IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JA43/03

In the matter between

OMEGA HOLDINGS LIMITED **1ST APPELLANT**

SHANGAI INDUSTRIAL INVESTMENT HOLDINGS CO LTD **2ND APPELLANT**

and

LI; B C S **RESPONDENT**

JUDGMENT

ZONDO JP

[1] The respondent was initially employed by the second appellant but by agreement between the second appellant and the respondent, the latter was seconded to the first appellant. It seems that he later concluded a contract of employment with the first appellant. This appears to have happened in 1999. In 2001 the respondent was dismissed. It is not clear whether the reason for his dismissal was poor performance, misconduct or operational requirements.

However, for present purposes the reason for his dismissal is irrelevant.

[2] A dispute arose between the respondent and the appellants about the fairness of the respondent's dismissal. The respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") for conciliation. Attempts to resolve the dispute through conciliation failed. Thereafter the respondent referred the dispute to the Labour Court for adjudication. In his statement of claim the respondent did not confine himself to the dismissal dispute but also included four claims sounding in money. I deal with each one of them in turn here below.

ClAIM 1

[3] The respondent gave the particulars of this claim in paragraphs 16.1 – 16.4 of his statement of claim. He alleged that the first appellant was obliged in terms of the contract of employment between them embodied in annexures "A" and "B" to the statement of claim to pay him in South African Rands on a monthly basis "**an amount equivalent to 11K$ portion of the package.**" He went on to allege that the first appellant had by mistake used the respondent's net salary instead of the gross salary when applying the US exchange rate and "**deducted tax from the net amount in Rands"** instead of the gross amount**.** He alleged that the effect thereof was that the respondent had "**double tax deducted from his salary**" with the result that "**the Rand portion of the [respondent]'s salary was lower than it should have been ("the short payment**").

ClAIM 2

[4] The only allegation made with regard to the second claim in the statement of claim is that **"(d)uring the [respondent's] employment with the 1st [appellant], the 1st [appellant] unlawfully deducted an amount of R 19 571,08 from the [respondent's] salary payments**."

CLAIM 3

[5] The third claim was for the payment of an amount of R 50 000,00 being in respect of educational assistance allowance which was to be spent on the respondent's son's education. The respondent alleged that the first appellant had been contractually obliged to pay to him such allowance but had failed to do so.

CLAIM 4

[6] The fourth claim was against the second appellant. The respondent alleged that the second appellant was contractually "**obliged to pay to the [respondent] air passage for annual leave**." He alleged that such benefit had been "**excluded from the notice pay that the 1st [appellant] paid to the [respondent]."** He alleged that in the premises the second appellant was liable to pay R11 000,00 in respect of such item.

[7] In their response to the statement of claim, the appellants objected to the jurisdiction of the Labour Court to entertain the claims

sounding in money on the basis that such claims were claims in terms of the Basic Conditions of Employment Act, NO 75 of 1997 ("**the Act**") and that, since the respondent was pursuing such claims in the same proceedings in which he was pursuing an unfair dismissal claim, he had been obliged to refer the claims sounding in money to the CCMA for conciliation but, as he had failed to do so, the Labour Court had no jurisdiction to entertain them.

[8] The appellants relied upon sec 74 of the Act for their objection to the jurisdiction of the Labour Court. Section 74 reads as follows:-

> **"74. Consolidation of proceedings.**
>
> **(1) A dispute concerning a contravention of this Act may be instituted jointly with proceedings instituted by an employee under Part C of this Chapter.**
>
> **(2) If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if-**
>
> **(a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;**
>
> **(b) the amount has not been owing to the employee for longer than one year; and**
>
> **(c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount.**
>
> **(3) A dispute concerning any amount that is owing to an employee as a result of a contravention of this Act may be initiated jointly with a dispute instituted by**

that employee over the entitlement to severance pay in terms of section 41(6).”

[9] Section 191 of the Labour Relations Act provides for the referral of a dispute about the fairness of a dismissal to the CCMA or a bargaining council, where there is a bargaining council with jurisdiction in respect of the dispute, for conciliation. It also provides that, if thereafter, the dispute remains unresolved, it must be referred to either arbitration by the CCMA or by a bargaining council having jurisdiction or to the Labour Court for adjudication. Accordingly, sec 74(2)(a) of the Act must be read to mean that a claim such as is contemplated in sec 74(2) must be referred to the CCMA or a bargaining council, if there is one which has jurisdiction, for conciliation.

[10] It is common cause that the claims sounding in money which the respondent included in his statement of claim were never referred to conciliation. It was on the strength of this fact that the appellants contended in effect that there had been no compliance with the condition prescribed in sec 74(2)(a) of the Act and that, for that reason, the Labour Court lacked jurisdiction to entertain such claims. The appellants did not rely upon sec 74(2)(b) and (c). Accordingly, those provisions will not be dealt with in this judgment.

[11] It will be noted that in terms of sec 74(2) of the Act the claim that the Labour Court is empowered to hear if the conditions set out in paragraphs (a) – (c) of subsection (2) are met is a “**claim for an amount that is owing to that employee in terms of this Act …”**

It stands to reason that, if a claim is for an amount that is owing to the employee but is not owing to that employee in terms of the Act, then the conditions contained in paragraphs (a) to (c) of sec 74(2) will not apply.

Proceedings in the Labour Court

[12] In the Labour Court the respondent's legal representative conceded that the respondent's claims were claims "**in terms of**" the Act but sought to argue another point on which it is not necessary to elaborate because it was not pursued on appeal. Nevertheless, the Court a quo decided the matter against the appellants precisely on the point in respect of which the respondent had made the concession favourable to the appellants. It held that the respondent's claims sounding in money were not claims "**in terms of**" the Act but were claims in terms of the contract of employment. It, accordingly, dismissed the appellants' objection to its jurisdiction. As the fact that the Court a quo decided the matter on a point which had not been argued was not one of the grounds of appeal, I refrain from expressing a view on whether the Court a quo was right to do so. The Court a quo subsequently granted the appellants leave to appeal to this Court against its judgment. Hence, this appeal.

The appeal

[13] On appeal Counsel for the appellants persisted in his contention that the respondent's claims sounding in money were claims "**in terms of"** the Act as contemplated by sec 74(2)(a). He submitted

that, therefore, the respondent was obliged to have referred the claims sounding in money to conciliation in terms of sec 74(2)(a) of the Act read with sec 191 of the Labour Relations Act. Counsel submitted that the respondent's failure to have done so deprived the Labour Court of the jurisdiction to hear such claims. Counsel for the respondent contended that the claims were not claims "**in terms of**" the Act but were contractual claims. It is necessary to consider each of the four claims to determine whether each one of them can in any way be said to relate to an amount that is owing "**in terms of**" the Act as provided for in sec 74(2). Put differently, the question to ask is: Was each amount claimed by the respondent "**an amount owing to [the respondent] in terms of"** the Act? If the amount is one owing in terms of the Act, then sec 74(2) applies. If the amount is not or cannot be said to be an amount owing to the respondent in terms of the Act, then sec 74(2) does not apply.

[14] It seems to me that the provisions of sections 2, 4 and 5 of the Act are significant. Section 2 of the Act reads thus:-

> "2. **Purpose of this Act – The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are –**
>
> **(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –**
>
> **(i) <u>by establishing and enforcing basic conditions of employment; and</u>**
>
> **(ii) <u>by regulating the variation of basic conditions of employment;</u>**

(b) **to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation**." (Underlining supplied).

[15] A "**basic condition of employment**" is defined in sec 1 of the Act as meaning "**a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment.**" Section 4 of the Act reads thus:

> **"4. Inclusion of provisions in contracts of employment- A basic condition of employment constitutes a term of any contract of employment except to the extent that –**
>
> **(a) any other law provides a term that is more favourable to the employee;**
>
> **(b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or**
>
> **(c) a term of the contract of employment is more favourable to the employee than the basic condition of employment."**

Section 5 read thus:

> **"5. This Act not affected by agreements. - This Act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act."**

[16] It is not unusual for a contract of employment to contain no express provision dealing with a particular issue of employment. In such a case, if the Act does contain a provision on such an issue, the

provision in the Act becomes applicable and can be enforced by the employee. It is also possible that a contract of employment may have a clause dealing with a certain issue and the Act would contain no provision dealing with such issue. In such a case such provision in the contract would not be a basic condition of employment because the Act would not have a provision dealing with it. In such a case there can be no difficulty whatsoever with a proposition that any claim for the enforcement of the provision of the contract of employment concerned is a claim in terms of the contract and not in terms of the Act. Where both the contract and the Act make provision for an issue in the same way and to the same extent, the question whether a claim in relation to such issue will be a claim in terms of the contract or in terms of the Act or both may present a difficulty.

Are the respondent's claims in terms of the Act?

[17] The question whether the respondent's claims are claims for amounts "**owing --- in terms of**" the Act is not an easy one. Under the Basic Conditions of Employment Act NO 3 of 1983 ("**the old Act**") a similar question arose in a number of cases when employees sued civilly for the recovery of monies due to them by their employers. In such cases the problem with suing civilly for the recovery of such monies was that sec 30(3) of the old Act required the production of a *nolle proequi* certificate before a civil court could hear such claims. The relevant provision of the old Act referred to claims "**by virtue of**" the provisions of that Act. The employee would sue the employer for the recovery of such monies and the employer would except to the claim on the basis that such a

claim was one "**by virtue of**" the old Act and could, therefore, not be instituted civilly unless a *nolle proequi* certificate had been issued by the relevant Attorney-General.

[18] It seems to me that there are two answers to the appellants' contention. The first is that the respondent's claims are not claims "**in terms"** of the Act. This is because the Act deals with minimum terms and conditions of employment and the respondent's claims do not relate to minimum terms and conditions of employment. They relate either to the types of claims that are not dealt with in the Act or if they are types which are dealt with in the Act, they are much better terms and conditions than those provided for in the Act and, therefore, fall outside the Act. In this regard it must be noted that in terms of sec 4(c) of the Act, which has already been quoted above, a basic condition of employment does not constitute "**a term of any contract of employment to the extent that a term of the contract of employment is more favourable to the employee than the basic condition of employment."** Furthermore, in this regard it needs to be borne in mind that the primary objects of the Act include **"to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution-**

1. **by establishing and enforcing basic conditions of employment; and**
2. **by regulating the variation of basic conditions of employment".**

[19] In other words the Act is about the establishment and enforcement of basic conditions of employment and the regulation of the variation of basic conditions of employment in order to give effect

to and regulate the right to fair labour practices conferred by sec 23(1) of the Constitution. As already stated earlier, a basic condition of employment is defined in sec 1 of the Act as "**a provision of this Act or a sectoral determination that stipulates a minimum term or condition of employment".** The respondent's claims sounding in money do not relate to any **"provision of the Act"** or a sectoral determination **"that stipulates a minimum term or condition of employment".** The claims are not about the enforcement of basic terms and conditions of employment provided for in the Act. Accordingly, the claims are not claims of amounts owing to the respondent "**in terms of"** the Act. All of the respondent's claims are based on alleged breaches of the contract of employment between the parties and not on the contravention of any provision of the Act. On this ground alone the appeal stands to be dismissed. The second answer to the appellants' contention is dealt with below.

[20] Another ground upon which the appeal can also be dismissed is one that is based on sec 77(3) of the Act. Section 77 (3) of the Act provides:

> **"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."**

[21**]** The effect of sec 77 (3) is to confer upon the Labour Court the same civil jurisdiction that the High Court or any other civil court has in respect of "**any matter concerning contract of**

employment". Section 77 (3) goes on to make it clear that that jurisdiction exists **"irrespective of whether any basic condition of employment constitutes a term of that contract".** It seems to me that the purpose of the provision beginning with the word "**irrespective"** was to leave no room for argument that such jurisdiction did not cover a contract of employment that has a condition or term that constitutes a basic condition of employment.

[22] In order to determine whether in a particular matter the Labour Court has the jurisdiction which is conferred upon it by section 77 (3), two questions need to be asked. The first is: Is the matter at hand a **"matter concerning a contract of employment"**? If the answer is no, then the Labour Court has no jurisdiction conferred by sec 77(3) of the Act to deal with such matter and that is the end of the matter. If, however, the answer is yes, the inquiry proceeds to the next question. The next question is: does the High Court, or, any civil court for that matter, have jurisdiction to hear and determine this matter? If the answer is no, the Labour Court has no jurisdiction based on sec 77(3) of the Act to determine the matter. If no civil court would have had jurisdiction to determine the matter, the Labour Court would also not have jurisdiction to deal with the matter. If the answer is yes, the Labour Court also has jurisdiction to deal with the matter. And its jurisdiction in regard to such matter is exactly the same as that which the High Court would have to deal with such matter. In other words no issue of jurisdiction which could not be raised before the High Court can be raised before the Labour Court.

[23] The purpose of section 77 (3) was to enable the Labour Court to hear and determine any matter concerning a contract of employment which the High Court or any civil court has jurisdiction to hear and determine. It sought to avoid the anomaly that would have arisen if there were matters concerning contracts of employment which the High Court and the Magistrates' courts could hear and determine which the Labour Court could not hear and determine.

[24] Where the Labour Court is faced with a matter concerning a contract of employment which the civil courts have jurisdiction to hear and determine, sec 74 does not preclude it from hearing and determining it in the same way that a civil court such as the High Court would deal with it if it was before such a court. Section 74 could not have been intended to encourage litigants to go to the civil courts rather than the Labour Court in regard to matters that concern contracts of employment. To construe sec 74 to mean that, if a litigant brings to the Labour Court a matter concerning a contract of employment which he could also have taken to the High Court, he will be faced with hurdles that he would not face if he had taken the matter to the High Court would be to say that the effect of the Act is to encourage litigants to take such matters to the High Court and Magistrate's court rather than to the Labour Court. It would be difficult to find any justification in the provisions of the Act for such a drastic conclusion, particularly because the Labour Court is a specialist superior court whose Judges have experience and expertise in labour and employment matters. In my view the purpose of sec 77 (3) was to facilitate the hearing of such matters by the Labour Court even though they could also be heard

by the High Court and other civil courts. In my judgement that the Labour Court has concurrent jurisdiction with the High Court in respect of such matters means that the jurisdiction that the Labour Court exercises in such matters is exactly the same as the jurisdiction that the High Court has in respect of such matters. Accordingly, one should be extremely slow to adopt a construction of the Act that will or may mean that there are more jurisdictional requirements that a litigant must satisfy if he brings such a matter to the Labour Court than he has to meet if he brings the same matter to the High Court because such a construction of the Act will make nonsense of the whole idea that the two Courts have concurrent jurisdiction in such matters. I can find no justification in the Act to adopt such a construction of the Act. Such a construction of sec 74(2) would be in conflict with or inconsistent with sec 77(3).

[25] In my view the provision of sec 74(2) of the Act must be read to refer to claims in respect of which the civil courts would not have jurisdiction. If it is construed in that manner, it is reconcilable with section 77(3). In such a case the position would be that, if a money claim that is brought before the Labour Court together with an unfair dismissal dispute is a claim in respect of which the civil courts have no jurisdiction and it concerns a contract of employment but the Labour Court has jurisdiction in terms of the Act, sec 74 (2) would apply. However, if the claim is a matter concerning a contract of employment and the civil courts have jurisdiction to determine it, sec 74 (2) does not apply and the Labour Court has jurisdiction to determine it. Claims sounding in money in respect of which the civil courts would not have

jurisdiction would include claims covered by the exclusive jurisdiction conferred on the Labour Court by sec 77 (1) of the Act. Section 77 (1) provides thus: **"Subject to the constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except, in respect of an offence specified in sections 43,44,46,48,90 and 92".**

[26] Some of the money claims in respect of which the Labour Court would have exclusive jurisdiction and in respect of which the civil courts would, therefore, have no jurisdiction would be claims for payment of an annual leave pay provided for in sec 21, leave pay provided for in sec 23 as well as payments for pay provided for in sec 18 (2) and (3) of the Act where the contract of employment does not contain any provision for annual leave, sick pay and holiday pay. The High Court would have no jurisdiction in respect of such claims because there would be no contractual basis for them and they would be based on the Act and the Act confers exclusive jurisdiction on such matters on the Labour Court.

[27] The claims in issue in this matter are all claims in respect of which the High Court would have jurisdiction and they are all matters concerning a contract of employment as contemplated in sec 77 (3) of the Act. Accordingly, sec 74 (2) does not apply to them and the Labour Court has concurrent jurisdiction with the High Court and any other civil court, for that matter, which is conferred upon it by sec 77 (3) to deal with such claims. Accordingly, on this ground, too, the appeal stands to be dismissed. With regard to costs I can

see no reason why costs should not follow the result in a matter such as this one.

[28] In the premises I make the following order:

1. The appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying, the other to be absolved.

ZONDO JP

I agree.

DAVIS AJA

I agree.

JAPPIE AJA

Appearances:

For the appellant:	Adv. L. Halgryn
Instructed by:	Joubert Attorneys
For the respondent:	Adv G. Hardy
Instructed by:	Allardyce & Partners Attorneys
Date of judgment:	9 February 2006