IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D476/09

DATE:26 NOVEMBER 2009

Reportable

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	APPLICANT
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	FIRST RESPONDENT
ETHEKWINI MUNICIPALITY	SECOND RESPONDENT
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	THIRD RESPONDENT

JUDGMENT

PILLAY D, J

INTRODUCTION

1. This application is preceded by two reviews of arbitration awards[1] and two other arbitrations, one before Professor Allan Rycroft[2] and the other

[1] Case No's D564/07 and 512/07

[2] Case No EMD110404, dated 10 April 2006

before Professor Karthigasen Govender[3]. The second respondent Municipality conceded that the reviews should succeed, but not on the grounds of the arbitrators' findings that they did not have jurisdiction. Given the centrality of the dispute about jurisdiction, the parties obtained an order by consent in Case No D512/07 to seek a declarator from the Labour Court, hence this application.

BACKGROUND

2. The background to this application for a declarator is that the applicant union, the Independent Municipality and Allied and Trade Union (IMATU), the Municipality, which is the employer, and the third respondent, the South African Municipal Workers Union (SAMWU) concluded a collective agreement (annexure DP3) to regulate the TASK Grading Review process. In terms of DP3, the parties entrusted to the Grading Forum (GF) the power and function of reviewing the grade assigned to positions within the Metropolitan, North Central, South Central, Inner West and South Operational Entities of the Municipality. The aim of the grading project was to achieve consistency in the grades assigned to the posts. As the project spanned five regions with varying grading systems, it was a mammoth task. Given the aim of DP3, the parties anticipated that there would be disputes. And there were several.

3. At the same time, the parties appreciated that the grading process had

[3] Case No EMD100506, dated 6 April 2008

to be completed expeditiously and finally. Balancing both needs, that is the effective resolution of disputes and the expeditious finalisation of the grading process, the parties agreed to the following terms of reference for the GF:

> "Terms of reference:
>
> 3.1 Reviews will only be considered on the basis of evidence supporting an inconsistent outcome of grades for comparable posts.
>
> 3.2 A unanimous decision by the Grading Forum following this review process, shall be final and binding on all parties. There shall be no grievance rights against a unanimous decision of the Grading Forum.
>
> 3.3 Any dispute arising from 3.1 above shall be submitted for arbitration."

4. The interpretation and application of clause 3 above of DP3 is the subject of this dispute. IMATU seeks an order amended to read in the following terms:

> "(T)hat those of the second respondent's employees who are aggrieved by or dispute any decision of the T.A.S.K Grading Forum ("the Grading Forum") established in terms of the collective agreement, may refer such grievance or dispute to the first respondent for arbitration, whether or not such decision is a unanimous or a *consensus* decision of that body, provided that such dispute arises:
>
> i. from a matter contemplated in clause 3.1 thereof, or

ii. without the review process contemplated in clause 3.2 having been followed."

SUBMISSIONS

5. For IMATU, Mr Winchester SC submitted that clause 3 did not deprive the Bargaining Council of jurisdiction because that question is dependent on the facts of each case, which have to be established at arbitration. He referred to various authorities[4] and to certain clauses[5] in DP3 to support his submission that clause 3 does not mean that all unanimous decisions of the forum are final and binding. If the GF comes to unanimous decisions without "following (the) review process" or without considering the "evidence supporting an inconsistent outcome of the grades from comparable posts", such a decision cannot be final and binding. Furthermore, the words "any dispute" in clause 3.3 was broad enough to support his interpretation. If it had been the intention of the parties to render unanimous decisions final and binding, they would have omitted the words "following this review process". In addition, if the parties intended clause 3.3 to apply to unanimous decisions only, they would have added words to that effect, as they did

[4] *UWCASU & Others v University of the Western Cape* (2002) 5 BLLR 487 LC at 490; *Food and Allied Workers Union v Clover SA Limited* (2000) 21 ILJ 1443 (CCMA); *North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & Others* (1997) 18 ILJ 971 LAC; *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465; *Total SA (Pty) Ltd v Bekker* 1992 (1) SA 617 (A) at 624I; *Melmoth Town Board v Marius Mostert (Pty) Ltd* 1984(3) SA 718 (A); *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43; *Food & Allied Workers Union v Commission for Conciliation, Mediation & Arbitration & Others* (2007) 28 ILJ 382 LC; *Communication Workers Union & Others v SA Post Office Ltd* (2005) 26 ILJ 1679 LC..

[5] clauses 3, 1.1, 1.8, 2.1, 2.2, 2.3 and 2.4

in previous collective agreements. So submitted Mr Winchester.

6. Mr van Niekerk SC, with Mr Schumann, submitted that the Court should have regard to three agreements concluded prior to DP3, because DP3 amalgamates and regulates all the regions covered in the prior agreements. He referred to various authorities in support of his submission that the Court should consider all the related contracts[6], authorities dealing generally with regard to the interpretation of contracts[7] and especially collective agreements[8].

7. On Mr van Niekerk's interpretation, the word "following" meant simply that the GF would attempt to reach consensus after the review process had been followed. The words "any dispute" refers to any dispute other than one about a unanimous decision of the GF. The binding effect of clause 3 is clear from its contents. If the purpose of clause 3 is to confer a review jurisdiction on the Bargaining Council, regardless of whether the GF's decision is unanimous, that would have been expressly stated.

8. Mr van Niekerk cited extensively the opinions of Professors Rycroft on the primacy of collective agreements,[9] and Govender on ascertaining

---

[6] *Du Preez en Andere v Nederduitsegereformeerde Gemeente, De Deur* 1994 (2) SA 191 (W); *Van der Post v Twijfelhoek Diamond Prospecting Syndicate* 1903 (2) SC 213 and *Barnett v Commissioner of Taxes* 1959 (2) SA 713 at 720; *Premier, Free State, & Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) (A) 339 at 409 H&I; *Delmas Milling Company Ltd v Du Plessis* 1955 (3) SA 447 A and *Christie, The Law of Contract, 4th Edition* pages 245 to 248

[7] *Swart &'n Ander v Cape Fabrix (Pty) Limited* 1979 (1) SA 195 (A); *Turner Morris (Pty) Ltd v Riddell* 1996 (4) SA 397 (E)

[8] *North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & Others* 1997 18 ILJ 971 LAC

[9] Paragraph 27 to 28 of the heads of argument for the Municipality

the intention of the parties from guidelines and circulars prepared subsequent to DP3 with the purpose of aiding its interpretation and application.[10]

ANALYSIS

9. In *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) at 409, paragraph 39, the Supreme Court of Appeal directed as follows regarding the interpretation of documents:

i. "(T)he integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning.

ii. (I)nterpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.

iii. (T)he rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent.

iv. (T)o the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its

[10] Paragraphs 35-38 of heads of argument for the Municipality

> factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'. The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice".

(Footnotes from the judgment omitted.)

10. The Court accepts that it can use the prior agreements, the subsequent guidelines and circulars to interpret DP3. However, it does not have to do so because DP3 is sufficiently clear. If the Court does refer to the other documents, it is purely to reinforce, not aid, its interpretation of DP3.

11. DP3 is a collective agreement, a context material to its interpretation. Maintaining the primacy of collective agreements is quintessential to sustaining a viable and vibrant collective bargaining system. In this case, the clear intention of the parties to DP3 was to design a dispute resolution system specifically for disputes arising from decisions of the GF. Critical to the design was finality of the disputes. To this end, the

parties agreed as a principle that:

> "Employees may request a once off review of their T.A.S.K grade for their posts in accordance with the main T.A.S.K Agreement based on evidence supporting an inconsistent outcome of grades for comparable posts."[11]

(Court's underlining)

12. They reinforce this principle in paragraph 3.1 when they restrict reviews to cases where there is evidence supporting an inconsistent outcome of grades for comparable posts. They also restrict the once-off review to decisions of the GF that are not unanimous. They further fortify their quest for finality by agreeing that unanimous decisions of the GF "shall be final and binding on all parties". That clause 3.3 refers to clause 3.1 only and not 3.2 confirms that no arbitration arises from paragraph 3.2.

13. As appealing as Mr Winchester's submission is that if aggrieved employees were not allowed to review both unanimous and non-consensual decisions of the GF, they could be saddled with wholly irrational decisions, it must be rejected. An elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. The obvious remedy available to the constituency is to not elect or re-elect its representatives, perhaps to dismiss them or even to sue or charge them for negligence, fraud or other cause. The bargain, however,

[11] Paragraph 1.1 of DP3

stands, unless it is manifestly unconstitutional, a submission not made in these proceedings.

14. In the context of DP3, however, the impact of clause 3.2 is not as extreme as IMATU will have the Court find. The bar to review is against unanimous, not majority, decisions. The GF is composed of representatives of all the parties to DP3. All IMATU has to do is to dissent to avoid a unanimous decision. In that way, it could avoid any irrational decision emanating from the GF.

15. Given the high priority the parties place on finality of grading disputes, the word "following" in clause 3.2 must mean "after". The words "the review process" must refer to the review process in clause 3.1 to determine inconsistent outcomes of grades for comparable posts. If the Court accepts the meaning IMATU attributes to the words "following this review process", namely that if the process is not followed, in arriving at unanimous decisions, such decisions must also be reviewable, the parties' aim of achieving finality will be wholly defeated. Potentially, every decision of the GF could be referred to arbitration; thereafter, beating a protracted path to the Constitutional Court becomes all too real.

16. In summary, IMATU is asking the Court to make a new agreement. That this Court cannot and should not do.

17. In the circumstances, the application is DISMISSED WITH COSTS, including the costs of two counsel.

18. The costs reserved in cases D564/07 and D512/07 are awarded to IMATU by agreement.

5 _____

Pillay D, J

Date of Hearing: 24 November 2009

Date of Judgment: 26 November 2009

10 Date edited: 16 December 2009

Appearances:

For the Applicant: Adv A Winchester instructed by Futcher Attorneys

For the Respondent: Adv GO van Niekerk SC with Adv P Schumann instructed by Hughes Madondo

IN THE LABOUR COURT

HELD AT DURBAN

CASE NO	:	D476/09
DATE	:	26 NOVEMBER 2009

IMATU

versus

SALGBC & ANOTHER

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF APPLICANT	:	MR WINCHESTER SC
ON BEHALF OF RESPONDENT	:	MR VAN NIEKERK SC
INTERPRETER	:	NOT REQUIRED

REPORT ON RECORDING

CLEAR. Thank you. Heads of argument for proper citations alluded to by the Court was not received.

CONTRACTOR
Sneller Recordings (Pty) Ltd. Durban ▪ 103 Jan Hofmeyr Road ▪ Westville 3630
Tel 031 2665452 ▪ Fax 031 2665459