



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS434/22

In the matter between:

DR LESIBA SAMUEL T MAPHOSO

Applicant

and

**SOUTH AFRICAN BROADCASTING CORPORATION
(SABC)**

First Respondent

SELLO ISAAC MASHILA

Second Respondent

Heard: 26 October 2023

Delivered: 05 February 2024

JUDGMENT

ADAMS, AJ

Introduction

- [1] The Applicant has referred a dispute to this Court on the basis of an unfair labour practice.
- [2] The First Respondent (Respondent) subsequently filed a special plea to the statement of case on the basis that this Court lacks jurisdiction to determine this dispute.
- [3] The Respondent, in raising the special plea, has contended, *inter alia*, effectively that:
- 3.1 the Applicant seeks an order that the Respondent's conduct and the conditions attached to the offer of 25 May 2021 constitute an unfair labour practice;
- 3.2 Section 191(1)(a) of the Labour Relations Act¹ (LRA) provides that:
- ‘If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –
- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
- (ii) the Commission, if no council has jurisdiction...’
- 3.3 in the circumstances, the Labour Court lacks the requisite jurisdiction to determine this dispute. Such a dispute must be referred to a bargaining council or the CCMA in line with section 191(1)(a) of the LRA.
- [4] In response to the special plea raised, the Applicant, through the delivery of a replication has contended that:

- 4.1 The matter was referred to the CCMA on 20 June 2022;

¹ Act 66 of 1995, as amended.

- 4.2 This Honourable Court has jurisdiction to entertain this matter notwithstanding the fact that the dispute in question falls within the ambit of the CCMA;
- 4.3 The leading case that speaks to this issue is *Ncaphayi v Commission for Conciliation, Mediation and Arbitration and others*² (*Ncaphayi*), which states that as long as the merits or the facts of the case have not already been decided by the commissioner, the applicant will always have the right to re-refer the very same case against the employer;
- 4.4 In terms of the *Ncaphayi* case, the Respondent is to prove the following for the matter not to proceed before the Honourable Court:
- 4.4.1 That such a case will be prejudicial to the Respondent, that witnesses have resigned, evidence is lost, and it is costly for the Respondent to be appearing for a case in which the Applicant has already shown that he is not interested in;
- 4.5 in the present case, none of the factors above-mentioned are applicable and as such, the Respondent's special plea stands to fail and the matter is to proceed on its merits in terms of the statement of claim and the evidence of witnesses if any.

Background

- [5] The Applicant referred a dispute to this Court on the basis of an unfair labour practice on 20 June 2022.
- [6] The Applicant has contended, in his statement of claim, that the conduct of the Respondent constituted an unfair labour practice in terms of section 186(2)(b) of the LRA.
- [7] In terms of the relief sought, the Applicant has claimed the following:

² (2011) 32 ILJ 402 (LC).

- 7.1 The conditions attached to the offer constitute unfair labour practice in terms of section 193;
- 7.2 The conditions attached to the offer should be declared invalid and set aside;
- 7.3 The Applicant must be appointed to the post of Senior Producer: Mandate;
- 7.4 Alternatively, compensation or any appropriate relief is to be paid to the Applicant.

[8] It is not in dispute that:

- 8.1 The Applicant's dispute involves that of an unfair labour practice;
- 8.2 The Applicant has referred a dispute to the CCMA on 20 June 2022 (being the same day that he prosecuted his proceedings in this Court).

Legal principles applicable

[9] Section 191(1)(a) of the LRA provides that:

'If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
- (ii) the Commission, if no council has jurisdiction...'

[10] Section 191(5)(a) of the LRA provides:

- '(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

- (a) the council or the Commission must arbitrate the dispute at the request of the employee if –
 - (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
 - (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
 - (iii) the employee does not know the reason for dismissal; or
 - (iv) the dispute concerns an unfair labour practice...'

[11] Section 191(5)(a) makes it peremptory for a dispute involving an unfair labour practice to be arbitrated by the council or the Commission after it has certified that the dispute remains unresolved.

[12] Section 158(2) of the LRA provides that:

'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..'

[13] This section permits the Labour Court to continue with matters sitting as an arbitrator with the parties' consent. The LRA, and in particular section 158(5) also provides that, except as provided in section 158(2), the Labour Court lacks jurisdiction to adjudicate an unresolved dispute if the Act requires the dispute to be resolved through arbitration.

[14] Importantly, it was held in *Member of the Executive Council of the Western Cape Provincial Government Health Department v Coetzee and others*³ that:

[73] The consent of the parties cannot clothe the Labour Court with jurisdiction it does not have. The wording of section 158(2) is plain and unambiguous. It only applies in matters before the Labour Court "*if at any stage after the dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration*" (emphasis added).

[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.

[75] In the circumstances, the Labour Court (Cheadle AJ) 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 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.

[76] It is clear from the section that the parties' consent for the court to sit as arbitrator had to be strictly within the circumstances prescribed and contemplated in section 158(2)(b). The section was not intended to give parties a choice at the outset, to avoid the forums or structures where

³ [2015] 11 BLLR 1108 (LAC) at paras 73 – 77.

arbitrations are normally to be conducted in terms of the LRA, in favour of opting for the Labour Court to sit as arbitrator.

[77] It is not the Labour Court's normal function to sit as arbitrator. Section 158(2)(b) is intended to cover exceptional circumstances where it was not apparent before the matter that it had to be referred to arbitration.'

[15] This Court agrees with the findings made in this regard. Section 158(2) is not intended to give parties a choice to avoid the forums and processes normally conducted by the LRA. It is not the Court's function to sit as an arbitrator and section 158(2)(b) is intended to only cater for exceptional circumstances in order to avoid parties forum shopping. This section can only be used in instances where it only becomes apparent after the matter was referred to this Court, that the matter should have been referred for arbitration.

[16] The Applicant's reliance on *Ncaphayi* to contend that this Court does have jurisdiction to adjudicate the dispute as long as the merits or the facts of the case have not already been decided is also misplaced.

[17] In *Ncaphayi*, the commissioner had concluded that he could not entertain the applicant's unfair dismissal claim unless the notice of withdrawal in respect of the applicant's first referral was not set aside by the court. The facts were completely distinguishable from the facts in *casu* with the applicant having initially referred his matter to the CCMA, withdrawn his matter, and then re-referred his matter to the CCMA for hearing again. The commissioner had found that the applicant's submission of a notice of withdrawal by a referring party constituted action and that he therefore had no jurisdiction to hear the matter until such time as the notice of withdrawal had been set aside by this Court.

[18] The Court found in *Ncaphayi* that the commissioner had misconstrued his power to conciliate the dispute by concluding that the applicant's withdrawal of the dispute needed to be set aside by this Court before he could entertain it.

[19] The *Ncaphayi* case does not support the Applicant's argument in these proceedings, nor can I rely on the findings made therein in making a finding in this matter.

- [20] I agree with the Respondent's contentions that the Applicant was aware that his dispute should be referred to the CCMA prior to launching these proceedings. The Applicant referred his dispute to the CCMA on the same day that he prosecuted his claim in this Court and has stated as much in his replication. His stance in the matter is simply that either the Labour Court or the CCMA may adjudicate his claim, and he is free to choose.
- [21] This stance, however, is not in line with Section 191(5), 157(5) or 158(2) of the LRA.
- [22] The Applicant's decision to institute proceedings in both the CCMA, as well as this Court demonstrates that the Applicant was aware that the matter required to be referred to arbitration prior to being instituted in this Court and is an example of forum shopping, for which section 158(2) of the LRA does not allow.
- [23] I do not find exceptional circumstances that would warrant the application of section 158(2) in either staying the proceedings and referring the dispute to arbitration or continuing with the proceedings in the circumstances.
- [24] Accordingly, this Court lacks the necessary jurisdiction to deal with this matter.
- [25] In the premises, I make the following order:

Order

1. The Labour Court lacks jurisdiction to adjudicate the Applicant's unfair labour practice dispute;
 2. The Respondent's special plea dated 30 June 2022 is upheld;
 3. The Applicant's statement of case is struck off the roll for lack of jurisdiction;
 4. There is no order as to costs.
-

R Adams

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Angelo Ray Harry Mason

Instructed by: Poto Attorneys

For the Respondent: Lisa Appelgryn

Instructed by: Werksmans Inc.