DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
20/01/2023
DATE
SIGNATURE

LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J996/21

In the matter between:

UNITED NATIONAL TRANSPORT UNION obo MEMBERS — **Applicant**

and

PASSENGER RAIL AGENCY SOUTH AFRICA — **Respondent**

Heard: **1 July 2022**

Delivered: **20 January 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 20 January 2023.)**

JUDGMENT

SIBANDA AJ

[1] The applicant (UNTU) referred a dispute to this Court on behalf of its members, to extract payment of wage increases due pursuant to a collective agreement concluded with the respondent (PRASA). UNTU contends that section 77(3) of the Basic Conditions of Employment Act[1] (BCEA) accords this

---

[1] Act 75 of 1997.

Court jurisdiction to order payments which are due in terms of a collective agreement, where the terms of the collective agreement have been incorporated in the individual employment contracts.

[2] PRASA resists the claim solely on the basis that this Court lacks jurisdiction to determine it because the claim concerns the interpretation and application of a collective agreement and the dispute-resolution clause in the collective agreement requires a claims of this nature to be referred to arbitration.

[3] The parties agreed that the jurisdiction should be disposed of separately and by oral argument. The parties also agreed that, if PRASA's special pleas are dismissed, then the relief sought in the statement of claim should be granted. This arrangement is captured in the following extract of the pre-trial minute:

> '7.1. It has been agreed between the parties that the Respondent's jurisdictional arguments will be set down separately and the Court must determine the competency of each of the Respondent's jurisdictional arguments.
>
> 7.2. In the event that the above Honourable Court finds in favour of the Applicant and dismisses the Respondent's jurisdictional arguments, the Respondent consents to judgment as prayed for by the Applicant in its statement of case in the relief portion of its pleading.'

[4] Jurisdiction is determined on the pleadings and having regard to the true nature of the dispute, not how either party has characterised it. This requires the Court to conduct a detailed analysis of the dispute. Doing so has profound effects. An incorrect analysis, or even a superficial one, may result in a forum assuming jurisdiction it does not have. For this reason, the Labour Appeal Court (LAC) has decried the conduct of a jurisdictional enquiry in circumstances where there is inadequate evidence to decide it.[2] In this case, no evidence was led. PRASA neither appeared at the hearing nor filed heads of argument. The entire Wage Agreement was not placed before the Court. The parties appear to have adopted the approach that since the facts are

---

2 See: *Arends and others v SA Local Government Bargaining Council and others* (2015) 36 ILJ 1200 (LAC)

LABOUR COURT

common cause, a decision on the true nature of the dispute upon which the case hinged, could be made on the papers as they stand. The parties are bound by this approach and its attendant consequences.

The case on the pleadings

[5] The following facts are common cause and taken from the pleadings and the pre-trial minute.

[6] UNTU represents 48% of PRASA's employees in the bargaining unit comprising persons below level 610. On 23 October 2020, PRASA and UNTU concluded a collective agreement governing wage increases to which employees within the bargaining unit would be entitled in the 2020/2021, 2021/2022, and 2022/2023 financial years (Wage Agreement).

[7] The Wage Agreement was the product of negotiations conducted under the aegis of the "PRASA Bargaining Forum". Neither party pleads that the PRASA Bargaining forum is a workplace forum contemplated in Chapter V of the Labour Relations Act[3] (LRA).

[8] The pleadings refer to two clauses in the Wage Agreement, which are undisputed.

8.1 First, in clause 4.6 of the Wage Agreement, PRASA agreed to effect –

'4.6.1 ...a 5% increase on the total guaranteed package across the board for permanent and fixed term contract Bargaining Unit employees employed in its corporate office, PRASA Technical, and PRASA Cress with effect from 1 April 2020;

4.6.2 ...a 5% increase on the total guaranteed package, across the board for permanent and fixed term contract Bargaining Unit employees who are employed in its corporate office PRASA Technical, and PRASA Cress with effect from 1 April 2021 (sic).'

[3] 66 of 1995, as amended.

LABOUR COURT

8.2 The second is clause 6.1 of the Wage Agreement, which provided for a dispute-resolution procedure in the following terms:

> '6.1 Any dispute relating to the validity, interpretation and application of this wage agreement or any matter relating to this agreement, shall be determined or resolved through a dispute resolution process as determined by the Labour Relations Act of 1995, or any other labour dispute resolution settlement services agreed to an appointed by the parties.'

[9] It is common cause that PRASA did not comply with the Wage Agreement. This appears from paragraphs 3.6 and 3.7 of the pre-trial minute under common cause facts.

[10] In the premises, UNTU seeks the following relief:

> '1. Directing the Respondent to make payment to the Applicant's members of the 5% increase due to the Applicant's members as at 30 April 2021 in terms of the wage agreement.
>
> 2. Alternatively to the aforegoing, the Respondent is to account to the Applicant in respect of each of its members quantum of the 5% increase that should have been paid in April 2021 and to pay the Applicant's members the back pay due to them.'

[11] During argument, Mr Van As drew attention to UNTU's prior attempts to enforce the Wage Agreement.

[12] During November 2020, UNTU brought an urgent application before this Court in which it sought specific performance of the Wage Agreement. PRASA contended that this Court lacked jurisdiction. UNTU argued that this Court's jurisdiction was founded in sections 157(1) and (2) and sections 158(1)(iii) and (iv) of the LRA. Justice Nkutha-Nkontwana disagreed with this first formulation for reasons which are unnecessary to traverse in this judgment and dismissed UNTU's primary claim. UNTU's alternative argument was that section 77(3) of the BCEA accorded this Court the requisite jurisdiction to entertain the issue. Justice Nkutha-Nkontwana did not expressly decide that

LABOUR COURT

point. The Learned Judge instead struck the matter from the roll for lack of urgency.

[13] On 30 August 2021, the day before the statement of claim was filed in this matter, UNTU referred a dispute to the Commission for Conciliation, Mediation, and Arbitration (CCMA) concerning the interpretation and application of the Wage Agreement. During December 2021, that dispute went to arbitration. In the resulting award, the commissioner found that the dispute did not concern the interpretation and application of a collective agreement, but rather its enforcement. At paragraph 6.2 of the award, the commissioner glibly ordered that "*[UNTU] may enforce the Wage Agreement*".

[14] If this was a victory at all, it rang hollow because the commissioner did not order PRASA to pay the wage increases. Neither PRASA nor UNTU challenged the commissioner's decision on review.

<u>The issues</u>

[15] The terms of the Wage Agreement and its breach are not disputed. UNTU seeks to breathe life into the Wage Agreement by extracting specific performance. UNTU founds this Court's jurisdiction on section 77(3) of the BCEA, contending in argument that the Wage Agreement was incorporated in the individual employment contracts by virtue of section 23(5) of the LRA. This formulation and PRASA's response raise two issues.

[16] The first is whether the true nature of the dispute concerns the interpretation and application of the Wage Agreement, as PRASA contends in its first special plea.

[17] The second issue is whether clause 6.1 of the Wage Agreement ousts this Court's jurisdiction.

LABOUR COURT

<u>The applicable principles</u>

[18] The starting point is to revisit the breadth of section 77(3) of the BCEA, which states:

> '(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

[19] In *Amalungelo Workers Union and others v Philip Morris SA (Pty) Ltd v another* (*Amalungelo Workers Union*),[4] the Constitutional Court set out the jurisdictional breadth of section 77 of the BCEA. It held that section 77(1) of the BCEA confers jurisdiction on the Labour Court in the "*widest of terms*".[5] Section 77(3) expands that jurisdictional purview to cover disputes arising from employment contracts, even if they are not governed by the BCEA. The Court went on to say:

> 'What locates a matter within the jurisdiction of the Labour Court is the application of the Basic Conditions Act to it. All claims to which this Act applies fall within the exclusive jurisdiction of the Labour Court. In addition, s 77(1A) grants the Labour Court exclusive jurisdiction to award civil relief arising from a breach of certain provisions of the Act. And if a matter that falls within the exclusive jurisdiction of the Labour Court is brought before another court, s 77(5) mandates the transfer of that matter to the Labour Court, regardless of the stage at which the transfer is effected.'[6]

[20] While section 77(3) of the BCEA may appear to be a "slam dunk" for UNTU, some qualifications must be stated. Most employment disputes "arise from employment contracts". Any dispute involving an employer and employee may fall within the scope of section 77(3) even if the true nature of that dispute, on closer scrutiny, is specifically regulated by the LRA.

---

4 (2020) 41 ILJ 863 (CC).
5 Ibid at para 23.
6 Supra fn 4 at para 24.

LABOUR COURT

[21] If, for example, the real complaint concerns unfair suspension under the guise of specific performance, then it is an unfair labour practice which should properly be ventilated in arbitration by either the CCMA or the appropriate bargaining council.

[22] There are also clear instances where a dispute may be subject to both regimes, but by clear election, the dispute is determined in a particular forum. For instance, a person who is dismissed can claim that their dismissal was unfair, in which case the LRA applies. The dispute can also be characterised as contractual, in which case the dismissal is a repudiation and the employee claims specific performance. In the former instance, the Labour Court lacks jurisdiction because the LRA allocates unfair dismissal disputes to the CCMA. In the latter, the Labour Court has jurisdiction in by virtue of section 77 of the BCEA.

[23] In short, simply characterising a dispute as "contractual" does not automatically invoke this Court's jurisdiction. This Court must discern whether the pleaded facts justify that characterisation; and whether the LRA allocates jurisdiction to a different forum.

[24] There is a particular need to be cautious when determining disputes concerning collective agreements. The LAC has been quite clear that once a dispute involves a collective agreement to which section 24 of the LRA (or in the case of a bargaining council, section 33A) this Court simply has no jurisdiction.[7]

[25] Disputes concerning the interpretation and application of a collective agreement are regulated by section 24 of the LRA, which requires that they be resolved by the CCMA. Section 24(1) and (2) of the LRA read:

> '(1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement

LABOUR COURT

7 *Sandton Body & Paint CC and another v Motor Industries Bargaining Council* (2017) 38 ILJ 2093 (LC)

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

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if –

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.'

[26] In *Health and Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, Kwazulu-Natal* (*Tshambi*),[8] the LAC explored the meaning of "interpretation or application" of a collective agreement. The LAC rejected the idea that section 24 of the LRA automatically and unreflexively applies to the breach of any right derived from a collective agreement. The Court held that the words "*dispute about the interpretation or application*" must be read conjunctively and narrowly. The LAC said:

'What is a 'dispute' per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. What is signally absent from the record is any clue that the respondent disputes that the collective agreement provides that an employee on

8 (2016) 37 ILJ 1839 (LAC).

LABOUR COURT

suspension is entitled to full pay. Indeed, on the basis of the allusions in the ruling, that fact seems to be common cause. Similarly, there is no clue that the respondent disputes that the collective agreement binds itself and the appellant. What then, can possibly be the dispute about the application of the collective agreement?'[9]

[27] At paragraph 30, the Court held that there is no justification to understand section 24 in a sense so broad that any alleged breach of a term of the collective agreement means the dispute automatically falls within section 24 of the LRA. The effect is that section 24 of the LRA does not apply in cases where there is no disagreement about (i) the terms of a collective agreement, or (ii) the application of the collective agreement to that dispute.

[28] Three cases illustrate the importance, for the purposes of deciding jurisdiction, of the difference between pure enforcement (where there is no disagreement about the meaning and application of a collective agreement) and disputes in which the interpretation and application of the collective agreement are central. At first blush, these cases appear to preclude this Court from exercising jurisdiction over claims of a similar nature to UNTU's claim. Mr Van As argued that each was distinguishable from UNTU's. It is thus necessary to consider the principles they establish.

The Ekurhuleni Case

[29] *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union obo Members (Ekurhuleni),*[10] concerned the rights of full-time shop stewards to remuneration during a protected strike. The union and the municipality concluded a collective agreement in a bargaining council, called the main agreement. That agreement governed the remuneration of the workforce and shop stewards' rights. In February 2011, the union embarked upon a

---

9 Id at para 17. See also: *Member of the Executive Council: Police, Roads & Transport, Free State Provincial Government v Public Service Co-Ordinating Bargaining Council & Others* (2022) 43 ILJ 1628 (LAC) at para 61.

10 (2015) 36 ILJ 624 (LAC).

LABOUR COURT

protected strike. In accordance with the "no work, no pay" principle, the municipality withheld the salaries of the union's full-time shop stewards.

[30] The Union approached the Labour Court for an order compelling the municipality to pay its members' remuneration for the period of a strike. It contended that the municipality's actions were in breach of clauses 2.5.6 and 2.5.7 of the main agreement, and also contravened sections 33 and 34 of the BCEA. The municipality disputed this on the basis that the main agreement could not be interpreted to require shop stewards to be paid during a protected strike. The Labour Court granted the union's order. On appeal, the municipality challenged the Labour Court's jurisdiction.

[31] The LAC commenced its analysis by considering the true nature of the dispute as it appeared from an analysis of the facts, rather than the parties' characterisation. The Court found that, at its heart, the dispute concerned the interpretation of the main agreement. This was because the Court was required to determine whether the municipality breached the agreement by withholding payment. Since the municipality disputed the meaning of the provisions upon which the union relied, deciding the dispute would necessitate interpreting those provisions of the main agreement. Thus, on its face, the dispute concerned the interpretation of a collective agreement and fell outside this Court's jurisdiction.

[32] The union invoked section 23(3) of the LRA in support of the argument that section 77(3) of the BCEA applied because the main agreement had been incorporated into the individual employment contracts. Thus, so the argument went, the Court was actually called upon to interpret the employment contracts and not the main agreement. The LAC rejected this argument for several reasons.

[33] First, the LAC rejected the notion that incorporating provisions of a collective agreement into an employment contract changes the document which is the subject of the interpretation exercise. It held that:

LABOUR COURT

> '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. The interpretation is certainly of the relevant clauses in the collective agreement and by implication, also of the relevant clauses in the employment contract.'[11]

[34] Second, the LAC held that the argument undermined the primacy of collective agreements and indeed collective bargaining. The aim of collective bargaining was to introduce uniformity. The effect of the argument was that a given clause in a collective agreement could mean different things at different times depending upon whether it is interpreted on its own or by reference to individual employment contracts.[12]

[35] Third, on the facts, the union never actually relied upon the employment contracts, but rather on the main agreement. It was indeed impossible to interpret the employment contracts without ascribing meaning to the main agreement.[13]

[36] The LAC then turned to consider whether jurisdiction could be founded in section 77(3) of the BCEA. The LAC held that it could not, because section 77(3) of the BCEA cannot ascribe powers to the Labour Court that are not in the LRA. The deductions could only contravene the BCEA if they were also in breach of the main agreement. Simply put, the LAC held:

> '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

---

11 Supra fn 10 at para 25.
12 Ibid at paras 26 – 27.
13 Ibid at para 28.

LABOUR COURT

conflicts with the LRA. They must be interpreted as being in harmony with each other.'[14]

[37] The distinguishing feature of this case is that there is no dispute here about the interpretation of the wage agreement, which is common cause between the parties. This dispute concerns the enforcement of that agreement as it has been incorporated into the employment contract. So, at face value, this court does not meet the issues posed in *Ekurhuleni*.

MEC Western Cape

[38] *Member of the Executive Committee of the Western Cape Provincial Government Health Department v Coetzee and others*[15] concerned the application of a scarce skills allowance which was provided for in a collective agreement. The appellants sought to extract payment by relying on section 77(3) on the basis that the collective agreement was incorporated into their employment contracts. The LAC rejected this approach and repeated its approach in *Ekurhuleni*. It held[16]:

> '[92] The real dispute between the appellant and the respondents is about the interpretation and application of the collective agreement. In particular, the respondents contend that they are covered by the terms of the collective agreement and the appellant denies it. The only manner of resolving that dispute is to interpret the collective agreement itself. That this is so is also apparent from Cheadle AJ's judgment on the merits. It was mainly, or fundamentally, about the interpretation of the collective agreement.
>
> [93] In *Ekurhuleni*, this court has held that the Labour Court is not empowered under the LRA or the BCEA to interpret and decide on the application of a collective agreement, particularly in circumstances where the interpretation (and the issue of application) is pivotal and fundamental (as in this case) and not merely incidental, to the resolution of the real dispute between the parties.'

---

14 Ibid at para 30.
15 (2015) 36 ILJ 3010 (LAC).
16 Ibid at paras 92 – 93.

LABOUR COURT

[39] The appeal was dismissed. Thereafter, the applicants followed the correct approach. They referred a dispute to the CCMA and obtained an award in their favour (that they were entitled to the scarce skills allowance). The ensuing review was dismissed. Leave to appeal was refused by the LAC and the Constitutional Court.[17]

Rukwaya

[40] In *Rukwaya and others v Kitchen Bar Restaurant* (*Rukwaya*),[18] the appellants were employed as waiters by the Kitchen Bar Restaurant. Both parties fell under the scope of the bargaining council for the Restaurant, Catering and Allied Trades. They were bound by the provisions of a collective agreement concluded in May 1998, which regulated, *inter alia*, the wages of all employees in the restaurant and catering sector. The collective agreement was extended to non-parties.

[41] The appellants brought an application to the Labour Court, claiming payment of outstanding wages and bonuses in terms of the collective agreement. Kitchen Bar challenged the Labour Court's jurisdiction on two grounds: (i) the dispute concerned the interpretation and application of a collective agreement, and (ii) it ought to be resolved in accordance with the dispute resolution mechanism in clause 28(A) of the collective agreement.

[42] The Labour Court upheld the jurisdictional challenge, holding that the real dispute was not about a breach of the collective agreement as incorporated in the employment contracts.

[43] The issue before the LAC was whether the appellants' claim fell within section 77(3) of the BCEA. The LAC reaffirmed the principle that jurisdiction is determined with regard to the substance of the dispute, not its form. So, while

---

17 *Member of the Executive Council for Health, Western Cape v Coetzee and others* (2020) 41 ILJ 1303 (CC).

18 (2018) 39 ILJ 180 (LAC).

LABOUR COURT

the appellants invoked section 77(3) in respect of their employment contracts, they clearly founded the claim on a breach of the collective agreement. The Court held that clause 28(A) of the collective agreement was peremptory, and not an alternative to the BCEA remedies. It added that collective agreements are required to govern disputes about their interpretation and application, which clause 28(A) expressly did. Moreover, section 33A of the LRA empowered the bargaining council to enforce collective agreements which they conclude. Clause 28A mirrored section 33A of the LRA. The appeal, therefore, failed.

Distilling the principles

[44] The following principles can be distilled from these cases.

[45] First, the Constitutional Court tells us, in *Amalungelo Workers' Union*, that section 77(3) of the BCEA confers upon this Court a broad jurisdiction. This can conceivably embrace a claim for the enforcement of a collective agreement.

[46] Second, the mere formulation of a claim to fall within section 77(3) of the BCEA does not automatically confer jurisdiction.

[47] Third, this Court lacks jurisdiction over cases which involve a disagreement about the interpretation and application of a collective agreement, as the phrase is construed in *Tshambi*. The correct course is for those matters to be referred to conciliation and then arbitration as contemplated in section 24 of the LRA. It is quite clear that once a dispute involves a collective agreement to which section 24 of the LRA, or section 33A in the case of an agreement concluded in a Bargaining Council, this Court simply has no jurisdiction.

[48] Fourth, invoking section 23(3) of the LRA does not change the nature of the document which the Court is required to interpret. Section 24 of the LRA

LABOUR COURT

continues to apply if the core of the dispute is about the meaning of the collective agreement or its application.

[49] Finally, the dispute-resolution clause in a collective agreement is peremptory. The impact is that this court lacks jurisdiction to enforce a collective agreement when the dispute properly falls within that clause.

Applying the principles to the facts

[50] UNTU's claim is evidently one in contract. UNTU's claim boils down to the following contentions: (i) the parties concluded the Wage Agreement; (ii) PRASA breached the Wage Agreement by failing to pay the annual increase to UNTU's members; PRASA is indebted to UNTU's members; and UNTU seeks payment.

[51] This is quintessentially a claim to enforce the Wage Agreement because the contractual rights which UNTU seeks to enforce derive from the Wage Agreement. UNTU invokes section 23(3) of the LRA to contend that the matter concerns its members' employment contracts because it has been incorporated by force of that provision. However, the source of the contractual rights and the document to which this Court must look in deciding the matter remains the Wage Agreement. Nevertheless, UNTU's claim falls within the wide ambit of section 77(3) of the BCEA.

[52] The next issue is whether the LRA allocates jurisdiction to a different forum.

[53] PRASA contends that the CCMA has jurisdiction because the dispute concerns the interpretation or application of the Wage Agreement to which section 24 of the LRA applies. PRASA's characterisation of the dispute is incorrect. Section 24 of the LRA applies when there is a difference of opinion about whether the agreement applies, or what it means. The pleadings disclose no difference of opinion about any provision of the Wage Agreement,

LABOUR COURT

and whether it can be invoked.[19] PRASA accepts that the Wage Agreement applies and does not join issue with its interpretation. Mr Van As is correct in distinguishing this case from *Ekurhuleni* which involved a disagreement about the terms of the collective agreement.

[54] This is where PRASA's second jurisdictional challenge arises. The Wage Agreement has a dispute resolution clause. Adherence to the agreed dispute resolution clause is peremptory, and cannot be circumvented by invoking section 77(3) of the BCEA. This is a matter of logic. There are two ways to reach this conclusion. The first is by direct reliance upon the LAC's decision in *Rukwaya*. Although that matter concerned a collective agreement in a bargaining council, to which section 33A of the LRA would have applied, the LAC clearly considered the dispute resolution clause to be equally binding. That was the foundation for the LAC's conclusion, that the remedy lay neither in in section 77(3) of the BCEA nor in the individual employment contracts, but rather in the dispute resolution procedure under the collective agreement.[20] This conclusion can also be reached by applying the principles of contract law. Where the contract sought to be enforced binds the parties to a dispute-resolution procedure, it is not open to the party seeking its enforcement to use a different mechanism. In the High Court, such an approach would validly be met with a special plea, resulting in the stay of the action.

[55] This is particularly poignant when regard is had to the provisions of the LRA which require collective agreements to provide internal dispute resolution mechanisms. Section 24(1) of the LRA requires collective agreements to regulate processes to resolve disputes about their interpretation and application. Absent such processes, or where those processes do not apply, any party to the agreement may refer a dispute about the interpretation or application of the collective agreement to the CCMA.[21] The referral begins with conciliation and culminates in arbitration.[22] Given the LAC's *dicta* above,

---

19 *Tshambi* at para 17.
20 *Rukwaya* at para 18.
21 Section 24(2)(a) and (b) of the LRA.
22 Section 24(4) and (5) of the LRA.

LABOUR COURT

section 24(1) of the LRA does not extend to questions of pure enforcement. Whereas section 33A of the LRA specifically regulates the enforcement of collective agreements concluded in bargaining councils. This suggests that the Legislature also appreciated the distinction between enforcement on one hand and interpretation and application on the other.

[56] The question then is whether clause 6 of the Wage Agreement prescribes a dispute resolution mechanism which embraces the present dispute.

[57] Clause 6.1 of the Wage Agreement contemplates three categories of dispute, namely (i) those concerning the validity of the Wage Agreement, (ii) those concerning the interpretation and application of the Wage Agreement, and (iii) those concerning "any matter" relating to that agreement. This matter falls within the third category under "any matter" relating to the Wage Agreement.

[58] The dispute resolution clause goes on to stipulate how the dispute must be resolved. However, clause 6.1 of the Wage Agreement is not a model of clarity in this regard. It simply provides that whatever the category of dispute, it must be resolved either by (i) using the dispute resolution mechanisms determined by the LRA, or (ii) any other dispute resolution settlement services agreed to and appointed by the parties.

[59] The first channel naturally applies to disputes expressly governed by the LRA, such as those concerning the interpretation and application of the Wage Agreement.

[60] The second dispute resolution channel contemplates disputes which the LRA does not regulate, such as those pertaining to breach or enforcement of the Wage Agreement, to the extent that the dispute would not concern the interpretation of that agreement. Such disputes are to be referred to dispute resolution settlement services agreed to and appointed by the parties. Hence, the parties agreed to reach an agreement in future — a *pactum de contrahendo* — without a deadlock-breaking mechanism. This formulation,

LABOUR COURT

whatever its meaning, does not bind the parties to arbitration. It is quite different from the detailed clause in *Rukwaya*. It follows that the second special plea must fail.

Conclusion

[61] In summary, the true nature of the dispute concerns the enforcement of the collective agreement. The rights which UNTU seeks to enforce derive solely from the collective agreement and are only incorporated into the employment contracts. The contract under which it seeks to extract performance is the collective agreement. This alone does not oust this Court's jurisdiction in terms of section 77(3) of the BCEA.

[62] UNTU's claim falls within the wide ambit of section 77(3) of the BCEA. PRASA's special pleas are dismissed. The first special plea is dismissed on the basis that the dispute does not concern the interpretation or application of the Wage Agreement, but rather its enforcement. The second special plea is dismissed because clause 6.1 of the Wage Agreement does not provide an enforceable or determinable dispute-resolution mechanism.

[63] UNTU's claim must therefore succeed. At the hearing, Mr Van As handed up a draft order, which forms the basis of the relief granted below with some minor adjustments. The only matter which requires clarification is that of costs. It appears proper to award UNTU its costs, given PRASA's consent to the relief sought in the statement of case, which included costs.

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

Order

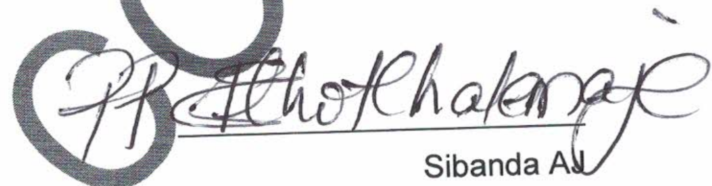
1. This Court has the requisite jurisdiction to adjudicate the Applicants' application in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997.

LABOUR COURT

2. The Respondent is to make payment, to each of the Applicant's members, the 5% wage increase in terms of the Wage Agreement concluded on 23 October 2020 with effect from 1 April 2021 to 31 March 2022;

3. The Respondent is to furnish to the Applicant, within ten (10) days of service of this Order, a schedule setting out the quantum of the backdated 5% wage increases that the Respondent should have paid to each of the Applicant's members during the period 1 April 2021 to 31 March 2022;

4. The Respondent is ordered to pay the costs of this application.



Sibanda AJ

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant:	MJ Van As
Instructed by:	Fluxmans Inc. Attorneys
For the Respondent:	No Appearance

LABOUR COURT