

IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

AR87/2012

In the matter between:

CAMERON WANNENBURG

APPELLANT

and

MADAMU TECHNOLOGIES (PTY) LTD

RESPONDENT

JUDGMENT

Date of Hearing: 04 June 2012

Date of Judgment: 13 June 2012

D. PILLAY J

[1] In this appeal, the applicant employee seeks to set aside the judgment of the Magistrates' Court, Pinetown in which that court ruled that it did not have jurisdiction to determine the employee's claim for remuneration. The respondent employer had paid the employee at the rate R28,000.00 per month. However, from 1 August 2009 it reduced the employees remuneration to R23,000.00 per month. The total amount claimed was reduced to R100,000.00 in order to bring it within the jurisdiction of the Magistrates' Court.

[2] Relying on *Monyela & Others v Bryce Jacobs t/a LV Construction (1998) 19 ILJ 75 (LC)* the learned magistrate concluded that the employee could seek redress in either the High Court or the Labour Court in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA). Allied to the jurisdictional challenge, the respondent contended that as the employee pleaded the cause of action to be the unilateral variation of the terms and conditions of employment, the High Court or Labour Court had jurisdiction in terms of

s 64(4) of the Labour Relations Act, 66 of 1995 (LRA). Relying on *Makhanya v University of Zululand*¹ the employer asked the learned magistrate to determine whether there was good cause of action on the substantive issues raised in the employee's particulars of claim.

[3] In this appeal the employer expands its criticism of the employee's pleadings to include a complaint that the employee did not allege or plead that the contract was repudiated, and whether he elected to enforce the agreement by way of a claim for specific performance, or to accept the repudiation, cancel the contract and sue for damages. The employee had to plead its election², which the employee failed to do. This latter attack on the pleadings was not debated in the Magistrates' Court.

[4] On the morning of the appeal both parties agreed that the Labour Court had jurisdiction. They consented to the matter being transferred to that forum. Consequently, the only issue remaining is the costs of the special plea in the Magistrates' Court and this appeal.

[5] Although the thrust of the challenge at the appeal hearing whittled down to whether the Magistrates' Court had jurisdiction, the debate in the Magistrates' Court related to whether the Labour Court on the one hand, or the Magistrates' and the High Courts on the other hand, had jurisdiction. I deal with the debate in the Magistrates' Court first.

[6] As at 30 May 2011 when the special plea was heard by the magistrate the issue of jurisdictional disputes about claims arising from

¹ 2010 (1) SA 62 (SCA)

² Amler's Precedents of pleadings page 34; *Datacolour International (Pty) Ltd v The Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA)

employment contracts was well settled.

[7] The applicable legislation is the BCEA. Section 77(3) of the BCEA provides:

'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 conditions of employment constitutes a term of their contract.'

[8] The breadth of any matter concerning a contract of employment' has been whittled down to exclude matters which fall within the exclusive jurisdiction of the Labour Court.³

[9] Turning to the case law, in *Old Mutual Life Assurance Company SA Ltd v Gumbi*⁴ and *Boxer Superstores Mthatha and Another v Mbenya*⁵ which was delivered 5 days earlier, the Supreme Court of Appeal accepted:

'The jurisdiction in the High Court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations (*Fredericks and Others v MEC for Education and Training Eastern Cape and Others* 2002 (2) SA 692 (CC))'

'Provided the employees claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, a High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice (*United National Public Servants Association of SA v Digomo NO and Others* (2006) ILJ 157 SCA para 4-5)

'An employee may therefore sue in the High Court for a dismissal that constitutes a breach of contract giving rise to a claim for damages (as

³ *Boxer* para 5(ii) E; *McKenzie* para 35

⁴ 2007 (5) SA 552 (SCA) [2007] ALL SA (866)

⁵ 2007 (5) SA 540 (SCA)

in *Fedlife*)⁶

[10] Although the SCA found in *SAMSA v McKenzie*⁷ that it was not dealing with a jurisdictional challenge but rather a challenge to the validity of the pleaded claim, it nevertheless clarified what claims are justiciable under the LRA. In discussing *Gumbi* and *Boxer* in which the employees relied on the common law and contract, the Wallis AJA observed

‘ . . . the question whether the High Court has jurisdiction to consider a claim for breach of contract is not controversial.’

[11] The employer could have been in no doubt that the employees claim related to his contract of employment. In fact, the employer elected to describe the nature of the dispute as a unilateral variation of the terms and conditions of employment. It then attempted to persuade the learned magistrate that such a cause of action fell squarely within the ambit of section 64(4) or the unfair labour practice provisions in section 186(2)(a) of the LRA.

[12] Quite obviously by 2011 it was well established that section 64(4) relates to remedying unilateral action by an employer by enabling employees to strike. A strike is by its nature a collective action. An individual employee withholding his labour is not an effective remedy for a unilateral change in conditions of his or her employment. As regards section 186(2)(a), the employee’s claim is for remuneration not benefits for which this section on unfair labour practices provides. Hence, his claim does not fall within the unfair labour practice jurisdiction of the Labour Court.

⁶ *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) (2001) 22 ILJ 2407
⁷ 2010 (3) SA 601 (SCA)

[13] In making these submissions the employer misplaced reliance on *Monyela*. That case was decided in November 1997 before the BCEA came into operation on 1 December 1998. Furthermore, in that case the unilateral change affected several workers; accordingly the Labour Court acknowledged the right of those workers to invoke the right to strike. The learned judge's remark about the jurisdiction of the High Court was made in passing.

[14] Another option available to some employees is compliance orders in terms of section 69 of the BCEA. However, s 6(1)(a) and (3) of the BCEA excludes the application of certain portions of the BCEA to particular employees. Thus a labour inspector may not issue a compliance order against an employer in respect of senior managerial employees and those earning in excess of an amount determined by the Minister. It was common cause that the employee in this case fell beyond the scope of the remedies offered by a compliance order.

[15] In short, for this employee neither the LRA nor the BCEA provided remedies that fell within the exclusive jurisdiction of the Labour Court.

[16] In applying the precedent set in *Fedlife* and *Makhanya* it was confirmed that the High Court and the Labour Court both have the power to enforce common law contractual and constitutional rights in so far as their infringement arises from employment⁸.

[17] At the hearing of this appeal, the particular focus of the employer's challenge is to the jurisdiction of the Magistrates' Court. It alleges that in terms of section 46(2)(c) of the Magistrates' Court Act,

⁸ Para 18.

32 of 1944, a Magistrates' Court has no jurisdiction in matters in which a claimant seeks specific performance without an alternative of payment for damages. I disagree.

[18] Jones & Buckle *The Civil Practice of the Magistrates' Court in South Africa* 10th Ed Vol 1, summarises the conflicting opinions on the interpretation of the term 'specific performance'. The narrow view is that the Magistrates' Courts have no jurisdiction to entertain a claim for specific performance of a contractual obligation in the absence of a claim for damages.⁹ The modern approach is that orders sounding in money, regardless of the cause of action, are not, for the purposes of the section, orders of specific performance.¹⁰ The modern approach is preferable because, practically, a claim for specific performance by payment of a sum of money will eventuate in a writ of execution or similar debt recovery procedures, not contempt of court and consequent imprisonment, which was the principal motivation for distinguishing claims for specific performance from claims sounding in money.¹¹

[19] What is in issue in this appeal is whether the Magistrates' Court had jurisdiction to enforce a claim arising from contract. The fact that the employee did not specify whether he accepted the repudiation and claimed damages or whether he rejected the repudiation and sought to enforce his claim, is immaterial in the circumstances of this case. The employer was in no doubt that the claim was for unilateral variation of the employee's terms and conditions of service. If it was material, the employer could have inferred that the employee sought specific performance because the employee was in employment at the time he

⁹ *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) at 442 C-D

¹⁰ *Packers Land and Development Corporation (EDMS) Bpk v Van Zyl* 1977 (3) SA 1041 (T) at 1045 D

¹¹ Jones & Buckle, section 46 citing *Bohm v Steyn's Garage Ltd* 1930 TPD 1 at 5

instituted proceedings. Any doubt the employer had about the employee's claim could have been clarified in either an exception to the particulars of claim or by a request for further particulars. Deficiencies in the pleading therefore did not impact on the Magistrates' Courts having jurisdiction.

[20] Ms Allen for the employee submitted from the bar that the employee's reasons for applying to the Magistrates' Court instead of the Labour Court were that he would bear costs on a lower scale and might get a date for hearing sooner than in the Labour Court. If this is correct, they are not the only considerations.

[21] Litigants should be reminded that the Labour Court should be preferred for labour disputes firstly because it is a specialist court designed for disputes in employment. Section 158 confers wide powers on the Labour Court which includes the power to review any decision of an employer,¹² to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law,¹³ to refer a dispute to arbitration¹⁴ and to reserve any question of law for decision by the Labour Appeal Court.¹⁵ The LRA requires judges of the Labour Court to have 'have knowledge, experience and expertise in labour law'¹⁶. Most of all, in the Labour Court there is no risk of jurisdictional challenges in employment disputes.

[22] In the circumstances, I grant an order in the following terms by agreement :

12 158 (1) (h)

13 158 (1) (j)

14 158 (2)

15 158 (4)

16 153 (6)(b)

Part A

1. By consent the appellant employee's claim under case number 1594/2010 in the Pinetown Magistrates' Court is remitted to the Labour Court for adjudication;
2. The appellant employee's particulars of claim are to stand as the Statement of Claim;
3. The respondent employer's plea on the merits is to stand as the Statement of Response;
4. The parties are directed to hold a Pre-Trial Conference and to file a minute thereof by no later than 2 July 2012 in the Labour Court.

Part B

5. The respondent employer shall pay the costs of the special plea in the Magistrates' Court and the costs of this appeal in the Labour Court.

D. PILLAY J

MBATHA J

I agree.

Counsel for Appellant:

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