THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 344/10

In the matter between

JOHANNESBURG CITY PARKS	**Appellant**
and	
ADV JAFTA MPHAHLANI NO	**First Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
SAMWU obo F MAGUVHE	**Third Respondent**
COMMISSIONER, CHAIRMAN WEBB NO	**Fourth Respondent**

Neutral citation: ***Johannesburg City Parks v Mphahlani NO & others*** **(344/10) [2011] ZASCA 56 (31 March 2011)**

Coram: Streicher, Nugent, Snyders, Bosielo and Majiedt JJA

Heard: **24 February 2011**

Delivered: **31 March 2011**

Summary: Labour Law – Dismissal – Interpretation – s 62(3A)(a) and (b) – whether the arbitrator had jurisdiction to hear the arbitration whilst there was a demarcation dispute pending before the CCMA

ORDER

On appeal from: Labour Appeal Court, Johannesburg (Zondo JP, Patel JA and Sangoni AJA sitting as a court of appeal).

1 The appeal is upheld with costs.

2 The order by the Labour Appeal Court is set aside and substituted with the following order:

1 The appeal is upheld with costs.

2 The order made by the Labour Court is set aside and substituted with the following order:

‘1 The arbitration award dated 17 November 2005 issued under the auspices of the South African Local Government Bargaining Council (case no GMD 080511) is set aside.

2 The third respondent is ordered to pay the costs of the application.’

JUDGMENT

BOSIELO JA (Nugent, Snyders and Majiedt JJA concurring)

[1] This is an appeal with the leave of this Court against a judgment of the Labour Appeal Court (LAC) dismissing an appeal by the appellant against the

judgment of the Labour Court (LC) in terms whereof the appellant's application for the review and setting aside of an arbitration award made by one Ms Webb during 31 October 2005 was dismissed.

[2] The facts of this case are fairly straight-forward and to a large extent common cause. Mr Maguvhe was employed by the appellant. He was a member of a trade union called South African Municipal Workers Union (SAMWU), the third respondent in this appeal. Following upon a formal disciplinary enquiry he was dismissed on 21 April 2005. A dispute regarding the fairness of the dismissal arose between the appellant and the third respondent, representing Maguvhe, which was referred to second respondent (SALGBC). Second respondent is a duly registered bargaining council. The appellant did not attend the conciliation meeting alleging that it did not fall within the jurisdiction of SALGBC. The dispute was referred to arbitration and the fourth respondent (Webb) was appointed the arbitrator.

[3] On 16 September 2005 the appellant sent a letter to the second respondent stating that it would not attend the arbitration proceedings as it did not fall within its jurisdiction. In addition, the appellant advised second respondent in the same letter that this was due to the fact that there was a demarcation dispute still pending before the Commission for Conciliation, Mediation and Arbitration (CCMA) and that until that dispute is resolved, it would not be bound by any decision taken by the second respondent. It stated further that by virtue of this fact its employees were free to refer their disciplinary matters to the CCMA which the appellant would duly attend.

[4] It is not in dispute that the letter aforesaid was received and read by the fourth respondent. As foreshadowed in the letter the appellant did not attend the arbitration proceedings. Notwithstanding the clear contents of the letter aforesaid and in the absence of the applicant, the fourth respondent found that she had jurisdiction and proceeded with the arbitration proceedings. She made a default award in favour of third respondent.

[5] Aggrieved by the arbitrator's decision, the appellant tried unsuccessfully to have the award reviewed and set aside by the LC. This was followed by an unsuccessful appeal to the LAC.

[6] This appeal revolves around the correct interpretation of s 62(3A) of the Labour Relations Act 66 of 1995 (LRA). I therefore find it expedient to set out the relevant part of s 62(3A) which reads:

'In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1)(a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that –

(a) the question raised –
    (i) has not previously been determined by arbitration in terms of this section; and
    (ii) is not the subject of an agreement in terms of subsection (2); and
(b) the determination of the question raised is necessary for the purposes of the proceedings.'

[7] Before us counsel for the appellant submitted that s 62(3A) is clear and has no inherent ambiguities. He contended that the section provides clearly and unambiguously that when faced with a demarcation dispute, the arbitrator has no

choice but to adjourn the proceedings until the very issue of jurisdiction is resolved, more so that the Bargaining Council itself does not possess the jurisdiction to resolve a demarcation dispute. This issue falls within the exclusive domain of the CCMA, so it was submitted.

[8] On the other hand, counsel for the third respondent, contended that even where the issue of jurisdiction is raised, the arbitrator must first satisfy himself or herself if he or she has jurisdiction on the facts before him or her and if the dispute is unrelated to the pending demarcation dispute, to proceed to hear the matter on the merits. He submitted that if the party raising lack of jurisdiction as a defence is aggrieved by the decision of the arbitrator to proceed, he or she is free to take such a decision on review to the LC where the matter can be referred to the appropriate forum with authority being the CCMA.

[9] It is common cause that SAMWU and the Independent Municipal and Allied Trade Union (IMATU) are both members of second respondent (SALGBC). SAMWU and IMATU contend that the appellant falls within the scope of second respondent. The appellant disputes this vigorously. It is this dispute that was referred to the CCMA for determination in terms of section 62 of the LRA by both SAMWU and IMATU. It follows logically in my view that, if the appellant is not a party to second respondent, then the second respondent would not have jurisdiction over it. This is the issue that was raised pertinently as a point *in limine* by the appellant. The question therefore is whether the arbitrator acted correctly by proceeding with the arbitration proceedings whilst there was this unresolved demarcation dispute.

[10] The LAC found that the appellant relied on a wrong section as s 62(3A) is restricted to an instance where the 'proceedings before an arbitrator are about the interpretation or application of a collective agreement'. The LAC found that the dispute herein was not about the interpretation or application of a collective agreement but about unfair dismissal. The LAC drew a distinction between s 62(3A) and s 62(3) and (5). The LAC found that the distinguishing feature is that s 62(3) speaks of 'any proceedings' whilst s 62(3A) restricts itself to 'proceedings before an arbitrator about the interpretation or application of a collective agreement.' The LAC concluded therefore that s 62(3A) was narrower than s 62(3) and not applicable to this case. The LAC found that s 62(3A) did not apply to the proceedings before the arbitrator as these were concerned with an unfair dismissal dispute. Furthermore the LAC found that in the absence of any evidence being put before the arbitrator, the arbitrator could not have been and was not satisfied about the questions raised in s 62(3A)(a) and (b).

[11] I do not agree with the construction of s 62(3A) and s 62(3) and (5) as adumbrated by the LAC. I found the distinction drawn by the LAC to be more illusory than real. The nub of the enquiry is simply whether the arbitrator had the jurisdiction to arbitrate this matter or not, given the admitted fact that there was a demarcation dispute which addresses jurisdiction pending before the CCMA.

[12] It would appear to me to be illogical that the arbitrator, fully alerted to the objection raised by the appellant in their letter of 16 September 2005, and whilst the demarcation dispute is still pending before the CCMA, could ignore such an objection and arrogate to herself the jurisdiction to arbitrate this matter. The

arbitrator could only have had jurisdiction if the collective agreement was binding on the appellant. That was in issue and pending before the only body empowered to decide it, the CCMA. In order to decide jurisdiction it had to be decided whether the collective agreement applied to the appellant. That decision falls squarely within the wording of s 62(3A). Logic dictates that in strict compliance with s 62(3A) which is couched in peremptory language that the arbitrator was obliged to adjourn the proceedings as the demarcation dispute was still pending before the CCMA.

[13] It is not in dispute that the demarcation dispute herein had been referred by SAMWU and IMATU during 2004 to the CCMA for determination of the question whether the appellant falls within the scope of the second respondent. It is furthermore common cause that as at 16 September 2005 when the arbitration proceedings were held this dispute was still pending before the CCMA. It makes little sense to me that the arbitrator could proceed to arbitrate the matter against an objection to the jurisdiction of second respondent (SALGBC) based on s 62(3A) of the LRA. It appears to me plain that such conduct circumvents the mischief which s 62(3A) seeks to address, ie that the arbitrator shall not adjudicate in a matter where his or her jurisdiction is being challenged on the basis of whether one of the parties is bound by the collective agreement. To say that, an arbitrator can act even in the face of a pending demarcation dispute and that such a decision can later be taken on review to the LC as submitted by counsel for the third respondent would cause multiple streams of litigation in the same issue and is simply untenable. This is so because even the LC itself will not be able to handle the matter until the CCMA has finally determined the demarcation dispute. Manifestly, the

consequences of such an approach are so absurd that the legislature could never have contemplated or intended them. An interpretation which leads to such patent absurdities should in my view, not be countenanced. It follows in my view that this appeal must succeed.

[14] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order by the Labour Appeal Court is set aside and substituted with the following order:

1 The appeal is upheld with costs.

2 The order made by the Labour Court is set aside and substituted with the following order:

‘1 The arbitration award dated 17 November 2005 issued under the auspices of the South African Local Government Bargaining Council (case no GMD 080511) is set aside.

2 The third respondent is ordered to pay the costs of the application.’

L O Bosielo
Judge of Appeal

STREICHER JA: (NUGENT, SNYDERS and MAJIEDT JJA concurring)

[15] This is an appeal against a judgment of the Labour Appeal Court (the LAC) in respect of an unfair dismissal dispute between the third respondent and the appellant.

[16] The third respondent was dismissed from the employ of the appellant on the ground that he had been in breach of the appellant's conditions of service in that he had done private work during working hours. He contended that his dismissal was unfair and referred the dispute to the second respondent, the South African Local Government Bargaining Council (the SALGBC). The SALGBC is registered in terms of s 29 of the Labour Relations Act 66 of 1995 (the LRA) as a bargaining council with the 'Local Government Undertaking in the Republic of South Africa' as its registered scope. The collective agreements concluded in the SALGBC have been extended in terms of s 32 of the LRA to non-parties falling within its registered scope.

[17] Upon the dispute having been referred to the SALGBC it called on the appellant and the third respondent to attend a conciliation meeting. The appellant responded that it would not attend the meeting as it did not fall within the jurisdiction of the SALGBC. It added:

'There is a demarcation dispute pending at the CCMA case no SA 18299/04. Until this matter is finalized by the CCMA Johannesburg City Parks will not be bound by any decision of the Bargaining Council and our employees are free to refer disciplinary matters to the CCMA which the company duly attend.'

The SALGBC thereafter called upon the parties to attend an arbitration of the dispute to which the appellant responded in a similar manner.

[18] The appellant is an association established by the City of Johannesburg Metropolitan Municipality and incorporated in terms of s 21 of the Companies Act 61 of 1973. The majority of the appellant's workforce is represented by the South African Municipal Workers Union (SAMWU) and the Independent Municipal and

Allied Trade Union (IMATU). SAMWU and IMATU contend that the appellant and various other utilities, agencies and corporatized entities (UAC's) established by the Greater Johannesburg Transitional Metropolitan Council and/or the City of Johannesburg Metropolitan Municipality, which succeeded it, fall within the registered scope of the SALGBC. At all material times the appellant and the other UAC's have contended that they do not fall within the scope of the SALGBC. During 2004 SAMWU and IMATU referred this dispute to the Commission for Conciliation, Mediation and Arbitration (the Commission) in terms of s 62 of the LRA. This is the demarcation dispute referred to in the appellant's letters to the SALGBC in response to its invitation to attend conciliation and arbitration proceedings.

[19] The SALGBC proceeded with the arbitration by appointing Ms Webb, the fourth respondent, to conduct the arbitration. The appellant did not attend the arbitration hearing and after having heard the evidence of the third respondent the arbitrator held that he had been unfairly dismissed and ordered that he be reinstated retrospectively from the date of his dismissal. The appellant thereupon applied to the Labour Court for an order reviewing and setting aside the arbitration award on the ground that the SALGBC lacked jurisdiction to adjudicate the dispute. The labour court held that the SALGBC did have jurisdiction in respect of the dispute and dismissed the application for review with costs.

[20] An appeal by the appellant to the LAC was unsuccessful. Counsel for the appellant submitted in that court, as he did before us, that, in terms of s 62(3A) of the LRA the fourth respondent was obliged to adjourn the proceedings once she

became aware that a demarcation dispute was pending before the Commission. The section reads:

'In any proceedings before an arbitrator about the interpretation or application of a *collective agreement*, if a question contemplated in subsection (1)*(a)* or *(b)* is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that –

(a) the question raised -

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.'

[21] Section 62(1) deals with demarcation disputes and provides that any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application may apply to the Commission for a determination as to (a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area; (b) whether any provision in any collective agreement is or was binding on any employee, employer, class of employee or class of employers.

[22] The LAC held that one should distinguish between a dispute and an issue in a dispute and that 'proceedings before an arbitrator about the interpretation or application of a collective agreement' referred to in s 62(3A) were intended to refer to proceedings where the main dispute between the parties was about the interpretation or application of a collective agreement. In the case under consideration, so it held, the main dispute concerned the fairness of the dismissal of the third respondent whereas the application of the collective agreement was

only an issue in that dispute. For that reason the LAC held that the section was not applicable to the arbitration proceedings conducted by the fourth respondent and that the appeal should be dismissed with costs.

[23] In terms of s 191 of the LRA a dismissed employee may refer a dispute about the fairness of his dismissal to a bargaining council if the parties to the dispute fall within the registered scope of the council or to the Commission if no council has jurisdiction (s 191(1)(a)). The council or the Commission must thereupon attempt to resolve the dispute through conciliation (s 191(4)). If the council or a commissioner certifies that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral, and the dispute remains unresolved the council or the Commission must arbitrate the dispute at the request of the employee if the employer alleged that the reason for dismissal is related to the employee's conduct (s 191(5)(a)(i)). Section 51(4) provides that if one or more of the parties to a dispute that has been referred to a bargaining council do not fall within the registered scope of that council, it must refer the dispute to the Commission. It is therefore clear that a bargaining council has no jurisdiction to arbitrate an unfair dismissal dispute if one of the parties to the dispute does not fall within the registered scope of the council.

[24] If the employer disputes that he falls within the registered scope of the bargaining council to which a dispute has been referred, as happened in the present case and that issue has not been determined by a body having authority to do so, it obviously needs to be determined in order to establish whether the bargaining council has jurisdiction in respect of the dispute. But, quite understandably, the

LRA does not confer jurisdiction on a bargaining council to arbitrate a dispute about its own registered scope. In terms of s 62 it is the Commission that has jurisdiction to decide demarcation disputes.

[25] Counsel for the third respondent did not submit that a bargaining council has jurisdiction to resolve a demarcation dispute. He submitted that the unfair dismissal proceedings between the appellant and the third respondent were not proceedings about the interpretation or application of a collective agreement and that s 62(3A) by implication authorised an arbitrator in such proceedings, in the event of a demarcation issue being raised, to proceed with the matter without determining the demarcation issue. Thus, leaving it to the party contending that he fell outside the registered scope of the bargaining council, to review the arbitrator's award once the demarcation issue had been decided by the Commission.

[26] I can understand an argument to the effect that because the legislature said that in proceedings about the interpretation or application of a collective agreement a demarcation dispute which has not been decided must be referred to the Commission, the legislature intended that in other proceedings such a dispute need not be referred to the Commission. But, that argument does not deal with the question as to what the arbitrator in such other proceedings is to do about the demarcation dispute if the proceedings are not adjourned and the demarcation dispute is not referred to the Commission. According to counsel for the third respondent's argument the arbitrator simply has to ignore the dispute about its jurisdiction, proceed with the matter, make an award which may subsequently, maybe months later, be reviewed and set aside. Meanwhile the award would

presumably be treated as a valid award which may be enforced. I am satisfied that the legislature could not have intended such an extraordinary result and that had it intended such a result it would have made its intention clear.

[27] Section 62(3A) provides that ‘no arbitrator’ may in the circumstances mentioned in the section proceed with an arbitration in the event of a demarcation dispute being raised. The reference to an arbitrator is therefore not a reference only to the SALGBC as arbitrator but is a reference to any arbitrator ie also an arbitrator appointed by agreement between the parties which, in terms of the agreement may have had jurisdiction to decide the demarcation dispute between the parties, had it not been for the section. This section must therefore have been intended to deprive arbitrators of jurisdiction to decide demarcation disputes between the parties in the circumstances mentioned in the section. That being so, there is no way it can be interpreted to have been intended to confer jurisdiction on an arbitrator, such as a bargaining council, which in any event does not have jurisdiction to arbitrate a demarcation dispute to proceed with the arbitration.

[28] For these reasons I agree that the appeal should succeed and that the order proposed by my colleague Bosielo JA should be made.

P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	Adv Timothy Bruinders SC
	Instructed by: Sim & Botsi, Johannesburg, Symington & De Kok, Bloemfontein;
For Respondent:	Adv JG van der Riet SC
	Instructed by: Cheadle Thompson & Haysom, Johannesburg; Matsepes Inc, Bloemfontein; McIntyre & Van der Post, Bloemfontein