

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2014/11875

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES/No

DATE

SIGNATURE

In the matter between:

MASUKU NONHLANHLA

Plaintiff

And

EKURHULENI METROPOLITAN MUNICIPALITY

Defendant

This judgment has been delivered by uploading it to the caselines digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 8 November 2023

JUDGMENT

Sutherland DJP:

Introduction

- [1] The plaintiff is a former employee of the defendant. She was dismissed. She sued the defendant on an alleged breach of the terms of her employment agreement. Also, she sued the defendant for injuria in consequence of an alleged unlawful dismissal, but that claim, I am told from the bar by both counsel, is not being persisted with. The defendant, inter alia, has pleaded that the High Court has no jurisdiction to hear the plaintiffs claim.
- [2] By agreement of the parties a rule 33(4) order was made thus:
- (1) The claim arising from the alleged breach by the defendant of the employment contract between the plaintiff and the defendant shall be dealt with thus:
 - (i) The question of whether or not the High court has jurisdiction to hear the claim of the plaintiff shall be separated and decided.
 - (ii) All other issues are deferred.
 - (2) If the judgment is that the High Court has not got jurisdiction, the plaintiffs claim shall be dismissed.
 - (3) If the judgment is that the high court has jurisdiction, the trial shall proceed.

[3] Accordingly, I heard argument on this question.

The jurisdictional issue

[3] The controversy is located in the jurisprudence that reserves certain types of claims for the fora created by the Labour Relations Act 61 of 1995 (LRA) and which, in other respects, allows for concurrent jurisdiction between the Labour Court and the High court in certain labour matters. It is trite that an employee who is able to allege a cause of action that constitutes a breach of an individual contract of employment may bring such a case to either the High Court or, in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA) directly to the Labour court, and need not pursue a statutory remedy through conciliation and arbitration in the Commission for Conciliation Mediation and Arbitration (CCMA).

[4] However, the jurisdiction of either court is not automatically engaged by a simple allegation that the plaintiff sues on a contract of employment. Rather, the *breach* which is alleged to have occurred must indeed constitute a breach of the terms of the contract and the allegations of fact in the particulars of claim must set out such a case. In this case that distinction has been overlooked.¹

¹ I was referred to several cases by the plaintiff. These cases do not support the plaintiffs case. In *Ngubani v National Youth Development Agency* (2014) 35 ILJ 1356 (LC) the plaintiff sued on an employment contract which did include a clause stipulating that a fair disciplinary enquiry was necessary. In *Somi v Old Mutual Africa Holdings (Pty) Ltd* (2015) 36 ILJ 2370 (LC) the provisions of the LRA were incorporated into the contract of employment. In *Wereley v Productivity SA & Another* (2020) 41 ILJ 997 (LC) a clause in the contract of employment incorporated the employers 'rules regulations and procedures' which the court held included a fair disciplinary procedure. All these cases are examples where there was, as a fact, an incorporation of a right to fairness, which in the case of this plaintiff is absent. In addition, I was referred to *Ekurhuleni Metropolitan Municipality v SA Municipal workers Union & others* (2018) 39 ILJ 546 (LAC) where the distinction between a contractual claim and a claim based on a statutory right was explained. That case takes the debate no further. Also, I was referred to *United National Transport Union v Transnet SOC ZALCJHB 2022/127* where a union lodged a claim based on an agreement to increase wages. On exception, the court held that the allegation passed the test for excipibility (see para [9]) and dismissed the exception. This case is not authority for the finding that a contractual term actually existed nor was the case argued for substantive relief.

[5] What is the plaintiffs cause of action? In her pleadings, it is averred thus: -

'(16) It was an implied² term of the plaintiffs' contract of employment with the defendant that both parties would treat each other lawfully in all matters dealing with their relationship.

(17) It was also within this contemplation that organised labour to which the plaintiff is a member and the defendant to enter into a collective agreement in terms whereof their relationship would be regulated and that neither part shall conduct themselves in contravention of the provisions thereof. Find attached a copy of the collective agreement, annex NM7.

(18) The defendant has failed to act in accordance with the provisions of the collective agreement in particular clause 7.7 in that it altered the findings and determinations of the initial presiding officer, which determination was final and binding on both parties to the collective agreement.

(19) the defendant instituting the alteration hearing and instituted the new disciplinary proceedings against the plaintiff for the same misconduct despite the fact that the previous disciplinary hearing ruled in her favour and handed down a sanction as per annex NM 3. The defendant has unreasonably and without just cause subjected the plaintiff to double jeopardy and its termination of the plaintiff's contract of employment is unlawful.'

[6] It is plain that the right invoked is one located in the collective agreement. It must at this juncture be remarked that the collective agreement is between the trade union and the defendant employer. The plaintiff is not a party to that agreement, nor does she aver so.

[7] More importantly, it is not averred that the collective agreement was incorporated into her contract of employment. This *per se* is a critical flaw in her case.

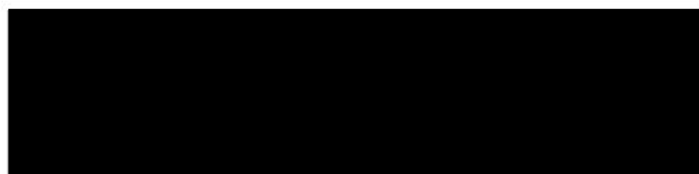
[8] The plaintiff's written contract of employment is constituted by a letter of appointment dated 29 June 2011. This document set out the usual banal details of her position as a cashier. It notably does not incorporate the collective agreement. Nor is the minimal text capable of being interpreted to do so.

² I read the term 'implied' to mean 'tacit' The term 'implied' should be reserved for the *naturalia* of a contract.

- [9] The source of *Right* the plaintiff claims have been violated is, as alleged, in clause 7.7 of the collective agreement. This is a clause in a part of that agreement which is headed 'conduct of a disciplinary hearing.' The clause 7.7 indeed does forbid an alteration of a determination by the 'municipal manager or other governing structure of a municipality'. Whether or not the defendant actually breached this clause, for the purposes of this judgment, is beside the point; i.e. is this a *Right* that can be invoked by invoking the contract of employment. Plainly, it cannot.
- [10] The Defendant's plea, paragraph 14 avers this defence. Further, the plea avers that the collective agreement provides for a procedure leading to conciliation and arbitration in the South African Local Government Bargaining Council (SALGBC). This is standard procedure for collective agreements, which like this one, was concluded under the auspices of the SALGBC. The claim is manifestly a labour law case. To rely on this *causa*, the plaintiff ought to have referred a dispute about an unfair dismissal to the SALGBC.
- [11] It is obvious that the High Court has no jurisdiction. The action must therefore be dismissed.
- [12] As to costs, paradoxically, having repudiated an opportunity to refer a claim of unfair dismissal to the SALGBC, I was told from the bar that the South African Municipal Workers Union (SAMWU) was the funder of the case on behalf of the plaintiff and owing to the ongoing relationship between that union and the defendant, there should not be, in line with conventions in labour litigation, a costs order against the plaintiff. That is not the norm in civil litigation. No reason exists why costs ought not to follow the result.

The Order

(1) The action is dismissed with costs.



Roland Sutherland
Deputy Judge President, Gauteng
Division, Johannesburg

Heard: 30 October 2023

Delivered: 8 November 2023

For the Plaintiff: Attorney P F Ndou, (with rights of appearance)
Of Ndou Attorneys.

For the Defendant: Adv T Ntoane
Instructed by Tshibi Zebedela Inc.