

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO. J 104/09

In the matter between:

MAYO MTOKAFONA EPHRAIM

Applicant

And

BULL BRAND FOODS (PTY) LTD

Respondent

JUDGMENT

VAN NIEKERK J

- [1] The applicant brings this claim under the Basic Conditions of Employment Act, 1997, seeking payment of a month's notice pay consequent on the termination of his employment by the respondent. The claim is for R3 133.80. The respondent denies liability to the applicant, on the basis that it was entitled to terminate the applicant's employment without notice.
- [2] The merits of the claim are not relevant at this juncture. When this matter was called yesterday, I sought clarity from Mr. Scholtz, who appeared for the applicant, as to the nature of the applicant's cause of action since the precise basis on which the applicant sought the Court's intervention to secure the relief he claimed was not immediately apparent from the pleadings. The applicant had recorded in his statement of claim that in terms of s 77(1) of the BCEA this Court generally has exclusive jurisdiction in respect of all matters under the Act, and that in terms of s 77(3) this

Court has concurrent jurisdiction with the civil Courts to hear matters concerning contracts of employment. When pressed on the issue, Mr. Scholtz conceded that the applicant had not pleaded a claim based in contract, i.e. that the applicant was not seeking to invoke the Court's jurisdiction under s 77(3). Rather, Mr. Scholtz contended, the applicant relied on s 77(1) of the Act, effectively to enforce the right to notice or payment in lieu of notice established by s 37.

- [3] The applicant's position raises the question whether this Court has the power effectively to enforce the provisions of the BCEA as an agent of first instance. Mr. Scholtz submitted that in terms of s 37, an employee was entitled, on termination of employment, to the prescribed notice. The respondent had failed to pay the applicant notice pay, being the equivalent of four weeks' remuneration. The relief sought in terms of the applicant's statement of claim is an order directing the respondent to pay the applicant his leave pay. Section 77 (1), by conferring exclusive jurisdiction on this Court in respect of all matters in terms of the Act, entitles the Court to direct that the applicant should be paid his notice pay.

- [4] Section 77 (1) of the BCEA reads as follows:

"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"

In my view, the provisions of this section do no more than confer a residual exclusive jurisdiction on this Court to deal with those matters that that the Act require be dealt with by the Court. The wording of the section does not confer a jurisdiction on the Court to deal with matters that must

be dealt with, in the first instance, by duly appointed functionaries. Mr. Scholtz then relied on s 77A (g) (which empowers the Court to make orders dealing with any matter necessary or incidental to performing its functions in terms of the Act) as the basis on which the Court was entitled to order payment of the notice pay claimed by the applicant. This submission confuses the issue of jurisdiction with the powers conferred on this Court to deal with matters under its jurisdiction – the fact that the Court is accorded the power to deal with matters necessary or incidental to performing its statutorily defined functions does not serve to expand the ambit of those functions.

- [5] In the absence of any provision in the BCEA that confers jurisdiction to this Court to enforce the provisions of the Act directly and as an agent of first instance, the applicant's claim is misconceived. To hold otherwise would entirely undermine the system of enforcement established by Chapter 10 of the Act. Chapter 10 establishes the mechanisms to monitor and enforce the protections guaranteed by the Act. In summary, the entry point into the system is the office of the labour inspector, to whom complaints may be made. The labour inspector is required to endeavor to seek an undertaking from the employer against whom the complaint is made (s 68), failing which the inspector may, if the inspector has reasonable grounds to believe that an employer has not complied with the Act, issue a compliance order (s 69). An employer may object to a compliance order by making representations to the director-general (s 71) and appeal to this Court in terms of s 72 against any order made by the director-general. In terms of s 73, the director-general may apply to this Court to have a compliance order made an order of Court in terms of s 158 (1) (a) of the Labour Relations Act. What relevance and purpose would this carefully crafted system continue to have if an employee were entitled to bypass it and approach this Court for orders directly enforcing the provisions of the Act?

- [6] The BCEA clearly contemplates that this Court has a general supervisory function in the statutory scheme of enforcement (given its appellate functions in terms of s 72), that it should facilitate the enforcement of orders made by the appropriate functionaries (given its powers to make compliance orders of Court) and that it should ultimately act to impose punishment for continued breaches of the Act (given the Court's powers to impose fines in terms of schedule 2 to the Act). In short, the Act does not extend to this Court those functions that are reserved for the labour inspectorate, and in particular, it does not contemplate that this Court may grant orders that would effectively amount to the compliance orders contemplated by s 69.
- [7] What may amount to a limited exception to this rule is to be found in s 77 (3), in so far as that section confers on this Court the jurisdiction to determine disputes concerning contracts of employment. Section 77 (3) may indirectly require the Court to enforce certain provisions of the BCEA in the sense that a claimant may rely on a provision of the Act to contend that a basic condition of employment (a provision of the Act that stipulates a minimum term or condition of employment) constitutes a term of a contract of employment. This is a consequence of the construction adopted by s 4 of the Act, which broadly speaking, provides that a basic condition of employment constitutes a term of any contract of employment. However, under s 77 (3), a claimant does not seek to enforce a statutory right rather than a contractual term that must be read down from the Act. In these proceedings, the applicant has expressly disavowed reliance on a cause of action framed in contractual terms, and I need therefore take the matter no further.
- [8] Finally, in relation to costs, I have already noted that the applicant's claim is entirely misconceived. The strategy undertaken by the applicant (or,

more likely, his attorney) appears to be one where a number of claims for relatively small amounts are instituted in terms of the BCEA following a termination of employment, each of them accompanied by a prayer for costs on a punitive scale. This claim is no exception. In correspondence addressed to the respondent, the applicant demanded payment of the applicant's outstanding leave pay, remuneration and notice pay under threat of proceedings in this Court where costs would be claimed on the scale as between attorney and own client. As matters transpired, it was only the claim for notice pay that was pursued, a claim which was defended by the respondent. The irresistible conclusion is that litigation initiated in these circumstances (in preference to lodging a complaint with a labour inspector) is intended solely to run up legal costs that might later be recovered from the employer party. A strategy of this nature clearly amounts to unprofessional conduct.¹ This is especially so where the amount of the claims does not warrant the scale of litigation initiated in what is the equivalent of a division of the High Court. In the present matter for example, a claim for some R3000, the papers extend to some 50 pages, a pre-trial conference has been held and the matter has been the subject of at least one interlocutory intervention by this Court. The parties attended Court ready to lead the evidence of their witnesses in trial scheduled to last a day. The legal costs incurred will inevitably far exceed the amount that the applicant claims. All of this has served to frustrate the statutory purpose of establishing an inexpensive and expeditious system for the enforcement of basic conditions of employment, and has served only to advance the interests of the applicant's attorney. I am reluctant in the present circumstances to make a punitive costs order against the applicant, who no doubt is an unwitting spectator to events. I am also reluctant to make an order for costs against the applicant's attorney without expressing the caution that similar matters will in future be dealt

¹ See the judgment by Todd AJ in *Bartmann AAC & Baartman MME t/a Khaya Ibhubesi v De Lange CLG & another* (J441/09, dated 17 April 2009).

with on the basis of referrals to the appropriate Law Society or Bar Council, and the risk of costs orders *de boniis propriis*. This judgment serves as that caution.

I accordingly make the following order:

1. The applicant's referral is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 26 November 2009

Date of judgment: 27 November 2009

Appearances:

For the applicant: Mr. W P Scholtz from Jansens Incorporated

For the respondent: Ms S Lancaster from Macrobert Inc.