REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 399/12

BEN NTLELE **Applicant**

and

ANGLO PLATINUM LIMITED **First Respondent**

COLIN DA SILVA **Second Respondent**

Heard: **30 January 2014**

Delivered: **18 February 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant, who is still employed by the First Respondent, had referred an alleged unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration. A certificate of non-resolution was issued on 20 February 2012, thus enabling him to launch this application. On 16 May 2012, the Applicant had filed a statement of claim "*in terms of section 6 and 10 of the Employment Equity Act read with Rule 50 of the Labour Relations Act"* (Sic).

[2] According to the Applicant, the nature of his claim is in two parts. The first part was substantive in nature and concerned the alleged failure by the First Respondent to properly consider and/or to appoint him to the position of Evaluation Day Shift Leader (EDSL) (a managerial position). The second part of the dispute was procedural in nature and involved an alleged flawed procedure that was followed by the First Respondent in appointment of the Second Respondent to the position, and an allegation that the First Respondent failed to adhere to and/or abide by the correct policies and procedures and the framework to allow a procedurally fair process.

Preliminary issues raised:

[3] Subsequent to the First and Second Respondent having filed a response to the statement of claim, the parties had on 3 September 2013 filed a signed pre-trial minute, and the matter was set-down for trial on 30 January 2014. On 29 January 2014, a day before the trial, the Respondents had filed their written heads of argument and raised a preliminary point to the effect that the Court lacked jurisdiction to entertain the dispute.

[4] The jurisdiction of the Court was challenged on two fronts. The first was that the monitoring and enforcement procedures envisaged in the Employment Equity Act ought to have been utilised by the Applicant. It was submitted that the issues raised by the Applicant in his pleadings were covered by the provisions of Chapter III of the EEA. In this regard, it was argued that the Court lacked jurisdiction due to the reason that the Applicant did not comply with the provisions of the Employment Equity Act in that he should have first used the compliance mechanisms of Chapter V of that Act. It was further argued that the facts of the Applicant's case were similar to those in *Minister of Safety and Security v Govender*[1] where the Court had held *inter alia* that it would lack jurisdiction to entertain proceedings in respect of alleged breaches of the obligation to implement affirmative action measures (being an obligation under chapter III of the EEA), prior to exhaustion of the enforcement procedures envisaged under Chapter V of that Act. The Respondents had made reference to various paragraphs in the Applicant's statement of case,

[1] [2010] 1 BLLR 55 (LC) at para 48

which it was contended was replete with references to the affirmative action obligations of the First Respondent. In this regard, it was further contended that the Applicant's claim was plainly premised on alleged breaches by the First Respondent of its obligation to implement affirmative action measures.

[5] The second preliminary point raised was to the effect that in addition to the Applicant's claim being based on Chapter III of the EEA, the Applicant's claim related to an alleged unfair conduct by the First Respondent pertaining to promotion. In this regard, it was contended that the Applicant had made an assertion that he ought to have been promoted to the position instead of the Second Respondent. To this end, it was argued that unfair labour practice disputes fell within the exclusive jurisdiction of the CCMA, and outside of the jurisdiction of this Court acting as arbiter of first instance.

[6] In response, Mr. Lennox on behalf of the Applicant had submitted that taking into account the nature of the preliminary points raised, the Respondents should have raised these issues by way of exception in terms of the provisions of Rule 11 of the Rules of this Court, rather than by way of a jurisdictional objection. To this end, he submitted that fairness required that the Applicant be afforded an opportunity to amend his pleadings.

[7] In regards to the preliminary points raised, arguments advanced on behalf of the Applicant were to the effect that his case was that he had been discriminated against on account of his race as envisaged in section 6 of the EEA, and that his primary relief was to be found in Chapter II of that Act. Furthermore, the Applicant ought to have been promoted into the position in question, and that the failure to appoint him was both procedurally and substantively unfair. He had relied in part on the fact that he is a historically disadvantaged South African (HDSA) and was eminently suitable for the position, or if not, the most suitable. It was argued that his case was based on discrimination on account of race, and he primarily relied upon Chapter II of the EEA which dealt with the prohibition of unfair discrimination.

[8] It was further argued that the Applicant had properly referred a dispute to the CCMA and a certificate of outcome was issued enabling him to refer the

dispute to this Court. It was conceded that as part of the factual background which the Applicant had pleaded and further elaborated upon in the pre-trial minute, averments were made that there was non-compliance with the Employment Equity Plan (EEP). It was submitted however that the main claim was that the Applicant was subjected to racial discrimination, and that this application did not call for an order directing compliance with the EEP of the First Respondent. In this regard, it was argued that the facts of this case were different from those in *Govender,* which the Respondents had relied upon in that it was not the primary claim of the Applicant that the EEP was not complied with.

Evaluation:

[9] The first issue that needs to be dealt with is whether given the nature of the points raised, the Respondent should not have raised them by way of an exception rather than by way of a jurisdictional point. Mr. Mosam on behalf of the Respondents had submitted that the choice was for the Respondents to exercise, and that they were entitled to raise these issues in the manner that they deemed fit at any time prior to the trial commencing. I am inclined to agree with Mr. Mosam. There is no provision in either the Rules for the Conduct of Proceedings in the Labour Court, or in the Practice Manual that prescribes whether an issue should be raised as an exception or as a point *in limine*. With exceptions, obviously the intention ultimately is to allow the other party to amend its pleadings accordingly so that its case can be met. However, with points *in limine*, where they are successful, the intention is to dispose of the matter completely. It is therefore up to a party to decide how to raise any particular issue that may affect the jurisdiction of the Court. Obviously the only considerations are whether these issues have been raised properly before the Court, whether the other party to the dispute was afforded an opportunity to respond to them, and ultimately, whether they are sustainable or not.

[10] The parties were in agreement that if the dispute before this Court related to Chapter II of the EEA, the Court would have the necessary jurisdiction to determine it. Chapter II of the EEA deals with the prohibition of unfair

discrimination. In terms of section 5, there is an obligation on employers to eliminate unfair discrimination, and section 6 prohibits discrimination on various grounds. More pertinent to this case is section 10 which deals with disputes concerning that chapter, and the dispute resolution path to be followed in instances where there is a dispute. In this regard, section 10 provides for disputes to be referred to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination, and where conciliation fails, for the dispute to be referred to this Court for adjudication.

[11] If the Applicant's dispute however relates to Chapter III as the Respondents have contended, the Court would obviously lack jurisdiction. Section 13 under Chapter III provides that designated employers must in order to achieve employment equity, implement affirmative measures for people from designated groups in terms of the Act. Section 20 provides that a designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

[12] Section 34 under Chapter V (Monitoring, Enforcement and Legal Proceedings) provides for employees or trade union representative to bring contraventions of the EEA to the attention of *inter alia*, a Labour Inspector, the Director-General or the Commission for Employment Equity. A Labour Inspector having investigated the matter under section 35 may *inter alia*, issue a compliance order to the employer under section 37. If the employer fails to comply within a period specified by the Labour Inspector, or does not object to that order, the Director-General may in terms of the provisions of section 37 (6), apply to this Court to make the compliance order an order of Court.

[13] In support of its contention that the Court lacked jurisdiction by virtue of the provisions of Chapter III of the EEA, the Respondents had also made reference to *Dudley v City of Cape Town*[2] wherein it was held that any interested party aggrieved by a designated employer's failure to comply with any of its obligations under Chapter III must take steps to have the enforcement procedure provided for in Chapter V invoked, and that the

[2] [2008] 12 BLLR 1155 (LAC) at para 46

interested party cannot simply ignore that procedure and institute court proceedings.

[14] It is trite that jurisdiction is determined on the basis of pleadings, and not on the substantive merits of the case[3]. Where the jurisdiction of the Court is disputed, Van der Westhuizen J in *Gcaba v Minister of Safety and Security*[4] stated the following;

> "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 the legal basis of the claim under which the applicant has chosen to involve the Court's competence…."

[15] In the light of the above legal principles, the actual nature of the Applicant's claim must be gleaned from his pleading. Mr. Lennox as already indicated had conceded that as part of the factual background, and further in the pre-trial minute, the Applicant had made averments that there was non-compliance with the Employment Equity Plan. In his statement of case, the Applicant had summarised his case as follows;

He was never afforded and/or granted the position despite him being part of the group of persons that are described as historically disadvantaged South Africans (HDSA), and also despite him being shortlisted, interviewed and being the most/best suitable available applicant for the position. The Second Respondent on the other hand was not interviewed, or if he was interviewed, he was not the most/best suitable candidate, did not meet the requirements for the position, and did not possess the required years of experience and other requirements. The Applicant alleged that there was favouritism and the First Respondent had failed to follow due process and in so doing, discriminated against him and has suffered as a result. The First Respondent had also failed to adhere and/or abide by the proper procedures in place to ensure that employment equity processes are promoted, and had failed to act in terms of its equity plan and/or any equity plan. According to the Applicant, all of the above issues fell under the various sections of the Employment Equity Act (The EEA).

[3] Chirwa v Transnet Ltd & others [2008] 2 BLLR 97 (CC)
[4] 2010 (1) SA 238 (CC) at 263 D-G

[16] It was further common cause that following his non-appointment to the position in question, the Applicant had lodged a grievance and alleged firstly, that he was overlooked for the position, and secondly, that the First Respondent had failed to comply with its Employment Equity Policy and Plan. Amongst other relevant issues the Applicant had raised in his statement of claim was the allegation that he was victimized since exercising his rights in terms of the Labour Relations Act, and further since the Second Respondent was appointed to the position. He had further contended that had he been considered for the position, it would have aided the First Respondent in fulfilling its EEPP quotas and being more representative in its EEPP plan and outcomes. In the Applicant's view, the First Respondent had a duty to adopt, act and implement an Employment Equity Plan. These averments, contentions and allegations were repeated at length in the parties' signed pre-trial minute. In regards to the legal issues that arose from the facts of his claim, the Applicant had submitted that the matter had to be decided in terms of the provisions of sections 6, 10, 11, 13, 15, 20, and 50 the EEA.

[16] Having had regard to the Applicant's pleadings as summarised above, it is apparent that they were drafted in such a manner that they were all-encompassing, and to cover each and every complaint the Applicant had in respect of his non-appointment. To this end, and notwithstanding the manner with which the relief sought is drafted, the difficulty always remains as to exactly what it is that the Court is required to determine amongst the myriad of issues raised. Moreso, the dilemma for the Respondents is always the uncertainty surrounding the case it is required to meet.

[17] In order to highlight these difficulties, the Applicant appears to be claiming unfairness in relation to the failure to promote or appoint him. Secondly, he is aggrieved at the fact that the First Respondent failed to comply with its EEP policies and plans, and acknowledge the fact that he was from a historically disadvantaged group. Thirdly, he also claimed victimization for exercising his rights in terms of the Labour Relations Act. Fifthly, he had contended that his claim should be decided in accordance with several provisions of the EEA,

which provisions vacillates between the provisions of Chapter II and those of Chapter III of the EEA.

[18] On a full consideration of the Applicant's pleading, it cannot in my view be said that any reference to the First Respondent's alleged non-compliance with its Employment Equity Plan or policies in the pleadings was merely made in passing or purely by way of background. Had such reference to non-compliance with employment equity plans or policies been made once in the pleadings, one would have been inclined to agree that not much significance should be attached to it. However, in this case, such reference was made *ad nauseam.* Other than the repeated references to this allegation in the pleadings, the Applicant had repeated the same, and almost verbatim, in the parties' pre-trial minute. In respect of the relief that he sought, at paragraph 73.6 of the signed pre-trial minute, the Applicant sought a declaratory that the First Respondent had failed to comply with the EEA and/or its EEPP. Furthermore, at paragraph 73.8 of the pre-trial minute, the Applicant sought an order to direct the First Applicant to comply with the EEA, in particular Chapter III of the EEA. Viewed as a whole, it cannot be said that the Applicant's case falls squarely within the ambit of Chapter II of the EEA. In the light of these repeated references to the First Respondent' alleged non-compliance with its EEPP, the Applicant cannot escape the clutches of the provisions of Chapter III of the EEA, and the dispute resolution path that should have been followed is that as prescribed in Chapter V of the EEA.

[19] It does not appear that the Applicant had premised his case on anything other than the failure to appoint him or the alleged failure by the First Respondent to comply with its employment equity plan or policy. The issue of race discrimination is sparsely referred to in the pleadings. At paragraph 10 of the pleadings, he contended that by virtue of the First Respondent's failure to follow due process he was discriminated against. At paragraph 37, he repeated the allegation that he was not appointed to the position and gives possible reasons. No reference however is made to race discrimination. Only on three occasions does he make any reference to race discrimination in the 13 submissions he made. In regards to the relief that he seeks, the fact that

he had made reference to, or sought the failure of the First Respondent to appoint him to the position to be declared as discriminatory does not in my view necessarily make his case one that falls within the purview of Chapter II of the EEA. The type of relief he seeks has to be looked at in terms of what he had pleaded. In this case, his pleadings fall squarely within the purview of Chapter III.

[20] In the light of the conclusions reached in respect of the first jurisdictional point raised, it would be academic to deal with the second point *in limine* which was raised by the Respondents. However, for the sake of completeness, it is important to reiterate that every employee has a right not to be subjected to unfair labour practices as envisaged in section 185 (b) of the LRA. Section 186 (2) defines an unfair labour practice as any conduct or omission that arises between an employer and employee involving *inter alia*, unfair conduct relating to promotion. When one has regards to the nature of the Applicant's pleadings, it is clear that he is aggrieved by the fact that the Second Respondent was appointed rather than him. Had he been appointed to the position in question, this would have led to a promotion as that appointment would have been at a higher level.

[21] The Applicant had advanced numerous reasons as to the reason he should have been appointed including the fact that he was part of HDSA, was better qualified, most suitable, most experienced, and had met all or most of the requirements for the position. In regards to relief, the Applicant sought *inter alia*, an order declaring the failure to appoint him to the position as procedurally and substantively unfair; declaring the failure by the First Respondent to *"properly consider him for the position, at least in terms of his experience, adequately to be unfair and/or discriminatory"*; directing the First Respondent to appoint him in the position; directing the First respondent to comply with the EEA, in particular, Chapter III of the EEA; and directing the First Respondent to compensate him in the amount of R500 000.00. On the whole, in view of the conclusions made above in respect of the allegations pertaining to discrimination, it should also be concluded that given the nature of the complaints raised in regards to his non-appointment, the relief that the

Applicant seeks, and the general manner and approach taken in formulating the claim, it should be concluded that his case, other than the conclusions already made in regards to the provisions of Chapter III of the EEA above, also bear the hallmarks of an alleged unfair labour practice dispute as contemplated in section 186 of the LRA. To this end, the dispute should have remained at the CCMA, having been properly referred to that forum.

Costs:

[22] It is trite that a cost order is determined in accordance with the considerations of law and fairness. The Respondents had sought a cost on account of the fact that the application before the Court was ill-considered. It was however argued on behalf of the Applicant that there was an on-going employment relationship between the parties, and that the consequences of such an order would be dire for him. Whilst these factors are taken into account, it should be borne in mind that fairness applies to both parties. In the light of the nature of the claim, and the pleadings, the Applicant had clearly caused the Respondents irritation. The Respondents had to sift through those pleadings in order to make sense of what the Applicant's case was all about. Throughout, from the time that the application was launched and up to a point where the parties had completed the pre-trial minute, the Applicant had persisted with his claim in the manner that he had done. In doing so, it does not appear that his on-going relationship with the Respondents or a possible cost order against him was even a consideration. To this end, it would be unfair for the First Respondent in particular, to be burdened with the costs of having to defend a claim that was ill-advised and ill-considered. In these circumstances, the following order is made;

Order:

i. The preliminary points raised by the Respondents are upheld.

ii. The Court lacks the requisite jurisdiction to determine the Applicant's claim.

iii. The Applicant is ordered to pay the First Respondent's costs of suit.

Tlhotlhalemaje

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. MA Lennox

Instructed by: Goldberg Attorneys

For the Respondent: Adv. A Mosam

Instructed by: Edward Nathan Sonnenbergs