THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case Number C884/2014

In the matter between:

THE CITY OF CAPE TOWN	Applicant
and	
INDEPENDENT MUNICIPAL AND ALLIED WORKERS UNION	First Respondent
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	Second Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Third Respondent
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	Fourth Respondent

Date heard: 16 April 2015

Delivered: 17 September 2015

Summary: Application for a declarator that the Disciplinary Procedure and Code Collective Agreement (the DPCCA) was not validly concluded in terms of the Constitution of the SALGBC and is not therefore binding on the City of Cape Town; Conditional counter-application that in the event it was not validly concluded, it continues to bind the parties in terms of section 23 of the LRA.

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks the following relief from this court:

(a) Declaring that the Disciplinary Procedure and Code Collective Agreement purportedly entered into between the first, second and third respondents on 21 April 2010, under the auspices of the fourth respondent on 21 April 2010, ("the DPCCA") was not validly concluded in terms of the fourth respondent's Constitution and accordingly did not become binding on the applicant;

(b) In the alternative, declaring that the DPCCA lapsed on 30 June 2012 and no longer binds the applicant;

(c) Further in the alternative, declaring that the DPCCA lapsed on 31 December 2012 and no longer binds the applicant.

[2] The first and second respondents have brought a conditional counter-application. They seek that:

(a) In the event that it is found that the DPCCA was never validly concluded as required by the Fourth Respondent's Constitution, an order declaring that the DPCCA is a valid collective agreement within the contemplation of section 23 of the LRA and binds all the parties to the DPCCA and all their respective members as contemplated in section 23(1) and (2) of the LRA;

(b) In the event that it is found that the DPCCA lapsed on 30 June 2012, alternatively 31 December 2012, an order declaring that the DPCCA remains part of the individual contracts of employment of all employees in

the local government sector who had been employed at the time when the DPCCA had been in operation, until it is varied by agreement.

[3] Both applications were opposed. Certain *in limine* issues were pleaded by the respondents. First, that this court does not have jurisdiction to grant the declaratory relief sought, because there is no specific provision in the LRA giving the court such power i.e. to declare a collective agreement invalid. It was submitted on behalf of the applicant that save in respect of matters which, in terms of the specific provisions of the LRA are to be determined by other institutions like the CCMA or a bargaining council, the whole scheme of the LRA is that the Labour Court is empowered to deal with matters arising from the LRA. The fundamental issue raised by this application is whether the applicant is bound by a collective agreement ostensibly concluded by an employer's organisation to which it belongs, under the auspices of a bargaining council. The application is in my view quintessentially a matter that the specialist labour courts must deal with.

[4] The second point in limine raised by the respondents, is that of estoppel i.e. that the applicant has made a factual representation through its conduct since 2010 (by initiating disciplinary hearings in terms of the DPCCA) that in the view of the City that the agreement is valid. I must agree with the applicant's submissions on this point that the very fact that the alleged representation is a representation as to the opinion of the City, is a sufficient basis to dismiss this defence. Further, that the representation is a representation as to the law, namely that the DPCCA is valid and binding.[1] The respondents have also failed to establish that, as a result of the alleged representation, they have altered their position to their prejudice.[2]

[5] The background facts pertaining to the conclusion of the DPCCA are recorded in the LAC judgment of **South African Local Government Association v Independent Municipal Allied Trade Union and Others**[3] which dealt with the

[1] LAWSA (2nd edition) Vol. 9, para 657
[2] LAWSA para 663.
[3] [2014] 6 BLLR 569 (LAC)

Wage Curve Agreement, purportedly concluded together with the DPCCA are as follows:

5.1 On 26 March 2012, SAMWU issued a strike notice. On 12 April 2010, its members embarked on a strike in furtherance of its demand for a Wage Curve Agreement and the conclusion of a new disciplinary code agreement i.e. the DPCCA.

5.2 During the strike the parties resumed negotiations. Draft collective agreements relating to the above were written.

5.3 The parties met formally under the auspices of the Council, on 19 and 20 April 2010, in order to conclude collective agreements relating to the wage curves and disciplinary code. They met as a Bargaining Committee of the Council.

5.4 After members of the Bargaining Committee and others had considered the draft agreements and sufficient consensus had been achieved, the parties decided that a team would refine the agreements reached in the Bargaining Committee and draft the final agreements, for consideration by the principal decision-makers of the parties.

5.5 The Bargaining Committee adjourned when the drafting team consisting of Messrs Koen (IMATU), Forbes (SAMWU), Lebello (SALGA), Yawa (SALGA) and Van Zyl (SALGA) started its work.

5.6 The drafting committee concluded its deliberations, whereafter Adams (the deputy General Secretary for Legal Matters of IMATU) was requested to print hardcopies of the “agreements”. Adams gave Yawa a copy of the two agreements. The unions indicated that they and SALGA discussed the contents of the agreements with their principals who were satisfied therewith and prepared to sign their agreements.

5.7 The DPCCA was signed by the parties’ principals at a signing ceremony on 21 April 2010.

[6] Clause 7.2 of the Constitution of the Council is headed 'Bargaining Committee' and

provides as follows:

"7.2.1 The Bargaining Committee shall consist of 20 (twenty) seats divided equally between the Employer Parties and the Trade Union Parties.

7.2.2 The allocation of Representatives among the Employer Parties shall be determined mutatis mutandis by the formula in sub-clause 5.4.

7.2.3 The allocation of representatives amongst the Trade Union Parties shall be determined by the formula in sub-clause 5.4.

7.2.4 The delegates shall, at the first meeting of the year, appoint a chairperson from amongst the delegates to the Bargaining Committee. The Bargaining Committee may appoint a chairperson from outside the delegates of the parties' representatives.

7.2.5 The Bargaining Committee shall meet as such place, date and time it or the Executive Committee may determine.

7.2.6 The Bargaining Committee shall have the power to conclude any collective agreement relating to terms and conditions of service or any other matter referred to it by the Executive Committee.

7.2.7 A dispute that arises in the Bargaining Committee shall be resolved in terms of Clause 11."

[7] Clause 16 of the Constitution is headed 'Decisions' and reads as follows:

"16.1 All decisions of the Central Council, Division or any Committee concerning substantive matters shall require a two-thirds concurrent majority of the Employer Representatives on the one hand and a two-thirds concurrent majority of the Trade Union representatives to the Council on the other hand.

16.2 No decision of the Central Council, Division or any Committee concerning substantive matters shall be binding on the Parties unless-

16.2.1 the subject matter of the decision has been reduced to writing before the decision is taken; or

16.2.2 If not reduced to writing before the decision is taken, the subject matter of the decision is reduced to writing and adopted by a subsequent decision of the Council.

16.3 Decisions of the Central Council, Division or any Committee concerning administrative matters shall require a simple majority of those Representatives present.

16.4 The Central Council shall determine from time to time which matters are substantive and which are administrative in terms of the process as is set out in clause 16.1 above."

[8] A further clause of the Constitution is cited by the applicant as relevant to the issue of whether the DPCC was validly concluded, and that is clause 17, which is headed 'Procedure for the Negotiation of Collective Agreements'. It reads as follows:

"17.1 A procedure, forum and level for negotiations shall be determined by the Parties to the Central Council.

17.2 Any Party to the Council may introduce proposals for the conclusion of a Collective Agreement on appropriate subject matter and at the appropriate level.

17.3 At least two-thirds of the Employer representatives on the one hand and two-thirds of the trade Union representatives on the other hand must vote in favour of a Collective Agreement for it to be binding on the Parties.

17.4 In the event of a dispute arising from the proposals for the conclusion of a Collective Agreement the Parties shall have the rights prescribed in the Act."

[9] The above clauses were considered by the LAC in **South African Local Government Association v Independent Municipal Allied Trade Union and Others** (supra). In the judgment the court made , the court made findings (of direct relevance to this matter), as to the failure of the parties' representatives to send back the Wage Curve Agreement to the Bargaining Committee in compliance with the terms of the Council's Constitution. The LAC found that:

"[30] In *Cape United Sick Fund Society v Forrest,* it was said that:

'It is of prime importance to decide in the first instance how to approach the problem raised in this appeal. The Society's Constitution is in writing and to use the words of Stratford, JA, in *Wilken v Brebner and Others* 1935 AD 175 at 187:

'We have only to solve the question submitted to us by ascertaining the meaning of a written document according to the well-established rules of the construction.'

This dictum is in consonance with a long line of cases in which emphasis is laid on the necessity of adhering to the terms of the Constitution of a body like a society.'[4]

[31] In my view, the same should apply to the Constitution of the third respondent. The three parties embroiled in litigation in this matter are the parties who drafted and signed the Constitution of the third respondent. They decided how decisions taken under the auspices of the third respondent should be taken and what body should have the power to conclude collective agreements.

[32] The problem with the entire procedure followed in this matter is that the Constitution does not make provision for a drafting team. If the parties decide to refer an administrative or substantive matter to an unrecognised

[4] 1956 (4) SA 519 at 527H to 528A. See also *Absa Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund* (under curatorship) 2012 (3) SA 585 (SCA).

sub-committee, it is incumbent on them to refer the matter back to the recognised Council, Division or Committee so that a resolution or decision can be taken in terms of the Constitution.

[33] In this matter, it is common cause that the Bargaining Committee did not reconvene after the drafting team was requested to refine the agreement....

[34] The union's case was that the practice has also been that after the drafting team had settled an agreement it is then taken to the principals, for vetting and signature. The court *a quo* found that the practice had been established and that the Wage Curve Agreement and the Disciplinary Code Agreement were validly inferred into in terms of the practice. I disagree.

[35] Firstly, the practice itself has not been properly established. There is no evidence as to when this practice was started; how many collective agreements have been adopted by following this practice or whether this practice was only followed in respect of administrative matters or both administrative and substantive matters. Even if one assumes that in some circumstances a practice by parties can override what they specifically agreed to in their Constitution, there must be sufficient evidence establishing that the practice or custom is well-entrenched. Such evidence is lacking in this matter. The existence of this practice was never put to the appellant's witnesses. Mashilo, who was the facilitator and senior member of SALGA and the third respondent, was not asked a single question relating to the existence of this practice. George, who signed agreements on behalf of SALGA, was not asked about the practice. Lebello, a member of SALGA and the Bargaining Committee, was also not asked about its existence.

[36] Secondly a practice cannot trump the express and unambiguous terms of a Constitution. The decisions taken by the drafting team clearly have far-

reaching implications, financial and otherwise. If this degree of deviation from the express provisions of the Constitution is tolerated it would effectively write the decision-making requirements set out in clause 16 out of existence. The Constitution of the third respondent should not, without justification, be frittered away by practice or judicial decree. This would indeed be a dangerous path to take because the parties testified that the intention was always to request the Minister of Labour to extend the agreement to non-parties to the agreement that are within the registered scope of the third respondent.

[37] The decision of the drafting team is not a decision of the Bargaining Committee. The reason why two thirds concurrent majority of the employer representatives on the one hand and two-thirds concurrent majority of the Trade Union Representatives on the other hand is needed for a decision is very important. Trade Union Representatives to the council are there with a mandate but as individuals. They have individual votes. If for an example three members of SAMWU who had six votes decided to agree with IMATU in favour of a proposal that would be seven Trade Union Representatives voting in favour of a proposal and if all the employer representatives also voted in favour; that decision would be a legal decision of the Bargaining Committee, irrespective of the mandate of the SAMWU delegation. The purported agreement was therefore not a binding agreement in terms of the third respondent's constitution. Considerations of equity cannot, when the provisions of the Constitution of the third respondent are clear and unambiguous, affect the interpretation to be placed on it."

[10] Given the above findings,(against which the respondents were unsuccessful in seeking leave to appeal to the Constitutional Court[5]), on precisely the clauses of the Council's Constitution which are the focus of this application, and their

[5] The Constitutional Court has refused leave to appeal against inter alia these findings, under Case CCT 44/14

trumping of the practice of allowing a drafting committee to finalise collective agreements for signature, I grant Prayer One of the applicant's notice of motion. This means that the following part of the counter application before me is now at issue i.e.:

> "(a) In the event that it is found that the DPCCA was never validly concluded as required by the Fourth Respondent's Constitution, an order declaring that the DPCCA is a valid collective agreement within the contemplation of section 23 of the LRA and binds all the parties to the DPCCA and all their respective members as contemplated in section 23(1) and (2) of the LRA;"

[11] The question that must be posed is whether a 'collective agreement' which is not binding in terms of the bargaining council's constitution, can nevertheless be considered binding on the parties to it, in terms of the provisions of section 23 of the LRA which reads as follows:

"23 Legal effect of collective agreement

(1) A collective agreement binds-

(a) the parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;

(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties." (my emphasis)

[12] Can a collective agreement entered into by parties to a bargaining council be governed by both sections 31/32 and section 23 of the LRA? The very purpose of the establishment of bargaining councils and the conclusion of collective agreements within them, is to regulate sectoral bargaining. For that reason, the binding nature of collective agreements concluded by parties to those councils is governed by specific provisions in the LRA, set out in Part C of Chapter 3 headed "Bargaining Councils". Section 31 and 32 of the LRA deal specifically with the binding nature of collective agreements concluded in a bargaining council:

"**31 Binding nature of collective agreement concluded in bargaining council**

Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-

(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

32 Extension of collective agreement concluded in bargaining council

(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council-

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

(2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice. (my emphasis)

(3) A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that-

(a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);

(b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council;"

[13] The use of the words: "subject to section 32" in section 31 of the LRA, is best understood as meaning: "except as curtailed by".[6] In particular, I note that Section 32(2) of LRA thus curtails the period of the binding nature of a collective agreement entered into by the parties to a bargaining council to one "from a specified date and for a specified period". In contrast, collective agreements governed by section 23 may bind the parties for an indefinite period in terms of section 23(4).

[6] the words 'subject to' in statutory interpretation —

'has no a priori meaning. . . . While the phrase is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning "except as curtailed by".' (see Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others 2014 (2) SA 480 at paragraph 35.

[14] A reading of the DPCCA reveals that it was drafted as a bargaining council agreement with the clear intention that it should be in conformity with section 31 and 32 of the LRA. The DPCCA records in Clause 3.4:

> "This portion of the Main Collective Agreement shall come into operation in respect of non-parties (which includes but is not limited to, municipal entities as defined in the Municipal Systems Act, 32 of 2000), on a date to be determined by the Minister of Labour and **shall remain of force and effect until 30 June 2012 and after 30 June 2012 for such further period as determined by the Minister of Labour at the request of the Parties.".**

[15] A further indication of the distinction between bargaining council collective agreements and those collective agreements governed by section 23 of the LRA is that the former are clothed with statutory enforcement mechanisms, as provided for in section 33A. In my judgment therefore, a bargaining council collective agreement is a collective agreement of a special type, which cannot 'morph' into a section 23 collective agreement when the agreement in question is found to be non-compliant with the bargaining council's constitution. In that scenario the parties to such an agreement would have no powers to enforce it across a sector invalidating the inherent purpose of the conclusion of a collective agreement in a bargaining council.

[16] In view of the above evaluation, I dismiss the first conditional counter claim. The second counter-claim therefore falls away. Given the relationship between the parties a cost order is not appropriate.

[17] In all the above circumstances, I make the following order:

Order

1. The Disciplinary Procedure and Code Collective Agreement (2010) was not validly concluded in terms of the SALGBC and accordingly did not become binding upon the applicant.

_____

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: AJ Freund SC with GA Leslie instructed by Norton Rose Fullbright South Africa

For the First and Second Respondents: JG van der Riet SC with U Dayanand-Jugroop instructed by Cheadle Thompson & Haysom INC