



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. J1125/21

In the matter between:

MACHUENE REUBEN DIPELA

Applicant

and

LIMPOPO ECONOMIC DEVELOPMENT AGENCY

Respondent

Heard: 15 February 2024

Delivered: This judgment was handed down electronically by emailing a copy to the parties. 15 March 2024 is deemed to be the date of delivery of this judgment).

Summary: Reasons for earlier order in which the court dismissed the application, for lack of jurisdiction, with applicant to pay the costs *de bonis propriis*

REASONS FOR ORDER

DANIELS J

Introduction

- [1] This application was heard on 15 February 2024, when the court handed down its order, in which it dismissed the application for lack of jurisdiction and ordered the applicant to pay costs *de bonis propriis*.
- [2] Subsequently, the applicant requested reasons for the order. These are my reasons.

Material facts

- [3] The applicant was employed by Great North Transport (Pty) Ltd (hereafter “GNT”) as an internal audit assistant, grade 10. GNT is a subsidiary of the respondent.
- [4] As a result of its financial difficulties, or about 1 May 2018, GNT transferred the applicant on a temporary basis to the respondent, (hereafter “LEDA”). The applicant was advised that his terms and conditions of employment during the period of the transfer would be unaffected.¹
- [5] The applicant launched this application on 6 October 2021, for an order directing and compelling LEDA to conduct a job evaluation exercise and to adjust the applicant’s remuneration upwards from grade 10 to grade 7.
- [6] By the time that the application was heard, the applicant was no longer engaged by LEDA, nor was he employed by GNT.

¹ The period of the transfer was 1 May 2018 until 1 June 2021, although it appears that LEDA continued paying the applicant until 31 March 2022.

Admission of supplementary affidavit

- [7] After the close of pleadings, without prior leave of the court, and in the absence of any formal application seeking leave, the applicant filed a supplementary affidavit.
- [8] In the supplementary affidavit, the applicant sought to advance a new cause of action, namely that the respondent had breached his employment contract.
- [9] There was no satisfactory explanation as to why the information in the supplementary affidavit could not have been included in the founding affidavit, or the replying affidavit.² All indications are that the facts contained in the supplementary affidavit were available to the applicant at the launch of the application. I took the view that when the applicant sought to introduce a new cause of action, the resulting prejudice could not be remedied by a cost order.³
- [10] On full conspectus of all the relevant circumstances, noting the prejudice to the respondent, noting that the admission of a supplementary affidavit is ordinarily done via interlocutory proceedings,⁴ noting the absence of a satisfactory explanation, noting the absence of any exceptional circumstances,⁵ the court exercised its discretion against the admission of the supplementary affidavit.

² *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & others* (2015) 36 ILJ 3045 (LC)

³ *Herbstein & Van Winsen The Civil Practice of the High Courts of SA* 5 ed vol 1 at 433-4

⁴ *Dicks v South East Node (Pty) Ltd* (2011) 32 ILJ 1357 (LC)

⁵ *Financial Advisory & Intermediary Services Ombud v CCMA & others* (2021) 42 ILJ 2603 (LC)

Jurisdictional issues

[11] In its notice of motion and founding papers, the applicant contended that the conduct of LEDA constituted an unfair labour practice. It pinned its colours to the mast.

[12] The applicant contended that this court has jurisdiction to determine the alleged unfair labour practice in consequence of sections 185 read with 186(2)(a) of the Labour Relations Act 66 of 1995 (hereafter “the LRA”) and section 23 of the Constitution of the Republic of South Africa.

[13] The respondent in its answering affidavit raised the jurisdictional issue and contended that the court had no jurisdiction to hear the dispute on the following grounds:

13.1 This court has no jurisdiction, as a court of first instance, in relation to unfair labour practices because such disputes must be referred to the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) for conciliation and (if conciliation fails to resolve the dispute) to arbitration, in terms of section 191(1) read with section 191(5)(a)(iv) of the LRA.

13.2 This court may not exercise its powers without the dispute first being conciliated, in accordance with section 157(4) of the LRA,

13.3 The respondent is not the applicant’s employer as at the date when the application was brought,

13.4 The applicant has failed to comply with the period (90 days), contemplated in section 191(1)(b) of the LRA, to refer an unfair labour practice dispute.

[14] Importantly, despite being alerted to the jurisdictional challenges, in its replying affidavit the applicant persisted with its initial submission that this court had jurisdiction. Furthermore, the applicant filed heads of argument in which it failed or refused to address the jurisdictional issues. The respondent sought a punitive cost order against the applicant for bringing the application in this court when the court clearly had no jurisdiction.

[15] I do not intend to discuss all the jurisdictional objections in this judgment. My order was based solely on the objection set out in para 13.1 above.

General principles: Jurisdiction

[16] In *Phahlane v SA Police Service & others*⁶ Van Niekerk J (as he then was) succinctly stated:

“This court is a creature of statute. In terms of s157(1), subject to the Constitution and s173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. In other words, a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that provides for that dispute to be determined by this court. It is incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction is to be determined strictly on the basis of the applicant’s pleadings, the

⁶ (2021) 42 ILJ 569 (LC) at para 6

merits of the claim are not material at this point. What is a determination of the legal basis for the claim, and then an assessment of whether the court has jurisdiction over it (see Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC); 2008 29 ILJ 73 (CC) at para 155, Gcaba v Minister for Safety and Security and others 2010 (1) SA 238 (CC) (2010) 31 ILJ 296 (CC) at para 75.” (Own emphasis)

Doctrine of subsidiarity

[17] The applicant sought to rely directly on the constitutional right against unfair labour practices. This is impermissible and undermines the doctrine of subsidiarity. The principle of subsidiarity was well summarized by Snyman AJ in *Mlaba v Minister of Home Affairs & another*⁷ as follows:

[36] *First things first. The applicant seeks to rely directly on the Constitution to substantiate his case of an unfair labour practice. This approach however flouts the principle of subsidiarity, since the concept of the prohibition of unfair labour practices is regulated by the LRA. In SA Human Rights Commission on behalf of SA Jewish Board of Deputies v Masuku & another the court held:*

‘Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. In simple terms, the principle can be summarised thus:

⁷ (2024) 45 ILJ 139 (LC) at paras 36 – 40

“Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”

Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.’

[37] In *My Vote Counts NPC v Speaker of the National Assembly & others* the court described the principles behind the doctrine of subsidiarity in the following manner:

‘First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law.’

[38] There can be no doubt that the LRA was intended to constitute the comprehensive legislation which was specifically designed to give effect to the protections afforded against unfair labour practices as enshrined in s 23(1) of the Constitution, or in other words, it is the LRA which gives

effect to this fundamental right. The doctrine of subsidiarity must therefore find application, and it would thus not be permitted for the applicant to seek to establish an unfair labour practice by way of a direct reliance on the Constitution. Such a situation was pertinently dealt with by the Labour Court in *Kapari & others v Office of the Chief Justice & another*. In that case, the applicants relied on s 23 of the Constitution in support of declaratory relief sought to the effect that the respondents committed an unfair labour practice by advertising their positions. The applicants in that case argued that the LRA did not afford them a remedy because the definition of an 'unfair labour practice' in the LRA did not provide for advertising already-occupied positions, and therefore they would be entitled to rely directly on s 23. The court dealt with these arguments as follows:

[15] To disregard the principle of subsidiarity and grant access to this (and other superior courts) on the basis of a direct application of the constitutional right to fair labour practices raises significant issues of principle. Halton Cheadle, who was instrumental in drafting both the LRA and the Constitution, observes that a right to fair labour practices is "an odd right to include in a Bill of Rights" and that its insertion into the interim Constitution was part of a package of provisions to secure the support of the public service for the new constitutional dispensation, and in particular, the restructuring and transformation of the public sector (Davis, Cheadle & Haysom *Fundamental Rights in the Constitution: Commentary and Cases* at 212). Should the constitutional right to fair labour practices be held to extend beyond the traditional triad (ie to test the validity of legislation that gives effect to the right, to interpret that legislation and to develop the common law), and should it become the basis for the development of new,

substantive rights, there is a clear danger that the finely balanced agreement that the LRA represents may be unraveled by well-meaning but enthusiastic judges. This is especially so where persons covered by the legislation concerned seek to develop a definition of unfair labour practice beyond that which already exists. Not least, there is the prospect of a “two-stream” development of labour law, an issue that the LRA sought to eliminate and address by establishing a specialist labour court.

[16] In short, it seems to me that to seek relief based on the direct application of s 23(1) of the Constitution is not an option open to the applicants. Should the applicants contend that the provisions of the LRA fail adequately to give expression to their constitutional right to fair labour practices, their remedy is to challenge the constitutionality of that Act.’

I cannot agree more.

[39] In National Education Health & Allied Workers Union & others v University of SA & another the Labour Court followed the same approach, where the court said:

[22] [I]t is well accepted that direct reliance on the Constitution of the Republic of SA 1996 (the Constitution) is impermissible in the light of the subsidiarity principle as correctly submitted by counsel for the respondents. The subsidiarity principle dictates that, “where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality. It cannot bypass legislation and rely directly upon the right”, unless the “factual situation is complex and the legal position uncertain”. In the

present case, the converse is true as the facts are crisp and predictable.

[23] The applicants' direct reliance on the Constitution rather than on the provisions of the LRA pertaining to unfair labour practice and/or unfair dismissal undermined the principle of subsidiarity.'

[40] It must follow that the applicant's direct reliance on s 23 of the Constitution is ill-founded and simply not competent. The principle of subsidiarity stands squarely in the way of this part of his case. The applicant is therefore limited to establishing his right to relief by reference to the LRA only, as he has not pleaded nor relied upon any breach of contract." (Own emphasis)

[18] In the circumstances, the applicant cannot rely directly on the constitutional right to fair labour practices. It must rely on the provisions of the LRA. The doctrine of subsidiarity is well established and has been endorsed repeatedly by our courts. This should have come as no surprise to the applicant's representative.

[19] Accordingly, the applicant's reliance on section 23 of the Constitution, and section 157(2) of the LRA does not assist the applicant to engage the jurisdiction of this court.

Provisions of the LRA

[20] The relevant sections of the LRA are:

191(1)(a) *"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.

.....

191(4): The council or the Commission must attempt to resolve the dispute through conciliation.

191(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 -

...

(Own emphasis)

[21] The provisions of the LRA, drafted in plain language, are perfectly clear, at the very least to practitioners of employment law. Absent the frills, the LAC put it thus:

“Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA.”⁸

[22] In the circumstances, this court has no jurisdiction in relation to unfair labour practices, at least, not as a court of first instance.

⁸ MEC for Education, North-West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC) at para 46

Costs

- [23] Section 162(1) of the LRA permits this court, in its discretion, to make an order for the payment of costs, according to the requirements of the law and fairness. When deciding whether to award costs, the court must consider *inter alia* whether the matter ought to have been referred to arbitration and, if so, the extra costs incurred in referring the matter to the court, and the conduct of the parties in proceeding with or defending the matter before the court.
- [24] In this matter, it was not fair for the applicant to drag the respondent to court when the dispute was so obviously in the wrong forum.
- [25] It is well established that the rule of practice that costs follow the result does not govern this court⁹ because it is necessary to strike a balance between not unduly discouraging workers, employers (including employer organisations), and unions from bringing their disputes to court and allowing frivolous cases to be brought.
- [26] In this matter, as the facts demonstrate, it must have been apparent to the applicant, from the very outset, that this court did not have jurisdiction. The applicant's representative, despite being an officer of the court, chose to ignore the obvious difficulties. This conduct amounted to an abuse of court process and was frivolous and vexatious. It was necessary for the court to mark its displeasure. As the court held in *National Education Health & Allied Workers Union on behalf of Members Providing Essential Health Services v Minister of Health & Others*¹⁰:

“This court is, of course, not in any position whatsoever to dictate that a spirit of cooperation must imbue how parties conduct

⁹ *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC) at para 19

¹⁰ (2020) 41 ILJ 1724 (LC) at para 61

themselves or express or advance their interests. But what the court can do is adjust the standard of what constitutes frivolous and vexatious conduct in litigation. In this way, those who elect to pursue obviously untenable legal points, use the court process as part of other power-plays, unnecessarily consume the resources of their opponents or make allegations they cannot substantiate know that they run the risk of a costs order thereby should they lose." (Own emphasis)

[27] In *Pheko and others v Ekurhuleni City*¹¹ the Constitutional Court held:

[51] Costs de bonis propriis are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case.

[28] In this matter, it is inconceivable that the applicant's representative, an attorney with experience of employment law, was entirely unaware that unfair labour practices are routinely referred to the CCMA or, where appropriate, the bargaining council. If she was unaware that unfair labour practices are referred to the CCMA or bargaining council, this amounted to gross negligence. Even if I were to assume that the applicant's legal representative was unaware of section 191, she was alerted to the jurisdictional challenge as soon as the respondent filed its opposing papers. The reasonable and responsible thing for her to do was to withdraw the application. Instead, the applicant's representative charged ahead. This was unreasonable.

¹¹ 2015 (5) SA 600 (CC)

[29] The applicant wasted the court's precious time, which could have been diverted elsewhere.

[30] Furthermore, to add insult to injury, when the applicant filed its heads of argument it did not address the jurisdictional challenge. This could only have been because it was aware that there were no answers.

[31] In the circumstances, the applicant's representatives' disrespect for the Rules of Court, the administration of justice, and its disregard for effective resolution of employment disputes, warranted censure.

Conclusion

[32] In the result, after considering the papers and arguments made by the parties, I made an order dismissing the application for lack of jurisdiction and made an order of costs *de bonis propriis*.

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms G Makoti

For the Respondent: Mr. E Nwedo

Instructed by: Lebea Attorneys