



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS 410/21

In the matter between:

ICTU obo KHOTSO ERASMUS AND 2 OTHERS

Applicant

and

TELKOM SOC LIMITED

Respondent

Heard: 31 July 2023, 01-02 August 2023, 27 and 29 November 2023.

Heads of Argument were submitted on 19 December 2023.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be

JUDGMENT

MABASO, AJ

- [1] Telkom SOC Limited (“Telkom”) dismissed the Individual Applicants for misconduct of fraud emanating from their alleged submittal of membership forms and/or they associated themselves with the misrepresentation in that some membership forms were submitted to Telkom by a trade union (“ICTU”) with the assistance of the Individual Applicants. Subsequently, this unfair dismissal dispute was declared as automatically unfair dismissal; this was after it had already gone through the CCMA conciliatory processes.
- [2] Telkom, in their Statement of Response filed in May 2021, disputed the jurisdiction of this Court and even said, *“In so far as the applicants’ alternative claim is that they were dismissed for misconduct but the dismissals were unfair, the Court has no jurisdiction to entertain their claim”*. During the trial, Telkom, as a party having an onus of proof, led evidence of its witnesses indicating that the Individual Applicants were dismissed for offences compressed above, and most of such evidence was not disputed during cross-examination. Consequently, such evidence is accepted by this Court as correct. *cf. President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) S 1 (CC) at para 61; S v Boesak 2001 (1) SA 912 (CC) at para 24.*
- [3] Issues covered hereinafter are: whether this Court has the jurisdiction to hear this matter; if the answer is no, what is the way forward?
- [4] Telkom has steadfastly believed that the Individual Applicants were dismissed for misconduct. At the close of Telkom’s case, this Court inquired about the issue of jurisdiction, considering that the evidence relating to misconduct was broadly not disputed by the Individual Applicants; following short deliberations, this Court decided to allow the Applicants to present evidence and made an undertaking that at the end of the proceedings parties will first have to deal with this issue. Applicants argue that this Court has jurisdiction, whereas Telkom says not.

- [5] This dispute was declared in accordance with section 191(5)(i) read with subsection (11) of the Labour Relations Act¹ (“the LRA”), which provides that an employee may refer a dispute to this Court if he or she alleges that the reason for dismissal is automatically unfair.² However, once a Court finds the true reason for the dismissal and that the matter belongs to a statutory body such as the CCMA, then this Court would refuse to pronounce on the fairness of the dismissal and ultimately dismiss the matter.³
- [6] However, sometimes this Court may proceed with a matter if it is found that the reason for the dismissal is not what the employees alleged. This is on the basis that section 158(2) of the LRA gives this Court two-fold discretionary options to resolve a dispute already before it once it becomes apparent that it has no jurisdiction; this section reads thus:

(2) **If at any stage after a dispute has been referred to the Labour Court,** it becomes apparent that the dispute ought to have been referred to arbitration, the Court may—

(a) *stay the proceedings and refer the dispute to arbitration or*

(b) *if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make, provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable. [My emphasis]*

- [7] The Labour Appeal Court (LAC) in *Member of the Executive Council of the Western Cape Provincial Government Health Department v Coetzee and others* (“Coetzee”)⁴ explained the elliptical phrase “*If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the*

¹ Act 66 of 1995, as amended.

² See *F & J Electrical CC v MEWUSA obo E Mashatola and Other* [2015] 5 BLLR 453 (CC) at para 15.

³ See *Wardlaw v Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC) para 13.

⁴ [2015] 11 BLLR 1108 (LAC), where it was held:

“[74] This was clearly not a case where it only became apparent after the referral to the Labour Court that the matter had to be referred to arbitration. This was a known fact before the referral to the Labour Court. The respondents had started off by referring the matter for conciliation failing which arbitration.” *cf.* its paras 65,66,72 to 80.

dispute ought to have been referred to arbitration". Thus, it is apparent from this ratio that if from the beginning, there was no need for the matter to be referred to this Court, then the Court should declare that it has no jurisdiction and consequently dismiss the matter on those bases, as the LAC succinctly held that:

"[75] In the circumstances, the Labour Court...could not have properly exercised the discretion, which is clearly circumscribed in section 158(2) "to continue with the proceedings with the court sitting as arbitrator". The Court was requested at the outset to sit as an arbitrator. There was no "continuation" of the proceedings in the sense contemplated in that section, but a request at the outset that proceedings be conducted with the Court sitting as arbitrator.

[78] The respondents deliberately abandoned the referral to arbitration ...and chose, of their own accord, for the Labour Court to sit as an arbitrator instead. The LRA does not allow for that. This was clearly an instance of forum shopping, which is completely undesirable."⁵

[8] It is indicated above that the evidence of Telkom relating to misconduct was never disputed; in the Statement of Case, the Applicants confirmed that they were dismissed on allegations of misconduct. They contended that the Certificate of Outcome describes the dispute as automatically unfair dismissal and "on that basis that [they] approached the labour Court...".

[9] It is trite law that a Certificate of Outcome does not prescribe the jurisdiction of this Court. *cf. Goldfields Mining South Africa (Kloof Mine) v NUMSA (2009) 12 BLLR 1214 (LC)* at para 14.

[10] As the evidence of Telkom was not disputed, it confirmed that the Individual Applicants submitted the forms in question, and they also confirmed this in paragraph 79 of the Statement of Case. Telkom says those documents were fraudulent. This means that they were not lawful activities of a trade union that had been exercised by the Individual Applicants, and they knew about this at the time of dismissal.

⁵ *Wardlaw v Supreme Moulding (Pty) Ltd* at para 75 and 78.

[11] This Court has considered that in paragraphs 59 to 71 of the Statement of Case, the Individual Applicants refer to provisions of the LRA and that of the Constitution of the Republic of SA, but none of them are applicable in this matter because it has been apparent from the beginning that they were dismissed for allegations of misconduct. Therefore, it is not appropriate for the Court to proceed with the matter as an arbitrator as that would be against the provisions of the LRA when considered together with what the LAC stated in *Coetzee supra*. Even though Mr Phala for the Individual Applicants, during the trial, had alluded to the issue of possible transfer of the matter to the CCMA, which Mr Maseremule opposed; this Court could not transfer this matter to the CCMA as it is restricted from doing so. Consequently, the claim is hereby dismissed due to lack of jurisdiction.

[12] In the circumstances, the following order is made:

Order:

1. The application is dismissed due to a lack of jurisdiction.
2. There is no order as to costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv M Phala

Instructed by: D H Golele Attorneys

For the Respondent: Mr P Maseremule

Instructed by: Maseremule Attorneys

LABOUR COURT