

SOUTH AFRICA / JUDGMENT

Rukwaya and Others v Kitchen Bar Restaurant (J591/2013) [2016] ZALCJHB 86; (2016) 37 ILJ 1466 (LC) (9 March 2016) [2016] ZALCJHB 86

COURT

Labour Court Johannesburg

BEFORE

Bakker

CASE / FILE NUMBER

J591/2013

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no: J591/2013

In the matter between:

PARDON RUKWAYA AND 31 OTHERS

Applicant

and

THE KITCHEN BAR RESTAURANT

Respondent

Heard: 14 January 2016

Delivered: 09 March 2016

Summary: True nature of dispute imperative when determining jurisdiction. Labour Court deprived of jurisdiction to enforce compliance of bargaining council collective agreement extended to non-parties. LRA remedy especially designed for the LRA breach must be pursued. Remedy to be found in the collective agreement itself, read with section 33A of the LRA. Section 23(3) of the LRA not available to employees to circumvent section 33A of the LRA to bring claim under section 77(3) of the BCEA.

Statutory provisions considered: Sections 1, 23(3), 32, 33A, 199(1)(c) of the LRA and sections 49(4), 70, 77(3), 77A(e) of the BCEA.

BAKKER, AJ

Introduction:

[1] The Applicants are/were working as waitrons in the Respondent restaurant. The parties fall under the registered scope of the

Bargaining Council for the Restaurant, Catering and Allied Trades (“the Council”). None of the parties (to this litigation)

are members of any of the Trade Unions or Employers’ Organisations that are parties to the Council. By virtue of her powers under section 32(2) of the LRA, the Minister of Labour has extended the terms and conditions of the Council’s Collective Agreement for Gauteng to the parties. The parties do not dispute that they are bound by the extended collective agreement and to those terms and conditions of employment.

[2] The Council’s Collective Agreement, as published in the Government Gazette and extended to non-parties, regulates, inter alia, minimum wages and other terms and conditions of employment applicable to the parties. The Applicants claim that the Respondent is in breach of several of these terms and conditions, principally its failure to pay the minimum wage.

[3] The uncommon feature of this litigation is the Applicants’ approach in vitiating their rights. The Applicants would have been well within their rights to institute the special dispute resolution mechanisms provided for in the Council’s Collective Agreement. However, instead of setting in motion an inspection by the Council’s designated agents to ensure compliance, failing which, to refer the dispute to a section 33A compliance arbitration under the auspices of the Council, the Applicants approached this Court, on motion, in terms of section 77(3) of the Basic Conditions of Employment Act (“the BCEA”) claiming a remedy under contract law.

[4] The Respondent raised a point in limine disputing the jurisdiction of this Court. The Respondent argues that the real issue in dispute is the alleged non-compliance with the provisions of the Council’s Collective Agreement, a matter that is reserved for (compliance) arbitration under the auspices of the Council.

[5] Because of the jurisdictional challenge, this Court is required to dispose of it before entering upon any further issues that may arise between the parties. Suitably, it was agreed that the Respondent’s point in limine be decided first and separately from the other issues that may yet follow.

The salient features:

- [6] The parties do not dispute the validity of the Ministerial extension of the Council's (main) Collective Agreement to the Industry non-parties. The Respondent has not obtained exemption from any of the provisions of the collective agreement and accepts it is bound thereto.
- [7] The Respondent has not, contrary to the provisions of clause 12 of the collective agreement extended to it, furnished any of the individual Applicants with a written contract of employment. Apart from the relevant extracts of the Council's Collective Agreement, no written employment contract formed part of the Applicants' motion.
- [8] In terms of clause 21 of the Council's Collective Agreement, the parties are expected to contribute a specified amount monthly towards the Council's dispute resolution levy.
- [9] It is recorded at clause 23 of the Council's Collective Agreement that the Council is responsible for monitoring and enforcement of the agreement. It continues to set out the powers of the Council's designated agents to secure compliance with the agreement.
- [10] Clause 28A of the Collective Agreement sets out a mandatory dispute resolution procedure in respect of all disputes 'pertaining to contraventions of the (collective) agreement'. It is apposite to reproduce some of these provisions:

'28A. DISPUTE PERTAINING TO CONTRAVENTIONS OF THE AGREEMENT

- (1) Disputes pertaining to contraventions of the Agreement must be done in the form of a sworn statement, setting out all the material fact(s) that form the basis of the complaint.
 - (2) On receipt of the complaint the Council shall within 14 days appoint a designated agent or official to investigate the dispute and/or may request further information, facts or data from either the employee or 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 had taken to ensure compliance with the Agreement and the recommendation 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.
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- (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 12 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; 66 Consolidated Collective Agreement
 - (d) any award contemplated in section 138(9) of the Act.
- [12] An award in terms of this clause is final and binding and may be enforced in terms of section 143 of the Act after the Secretary and or a person appointed by the Council has certified the arbitration award, unless it's an advisory award.' (own emphasis)
- [11] The Applicants brought their application in terms of the provisions of section 77(3) of the BCEA claiming payment of actual minimum wages and/or bonuses not paid and/or unlawful and prohibited deductions. The Applicants rely on the specific provisions of the Council's Collective Agreement to assert that they are 'employed as normal waiters in terms of the collective agreement' and to proclaim an entitlement, and illustrate non-compliance and breaches of the Council's Collective Agreement. The Applicants emphasise in their founding papers that this application has become necessary because of the Respondent's failure to pay them 'in terms of their conditions of employment as enshrined in the collective agreement.'
- [12] Identifying the true nature of the present dispute is an important consideration and a central theme of this judgment to which I return at several junctures below.

The

issues:

Ekurhuleni is binding on this Court

- [13] The parties were unable, both in their written submissions and during argument, to refer me to any authorities directly in point. On invitation from this Court, the parties filed supplementary heads of argument dealing with the applicability of the judgment of the Labour Appeal Court in *Ekurhuleni Metropolitan Municipality v South African Municipality Workers Union*. Perhaps not surprisingly, the Applicants endeavoured to persuade me that Ekurhuleni is distinguishable both on its facts and legal principles and is of no concern to this Court. The Respondent, in contrast, submitted that Ekurhuleni is on all fours with the present matter and must be followed by this (lower) Court.

[14] It is incumbent on this Court to be guided by the authority of the LAC. The LAC has dealt with a similar issue in Ekurhuleni and I am unable to deviate from the principles laid down there. Even if Ekurhuleni is distinguishable to some extent on its peculiar facts, the legal principles are germane and must be applied equally in the present matter. Coppin, AJA identified the issue before the LAC as follows:

‘It was submitted that the main agreement varied the individual contracts of employment of the employees concerned and that the Labour Court has jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act, No. 75 of 1997 (“the BCEA”) to deal with the claims of the employees to be paid their salaries.’

This very issue is at the heart of the present determination.

[15] At paras 24 and 25 of Ekurhuleni the majority of the LAC held:

‘[24]that the court a quo was interpreting, not the main agreement per se, but the individual contracts of employment of those employees insofar as those contracts “incorporated” the relevant clauses of the main agreement and that it had the power to do so in terms of section 77(3) of the BCEA.’

[25] 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 section 23(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.” 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.’

[16] By parity of reasoning, it is not correct that if the specific clauses in the Council’s Collective Agreement, by which the employment contract is varied, are breached, that it is in fact a breach of the employment contract and not of the Council’s

Collective Agreement. It seems to me that the Applicants do not rely, in fact, on any specific provision of their individual (verbal)

contracts of employment. The factual premise of the Applicants’ claim is entirely dependent on the Council’s Collective

Agreement, with reference to specific clauses therein to establish the entitlement to a minimum wage and to certain bonuses. It is therefore hard to imagine on what factual basis the Applicants are able to assert that their claim arises from contract and the terms of the BCEA. The avoidance of the minimum wage and payment of bonuses can only be a violation of the individual contract and the BCEA if they are, firstly, a breach of the Council's Collective Agreement.

[17] The LAC continued:

'[26] 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 section 199 of the LRA, read together with section 23(3) of the LRA, purpose "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".

[30]The deductions and non-payment of salaries can only be a contravention of the BCEA if they are in breach of the main agreement. The Labour Court is not empowered, under either the LRA, or the BCEA, to interpret and apply the main agreement, particularly in circumstances where the interpretation is pivotal and fundamental, and not merely incidental, to the resolution of the dispute between the parties, including the determination of the claims of the employees. In terms of the basic tenets of our law on the interpretation of statutes, the BCEA cannot be interpreted in a manner which conflicts with the LRA. They must be interpreted as being in harmony with each other.

[31] Having determined the true nature of the dispute between the parties, the court a quo should not have gone on to adjudicate the merits of the dispute, but ought to have allowed the matter to be referred to the body or the CCMA with jurisdiction as contemplated in section 24 of the LRA.' (Footnotes omitted)

[18] 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 section 33A 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 section 23(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 section 77(3) of the BCEA is superficial and goes against substantial considerations to the contrary.

[19] The dispute resolution mechanisms and associated remedies especially created by the Council and the LRA for situations like the present must be followed.

[20] As stated above, I am bound by the law as enunciated in the Ekurhuleni-decision and find that this Court does not have jurisdiction to adjudicate the Applicants' claim. If I were, however, to assume in favour of the Applicants that Ekurhuleni is not binding authority defeating the jurisdiction of this Court, I would in any event, and for the reasons that follow, decline to hear the application. The question of this Court's jurisdiction is pregnant with a number of issues, which I discuss in turn:

The true nature of the dispute:

[21] It is by now axiomatic that this Court, in determining its jurisdiction, must first consider the true nature of the dispute

before it. Conradie, JA, as he then was, held in *Coin Security Group (Pty) Ltd v Adams and 37 Others*:

'It is the court's duty to ascertain the true or real issue in dispute... In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented... The characterization of a dispute by a party is not necessarily conclusive....'

[22] The Applicants brought their claim to this Court in the form of an application in terms of section 77(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 little 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. This is manifested, inter alia, in the following:

- i. The background information provided by the Applicants in their founding papers are entirely limited to a deposition of the registered scope of the Council and how it operates in relation to the parties; the conclusion and extension of the collective agreement (as amended from time to time) and the specific provisions contained in the collective agreement alleged to have been breached. Conspicuously absent is any reference at all to where, when and by whom the individual contracts of employment were concluded;
- ii. No contractual terms are pleaded save for referring to the provisions of the collective agreement claimed to have been incorporated by the operation of section 23(3) of the LRA;
- iii. In their founding papers the Applicants explain in detail the alleged breaches of the collective agreement, under the heading 'BREACH

OF THE COLLECTIVE AGREEMENT';

- iv. The underlying dispute has its origin in the short-payment of Industry minimum wages negotiated in the Council, as included in a collective agreement extended to the Applicants in terms of section 32 of the LRA. Section 32, which falls under Part C: Bargaining Councils in the

LRA, is closely followed by section 33A dealing with enforcement of the collective agreements. There is no denying that the Legislature has included section 33A of the Act as a specially-designed-machinery to provide a remedy for a situation where there is an allegation of a breach of a right that flows from the operation of section 32 of the Act;

- v. No written (individual) employment contract exists;
- vi. Absent the collective agreement (as extended), the Applicants have no claim;
- vii. In their heads of argument, the Applicants assert that they ‘do not dispute that the agreements on which they seek to rely are collective agreements... concluded in a bargaining council’.

[23] The substance of the Applicants’ complaint is the Respondent’s non-compliance with the provisions of the Council’s Collective Agreement. What the Applicants have done, is to dress-up or camouflage their claim as a contractual breach that would otherwise enable them to gain direct access to this Court under the provisions of section 77(3) of the BCEA and avoid the special enforcement procedures of section 33A of the LRA. There is a plethora of authorities establishing the principle in our law that parties should not be allowed to disguise a cause of action as something else simply to avoid a mandatory procedure.

[24] In *Mohlaka v Minister of Finance and Others*, the Court held that:

‘Section 77(3) of the BCEA provides that the Labour Court has concurrent jurisdiction with the civil courts to determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract; this section cannot be interpreted so widely as to include any matter concerning the contract of employment which is already regulated in the LRA. To allow concurrent jurisdiction between the Labour Court and the CCMA would resuscitate the problems identified above under the old labour laws. The Legislature could never have intended that. (emphasis added)

[25] The legislative framework that underpins the Applicants’ claim is founded in Chapter III (Collective Bargaining) of the LRA, mostly Part C thereof: Bargaining Councils, sections 27 to 34 of the LRA. This legislative scheme was enacted as a compendium of rights and remedies that should be read together. That legislative framework offers a cure for the Applicants’ concerns. Section 33A of the LRA provides a tailor-made remedy for circumstances of the type that the parties to this dispute find themselves in. It could not have been the intention of the lawmaker to create a dual jurisdiction to deal with the problem. I do not believe section 77(3) of the BCEA, properly interpreted in the context of the true nature of this dispute, must be construed so widely as to provide a choice of remedy to the Applicants.

Policy considerations:

[26] Mr. Lennox, appearing for the Respondent, contended that there are many underlying policy considerations that should encourage a finding resisting jurisdiction. He relied on the convenience of the court, the backlog of cases pending before the Labour Court and the

speedy resolution of labour disputes. Mr. Snyman, who appeared for the Applicants, disputed these contentions. He stated, correctly in my view, that policy considerations cannot oust jurisdiction. Although I can think of many reasons why arbitration should be preferred in the present matter to adjudication by this Court, I am mindful that the jurisdiction of this Court is not policy driven. The statutes applicable either afford jurisdiction to adjudicate the dispute or they do not.

Section 23(3) of the LRA:

[27] The Applicants rely on section 23(3) of the LRA and the judgment in *South African Maritime Safety Authority v McKenzie* to establish the integration into their individual employment contracts of the minimum wage provisions and other beneficial terms provided in the Council's Collective Agreement. Although I take no issue with the Applicant's interpretation of the statutory provision, I am reluctant to agree to its application in casu. *McKenzie* is certainly not authority for the propositions that the Applicants want to establish. Firstly, the SCA's observations concerning

section 23(3) of the LRA at para 23 of its judgment was obiter and not, as was suggested, the ratio decidendi; secondly *McKenzie* is manifestly distinguishable on its facts and the nature of the underlying enquiry (where the SCA admitted at para 57 that it was concerned with the substantive rights of parties and not jurisdictional issues); thirdly reference to a collective agreement

was not made in the context of a collective agreement concluded in a bargaining council as extended to non-parties – which renders the entire statutory context within which the present matter must be decided entirely distinguishable from the SCA's annotations; and, fourthly, the ordinary language of section 23(3) of the LRA suggests that the Legislature accepted that integration of the terms of a collective agreement into an employment contract may not always, and as an automatic consequence, be applicable.

[28] The words 'where applicable' in section 23(3) of the LRA serves as a form of caveat that it will not be appropriate every time to infuse a contract of employment with the terms of a collective agreement. *McKenzie* (supra) as interpreted in *Steenkamp and Others v Edcon* confirmed that one could not simply transpose all rights from the LRA into individual contracts of employment. In the present matter, it is not, in my view, necessary to permeate the Applicants' contracts of employment with the provisions of the Council's Collective Agreement. The Applicants' impetus to do so is founded in the single purpose to permit them to contractually enforce those rights. This is not required or desirable. The collective agreement itself, sustained by the legislative framework and the section 33A machinery, provides an adequate and plenary remedy.

[29] Where *McKenzie* finds valuable and practical application is where the SCA held:

‘Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer.’

[30] If I am wrong that it is not appropriate in casu to infuse the contract of employment and the minimum wage provisions that are to be incorporated into the Applicants’ employment

contracts, it must follow, as night follows day, that the special dispute resolution mechanisms created by clause 28A to enforce those rights must correspondingly be incorporated. The Applicants cannot escape the logic that, if section 23(3) integrates minimum wages and other conditions of employment into their contracts of employment, then section 23(3) equally integrates the special dispute resolution mechanisms (prescribed in clause 28A) into their contracts of employment. The Applicants are not permitted to approbate and reprobate and select which clauses they want incorporated and which they do not.

[31] In *Carlbank Mining Contracts (Pty) Ltd v NBCRFI and Others*, Van Niekerk, J held:

‘There can be no doubt that s 23 (3) of the LRA is authority for the proposition that a collective agreement containing a particular mode of dispute resolution takes precedence over the terms of any individual contract.’

And so it must be, particularly under circumstances where the individual contracts of employment contain no dispute resolution clause, and, in view of the peremptory language in which clause 28A was crafted.

[32] On appeal the LAC discussed the interaction between sections 199 and 23(3) of the LRA and held that:

‘The two provisions together aim at advancing a primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to collective agreements above individual contracts of employment. The policy is in keeping with the ILO Collective Agreements Recommendation (footnote omitted) which states:

“Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.”

Clause 28A of the Council’s Collective Agreement:

[33] Terms and conditions of employment in this industry are negotiated from time to time at national/industry level between the Trade Unions and Employers’ Organisations party to the Council. Once an agreement is reached between those parties, provided the peremptory requirements imposed by section 32(1) of the LRA are met, the Council may request the Minister to extend the agreement to non-parties in the Industry. If the Minister is satisfied that the request complies with the provisions of section 32(1) of the LRA and the collective agreement meets the peremptory terms of section 32(3) of the LRA, she must extend the agreement to all employers and employees identified in the request that fall within the

Council's registered scope.

[34] Plant level negotiation is not permitted in relation to issues determined in the Council's collective agreements extended to non-parties. The Respondent is barred from negotiating with the Applicants minimum wages and other terms and conditions of employment

included in the collective agreement. This disqualifies the Respondent from negotiating with the Applicants any such amendments

to their employment contracts. The Respondent must therefore pay the minimum wages imposed on it by the majority of stakeholders in this Industry. By parity of reasoning, the Applicants would equally be excluded from negotiating terms and conditions different from those imposed by the extended collective agreement. In the event that the Respondent and/or the Applicants require a deviation from those terms, they shall have to follow the exemption procedures provided for in clause 5 of the collective agreement, read with section 32(3)(dA) of the LRA.

[35] Zondo, JP, as he then was, writing for a unanimous LAC held in *Kem-Lin Fashions CC v Brunton and Another*, that:

'[23] non-parties cannot seek to have different rules applied to them simply on the basis that they are not parties to the collective agreement.'

[25] ... the effect in law of an extension of a collective agreement in terms of s 32(2) is that, for all intents and purposes, a non-party is turned into a party, and, is placed in relation to the collective agreement on the same level as a signatory to the collective agreement.

...

It seems to me that, once it can be said that the Minister has, in terms of s 32(2), extended a collective agreement to an entity by publishing a notice in the Government Gazette declaring that the collective agreement will be binding on such entity, such entity is bound by the collective agreement, and, cannot escape the consequences thereof unless it is granted an exemption or in an appropriate case, the extension is set aside by a court of competent jurisdiction.

[33] The situation the appellant finds itself in is a result of the fact that the collective agreement has been extended to it. As long as the extension of the collective agreement remains, the appellant is subject to the collective agreement. If it were to appear to the appellant that there was some unfairness about any aspect of the application of the collective agreement to the appellant, there is a remedy available to the appellant to avoid either certain provisions of the collective agreement or the entire collective agreement. That is the exemption procedure. In terms of the procedure even a non-party to whom the collective agreement has been extended may apply to the second respondent to be exempted from either certain provisions of the collective agreement or from the collective agreement as a whole. If the second respondent were to refuse to grant the appellant exemption, there is even provision in the collective agreement for an appeal against such a decision to an independent body.'

- [36] Neither party has obtained exemption from any of the provisions of the Council's Collective Agreement. Therefore, in the absence of a direct attack or collateral defence to the validity of the Ministerial extension, the Respondent is expected to pay the minimum wages and comply with all the other conditions specified in the Council's Collective Agreement; and the Applicants are equally expected to comply with all conditions and are subject to the dispute resolution procedures detailed in the collective agreement.
- [37] It can certainly not be suggested that the parties to the Council and the members they represent must follow the procedures prescribed in clause 28A of the Council's Collective Agreement, read with section 33A of the LRA; however, non-parties have an additional advantage or choice to pursue other remedies (under section 77(3) of the BCEA) ordinarily not available to the architects of the collective agreement.
- [38] If I accept, as I have to, that the parties to this litigation are no different de jure than any employer or employee member of the Trade Unions and Employers' Organisations that negotiated and concluded the collective agreement, the consequence is that the special enforcement procedure applies to them as if they themselves have crafted and agreed to those provisions. Moreover, as reasoned above, the underlying causa of the Applicants' claim is premised on an alleged breach of the provisions of the Council's Collective Agreement, as incorporated into their individual contracts of employment, and, in my view, is subject to arbitration.
- [39] Insofar as the Applicants invite this Court to intervene and order specific performance of those (selective) contractual terms

integrated by the Council's Collective Agreement, by virtue of this Court's powers under section 77A(e) of the BCEA, I can find no basis to simply discount and ignore the special enforcement procedure, as the Applicants want me to do. The Respondent, on the other hand, insist that the Applicants are required, to the exclusion of any other remedy they may have in contract, to follow the arbitration procedure imposed on the parties by clause 28A of the Council's Collective Agreement. To this end, section 49(4)(a) of the BCEA is instructive where it provides that no provision in that Act may be interpreted as permitting a contract of employment contrary to the provisions of a collective agreement. If I were to accept that this Court can simply discard the special enforcement procedure agreed to at the Council, I would be reading into the employment contract a remedy at variance with and not available to the Applicants in the Council's Collective Agreement. Besides, the Applicants seem to obfuscate the legal consequence of its request for an order of specific performance of the provisions of the employment contract, as infused by the Council's Collective Agreement, that the special enforcement procedure must equally follow and then binds them.

[40] My conclusion that clause 28A of the Council's Collective Agreement is binding on the parties is not entirely dispositive of the jurisdictional enquiry. It is the Applicants contention, regardless of the clause 28A arbitration remedy, that they have an election to bring their claim to the Labour Court in motion proceedings under section 77 of the BCEA. The Respondent disputes

these contentions and insist that clause 28A read with section 33A of the LRA establishes a plenary arbitration jurisdiction.

Does clause 28A of the Council's Collective Agreement and section 33A of the LRA exclude all other ordinary remedies?

[41] McKenzie (supra) at para 16, with reference to Coetzee v Fick and Another 1926 TPD 213 at para 216 as approved in Da Silva and another v Coutinho 1971 (3) SA 123 (A) held at para 135:

'We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.'

[42] It is true that neither clause 28A of the Council's Collective Agreement nor section 33A of the LRA contains an express removal of a party's ordinary right to sue in contract when a breach occurs. Therefore, I have to decide if the enforcement procedure in clause 28A of the collective agreement constitutes an exclusive remedy. Put differently, has the special dispute resolution procedures of the collective agreement, read with section 33A of the LRA, deprived the Applicants of their entitlement to prosecute their claim under contract and in terms of section 77 of the BCEA?

[43] In McKenzie, the SCA held:

'If on a proper interpretation of the statute in question the legislature has confined a person harmed by a breach of the right conferred

therein to the statutory remedy then resort to other means of enforcement is excluded. Accordingly both the scope of the right

itself and the means of enforcing that right are determined by the intention of the legislature as ascertained on a proper interpretation of the legislation. It follows from the authorities mentioned in paragraph 7 of this judgment that it is now clearly established that in order to enforce the statutory right not to be unfairly dismissed as embodied in section 185 of the LRA an injured party must have resort to the tribunals established under the LRA, being either the CCMA or in some instances the Labour Court.'

[44] Mr. Snyman maintained that clause 28A of the Council's Collective Agreement is analogous to the enforcement procedures and remedies available to employees under Part A Chapter 10 of the BCEA. He insisted that employees in non-organised sectors have a choice of

remedy to either enforce compliance via a labour inspector or sue under contract in terms of section 77(3) of the BCEA. I do not see how this analogy is helpful to the Applicants' cause. Firstly, the Applicants do fall within the registered scope of the Council and therefore are indeed part of an organised sector; and secondly, the provisions of section 70(a) of the BCEA are destructive to the proposition that the employees have a choice of remedy. It seems to me that the Legislature made a clear decision under Part A: Chapter 10 of the BCEA to exclude the remedies available to an employee who 'is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing'. Moreover, the provisions of section 199(1)(c) of the LRA is just as clear that the parties to a contract of employment may not waive the application of any provision in an applicable collective agreement.

[45] In the present matter, it is not disputed that the Applicants are covered by the enforcement machinery of clause 28A and section 33 and 33A of the LRA. In all of these provisions, arbitration is expressly identified (firstly by the parties to the collective agreement and secondly by the Legislature in section 33A of the LRA) as the intended forum to enforce the rights emanating from the Council's Collective Agreement as extended to the parties. I am reluctant to agree with Mr. Snyman that the Applicants have an election of remedies available to them.

[46] In *Chirwa v Transnet Ltd and Others*, Skweyiya, J stated:

'(T)he existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is, in the first instance, through the mechanisms established by the LRA that the employee should pursue her or his claims.'

[47] As Zondo, J observed in *Steenkamp and Others v Edcon Limited*, the remedies available to litigants need to be found in the source of the breach. In the present matter, the Applicants require compliance with the provisions of the Council's Collective Agreement and should, in my view, follow the enforcement procedures laid down in clause 28A of the agreement, read with section 33A of the LRA. It needs to be restated that the primary source of the entitlement to the minimum wage and bonuses, as claimed by the Applicants, are the results of collective bargaining in the Council, extended to them by the mechanisms of section 32 of the LRA. Absent the section 32 extension, the Applicants have no claim. This special dispensation created by the LRA includes the enforcement procedures laid down in sections 33 and 33A of the LRA. All of this means that the remedy available to the Applicants lies not in section 77 of the BCEA or their contracts of employment but in the special dispute resolution mechanisms provided in section 33A of the LRA.

[48] I have expressed the view above that the section 32 Ministerial extension of the Council's Collective Agreement is the fulcrum of the Applicants' claim. Without the collective bargaining in the Council and the extension of the fruits of such bargaining to the non-parties, the Applicants would have no claim to the industry minimum wages and bonuses. Essentially, the Applicants rely on LRA rights and, according to the principles laid down in *Edcon and Chirwa*, should pursue LRA remedies. Section 33A of the LRA provides a 'purpose-built framework' to enforce compliance with the Council's Collective Agreement. To hold otherwise might be seen to undermine one of the primary objects of the LRA, which is to create a framework for collective bargaining to determine wages and terms and conditions of employment; to promote collective bargaining, and the effective resolution of labour disputes. There can be no doubt that the primacy of collective agreements was a deliberate policy choice and where that collective agreement prescribes a peremptory arbitration process in line with the LRA remedy, the Applicants are not entitled to circumvent 'the finely-tuned dispute resolution structures created by the LRA'.

[49] *Chirwa*, as interpreted by Pillay, J in *Mohlaka v Minister of Finance*, endeavours to streamline the resolution of labour disputes under the LRA. With reference to the section 210 primacy of the LRA, the Court held at para 10:

'Unless the LRA and the BCEA are read consistently and as legislation complementary to each other, the BCEA conflicts with the LRA if it duplicates processes and remedies already provided in the LRA because duplication is precisely what the legislature sought to avoid.'

[50] If I were to accept that the Applicants have a choice of remedy, either under section 77(3) of the BCEA or section 33A of the LRA, it will render superfluous the judiciously crafted framework within which the Applicants' right to a minimum wage were created. I am in agreement with Professor Darcy du Toit who said:

'To infer the existence of a common law right duplicating the statutory right is to call into question the purpose of enacting the statutory right.'

[51] The Applicants take issue with the limitation of their claim under the provisions of clause 28A(1)(a) of the Council's Collective Agreement. They claim to have a far greater entitlement if they were allowed to sue in terms of the contract. The difficulty with this proposition is that the limitation of the claim (per the collective agreement) is incorporated into the contract of employment on the same basis that the minimum wage and other conditions of employment became part thereof. It seems to me that this is exactly the sort of provision from which the Applicants may seek exemption and is not the type of issue the courts should readily interfere with, especially in the absence of the Council's participation. Apart from the above criticism, the Applicants have advanced no grounds and have shown no good cause for seeking to avoid the arbitration clause. In any event, even if the Applicants were able to find a way to avoid the operation of clause 28A of the Council's Collective Agreement, they would still be confronted with the plenary arbitration jurisdiction established by section 33A of the LRA.

Costs

- [52] I have a discretion under section 158 (1)(a) read with section 162 of the LRA to award costs on the basis of the requirements of law and fairness. Unless fairness dictates otherwise, costs are normally awarded to the successful party. The ongoing employment relationship of the parties is a relevant consideration when awarding costs. I am of the view that a cost order against the Applicants might prejudice that relationship and would therefore be inappropriate. This matter raised an important issue of law that required consideration by this Court and was not an unreasonable approach by the Applicants. In my view, it is fair that each party pays its own costs.
- [53] Finding that this Court has no jurisdiction to adjudicate the dispute is by no means the end of the road for the employees. The Applicants are entitled to pursue the remedies available to them under clause 28A of the Council's Collective Agreement and, if it becomes necessary, arbitration in terms of section 33A of the Act. If the Applicants pursue their remedies, as I hope they will, the Arbitrator may, in his/her discretion, charge an arbitration fee and award costs against the unsuccessful party.

Order

[54] In the premises, the following order is made:

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

Bakker, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Attorney Mr. Sean Snyman

Instructed by:

Snyman Attorneys

For the Respondent: Advocate Lennox

Instructed by:

Waldeck Attorneys.

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