

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J581/2022

In the matter of:

ELIZABETH PETRONELA OLIVIER

Applicant

and

**THE MEC: NORTH WEST PROVINCIAL
GOVERNMENT DEPARTMENT OF EDUCATION
AND SPORT DEVELOPMENT:
MMAPHEFO LUCY MATSEMELA**

First Respondent

**THE HEAD OF DEPARTMENT: NORTH WEST
PROVINCIAL DEPTMENT OF EDUCATION AND
SPORTS DEVELOPMENT:
SM MAWASHE**

Second Respondent

THE GOVERNMENT EMPLOYEES PENSION FUND

Third Respondent

**THE GOVERNMENT PENSIONS FUND ADMINISTRATIVE
AGENCY**

Fourth Respondent

Heard: 12 March 2024

Delivered: 24 March 2024

JUDGMENT

WHITTINGTON, AJ

Introduction

[1] The applicant in this matter has instituted a claim in terms of Section 77 (3) of the Basic Conditions of Employment Act¹, 1997 (BCEA).

[2] In particular, the applicant claims that the respondents have breached the provisions of the contract of employment with the second respondent by prematurely terminating her employment.

[3] In response to the allegations in the applicant's statement of claim the respondents originally raised three points *in limine*.

[4] The first of these, a plea of *lis pendens*, was abandoned at the hearing and nothing more need be said regarding that point.

[5] What remains to be determined at this stage of the proceedings is two points *in limine*.

Background facts

[6] The first point *in limine* is that the respondents allege, as it relates to an unfair dismissal, the matter ought to have been referred to a bargaining council in the relevant sector for resolution in terms of Section 191 of the Labour Relations Act² (LRA). Having failed to do so, so the argument goes, the applicant is precluded from approaching the Labour Court for relief as the Labour Court has no jurisdiction to hear the matter.

[7] This line of argument was comprehensively addressed by the Labour Appeal Court in the matter of *South African Municipal Workers Union obo Morwe v Tswaing Local Municipality and Others*³ (SAMWU v Tswaing). The Labour Appeal Court was required to consider an earlier judgment in which it was held that, where a contract of

¹ Act 75 of 1997.

² Act 66 of 1995, as amended.

³ [2022] ZALAC 107; (2022) 43 ILJ 2754 (LAC).

employment is terminated or cancelled, lawfully or unlawfully, fairly or unfairly, the jurisdiction of the Labour Court under section 77 (3) of the BCEA cannot be invoked.

[8] The Labour Appeal Court, in paragraph 9 of the judgment, found that the notion that a dispute about the termination of a contract is outside the jurisdiction of the Labour Court is misconceived.

[9] The respondents also rely on the provisions of Regulation 6 read with Chapter G of the Employment of Educators Act⁴. The regulation, so says the respondent, sets out that educators are required to lodge a grievance relating to their employment rights within 90 days.

Analysis

[10] Having been referred to the Employment of Educators Act as aforesaid I noted that reference appears to be incorrect. Nonetheless, after traversing all of the regulations to the Employment of Educators Act as a courtesy to the respondents, I was able to find, in the regulations set out in GN 222 OF 18 February 1999⁵, Chapter H and Regulation 3 (b) (i) thereof the provisions dealing with grievances.

[11] The provisions state that a grievant or grievants may lodge a grievance or grievances with the head or the supervisor in writing within a reasonable period of time, but in any event not later than 90 calendar days following the time and date on which the alleged grievance or grievances occurred.

[12] It appears to me, from the plain wording of this section, that a grievance may be lodged with the head or supervisor within 90 days. The provisions do not appear to be peremptory and there is no indication in the regulations that any failure to follow this grievance procedure would preclude an employee from following any other remedy they may have in law.

⁴ Act 76 of 1998.

⁵ GN 222 of 18 February 1999: Terms and conditions of employment of educators determined in terms of section 4 of the Employment of Educators Act, 1998.

[13] Accordingly, I am of the view that these provisions do not operate to oust the jurisdiction of the Labour Court in disputes relating to a contract of employment.

[14] The applicant was thus entitled to refer the dispute regarding the termination of her contract of employment to the Labour Court in terms of the provisions of Section 77 (3) of the BCEA and this court does in fact have jurisdiction to hear the matter.

[15] Accordingly, the first point *in limine* falls to be dismissed.

[16] The second *point in limine* is likewise a jurisdictional challenge in the sense that the respondents allege that the Labour Court does not have the power to directly enforce the provisions of the BCEA and, so the argument goes, as the applicant seeks to rely directly on the provisions of the BCEA rather than on a breach of contract the Labour Court lacks the jurisdiction to deal with the applicant's claim.

[17] What the applicant actually alleges is that the terms of her employment contract ought to be interpreted as providing that her retirement date was set to 1 January 2021.

[18] I am alive to the fact that, on the papers, there is a dispute as to whether the legislation relied upon by the applicant did indeed form part of her contract of employment. This is a dispute for the court hearing the merits of the matter to determine – the point that I am asked to determine relates to whether the applicant seeks to rely directly on the provisions of the act and if so whether this reliance ousts the jurisdiction of this court.

[19] As noted by the Labour Appeal Court in the matter of *SAMWU v Tswaing*⁶ jurisdiction is an issue decided on the pleadings.

[20] As the plain intention was to engage the jurisdiction of the Labour Court under section 77(3) of the BCEA, it is appropriate to take a charitable view and treat the

⁶ Cited above, at paragraph 7 thereof.

averments as if they had averred that specific performance of the terms of the contract which had been breached by the employer was sought.

[21] I note that the applicant has not stated whether the contract on which she relies is written or oral or whether the terms relied upon are express, tacit or implied. However, as the applicant has not elected to raise an objection to the formulation of the applicant's claim it would be inappropriate for me to express any views on this aspect.

[22] What is clear is that the applicant has pleaded reliance on a breach of contract and does not rely directly on the act. To this end, the second point *in limine* must also be dismissed.

[23] Accordingly, I make the following order:

Order

1. I record that the point *in limine* relating raised by the respondents in paragraph 5.1 of the statement of defence has been abandoned by the respondents.
2. The points *in limine* raised by the respondents in paragraphs 5.2 and 5.3 of the statement of defence are dismissed.
3. There is no order as to costs.

D Whittington

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: E P Olivier
Instructed by: Erasmus Inc Attorneys

For the Respondent: L Qnebe
Instructed by: State Attorney Johannesburg