Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 134/13

In the matter between:

AUTOPAX PASSENGER SERVICES (PTY) LTD	**First Applicant**
and	
SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL	**First Respondent**
MOHINI SOMAN *N.O*	**Second Respondent**
SATAWU obo MEMBERS	**Third Respondent**

Heard: 09 June 2016
Delivered: 14 June 2016
Summary: (Review – ostensible interpretation and application dispute – real dispute concerning applicability of s 9 of BCEA – arbitrator lacking jurisdiction)

JUDGMENT

LAGRANGE J

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Introduction

[1] The subject matter of this review application is an award issued by the second respondent under the auspices of the South African Road Passenger Bargaining Council ('SARPBAC'). The arbitrator understood that she was called upon to determine an interpretation and application dispute relating to the determination of working hours and payment of overtime to so-called "double drivers", who are drivers who work in two person teams on long distance trips, during which they alternate on driving duties.

[2] A number of preliminary points were raised by the applicant party at the arbitration ('Autopax'), but the arbitrator was satisfied she had jurisdiction. In these proceedings, Autopax has raised more focussed jurisdictional issues which have to be considered. Before addressing these issues, it is useful to sketch some background to the dispute.

[3] The applicant claims that the question of payment of these drivers was settled by an agreement concluded on 20 May 2009. In terms of that agreement, pending the finalisation of the issue of accommodation of double drivers, Autopax would pay them a single allowance of R 150 per round trip irrespective of the distance travelled. As far as the determination of their normal hours of work are concerned, Autopax contends that the determination of double drivers' normal hours is set out in Annexure C to their contracts of employment. The annexure states that normal working hours does not include "inactive service", which includes periods when a driver is not driving because they are resting or sleeping and time away from the Depot.

[4] SATAWU, the union representing the respondents had contended that, in terms of section 49(4) of the Basic Conditions of Employment Act, 75 of 1997, these employment contracts could not supersede the main collective agreement. Consequently, ordinary hours of work had to be calculated in accordance with section 9 of the Basic Conditions of Employment Act.

[5] The arbitrator concluded that in terms of a later settlement agreement of 8 March 2012 ('the 2012 settlement agreement') it was clear that the parties

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intended that the BCEA should determine what constitutes hours of work and the calculation thereof, due to the wording of clause 2 of that agreement which states:

> "It is further agreed that overtime will only be paid once the 195 normal hours have been worked/reached. Overtime payments will be calculated in terms of the Basic Conditions of Employment Act."

[6] Other relevant provisions of the 2012 settlement agreement were that:

> "1) Arbitration Method of Calculation
>
> 1.1.1 To refer the dispute relating to the method/formula to be used in calculating the 195 normal hours worked by the union's members involved in double driving to the CCMA for arbitration.
>
> 1.1.2 It is further agreed that the arbitration will take place in accordance with the CCMA's rules and that the parties hereby also waived their right to be given 14 days' notice of the arbitration.
>
> 1.1.3 Commissioner Blignaut will assist with the referral to the CCMA.
>
> …
>
> 4) Double driver allowance will be increased to R200 per round trip as from 1 April 2012. The parties will further negotiate the adjustment of this amount in September 2012."

(emphasis added)

[7] Another term of the agreement was that SATAWU agreed to withdraw a strike notice and Autopax agreed to withdraw an application to interdict the strike.

The arbitrator's reasoning

[8] On the jurisdictional questions posed by Autopax at the arbitration, the arbitrator traced the history of the dispute which originated when the parties agreed in the 2011 wage agreement that the issue of double drivers would be referred to the advisory arbitration. An advisory award was issued on 14 August 2011 but was not implemented. In accordance with the 2011 wage previous agreement, the matter was referred to the CCMA for determination and later the 2012 settlement agreement,

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outlined above, was concluded. The arbitrator noted this, but continued thus:

> "However, the issue of the payment of the double drivers remained and the applicant's referral seeks clarity on how 45/195 should be calculated and they want ordinary hours worked to be calculated in accordance with the provisions of the BCEA. The respondent submitted that there is no dispute before me to interpret. However with regard to the history of this dispute, it is quite clear that the applicants are seeking for clause 1 of the settlement agreement dated 8 March 2012 to be interpreted and applied. Section 24(8) of the Labour Relations Act allows for the CCMA or the Council to interpret settlement agreements. Furthermore, it is clear from the applicant's submissions that the applicant is seeking for the hours of work to be calculated in accordance with the provisions of the BCEA. The applicant is not seeking for interpretation of section 9 of the BCEA. I am therefore satisfied that there is a valid agreement before me and that SARPBAC has the jurisdiction to arbitrate this dispute."

(emphasis added)

The arbitrator was plainly of the view that she had acquired jurisdiction to determine the dispute because it concerned the interpretation and application of clause 1 of the 2012 settlement agreement and that she was not required to actually interpret section 9 of the BCEA but simply to decide if ordinary hours of work were determined by the BCEA.

[9] Turning to the merits of the dispute, the arbitrator correctly found that the 2011 wage agreement was silent on the hours of work for drivers. She rejected Autopax's argument that the drivers' hours of work were those stipulated in Annexure C to the standard contracts of employment entered into after 2006, because SATAWU, or alternatively the drivers who were employed under different contracts, never signed those contracts. She continued, stating:

> "Therefore, I cannot accept that the hours of work for the double drivers contained in Annexure C to the contracts of employment. The main agreement was signed between both parties on the 25 July 2011 after the settlement agreement on 20th May 2009 and therefore regulates the terms and conditions of employment of the applicant. The agreement is silent on what constitutes hours of work in the calculation of the 195 hours worked.

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> In the absence of any provision in the main agreement, the BCEA must be consulted to determine what constitutes hours of work on the calculation thereof. I am also mindful of clause 2 of the settlement agreement dated 8 March 2012 which states: "It is further agreed that overtime will only be paid once the 195 normal hours have been worked/reached. Overtime payments will be calculated in terms of the **Basic Conditions of Employment Act** [my emphasis]". It is therefore clear that the parties intended to rely on the BCEA for overtime pay. The respondent's argument that the drivers were above the threshold of the BCEA is therefore baseless. I believe that the 195 hours worked must be calculated in terms of the BCEA. However, it is not within my jurisdiction to determine how the calculation must be done or whether or not the respondent complied with this provision of the agreement. The applicant has the right to seek resolution or adjudication of any disputes arising from the determination implementation of the hours worked to the relevant forum in terms of the BCEA."

(court's emphasis added - underlined)

The review

[10] The employer seeks to review and set aside the award or that it should be set aside and remitted back to be heard *de novo* by another arbitrator.

[11] The applicant's principal ground of review on the merits of the award is that, the arbitrator ignored the provisions of the 2009 settlement agreement and the provisions of the main collective agreement extended by the Minister of Labour on 16 April 2012 and focused exclusively on the 25 July 2011 wage agreement. In particular, she misdirected herself in assuming that because the 2011 wage agreement was entered into after the 2009 settlement agreement, it therefore superseded the 2009 document in all respects. Further, had the arbitrator properly considered the main agreement she would have realised that clause 2 and clause 30 of that document were applicable to the dispute and not the provisions of section 9 of the BCEA. Clause 2 of the main agreement defines ordinary hours of work as:

> "hours of work prescribed in clause 6 or if by agreement between employer and the employees, the latter works a lesser number of hours, such shorter hours and including:

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(a) …

(b) …

But does not include any meal interval, sleepover period or any time for which a subsistence allowances payable to an employee, if during such period, the employee does not work other than remaining in charge of the vehicle..."

Clause 30 of the main agreement states:

"All conditions of employment, or parts thereof, that were in force as at 31 March 2011 and not specifically dealt with in this agreement, shall remain in force and shall continue to be regulated by custom and practice existed at that time, contracts of employment, collective agreements and/or relevant legislation."

[12] Although not previously raised in its founding papers, Autopax also raised in supplementary heads of argument a variation of the jurisdictional question. In essence, Autopax argues that in purporting to interpret the settlement agreement of 2012, the arbitrator improperly assumed jurisdiction because: it was not a collective agreement dealing with terms and conditions of employment or a matter of mutual interest in terms of the definition of a collective agreement in section 213 of the LRA; no agreement exists concerning so-called double drivers which can be interpreted; the 2012 settlement agreement was effectively an agreement to refer a dispute to arbitration and the dispute before the arbitrator did not concern the interpretation of that document.

[13] In relation to the substantive merits, SATAWU contends that the 2009 settlement agreement has been superseded by the provisions of the 2011 collective agreement. In passing, it should be mentioned that the 2011 agreement contained two provisions of some interest for the purposes of this review. Clause 12 confirmed that the parties had agreed to refer the 'Double Driver 'matter to advisory arbitration and that if the advisory award was not implemented, the matter would be referred to the CCMA for arbitration. Clause 13 provided that all other conditions of employment not set out in the 2011 agreement would remain unchanged. In the light of those two provisions, which Autopax contends the arbitrator ignored the fact that the 2011 agreement was silent on the issue of hours of work, did

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not mean that the issue was indeterminate, but rather that, provisions in the 2009 agreement remained in place and enforceable unless they were specifically amended by the 2011 agreement. It also meant that whatever conditions applied previously continued to apply.

[14] Although the interpretation and application dispute ostensibly concerned the 2012 settlement agreement, SATAWU's submissions made it clear that the real area of disagreement was the interpretation and application of section 9 of the BCEA. Thus, in describing the facts of the dispute in the 7.11 referral form, in which SATAWU identified the dispute as one concerning the "interpretation or application of collective bargaining provisions" SATAWU stated:

> "Parties have agreed under the auspices of CCMA on the 08/03/2012 to approach the commission to explain how 45/195 is calculated."

Further, the remedy sought was described as:

> "That all hours worked should be calculated as per BCEA."

Aside from the reference to the 2012 settlement agreement as the origin of the referral, the referral form identified no other collective agreement that had to be interpreted.

[15] No evidence was led before the arbitrator but the parties placed various documents before her and made written submissions. In SATAWU's written submissions to the arbitrator and in those made in court, SATAWU argued that the arbitrator was not required to adopt a formalistic approach in identifying the dispute at hand but rather should consider the substance of the dispute. In SATAWU's written submissions it described the 'issue to be decided' in the arbitration as follows:

> "Parties differ <u>in terms of the interpretation and application of section 9 of the BCEA</u> in which as per the help of the CCMA COMMISSIONER were advised to seek an appropriate remedy through Arbitration. You are therefore requested to assist with the application and interpretation of 45 hours a week and its meaning to Autopax and its employees."

(emphasis added)

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[16] What is apparent from the above is that the referral to arbitration by SATAWU was, in truth, not the referral of an interpretation and application dispute relating to the 2012 agreement. In fact, SATAWU was simply seeking to give effect to the previous agreements between the parties to refer the matter to arbitration, which was last formulated in the 2012 settlement agreement, namely to refer the dispute relating to the method/formula to be used in calculating the 195 normal hours worked by SATAWU's members involved in double driving to the CCMA for arbitration, which in its view boiled down to the application of s 9 of the BCEA.The real nature of the dispute obviously has a material bearing on the arbitrator's jurisdiction.

[17] When the matter was argued, it was put to Autopax's counsel *Mr Sibanda* that there was nothing in principle to prevent parties agreeing to arbitration as a method of settling a dispute of this nature. He qualified his response by saying that although the LRA did not typically provide for the determination of this type of dispute by arbitration, and even if the parties might conceivably have agreed to resolve it through private arbitration, they could not give the bargaining Council jurisdiction to do so: it exercises its jurisdiction to arbitrate strictly in terms of the LRA and such a dispute fell outside its powers.

[18] Having regard to section 51(3) of the LRA, it is apparent that once parties have failed to resolve a dispute over a matter of mutual interest (which includes both disputes of right and interest disputes) through conciliation, then the bargaining council is obliged to arbitrate the dispute if one of the parties is not a party to the Council, or a member of a party to the Council, if the LRA requires such a dispute to be resolved by arbitration or, "all the parties to the dispute consent to arbitration under the auspices of the Council." On the other hand, if parties to the dispute are also parties to the Council or members of the parties to the Council, then in terms of section 51 (2) of the LRA, they must attempt to resolve the dispute in accordance with the Council's Constitution. It is not clear from the papers in this dispute whether the dispute in question would have been subject to section 51 (2) or section 51 (3), but if the dispute does fall within section 51(3), the Council might well have had jurisdiction to entertain the dispute

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in view of the agreement of the parties to refer the matter to arbitration. In the absence of such information ruling out the possibility that the constitution of SARBAC would not have permitted such a dispute being referred to arbitration, or alternatively that 51(3)(b) did not apply, Autopax has not succeeded in showing that the Council could not have exercised jurisdiction under either of these provisions.

[19] Nonetheless, Autopax contended that the arbitrator fundamentally misdirected herself when she decided that she was seized with an interpretation and application dispute that concerning clause 1 of the settlement agreement dated 8 March 2012. The applicant argued that clause 1 simply described the terms of reference of the dispute that was referred to arbitration and it was not the interpretation or application of that clause which was in issue. In this respect, I must agree with Autopax that the clause in question was simply the description of the dispute and the substantive dispute could not remotely be considered as one that concerned the interpretation or application of clause 1. Having decided that this tenuous peg was strong enough to give her jurisdiction, the arbitrator then proceeded to determine if the determination of the ordinary hours of work for double drivers was to be found in the BCEA as SATAWU contended.

[20] Nonetheless, whatever the arbitrator's express starting point, in the course of her award she did in fact attempt to address the essence of the real dispute which had been referred to arbitration, namely how the lawful ordinary hours of double driver's should be determined.

[21] The applicant agrees with the arbitrator's conclusion that it was not within her jurisdiction to determine if it had complied with the BCEA or to perform the calculation necessary to determine double drivers' ordinary hours. It also agrees SATAWU should pursue any dispute about the determination and implementation of hours to be worked under the relevant forums in the BCEA. What it takes issue with is the arbitrator's finding that the hours 'must be calculated in terms of the BCEA'. Although the arbitrator did not refer to section 9 of the BCEA expressly, the only provision of the BCEA which could yield 'a calculation' of ordinary hours worked is section 9.

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Thus, by necessary implication she found that the ordinary hours of work for double drivers should be calculated by reference to that section, or to put it differently, that s 9 of the BCEA is the applicable standard to determine the ordinary hours of double drivers. In so doing, the arbitrator was determining not whether the provisions of a collective agreement required their ordinary hours to be determined *in accordance* with the BCEA, but whether the BCEA was of direct application even if she felt she could not go so far as to perform the calculation herself.

[22] As such, she assumed the power to determine the direct application of the statute, which is not a function she could be given by the consent of the parties even if the parties had been able to ask her to determine a dispute which does not have to be referred to arbitration under the LRA by virtue of sections 51(2) or (3) of the LRA. The application of the BCEA is a matter to be dealt with by the enforcement mechanisms contained in Chapter 10 of the BCEA and parties cannot confer the power to decide that on arbitrator, who has not got that authority in terms of the BCEA. Consequently, the primary question is whether an arbitrator acting solely on the basis of the consent of parties to the dispute, can decide if specific provisions of a statute, in this case the BCEA, are legally binding on those parties if the arbitrator has not been given the statutory power to do so. The arbitrator believed the line between her power and that of the statutory enforcement mechanisms in the BCEA was only crossed when it came to determining the specific infringements Autopax might have committed in terms of s 9, but that line was already crossed when she decided the primary question herself. What she decided was not merely an issue incidental to interpreting a collective agreement, but she effectively determined the direct applicability of statutory provisions.

[23] In this respect, the arbitrator misconceived her jurisdiction and her award stand to be set aside on this ground. As the very manner in which the dispute was framed invited her to make this error, there is no point in remitting the dispute to be determined afresh by another arbitrator who will also lack the same power.

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[24] It is however appropriate to mention that the application of specific provisions of the BCEA is a complex issue and it may happen that conditions of employment in a particular sector will be determined by the specific interplay of collective agreements, sectoral agreements and the provisions of the BCEA. Section 49 of the BCEA, for example, specifically recognises that certain provisions of the BCEA including ordinary working hours might be modified by collective agreements. In this particular case, the promulgated collective agreement under Notice No R 272 of 5 April 2012 in GG 35213 would appear to have a direct bearing on the determination of ordinary hours of work of double drivers, though it was not referred to by either party in their submissions to the commissioner.

[25] The issues on review were neither frivolous nor straight forward one and it is understandable for SATAWU to have opposed the application. Accordingly, an adverse cost award would be inappropriate

Order

[26] The arbitration award of the second respondent dated 05 December 2012 and issued under case number RPNT 1335 is reviewed and set aside.

[27] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

For the Applicant:	M. Sibanda instructed by Werksmans
For the Third Respondent:	Z.Maphanga for SATAWU

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