THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2208 / 16

In the matter between:

ABRAHM GAAREKWE BORE **Applicant**

and

THE MINISTER OF HEALTH **First Respondent**

THE DEPARTMENT OF HEALTH, GAUTENG **Second Respondent**

THE HEAD OF THE DEPARTMENT OF HEALTH, GAUTENG **Third Respondent**

THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION, GAUTENG **Fourth Respondent**

THE HEAD OF THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION, GAUTENG **Fifth Respondent**

Heard: **15 November 2018**

Delivered: **29 May 2019**

Summary: Application – declaratory relief – application intended to bypass prescribed dispute resolution processes under the LRA – application not competent – obliged to have referred matter to arbitration

Jurisdiction – real issue in dispute about interpretation and application of collective agreement – constitutes issue in dispute that must be arbitrated by bargaining council – court having no jurisdiction to entertain dispute

Jurisdiction – allegation of incorrect reinstatement – would be a dispute concerning possible unfair labour practice – also a dispute where arbitration at bargaining council is prescribed – court having no jurisdiction to entertain dispute

Doctrine of election – employee failing to challenge reinstatement as being allegedly incorrect – acquiesced in position appointed to for a number of years – cannot now seek to challenge appointment where never challenged before – cannot blow hot and cold

Application – no legitimate basis for application established by applicant – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this instance, the applicant has brought an application seeking declaratory relief. It is not entire clear as to the basis upon which the applicant seeks this relief, since the notice of motion and founding affidavit makes no reference to the empowering provision in the Labour Relations Act ('LRA')[1] relied upon. However what is at least clear is that the applicant does not seek to review and set aside any determination or decision of any of the respondents. I can only surmise it must be an application in terms of section 158(1)(a)(iv) of the LRA.

[2] The relief sought by the applicant is an order to the effect that he be translated into an occupation specific occupation, and that his remuneration be adjusted accordingly, with effect from 1 July 2007. The applicant relies on Resolution 3 of 2007 issued in the Public Health and Social Development Sectoral Bargaining Council ('PHSDSBC') in support of his case in this regard.

[3] The actual employer of the applicant is the Gauteng Department of Health (the second respondent). However, and for the purposes of the judgment, and in

[1] Act 66 of 1995 (as amended).

order to encompass all the various functionaries cited by the applicant, I will refer to all the respondents jointly as 'the department'.

[4] The application is opposed by the department. The primary defence raised by the department is one based on a lack of jurisdiction of this Court to entertain the application. According to the department, the actual nature of the issue in dispute raised by the applicant concerns the interpretation and application of a collective agreement, which it contends is an issue that must be resolved by way of arbitration in terms of the dispute resolution mechanists prescribed by the LRA, and should not be referred to this Court for determination as a Court of first instance.

[5] The application came before me for argument on 15 November 2018. The applicant was unrepresented at the hearing, but wished to proceed with his matter without representation. Argument was concluded, and I reserved judgment. I will now proceed to determine the applicant's application, starting with a short summary of the relevant background facts.

The relevant background

[6] The applicant commenced employment with the department in 1989 as a professional nurse. The applicant progressed up the ranks, and in March 2001 was appointed to the position of Deputy Director: Nursing at the Tembisa Regional Hospital.

[7] The applicant was dismissed by the department on 26 June 2006 for alleged misconduct. He then pursued an unfair dismissal dispute to the PHSDSBC. The dispute ultimately came before arbitrator Mthethwa at the PHSDSBC for arbitration over a number of days in February, March, April and May 2007. Arbitrator Mthethwa, pursuant to the arbitration proceedings, issued an arbitration award dated 6 June 2007, in which he found that the dismissal of the applicant by the department was unfair. Of relevance to the current matter, the relief afforded by arbitrator Mthethwa to the applicant included that the department had to reinstate the applicant into what the arbitrator described as '*any other suitable position*' with the same terms and conditions of employment as the position he was in prior to dismissal. It was also directed that the department may deploy him to any other hospital other than Tembisa.

[8] On 12 July 2007, the department gave effect to this arbitration award. It informed the applicant in writing that he was reinstated in the position of Deputy Director: Nursing Administration, with duty resumption date of 1 July 2007, on the same conditions of employment and in the same region. However, the applicant was not allocated to a specific hospital, and was deployed to the central (head) office. The applicant never challenged this reinstatement on this basis, and took up the position, where he remained throughout.

[9] In 2007, the department and the various representative trade unions, represented in the PHSDSBC, concluded a collective agreement which sought to regulate the remuneration structure and career progression system for nurses. This collective agreement became known as the '*Occupational Specific Dispensation for Nurses*' ('OSD"), and was formally adopted in the PHSDSBC as Resolution 3 of 2007, on 10 September 2007. The effective date of the application of the OSD was agreed to be 1 July 2007.

[10] The occupation of Deputy Director: Nursing was an occupation affected by the OSD, described as '*Deputy Manager: Nursing (level 1 & 2 Hospitals)*' in annexure "A" to the OSD. Annexures "B" and "C" to the OSD then set out how this position is to be translated. However, it was undisputed that these provisions were only applied to this occupation where the incumbent was stationed in a particular hospital, and for this reason was not applied to the applicant, but the applicant contended that this dispensation did apply to him.

[11] In the founding affidavit, the applicant records the following: '*Of importance to me is the interpretation of the Resolution insofar as it concerns employees employed at Central (Head) Office*'. The reason for this statement by the applicant is that the department considered head office employees as being administrative and managing employees, and not employees responsible for actual nursing in public hospitals, and for that reason decided the OSD would not apply to these employees. The applicant disagreed, contending that it did apply to him, for two reasons. First, he contended that he was still a registered professional nurse. Second, he contended that had the department not, as he called it, '*incorrectly reinstated*' him in July 2007, he would have been in the actual occupation contemplated by the OSD referred to above.

[12] The issue of whether the OSD would apply to employees in the qualifying categories stationed at the department's head office was dealt with in subsequent proceedings in the PHSDSBC in 2009, unrelated to the current dispute. It was in fact a dispute about the interpretation of the OSD pursued by the unions. The dispute was resolved by way of a further collective (settlement) agreement concluded in the PHSDSBC on 7 August 2009, in which agreement it was recorded that the OSD would also apply to nurses at head office, but only where registration with the South Africa National Health Council was an inherent requirement of the position occupied by the nurse at head office. All employees were then informed by the department, in writing, in a memorandum dated 25 August 2009, of the implementation of this agreement.

[13] It may be added that according to the department, the applicant occupied the position of Deputy Director: Administration, which later changed title to Middle Manager: Administration. This was an occupation (position) in the department not forming part of the OSD, and was regulated by Resolution 3 of 2009, which is an entirely different dispensation. The records of the department relating to the employment of the applicant following his reinstatement in July 2007 reflects throughout that he in fact occupied the position of Deputy Director: Administration.

[14] Therefore, and even following the further collective agreement of 7 August 2009, the department did not apply to OSD to the applicant. The applicant did nothing about this, until 2011, when he made enquiries with the department about this. In a letter dated 18 April 2011, the applicant was informed that the OSD did not apply to him, because his duties were management and co-ordination related, and he did not perform duties aligned to nursing *per se*. Despite having been so informed, the applicant left matters there, and there is no indication that he took any steps at the time to challenge what he had been clearly informed.

[15] Only on 19 April 2016, some five years later, the applicant then lodged a grievance with the department in which he took issue with the position he was appointed in. But significantly, this grievance did not refer to the interpretation and then application of the OSD to him. Instead, in the grievance, the

applicant contended that he had been demoted. It does appear that this 'demotion' was based on the contention that he had been incorrectly reinstated in 2007. In short, the applicant complained that because he was incorrectly reinstated in 2007, he was demoted. In answer to this grievance, in a memorandum dated 11 May 2016, the department declined to entertain the grievance, stating that it was brought out of time. The applicant was informed he was free to pursue the matter elsewhere.

[16] The applicant then brought the current application on 18 October 2016. Due to the jurisdictional issue raised by the department, it must be dealt with first, before the merits of the applicant's application can be entertained.

The issue of jurisdiction

[17] As touched on above, the department's jurisdictional objection was that the actual issue in dispute concerns the interpretation or application of a collective agreement that needs to be dealt with by way of arbitration in the PHSDSBC. According to the department, and as such, this Court would have no jurisdiction to entertain the same.

[18] It is always the duty of this Court to determine the true or real nature of the dispute it is called on to decide.[2] The reason why this is important is because the LRA allocates different kinds of disputes to different dispute resolution fora for determination, all based on the nature of the dispute.[3] It is by now trite that if the issue in dispute is one that must be resolved by way of arbitration under the LRA, this Court simply has no jurisdiction to entertain same as a Court of first instance,[4] and the dispute resolution process prescribed by the LRA must have primacy.[5]

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[2] *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 *ILJ* 305 (CC) at para 52; *CUSA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 66; *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 *ILJ* 925 (LAC) at para 16; *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at para 18; *Mpele v Municipal Council of the Lesedi Local Municipality and Others* (2019) 40 ILJ 572 (LC) at para 45.

[3] See *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 *ILJ* 142 (LAC) at paras 38-39; *MTN (Pty) Ltd v Pragraj and Another (2)* 2002) 23 *ILJ* 299 (LAC) at para 15;

[4] See section 157(5) of the LRA.

[5] See *Chirwa v Transnet Ltd and Others* (2008) 29 *ILJ* 73 (CC) at para 41; *Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296 (CC) at para 56; *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another* (2012) 33 ILJ 1822 (LAC) at paras 26 – 27.

[19] As a point of departure, jurisdiction is determined on the basis of the case as pleaded by the litigant.[6] However even this would be subject to the duty, despite what has been pleaded, to ascertain the true or real nature of the dispute as it emerges from the pleadings as a whole, no matter how it is labelled when pleaded.[7] In *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members*[8] it was held:

> 'It is trite that the jurisdiction of the Labour Court (and the CCMA or a council) to entertain a matter is determined from the pleadings in the matter. It is also an established principle that in application proceedings, the affidavits constitute the pleadings and the evidence. While the issues between parties generally emerge from the pleadings, it may not be readily possible to determine what the true nature of those issues are, or what the true nature of the dispute is, because of the manner in which the pleadings are drafted. Therefore, the true nature of the dispute is to be determined from an analysis of the facts and not from the parties' characterisation of the dispute.'

[20] The matter *in casu* is a case in point. The first crisp question to answer for the applicant to succeed in his application is whether the applicant's case that he remains registered with the South Africa National Health Council as a professional nurse makes the OSD applicable to him is a scenario contemplated by the OSD. And as such, is this not a dispute that in reality calls for the interpretation and application of a collective agreement (the OSD). If that is so, then section 24(1) of the LRA would indeed find application.[9] Section 24(1) reads:

> 'Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must

[6] *Gcaba* (*supra*) at para *75; Mbatha v University of Zululand* (2014) 35 *ILJ* 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 *ILJ* 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 *ILJ* 1098 (LAC) at para 37;

[7] *Zungu v Premier, Province of KwaZulu-Natal and Another* (2017) 38 *ILJ* 1644 (LAC) at para 18; *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC) at para 42.

[8] (2015) 36 ILJ 624 (LAC) at para 21.

[9] Clause 6 of the OSD provides that any dispute about the interpretation or application of the OSD shall be dealt with by way of the dispute resolution processes of the PHSDSBC.

> first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.'

[21] But there is a second aspect to this case. The applicant has said that he was incorrectly reinstated in 2007. Or as he succinctly described it in his grievance in 2016 – he was demoted by way of the reinstatement. It is clear from the founding affidavit that the gist of the applicant's case in this respect is that he was placed in a lesser position than the one he occupied when he was reinstated by arbitrator Mthehtwa. If this is the issue, then section 186(2)(a) of the LRA would be applicable, which reads:

> ''Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving — *(a)* unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.'

[22] In sum, if the real issue in dispute concerns the interpretation and application of the OSD, the LRA prescribes that such dispute must be resolved by way of arbitration under the auspices, in this case, of the bargaining council (PHSDSBC).[10] If the real issue in dispute is an unfair labour practice, then it must also be resolved by way of arbitration under the auspices of the PHSDSBC, being the applicable bargaining council with jurisdiction.[11] It is not for this Court to entertain any of these disputes, as this Court would simply not have jurisdiction to do so.[12]

[23] Considering the above, I must find substance in the department's jurisdictional objection. First, there can be little doubt that the applicant's contention that his continued registration as a professional nurse makes the OSD applicable to him, would concern an issue that calls for the interpretation of the OSD. The applicant in fact says this in so many words in his own answering affidavit, which I have quoted above, putting the issue really beyond doubt.[13] Further, the OSD is undoubtedly a collective agreement.[14] In simple terms, the issue in

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[10] See section 24(1) of the LRA, as read with clause 6 of the OSD.
[11] See section 191(1) as read with section 191(5)(a)(iv) of the LRA.
[12] See *Aucamp* (*supra*) at paras 32 – 33.
[13] Compare *Public Servants Association on behalf of Strauss and Others v Minister of Public Works No and Others* (2013) 34 ILJ 2929 (LC) at para 12.
[14] *Department of Correctional Services (Western Cape) v Democratic Nursing Organisation of South Africa and Others* (CA7/13) [2014] ZALAC 76 (18 December 2014) at para 19.

dispute raised by the applicant as it emerges from the pleadings leaves me with no doubt that deciding this dispute will necessarily involve an interpretation of the OSD and a determination whether it applies to the applicant.

[24] I fail to understand why the applicant chose to pursue his dispute about the interpretation and application of the OSD, to this Court, in the manner that he did. There is ample precedent to have steered the applicant in the right direction, considering the fact that disputes relating to the interpretation of the OSD has been the subject matter of several judgments of this Court and the Labour Appeal Court (LAC), and from which judgments it surely must have been clear that the issue required the interpretation and application of the OSD which needed to be done by way of arbitration.

[25] I wish to make specific reference to three judgments of the LAC in this regard. First in *Western Cape Department of Health v Van Wyk and Others*[15] the Court accepted that the OSD was a collective agreement which an arbitrator had the power to interpret. In *Van Wyk supra*, the issue was whether the employees were employed in a '*speciality unit*' as contemplated by the OSD, which would entitle them to translation.[16] The clear similarity to the case of the applicant is immediately apparent. The Court in *Van Wyk supra* held:[17]

> 'In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. 6 In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.'

[15] (2014) 35 ILJ 3078 (LAC) at para 21.
[16] See para 16 of the judgment.
[17] Id at para 22.

[26] My second reference is to *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*[18]. This case concerned a nurse that contended that she had been incorrectly translated in terms of the OSD, and the very issue raised was that she was fulfilling the duties of Deputy Manager: Nursing, but instead was translated to the position of Assistant Manager: Nursing.[19] Once again, this was a dispute that was subjected to arbitration. The Court concluded:[20]

> '… Returning to the present dispute, the words employed in the OSD agreement read together with the translation tables compels interpretative work …'

[27] Finally, I refer to *Department of Correctional Services (Western Cape) v Democratic Nursing Organisation of South Africa and Others*[21] which concerned an employee that was employed in the position of Head of Department: Healthcare Services at the Obiqua Correctional Centre, where her duties were of a managerial nature and included administration, supervision and primary healthcare tasks. When the OSD was implemented, her duties remained the same and her case was that the Obiqua Correctional Centre was a primary health centre and a speciality unit entitling her to be translated under OSD. In this case as well, the Court accepted that the dispute was one concerning the interpretation and application of the OSD, which was dealt with at arbitration.[22]

[28] Cases where this Court was called on to consider matters relating to the interpretation and application of the OSD in the context of review applications, where litigants sought to challenge arbitration awards in the bargaining council in this regard, include *Public Servants Association on behalf of Traut v Department of Correctional Services (Western Cape) and Others*[23], *Democratic Nursing Organisation of South Africa obo Fadana v Public Health and Social Development Sectoral Bargaining Council and Others*[24], *Minister of*

[18] (2016) 37 ILJ 1819 (LAC).
[19] See para 25 of the judgment.
[20] Id at para 34.
[21] (CA7/13) [2014] ZALAC 76 (18 December 2014) at para 8.
[22] See para 17 of the judgment.
[23] (2015) 36 ILJ 1911 (LC).
[24] (C1011/2010) [2014] ZALCCT 22 (20 May 2014).

Correctional Services v Public Health and Social Development Sectoral Bargaining Council and Others[25], and *PAWUSA obo Skosana and Others v Public Health and Social Development Sectoral Bargaining Council and Others*[26]. All this should have guided the applicant, who was legally represented when the application was brought, which forum to go to as the proper point of departure in pursuing his case. One can do little better than to quote from what the Court said in *Department of the Premier, Western Cape v Plaatjies No and Others*[27], where the Court dealt with translation under Resolution 1 of 2008 (a comparable resolution at another public service bargaining council):

> 'In the present case, the Dickinson respondents formulated the main claim before the bargaining council as one concerning the application of Resolution 1 of 2008, although it was somewhat imprecisely formulated in their statement of claim. If that was the true nature of the dispute, the bargaining council had jurisdiction to consider it in terms of s 24 of the LRA. …'

[29] Now once it is determined that the dispute should have been referred to the PHSDSBC for arbitration, that must be the end of the case for the applicant as far as the jurisdiction of this Court to hear his matter is concerned. In *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another*[28] the Court dealt with a resolution under the PSCBC, and held:

> 'Therefore, the court a quo … correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organization, is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution.'

[25] (C121/2010) [2011] ZALCCT 77 (27 August 2011).
[26] [2011] 11 BLLR 1079 (LC).
[27] (2013) 34 ILJ 2876 (LC) at para 38.
[28] (2012) 33 ILJ 1822 (LAC) at para 32.

The Court concluded:[29]

> 'It follows therefore that where an employee, such as De Bruyn, is dissatisfied with a decision by the employer with regard to the issue of leave of absence, as is the case in casu, his remedy lies in the provisions of the resolution. It follows that the appellant is confined to its remedy in terms of s 24 of the LRA …'

[30] Following on, and in *Ekurhuleni Metropolitan Municipality supra* the Court said the following:[30]

> 'If the main issue in the 'pleadings' is about the interpretation and application of the clauses in the main agreement, … then it must, in terms of s 24 of the LRA, be resolved, first, by conciliation, failing that, by arbitration, in accordance with the provisions of the main agreement, alternatively, by the CCMA by means of conciliation, failing that, by means of arbitration …'

Having so found, the Court then concluded:[31]

> 'The real dispute between the parties was indeed about the interpretation and application of the main agreement, in particular clause 2.5.6 thereof. In terms of s 24 of the LRA it was not within the power of the court a quo to hear and determine such a dispute between the parties. That power resided in the body contemplated in the main agreement, if there was indeed a procedure provided as contemplated in s 24(1) of the LRA …'

[31] In my view, and clearly appreciating the merit of the jurisdictional objection pertinently raised by the department in the answering affidavit, the applicant completely changes tack on reply. On reply, the applicant contends that the dispute does not concern the interpretation of the OSD. Needless to say, this directly contradicts what is said in the founding affidavit. But despite that unexplained contradiction, the applicant on reply says that the matter concerns the enforcement of the OSD as contemplated by section 142A(1), which

[29] Id at para 34. See also *Farre v Minister of Defence and Others* (2017) 38 ILJ 174 (LC) at para 17.
[30] Id at para 23
[31] Id at para 29.

means that section 24(1) does not apply. For the reasons to follow, I however consider that this change of tack is equally doomed to fail.

[32] It must be immediately said that it is not permissible for the applicant to make out a new case on reply, which the applicant is in fact doing.[32] In *Betlane v Shelly Court CC*[33] the Court said:

> 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time. …'

Nowhere in the founding affidavit or the notice of motion does the applicant contend that this a case of enforcement. There is no reference to, or reliance on, section 142A. It cannot be raised for the first time on reply.[34]

[33] In any event, considering section 142A(1), the OSD itself (resolution 3 of 2007) is not a settlement agreement and the settlement agreement of 7 August 2009 that was made an arbitration award in terms of section 142A(1) of the LRA does not specifically apply to the applicant, his circumstances, his position, and the facts relating to his appointment, reinstatement and the like.

[34] But what must be fatal to this new argument of the applicant has to be that even if it can be said that the applicant seeks enforcement of the OSD, this enforcement is impossible without first interpreting and applying the OSD. The kind of dispute raised by the applicant in this application, even if one calls it enforcement, has been dealt with in the judgments referred to above as one necessitating the interpretation and application of the OSD first. It follows that it is simply not an enforcement dispute, for the simple reason that enforcement is not possible without first considering whether the OSD is indeed applicable

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[32] See *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA); *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A – B.

[33] 2011 (1) SA 388 (CC) para 29.

[34] *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 20.

to the applicant. In *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-Time Employees*[35] the Court held:

> 'In this matter it is evident that the parties disagree about the meaning of the contents of the settlement agreement. The respondent states that the agreement needs to be interpreted. In such circumstances, because the parties themselves disagree as to what was intended by the agreement, so much so that both parties agree that third party intervention is necessary to give a proper interpretation as to what were the terms of the agreement, the application does not even 'get off the starting blocks'. The Labour Court cannot in such circumstances make the agreement an order of court, because there is a dispute about what was agreed, and it would serve no purpose, other than to exacerbate the interpretational issue, if such an agreement were to be made an order of court. An order that is unclear and ambiguous is open to dispute and that defeats the very purpose for making it a court order in the first place. Such an order would not be enforceable or executable.'

[35] I thus conclude that insofar as the applicant seeks relief founded on the interpretation, and then application, of the OSD, where it comes to his position as Deputy Director: Nursing Administration which he actually occupied throughout, it is a dispute that he was compelled to have referred to the PHSDSBC for conciliation, and then if the matter remained unresolved, to arbitration at the same bargaining council. He was not entitled to approach this Court directly, whether in terms of section 158(1) of the LRA, or otherwise. He was compelled to have followed the prescribed dispute resolution process. It follows that this Court has no jurisdiction to entertain his case in this regard.

[36] Next, the issue of the alleged 'incorrect' reinstatement of the applicant must be considered. This is of course an issue that does not specifically relate to the OSD and its interpretation or application. It really concerns a dispute as to whether the department has complied with the arbitration award of commissioner Mthethwa when reinstating him. It is noteworthy that the applicant never sought to enforce the arbitration award. He not once, from 2007 up to 2016, contended that the department did not comply with the arbitration award or sought to pursue a dispute in this regard. If he believed

[35] (2014) 35 ILJ 455 (LAC) at para 23.

the department did not comply with the award because of the manner that it sought to reinstate him, he was of course free to pursue enforcement proceedings under either sections 143 or 158(1)(c) of the LRA, followed by contempt proceedings in this Court if still not resolved to his satisfaction. However, he acquiesced to the manner in which the department reinstated him. He took up the appointment without protest and remained working in that capacity. He simply cannot then, close on nine years later, take issue with it because it is now considered by him to be suitable to do so. As said in *Pitelli v Everton Gardens Projects CC*:[36]

> '… A litigant cannot expect to blow hot and cold depending upon which is most advantageous at the time …'

[37] The point in this regard can be best illustrated this way. Reinstatement means, in the context of it being awarded to an employee in an arbitration award as a result of an unfair dismissal dispute, the restoration of the *status quo ante*, which is a restoration as if the dismissal never happened.[37] It follows that the original contract of employment of the employee is restored. Thus, and if the employee is not reinstated on this basis, but appointed in a position which is something else, it would be a breach of the contract of employment. This places the employee before an election, being either to approbate and accept this changed appointment, or reprobate and challenge it, seeking enforcement of his original contract of employment using the mechanisms provided by the LRA in this regard.[38] As said in *Pretorius v Rustenburg Local Municipality and Others:*[39]

> 'The law of contract recognizes that in certain circumstances a contracting party may be put to an election either to approbate (ie to affirm the continued existence of the contract) or to reprobate (ie to cancel or terminate the contract). A contracting party is bound by such an election, whether evinced

[36] [2010] 4 All SA 357 (SCA) at para 34.
[37] See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 2507 (CC) at para 36; *Themba v Mintroad Sawmills (Pty) Ltd* (2015) 36 ILJ 1355 (LC) at para 22.
[38] Sections 143 or 158(1)(c) of the LRA, followed by contempt proceedings.
[39] (2008) 29 *ILJ* 1113 (LAC) at para 41. See also *Septoo v City of Johannesburg* (2018) 39 ILJ 580 (LAC) at para 19; *Hlatshwayo v Mare & Deas* 1912 AD 242; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 *ILJ* 991 (LAC) at para 46; Mohlomi (*supra*) at para 78.

> expressly or by conduct, and cannot go back on it once made. He cannot, it has been put, act inconsistently or blow hot and cold.'

[38] The election contemplated above can be exercised expressly, or tacitly. In this case, and considering that the applicant was unilaterally appointed by the department into the position of Deputy Director: Nursing Administration in July 2007, the 'election' in this case would be established by whether the applicant acquiesced in it by way of conduct. Acquiescence by conduct entails, as said in *National Union of Metalworkers of SA and Others v Fast Freeze*[40]:

> '… (c) Acquiescence by conduct requires an overt act by such party, ie conduct which conveys outwardly to the other party his attitude towards the judgment.
> *(d)* The overt act must be consistent with an intention to abide by the judgment, and inconsistent with an intention to appeal against such judgment.
> *(e)* The test is objective. It is the outward manifestation of such party's attitude in relation to the judgment that must be looked at, not his subjective state of mind or intention. …'

[39] In my view, the applicant elected to live with what he had where it came to the position into which he was reinstated in July 2007. He was specifically informed in writing what that position was, and the employment records at the department were adjusted accordingly to reflect this, however he did nothing to contradict this. He did a volte face some nine years later, with the view to claiming a difference in salary for that entire period. That is simply not permissible.[41]

[40] I believe that the applicant was clearly alive to the aforesaid challenge faced by his considering any belated challenge of his reinstatement. As a result, he sought to in effect resurrect this dispute by bringing a grievance in 2016, in which he then said he was demoted by way of the manner in which the

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[40] (1992) 13 *ILJ* 963 (LAC) at 973F–974C. See also *Balasana v Motor Bargaining Council and Others* (2011) 32 ILJ 297 (LC) at para 11; *Mdhluli v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 1614 (LC) at paras 14 – 15; *SA Municipal Workers Union and Another v Emalahleni Local Municipality and Others* (2011) 32 ILJ 2196 (LC) at para 19.

[41] See *Equity Aviation* (*supra*) at para 54. Also compare *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others* (2015) 36 ILJ 232 (LC) at para 46; *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA and Another* (2019) 40 ILJ 305 (LAC) at paras 41 – 43

department effected his reinstatement. Without even going into the merits or competence of this approach, or whether the argument is sustainable on the facts, this case, as it is pleaded, in any event equally falls outside the jurisdiction of this Court to consider and determine. The reason for this is simply that it would be a dispute concerning an unfair labour practice, in terms of the definition in section 186(2)(a) quoted above. An unfair labour practice dispute must be pursued by way of arbitration to the PHSDSBC, and this Court has no jurisdiction to entertain the same. As held in *Gcani v Minister of Justice and Correctional Services and Others*[42]:

> **'**Therefore, and as a general proposition, where a public service employee has been dismissed, or complains about other conduct of his or her employer that would be an unfair labour practice, a review application in terms of s 158(1)*(h)* by such employee challenging such conduct by the employer, is simply not competent. These disputes must be pursued and then decided in terms of the arbitration or adjudication dispute-resolution mechanisms under chapter VIII of the LRA.

[41] In the circumstances, the applicant's case that his incorrect reinstatement constitutes a demotion, being his case in this regard as pleaded, places this issue in dispute outside the jurisdiction of this Court. The applicant is compelled to have pursued this dispute to the PHSDSBC for conciliation, and then to arbitration (if it remained unresolved).

Conclusion

[42] Accordingly, the department's jurisdictional objection must be upheld. The applicant's application in this instance concerns issues in dispute that must be resolved in terms of the provisions of sections 24 and/or 191(5)(a)(iv) of the LRA, both of which provisions prescribe arbitration as the ultimate dispute resolution mechanism. It was not competent for the applicant to have approached this Court as he did, considering that this Court has no jurisdiction to decide these issues in dispute as a Court of first instance. The applicant's application must therefore fail for want of jurisdiction of the Labour Court to entertain his application.

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[42] (2019) 40 ILJ 358 (LC) at para 28. *Aucamp* (*supra*) at para 32. Also compare *Mathibeli v Minister of Labour* (2015) 36 ILJ 1215 (LAC) at paras 17 – 18.

[43] Considering this conclusion I have come to, is it simply not necessary to consider the merits of the applicant's application, and I shall refrain from expressing any views in this regard.

[44] In the replying affidavit, the applicant has asked, in the event of this Court finding that it had no jurisdiction to entertain the matter, to apply the provisions of section 158(2)[43] of the LRA, and refer this matter to arbitration at the PHSDSBC. In terms of this provision, where it becomes apparent that the issue in dispute should have been referred to arbitration, the Labour Court has the power to stay the litigation proceedings and order that the dispute be referred to arbitration.[44] The Labour Court is however not obliged to stay the proceedings and still has a discretion to decide whether to do so, as is evident from the word '*may*' in Section 158(2).[45]

[45] In this instance, I am unconvinced to exercise my discretion in favour of the applicant and decide to stay the proceedings and refer the dispute to arbitration at the PHSDSBC as required. As touched on above, there is ample precedent informing the applicant as to the correct manner in which he had to pursue is dispute. He was also legally assisted when his application was brought. He nonetheless deliberately bypassed all the prescribed dispute resolution provisions and came to this Court directly. Only when confronted with a jurisdictional objection, did the applicant, almost as an afterthought, sought to then ask that the matter be referred to arbitration by this Court. I say an afterthought, because the applicant on reply first tried to make out a case that this Court has jurisdiction because the dispute is an enforcement dispute. I shall therefore not stay the current matter and refer it to arbitration.

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[43] Section 158(2) reads: '*If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may- (a) stay the proceedings and refer the dispute to arbitration …*'. In terms of section 158(3)(b), '*arbitration*' for the purposes of section 158(2) includes arbitration under the auspices of an accredited bargaining council, or, in terms of section 158(3)(e), arbitration where the dispute is about the interpretation or application of a collective agreement.

[44] *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC) para 24 ; *Pienaar v Stellenbosch University and Another* (2012) 33 ILJ 2445 (LC) at para 22 – 23 ; *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 371 (LC) at para 15; *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at pars 24 – 25.

[45] *Aucamp* (*supra*) at para 46.

[46] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. In exercising this discretion, I am compelled to give consideration to a number of issues in the way the applicant pursued this application. I must consider that there was ample guidance and precedent to inform the applicant what he needed to do in order to pursue his case. I also consider that the applicant did nothing for years, and then sought to engage the respondent demanding a substantial amount in what he alleged was remuneration due for this entire period. It is also my view that the applicant was opportunistic and designed his case of the 'incorrect reinstatement' demotion in 2016 to overcome what would clearly have been a close on impossible task to challenge this state of affairs some nine years after it happened. The applicant's application was always ill conceived. This is also evident from the manner in which the applicant sought to change tack on reply.

[47] I am mindful that there is still an ongoing employment relationship between the parties, and of the pronouncements of the Constitutional Court with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[46]. However, the judgment in *Zungu supra* cannot serve as some or other blanket immunization from costs orders. There would always be circumstances in which a judicial exercise of the discretion, where it comes to costs, justifies costs being awarded, and in my view, the matter *in casu* is one of these.

[48] Overall considered, I believe that this is an instance where, in exercising my discretion, a costs order against the applicant is justified, and I shall therefore make an order that the applicant pay the costs of the application.

[49] In the premises, I make the following order:

Order

1. The applicant's application is dismissed for want of jurisdiction of the Labour Court.

2. The applicant is ordered to pay the respondents' costs.

[46] (2018) 39 ILJ 523 (CC) at para 25.

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S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	In person
For the Respondents:	Advocate B Ford
Instructed by:	MNS Attorneys