

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS793/21

In the matter between:

**LAUDIUM SECONDARY SCHOOL
GOVERNING BODY**

Applicant

SUDESH MOOLOO

Respondent

In Re:

SUDESH MOOLOO

Applicant

and

**LAUDIUM SECONDARY SCHOOL
GOVERNING BODY**

Respondent

Heard: 19 April 2024

Delivered: 2 May 2024 (This judgment was handed down electronically by emailing a copy to the parties. Accordingly 2nd May 2024 is deemed to be the date of delivery of this judgment).

Summary:

Special pleas, considered, and all dismissed, save for the second special plea.

JUDGMENT

DANIELS J

Introduction

[1] Mr Sudesh Mooloo (hereafter “Mr M” or “the applicant”) is the applicant in the main dispute, a dispute about the fairness of his *alleged* dismissal. Mr M was employed by the Laudium Secondary School (hereafter “the School” or “the respondent”) for over 20 years. His fixed term contract was not renewed allegedly because of his expression of political views and opinions, which found little support in the community serviced by the School.

[2] Mr M referred a dismissal dispute to the Labour Court, alleging that he was unfairly discriminated against, and his dismissal was automatically unfair.

[3] The School has raised four special pleas. The applicant argued that the first and second special pleas should only be determined after evidence is presented. The School raised a further jurisdictional issue at the hearing, which it raised in correspondence with the applicant a few days before the hearing. The applicant argued that this was trial by ambush.

[4] Before addressing the special pleas, it is necessary to set out the factual background.

Material facts

[5] Mr M was employed by the School, through its School Governing Body¹ (the “SGB”) as an Afrikaans teacher. He was engaged on successive three-monthly fixed term employment contracts for a lengthy period, which according to the applicant exceeds 20 years.

[6] During the events set out below, Mr M was engaged on an employment contract for the period 1 April 2021 to 30 June 2021.

¹ Section 3(4) of the Employment of Educators Act No. 76 of 1998, read with section 20(4) of the South African Schools Act No. 84 of 1996 permits public schools to establish posts additional to those established through the Department of Education. In respect of such posts, the public school is the employer.

[7] Mr M is an ardent and outspoken Christian who regularly engaged in religious debates on social media.

[8] On 18 May 2021, Mr M posted a WhatsApp status update which read:

“I am not Anti-Palestine, but I am anti-Hamas. I stand with Israel.”

[9] Mr M resides in a predominantly Muslim community, who did not take kindly to his WhatsApp post.

[10] Mr M’s WhatsApp post was made in relation to a highly emotive issue – the long-standing hostilities between Israelis and Palestinians (including Hamas) in the Gaza Strip.² He was, of course, fully aware that his post would attract negative reaction.

[11] Following his WhatsApp post, Mr M received various threats, and protests were held outside his home. Afraid for his safety, the applicant failed to report for duty.

[12] The SGB sent a notice to the applicant on 26 May 2021, requiring him to submit the necessary documentation to assess the renewal of his employment contract. The documentation was required by 2 June 2021.

[13] The applicant alleges that he arranged a meeting with the School for 1 June 2021, to discuss his difficulties, but this was cancelled by the School. The School denies that any such meeting was arranged.

[14] The applicant did not submit the required documentation by 2 June 2021.

² Mr M’s comment must be understood in context. During 1948, Britain created the State of Israel on land that had been inhabited by both Jews and Arab Palestinians. Hostilities between these groups led to the mass displacement of Palestinians. Many Palestinians became refugees in the Gaza Strip. Gaza fell into the hands of Israel when it occupied the territory during 1967. The conflict in the Gaza has continued, with Hamas representing many militant Palestinians, though Hamas is by no means representative of all Palestinian people.

[15] On 15 June 2021, the School sent a further letter was sent to the applicant. It was titled “Notice of Caution: Discharge in terms of section 14(1)(a) of the Employment of Educators Act.” It recorded that the applicant had been absent without leave since 1 June. It further recorded that the applicant was required to apply for leave, or report for duty within 14 days, failing which he would be deemed to have been discharged in terms of section 14(1) of the Employment of Educators Act 76 of 1998 (hereafter “the Educators Act”).

[16] The School sent a further letter, also dated 15 June 2021, to the applicant advising him that because he had failed to submit the documentation required (to have his employment contract renewed) the School would not renew his employment contract.

[17] The applicant referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (hereafter the “CCMA”) on 12 July 2021. In the referral, the applicant alleged that he had been unfairly dismissed because he had a reasonable expectation of renewal. He also alleged that his dismissal was automatically unfair because the reason for his dismissal was his religious and political beliefs. The CCMA failed to enrol the dispute for conciliation and issued no certificate of outcome of conciliation.

[18] The applicant referred a dispute to this court in which he alleges that he had a reasonable expectation that his contract would be renewed, and he was dismissed because of his religious and political beliefs. He alleged that he was unfairly discriminated against as contemplated in section 6(1) of the Employment Equity Act No. 55 of 1998 alternatively section 186(1)(b) and 187(1)(f) of the Labour Relations Act No. 66 of 1995 (hereafter “the LRA”).

Legal issues and analysis

[19] In respondent’s statement of defence, it raised four special pleas. However, at court, the respondent raised a further special plea. The applicant argued that this amounted to trial by ambush. I don’t agree. Prior notice was given to the applicant. In any event, the court is enjoined to consider all

jurisdictional issues regardless of when they are raised. This new special plea will be dealt with as the fifth special plea.

First special plea: Employment of Educators Act (the “Educators Act”)

[20] The applicant alleges that the applicant was deemed to be dismissed in accordance with section 14(1)(a) of the Educators Act which reads as follows:

“An educator appointed in a permanent capacity who is absent from work for a period exceeding 14 consecutive days without permission of the employer is deemed to be shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct.” (Own emphasis)

[21] Section 1 of the Educators Act defines “educator” as an individual appointed in an “educator establishment” determined by the Department of Education. The applicant was not engaged in an educator establishment determined by the Department. Instead, the applicant was engaged by the SGB. Accordingly, the applicant was not an educator as contemplated by the Educators Act. In any event, section 14(1)(a) applies only to educators engaged in a permanent capacity and the applicant was not engaged in a permanent capacity. Section 14(1)(a) of the Educators Act clearly does not apply to the applicant. Accordingly, the first special plea is dismissed.

Second special plea: Fixed term employment contract

[22] The respondent alleges that the applicant was not dismissed because he was engaged on a fixed term employment contract, and the term of his contract expired.

[23] The applicant, on the other hand, alleges that he has a reasonable expectation that his contract would be renewed because, among other things, he had been employed for more than two decades on a fixed term basis. The applicant also alleges he had a reasonable expectation of renewal because he was a good employee and had been recognised as such.

[24] If the applicant can prove these allegations, the applicant would have proved that he was dismissed in terms of section 186(1)(b) read with section 192(1) of the LRA. The applicant states that this issue cannot be determined in the absence of evidence and he requested the opportunity to lead evidence. It would be unfair to determine this issue without affording the applicant an opportunity to lead evidence. In the circumstances, this issue must be determined at trial.

Third special plea: No referral under the Employment Equity Act

[25] Section 6(1) of the Employment Equity Act reads as follows:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground.” (Own emphasis)

[26] Section 10(1) of the Employment Equity Act reads as follows:

“In this section, the word ‘dispute’ excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.” (Own emphasis)

[27] When section 6(1) and 10(1) of the Employment Equity Act are read together it is clear that these sections are not applicable to this dispute. The court is not required to consider an employment policy or practice. In the circumstances, no referral in terms of the Employment Equity Act was required.

[28] The Employment Equity Act is, in fact, entirely irrelevant. The dispute falls to be determined under section 187(1)(f) of the LRA which prohibits a

dismissal based on various listed grounds.³ Section 187(1)(f) of the LRA prohibits dismissal on the basis of religion, beliefs, political opinions.

[29] The third special plea is, accordingly, dismissed.

Fourth special plea: Jurisdiction of Labour Court

[30] The respondent alleges that this court has no jurisdiction to hear and determine any dismissal dispute where the applicant has alleged that the dismissal is the result of unfair discrimination. This submission flies in the face of the express, and clear, provisions of the LRA.

[31] Section 187(1)(f) of the LRA reads as follows:

“A dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 5 or, if the reason for the dismissal is –

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility” (Own emphasis)

[32] This dispute concerns an alleged dismissal where the applicant alleges that the reason for his dismissal was his religion, belief and political opinion.

[33] Section 191(5)(b) of the LRA states that an employee may refer a dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is automatically unfair. This is what the applicant has done.

³ Section 187(1)(f) of the LRA also prohibits dismissal on other arbitrary grounds, which are analogous to the listed grounds.

[34] Section 157(1) of the LRA states *inter alia* that the Labour Court has jurisdiction in respect of all matters which are to be determined by the court under the LRA or any other law.

[35] When section 187(1)(f) is read together with section 191(5)(b) and 157(1) of the LRA there can be no question that this court has jurisdiction over this dispute.

Fifth special plea: there must be actual conciliation, or a certificate

[36] Respondent alleges that following a referral to the CCMA or Bargaining Council there must be an attempt to conciliate the dispute, and this has not happened because the CCMA never set the matter down for conciliation. The respondent also alleges further that the dispute can only be referred to this court after a certificate of outcome of conciliation has been issued, and this has not happened.

[37] In *SAMWU on behalf of Manentza v Ngwathe Local Municipality & others*⁴ ("Ngwathe") the LAC held as follows:

On a proper interpretation, s 191(5) of the LRA entitles an employee to refer an unresolved unfair dismissal or unfair labour practice dispute for arbitration to the CCMA or a bargaining council, in terms of subsection (5)(a) thereof, or for adjudication to the Labour Court, in terms of subsection (5)(b) thereof, upon the occurrence of either of two events: the issue of a certificate of non-resolution of the dispute or the expiry of the 30-day period from either the CCMA's or the bargaining council's receipt of the referral. The effect of this interpretation is that the occurrence of either of these two events entitles an employee to request the bargaining council concerned or the CCMA to arbitrate the dispute in terms of s 191(5)(a) of the LRA or to refer the dispute to the Labour Court for adjudication in terms of s 191(5)(b) thereof.

(Own emphasis)

⁴ (2015) 36 ILJ 2581 (LAC) at para 27

[38] In *National Union of Metalworkers of SA v Intervolve (Pty) Ltd & others*⁵ (“*Intervolve*”) the majority judgment, per Cameron J (as he then was) of the Constitutional Court stated as follows:

“Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed.” (Own emphasis)

[39] It is clear from both *Ngwathe* as well as *Intervolve* that a referral to this court, under section 191(5)(b) of the LRA, does not require actual conciliation, nor does it require the prior issue of a certificate of outcome of conciliation.

[40] The Constitutional Court stated in *AMCU and others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) and others*:⁶ “Judicial precedent is a principle of our law. It obliges lower courts to follow decisions of higher courts, for as long as those decisions remain in operation.”

[41] The respondent referred me to *Matunga v G & R Hydraulics (Pty) Ltd*⁷ in which this court held that, despite a referral to conciliation having been made, the issue of a certificate of outcome of conciliation was a jurisdictional prerequisite for a referral of an automatically unfair dismissal to adjudication. *Matunga* contradicts the express language of section 191 of the LRA, but it also contradicts the abovementioned precedents. Accordingly, *Matunga* is clearly wrong, and I do not intend to follow it.

[42] In the circumstances, a referral of a dispute to this court in terms of section 191(5)(b) of the LRA does not require actual (prior) conciliation, nor does it require the prior issue of a certificate of outcome of conciliation. The LRA requires only that the dispute must be referred to conciliation. The fifth special plea is dismissed.

⁵ (2015) 36 ILJ 363 (CC) at para 32

⁶ (2020) 41 ILJ 1837 (CC) at para 24

⁷ Unreported Judgment (JS991/2020) ZALCJHB 343 (29 September 2021)

Costs

[43] I have dismissed all the special pleas, save for the second special plea which must be determined after evidence has been presented at trial. Accordingly, it is premature to consider costs in relation to the special pleas. In any event, as the Constitutional Court has warned⁸ costs do not automatically follow the result in employment disputes. In the circumstances, law and equity do not compel me to make a cost order.

Conclusion

[44] In the result, the special pleas are all dismissed save for the second special plea which must be determined after all the evidence has been presented. There is no order as to costs. The dispute may be enrolled for trial.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Nikki Stein
Instructed by: Malcolm Lyons & Brivik Inc

For the Respondent: Advocate M Moolla
Instructed by: N Moola Inc

⁸ *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC)