REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 3454/10

In the matter between:

MOTHEO DISTRICT MUNICIPALITY **Applicant**

and

SAMWU OBO MEMBERS **First Respondent**

ABRAHAM NTHAKO N.O. **Second Respondent**

SALGBC **Third Respondent**

Heard: **21 May 2015**

Delivered: **2 June 2015**

Summary: Review – jurisdiction – jurisdiction decided on basis of dispute as referred by union.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Motheo District Municipality, seeks to have a jurisdictional ruling by the second respondent (the arbitrator) issued under the auspices of the third respondent (the South African Local Government Bargaining Council) reviewed and set aside.

Background facts

[2] The first respondent, SAMWU (acting on behalf of its members), referred a dispute to the Bargaining Council. It categorised the nature of the dispute as being about an unfair labour practice. Summarising the facts of the dispute in the referral form, it said:

> "The dispute relates to the conduct of the employer in not extending benefits to some members."

[3] That dispute was not resolved. The Council issued a certificate to that effect, indicating that it concerned an unfair labour practice in terms of s 186(2)(a) of the LRA and that it can be referred to arbitration. The union did so.

[4] The arbitration was heard by commissioner Charlton Rex. The Municipality did not attend, nor did it file any written submissions, despite the fact that it had raised a jurisdictional point *in limine* and that the parties agreed that they would submit written submissions to the arbitrator before the hearing. Commissioner Rex issued a default award. He characterised the dispute as one pertaining to "unfair labour practices relating to promotion". He found that the Municipality had committed a number of unfair labour practices and ordered it to "promote" various employees to different salary levels.

[5] The Municipality successfully had that award rescinded. The arbitration was set down afresh before the second respondent, commissioner Nthako. Both parties were represented this time. The Municipality again raised a jurisdictional point *in limine*. No evidence was led. The arbitrator recorded the parties' arguments as follows:

> "The [Municipality's] representative submitted that the employees referred the matter for unfair labour practice and indicated that it relates to benefits.

> However, it is not one matter and there are seven applicants. The facts of the applicants differ materially and the applicants are applying short cut approach to the matter. He submitted that the employees should refer the matters individually. The [Municipality] submitted that the Council does not have jurisdiction to deal with this matter."
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> "The [union's] representative submitted that this matter was referred to the Council in 2009 for unfair labour practice. The matter was then scheduled for the 2nd of December 2009. The Employer raised a point in limine on the same points that they are raising before the Council. The submissions made were to be ruled upon by Commissioner Rex but there was [*sic*] no written submissions made.
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> Initially, the matter was set down and a default award was issued due to non attendance by the Employer. The employees submitted that the point in limine should be dismissed."

The ruling

[6] The arbitrator held that the Council did have jurisdiction to hear the dispute based on the following two factors:

> "Having regard to the submissions made by the parties it is my view that this application should not have been brought at all. A certificate of non resolution was issued and that certificate indicated that the matter should be arbitrated. That certificate gives the Council jurisdiction to arbitrate the matter and if the [Municipality] would like to challenge that certificate, it should be done through the Labour Court.
>
> The Union has the right to refer the matter to the Council on behalf of its members for any dispute that the Council has been accredited to adjudicate upon. The question of merits is a matter of evidence."`

[7] The Municipality argues that the award should be set aside because the arbitrator committed misconduct and exceeded is powers/

Evaluation / Analysis

[8] In deciding whether the award is reviewable, the Court should first consider what the appropriate test is.

The appropriate test

[9] Although the Municipality's review grounds were based on the reasonableness test set out in *Sidumo*[1], Mr *Grobler*, for the union, correctly argued that the appropriate test in the review of a jurisdictional ruling is simply whether the arbitrator was right or wrong.[2]

The effect of the certificate of non-resolution

[10] In appearing to hold that the Council had jurisdiction because another commissioner had issued a certificate stating that the dispute remained unresolved, the arbitrator was clearly wrong, as Mr *Grobler* readily conceded, referring to *Mickelet v Tray International Services & Administration (Pty) Ltd.*[3]

[11] But does that mean, in and of itself, that the award should be reviewed and set aside? I think not, contrary to what Mr *Dehal* submitted. The Court should still consider whether the arbitrator's conclusion was correct, i.e. whether the Council has jurisdiction or not. And in order to do so, the Court must also consider the second leg of the ruling.

Jurisdiction based on the referral

[12] Mr *Dehal* argued that the real dispute before the arbitrator did not relate to an unfair labour practice, but to a claim for higher salary, which is a dispute of interest and thus not arbitrable. That is not the argument that the Municipality put up before the arbitrator; it simply argued that the individual employees should have referred discrete disputes. I shall nevertheless consider whether the arbitrator correctly assumed jurisdiction when he held that the union had the right to refer a dispute to the Council "for any dispute that the Council has been accredited to adjudicate upon", and that the question of merits is a matter for evidence.

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[1] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[2] He referred to *SARPA v S A Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC) paras 39-41 and *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC) paras 22-23.

[3] (2012) 33 *ILJ* 661 (LC) para 19. See also *Bombardier Transportation (Pty) Ltd v Mtiya N.O.* (2010) 31 *ILJ* 2065 (LC) and *BMW SA (Pty) Ltd v NUMSA* (2012) 33 *ILJ* 140 (LAC) para [5].

[13] Without referring to it, the arbitrator in fact came to the correct conclusion, in my view, when one has regard to the jurisprudence of the higher courts. As Nugent JA stated in *Makhanya*:[4]

> "[T]he power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*[5] , expressed it as follows:
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> 'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.'"

[14] Although the referral to arbitration does not have the status of pleadings, I am of the view that the same principle holds true where an employee or trade union chooses to frame a dispute in a particular way and based on a particular cause of action. That must be in line with the *dictum* of the Constitutional Court in *Gcaba* [6] that:

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

[15] And in *South African Maritime Safety Authority v McKenzie* [7], a unanimous judgment of the Supreme Court of Appeal, Wallis AJA commented as follows :

> "Once more, as in other cases that have come 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 & Others*, the question in such a case 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. In this case the particulars of claim could not have made it clearer that Mr McKenzie's claim is for damages for breach of contract."

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[4] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 62.

[5] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 155.

[6] *Gcaba v Minister for Safety & Security* (2010) 1 SA 238 (CC) para 75.

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

[16] In the case that served before the arbitrator, the union referred an unfair labour practice dispute to the Bargaining Council. It may be a good or a bad case. That can only be ascertained once it has led the evidence. But there is no doubt that the Council has jurisdiction to hear that claim in terms of s 186(2)(b) of the LRA.

[17] The case cited by Mr *Dehal, North West Tourism Council v CCMA*[8], not only precedes the higher authority to which I have referred, but is also distinguishable. In that case it was held, quite correctly, that the CCMA had no jurisdiction to arbitrate a case where the employee based his cause of action on discrimination.

[18] Mr *Dehal* also referred to the judgment of this court in *South African Post Office v CCMA*[9] to argue that the union's claim did not amount to an unfair labour practice. But in the subsequent case of *SARS v Ntshintshi*[10] I noted:

> "This Court held in *South African Post Office* that an acting allowance, on the facts of that case, did not constitute a 'benefit' as contemplated by section 186(2)(a). In doing so, and taking into account the principle of *stare decisis*, I considered myself bound by the Labour Appeal Court authorities in *Hospersa v Northern Cape Provincial Administration*[11] *, Gauteng Provinsiale Administrasie v Scheepers* [12] and *G4S Security v NASGAWU*[13].
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> Subsequently, on 21 February 2013 -- after this application had been brought -- the Labour Appeal Court handed down judgment in *Apollo Tyres South Africa (Pty) Ltd v CCMA & others*.[14] In *Apollo Tyres*, the LAC held that a 'benefit' for the purposes of s 186(2)(a) is not limited to an entitlement that arises *ex contractu* or *ex lege*. It departed from its earlier three judgments referred to above and followed by this Court in *SA Post Office*. Musi AJA held:

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[8] [1998] ZALC 31 (17 June 1998).

[9] (2012) 33 *ILJ* 2970 (LC).

[10] [2013] 9 BLLR 923 (LC); (2014) 35 ILJ 255 (LC) paras 34-36.

[11] (2000) 21 *ILJ* 1066 (LAC).

[1212] [2000] 7 BLLR 756 (LAC).

[13] Unreported (case no DA 3/08), 26 November 2009.

[14] [2013] 5 BLLR 434 (LAC).

> 'In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgement 'benefit' in section 186 (2) (a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. Insofar as *Hospersa, G4S* and *Scheepers* postulate a different approach they are, with respect, wrong.'
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> In the light of that unequivocal judgment, this Court must now be bound by the latest LAC judgment, even though it is contrary to that court's earlier jurisprudence."

[19] Given the latest jurisprudence and the wide interpretation given to the term 'benefits' in order to bring it into the definition of an unfair labour practice, also, it seems to me that the arbitrator was correct in holding that the Council does have jurisdiction over the unfair labour practice claim as alleged by the union.

Conclusion

[20] I conclude that the arbitrator correctly found that the Bargaining Council has jurisdiction to hear the unfair labour practice dispute referred by the union, although his first premise – based on the certificate of non-resolution – was wrong.

The appropriate relief

[21] Although I have found that the conclusion is correct, I agree with Mr *Dehal* that the Court should give further direction as to how the matter should proceed.

[22] The Council has to hear evidence on the merits. It may be that, once the evidence is in, it finds that it does not have jurisdiction over the dispute that the union referred; but that is unlikely. It is more probable that the arbitrator will make a finding on the merits, one way or the other. But I also

agree with Mr *Dehal* that it would be preferable for an arbitrator other than the second respondent to hear the dispute on the merits.

Costs

[23] The effect of the finding is that the dispute is ongoing and that the merits are still to be determined. There is also an ongoing relationship between the parties. I do not consider a costs order to be appropriate in law and fairness.

Order

[24] I therefore make the following order:

24.1 The application for review is dismissed.

24.2 The dispute is remitted to the SALGBC (the third respondent) for arbitration before a commissioner other than the second respondent.

24.3 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Adv Dehal Instructed by Mabalane Seobe Inc.
FIRST RESPONDENT:	Adv S Grobler Instructed by Kramer, Weihmann & Joubert.