

SOUTH AFRICA / JUDGMENT

Appels v Education Labour Relations and Others (J2264/17) [2017] ZALCJHB 428; (2018) 39 ILJ 816 (LC) (7 November 2017) [2017] ZALCJHB 428

COURT

Labour Court Johannesburg

BEFORE

A van Niekerk

CASE / FILE NUMBER

J2264/17

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 2264/17

In the matter between:

LEON LOGAN APPELS

Applicant

And

EDUCATION LABOUR RELATIONS

First Respondent

NORTH WEST DEPARTMENT OF

EDUCATION AND SPORT DEVELOPMENT

Second Respondent

SOUTH AFRICAN DEMOCRATIC

TEACHERS UNION

Third

Respondent

NATIONAL PROFESSIONAL TEACHERS'
ASSOCIATIONS OF SOUTH AFRICA

Fourth Respondent

SUID-AFRIKAANSE ONDERWYSUNIE

Fifth Respondent

NATIONAL TEACHER'S UNION

Sixth Respondent

PROFESSIONAL EDUCATOR'S UNION

Seventh Respondent

PUBLIC SERVANT'S ASSOCIATION

Eighth

Respondent

HEALTH AND OTHER SERVICE PERSONNEL
TRADE UNION OF SOUTH AFRICA

Ninth Respondent

DR.A.D ABDOOL

Tenth Respondent

THE REGISTRAR OF LABOUR RELATIONS

Eleventh Respondent

Application heard: 31 October 2017

Judgment

delivered: 7 November 2017

VAN NIEKERK J

- [1] The question to be answered in this case is whether a bargaining council is entitled to vary a time limit for the referral of a dispute where that time limit is fixed by the Labour Relations Act.

- [2] Section 191(1) (a) of the LRA provides that any person who claims that his or her employer has committed an unfair labour practice may refer a dispute to a bargaining council (or to the CCMA, if there is no bargaining council that has jurisdiction). Paragraph
- (b) states that the referral must be made within 90 days of the act or omission which is alleged to constitute the unfair labour practice, or if it is a later date, within 90 days on which the employee became aware of the act or occurrence.
- [3] The applicant, Mr. Appels, is currently employed at the Alabama School in Klerksdorp. During late 2016, he unsuccessfully applied for appointment to the vacant post of principal at the school. Appels took the view that the failure to appoint him was an unfair labour practice. He lodges a grievance, which was heard by the district review panel during February 2017. On 9 March 2017, Appels was advised that the panel had upheld the appointment of the successful candidate.
- [4] Appels referred a dispute to the bargaining council on 30 May 2017, within the 90-day period established by s 191 (1). The bargaining
- council said that his referral was defective because in terms of the council's constitution, all disputes about promotion had to be referred within 30 days of the date of which the employee became aware of the employer's final decision not to promote the employee. The referral had been made about 82 days after Appels had become aware of the review panel's decision. The council advised Appels to apply for condonation for the late referral.
- [5] After consulting his attorney, Appels disputed that the council's dispute resolution procedure could lawfully override a time limit established by the LRA. He refused to apply for condonation for the late referral of his dispute, because given the time limits established by the LRA, he did not believe that it had been referred late. The council refused to accept the referral without an application for condonation, because in terms of its constitution, the referral had been made out of time. That impasse is what these proceedings are about.
- [6] The relevant statutory provisions are to be found in s 51 of the LRA, a section dealing with the dispute resolution functions of bargaining councils. Section 51 (9) of the LRA reads as follows:

A bargaining council may, by collective agreement –

- (a) establish procedures to resolve any dispute contemplated in this section; ...

Disputes contemplated in the section include unfair labour practice disputes, the kind of dispute that is at issue in this case. Section 51(9) needs to be read with s 28

- (1) which, amongst other things, empowers a bargaining council within its registered scope to conclude and enforce collective agreements, prevent and resolve labour disputes, and perform the dispute resolution functions referred to in s 51.

- [7] The bargaining council's constitution, which the parties acknowledge is a collective agreement between the parties to the council, incorporates a dispute resolution procedure. The procedure was adopted in August 2016. Clause 7.3 refers specifically to disputes about promotions and provides that a party to a dispute may refer the dispute for conciliation-arbitration when the head of department has made a decision about the promotion, that the general secretary must set down the dispute for arbitration within 30 days of the referral on an expedited basis where that is decided and a requirement that the process be completed within a maximum of three hearings. Clause 9 regulates the time periods within which a dispute must be referred. The clause mirrors s 191 of the LRA, except in the case of what is referred to as 'promotions'. Clause 9.1.3 reads:

9.1 A party may refer a dispute to the General Secretary:...

9.1.3 In the case of promotions, within 30 days from the date on which the employee became aware of the employer's final decision not to promote the employee'.

- [8] The bargaining council submits that properly read, these provisions permit a councils to design their own dispute resolution systems that ensure the efficient and cost effective resolution and prevention of disputes. In doing so, the council may deviate from the time periods fixed by the LRA, and s 191 of the LRA in particular. The rationale for reducing the 90-day time limit in s 191 to 30 days is concerned with the need to ensure expeditious dispute resolution. It is not disputed that during the course of the last year, 225 disputes about promotion were referred to the council. (In the previous year, 248 disputes were referred.) The council submits that it is in the interests of learners and all other interested parties that disputes about promotion are resolved as quickly as possible. A dispute about promotion presupposes a vacancy that must be filled. Any failure to fill the vacancy pending the resolution of a dispute about who should be appointed to the post has obvious consequences for the quality of teaching. Further, successful appointees often have to relocate to occupy the new positions. An unresolved dispute always has the potential for the reversal of an appointment and the obvious prejudice to the incumbent in the form of a reversal of salary and even relocation. Where the initially successful incumbent is required to revert to his or her previous position, very often another person has been appointed to that position resulting in a domino effect. In short, the purpose of the expedited procedure that applies to promotion disputes is to limit and if possible avoid all of these consequences.
- [9] Appels takes a different view. He emphasises that clause 9.1.3 does more than establish a simple procedural bar to the reference of disputes after the expiry of the 30-day period. He submits that clause 9.1.3 also determines jurisdiction in the sense that it places a limitation on the power or competence of the bargaining council to hear and determine issues between parties. In this sense, clause 9.1.3 of the dispute resolution procedure extinguishes a referring party's right to refer an unfair labour practice dispute relating to promotion within the 90-day period established by s 191. Appels also argues that bargaining councils are creatures of statute and that the rules they make governing dispute resolution should not be in conflict or inconsistent with the LRA. He makes reference to Premier Gauteng and

another v Ramabulana N.O and others [2008] 4 BLLR 299 (LAC) in support of this proposition. That case dealt with rules for the conduct of proceedings made by the CCMA, and can thus be distinguished from the present case, which concerns the application of statutory provisions that relate specifically to bargaining councils and their right to design dispute resolution procedures by way of collective agreements.

- [10] In my view, there are at least two reasons why Appel should not succeed. The first is that Appel is indirectly a party to and bound by the collective agreement that contains clause 9.1.3. It is not disputed that Appels is a member of a trade union that is a party to the council, and also a party to the collective agreement that incorporates clause 9.1.3. In terms of s 23 (1) of the LRA, a collective agreement binds the parties to the collective agreement and each party to the agreement and the members of every other party, in so far as the provisions are applicable between them. Further, members of the registered trade union there is a party to the collective agreement about by the agreement if the agreement regulates the terms and conditions of employment or the conduct of employers in relation to their employees or of employees in relation to their employers. As a member of a union party to the agreement, Appels is therefore bound by the collective agreement that regulates dispute resolution procedures. In these circumstances, it is not open to him to contend, as he has, that clause 9.1.3 of the agreement is of no force and effect. In short, the 30-day period within which promotion disputes must be referred is an agreed period, and Appels is bound by that agreement.
- [11] Even if I am wrong in coming to that conclusion and accept that Appels is entitled to challenge the terms of the agreement despite the fact that he is bound by it (if only because clause 9.1.3 stands in conflict with s 191 (1) (b) (ii) of the LRA), the key to a proper interpretation of s 51 (9) of the LRA is an understanding of the role of bargaining councils in the statutory dispute resolution system. Bargaining councils are voluntary bodies and operate according to the principles of self-regulation and autonomy. Having said that, bargaining councils are creatures of statute and may act only within the confines of the empowering legislation. The question to ask is whether s 51 (9), which clearly empowers bargaining councils to 'establish procedures to resolve any dispute...', must be read subject to a condition that any agreed procedure must replicate time periods and any other limitations as they find reflection in the LRA. There is nothing in the LRA that establishes such a condition, or which otherwise places constraints on a bargaining council that agrees to establish dispute resolution procedures. On the contrary, there is at least one authority to support the proposition that bargaining councils may establish procedures that differ from those established by the LRA.

[12] In *MIBCO v Osborne & others* [2003] 6 BLLR 573 (LC), Landman J in the case that concerned the enforcement of arbitration awards issued by bargaining council arbitrators, considered s 51 (8) and (9). Section 51 (8) provides that unless otherwise agreed to the collective agreement, sections 142A and 143 to 146 applied to any arbitration conducted under the auspices of a bargaining council. In the course of his judgment (at 577B), Landman J said the following:

However, section 51 (9) permits a bargaining council to exclude the operation of the LRA in the circumstances contemplated in that subsection, by establishing its own procedures by means of a collective agreement, which obviously can be extended to non-parties. The collective agreement, such as those to which I have referred in this judgement, circumvent the operation of the LRA.

[13] In *Wanenburg v Motor Industry Bargaining Council & others*

(2001) 22 ILJ 242 (LC), Pillay J considered a dispute that concerned a bargaining council procedure for applying for condonation and appealing against any refusal of condonation that different from what is provided in the LRA. The court held that it did not matter that the referring party was not a party to a dispute resolution agreement concluded by a bargaining council, or that not been extended to him. The court said the following in relation to the right of bargaining councils to design dispute resolution systems:

[20] Bargaining councils may design their own dispute systems in ways that ensure efficient and cost effect (sic) resolution and prevention of disputes. From the DRC terms of reference and procedures, there is nothing inherently prejudicial to nonparties. It provides a procedure for conciliation and arbitration of disputes and for granting combinations. It is consistent with the LRA. There is therefore no reason for the court to interfere by imposing any other procedure.

[21] in the circumstances the DRC terms of reference and procedures can be applied to nonparties not as a collective agreement but as a procedure developed by the bargaining council for the industry in order to give effect to its obligations in terms of ss 51 (3) and 191

(2) in order to carry out its functions in terms of s 28 (1) (c) and (d)...

[23] Firstly, bargaining councils must be allowed the flexibility to design their own dispute systems so that the most inexpensive and effective procedures are adopted. If that means having a condonation application followed by an internal appeal, so be it. Even if the NRA makes no express provision for such an appeal, it would be consistent with the general policy of encouraging maximum use of private and internal dispute resolution mechanisms and the settlement of disputes at the lowest possible level.

[14] In *Portnet v Le Grange & others* (1999) 20 ILJ 916 (LC), the court was concerned with an application to review and set aside an arbitration award in which the arbitrator had held that the provisions of a bargaining council constitution binding on the parties, they are superseded by the provisions of s 191

- (2) of the LRA. Further, the arbitrator held at the mere fact that the constitution was binding on the parties did not necessarily mean that any failure to comply with any provision of the agreement automatically disqualifies a referral and makes it incompetent in terms of the act. In that case, the referral was a week late if the constitution applied, but referred in time if s 191 applied. The court upheld the review, concluding that the arbitrator had misdirected himself in regard to the law. In particular, the provisions of s 51 of the Act which requires parties to a council to attempt to resolve any dispute between them in accordance with the constitution of the council. Since the parties were all parties to the bargaining council and subject to its constitution the court concluded as follows:
- [19] There was accordingly no basis in law for the first respondent to find that he was not bound by the provisions of the bargaining council's constitution which, in itself, also constituted a collective agreement.
- [20] Collective agreements and the provisions thereof are binding in terms of the Act as the arbitrator himself admits. Further, s 1 of the act (which deals with the purpose of the act) identifies as one of the primary objects of the Act the promotion of orderly collective bargaining.
- [15] There is a further authority that suggests that primacy should be given to collective agreements concluded in bargaining councils that regulate dispute resolution. In *NBCRFI v Carlbank Mining Contracts (Pty) Ltd* [2012] 11 BLLR 1110 (LAC), the Labour Appeal Court emphasised the primacy of collective agreements concluded in bargaining councils and declined to give effect to a contract of employment that made provision for private arbitration in the event of a dispute. In short, s 51 empowers bargaining councils to establish procedures to resolve disputes and in doing so, to design their own procedures that address the exigencies of the sector for which they are registered and to ensure efficient and cost effective dispute resolution. These procedures may deviate from those established by the LRA.
- [16] Obviously, a bargaining council is not at liberty, when it establishes procedures to resolve disputes, act without constraint.

The bargaining council in the present instance accepts that any procedures established by a council pursuant to s 51 (9) must be

fair, reasonable and broadly consistent with the LRA. Decisions taken by bargaining councils are subject to judicial review, if not in terms of the Promotion of Administrative Justice Act, then by way of a review in terms of the principle of legality (see *Free Market Foundation v Minister of Labour and others*

- [2016] 8 BLLR 805 (GP)). This will ensure that procedures are rational, not arbitrary and free from caprice or ulterior purpose. The reasons proffered by the bargaining council for truncating the periods within which promotion disputes must be referred are obviously rational, intended as they are to serve the legitimate ends of minimising disruptions to

learning and the expeditious resolution of disputes. Further, a referring party who fails to comply with the applicable time limit has a remedy in the form of an application for condonation. Rulings in these applications are similarly subject to review.

- [17] In relation to costs, the scope is a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. This court traditionally does not make orders for costs against individuals who in good faith seek to pursue what they perceive as their rights. There is no reason to depart from that convention. The requirements of the law and fairness are best served by an order that each party bear its own costs. Finally, the court's finding in relation to the applicable time period for the referral of a dispute should not serve to non-suit Appels. I intend before to make an order in terms of which he may file an application for condonation for the late referral of his dispute within a specified period.

I make the following order:

1. The application is dismissed.
2. The applicant is granted 14 days from the date of this order to apply to the first respondent for condonation for the late referral of his dispute.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Mr. W Scholtz, Scholtz Attorneys

For the first respondent: Adv. M van As, instructed by SolomonHolmes Attorneys

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