitration minute, that the issue regarding the meaning of the relevant sentence that the applicant now seeks to introduce, was not within the contemplation of either of the parties at the time, was not an issue in dispute and was not an issue that the arbitrator was called upon to determine.

[78] It is clear that the third respondent did not have an opportunity to respond to the averments in this regard and did not even file supplementary heads dealing with this aspect. Mr. Molotsi tried to convince me from the bar that when the matter appeared before this Court on the 11th July 2014, the matter was adjourned *sine die* due to this issue being raised at that stage.

[79] I do not see how this information, even if I was to accept the same from the bar, assists the applicant. If the issue was germane at that stage why did the applicant not simply file a supplementary affidavit instead of only raising the issue in supplementary heads which were filed as late as the 1st October 2014? It remains an inescapable fact that this new cause has not been pleaded at all or indeed even responded to.

[80] Mr. Molotsi, to his credit, nevertheless tried to argue that the arbitrator was obliged, in the discharge of his duties, to have regard to the whole collective agreement and that the arbitrator committed an irregularity in not doing so. I disagree.

[81] In the matter of *Yao Ying Metal Industries (Pty) Limited v Pooe NO and others*[24] the Supreme Court of Appeal opined:

> 'The task of an arbitrator is a demanding one. It is made more demanding by the absence of formality that characterises the resolution of labour disputes. It is important that an arbitrator, notwithstanding the absence of formality, ensures at the outset that the ambit of the dispute has been properly circumscribed, even if the dispute has many facets, for that defines the authority that the arbitrator has to make an award. The authority of an arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid. [my emphasis] As pointed out by Mustill and Boyd in the context of commercial arbitration (but the principle is equally applicable to labour arbitrations):'If (an arbitrator) awards on issues which have not been left to him for decision, he commits misconduct and may also be acting in excess of jurisdiction'.

[82] The Supreme Court of Appeal[25] went on to add:

> 'The same point was made in Produce Brokers (cited with approval in McKenzie):
>
> 'The binding force of an award must depend in every case on the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission, the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission'.
>
> An award may also not be founded on matters that occur to the arbitrator but that the parties have had no opportunity to address. That is simply an application of the principles of natural justice, and in particular the right to be heard, that are now formalised in the Promotion of Administrative Justice Act 3 of 2000.'

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[24] *[2007] 3 All SA 329 (SCA) at paras [5]. I am aware that this matter was overturned in the Constitutional Court however the principles enunciated above do not appear to have been disturbed by the Constitutional Court. See (2008) 29 ILJ 2461 (CC)*

[25] *Id at para [6]*

[83] In *NUMSA v Driveline Technologies* (*Pty*) *Ltd and Another* [2000][26] Zondo AJP as he then was and after a review of all the authorities, stated that as a point of departure, it should be accepted that courts would ordinarily hold litigants to a pre-trial agreement recorded in a pre-trial minute or issues therein.

[84] Zondo AJP further held that if a party wished to introduce another defence to the one pleaded, that party would usually be required to apply for an amendment first. The other party would then consider such amendment in due course and decide whether to oppose it or not. There might even be cases where parties agree in a pre-trial minute that a cause of action, for example, that has not been covered by the pleadings cannot be introduced later even by way of amendment.

[85] In the matter *Filta-Matix* (*Pty*) *Ltd v Freudewberg and Others*[27] (*per* Harms JA (as he then was) held:

> 'If a party elects to limit the ambit of his case, the election is usually binding'.

[86] If one has regard to the pre-arbitration minute one must come to the conclusion that the terms of reference given to the arbitrator appear to be very limited, namely:

> 'Thus the arbitrator is required to decide whether:-
>
> (a) the appeal was indeed lodged;
>
> (b) if it was not lodged whether the Council assumes jurisdiction to entertain the matter"[28]

[87] Thus the issues before the arbitrator were very narrow and limited. The issue of the expiry of time limits, in as much as they may be relevant at all, was never traversed at the arbitration. It appears to me to be opportunistic that the

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[26] *[2000] 1BLLR 20 (LAC) at para 93 see too Price NO v Allied-JBS Building Society1986 (3) SA 876 (A) at 882D–E; Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) SA 106 (A); Shoredis Construction (Pty) Ltd v Pienaar NO and Others [1995] 4 BLLR 32 (LAC); Checkers Shoprite (Pty) Ltd v Busane (1996) 17 ILJ 701 (LAC)*

[27] *1998 (1) SA 606 (SCA) at 613E–614D*

[28] *para 2.4 on p.63 of the record*

applicant now complains about an issue that neither the applicant nor their legal representatives had previously raised let alone contemplated.

[88] The applicant failed to raise the issue before the arbitrator and the arbitrator did not have an opportunity to deal with it. In my view not only would it be prejudicial to the third respondent to have regard to this new cause it would be wrong for this Court to pronounce on an issue which the arbitrator did not have an opportunity to deal with.

[89] There is another aspect which impacts on the prejudice in this matter. The inclusion of the words "or the time period as stipulated in the relevant prescripts has lapsed, "given their literal, ordinary and plain meaning creates such an absurdity to the purposive intent gleaned from the meaning of Clause 3.2 read with Clause 1.5 (c) to bind parties to exhaust internal remedies that one would be constrained not to disregard these words in their entirety. In the hearing of the review in this regard both Mr Molotsi and Mr. Winfred agreed with this contention.

[90] In the final analysis and in all the circumstances of this matter I find that the arbitrator was correct when he found that the applicant was obliged to lodge his appeal before proceeding to the bargaining council.

[91] In the event that I am wrong in holding that an issue of procedural jurisdiction does fall to be reviewed differently from the above analysis and that this Court is bound to review the arbitrator's award on the basis of reasonableness. I find that the arbitrator did not misconceive the nature of the hearing and that his decision was one which falls within the range of decisions that a reasonable arbitrator would make. [30]

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[29] *Aviation Union of SA vs SAA Airways (Pty) Limited 2010 (4) SA 604 (LAC) at para [25] Zondo JP…." you do not depart from the ordinary meaning of a word in a statute unless giving that word its ordinary meaning would result in an absurdity…it is permissible to depart from the ordinary meaning of a word or provision in a statute where to give the word or statutory provision its literal or ordinary meaning would clearly defeat or undermine the clear purpose of the statutory provision concerned'. See too Aviation Union of SA vs SAA Airways (Pty) Limited (2011) 32 ILJ 2861 (CC).*

[30] *Sidumo vs Rustenburg Platinum Ltd 2008 (2) SA 24 CC; Andre Herholdt vs Nedbank Limited (2013) 34 ILJ 2795 (SCA) Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others (2014) 35 ILJ 943 (LAC) at para 21*

[92] In the circumstances, the application for review falls to be dismissed.

Costs

[93] This matter has had a long history stretching back to 2010. There is no ongoing relationship between the parties in this matter. Mr. Molotsi advised from the bar that the applicant was unemployed. No evidence of that fact, even if it were relevant to the determination of the issue of costs in this matter, was placed before me. There is in consequence nothing to convince me to deviate from an order that costs should follow the result.

ORDER

I make the following Order:

1. The application for review is dismissed.
2. The applicant is ordered to pay the third respondent's costs.

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PRIOR, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr. Molotsi from A.P.Shangase and Company Attorneys

For the Respondent: Advocate Winfred instructed by the State Attorney