



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case No: P 103/10

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

and

MBULELO PATRICK NKAMBULE

First Respondent

MR L.M. NABO, N.O

Second Respondent

**THE SAFETY AND SECURITY
SECTORAL BARGAINING COUCIL**

Third Respondent

Heard: 16 AUGUST 2012

Delivered: 21 MAY 2013

Summary: It is the prerogative of the employee who has been overlooked for promotion to choose between referring an unfair labour practice related to promotion or a discrimination dispute. The employer

has no right to dictate either the nature of the dispute to be referred or the appropriate forum for its resolution.

Section 145 of the LRA review: Unfair labour practice related to promotion.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an award of the second respondent (the arbitrator) in which he found that the applicant committed an unfair labour practice by not promoting the first respondent Mr Nkambule (Nkambule).

Factual Background

- [2] In 2007 the applicant advertised the principal personnel officer post. It is a level 7 post. Nkambule, an employee of the applicant who was a clerk in a level 3 post applied. He was short-listed and recommended for appointment by the interviewing panel as he had obtained the highest points. He was not appointed, instead Ms Sifo (Sifo) who was the tenth in the order of merit of the candidates was appointed. He referred an unfair labour practice dispute related to promotion to the third respondent. The second respondent (the arbitrator) issued an award in his favour and ordered the applicant to appoint him to a level 7 post equivalent to the one he was recommended for and that he be remunerated accordingly with effect from 15 February 2007. In this application the applicant seeks an order reviewing and setting aside the arbitration award.

Grounds for Review

- [3] The only ground the applicant sought to rely on is that the arbitrator lacked jurisdiction to arbitrate the dispute before him as the real dispute that was the subject of the arbitration was discrimination. It falls under

the exclusive jurisdiction of this court in terms of the Employment Equity Act 55 of 1998 (the EEA).

Merits

- [4] It is common cause that subsequent to Sifo's appointment to the post Nkambula referred an unfair labour practice dispute to the third respondent. His case was based on the applicant's conduct of overlooking him for appointment to the post, a step which would have been a promotion, although he was the best candidate.
- [5] It is true that the applicant's conduct of overlooking Nkambule for promotion notwithstanding that he had scored the highest points and preferring to appoint Sifiso, an African female may constitute either an unfair labour practice related to promotion as envisaged in the LRA or discrimination in terms of EEA. In casu Nkambule alleges that his dispute is based on the former and the applicant expressed the view that it is based on the latter.
- [6] I agree with Nkambule that the correct approach to be adopted in this matter is expressed as follows in *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*.¹ "Thus, the *ipse dixit* of the respondent is explicit: the claim is based on an unfair labour practice relating to promotion and not on unfair discrimination. This important consideration as the respondents were the masters of the case before the CCMA and thus had the prerogative to base their action on grounds of their choosing. It is not for the employer to determine what the employees cause of action should be, nor that matter to dictate in which forum the case should be heard. Nevertheless the *ipse dixit* of the respondent is not the only factor to be considered by the court in determining the central issues before the CCMA. If it is found that the real issues before the CCMA was an unfair discrimination, then the court should find for the applicant on its jurisdiction point". The determination of

¹ (2001) 22 ILJ 2439 (LC) at para 26-27.

jurisdiction is expressed as follows in *Gcaba v Minister for Safety and Security and Others*.²

“Jurisdiction is determined on the basis of pleadings, as Langa CJ held in *Chirwa*, supra and not the substantive merits of the case. If Mr Gcaba’s case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administration decision. In the event of the court’s jurisdiction being challenged at the outset (*in limine*), the applicant’s pleadings are the determining factor. They contain a legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavit-must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustained another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustained a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court”.

- [7] In determining the forum with the necessary jurisdiction it is therefore necessary to consider a number of factors. Firstly, it is the way in which the referring party’s case is pleaded before the third respondent. As there are no pleadings in bargaining councils the manner in which the dispute is couched in the referral documents serves the purposes. It is common cause that Nkambule referred an unfair labour practice related to promotion in terms of section 186 (2) (a) of the LRA.
- [8] The second factor to be taken into account is that it is the prerogative of the master of the case, the referring party to choose the nature and therefore correct forum of the dispute. As the referring party, Nkambule chose the nature of his case and based it on section 186 (2) (b) of the

² [2009] 12 BLLR 1145 (CC) at para 75.

LRA. Section 191 (1) (a) (i) bestows jurisdiction over unfair labour practices on the CCMA and bargaining councils. By electing to refer an unfair labour practice relating to promotion, Nkambule automatically chose the third respondent as the correct forum to determine his dispute.

- [9] The third factor is that it is not for the employer party to determine the cause of action or to dictate it. And lastly the real issue being referred plays a pivotal role in determining the forum with the necessary jurisdiction. The applicant submitted that the actual dispute before the third respondent was a discrimination dispute. It based this argument on the averment that Nkambule complained about the fact that the applicant utilised an equity plan as reason for preferring Sifo, a female employee over him in respect of a promotional post. It sought to rely on the manner in which the arbitrator defined the issue to be decided which he stated as follows: "Since this is an unfair labour practice dispute related to promotion, the following issues are in dispute and therefore need to be determined:

- 9.1 Whether the 1st Respondent was justified to use three (3) different equity plans for the same promotion phase in the same province
- 9.2 Whether the Provincial, Divisional, and National Commissioners were justified o (sic) in over emphasise equity over and above other factors, when approving and appointing a candidate for the post in question;
- 9.3 Whether the Applicant's non appointment and the 2nd Respondent's appointment to the post in question amounted to an unfair labour practice. If so;
- 9.4 Whether the relief of appointing the Applicant to the post of the Principal Personell Officer, post number EC 113-2007, would be appropriate, under the circumstances".

[10] The applicant argued that the reliance by the arbitrator on the use of the equity plans in defining the nature of the dispute before him confirms the correctness of its version. The applicant further argued that the arbitrator was not bound by the manner in which the parties defined the dispute and relied on the following dictum in *Wardlaw v Supreme Moulding (Pty) Ltd*³ 'In the light of the above it seems to us that the employee's allegation of the reason for the dismissal as contemplated in section 191 (5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that had jurisdiction to resolve the dispute on the merits finally. That may depend on whether it does later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon it not later becoming 'apparent' to court within the contemplation of section 158 (2) of the Act that the reason for the employee's dismissal is one that falls within section 195 (5) (a) of the Act. We say it is provisional or conditional because, if it later becomes 'apparent' that the dispute is one which ought to have been referred to arbitration, the court will decline jurisdiction and have the dispute referred to arbitration.'

[11] The applicant submitted that Nkambule substantiated his unfair labour practice claim by relying on the applicant's unfair conduct of using three different equity plans in defending itself against claims in a single promotion cycle. The arbitrator himself based his decision partly on the use of the equity plans. The applicant submitted that where there has been a dispute about the application of an equity plan in the context of a promotion dispute, the dispute has to be adjudicated by this court. In *Baxter v National Commissioner, Correctional Services and Another*⁴ the

³ [2007] 28 ILJ 1042 (LAC) at para 24.

⁴ [2006] 9 BLLR 844 (LC).

court found the status of equity plans implemented not to appoint the applicant questionable and found that the failure to appoint the applicant was based on unfair discrimination.

[12] In determining the actual dispute before the arbitrator, I have considered that Nkambule referred an unfair labour practice dispute based on his non-appointment to a senior post notwithstanding that he was the best candidates. His complaint is based on merit. He submitted that he should have been appointed by virtue of being the best candidate and his non-appointment constituted an unfair labour practice. The issue of the equity plans was raised by the applicant as a defence which Nkambule had to disprove. He could not have disproved it without referring to the equity plans. A defence cannot be used to determine jurisdiction as it would deprive the referring party the right to determine the nature of its dispute and the forum to determine it.

[13] The case the applicant sought to rely on can be distinguish from the present in that Nkambule took a decision to refer his dispute to the third respondent. The actual dispute before the arbitrator was an unfair labour practice. Neither Nkambule nor the second respondent referred to discrimination. The fact that the word discrimination was not used, does not on its own reflect the true nature of the dispute. However, when considered with other relevant factors in determining the nature of the dispute, it supports Nkambule's version.

[14] Reference to equity plans only, especially those which have been introduced in defence, does not necessarily make a dispute a discrimination dispute. Another factor which points to the conclusion that Nkambule's dispute is an unfair labour practice rather than discrimination is that he submitted that the equity figures the applicant referred to in its defence did not apply to employees like him, who were appointed in terms of the Public Service Act.

[15] An employee's conduct of by passing the best candidates for appointment does constitute an unfair labour practice. Nkambule cannot be criticised

for exercising his right of challenging his non-appointment as an unfair labour practice based on merit only.

[16] For these reason I conclude that the third respondent had the necessary jurisdiction to arbitrate the dispute before him. The applicant did not prove any valid grounds to have the second respondent's award reviewed and set aside. Further no, reasons were given for costs not to follow the result.

[17] In the circumstances, the following order is made:

18.1 The application is dismissed with costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Kroon

Instructed by: State Attorney

For the first Respondent: Adv. JL Basson

Instructed by: Grosskopf Attorneys

LABOUR COURT