



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D225/11

In the matter between:

THABISO NTSALLA

Applicant

and

MATATIELE LOCAL MUNICIPALITY

Respondent

Heard: 02 August 2012

Delivered: 27 September 2012

Summary: Exception to a plea – *res judicata* raised to a claim for damages following arbitration – same cause of action arbitrated is relied on in the statement of claim – exception upheld.

JUDGMENT

CELE J

Introduction

- [1] These proceedings entail a consideration of three points raised *in limine* by the respondent to a pleaded case of the applicant. The applicant opposed each of the grounds on which her claim is sought to be dismissed in the event any of the exceptions is granted.

Factual Background

- [2] The applicant commenced her employment with the respondent in the position of a Strategic Manager for a period of five years from 1 June 2007 in the business of the council and she reported to the Mayor.
- [3] On 8 December 2008, the applicant went on leave. Whilst she was on leave and on 18 December 2008, the Council of the respondent convened a meeting where it resolved to change the applicant's designation from Strategic Manager to Manager still in the office of the Mayor. When she returned from her leave she was appraised of the change to her position.
- [4] She took the position that this resolution was taken unilaterally and without consulting her about the reasons thereof and the adverse effects of such amendment to her employment conditions, in other words, that the *audi alteram partem* rule was not met. She considered the respondent to have breached her contract of employment by reason of the said unilateral change to the terms and conditions of her employment and on 20 April 2009 she issued the respondent with a letter of her resignation, saying that she had been constructively dismissed by the respondent. The respondent accepted her resignation but disputed constructive dismissal, stating that the applicant knew about the change of her position and even typed the organogram in which the change was reflected.
- [5] She referred a dispute of unfair constructive dismissal to the Commission for Conciliation, Mediation and Arbitration, the CCMA, for conciliation and later for arbitration in June 2009. The arbitration hearing commenced on 12 May 2010 and was decided by default in her favour on 18 May 2010 by the CCMA's Commissioner, Mr Jabulani Ngwane. She was awarded an amount of six months' salary compensation in the total of R341 000, 00. The respondent unsuccessfully sought rescission of the default award but elected not to seek a review of the ruling. Instead, it paid the applicant the sum of R341, 000,00 due in terms of the award.
- [6] Notwithstanding her success in the CCMA, the applicant filed a statement of claim with the Registrar of this Court on 12 May 2011 under rule 6 of the rules

of this Court. She is claiming the full damages she says she has suffered as a result of the unlawful breach of her contract, being what she would have earned up to the expiry of her contract of employment, less the amount already paid in terms of the CCMA award. The applicant describes the alleged breach, *inter alia*, in the following terms:

‘3.6 When she was on leave, on 18 December 2008 the Council of the Respondent convened a meeting where it resolved to change the Applicant’s designation from Strategic Manager to Manager in the office of the Mayor. This resolution was taken unilaterally and without consulting the Applicant about the reasons thereof and the adverse effects of such amendment to her employment conditions.

.....

3.9 The applicant tried on numerous occasions to reverse the unilateral change to terms and conditions of employment but to no avail.

3.10 The applicant then considered the Respondent to have breached her contract of employment by reason of the said unilateral change to the terms and conditions of her employment and she resigned.

.....

3.12 It is apparent from the applicant’s notice of resignation that same was not a voluntary resignation but was as a result of circumstances beyond her control, namely, the unilateral change to the terms and conditions of her employment.

.....

4 The respondent’s unilateral change to the terms and conditions of the applicant’s employment amounted to an unlawful breach of her employment contract.’

The issue

[7] The three points raised by the respondent *in limine* in regard to the applicant’s claim are that:

- The matter is *res judicata* in that the claim before this Court is one which has already been determined before the CCMA by way of the applicant's constructive dismissal dispute and consequent award.
- Alternatively, the complaint relates to an alleged unilateral change to terms and conditions of employment which constitutes a demotion and should accordingly have been dealt with by the CCMA as an alternative to the constructive dismissal claim.
- Further alternatively and only in the event that the applicant succeeds in proving that she has a valid contractual claim, her claim is limited to thirty days' notice in terms of clause 4.3 of the applicant's employment contract.

Evaluation

[8] As correctly submitted by Ms Reddy for the applicant this Court has jurisdiction to hear claims for damages arising out of a breach of contract of employment. Sections 77 (3) and 77 A (e) of the Basic Conditions of Employment Act Number 75 of 1997, the BCEA, confer concurrent jurisdiction on this Court with the High Court to determine a matter concerning a contract of employment and to award damages for a breach of contract. In this respect, section 195 of the Act¹ provides that:

‘An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.’

[9] An employee who seeks relief under the remedies in terms of the Act does not, by doing so abandon his or her contractual rights². The respondent does not appear to take issue with this legal right to claim on contract. *Res judicata* is raised against the pleaded facts and legal principles relied on by the applicant.

[10] The applicant's complaint from her pleaded case is that the respondent failed to consult her before changing her designation from Strategic Manager to

¹ The Labour Relations Act Number 66 of 1995.

² See *Manana v King Sabata Dalindyebo Municipality* (2011) 32 ILJ 581 (SCA).

Manager in the office of the Mayor, and that she regards this change of designation to be a unilateral change to her terms and conditions of employment, which is in her view a breach of the employment contract entitling her to resign. The respondent has correctly contended that there is no express term in the applicant's contract of employment which prevents the respondent from changing her designation without consulting her, nor is it pleaded that such express term exists. In order for the applicant to succeed in her claim, it is necessary for her to allege and prove that such a term is implied. The basis for such a term to be implied would be if it was implied with reference to labour legislation which imports the term by operation of law. That has not been pleaded³.

- [11] As also correctly submitted by Mr Menesses for the respondent, it has been held in *Verhagen v Abramowitz*⁴ that:

'When the matter has been referred to an arbitrator for a decision and an award has been given the situation is materially altered. Thus in *Strutt v Chalmers and Another*, 1959 (2) SA 536 (N), it was held that a party to an arbitration is not entitled to seek a decision of the Court on the very same matters already referred to arbitration, and when an award has in fact been made it has been held that such an award is equivalent to *lis finita* and as between the parties the matter is *res judicata* (*Schoeman v Van Rensburg*, 1942 TPD 175 at p 177).'

- [12] The arbitrations of the Commission for Conciliation, Mediation and Arbitration, the CCMA, are compulsory and designed to dispose of a dispute finally through an award that is subject to review but not to appeal on its merits.⁵ A certified award of the CCMA may be enforced as if it were an order of this Court.⁶ In the circumstances, it is clear that *res judicata* may be raised in

³ In *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) the Constitutional Court held that the question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts.

⁴ 1960 (4) SA 942 (C) at 950 G-H.

⁵ It is for that reason that one may therefore not split a single matter into discrete parts to arbitrate one while litigating the other: See *Gibb v Nedcor Ltd* (1998) 19 ILJ 364 (LC).

⁶ Section 142(1) and (3) of the Labour Relations Act.

respect of an arbitration award issued by the CCMA which by its very design has disposed of the dispute finally.

- [13] The cause of action relied upon by the applicant in her claim is the unilateral change to her terms and conditions of employment. The arbitrating commissioner found in paragraph 8 of his award that:

‘I am satisfied on the evidence before me which stands unchallenged, that: 1) The Respondent’s conduct to pass a resolution unilaterally changing the applicant’s designation and affected her responsibilities caused the applicant to tender her resignation on 20 April 2009.’

- [14] The pleaded case of the applicant has accordingly been decided in her favour by the CCMA. She is not entitled to rely on the same cause of action in a claim before this Court. The defence of the respondent will help prevent the repetition of lawsuits and the possibility of conflicting decisions on points of law or facts see *Evins v Shield Insurance Co Ltd*.⁷

- [15] Having reflected on the law and fairness of the costs order, the following order is accordingly issued:

1. The defence of *res judicata* is upheld.
2. The claim of the applicant is dismissed.
3. The applicant is to pay costs hereof.

Cele J.

Judge of the Labour Court.

⁷ 1980 (2) SA 814 (A) at 835 G.

APPEARANCES:

FOR THE APPLICANT:

Ms S Reddy

Instructed by A P Shangase Attorneys, Durban.

FOR THE RESPONDENT:

Mr R Menesses

Instructed by Barkers Attorneys, Durban.