



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JHANNESBURG

Not Reportable

Case no: JA 2013/13

In the matter between:

BOOYSEN MFANANYANA MASHEGO

Appellant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

Respondent

Heard: 20 March 2014

Delivered: 13 May 2014

Summary: jurisdiction of the Labour to hear automatically unfair dismissal- appellant's case not one contemplated in section 191(5)(b) of the LRA- Labour Court not bound by the description of dispute in the certificate of outcome. Labour Court lacking jurisdiction for unfair dismissal dispute- Labour Court judgment upheld- appeal dismissed-

Coram: Waglay JP, Molemela AJA and Sutherland AJA

JUDGMENT

SUTHERLAND AJA:

Introduction

- [1] This case is about whether or not the Labour Court was correct to hold that it had no jurisdiction to try the case put up by the appellant (applicant *a quo*).

The appellant was aggrieved by his allegedly unfair dismissal by the respondent. An alleged unfair dismissal case must be heard by a commissioner of the CCMA unless the aggrieved employee alleges that the reason for the dismissal is automatically unfair as contemplated in Section 191(5)(b) of the LRA, in which case the matter must be referred to the Labour Court for adjudication.

[2] The appellant referred his case to the Labour Court, contending that the case pleaded made out a case for an alleged automatically unfair dismissal. Prompted by the trial judge, this question was addressed at the outset of the proceedings as the answer to it would determine whether the court had jurisdiction. The judge, after argument, held that the court lacked jurisdiction because no such case was made out. This is the heart of the appeal. In addition the costs order made against the appellant is challenged.

[3] Other lines of argument were taken which can be disposed of summarily.

3.1. First, it was contended that because the conciliator, in the certificate of non-resolution, had mentioned a referral to the labour court and alluded to an automatically unfair dismissal, the court was bound by the say-so in that certificate unless and until the certificate was reviewed and set aside.

3.2. This is mistaken; the certificate has no bearing on a court deciding whether it has jurisdiction. (see: NUMSA and Others v Driveline Technologies (Pty) Ltd (2000) 21 ILJ 143 (LAC) at [9])

3.3. Secondly, with reference to a passage in the minute of the pre-trial conference that recorded the respondent as stating that it would argue 'at the conclusion of the matter' that the court had no jurisdiction because the dismissal was 'not automatically unfair in terms of section 187(1)(d)(i) of the LRA' it was contended on behalf of the appellant that it was not permissible to argue that point at the outset.

3.4. This is mistaken. Logic alone demands that any challenge to the jurisdiction of a court be resolved before the potential waste of time,

energy and money on a trial. It is a correct proposition that once litigants have committed themselves to the issues to be contested in a pre-trial conference, they may not unilaterally repudiate that commitment. (See: *Filta-Matrix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614 B- D.) This is a rule founded on common sense and fairness which are required to facilitate a fair adjudicative process.

3.5. However, where an inappropriate arrangement about the *conduct* of the proceedings is agreed upon, that agreement does not bind the court. Still less is a court bound by a mere statement by a litigant about what and when it proposes to argue a point, which does not amount to an agreement, but is merely a declaration of intent to fairly alert the opponent to its intentions. Accordingly, the allusions in the minute are irrelevant to the propriety of the timing of the decision about the existence of jurisdiction.

[4] Because the existence of an alleged automatically unfair dismissal is a jurisdictional prerequisite to the Labour Court hearing a trial, it must logically follow that it is incumbent on a court to enquire into whether such a case has indeed been articulated for its adjudication, whether that question is raised by the litigants or not. This enquiry is not to be confused with an enquiry into the contested merits of the allegations and counter-allegations, which is the purpose of the trial itself.

[5] If a proper interpretation of the pleadings and any common cause facts put before the court demonstrates the absence of a set of circumstances that can support a conclusion that a dismissal took place that was automatically unfair then the court lacks jurisdiction and ought to refuse to hear the matter.

[6] The question in this matter, thus, resolves itself into whether or not such a case was shown on the pleadings and on the agreed facts set out in the pre-trial conference minute.

[7] The statement of claim alleged that the appellant was charged with misconduct and subjected to a procedurally unfair disciplinary enquiry in that,

among other complaints, his opportunity to cross-examine and to testify were truncated. Also, it was alleged that the charges were meritless as he was not guilty of any misconduct.

- [8] The appellant avers that he was dismissed. He then appealed. The appeal tribunal sent him a written notification of the outcome. It stated:

‘(1) I uphold the decision of the chairperson of the hearing to dismiss you from your employment with NUMSA.

or

(2) You are demoted to a position of local organiser either Ekurheleni region or JC Bezuidenhout region wherever there is a vacancy, the idea is not to place you in a position of trust and responsibility either in the region or head office for a period of four years.

(3) You will earn the salary of an organiser.

(4) You will be required to respond ...in writing within 5 days of your choice of one of these sanctions.”

- [9] The appellant pleaded that upon receipt of this notice, he responded and:

‘...he opted /or chooses the demotion option in the sanction subject to and without prejudice to any of his rights to challenge both the finding of guilty and the sanction.’ (Statement of Claim: para [41])

- [10] The appellant pleaded that the respondent reacted by telling the appellant:

‘ ...he should not report to the respondent head office or any of the two NUMSA regions...in that it regards the [appellant’s] acceptance of the alternative sanction conditional and therefore the [appellant] had repudiated the offer.” (Statement of Claim: para [42])

- [11] These averments were admitted by the respondent.

- [12] The appellant then went onto plead that he was dismissed twice. He construed the verdict of the initial disciplinary enquiry as the ‘first dismissal’ and the respondent’s refusal to allow him to report for duty after he chose the

demotion option as a 'second dismissal'. The respondent's statement of defence did not specifically take issue with the appellant's construction of two dismissals but nevertheless denied all the allegations which were critical of the procedure and the substantive justification for the outcome of dismissal.

[13] The appellant went on to plead:

'The second dismissal of the [appellant] is in terms of section 187(1)(d)(i) of the LRA automatically unfair as the reason for the dismissal is that the [appellant] indicated an intention to take action against the respondent by exercising rights conferred to him by the LRA.' (Statement of Claim: para 51).

This averment was denied by the respondent.

[14] The pre-trial conference minute contained a set of common cause *facts*.

Paragraphs 2.21 – 2.23 are relevant:

'2.21: After finding the applicant guilty, and having given the parties an opportunity to present mitigating circumstances and aggravating circumstances the chairperson provided the parties with his 'respondents' deputy secretary via Email on 25 October 2010.

2.22: The applicant appealed the sanction, and the appeal was held on 6 November 2010 under the chairmanship of the respondent's vice- president, Mr philemon Bokaba.

2.23: Bokaba found the applicant guilty and imposed a sanction in terms whereof the applicant was provided with an alternative to dismissal, namely demotion to the position of local organiser Ekurheleni or JC Bezuidenhout region, subject to availability of positions in either branch. The applicant was given five days to consider this alternative and to inform the respondent's general secretary thereof in writing.'

[15] Do these averments and common cause facts constitute a platform upon which to conclude that the dismissal was automatically unfair? The Court had to assume the truth of the *facts* alleged by the appellant, which in any event were all admitted, and test whether or not they could support the conclusion pleaded in paragraph 51 of the statement of case.

- [16] It seems to me that two insurmountable obstacles impede the argument of the appellant. First, the notion of two dismissals is unsustainable. Second, the absence of *facts* pleaded to show that the dismissal was caused by an expression of an intention that a dispute would be referred to the CCMA.

Two dismissals?

- [17] The very conceptualisation of a double dismissal is flawed. A person who has been dismissed cannot, logically, be dismissed a second time. It is possible for there to be sequential dismissals of a person, but that notion implies that the 'first' dismissal was rescinded. However that is not what was pleaded.
- [18] In my view, the construction of the appellant's case was clumsily composed without really thinking through the implications of the allegation of two dismissals or properly identifying the legal standing of each of the critical events.
- [19] When an employee is lawfully, albeit unfairly dismissed, the employment relationship is terminated there and then. (It is true that for the purpose of proceedings in the Labour law realm the necessary fiction is upheld that the relationship continues but that is a legal construct which exists to facilitate equity litigation and does not undermine the finality of the dismissal *per se*.) Unlike in legal proceedings where an appeal suspends the operation of a judgment, no such doctrine of suspended operation is applicable to a dismissal by an employer.
- [20] An appeal to higher managerial authority by an employee invites that authority to undo or reverse what has already become a *de jure* fact: the dismissal. Accordingly, the appeal tribunal cannot 'dismiss' an employee for a second time. When an appeal fails, the initial sanction of dismissal stands. To belabour the point, when an employee's appeal fails it cannot be construed that he was unfairly dismissed because his appeal ought to have succeeded. The appeal tribunal may be wrong, but its decision does not overtake or succeed that of the initial disciplinary enquiry. In cases where the appeal succeeds, the initial dismissal is undone or retrospectively rescinded.

- [21] It follows that the appellant's premise of two dismissals was fatally flawed and there could only ever be one dismissal: that which took effect upon the decision of the disciplinary enquiry; ie the dismissal which the appellant construed as the 'first'; dismissal'. The inevitable consequence of this analysis is that the very foundation for the complaint about the so-called 'second dismissal' is demolished.

What facts are there to show the cause of the dismissal was the intention to refer a dispute to the CCMA?

- [22] The sole 'fact' alleged, as distinct from a conclusion, to find an automatically unfair dismissal is that the respondent offered to ameliorate the sanction of dismissal if the appellant was content with a demotion and that his counter offer of a conditional acceptance was refused, the confirmation of the dismissal being confirmed. This fact is common cause. Can it support the conclusion that the reason the appellant was dismissed was because he intended to challenge the disciplinary action taken against him? In my view, it cannot.
- [23] The sole dismissal was the result of having been found guilty of misconduct. The offer of an amelioration of the sanction of dismissal cannot transform the dismissal or in any way compromise the reason for the dismissal. Therefore the pleaded allegations of fact cannot, on their own terms, lead to a finding that the reason for the dismissal was, as alleged, the prohibited conduct described in section 187(1)(d)(i): ie, " A dismissal [which is] automatically unfair ...[because] the reason for the dismissal is that the employee indicated an intention to take action against the employer, by exercising any right conferred by [the LRA]"
- [24] The Labour court was therefore correct to hold that no case for an automatic unfair dismissal was made out and as result, the court lacked jurisdiction.

The discretion in section 158(2)(a) to refer the matter to the CCMA

- [25] It was contended that once the Labour court found it lacked jurisdiction it ought to have exercised its discretion to refer the matter to the CCMA and not

leave it for the appellant to be put to the trouble of starting afresh and, axiomatically, being obliged to seek condonation for the late referral.

[26] Although the point was mentioned in the notice of appeal, the heads of argument filed did not allude to the point. In oral argument it was again pressed.

[27] However, nowhere has any substantiation been advanced why the failure to make such an order was an unjudicial exercise of discretion, the necessary fount of any criticism of a discretionary decision. The ostensible basis for the contention seems to be a plea *ad misericordium*. That is not enough.

[28] Thus, the argument, bereft as it of a cogent foundation, must fail.

Costs

[29] The order issued on 27 August 2012, in respect of the Trial Court's judgment, by the registrar, contains an order that the appellant was to pay the costs. However, when the *ex tempore* judgment was given on 27 August 2012, the judge quite plainly stated that there would be no costs order made. The discrepancy has not been explained. In my view, the judges' initial stance should prevail.

[30] As regards costs in the appeal, I am of the view that no order as to costs be made.

Order

[31] The appeal is dismissed, save in respect of the costs order.

[32] The appeal against the costs order is upheld. The order that the appellant (applicant *a quo*) pay the costs is set aside, and replaced with an order that there be no order as to costs.

[33] In the appeal, there shall be no order as to costs.

Sutherland AJA

I agree

Waglay JP

I agree

Molemela AJA

APPEARANCES:

FOR THE APPELLANT:

Adv W Mokhari SC, with him, Adv H W Sibuyi,

Instructed by Faku Attorneys.

Ref: Mr T Faku

FOR THE RESPONDENT:

Mr B M Masuku of Mervyn Taback Inc.