



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2689/10

In the matter between:

GERRIT JOACHIM SMIT

Applicant

And

JB MTHEMBU

First Respondent

**SAFETY AND SECURITY
SECTORAL BARGAINING COUCIL**

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

Heard: 22 March 2012

Delivered: 16 April 2012

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application in terms of s 158 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside a ruling made by the first respondent (the commissioner) to the effect that the second respondent (the bargaining council) lacked jurisdiction to arbitrate an unfair labour practice dispute between the applicant and the third respondent.

The facts

- [2] The material facts are not in dispute. The applicant was employed by the third respondent between 1987 and 2008. He resigned during 1992 and was re-employed in 2001. He again resigned in May 2008. During 2009, the applicant sought to withdraw his resignation, and simultaneously applied for re-enlistment in a letter addressed to the provincial commissioner on 24 February 2009. On 17 June 2009, the applicant was advised that it was necessary to finalise the issue of his resignation before his re-enlistment could be considered. The provincial commissioner declined to re-enlist the applicant, and disputes that any agreement was reached on the terms of which the applicant's resignation as to be accepted and his re-enlistment approved. The applicant contends that in August 2009, he was advised that the withdrawal of his resignation would be processed, and that the period that he was not in service would be treated as unpaid leave. The applicant contends further that the withdrawal of his resignation and his reinstatement into the service of the third respondent was confirmed on the SAPS database.
- [3] The crisp issue referred to arbitration was therefore the existence or otherwise of an agreement in terms of which the applicant would be reinstated or re-employed by the third respondent, and assuming the existence of an agreement, whether the third respondent was in breach of it.

The award

- [4] At the arbitration hearing, the third respondent raised a point *in limine* to the effect that the bargaining council had no jurisdiction to determine the dispute referred to it. The third respondent submitted that since there was

no longer an employment relationship between the parties, the council lacked jurisdiction. The commissioner upheld the point. He concluded:

'It is apparent from the documentary evidence that the Applicant resigned and subsequently sought to withdraw his resignation. However, the Respondent accepted the resignation and declined the Applicant's purported withdrawal of it.

It is apparent from the foregoing that, at 17 June 2010, there was therefore no employment relationship between the parties.

The present case is distinguishable from the case in NS v SA Mutual Life Assurance Society Ltd t/a Old Mutual & others [2001] 22 ILJ 1864 (LC). In this case the court held that in an unfair Labour Practice Dispute (Residual Old Item 2 (1)(a) of Schedule 7 to the LRA 1995), where the employee resigns before institution of proceedings in the Labour Court, there is no basis in Law or Equity, why the remedy sought in respect of the wrong committed by the Employer is to be denied simply because the relationship came to an end. The right to relief comes into existence when the wrong is committed and not when action for relief is instituted.

In the light of the foregoing, the point in limine should be upheld as the right to relief claimed came into existence when there was no longer an employment relationship between the parties'

The applicable legal principles

[5] An application to review a jurisdictional ruling is not determined on the basis of the reasonableness test established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). In *South African Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC), the LAC held that in regard to a commissioner's finding on jurisdiction (in that case, the existence of a dismissal), the question is not

whether the commissioner's finding was reasonable but whether on the facts the applicants had been dismissed. The basis of this approach is that a ruling on jurisdiction made by the CCMA is made for convenience – the CCMA is a creature of statute and cannot decide its own jurisdiction. Whether the CCMA (or, as in the present instance, a bargaining council) has jurisdiction is a matter for this court to decide. In other words, the issue before this court is whether objectively speaking, having regard to the facts, the bargaining council had the jurisdiction to entertain the dispute.

[6] As I understand it, the point raised by the third respondent at the arbitration hearing was that only a person defined as an 'employee' in s 213 of the LRA is entitled to refer an unfair labour dispute to the appropriate dispute resolution agency. In this instance, the third respondent contended that because the applicant had resigned in May 2008, he was no longer an employee and therefore not entitled to complain of an unfair labour practice.

[7] The dispute referred to the bargaining council was one that concerned an unfair labour practice in the form of an alleged failure or refusal to reinstate the applicant in terms of an agreement. It is self-evident that a claim of this nature will necessarily be brought by a party who is not in an employment relationship, or as the Act puts it, 'a *former* employee' (own emphasis). What a former employee seeks in these circumstances is the restoration of the employment relationship in terms of an agreement to that effect for which the party contends. The plain wording of s 186 (1) (c) entitles a former employee in these circumstances to seek the enforcement of an agreement to re-instate or re-employ. The existence or otherwise of the agreement or the nature of its terms (an issue that was canvassed by the third respondent at the arbitration hearing) is a matter that goes to the merits of the claim, not to jurisdiction.

[8] The commissioner's ruling is nothing less than absurd – its effect is to deny a remedy to the very parties that the Act seeks to protect. But it is not the reasonableness of the commissioner's decision that is at issue – to succeed in this application, the applicant must establish the relevant jurisdictional facts. It is not disputed that the applicant is a former employee of the third respondent, nor is it disputed that he contends for the existence of an agreement in terms of

which he would be re-employed and that the third respondent refuses to re-employ him.

[9] This is a matter where little purpose would be served in setting aside the commissioner's ruling and remitting the matter to the bargaining council for the jurisdictional issue to be reconsidered. I intend to substitute the commissioner's ruling and to remit the matter for arbitration before a different commissioner on the merits.

Costs

[10] The applicant was not legally represented, but I see no reason to deny him the reasonable costs that he may have incurred in bringing this application. The point *in limine* raised by the third respondent at the arbitration hearing was ill-advised, as was the attempt to defend it in these proceedings.

Order

I accordingly make the following order:

1. The ruling made by the first respondent on 1 September 2010 is reviewed and set aside.
2. The ruling is substituted by the following:

“The bargaining council has jurisdiction to arbitrate the dispute referred by the applicant”.
3. The matter is remitted to the second respondent for arbitration on the merits before a different arbitrator.
4. The third respondent is to pay the costs of these proceedings.

A van Niekerk J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person

THIRD RESPONDENT: M Sello, instructed by the state attorney

Labour Court