Varying decisions on bargaining agreements and cancellations

By Johan Botes

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A curious statutory effect of collective agreements is that a collective bargaining agreement amends the contracts of employment of individual employees.

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On the surface, the provision in section 23 of the Labour Relations Act is inoffensive. “Where applicable, a collective agreement varies any contract of employment between an employee and employer, who are both bound by the collective agreement.”

The aim of this seems to cater for a situation where terms and conditions of employment are amended through collective bargaining. Terms and conditions of employment are typically captured in a written employment contract. Thus, where the subsequent collective bargaining agreement amends the terms and conditions, the logical consequence is surely that the original employment contract should be amended by the newly negotiated terms and conditions of employment (as captured in the collective bargaining agreement).

For example, where the parties originally agreed that the employee will be paid remuneration of R10,000 per month, but through collective bargaining later agree that employees on this grade will receive a salary increase of 10%, the original employment contract is amended to reflect a new annual salary of R11,000 per month as a result of section 23 of the LRA.

However, what happens when the collective bargaining agreement expires or is cancelled? Does the employee’s salary revert to R10,000 per month again? Surely not - in terms of section 23(3) the right to the new salary, as contained in the collective bargaining agreement, varied the contract of employment. The employment agreement now reads that the employee’s remuneration is R11,000 per month as a result of the negotiated increase captured in the collective bargaining agreement that, in turn, varied the employment contract.

Court upholds collective agreement in 2014

This was also the view of the Labour Court in South African Municipal Workers Union v City of Tshwane in 2014. The court had to consider whether shift systems, captured in a collective bargaining agreement, survived the cancellation of the agreement. The court stated as follows:

“It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees’ contract of employment. It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees’ employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective

agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals' contracts."

Contrary decision in 2017

On 1 August 2017 in the judgment of the Labour Appeal Court in Imperial Cargo Solutions v Satawu and other, the LAC came to a different conclusion. It held that the obligations created in the collective bargaining agreement fell away upon the cancellation of that agreement.

The issue before the LAC centred on an application to interdict strike action. The employer argued that the employees' refusal to do ancillary tasks, as agreed in the collective bargaining agreement, was unprotected strike action, as the employees remained obliged to perform the tasks even after the trade union cancelled that agreement. The LAC disagreed. It reasoned that both the employee's duty to perform the ancillary work and the employer's obligation to pay extra remuneration for such work ended on the cancellation of the agreement.

Differing facts, circumstances

It held that the facts and circumstances were distinguishable from the SAMWU case.

It stated, "It would make no sense to contend that the appellant's obligation to pay for the ancillary functions fell away upon cancellation of the agreement by the respondents but that the obligation to perform the ancillary functions survived the cancellation."

The judgment contains no further indication of the court's reasoning in rejecting the argument on the effect of section 23(3). The lingering question is whether both obligations created in the collective bargaining agreement, (the employees' duty to perform the ancillary tasks and the employer's obligation to pay extra remuneration for the performance of these tasks) should not have survived the cancellation of the collective bargaining agreement. That, it would appear, would have been congruent with the wording of section 23(3) and in line with the judgment in SAMWU.

Careful consideration now needed

Until the matter is considered by a higher court (or the LAC in a different matter), employers and employees will be well advised to carefully consider rights and obligations created in collective bargaining agreements. It may be more beneficial than ever to consider constructing such an agreement carefully, in such a manner that it captures the clear intention of the parties on those rights or obligations that should survive the cancellation of the agreement. Should employees thus want an allowance or other benefit to remain as an ongoing right post the life of the collective bargaining agreement, this should be captured as such in that agreement. Likewise, if employers intend for the quid pro quo obligation to remain in force after the expiry or cancellation of the collective bargaining agreement, best to say as much in that document. The judgment in Imperial Cargo Services does not detract in any way from the right of the parties to bargain and reach agreement on how to treat the fruits of their negotiations after the underlying agreement terminates.

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