IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Reportable and of interest to other Judges

CASE NO C654/2009

In the matter between:

CITY OF CAPE TOWN	**APPLICANT**
And	
SOUTH AFRICAN LOCAL GOVERNMENT	
BARGAINING COUNCIL	**1ST RESPONDENT**
PANELIST D.P VAN TONDER NO	**2ND RESPONDENT**
SOUTH AFRICAN MUNICIPAL WORKERS UNION	**3RD RESPONDENT**

JUDGMENT

AC BASSON, J

[1] This is an application to review and set aside an *in limine* ruling by the second respondent ("the arbitrator"). In terms of the ruling the arbitrator found that the 1st respondent ("the council") has jurisdiction to arbitrate an "essential services" dispute. On 18 August 2010 this court reviewed and

set aside the ruling and replaced it with a finding that the first respondent has no jurisdiction to hear the dispute. The court also ordered that there should be no order as to costs. Here are the full reasons for my order.

[2] I do not intend summarising the history of the dispute in detail. Suffice to point out that the dispute has a long history dating back to 2000. A large number of disputes have been lodged relating to the formation of the City of Cape Town and the city's plans to restructure the organization.

Referral to conciliation

[3] A dispute was referred to the council for conciliation about the *refusal* of the applicant (City of Cape Town - hereinafter referred to as "the city") to *bargain* on a set of demands tabled by the applicant. The following demands were contained in a letter which was also attached to the referral form:

(i) the City halt the implementation of the placement process adopted by the city.;

(ii) the city must stop relocation of workers pending the finalization of a placement agreement;

(iii) the status quo on conditions of service on the same terms as at November 2006 must be restored; and

(iv) the city must enter into talks to renegotiate a new settlement agreement on the organograms and placement process.

(I will refer to these issues collectively as the "*listed issues*".)

[4] The dispute was conciliated on 9 November 2007 but could not be resolved. What dispute was in fact conciliated will be considered hereinbelow. Commissioner Martin presided over the conciliation proceedings. He issued an *advisory award* (on 23 November 2007) and also issued a certificate out outcome (dated 26 November 2007) which certified that the dispute remained unresolved as at 26 November 2007 and indicated on the certificate that the dispute may be referred to a strike. Commissioner Martin further recorded on the certificate of outcome that the dispute was between SAMWU and the City of Cape Town and that the dispute was in respect of an alleged *refusal to bargain* by the City of Cape Town. Commissioner Marin further recorded in his advisory award that the issue in dispute was the *refusal to bargain*. It is further also clear from the advisory award that the award was issued in terms of section 64(2) of the LRA (which specifically deals with disputes about the refusal to bargain).

[5] In the application (referral) for conciliation it is specifically recorded (on behalf of the members of SAMWU) that the employer is refusing to bargain with the union on a set of demands table. The referral form further recorded the desired outcome of the conciliation to be:

(i) Firstly, that the employer (the city) bargain with the union on the listed matters; and

(ii) Secondly, that an advisory award be issued in terms of section 64(2) of the LRA.

[6] The referral to conciliation makes no mention about the fact that the referral was in respect of both essential and non-essential service employees nor does the referral mention that compulsory arbitration may follow unsuccessful conciliation in respect of essential service employees (as contemplate by section 74 of the LRA).

Strike

[7] On 18 January 2008 SAMWU issued a strike notice and called out a strike of all its *non-essential service members*. The notice called on the city to bargain with SAMWU's on certain demands.

Referral to arbitration by the essential services employees

[8] On 6 February 2008 SAMWU apparently changing tact, then referred a dispute to arbitration *in terms of section 74(4)* in respect of its *essential service* members. In the referral form it is recorded that the dispute is about the inability on the part of the parties to reach agreement on matters of mutual interest primarily involving the city's restructuring process. The referral refers to the strike action commenced by non-essential services members and states that the subject matter of the current strike action are the same as those on which SAMWU now wished the council to arbitrate. In the referral to arbitration it is also stated that the parties were unable to reach agreement on matters of mutual interest.

[9] When the matter came before the 2nd respondent (Arbitrator Van Tonder) four objections to the jurisdiction of the council were raised on behalf of the city:

(i) there was not proper referral to arbitration in the sense that the dispute that was referred to arbitration is *not* the same dispute and not in respect of the same employees than the one that was referred to conciliation.

(ii) The 30 day time limit referred to in section 139(1) of the LRA was not complied with.

(iii) This dispute cannot be arbitrated in terms of section 74 of the LRA because the applicant's members had already embarked on strike action in respect of the same demands.

(iv) The applicant cannot expect to achieve something in an interest arbitration that it could not achieve through strike action.

[10] This essential services dispute was referred to arbitration in terms of section 74(4) of the LRA without first referring the dispute on behalf of its essential services members to be conciliated under the provisions of section 74(1) of the LRA as a precursor to a referral to arbitration. As will become more apparent, SAMWU's argument (and accepted by Arbitrator Van Tonder) was that it need not refer the dispute to conciliation as the dispute has already been conciliated by Commissioner Martin.

[11] It was this referral that was met with an *in limine* application. The arbitrator dismissed the *in limine* attack on the jurisdiction of the council and ruled that the arbitration proceed on the *merits* (i.e the substance of the listed demands). It is this ruling that is the subject of the review. The arbitrator held, *inter alia*, as follows:

"[54] In respect of the employees in essential services however, there was no need for applicant to refer to any statutory provisions in the referral form to conciliation, because in respect of those employees it was unnecessary to take any further procedural steps apart from conciliation. When a dispute about a refusal to bargain with employees in essential services cannot be resolved at conciliation, the next logical step in terms of the LRA for such employees, is to refer their dispute for arbitration in terms of section 74. ***There is accordingly no reason why respondent should not have known that an arbitration in terms of section 74 may follow should the dispute not be resolved at conciliation.***

…….

[56] In the circumstances, I am satisfied that the manner in which the dispute was referred did not preclude the parties at conciliation from ventilating the dispute in respect of both the employees in non-essential services and the employees in essential services. ***The referral was clearly wide enough to ventilate the dispute in respect of both categories of employees at conciliation. "***[1]

[12] On behalf of SAMWU it was argued before the arbitrator that it was indeed the same dispute in respect of the same employees that was referred to conciliation and arbitration and that the only difference was that the employees in non-essential services are not included in the referral to

[1] My emphasis.

arbitration. It was further argued that there exists no reason why a union cannot call out a strike in respect of its employees in non-essential services while at the same time referring a dispute in respect of the same issue to arbitration in respect of its members in essential services.

[13] The arbitrator dealt with each of the complaints comprehensively and arrived at the conclusion that the council has jurisdiction. I do not intend to discuss the judgment in detail except where it is necessary to do so. Suffice to point out that all the points *in limine* were dismissed. What is, however, important to restate is the fact that the arbitrator was of the view that it has jurisdiction to arbitrate the interest dispute (the listed demands). As will come clear later in the judgment, I have concluded that these issues (the listed demands) were not subjected to the conciliation process. The only issue before the conciliator was the city's refusal to bargain.

[14] In essence the arbitrator found the following:

(i) the council had jurisdiction to arbitrate the dispute.

(ii) the fact that the arbitration may be academic because the union cannot hope to achieve by an essential service arbitration what it could not achieve through the non-essential service employee strike was not relevant to the issue of jurisdiction but should be treated as part of merits of the dispute.

(iii) there is no merit in the argument that a union must make an election about whether or not it wishes to embark on a strike (calling out the non-essential services members) or to refer a

dispute to arbitration in respect of the essential services members in circumstances where the same dispute is raised in respect of both essential services and non-essential services employees.

(iv) the special provisions for arbitrating disputes in essential services contained in section 139 of the LRA (and specifically made applicable to essential services arbitrations under the CCMA) are not generally applicable to proceedings before bargaining councils. The arbitrator further held that even if he was wrong, in his view and section 139(1)(a) was applicable, it will not deprive the bargaining council with jurisdiction as it would lead to harsh and absurd consequences.

(v) the dispute that had been conciliated before the commencement of the strike was *the same dispute* as the one that formed the subject matter of the essential services arbitration.

The review

[15] The jurisdiction to arbitrate a dispute in essential services derives from the provisions of section 74 of the LRA and more specifically sections 74(3) and (4) of the LRA. In terms of section 74 of the LRA a council (or the CCMA if no council has jurisdiction) the following requirements must be satisfied:

(i) The referring party must be a party to a dispute that is precluded from participating in a strike because that party is engaged in an essential service.

(ii) The council must attempt to resolve the dispute through conciliation.

(iii) If the dispute remains unresolved, the party may request that the dispute be resolved through arbitration.

(iv) The dispute must be a dispute concerning a matter of mutual interest.

Was there any referral to an essential services arbitration which was competent in law?

[16] Arbitrator Van Tonder was of the view that the certificate of outcome that was issued by Commissioner Martin can subsequently be used by a union should it so wish as proof that there has also been conciliation as contemplated under section 74(3) of the LRA. I am, in principle in agreement (despite certain reservation – see hereinbelow) with this finding provided that the issue referred to arbitration (in terms of section 74 of the LRA) is the same dispute or issue that was subjected to conciliation irrespective of whether the dispute was referred to conciliation. Put differently, it is not fatal to the process of referring a dispute to interest arbitration in terms of section 74 of the LRA that the dispute was referred to conciliation in terms of section 64(1) of the LRA and not section 74(1) of the LRA. (See, however, paragraph [33] *infra*.)

[17] Parties engaged in essential services are precluded from participating in a strike as a mechanism to resolve an interest dispute. Parties engaged in non-essential services may, however (unless the parties have agreed to

refer the dispute to arbitration), resort to industrial action as a mechanism to resolve an interest dispute. A party to an essential service dispute who refers a dispute to the council is calling upon an arbitrator to resolve the impasse between the parties through arbitration and is effectively requiring the arbitrator to determine the outcome of the interest dispute between the parties by issuing an award which will be binding upon the parties.

[18] Where a (non essential service) party wishes to resort to strike action as a mechanism to resolve a dispute, the dispute must be referred to conciliation in terms of section 64(1) of the LRA. Once conciliation has failed the parties may then give notice and thereafter embark on strike action. A party to a dispute in an essential service will refer the dispute to conciliation in terms of section 74(1) of the LRA and once conciliation fails, refer the dispute to arbitration in terms of section 74(4) of the LRA.

[19] Can a party to an essential services dispute who wishes to refer a dispute to arbitration in terms of section 74(4) of the LRA simply rely on a referral to conciliation in terms of section 64(1) of the LRA thereby circumventing the dispute resolution procedures provided for in section 74(3) of the LRA? As already indicated, despite certain reservations and despite the fact that the LRA specifically provides for conciliation procedures in terms of section 74(2) of the LRA in respect of an essential service dispute, I am nonetheless of the view that, in principle, nothing prevents a referring party from relying on a certificate of outcome to refer a dispute to essential

service arbitration despite the fact that the dispute was not referred to conciliation in terms of section 74 of the LRA.

[20] Moreover, I am in agreement with the finding that, on a proper reading of the LRA, there is no support for the principle that a union must make an election about whether it wishes to embark on a strike or refer a dispute to arbitration where the same dispute is raised on behalf of both essential services and non-essential services employee. In other words, there is nothing in the LRA that requires a referring party to make an election in respect of the *method* the union intends to use to resolve the impasse as the LRA provides for strike action as a mechanism to resolve a dispute in the case of non-essential services employees and compulsory arbitration in respect of essential services employees. Furthermore, no mention is made in the LRA to suggest that essential service employees lose their right to arbitration simply because their non-essential service colleagues have seized the opportunity to strike. The LRA is clear: any essential service employee may request that a dispute be resolved through conciliation and thereafter arbitration should the parties not settle the dispute. There is in my view no exception or restrictions to the right of essential services employee in the manner suggested by the city. See *NEHAWU & Another v Public Health & Welfare Sectoral Bargaining Council & Others* (2006) 27 *ILJ* 1829 (LC) where the court found that a trade union could call its other (non-essential) members out on strike in support of the demand of an individual employee who was part of an

essential service. At the same time, the individual employee retained the right to have his dispute determined by way of an essential service arbitration. A party to a dispute who is precluded from striking because he or she is engaged in an essential service is therefore entitled to refer that dispute to conciliation and thereafter to arbitration under section 74. In *South African Police Service v POPCRU & Others* (unreported decision: J1444/2007) the court sanctioned the right of certain employees to strike and others to arbitrate over the same dispute. In this case the SAPS sought to interdict all of its employees from striking because the police service is deemed to be an essential service. SAPS argued that it did not matter what job description an employee held whether it was a tea lady, cleaner or uniformed officer, as all personal in the SAPS render an essential service by reason of being in the SAPS employ. The court held that not all employees of SAPS render an essential service and are thus not all prohibiting from participating in strike action. The court also rejected the SAPS's submission that any order that some personnel of SAPS render non-essential service and may strike while others may not by reason of rendering an essential service would be "enormously difficult" to implement. The court only interdicted "members" of the SAPS from striking and allowed those employees of the SAPS who did not perform essential services to participate in the strike. Nothing therefore precluded the "members" of the SAPS who were prohibited from striking from exercising their rights under section 74 by referring the dispute to arbitration.

[21] I am further of the view, as already indicated, that it is also not fatal from a procedural point of view, if the union refers a dispute to conciliation in respect of non-essential services employees and essential services employees. To hold otherwise will, in my view, be unduly formalistic and may lead to a duplication of the conciliation process where the dispute involves both essential services employees and non-essential services employee.

[22] In principle I am therefore in conclusion of the view that it would also be unduly technical and formalistic to insist that a referring party refer a dispute to conciliation in terms of a specific (or the correct) section of the LRA. The question should rather be whether or not the dispute between the parties was conciliated irrespective of the section in terms of which the dispute was referred. Having said this, I must, however, raise one issue of concern. There is, in my view, a practical difference between a dispute that is referred to conciliation with the option of resorting to strike action in the event conciliation fails on the one hand, and, on the other hand, a dispute referred to conciliation with the option of referring the dispute to (compulsory) arbitration in the event conciliation fails. This difference may in fairness require the referring party to be more specific in the application for conciliation in respect of the nature of the dispute and may also require the referring party to at least alert the employer of the possibility of referring the dispute to compulsory arbitration where the dispute also

involves essential services employees. I will return to this point hereinbelow.

[23] Where it is in dispute, or where it is unclear what the issue in dispute is, or which dispute was in fact subjected to the conciliation process, the court may be called upon to determine the issue. In respect of the nature of the dispute it is accepted that this court will not approach a referral to conciliation formalistically and merely accept that the nature of the dispute is necessarily that what is being characterized in the referral form as the issue in dispute nor should the conciliator merely accept the characterization of the dispute referred to conciliation. The court is also not bound by the conciliator's characterization of the dispute between the parties in the certificate of outcome. It is therefore competent for the court to determine what the essential dispute or disagreement between parties is and/or whether that dispute has in fact been conciliated irrespective of the legal characterization of particular set of facts. See in this regard *National Union of Metalworkers of SA & OTHERS v Driveline Technologies (Pty) Ltd & Another* (2000) 21 ILJ 142 (LAC).

[24] In the present case a dispute regarding the refusal to bargain was referred to the council and, as will be explained hereinbelow, it would appear from the facts that this was indeed the dispute (and the only dispute) that was subjected to conciliation. However, when the matter came before the arbitrator in terms of section 74(4) of the LRA the arbitrator was of the view that the dispute that was referred to arbitration had been conciliated

and that there was no reason why the city should not have known that an arbitration in terms of section 74 of the LRA may follow should the dispute not be resolved at conciliation. I do not agree with this finding. The dispute that was conciliated did not concern the substantive issues (the listed demands) but only concerned the refusal to bargain. I will now turn to the reasons for my conclusion bearing in mind what has already been stated in respect of the characterization of the nature of the dispute by the referring party.

What was the dispute that was referred to conciliation on 27 September 2007?

[25] I have already referred to the fact that the dispute that was referred (in the referral form) was a dispute concerning a *refusal to bargain* by the city with SAMWU on a set of demands that were tabled. In paragraph 3 of the referral form SAMWU summarised the facts pertaining to the dispute as follows:

> *"Employer refusing to bargain with union on set of demands tabled."*

SAMWU further stated under what it (SAMWU) required to be the result of conciliation the following:

> *"1. That the employer bargain with the union on listed matters.*
>
> *2. An advisory award to be issued i.t.o section 64(2) of the LRA."*

[26] The council (Commissioner Martin) then issued the certificate of outcome in which the nature of the dispute is described as follows:

"Refusal to bargain by the City of Cape Town."

In addition hereto, the Commissioner also indicated that the parties to the dispute may now resort to a strike or a lock-out. The certificate was furthermore preceded by an *advisory award* in terms of which Commissioner Martin identified the issue in dispute as "*Refusal to bargain*". Commissioner Martin furthermore recorded in his advisory award that the advisory award was issued in terms of section 64(2) of the LRA:

> *"In terms of section 64(2) of the Labour Relations Act 66 of 1996 as amended the issues stated in the background to the dispute above are legitimate bargaining subjects. Accordingly the applicant is entitled to the certificate of outcome and this advisory award as the disputer referred remains unresolved.*
>
> *The applicant is however, advised to attempt to further pursue the resolution of this dispute as the bargaining subjects may be construed as representing excessive demands."*

[27] Consistent with the above, SAMWU then issued a strike notice in terms of which it stated the following:

> *"Please be advised that the South African Municipal Workers' Union (SAMWU) is hereby giving notice in terms of section 64 of the Labour Relations Act, act 65 of 1996, as amended, of protected Strike action* ***in lieu of the inability on the part of the City of Cape Town to bargain*** *with the union specific demands tabled*

which inability is confirmed in the Salgbc advisory award under case number WCM090709."[2]

[28] It is also significant to point out that SAMWU did not in the referral document demand that the city complies with the listed demands, nor did the strike notice demand that the city complies with the listed demands.

[29] Lastly it should also be pointed out that in October 2007 the Labour Court had interdicted a strike which SAMWU had called in support of its demands relating to the restructuring. One of the basis for the interdict was that SAMWU had called a strike concerning a refusal to bargain without first obtaining an award. SAMWU thereafter took the necessary steps to obtain an advisory award on 26 November 2007 and the certificate of outcome to ensure that the subsequent strike would be protected.

[30] It is therefore, in my view clear from the facts that the dispute that was referred to the council in fact was a dispute concerning the *refusal to bargain*:

(i) Although accepting that the court is not bound by the legal characterizing of the dispute, the referral form clearly describes in paragraph 3 the nature of the dispute as one concerning a refusal to bargain. The referring party further expressly expanded in the referral form by stating that the employer refuses to bargain on a set of demands.

---

[2] *Ibid*.

(ii) SAMWU specifically requests in the referral form (dated 27 September 2007) that the outcome of conciliating must be that the employer bargain with the union on the listed matters and that an advisory award be issued in terms of section 64(2) of the LRA.

(iii) Consistent with the above, Commissioner Martin issued an advisory award (dated 23 November 2007) and issued a certificate stating that the dispute about the refusal to bargain remained unresolved (dated 26 November 2007).

(iv) Also consistent with the above, the commissioner recorded indicated that SAMWU may resort to strike action.

(v) Further consistent with the above is the strike notice issued consequently to the certificate of outcome in terms of which it is expressly stated that the city is refusing to bargain. Although I accept that that the court should not be unduly formalistic, it would furthermore appear that the dispute that was referred to the council concerned a dispute in terms of section 64(2) of the LRA which concerned a refusal to bargain. The certificate issued was furthermore clearly issued in terms of section 64(1)(a) of the LRA.

(vi) The certificate indicates that the parties may now resort to strike action. I am in agreement with the city that it appears, at least on the face of it, that the certificate was issued in terms of section 64(1)(a) in that it sanctions the parties to resort to a strike. I also accept that on the face of it the certificate does not purport to have

been issued in terms of section 74(1)(a) of the LRA and does not make any reference to a referral to arbitration as a means of resolving the dispute (although this omission, as already indicated, does not invalidate the conciliation process). I am thus in agreement with the city that it does not appear that, at least at that stage, the union had planned on resolving the dispute by means of essential services arbitration. This conclusion is also, in my view, consistent with the fact that that union proceeded to call out a strike amongst all of its members engaged in non-essential services. I must also point out that the referral to conciliation makes no reference to non-essential services whereas the referral to arbitration refers specifically to essential services employees although this omission is not (despite certain reservations), as already indicated, fatal to the process. I am therefore in agreement with the city that it does not appear from the referral form to conciliation that the conciliation of the dispute was a precursor to an essential services arbitration in the event of the parties being unable to resolve their differences. It was only on 6 February 2008 that the union decided to refer an essential services dispute to arbitration. The city contended that the dispute that was referred to arbitration ought to have been referred to conciliation in terms of the provisions of section 74(1) as a precursor to a referral to arbitration.

[31] It is, therefore in my view clear from the facts viewed as a whole, that the dispute that served before the council did *not* concern the substance of any of the listed demands. There is no indication on any of the documents before this court that SAMWU demanded that the outcome of the conciliation should be that the city complies with the listed demands nor is there any indication from the strike notice that the demand was that the city complied with the listed demands. The demand forming the subject matter of the strike was the demand that the city *bargain* with SAMWU on the listed demands.

[32] I am therefore not persuaded that Arbitrator Van Tonder was entitled to descend into the arena and define his terms of reference so as to made the dispute one capable of being the subject matter of an essential services arbitration and therefore about issues other than a refusal to bargain. The arbitrator therefore erred in defining his terms of reference to include the following disputes: (i) whether the city is required to halt the implementation of the placement process; (ii) whether the city must immediately stop relocation of workers pending finalisation of a placement agreement; (iii) whether the status quo prior to the issuing of placement letters must be restored on the terms as at November 2006 and (iv) whether the city must enter into talks to renegotiate a new settlement agreement on the “Organograms and placement process”. These disputes now incorporated by Arbitrator Van Tonder as being the disputes of interest that have been referred to arbitration were never the subject of the

conciliation process. There is simply no documentary evidence which supports a finding that the interest disputes that Arbitrator van Tonder intended to subject to arbitration are the same disputes that were referred to conciliation. The dispute referred to conciliation was about the refusal to bargain and not the substance of the listed demands. I am further in agreement with the submission that there is a substantial difference between claiming that there has never been bargaining because a party is refusing to bargain on the one hand and on the other hand claiming that, although there has been bargaining, bargaining has reached an impasse in an essential services dispute and referring the dispute to arbitration and requesting the arbitrator to make an agreement for the parties. The only dispute that was referred was a dispute concerning a refusal to bargain.

[33] This brings me to the concern raised *supra*. Although it is strictly not necessary for me to decide this issue in light of my finding that the dispute before the arbitrator was not the same dispute that was conciliated, I am nonetheless of the view that it is necessary to make a few observations in respect of referrals to conciliation where compulsory arbitration is the next step. Although I have indicated that I am of the view that there is in principle no reason why a referring party could not rely on a certificate of outcome issued in terms of section 64(1) of the LRA in referring the dispute to compulsory arbitration (as holding otherwise may be unduly formalistic), I am nonetheless of the view that an employer is entitled in fairness to some kind of indication that the dispute that is being subjected

to conciliation is one which also concerns essential services employees and that the dispute concerns a dispute that may be referred to compulsory arbitration in terms of section 74 of the LRA. The power to make a collective agreement in terms of an arbitration award for the parties is a far reaching power entrusted to arbitrators (and commissioners). An employer is therefore in my view entitled to know that the referring party is referring a dispute to conciliation which involves non-essential services employees in respect of which such referring party may refer the dispute to compulsory arbitration. From a practical point of view, parties may well approach a conciliation where strike is an option differently from a conciliation where compulsory arbitration is the next step. I have already alluded to the fact that when a dispute about a matter of mutual interest is referred to compulsory arbitration, the arbitrator is called upon to decide the issues for the parties and make an agreement which will be binding on the parties. This may, in my view, well impact on the manner on which the employer approach the conciliation process as the employer may well be more inclined to consider the merits of the demands more seriously in light of the fact that a failure to accede to the demands may well result in a third party imposing an agreement on the parties.

Failure to comply with time limits

[34] It was common cause that SAMWU referred the dispute to arbitration in terms of section 74 of the LRA 72 days after the certificate of outcome was issued.

[35] On behalf of the city it was submitted that the arbitrator's finding that the LRA provides no time limit prescribing the period within which an interest arbitration must be conducted by a bargaining council arbitration after the certificate has been issues is wrong in law and would, if correct, defeat the object of the LRA.

[36] On behalf of SAMWU it was argued that there is no particular reason as to why this period of time ought to constitute an undue delay particularly in light of the fact that there was a strike over the same issues in progress. (I have already pointed out that I do not agree with the latter argument namely that the strike was over the same issues that were the subject matter of the strike.)

[37] The arbitrator found that section 139 of the LRA – which requires a commissioner of the CCMA to complete an (essential service) arbitration (under the auspices of the CCMA) and issue an arbitration award within 30 days of the date of the certificate referred to in section 136(1) of the LRA – is not applicable to essential services arbitration held under the auspices of a *bargaining council*. The arbitrator thus effectively held that in the case of an essential services arbitration held under the auspices of the *bargaining council* there is no time limit within which a dispute must be referred to arbitration after the certificate of non resolution was issued. I

am in agreement with the city that this finding constitutes a material error of law: Firstly, section 139(1) of the LRA gives effect to the right of essential services workers to a speedy arbitration. There is, in my view no reason why the same policy consideration should not also apply where the essential services arbitration is held under the auspices of a bargaining council. A reading of section 73(3) of the LRA also reinforces the view that the legislature recognized that disputes in essential services be resolved speedily. In this section the essential services committee is required to expeditiously determine disputes about whether or not a service is an essential service or not. Secondly, even if it is accepted that section 139 of the LRA is not directly applicable to bargaining councils (but only to the CCMA), it does not necessarily follow that the principle does not apply. Bargaining councils are in my view, required to apply the principle that a party who seeks an essential services arbitration must refer that dispute without undue delay. Thirdly, there are policy considerations why the dispute must be referred without undue delay. If conditions of service are to be imposed by an arbitrator in respect of the essential services component of a workforce, then in all likelihood those conditions where they are of general application to all categories of employees may well be extended by the employer to non-essential services employees. See *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* [2004] 25 *ILJ* 2195 (LAC) where the court had to consider the argument that the court below had erred in coming to the conclusion that the

appellant was required to refer the dispute for adjudication by the Labour Court within 90 days as required in terms of section 136(1) of the LRA. The appellant argued that the dispute had not been referred in terms of section 136 of the LRA but was referred in terms of section 10(6)(a) of the Employment Equity Act (an unfair discrimination act). This section does not require that the dispute be referred to the Labour Court within a specific time after the issuing of a certificate outcome. The LAC followed an interpretation which held that the provisions of the LRA as set out in section 36(1) which required referral within 90 had to be read as it they were of equal application in the context of adjudication as envisaged in section 10 of the Employment Equity Act.

[38] In conclusion therefore, it is, in my view, consistent with the purpose of the LRA that it was intended that an arbitrator conducting an essential services arbitration under the auspices of a bargaining council must complete and issue an essential services arbitration award within a reasonable time of the date on which the certificate of outcome is issued. Accordingly it was in my view incumbent to have complied with the 90 day period. The ruling is therefore also reviewed and set aside on this ground.

Conclusion

[39] In the event the ruling by Arbitrator Van Tonder is reviewed and set aside and replaced with a finding that the first respondent has no jurisdiction to hear the dispute. There is no order as to costs.

AC BASSON, J

Date of proceedings: 18 August 2010

Date or order: 18 August 2010.

Date of judgment: 12 January 2010.

For the applicant:

CS Kahanovitz SC instructed by Webber Wentzel Attorneys

For the respondent:

Adv J Whyte instructed by Cheadle Thomson & Haysom