



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 383/07

Case no: JS 387/07

In the matter between:

DEON VAN METZINGER

First Applicant

RINA VAN METZINGER

Second Applicant

and

THE CONSERVATION CORPORATION t/a CC AFRICA

Respondent

Heard on: 13 August 2012

Delivered on: 14 August 2012

JUDGMENT

Introduction

- 1] This matter was set down for trial on 13 August 2012. Parties agreed that the two matters that were brought under separate case numbers by the applicants would be consolidated and heard together as the claims were similar and brought against the same respondent.
- 2] At the commencement of the trial parties sought leave from the Court to allow a point in limine raised by the respondent to be argued first and a ruling be made by the Court on that issue in order to curtail the proceedings. Ordinarily points in limine are raised in application proceedings and not during the trial. It was for the sake of expediency that the Court entertained the application.
- 3] The point in limine raised by the respondent is that this Court has no jurisdiction to determine the performance bonus claim sought by the first applicant as it did not comply with section 74(2) of the Basic Conditions of Employment Act¹ ("the BCEA"). This issue is dealt with in greater detail herein below.
- 4] The respondent further submitted that the onus of proving whether or not the court had the necessary jurisdiction to entertain that issue rested with the applicants. The applicants agreed to begin on this issue and called the first applicant as a sole witness merely to give evidence on whether or not the performance bonus dispute was referred to the Commission for Conciliation Mediation and Arbitration ("the CCMA") together with the unfair dismissal dispute which would therefore make it competent for this Court to determine that issue and order the relief sought.
- 5] No witnesses were called by the respondent on this issue.

Facts

¹ Act 75 of 1997 as amended

- 6] It is common cause that the first and second applicants were employed by the respondent as a couple in its airwing charter division at Phinda Game Reserve (“Phinda”).
- 7] The first applicant was employed as an aircraft pilot on 26 June 1999 whilst, the second applicant, his wife was employed as an administrative manageress.
- 8] Both applicants were dismissed on 31 October 2006 by the respondent for operational requirements. The substantive and procedural fairness of that dismissal remains in dispute.
- 9] The applicants referred separate disputes to the CCMA dated 08 November 2006.
- 10] The disputes remained unresolved leading to the applicants launching claims to this Court on 12 June 2007.
- 11] The issue that gives rise to the point in limine raised by the respondent is the second relief sought by the first applicant in clause 27.2 of his statement of claim.
- 12] In addition to the 12 months compensation of R472 632.00, the first applicant seeks compensation in the sum of R938 511.00 in respect of performance bonus.
- 13] It is important to note that the second applicant does not seek any performance bonus in her statement of claim.

Submissions

14] The issue raised by the respondent is that this Court has no jurisdiction to entertain the performance bonus claim raised by the first applicant because the first applicant has failed to comply with section 74(2) of the BCEA. Section 74(2) of the BCEA states as follows:

“74.

.....

(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

.....”

15] The respondent submits that the first applicant did not refer a performance bonus dispute to the CCMA in terms of Section 191(1) of the Labour Relations (“the LRA”) ²and therefore the Court may not determine that claim for an amount allegedly owing together with the unfair dismissal claim.

16] Counsel for the Respondent referred to the case of *Douglas & Others v The Gauteng MEC for Health*³ where Van Niekerk AJ (as he then was) held as follows:

“Section 191 contemplates two forms of referral. The first is the referral of a dispute to the appropriate statutory dispute resolution agency (see section 191(1)), the

² Act 66 of 1995

³ (2008) 29 ILJ 1499 (LC) at paragraph 39

*second contemplates the referral of a dispute to this Court or to an arbitrator for adjudication (section 191(5)). Which form of “referral” does **section 74(2)** of the **Basic Conditions of Employment Act** contemplate? In my view, it can only be the former. The Labour Courts have consistently held that a dispute as framed in the initial referral to the CCMA or bargaining council is definitive, and that it is not competent for a party to change the nature of the dispute at the second stage of referral to arbitration or adjudication (See NUMSA v Driveline Technologies (Pty) Ltd & Another [2007] ZALC 66; [2000] 1 BLLR 20 (LAC)). In the present instance, the referral form in terms of which the Applicants referred their dispute to the Bargaining Council makes no mention of a claim for remuneration for the month of April 2006. The claim for remuneration appears for the first time in the Applicants’ statement of claim filed in these proceedings. In these circumstances, the Applicants have not met the condition established by **section 74(2) (a)** and this Court is accordingly precluded from making any order in this regard.”*

- 17] Applying the Douglas case to the facts of this case, the respondent contends that the 7.11 referral form to the CCMA only referred to unfair dismissal for operational requirements as a nature of the dispute referred. Nowhere is the dispute concerning performance bonus mentioned in the first applicant’s referral form, his application for condonation which accompanied the referral form nor is it mentioned in the Certificate of Outcome as a dispute that the commissioner conciliated.
- 18] The first applicant testified that there were two conciliation meetings held, one in respect of his wife, the second applicant on 05 December 2006, which he did not attend and the other which was held on 04 May 2007 in respect of his dispute. Both applicants attended the conciliation hearing on that day.
- 19] The first applicant’s evidence in essence was that, although the referral documents may have been silent on the performance bonus issue, the matter was discussed at conciliation, amongst other benefits discussed. The first applicant sought to disclose details of the conciliation discussions.
- 20] Rule 16 of the CCMA Rules⁴ does not permit reference to any of the discussions held at the CCMA. It states as follows:

1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.”

21] Evidence relating the conciliation discussions must therefore be rejected. Applicants’ Counsel suggested that even if those discussions may not be disclosed, the performance bonus issue has always been a “dispute” that the respondent has been aware of. The basis of this submission is that, correspondence between the parties and evidence given by the first applicant would clearly suggest that parties have during the section 189⁵ discussions at the workplace discussed the performance bonus issue.

22] I cannot agree with the applicants that these alleged discussions at the workplace indicate that the dispute was referred to the CCMA. Those discussions in my view are irrelevant.

23] I equally reject that the respondent had admitted in its response that the Court had jurisdiction to hear performance bonus claim.

24] In my view there is clear non-compliance with section 74(2) of the BCEA.

Can the Court determine the claim in terms of Section 77(3) of the BCEA

25] The matter, however, does not end there in my view. The applicants have submitted that even if the Court were to find that the dispute was not referred to the CCMA in accordance with section 191 of the LRA as required by section 74(2) of the BCEA, the Court would still have jurisdiction to hear this matter in terms of section 77(3) of the BCEA.

26] The basis for this submission was that there was an oral employment

⁵ Act 66 of 1995

agreement that was not disputed. Section 77(3) of the BCEA provides as follows:

“(3) 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.”

27] The only place where the performance bonus issue is mentioned in the body of the statement of claim (apart from the relief sought) is in paragraph 24.7. That paragraph reads as follows:

“24. The monthly remuneration package earned by the Claimant was as follows:

<i>24.7.1 Amount overdue 2001 to 2006</i>	<i>747 145.00</i>
<i>24.7.2 Amount due for 4 months ending</i>	
<i>on 31 October 2006</i>	<i>98 501.00</i>
<i>24.7.3 Due for 2007 based on forecast Figures</i>	<i>92 865.00</i>
<i>TOTAL DUE AND PAYABLE</i>	<i>977 897.00”</i>

28] Apart from this there are no other allegations dealing with performance bonus. If the first applicant believes that he is entitled to a performance bonus, it is necessary for him to allege so as to prove that he is contractually entitled to that amount. It is not sufficient for him to merely prove that failure to pay that amount was unfair. No basis is mentioned in the pleadings entitling the first applicant to the performance bonus he now seeks to enforce.⁶ He must allege the terms of the contract on which he seeks to rely.

29] The respondent's response either does not take the matter any further. The respondent merely denies paragraph 24.7 of the statement of claim in its response without placing basis for its denial.⁷

30] The respondent further indicated its intention to bring an exception in terms of which it would contend, amongst others, that “the statement of case fails to

⁶ See *Voster v Real Africa Corporate Services (Pty) Ltd* (2003) 24 ILJ 451 (LC)

⁷ See paragraph 4.9 of the Respondent's response to the statement of claim

disclose a cause of action in respect of claim 27.2. The Respondent did not bring that exception but simply argued that it was raising the point in limine as a special plea. No formal special plea was lodged. The entire point in limine was argued orally. The fact the respondent mentioned that it believed that the court had no jurisdiction to entertain the performance bonus claim in the pre-trial minute takes this matter no further. What is also interesting is that the respondent submitted that its attack on jurisdiction was not whether or not the issue was pleaded but it was merely non-compliance with section 74(2) of the BCEA.

31] The respondent's Counsel argued that section 77(3) of the BCEA was not applicable in this case because the claim is framed as an unfair dismissal claim and the performance bonus relief is sought under the unfair dismissal dispute.

32] Jurisdictionally, the Court is entitled to entertain the performance bonus issue as a contractual claim in terms of section 77(3) of the BCEA. However, the contractual claim has not been properly pleaded, which is a bar to the applicant to lead evidence on the issue as the pleadings stand.

33] In the circumstances, I find that the applicants have failed to comply with section 74(2) of the BCEA. Section 77(3) of the BCEA performance bonus claim has not been properly pleaded.

1. Therefore, the applicants are barred from leading evidence on the pleadings as they stand;

2. The issue of costs shall be determined at the end of the trial.

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

For the applicants: Adv DH Wijnbeeck

Instructed by: Dewey Souza, Sandton

For respondent: Adv R Moultrie

Instructed by: Wright Rose Innes, Saxonwold