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Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NUMBER: JR 1592/07

In the matter between:

CARLBANK MINING CONTRACTS (PTY) LTD	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY	**1st Respondent**
E FOURIE *N.O*	**2nd Respondent**
JOHN MOSOEU	**3RD Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This application raises the following question: Should this court enforce a term of an employment contract that requires disputes to be referred to private arbitration, in circumstances where the parties are subject to the jurisdiction of a bargaining council that has concluded a collective agreement providing for the

resolution of disputes under the auspices of the council? Put another way, can an employer and employee who are bound by a collective agreement concluded in a bargaining council ‘contract out’ of the agreement, at least in so far as it concerns the resolution of disputes, by agreeing to refer disputes to private arbitration? At first blush, the answer seems obvious – commonly held wisdom is that the Labour Relations Act encourages private dispute resolution, and if parties agree in a contract of employment that any disputes arising between them will be privately arbitrated, then *pacta sunt servanda.* But the LRA also promotes collective bargaining at sectoral level, and establishes mechanisms for collective agreements concluded in bargaining councils to be extended to all employers and employees in the sector for which the council is registered, and to bind them to those agreements unless an exemption has been granted by the council. Many bargaining councils that have been accredited to perform dispute resolution functions have concluded collective agreements to establish structures and processes for the resolution of disputes between parties who fall within their registered scope. This case raises the potential tension between these two objectives.

Factual background

[2] The third respondent (“Mosoeu”) was employed by the applicant as a motorbike driver. Whether Motsoeu was employed for a fixed term is disputed, but in May 2007, Mosoeu claimed that the applicant had dismissed him, in circumstances that are not relevant to these proceedings. He referred a dispute to the first respondent (“the council”) in terms of the council’s Exemptions and Dispute Resolution Collective Agreement (‘the collective agreement’). He claimed that his dismissal was unfair and sought reinstatement into the applicant’s employ. It is common cause that at the relevant time, the collective agreement was binding on the parties by virtue of their engagement within the council’s registered scope, and the extension of the agreement to non-parties in terms of s 32 of the LRA.

[3] At the conciliation meeting convened by the council on 29 June 2007, the applicant's representative contended that the council did not have jurisdiction to entertain the dispute, because the terms of Mosoeu's contract required the matter to be referred to arbitration. The relevant clause reads as follows:

> "*13. DISPUTE PROCEDURE*
>
> *In the event of a dispute arising as a result of this agreement, the dispute will be submitted to arbitration in terms of the Arbitration Act 42 of 1965, by way of written notice thereof. The arbitration will be held within 2 weeks of same being requested or as soon thereafter as an appointed Arbitrator is available.*
> *The Arbitrator will be selected from the Tokiso list of panelists.*"[1]

It is not disputed that the applicant's policy is to meet the full costs of any arbitration conducted in terms of the agreement, or that Tokiso is a reputable dispute resolution agency that is entirely independent of the applicant.

[4] The second respondent, who presided over the meeting, ruled that clause 13 of the contract did not oust the council's jurisdiction to deal with the dispute in terms of the collective agreement. In essence, the second respondent reasoned that to the extent that the contract of employment purported to do so, section 191 of the Labour Relations Act ("the LRA") afforded the council's collective agreement precedence and that the arbitration agreement constituted a waiver of a right conferred by the collective agreement. Specifically, she found that the agreement afforded Motsoeu less favourable treatment than that contemplated by the collective agreement, since Motsoeu would have to seek out Tokiso and

[1] Despite its lack of detail, it is not disputed that clause 13 constitutes an arbitration agreement. To the extent that the agreement does not refer expressly to unfair dismissal disputes, this is not an issue raised on the papers, but to the extent that the contract provides that the employee's services may be terminated in terms of any relevant legislation, any dispute about unfair dismissal clearly arises from the agreement.

contribute to the costs of the arbitration. Since the matter could not be settled, she issued a certificate of outcome reflecting that the dispute remained unresolved.

[5] The applicant originally sought to review and set aside the certificate of outcome, on the basis that the first respondent ("the council") had no jurisdiction to deal with the dispute between the parties. In the light of this court's judgment in *Goldfields Mining South Africa (Pty) Ltd (Kloof Mine) v CCMA* & others [ref], the applicant did not persist with this claim, but pursued its contention that the second respondent's ruling to the effect that the council had jurisdiction to conciliate and arbitrate the dispute should be reviewed and set aside.

The relevant regulatory provisions

[6] The collective agreement was concluded between the employers' organisation that is a party to the council (the Road Freight Employers' association) and the Motor Transport Workers' Union, the Professional Transport Workers' Union of South Africa, the Africa Miners' and Allied Workers' Union, and the South African Transport and Allied Workers' Union, and the Transport and Allied Workers' Union. The scope of the agreement extends to the whole of the Republic, and to those persons for whom minimum wages are prescribed by the council's wage agreements, and their employers. The collective agreement is binding on the parties to the present dispute by virtue of the extension of the agreement in terms of s 32 of the LRA.

[7] Clause 5 of the collective agreement regulates the resolution of disputes. The preamble to the clause, hardly drafted in the clearest terms but significant in these proceedings, reads:

> "*All disputes shall, if required by the Act {the LRA}, be referred to the Council for conciliation and arbitration."*

Clause 5 (2) concerns dismissal disputes. The preamble to the clause reads "Other disputes referred to Council in terms of the Act". Clause 5 (2) (a) reads as follows:

> "*A party who intends referring a dispute to Council on the grounds that his/her dismissal was unfair shall –*
>
> *(i) in the event if internal remedies being available, immediately after dismissal have initiated the process to exhaust all internal remedies; or*
>
> *(ii) if there is a recognition agreement in force which provides a dispute resolution process, have followed it;*
>
> *before any dispute can be referred to Council.*

The balance of clause 5 is concerned with the regulation of conciliation and arbitration procedures in unfair dismissal disputes.

Grounds for review

[8] Adv Pretorius SC, who with Adv. F Venter appeared for the applicant in these proceedings, submitted that the parties were bound by the contract of employment, and that the proper forum for the resolution of Mosoeu's unfair dismissal dispute is private arbitration. To the extent that the council had relied on clause 5 of the collective agreement to conclude that the private arbitration clause should not be enforced, the clause requires that disputes "*shall be referred to the council if required by the Act"* (my emphasis). Since the LRA does not require or compel a referral to be made to the council, the council has no monopoly on dispute resolution in respect of those parties who fall within its registered scope. It accordingly remains open to parties who are bound by the collective agreement to elect to refer a dismissal dispute to private arbitration,

and there is no reason why this election may not be exercised in anticipation of any dispute, in a contract of employment.

[9] This is a compelling argument, and I would extend it by noting that the use of the word “shall”, in the present context, confers permission as opposed to creating a duty. In these circumstances, “shall” is ordinarily read as “may”. In other words, the use of the word “shall” does not denote a mandatory action; the preamble means no more than that disputes may be referred to the council for resolution. In any event, as Mr. Pretorius submitted, the use of the word “shall”, qualified as it is by the requirements of the LRA, necessitates an examination of the provisions of the LRA that regulate the referral of disputes. The LRA does not compel parties to refer disputes to the CCMA or to bargaining councils with jurisdiction; they do so at their election. There is no bar to a party electing to settle a dispute at any stage of the statutory process, even in circumstances where a bargaining council has commenced conciliation or arbitration proceedings, by agreeing to have the dispute determined by private arbitration. Why then should the parties not be at liberty to reach the same agreement as a term and condition of employment?

[10] Adv Barnes, who appeared for the first and third respondents, submitted that there were at least two reasons why arbitration agreements such as the one concluded between the parties should not be enforced. The first submission is based on s 23 of the LRA, the second on s199.

[11] Section 23 (3) provides:

> “*Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement”*

Section 199 reads as follows:

> "*(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not -*
>
> *(a) permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;*
>
> *(b) permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award;*
>
> *(c) waive the application of any provisions of that collective agreement or arbitration award.*
>
> *(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid."*

[12] There can be no doubt that s 23 (3) of the LRA is authority for rte proposition that a collective agreement containing a particular mode of dispute resolution takes precedence over the terms of any individual contract. [2] However, to the extent that s 23 (3) may have varied Motsoeu's contract of employment by substituting clause 13 for the provisions of the collective agreement, this begs the question of whether the collective agreement obliges a party to refer a dispute to the council. For the reasons recorded above, in my view, it does not. Section 23 (3) of the LRA is therefore not a bar to an

[2] See *Johnson v CCMA & others* [2005] 8 BLLR 7096 (LC), referring to *Mthimkhulu v Commission for Conciliation, Mediation & Arbitration & another* (1999) 20 *ILJ* 620 (LC). See also *SAB v CCMA & others* [2002] 9 BLLR 894 (LC) where in the context of a dispute concerning a collective agreement that established a private arbitration procedure, Ntsebeza AJ held that the CCMA's jurisdiction is ousted.

agreement to refer dispute arising from a contract of employment to private arbitration.

[13] The submission based on s 199 is more compelling. It finds support in the recent decision by this court, *SACWU obo Stinise v Dakbor Clothing (Pty) Ltd & others* (2007) 28 *ILJ* 1318 (LC). In that case, Nel AJ held that a private arbitration clause in a contract of employment constituted less favourable treatment and thus a waiver of a provision of a collective agreement in terms of s 199 (1) (c), and that the clause was accordingly invalid. I do not read the judgment to establish a generally applicable principle to the effect that a collective agreement concluded by a bargaining council that regulates dispute resolution necessarily precludes parties from agreeing to refer to a dispute to private arbitration. The conclusion reached by Nel AJ and its application to the circumstances of the present case must be evaluated in the light of the wording of s 199. Nel AJ appears to have accepted that the arbitration agreement that was the subject of challenge in the matter before him treated the affected employee in a manner that was less favourable than the terms of the collective agreement. I do not read the judgment to establish a general principle to the effect that s 199 always excludes the application of any private arbitration agreement - the terms of the collective agreement are a relevant factor, as are the terms of the arbitration agreement.

[14] Section 199 contemplates the protection of employee interest at three levels. The first, not relevant in these proceedings, relates to minimum wages – ss (1) (a) prohibits any term of an employment contract that provides for an employee to be paid remuneration in an amount less than that prescribed. Subsection (1) (b) prohibits any contractual term that permits an employee to be treated in a manner, or to be granted any benefit, so as to be less favourably treated than the terms prescribed by a collective agreement. Thirdly, ss (1) (c) prohibits the waiver of the application of any provision of a collective agreement.

[15] I deal first with the issue of waiver. In the absence of any right to refer a dispute to the council, there can be no question of any waiver of that right. Put another way, if the collective agreement does not establish a provision in terms of which a party is compelled to refer a dispute to the council and only the council, then by agreeing to refer a dispute to private arbitration, there can be waiver of the application of the council's agreement. In so far as any less favourable treatment is concerned, on the facts of this case, Motsoeu has not been subjected to less favourable treatment as contemplated by ss (1) (b). Clause 13 of the employment contract contemplates that disputes will be referred to a credible private dispute resolution agency (ironically, the same agency utilised by the council in the exercise of its dispute resolution functions) at no cost to the employee. In the present instance, the benefit or treatment for the purposes of s 199 (1) (b) is not to the right to refer a dispute to a bargaining council – it is to have an employment dispute expeditiously determined by an independent third party at no cost. That is what clause 13 accomplishes. In these circumstances, I fail to appreciate how it can be said that 199 (2) precludes the parties from agreeing to refer disputes to private arbitration. .

[16] Following the reasoning of *Dakbor Clothing*, the answer would be different, in my view, where a private arbitration agreement provides for a dispute resolution process that is less favourable to the employee. If, for example, the nominated arbitrator appears to be less than qualified or impartial, or where the employee is obliged to contribute toward the cost of the arbitration proceedings, it seems to me that a bargaining council or this court would be empowered, after an evaluation of the arbitration agreement, to decide that the agreement provides for less favourable treatment than that provided by any collective agreement concluded by the council, and that the agreement is therefore invalid. In the present instance, to the extent that the second respondent considered that Mosoeu was prejudiced by the agreement both in having to locate Tokiso and to face the possibility of a contribution to the costs of the arbitration, neither of these factors is born out by the facts.

[17] Did the bargaining council in any event have discretion to arbitrate the dispute? Both counsel referred to s 147 of the LRA. Section 147 (6) contemplates the referral of a dispute to the CCMA in circumstances where it becomes apparent that the dispute ought to be resolved through private dispute resolution in terms of a private agreement between the parties to the dispute. The section provides that the CCMA may either refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures, or appoint a commissioner to resolve the dispute in terms of the Act. There is no equivalent provision in respect of bargaining councils. In these circumstances, s 147 offers no assistance, and matters such as the present must be determined by reference to the wording of the relevant arbitration and collective agreements.

[18] Both counsel referred to *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D), Ms Barnes to submit that notwithstanding the arbitration agreement, the council retained jurisdiction to entertain the dispute; Mr. Pretorius to submit that nothing in that decision that entitled the bargaining council to assume jurisdiction. To the extent that the court held that an arbitration agreement does not axiomatically serve to oust jurisdiction,[3] it does no more than reaffirm that an arbitration agreement does not deprive the court of its ordinary jurisdiction over the disputes that it encompasses. But it does not follow that a bargaining council, a creature of statute, retains any inherent right of supervision over private arbitration proceedings between parties within its registered scope, even less does it mean that the council has a discretion to prevent or call a halt to any private arbitration and tackle the dispute itself.[4]

[3] See *Cosmo Health (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2005) 26 *ILJ* 467 (LC) where this principle was referred to and applied in the context of s 147 (6).

[4] The Arbitration Act does not apply to any arbitration conducted by a bargaining council - see s 51 (8) read with s 146 of the LRA.

[19] In summary, to the extent that the second respondent failed properly to consider the relevant provisions of the collective agreement and took into account speculative, incorrect and therefore irrelevant considerations, her ruling that the council retained jurisdiction to conciliate and arbitrate the dispute referred to the council by Motsoeu is reviewable.[5]

[20] Finally, in relation to costs, this application was brought as a test case. The outcome it would seem has important implications for both the applicant and the bargaining council. For this reason, and having regard to the discretion that s 162 of the LRA confers on the court, I do not intend to make any order as to costs.

I accordingly make the following order:

1. The second respondent's ruling that the first respondent retained jurisdiction to entertain the dispute referred to the latter on 25 May 2007 is reviewed and set aside.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 15 July 2010
Date of judgment: 21 July 2010

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[5] See *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR (CC) at para [134] (per O'Regan J).

Appearances:

For the applicant	Adv PJ Pretorius SC, with Adv F Venter
	Instructed by Bowman Gilfillan Inc
For the respondent:	Adv H Barnes
	Instructed by Moodie & Robertson Attorneys