CHEADLE THOMPSON & HAYSOM INC. ATTORNEYS

Memorandum

To	: SADTU, DENOSA, POPCRU & Others	**From**	: Phillip Masilo
Your ref	:	**Our ref**	: SAD10509/P Masilo
Subject	: Dispute on non-compliance with the terms of the Collective Agreement: Resolution 1 of 2018	**Date**	: 19 June 2020

Introduction

1 We refer to the above matter and the virtual meeting held on 18 June 2020.

2 As you aware, the dispute in the above matter is set for arbitration on Monday, 22 June 2020. During the meeting, Unions raised several points of clarity relating to the matter which can be summarized as follows:

2.1 Implication of the Labour Court application by PSA and Others;

2.2 Whether the ninth to further respondents should join the Labour Court application as they are cited in the matter.

3 The above issues were clarified during the meeting, however, we were requested to put out clarification and advise in writing.

Collective Agreement

4 It is common cause that the Public Sector Unions signed a collective agreement with the employer in 2018 wherein, the agreement provides for salary adjustment for periods

1 April 2018 to 31 March 2019, 1 April 2019 to 31 March 2020, and 1 April 2020 to 31 March 2021, for employees on salary level 1-12.

5 The relevant clauses of the 2018 signed agreement provides as follows:

5.1 Clause 3.3 of the agreement reads as follows:

"The salary adjustment for the period 1 April 2020 to 31 March 2021, effective from 1 April 2020, for employees on salary levels 1-12 will be as follows:

3.3.1 Level 1 to 7: Projected CPI + 1.0%;

3.3.2 Level 8 to 10: Projected CPI + 0.5%; and

3.3.3 Level 11 to 12: Projected CPI"

5.2 Clause 10 of the agreement makes provision for a dispute resolution clause which reads as follows:

"If there is a dispute about the interpretation or application of this agreement any party may refer to the matter to the Council for resolution in terms of the dispute resolution procedure of the Council"

5.3 Clause 11 of the agreement further deals with the implementation of the agreement and reads as follows:

"11.1 This agreement shall come into effect on the date it enjoys majority support and shall remain in force unless terminated or amended by agreement in writing;

11.2 In the interpretation and application of this agreement, words used in the agreement and defined within the Constitution of the Council will have the meaning as defined in the Constitution;

11.3 In the event of any conflict between a provision of this agreement and any other agreement of the Council, the provision of this agreement, takes precedence; and

11.4 The Council will monitor the implementation of this agreement."

Labour Court Application

6 On or about 5 June 2020, PSA and other Unions filed applications with the Labour Court where they seek the Labour Court to declare the employer's failure to implement the salary adjustment as contemplated in clause 3.3 of the *collective agreement* is in breach of the employment contract and order the employer to implement the salary adjustment.[1]

7 PSA cited SADTU and other trade unions in the application because they are signatories to the *collective agreement* and they have material interest in the outcome of the application. It should also be noted that the applicants seek no relief against the respondents.[2]

8 As advised, it is our view that SADTU and others must not join nor oppose the application as such would expose clients to unnecessary cost orders. We reiterate our view that it will not be in the interest of SADTU and other unions to join or oppose as prospects of success are not good on the ground of legal precedent set by the Labour Appeal Court in a matter of *Rukwaya & Others v Kitchen Bar Restaurant*, which will be discussed below.

The Law

9 Section 3.1 of the Labour Relations Act 66 of 1995 ("LRA") makes provision for collective agreements concluded in a bargaining council and reads as follows:

[1] See Notice of Motion
[2] See paragraph 23 of the Founding Affidavit

"Binding nature of the collective agreement concluded in the Bargaining Council

Subject to the provisions of section 32 and the Constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-

(a) The parties to the *bargaining council* who are also parties to the *collective agreement*;

(b) Each party to the *collective agreement* and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) The members of a registered *trade union* that is a party to the collective agreement and the employers who are members of a registered *employers' organization* that is such a party, if the *collective agreement* regulates-

(i) Terms and conditions of employment; or

(ii) The conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers."

10 Section 33A of the LRA deals with the enforceability of *collective agreements* by bargaining councils, and reads as follows:

*"**Enforcement of collective agreements by bargaining councils***

(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with it collective agreements in terms of this section or a collective agreement concluded by the parties to the council.

(2) For the purposes of this section, a collective agreement is deemed to include:

a. Any basic condition of employment which in terms of section 49(1) of the Basic Conditions of Employment Act constitutes a term of the employment of any employee covered by the collective agreement; and

b. The rules of any fund or scheme established by the bargaining council.

(3) A collective agreement in terms of this section may authorize a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period.

(4)

(a) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.

(b) If a party to an arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph (a), the Commission, on request by the council, must appoint an arbitrator.

(c) If an arbitrator is appointed in terms of subparagraph (b)

(i) the Council remains liable for the payment of the arbitrator's fees; and

(ii) the arbitrator is not concluded under auspices of the Commission.

(5) An arbitrator conducting an arbitration in terms of this section has the powers of a commissioner in terms of section 142, read with the changes required by the context.

(6) Section 138, read with the changes required by the context, applied to any arbitration conducted in terms of this section.

(7) An arbitrator acting in terms of this section may determine any dispute concerning the interpretation or application of a collective agreement.

(8) Interest on any amount that a person is obliged to pay in terms of a collective agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the arbitration award provides otherwise.

(9) An award in an arbitration conducted in terms of this section is final and binding and may be enforced in terms of section 143.

11 The case of ***Rukwaya & Others v Kitchen Bar Restaurant***[3] is of relevance to the matter at hand.

11.1 The appellant employees contended that the employer was in breach of several of the terms and conditions of the collective agreement, and in particular, that it had failed to pay the minimum wage determined by the agreement.

11.2 However, instead of invoking the dispute-resolution mechanisms provided for in the collective agreement, and failing that, referral to compliance arbitration under the auspices of the Council in terms of Section 33A of the LRA, the employees approached the Labour Court in terms of Section 77(3) of the Basic Conditions of Employment Act 75 of 1997, claiming a remedy under contract law. The employer disputed the jurisdiction of the court.

11.3 The Labour Court found that the true nature of the dispute was the employer's non-compliance with the provisions of the *collective agreement* and it had to be enforced via the dispute-resolution mechanism contained in the collective agreement, and if necessary, arbitrated in terms of section 33A of the LRA. Accordingly, the Labour Court held that it did not have jurisdiction to adjudicate the dispute.

11.4 The matter was thereafter taken on appeal to the Labour Appeal Court (LAC). The LAC held as follows in paragraphs 17 and 18 of its judgement:

> *"The appellants in this appeal rely on the respondent's purported contraventions of the collective agreement to support their claim for payment*

[3] *(2018) 39 ILJ 180 (LAC)*

of a minimum wage and certain other things. The determination of whether the respondent has contravened the collective agreement as alleged, calls for its interpretation and application. However, in terms of clause 28(A) of the collective agreement, disputes pertaining to its interpretation and application must be dealt with by the bargaining council in accordance with the procedure set out therein.

A bargaining council is empowered in terms of section 33A of the LRA to enforce a collective agreement, which it has concluded. The dispute resolution procedure provided for in clause 28(A) of the collective agreement seeks to do precisely that. It is binding on both the appellants and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by other party."[4]

11.5 The LAC agreed with the Labour Court that it had no jurisdiction to deal with the dispute that had arisen from a contravention of the collective agreement. The appeal was dismissed.

Conclusion

12 Based on the Labour Appeal Court judgment referred above, we are of the opinion that the Unions will have difficulty in convincing the Court that it has jurisdiction to adjudicate the matter considering the fact that the collective agreement sets out the dispute resolution mechanism that parties should follow in case of a dispute.

13 We attach a copy of the judgment for ease of reference.

[4] Rukwaya & Others v Kitchen Bar Restaurant (2018) 39 ILJ 180 (LAC) at paras 17- 18

The issue of costs

[67] In accordance with the requirements of law and fairness, I am of the view that the costs of this appeal should follow the results. I can conceive of no reason not to order the appellants, who made common cause in relation to all the issues in this case, to share the costs burden jointly and severally.

Order

1 The application for reinstatement of the appeal is upheld.
2 The application for condonation of the late filing of the record of appeal is upheld.
3 The appeal is dismissed.
4 The Minister of Higher Education & Training and the National Skills Fund, first and second appellants, are to pay the costs of this appeal jointly and severally, the one paying the other to be absolved. Such costs are to include the costs consequent upon the employment of two counsel.

TLALETSI AJP and KATHREE-SETILOANE AJA concurred.

Appellants' Attorney: *State Attorney*, Pretoria.
First Respondent's Attorneys: *Bowman Gilfillan*.

RUKWAYA & OTHERS v KITCHEN BAR RESTAURANT

LABOUR APPEAL COURT (JA80/16)

3 May; 5 September 2017

Before TLALETSI DJP, DAVIS JA and KATHREE-SETILOANE AJA

Labour Court—Jurisdiction—Basic Conditions of Employment Act 75 of 1997—Contractual claim—Employees relying on incorporation of terms of collective agreement in contracts of employment to approach court in terms of s 77(3)—Dispute concerning minimum wages and conditions of employment negotiated and agreed at bargaining council—Dispute not concerning payment of what contractually agreed to between parties or incorporated into individual contracts by virtue of s 23(3) of LRA 1995—Special dispute-resolution procedure in bargaining council collective agreement and enforcement procedures of s 33A of LRA to be followed—Court not having jurisdiction.

Labour Court—Jurisdiction—Basic Conditions of Employment Act 75 of 1997—Contractual claim—Employees relying on incorporation of terms of collective agreement in contracts of employment to approach court in terms of s 77(3)—Not entitled to do so—Court not having jurisdiction.

Labour Court—Jurisdiction—Collective agreement—Employees relying on incorporation of terms of collective agreement in contracts of employment to approach court in terms of s 77(3) of Basic Conditions of Employment Act 75 of 1997—Dispute concerning minimum wages and conditions of employment negotiated and agreed at bargaining council—Dispute not concerning payment of what contractually agreed to between parties or incorporated into individual contracts by virtue of s 23(3) of LRA 1995—Special dispute-resolution procedure in bargaining council collective agreement and enforcement procedures of s 33A of LRA to be followed—Court not having jurisdiction.

The appellant employees were employed as waiters by the respondent restaurant. Both parties fell under the scope of the Bargaining Council for the Restaurant, Catering & Allied Trades. Although not parties to the bargaining council, they were bound by the council collective agreement following the Minister of Labour's extension of the agreement to non-parties. The employees believed that the restaurant was in breach of several of the terms and conditions of the collective agreement; principally that it had failed to pay the minimum wage determined in the agreement. Instead of vitiating their rights by relying on the dispute-resolution mechanisms provided for in the collective agreement and, failing that, referral to compliance arbitration under the auspices of the council in terms of s 33A of the LRA 1995, the employees approached the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, claiming a remedy under contract law. The restaurant disputed the jurisdiction of the court. It argued that the real issue in dispute between the parties was the alleged non-compliance with the provisions of the collective agreement, a matter that was reserved for arbitration under the auspices of the council. It accordingly contended that the employees were compelled to follow the dispute-resolution procedure provided for in clause 28(A) of the collective agreement.

The Labour Court found that the true nature of the dispute was the restaurant's non-compliance with the provisions of the collective agreement and it had to be enforced via the dispute-resolution procedures in clause 28(A) of the collective agreement, and if necessary, arbitrated in terms of the provisions of s 33A of the LRA. The dispute was clearly not about getting paid what was contractually agreed between the parties or even what was agreed on behalf of workers at plant level and then incorporated into their individual contracts by virtue of the provisions of s 23(3) of the LRA. The dispute was about minimum wages and other conditions of employment negotiated and agreed at the council. To suggest that the dispute was of the type envisaged by s 77(3) of the BCEA was superficial and went against substantial considerations to the contrary. The dispute-resolution mechanisms and associated remedies especially created by the council and the LRA for situations like the present had to be followed. The court, therefore, did not have jurisdiction to adjudicate the employees' claim (see *Rukwaya & others v Kitchen Bar Restaurant* (2016) 37 *ILJ* 1466 (LC)).

The employees contended, on appeal, that their claim for wages was made in terms of their employment contracts, hence they were entitled to approach the court a quo for relief under s 77(3) of the BCEA, which provided that the Labour Court had 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 constituted a term of that contract.

Focusing on the contents of the founding affidavit in order to establish what the legal basis of the employees' claim was, the Labour Appeal Court set about determining the true nature of the dispute, considering substance rather

than form, and it concluded that the legal basis of the employees' claim was founded on the restaurant's non-compliance with the collective agreement and not upon a breach of their contracts of employment. The substance of their complaint was the restaurant's failure to pay them the industry minimum wages and bonuses in terms of the collective agreement. This, as correctly found by the Labour Court, was the real issue in dispute between the parties. In the light of this, the employees were obliged to follow the dispute-resolution process provided for in clause 28(A) of the collective agreement.

The court noted that, in terms of s 24(1) of the LRA, all collective agreements are required to provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement through conciliation, and if the dispute remains unresolved, through arbitration. Clause 28(A) of the collective agreement, in the current dispute, provided for such a procedure. It was couched in peremptory terms and was binding on both the employees and the restaurant. It provided a speedy and cost-effective mechanism to employees in the industry seeking to enforce their rights in terms of the collective agreement. The contention that clause 28(A) of the collective agreement was intended as an alternative to the remedies provided for under the BCEA was, in the court's view, subversive of the spirit and purport of clause 28(A) of the collective agreement — a peremptory provision — the objective of which was to ensure a speedy and cost-effective resolution of a dispute that had arisen from a contravention of the collective agreement. Furthermore, the bargaining council was empowered in terms of s 33A of the LRA to enforce the collective agreement. The dispute-resolution procedure provided for in clause 28(A) of the collective agreement sought to do precisely that — it was binding on both the employees and the restaurant, and it provided each of them with a remedy which they were obliged to pursue in the event of non-compliance by the other party.

The court accordingly agreed with the Labour Court that it had no jurisdiction to deal with the dispute that had arisen from a contravention of the collective agreement. The appeal was dismissed.

Appeal to the Labour Appeal Court from a decision of the Labour Court. The facts and further findings appear from the reasons for judgment. The judgment of the court below is reported at (2016) 37 *ILJ* 1466 (LC).

Annotations

Cases

Coin Security Group (Pty) Ltd v Adams & others (2000) 21 *ILJ* 924 (LAC) (referred to)

Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members (2015) 36 *ILJ* 624 (LAC) (considered)

Gcaba v Minister for Safety & Security & others 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) (referred to)

Rukwaya & others v Kitchen Bar Restaurant (2016) 37 *ILJ* 1466 (LC) (upheld on appeal)

Statutes

Basic Conditions of Employment Act 75 of 1997 s 77(3)

Labour Relations Act 66 of 1995 s 1*(d)*(iv), s 23(3), s 24(1), s 32(2), s 33A, s 138(9), s 143, s 199

Adv A J Posthuma for the appellants.

Adv M A Lennox for the respondent.

Judgment reserved.

KATHREE-SETILOANE AJA:

[1] This is an appeal against the judgment of the Labour Court (Bakker AJ) in which it found that it has no jurisdiction to adjudicate the appellants' claim against the respondent for the payment of, amongst other things, a minimum wage. The appellants are waiters employed by the Kitchen Bar Restaurant (the respondent).

[2] Both parties fall under the scope of the Bargaining Council for the Restaurant, Catering & Allied Trades (the bargaining council). Although not parties to the bargaining council, they are bound by the bargaining council collective agreement (the collective agreement), which was concluded in May 1998 to regulate the conditions of employment and the wages of all employees in the restaurant, catering and allied trade industry. The Minister of Labour, by virtue of her powers under s 32(2) of the Labour Relations Act 66 of 1995 (the LRA), extended the terms and conditions of the collective agreement to non-parties.[1] It is common cause between the parties that they are bound by the collective agreement.

The Labour Court decision

[3] The appellants made application to the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) for the payment of the outstanding wages and weekly bonuses, as well as a refund of certain unlawful deductions, which were purportedly owing to them in terms of the collective agreement. The appellants contended that the respondent had contravened certain clauses of the collective agreement by, amongst other things, failing to provide them with written contracts of employment and pay them a minimum wage. According to the appellants, their only earnings are from the service tips or gratuities which they receive from patrons of the restaurant, but that the respondent has made certain unlawful deductions from these earnings for 'breakages, table-runners, linen and soap'.

[4] The respondent opposed the application in the Labour Court, on the basis that the Labour Court had no jurisdiction to entertain the application, as the dispute was founded on the interpretation and application of the collective agreement. It contended that the dispute could only be resolved through conciliation and, if it remained unresolved, through arbitration in terms of clause 28(A) of the collective agreement. It accordingly contended that the appellants were compelled to follow the dispute-resolution procedure provided for in clause 28(A) of the collective agreement. Clause 28(A) of the collective agreement reads as follows:

> '(1) Disputes pertaining to contraventions of the agreement must be done in the form of a sworn statement setting out all of the material fact(s) that form the basis of the complaint.
> (2) On receipt of the complaint, the council shall within 14 days appoint a designated agent or official to investigate the complaint and/or may

[1] GN R707 of 22 May 1998.

request further information, facts or data from either the employee or the employer.

(3) The designated agent or official shall within 30 days of his appointment submit a written report to the secretary on his investigation and the steps he has taken to ensure compliance with the agreement and the recommendations for the finalisation of the complaint.

(4) Should the complaint not be settled, the complainant may request the council to set the matter down for arbitration within 30 days of being served with the outcome of the investigation. ...

(10) An arbitrator conducting an arbitration in terms of this clause has all the powers of a commissioner as set out in the Act.

(11) An arbitrator may make an appropriate award including:

(a) ordering any person to pay any amount owing in terms of this agreement provided that any claim pertaining to clauses 5, 6, 7, 9, 13, 14, 16 and 17, shall not exceed the period of twelve months, from date the complaint has been lodged at the council;

(b) charging a party an arbitration fee;

(c) ordering a party to pay the costs of the arbitration;

(d) any award contemplated in section 138(9) of the Act.

(12) An award in terms of this clause is final and binding and may be enforced in terms of section 143 of the Act after the secretary and/or a person appointed by the council has certified the arbitration award, unless it is an advisory award.'

[5] In deciding the jurisdictional question, the Labour Court reasoned as follows:

'[18] The true nature of the present dispute is the respondent's non-compliance with the provisions of the council's collective agreement and must be enforced via the procedures in clause 28A of the council's collective agreement, and if necessary, arbitrated in terms of the provisions of s 33A of the LRA. The dispute is clearly not about getting paid what was contractually agreed between the applicants and the respondent or even what was agreed on behalf of workers at plant level and then incorporated into their individual contracts by virtue of the provisions of s 23(3) of the LRA. This dispute is about minimum wages and other conditions of employment negotiated and agreed at the council. To suggest that the present dispute is of the type envisaged by s 77(3) of the BCEA is superficial and goes against substantial considerations to the contrary. ...

[22] The applicants brought their claim to this court in the form of an application in terms of s 77(3) of the BCEA premised on a breach of employment contracts, but in substance the complaint is the respondent's failure to pay them the industry minimum wages and bonuses in terms of the council's collective agreement. Applying the "substance over form" principle, I have no hesitation in finding that the real issue in dispute is the respondent's non-compliance with the provisions of the council's collective agreement, and not, as the applicants want to characterise the dispute, a breach of the terms of their individual contracts of employment. The main issue is about the council's collective agreement and not individual contracts.'

[6] The Labour Court accordingly found that it did not have jurisdiction to adjudicate the appellants' claim. The appeal against the Labour Court's decision is with its leave.

Jurisdiction

[7] The appellants contend, on appeal, that their claim for wages was made in terms of their employment contracts, hence they were entitled to approach the Labour Court for relief under s 77(3) of the BCEA, which provides that 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.

[8] It is an established principle of law that the question of jurisdiction is determined with reference to the allegations which are set out in the pleadings and not the substantive merits of the case. Thus, in the case of an application of this nature, the court must closely examine the contents of the founding affidavit in order to 'establish what the legal basis of the applicants' claim is'. It, however, does not behove the court to say that 'the facts asserted by the applicants would also sustain another claim'.[2] It is, therefore, vital for the court to 'ascertain the true or real issue in dispute'. This would necessitate examining the substance of the dispute over the form in which it is presented. The 'characterisation of the dispute by a party' is, consequently, 'not necessarily conclusive'.[3]

[9] The appellants' cause of complaint as appears from paras 7, 8 and 9 of the founding affidavit is the respondent's non-compliance with the collective agreement. In para 7 the appellants allege:

'This claim is brought in terms of the provisions of s 77 of the Basic Conditions of Employment Act 75 of 1997, as a result of the respondent's failure to pay the individual applicants the required and stipulated minimum wage and/or bonuses in the restaurant, catering and allied trade industry, and the unlawful and unauthorised deductions made from the remuneration of the individual applicants by the respondent.'

[10] These claims have their basis in the collective agreement. This is clear from the founding affidavit itself, where the appellants allege that in May 1998 the collective agreement was concluded in the industry regulating all wages and conditions of employment of the employees in the industry and, by virtue of her powers in terms of s 32(2) of the LRA, the minister extended the collective agreement to non-parties to the agreement thus making it binding on all employers and employees in the industry.

[11] The appellants then pertinently allege that the respondent is clearly bound by the collective agreement which specifically regulates and determines the terms and conditions of employment of the individual appellants in this instance. They go on to allege the material terms of the collective agreement that are applicable to their various claims for payment, and describe the purported contraventions which include the failure of the respondent to enter into a written agreement with each of them; pay each of them a minimum wage; and pay those

[2] *Gcaba v Minister for Safety & Security & others* 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) at para 75.

[3] *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 *ILJ* 924 (LAC) at para 15.

of them who qualified a weekly bonus. In addition, they aver that the respondent contravened the collective agreement by making deductions from the remuneration which they earned from the gratuities received from the patrons of the restaurant. They aver that the respondent's conduct 'is clearly in breach of, and in direct contravention of the collective agreement'.

[12] Thereafter, in para 11 of the founding affidavit, the appellants reiterate that:

> 'The respondent has failed to pay the individual applicants their remuneration in the form of the prescribed minimum wage, failed to pay bonuses due, and made unlawful and unauthorised deductions from the individual applicants' salary, which is clearly not only in breach of the clear and specific terms of the employment between the individual applicants and the respondents but also in breach of the Basic Conditions of Employment Act and the collective agreement in the industry.'

The legal basis of the appellants' claim is founded on the respondent's non-compliance with the collective agreement and not upon a breach of their contracts of employment. The substance of their complaint is the respondent's failure to pay them the industry minimum wages and bonuses in terms of the collective agreement. This, as correctly found by the Labour Court, is the real issue in dispute between the parties. In the light of this, the appellants were obliged to follow the dispute-resolution process provided for in clause 28(A) of the collective agreement.

[13] In terms of s 24(1)[4] of the LRA, all collective agreements are required to provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement through conciliation, and if the dispute remains unresolved, through arbitration. Clause 28(A) of the collective agreement, in the current dispute, provides for such a procedure. It is couched in peremptory terms and is binding on both the appellants and the respondent. It provides a speedy and cost-effective mechanism to employees of the restaurant, catering and allied trades industry seeking to enforce their rights in terms of the collective agreement.

[14] Section 1*(d)*(iv) of the LRA provides that the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objective of the Act, which is 'to promote ... the speedy resolution of labour disputes'. Clause 28(A) of the collective agreement does just that. It allows for an investigation into the complaint, referral of the dispute to conciliation and, if it remains unresolved, referral to arbitration.

[15] Clause 28(A) of the collective agreement simply affords an employee

[4] Section 24(1) of the LRA provides:
'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) 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.'

seeking to be paid in accordance with the collective agreement a mechanism to speedily enforce his or her rights under the collective agreement. The contention that clause 28(A) of the collective agreement was intended as an alternative to the remedies provided for under the BCEA is, in my view, subversive of the spirit and purport of clause 28(A) of the collective agreement — a peremptory provision — the objective of which is to ensure a speedy and cost-effective resolution of a dispute that arises from a contravention of the collective agreement.

[16] As became apparent during argument, what the appellants sought to do in the application before the Labour Court was to incorporate the terms of the collective agreement into their contracts of employment for purposes of approaching that court in terms of s 77(3) of the BCEA. This practice was criticised and expressly rejected by this court in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members*,[5] on the following basis:

> '[25] This argument, in my view, which is made to overcome the difficulty which the jurisdictional point presents to the respondent, ignores the primacy of collective agreements under the LRA. One could equally argue that the court a quo was interpreting the main agreement and that the dispute was about the main agreement which was the source of the relevant clauses. For this argument, respondent's counsel purportedly relied on s 23(3) of the LRA which provides: "Where applicable a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement." That provision is likely to apply to all collective agreements where reciprocal rights and obligations of employers and employees are dealt with. But it is not correct that if clauses in the collective agreement, by which the employment contract is varied, are interpreted, that it is in fact an interpretation of the employment contract and not of the collective agreement. The interpretation is certainly of the relevant clauses in the collective agreement and by implication, also the relevant clauses in the employment contract.
>
> [26] Collective agreements are to be accorded primacy. In *National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts (Pty) Ltd & another*, this court held that the purpose of s 199 of the LRA, read together with s 23(3) of the LRA, is to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements above individual contracts of employment. Section 199 provides, inter alia, in essence, that contracts of employment may not disregard or waive collective agreements.
>
> [27] The fact that it was agreed that the rights, duties and obligations pertaining to full-time shop stewards were to be reduced to a collective agreement at bargaining council or sectoral level is indicative of the intention to create and maintain uniformity in the sector in respect of those matters. The meaning to be given to each clause in the collective agreement was therefore also clearly intended to be uniform throughout the sector and at both bargaining council and plant levels. To distinguish between the collective agreement and the individual contracts of employment

[5] (2015) 36 *ILJ* 624 (LAC) at paras 25–27.

in respect of those aspects when interpreting the relevant clauses, could be subversive, firstly, because of the very intention of maintaining uniformity, because there is a possibility that different meanings could be given to the very same clauses by the different parties to the agreement if they were allowed definitively to interpret the clauses at plant level. Such an approach would also weaken the collective agreement to the point of rendering it ineffective. Further, such an approach would be inconsistent with one of the other main objectives of the LRA, namely to ensure orderly and effective collective bargaining. The said objective of the LRA and the collective agreement can only be maintained if the collective agreement, ie the main agreement, itself is interpreted.' (Footnote omitted.)

[17] The appellants in this appeal rely on the respondent's purported contraventions of the collective agreement to support their claim for payment of a minimum wage and certain other things. The determination of whether the respondent has contravened the collective agreement as alleged, calls for its interpretation and application. However, in terms of clause 28(A) of the collective agreement, disputes pertaining to its interpretation and application must be dealt with by the bargaining council in accordance with the procedure set out therein.

[18] A bargaining council is empowered in terms of s 33A[6] of the LRA to enforce a collective agreement, which it has concluded. The dispute-resolution procedure provided for in clause 28(A) of the collective agreement seeks to do precisely that. It is binding on both the appellants and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by the other party.

[19] It follows from this that the remedy available to the appellants in the dispute concerning their claimed payments lies neither in s 77 of the BCEA nor their contracts of employment, but in the special dispute-resolution mechanisms provided for in clause 28(A) of the collective agreement. In terms of this clause, the Labour Court has no jurisdiction to deal with a dispute arising from a contravention of a collective agreement. Accordingly, the appeal must fail.

[20] In the result, I order that: 'The appeal is dismissed with no order as to costs.'

DAVIS JA and TLALETSI JA concurred.

Appellants' Attorneys: *Snyman Attorneys.*
Respondent's Attorneys: *Waldeck Attorneys.*

[6] Section 33A(1) provides:
'Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreement in terms of this section or a collective agreement concluded by the parties to the council.'