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Of interest to other judges

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN**

**Case no: D 464/09**

**In the matter between:**

**THE HEALTH AND OTHER SERVICES**

**PERSONNEL TRADE UNION OF**

**SOUTH AFRICA**

**SAVELLE EDMOND KOPS & OTHERS**

**FIRST APPLICANT**

**SECOND AND FURTHER**

**APPLICANTS**

**And**

**THE MEMBER OF THE EXECUTIVE COUNCIL**

**FOR THE DEPARTMENT OF HEALTH,**

**EASTERN CAPE**

**RESPONDENT**

**(the Excipient)**

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**JUDGMENT**

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**GUSH J:**

1. This matter concerns an exception raised by the respondent/excipient (who I shall for the sake of convenience refer to as the respondent) against the applicants' statement of claim.

2. The applicants applied for judgment against the respondent for payment of amounts the applicant's claimed were due to the 2<sup>nd</sup> and further applicant's arising from the application of the terms of a collective agreement the first applicant had entered into with the respondent.
3. The agreement sought to regulate the "*post transfer*" implications "*in relation to section 197 of the Labour Relations Act*" arising from the "*transfer of emergency medical services employees from the municipalities to the eastern Cape Provincial Department of Health*"<sup>1</sup>. The stated objectives of the agreement included "*to ensure that the transfer of certain employees' (including second and further applicants) contracts of employment from various municipalities to the department complied with section 197 of the LRA*" and "*to align the remuneration and conditions of employment of such employees with the public service remuneration system and practice*"<sup>2</sup>.
4. The applicants averred that in compliance with the collective agreement the respondent had calculated what was due to the 2<sup>nd</sup> and further applicants. The applicants' had accepted the calculation and accordingly the 2<sup>nd</sup> and further applicants were due the amounts set out in a schedule attached to the statement of claim.<sup>3</sup>
5. The applicants recorded that "*notwithstanding demand respondent has refused, neglected or otherwise failed to pay to the second and further*

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<sup>1</sup> Annexure B to the statement of claim

<sup>2</sup> Statement of claim para 6.1

<sup>3</sup> Annexure C to the statement of claim

*applicants the amounts [set out in the schedule] and is accordingly liable to make such payments*<sup>4</sup>.

6. Under the heading “Legal Issues” the applicants aver that to their knowledge there are no legal issues that are relevant to the application and that the matter only concerns the non payment of the “undisputed obligations”.
7. In response the respondent raised an exception to the applicants’ statement of claim in that it was vague and embarrassing alternatively lacked the necessary averments to sustain an action.
8. The respondent’s reasons were that:
  - a. the applicant’s claim for monies was based on the respondent’s failure to give effect to or act in terms of the collective agreement and therefore the applicants’ sought to enforce the collective agreement but that the applicants expressly disavowed any reliance on a cause of action based on a dispute about the application of a collective agreement;
  - b. the applicants had not set out their cause of action in their statement of claim; and
  - c. despite the requirements of rule 6(1)(b)(iii) of the rules of this court that a statement of claim must contain a *“clear and concise statement of the legal issues that arise from the material facts which statement must be sufficiently particular to enable any opposing party to reply to the document”* the applicants had stated

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<sup>4</sup> Para 11 of the statement of claim

that there were “*no legal issues that are relevant to the application*”.

9. When the matter commenced the respondent argued that the exception (in addition to the grounds set out in their notice) included the question of jurisdiction, which was referred to in its heads of argument. The respondent submitted, based on the decision in **Viljoen v Federated Trust Ltd**<sup>5</sup>, that for this reason too, the respondent’s exception should be upheld.
10. The respondent argued that the court lacked jurisdiction by virtue of the provisions of s 24 of the LRA as the dispute involved the application of a collective agreement.<sup>6</sup>
11. The applicants were of the view that this submission constituted a new ground of exception and that they required time to address this issue. Accordingly the matter was adjourned by consent to allow the parties an opportunity to specifically address the question of jurisdiction and both parties agreed to file and duly filed supplementary heads of argument.
12. Dealing with the exception Mr Kroon, who appeared for the respondent, argued that given the requirements of the rules of this court the applicants were required not only to set out the material facts upon which they relied but also clearly and concisely record the legal issues that

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<sup>5</sup> 1971 (1) SA 750 (O)

<sup>6</sup> S 24 (2) “*If there is a dispute about the interpretation or application of a collective agreement, any party to the agreement may refer the dispute in writing to the Commissioner...*”

arise from those facts<sup>7</sup>. The applicants' statement of claim which contained the averment that there were no legal issues arising from the cause of action upon which they relied did not comply with the provisions of rule 6.

13. It was submitted further that although the applicants' claim appeared to be based on the application of the collective agreement the applicants had "*expressly disavowed any reliance on the collective agreement in question*"<sup>8</sup> and that there were no legal issues for the court to decide.
14. The respondent insisted that despite averment in the applicants' statement of claim that there was no dispute and that their case "*concerns only the payment of undisputed obligations*"<sup>9</sup> there clearly was a dispute as the respondent had refused to make the payment and that the dispute involved the application of a collective agreement. This meant that the applicants had not disclosed a cause of action and that therefore the exception should be upheld and the applicants' case should be dismissed.
15. Therefore Mr Kroon argued that not only was the statement of claim vague and embarrassing, alternatively that it lacked the necessary averments to sustain an action, but that it was also excipiable as the applicants expressly disavowed any reliance on a cause of action based on a dispute about the application of a collective agreement. Mr Kroon

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<sup>7</sup> Rule 6(1)(b) of the Rules of the Labour Court

<sup>8</sup> Respondents heads of argument

<sup>9</sup> Applicants' statement of claim para 12

suggested that if there was no dispute there was nothing for the court to determine.

16. Regarding the question of jurisdiction the respondent's argument was that it was clear from the applicants' statement of claim that:
  - a. there was a dispute between the parties;
  - b. the dispute concerned the application of a collective agreement.

Therefore the provisions of s24(2) applied and the matter should have been referred to arbitration.

17. In response Mr Crampton for the applicants' insisted that there was no dispute and that if there was no dispute no arbitration could take place. He argued that the respondent had simply "*failed neglected or refused*" to pay the amounts due to the 2<sup>nd</sup> and further applicants and that this did not constitute a dispute. These submissions were based on the decision in **Telecall (Pty) Ltd v Logan**<sup>10</sup> as authority for the proposition that in order for an arbitration to take place there must be an arbitrable dispute where it was held that

*"... before there can be a reference to arbitration a dispute , which is capable of proper formulation... must exist..." "If what is intended ... is merely an expression of dissatisfaction ... no arbitration can be entered upon"*<sup>11</sup>

And

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<sup>10</sup> 2000 (2) SA 782 (SCA) at p786/7

<sup>11</sup> 2000 (2) SA 782 (SCA) at p786/7

*“...a failure to pay does not, without more, imply that there is a dispute as to liability”.<sup>12</sup>*

18. There is no doubt that if there is no dispute then there is nothing to arbitrate. I will return to the applicants' proposition that there is no dispute between the parties below.
  
19. Turning to the jurisdictional issue, Mr Crampton for the applicants suggested that the court had jurisdiction by virtue of the provisions of s77(3) of the Basic Conditions of Employment Act.<sup>13</sup> This averment or reliance on s77(3) is not specifically pleaded. Neither does it appear from the applicants' statement of claim that they rely their contracts of employment in claiming what they allege is due to them in terms of the collective agreement, despite the definition of a collective agreement being *“a written agreement concerning terms and conditions of employment”*.
  
20. Mr Crampton argued that once the court had jurisdiction to entertain the applicants' claim by virtue of s77(3) of the BCEA, should it appear later that the claim was a “dispute” as contemplated in s158(2) of the LRA then the court could exercise its discretion as provided for in that section.
  
21. If however an applicant relies on the jurisdiction conferred on the Court by virtue of s77 (3) of the BCEA on the grounds that the cause of action is *“a matter concerning a contract of employment”* there is no reason why

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<sup>12</sup> PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA (SCA) 68 at p73

<sup>13</sup> Act 75 of 1997; s77(3) 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”

the provisions of s158 (2) of the LRA should, depending on the respondent's reply, determine the manner in which it should be decided. The Court's jurisdiction would be established by virtue of s77 of the BCEA and it would determine the matter accordingly. The cause of action would establish the jurisdiction and there would be no need to apply s158 (2) of the LRA. This argument does not take account of s157(5) of the LRA which I deal with below.

22. I am not satisfied that the applicants' claim is based on a cause of action contemplated by s77(3) and accordingly the exception and the issue of jurisdiction must be determined in accordance with the provisions of the LRA and in particular ss 157 and 158.
23. In addition to the argument that the court had jurisdiction by virtue of s77(3) the Mr Crampton submitted that the statutory requirement that disputes regarding the application of collective agreements as set out in s 24(2) of the LRA<sup>14</sup> to be referred to arbitration was subject to the *"overriding jurisdiction of this court is equivalent or similar to the jurisdiction retained by a civil court in relation to a dispute that is covered by an arbitration agreement"*<sup>15</sup> and *"an overriding jurisdiction in respect of "disputes about the ... application of a collective agreements. "*<sup>16</sup>. It was suggested that on this basis the court had the jurisdiction to entertain the matter and if or when it became a "dispute" for example should the answering papers of the respondent reveal the existence of a dispute then the court then had the discretion to either stay the proceedings and

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<sup>14</sup> S24(2) "If there is a dispute about the interpretation or application of a collective agreement, any party may refer the dispute in writing to the commission..."

<sup>15</sup> Applicants heads of argument on the question of jurisdiction para 22

<sup>16</sup> Applicants heads of argument on the question of jurisdiction para 37

refer the dispute to arbitration or with the consent of the parties if expedient proceed with the court sitting as an arbitrator.<sup>17</sup>

24. The argument that the court enjoys an “*overriding jurisdiction*” “*equivalent or similar to the jurisdiction retained by a civil court in relation to a dispute that is covered by an arbitration agreement*” ignores the specific provisions of s 157 of the LRA.
  
25. S157(1) of the LRA confers exclusive jurisdiction on the Labour Court “*in respect of all matters that elsewhere in terms of the Act or in terms of any other law are to be determined by the Labour Court.*” S157(5) specifically provides that “*except as provided for in s158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration*”.
  
26. S158(2) confers on the Labour Court a limited and prescribed power to deal with disputes that are required by the LRA to be resolved through arbitration. The section provides:
 

*“If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-*

  - (a) *Stay the proceedings and refer the dispute to arbitration; or*
  - (b) *With the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make”*

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<sup>17</sup> S158(2) of the LRA

27. It is so that in this matter the applicants “expressly disavow” the existence of a dispute involving the application of a collective agreement and in fact in their statement record that the matter concerns the non payment of an “undisputed obligation”.
28. In reply the respondent argued that despite the insistence by the applicants that there was no dispute the applicants’ averment in their statement of claim that :

*notwithstanding demand respondent has refused, neglected or otherwise failed to pay to the second and further applicants the amounts [set out in the schedule] and is accordingly liable to make such payments”<sup>18</sup>*

clearly demonstrated that there was a “referable” or arbitrable dispute. In support of this contention Mr Kroon referred to the “Law of Arbitration”<sup>19</sup> where the learned author says:

*“Courts have found that a referable dispute exists where-*

*...*

*(d) money is claimed unless and until the defendants admit that the sum is due and payable. If letters have been written making some request or demand and the defendant did not reply, there is a dispute”<sup>20</sup>*

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<sup>18</sup> Para 11 of the statement of claim

<sup>19</sup> Law of Arbitration. Ramsden. Juta 2009

<sup>20</sup> At page 51

29. Although the authorities quoted by the author are from other jurisdictions the logic is hard to refute. The applicant based its averment that there was no dispute on the authority that “*an expression of dissatisfaction*”<sup>21</sup> is based not an arbitrable dispute and “...*a failure to pay does not, without more, imply that there is a dispute as to liability*”<sup>22</sup>. What distinguishes the applicants’ claim from these propositions is that the applicants claim is not only on more than an “*expression of dissatisfaction*”, but also that the respondent’s failure to pay must be seen in the context of the applicants’ specific averment that the failure to pay is “*notwithstanding demand*”.
30. The respondent’s insistence that the Court does not have jurisdiction because the applicants’ claim is based on a dispute about the failure of the respondent to comply with a collective agreement or in other words “*about the application of a collective agreement*”, ignores the provisions of s158(5) which specifically confers jurisdiction on the Court when confronted with such disputes.
31. In the matter of Commercial Workers Union of SA v Tao Ying Metal industries & Others the Constitutional Court<sup>23</sup> held that the objectives of the LRA required that the “*substantial merits*” of a dispute should be dealt with and that the arbitrator should in dealing with matters “*reach for the real dispute between the parties*”<sup>24</sup> and “*in deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature*”.<sup>25</sup> Despite the

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<sup>21</sup> Telecall (Pty) Ltd v Logan (supra)

<sup>22</sup> PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd (supra)

<sup>23</sup> (2008) 29 ILJ 2461 (CC)

<sup>24</sup> At page 2482 para [65]

<sup>25</sup> At page 2483 para[66]

applicant having decided approach the Court directly and therefore eschew the benefits of the informality attached to the arbitration process the fact remains that the issue in dispute requires it to be arbitrated which is a process designed to resolve disputes fairly and expeditiously In accordance with the objects of the LRA. In order to ensure that the matter is resolved without delay, there is no reason therefore why in the specific circumstances of this matter that the court should not similarly adopt a more lenient approach to the applicants' pleadings given the fact that the court is expressly given specific powers to deal with disputes that should have been referred to arbitration in the first instance.

32. For this reason I am disinclined to uphold the respondent's exception that the applicants' statement of claim is vague and embarrassing or that it does not disclose a cause of action, particularly in the light of the respondent's insistence, despite what the applicants say to the contrary, that there is in fact a dispute between the parties and that this dispute concerns the application of a collective agreement. I am accordingly satisfied that the applicants' statement of claim does disclose a cause of action and that the cause of action is a dispute and that the dispute is a dispute regarding the application of a collective agreement.
33. That being so the exception falls to be dismissed and the provisions of s158(2) must apply to the resolution of this matter. The parties have agreed that they have not nor will they consent to the Court proceeding by way of arbitration and therefore the appropriate order is to stay the proceedings and order that the dispute be referred to arbitration
34. As far as costs are concerned it is appropriate that each party pay its own costs.

35. Accordingly I make the following order:

- a. The respondents exception is dismissed;
- b. In terms of section 158(2) of the LRA the proceedings are stayed and the dispute is referred to arbitration;
- c. Each party to pay its own costs.

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**GUSH J**

**Date of hearing : 16<sup>th</sup> July and 26<sup>th</sup> October 2010**

**Date of judgment : 4<sup>th</sup> November 2010**

**APPEARANCES**

**For the applicants : Advocate D. P. Crampton**

**Instructed by : Llewellyn Cain Attorneys**

**For the respondent : P. N. Kroon**

**Instructed by : State Attorney Port Elizabeth**