IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 80/16

In the matter between:

PARDON RUKWAYA

AND 31 OTHERS **Appellants**

and

THE KITCHEN BAR RESTAURANT **Respondent**

Heard: **03 May 2017**

Delivered: **05 September 2017**

Summary: Jurisdiction of the Labour Court – employees seeking payment of minimum wages from employer in terms of a collective agreement – principle that jurisdiction is determined with reference to the allegations which are set out in the pleadings restated – employees' claim based on the collective agreement. Held that the legal basis of the appellants' claim is founded on the respondent's non-compliance with the collective agreement and not upon a breach of their contracts of employment - the substance of employee's complaint is the employer's failure to pay them the industry minimum wages and bonuses in terms of the collective agreement. Employees obliged to follow the dispute resolution process provided for in the collective agreement. Labour Court's judgment upheld – appeal dismissed.

Coram: Tlaletsi DJP, Davis JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment of the Labour Court (Bakker AJ) in which it found that it has no jurisdiction to adjudicate the appellants' claim against the respondent for the payment of, amongst other things, a minimum wage. The appellants are waiters employed by the Kitchen Bar Restaurant ("the respondent").

[2] Both parties fall under the scope of the Bargaining Council for the restaurant, catering and allied trade industry ("the Bargaining Council"). Although not parties to the Bargaining Council, they are bound by the Bargaining Council collective agreement ("the collective agreement), which was concluded in May 1998 to regulate the conditions of employment and the wages of all employees in the restaurant, catering and allied trade industry. The Minister of Labour, by virtue of her powers under s32(2) of the Labour Relations Act, 66 of 1995 ("the LRA"), extended the terms and conditions of the collective agreement to non-parties.[1] It is common cause between the parties that they are bound by the collective agreement.

The Labour Court decision

[3] The appellants made application to the Labour Court in terms of s77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA") for the payment of the outstanding wages and weekly bonuses, as well as a refund of certain unlawful deductions, which were purportedly owing to them in terms of the collective agreement. The appellants contended that the respondent had contravened certain clauses of the collective agreement by, amongst other things, failing to, provide them with written contracts of employment and pay them a minimum wage. According to the appellants, their only earnings are

[1] GNR707 of 22 May 1998.

from the service tips or gratuities which they receive from patrons of the restaurant, but that the respondent has made certain unlawful deductions from these earnings for “breakages, table-runners, linen and soap”.

[4] The respondent opposed the application in the Labour Court, on the basis that the Labour Court had no jurisdiction to entertain the application, as the dispute was founded on the interpretation and application of the collective agreement. It contended that the dispute could only be resolved through conciliation and, if it remained unresolved, through arbitration in terms of clause 28(a) of the collective agreement. It accordingly contended that the appellants were compelled to follow the dispute resolution procedure provided for in clause 28(a) of the collective agreement. Clause 28(a) of the collective agreement reads as follows:

> ‘(1) Disputes pertaining to contraventions of the Agreement must be done in the form of a sworn statement setting out all of the material facts that form the basis of the complaint.
>
> (2) On receipt of the complaint, the Council shall within fourteen days appoint a designated agent or official to investigate the complaint and/or may request further information, facts or data from either the employee of the employer.
>
> (3) The designated agent or official shall within 30 days of his appointment submit a written report to the Secretary on his investigation and the steps he has taken to ensure compliance with the Agreement and the recommendations for the finalisation of the complaint.
>
> (4) Should the complaint not be settled, the complainant may request the Council to set the matter down for arbitration within 30 days of being served with the outcome of the investigation.
>
> …
>
> (10) An arbitrator conducting an arbitration in terms of this clause has all the powers of a commissioner as set out in the Act.

(11) An arbitrator may, make an appropriate award including:

(a) ordering any person to pay any amount owing in terms of this agreement provided that any claim pertaining to clause 5, 6, 7, 9, 13, 14, 16 and 17, shall not exceed the period of twelve months, from date the complaint has now been lodged at the Council;

(b) charging a party an arbitration fee;

(c) ordering a party to pay the costs of the arbitration;

(d) any award contemplated in s 138(9) of the Act.

(12) An award in terms of this clause is final and binding and may be enforced in terms of s143 of the Act after the Secretary and/or a person appointed by the Council has certified the arbitration award, unless it is an advisory award.'

[5] In deciding the jurisdictional question, the Labour Court reasoned as follows:

'The true nature of the present dispute is the Respondent's non-compliance with the provisions of the Council's Collective Agreement and must be enforced via the procedures in clause 28A of the Council's Collective Agreement, and if necessary, arbitrated in terms of the provisions of s33A of the LRA. The dispute is clearly not about getting paid what was contractually agreed between the Applicants and the Respondent or even what was agreed on behalf of workers at plant level and then incorporated into their individual contracts by virtue of the provisions of s23(3) of the LRA. This dispute is about minimum wages and other conditions of employment negotiated and agreed at the Council. To suggest that the present dispute is of the type envisaged by s77(3) of the BCEA is superficial and goes against substantial considerations to the contrary.

…

[22] The Applicants brought their claim to this Court in the form of an application in terms of s77(3) of the BCEA premised on a breach of employment contracts, but in substance the complaint is the Respondent's failure to pay them the industry minimum wages and bonuses in terms of the

> Council's Collective Agreement. Applying the 'substance over form' principle, I have no hesitation in finding that the real issue in dispute is the Respondent's non-compliance with the provisions of the Council's Collective Agreement, and not, as the Applicants want to characterise the dispute, a breach of the terms of their individual contracts of employment. The main issue is about the Council's Collective Agreement and not individual contracts.'

[6] The Labour Court accordingly found that it did not have jurisdiction to adjudicate the appellants' claim. The appeal against the Labour Court's decision is with its leave.

Jurisdiction

[7] The appellants contend, on appeal, that their claim for wages was made in terms of their employment contracts, hence they were entitled to approach the Labour Court for relief under s77(3) of the BCEA, which provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract.

[8] It is an established principle of law that the question of jurisdiction is determined with reference to the allegations which are set out in the pleadings and not the substantive merits of the case. Thus, in the case of an application of this nature, the court must closely examine the contents of the founding affidavit in order to "*establish what the legal basis of the applicants' claim is*". It, however, does not behove the court to say that "*the facts asserted by the applicants would also sustain another claim*".[2] It is, therefore, vital for the court to *"ascertain the true or real issue in dispute"*. This would necessitate examining the substance of the dispute over the form in which it is presented. The *"characterisation of the dispute by a party"* is, consequently, *"not necessarily conclusive…."*[3]

[2] *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 75.
[3] *Coin Security Group (Pty) Ltd v Adams and 37 Others* (2002) 21 ILJ 924 (LAC) at para 15.

[9] The appellants' cause of complaint as appears from paragraphs 7, 8 and 9 of the founding affidavit is the respondent's non-compliance with the collective agreement. In paragraph 7 the appellants allege:

> 'This claim is brought in terms of the provisions of s77 of the Basic Conditions of Employment Act, 75 of 1997, as a result of the Respondent's failure to pay the individual Applicants the required and stipulated minimum wage and/or bonuses in the restaurant, catering and allied trade industry, and the unlawful and unauthorised deductions made from the remuneration of the individual applicants by the Respondent.'

[10] These claims have their basis in the collective agreement. This is clear from the founding affidavit itself, where the appellants allege that in May 1998 the collective agreement was concluded in the industry regulating all wages and conditions of employment of the employees in the industry and, by virtue of her powers in terms of s32(2) of the LRA, the Minister extended the collective agreement to non-parties to the agreement thus making it binding on all employers and employees in the industry.

[11] The appellants then pertinently allege that the respondent is clearly bound by the collective agreement which specifically regulates and determines the terms and conditions of employment of the individual appellants in this instance. They go on to allege the material terms of the collective agreement that are applicable to their various claims for payment, and describe the purported contraventions which include the failure of the respondent to, enter into a written agreement with each of them; pay each of them a minimum wage; and pay those of them who qualified a weekly bonus. In addition, they aver that the respondent contravened the collective agreement by making deductions from the remuneration which they earned from the gratuities received from the patrons of the restaurant. They aver that the respondent's conduct "*… is clearly in breach of, and in direct contravention of the Collective Agreement*".

[12] Thereafter, in paragraph 11 of the founding affidavit, the appellants reiterate that:

> 'The Respondent has failed to pay the individual applicants their remuneration in the form of the prescribed minimum wage, failed to pay bonuses due, and made unlawful and unauthorised deductions from the individual applicants' salary, which is clearly not only in breach of the clear and specific terms of the employment between the individual Applicants and the Respondents but also in breach of the Basic Conditions of Employment Act and the Collective Agreement in the industry.'

The legal basis of the appellants' claim is founded on the respondent's non-compliance with the collective agreement and not upon a breach of their contracts of employment. The substance of their complaint is the Respondent's failure to pay them the industry minimum wages and bonuses in terms of the collective agreement. This, as correctly found by the Labour Court, is the real issue in dispute between the parties. In the light of this, the appellants were obliged to follow the dispute resolution process provided for in clause 28(a) of the collective agreement.

[13] In terms of s24(1) [4] of the LRA, all collective agreements are required to provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement through conciliation, and if the dispute remains unresolved, through arbitration. Clause 28(a) of the collective agreement, in the current dispute, provides for such a procedure. It is couched in peremptory terms and is binding on both the appellants and the respondent. It provides a speedy and cost-effective mechanism to employees of the restaurant, catering and allied trades industry seeking to enforce their rights in terms of the collective agreement.

[14] Section 1(d)(iv) of the LRA provides that the purpose of the Act is to advance economic development, social justice, labour, peace and the democratisation of the workplace by fulfilling the primary objective of the Act, which is "***...*** *to promote* ***...*** *the speedy resolution of labour disputes*". Clause 28(a) of the

[4] Section 24(1) of the LRA provides:
'Every collective agreement excluding an agency shop agreement concluded in terms of s 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1) must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.'

collective agreement does just that. It allows for an investigation into the complaint, referral of the dispute to conciliation and, if it remains unresolved, referral to arbitration.

[15] Clause 28(a) of the collective agreement simply affords an employee seeking to be paid in accordance with the collective agreement a mechanism to speedily enforce his or her rights under the collective agreement. The contention that clause 28(a) of the collective agreement was intended as an alternative to the remedies provided for under the BCEA is, in my view, subversive of the spirit and purport of clause 28(a) of the collective agreement – a peremptory provision – the objective of which is to ensure a speedy and cost-effective resolution of a dispute that arises from a contravention of the collective agreement.

[16] As became apparent during argument, what the appellants sought to do in the application before the Labour Court was to incorporate the terms of the collective agreement into their contracts of employment for purposes of approaching that court in terms of s77(3) of the BCEA. This practice was criticised and expressly rejected by this Court in *Ekurhuleni Metropolitan Municipality v The SA Municipality Workers' Union on behalf of workers,*[5] on the following basis:

> 'This argument, in my view, which is made to overcome the difficulty which the jurisdictional point presents to the Respondent, ignores the primacy of collective agreements under the LRA. One could equally argue that the court *a quo* was interpreting the main agreement and that the dispute was about the main agreement which was the source of the relevant clauses. For this argument, Respondent's counsel purportedly relied on s23(3) of the LRA, which provides:
>
> 'Where applicable a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement.'

[5] *Ekurhuleni Metropolitan Municipality v The SA Municipality Workers' Union on behalf of workers,* (2015) 36 ILJ 624 (LAC) at paras 25 and 26.

That provision is likely to apply to all collective agreements where reciprocal rights and obligations of employers and employees are dealt with. But it is not correct that if clauses in the collective agreement, by which the employment contract is varied, are interpreted, that it is in fact an interpretation of the employment contract and not of the collective agreement. The interpretation is certainly of the relevant clauses in the collective agreement and by implication, also the relevant clauses in the employment contract.

Collective agreements are to be accorded primacy. In *National Bargaining Council for the Road Freight Industry and another v Carlbank Mining Contracts (Pty) Ltd and another*, this Court held that the purpose of s199 of the LRA, read together with s23(3) of the LRA, is to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements above individual contracts of employment. Section 199 provides, *inter alia*, in essence that contracts of employment may not disregard or waive collective agreements. The fact that it was agreed that the rights, duties and obligations pertaining to full-time shop stewards were to be reduced to a collective agreement at Bargaining Council or sectoral level is indicative of the intention to create and maintain uniformity in the sector in respect of those matters. The meaning to be given to each clause in the collective agreement was therefore also clearly intended to be uniform throughout the sector and at both Bargaining Council and plant levels. To distinguish between the collective agreement and the individual contracts of employment in respect of those aspects when interpreting the relevant clauses, could be subversive, firstly, because of the very intention of maintaining uniformity, because there is a possibility that different meanings could be given to the very same clauses by the different parties to the agreement if they were allowed definitively to interpret the clauses at plant level. Such an approach would also weaken the collective agreement to the point of rendering it ineffective. Further, such an approach would be inconsistent with one of the other main objectives of the LRA, namely to ensure orderly and effective collective bargaining. The said objective of the LRA and the collective agreement can only be maintained if the collective agreement, *ie* the main agreement, itself is interpreted.' [Footnote omitted]

[17] The appellants in this appeal rely on the respondent's purported contraventions of the collective agreement to support their claim for payment of a minimum wage and certain other things. The determination of whether the respondent has contravened the collective agreement as alleged, calls for its interpretation and application. However, in terms of clause 28(a) of the collective agreement, disputes pertaining to its interpretation and application must be dealt with by the Bargaining Council in accordance with the procedure set out therein.

[18] A bargaining council is empowered in terms of s33A[6] of the LRA to enforce a collective agreement, which it has concluded. The dispute resolution procedure provided for in clause 28(a) of the collective agreement seeks to do precisely that. It is binding on both the appellants and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by the other party.

[19] It follows from this that the remedy available to the appellants in the dispute concerning their claimed payments lies neither in s77 of the BCEA nor their contracts of employment, but in the special dispute resolution mechanisms provided for in clause 28(a) of the collective agreement. In terms of this clause, the Labour Court has no jurisdiction to deal with a dispute arising from a contravention of a collective agreement. Accordingly, the appeal must fail.

[20] In the result, I order that:

"The appeal is dismissed with no order as to costs."

F Kathree-Setiloane AJA

[6] Section 33A(1) provides:
'Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreement in terms of this section or a collective agreement concluded by the parties to the council.'

Davis & Tlaletsi JJA concurring

APPEARANCES:

FOR THE APPELLANTS:	AJ POSTHUMA
	Instructed by Snyman Attorneys
FOR THE RESPONDENT:	MA LENNOX
	Instructed by Waldeck Attorneys