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Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: C 1038/2010

In the matter between:

GODFREY LOUW

APPLICANT

and

EDEN DISTRICT MUNICIPALITY

RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application brought in terms of section 158(1) of the Labour Relations Act 66 of 1995. The applicant seeks an order *inter alia* in the following terms:

- 2 *Declaring whether the South African Local Government Bargaining Council or the Commission for Conciliation, Mediation and Arbitration has jurisdiction in respect of the disputes between the Applicant, an employee employed in terms of section 57 of the Local Government: Municipal Systems Act, and the Respondent about:*
 - (a) *an alleged unfair labour practice;*
 - (b) *an alleged unfair dismissal; and*

- (c) *the interpretation or application of the Disciplinary Procedure Collective Agreement of the South African Local Government Bargaining Council.*

The facts

[2] On 1 July 1998, the applicant was employed as a municipal manager of the respondent in terms of s 57 of the Local Government: Municipal Systems Act, Act 32 of 2000 (“the Systems Act”). He has referred three disputes to the bargaining council. These disputes respectively relate to the applicant’s suspension, his dismissal and the interpretation of a collective agreement regulating disciplinary procedures. In relation to the first dispute, the respondent challenged the jurisdiction of the bargaining council to arbitrate the dispute, and contended that the dispute ought to have been referred to the CCMA. On 16 November 2010, the arbitrator dismissed the point *in limine*, and ruled that the matter was properly before the bargaining council. In relation to the second dispute, the bargaining council has issued a certificate of outcome, but the applicant has not yet requested arbitration, pending the outcome of this application. In relation to the third dispute, on 16 November 2010, the bargaining council made a ruling in which it recorded that the parties had by agreement decided that ‘the only option’ to establish the correct forum is to refer the matter to this court on an urgent basis *‘for a declaratory from the Honourable Court as it is argued that there are conflicting rulings and awards regarding the correct forum to deal with section 57 employees and that there is a necessity to expedite the process. This matter is of national interest and should accordingly be decided by the Labour Court to create clarity and jurisprudential precedent across the republic of RSA’*. On that basis, the arbitrator made a ruling to the effect that by mutual agreement, the matter be referred to this court on an urgent basis for a declaratory order.

The relevant legal principles

[3] I will assume for present purposes that the application is urgent. In effect, what the applicant and the respondent seek is a directive from this court as to whether the dispute between them should be determined by the bargaining council or the CCMA. There are conflicting rulings on this point; the applicant has referred to a number of rulings made both by the CCMA and the bargaining council in this regard. But it does not follow, as the arbitration ruling suggests, that there is any basis on which this court can grant a declaratory order, or, for that matter, that the application should be treated as urgent. While this court is empowered to grant declaratory orders (see s 158(1) (a) (iv)), it may only do so in respect of matters that fall under its jurisdiction. Disputes about suspension, dismissal for misconduct and the interpretation of collective agreements do not fall within this court's jurisdiction – these are matters that must in the first instance be determined by the CCMA or a bargaining council, as the case may be. The ruling that is the genesis of this application was made in respect of a referral to arbitration of a dispute about the interpretation of a collective agreement concluded by the bargaining council to regulate disciplinary procedures – this is something over which this court manifestly has no jurisdiction.

[4] If a jurisdictional challenge is mounted at an arbitration hearing (or a conciliation meeting) the CCMA or the bargaining council, it must be dealt with by the presiding arbitrator or commissioner, who must make a ruling.

Ordinarily, the CCMA and bargaining councils make rulings on jurisdictional points for the purpose of convenience and not because the decision is binding on the parties (see *SARPA v SA Rugby (Pty) Ltd: SA Rugby (Pty) Ltd v SARPU* [2008] 9 BLLR 845 (LAC)). Both these institutions are creatures of statute, and neither may grant itself jurisdiction that it does not have, or deprive itself of jurisdiction that it enjoys by making a wrong finding that it lacks jurisdiction. An aggrieved party may apply under s 158 (1) (g) to review the ruling. This court is

then required to determine whether objectively speaking, the facts that would confer jurisdiction on the CCMA or the bargaining council existed. The court does not, as it does under s 145, determine whether the ruling was one to which a reasonable decision-maker could have come. In other words, the Act establishes this court as a supervisory authority over the CCMA and bargaining councils. The court is not empowered to make rulings on jurisdiction as a court of first instance in disputes which in terms of the Act must be referred to arbitration by the CCMA or a bargaining council, however convenient that may be to the broader constituency of municipal managers or the local authorities that employ them.

[5] In short: it is not for a bargaining council arbitrator (nor a CCMA commissioner, for that matter) to make a ruling that has the effect of requiring this court to make declaratory orders on jurisdiction when the jurisdiction of the council (or the CCMA) has been challenged. The arbitrator must, if called on to do so, make a ruling on jurisdiction. Any party aggrieved by the ruling may seek to have it reviewed and set aside. This court does not have the jurisdiction, as a court of first instance, to decide jurisdictional disputes pending before arbitrators and commissioners. To the extent that the applicant relies on this court's powers to grant declaratory orders, the applicant confuses the concepts of jurisdiction on the one hand and powers on the other. Although certainty has an inherent value, it cannot be sought at the cost of undermining the statutory dispute resolution structure and the status of this court as a supervisory authority. Similarly, considerations of convenience to the parties do not confer jurisdiction on this court where none is established by the Act. For this reason, the application must fail.

[6] In any event, this court ought ordinarily to refuse to grant declaratory orders when a party approaches the court to obtain a declaration of rights merely because those rights have been disputed. The court is not here to advise on the merit of differing contentions in these circumstances, however important these may be to the parties, or however convenient it may be to them that the court

makes an order upholding one of the positions contended for (see *Gibb v Nedcor Limited* [1997] 12 BLLR 1580 (LC), at 1598).

For these reasons, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 30 November 2010

Date of judgment 6 December 2010

Appearances:

For the applicant: Adv P. Kantor instructed by Craig Schneider Associates,
Attorneys.