



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS237/14

HEYMANN TOMMY

Applicant

and

GHH MINING MACHINES (PTY) LTD

First Respondent

SANDRA BAIN

Second Respondent

Heard: 1 August 2014

Delivered: 12 February 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This matter concerns a point *in limine* raised by the First Respondent in response to the Applicant's statement of case. Central to the objection is that this Court lacks jurisdiction to adjudicate the Applicant's claims of alleged unfair dismissal and unfair labour practice.

Background:

- [2] The Applicant was employed with effect from 1 November 2011 as a Training and Development Manager. On 2 August 2013, he was issued with a notice to attend a disciplinary enquiry to answer to allegations pertaining to gross negligence and refusal to obey a lawful and reasonable instruction. On 20 August 2013, the chairperson of the disciplinary enquiry had recommended that the applicant be demoted. The Applicant had declined the offer of a demotion, prompting the First Respondent to issue him with a final written warning. Following an appeal, the final written warning was reduced to a written warning.
- [3] Still aggrieved with the written warning, the Applicant had then referred an alleged unfair labour practice dispute to the CCMA on 24 October 2013. Conciliation proceedings held on 25 November 2013 failed to resolve the dispute and the Applicant had referred it for arbitration. The dispute was subsequently withdrawn on 10 March 2014.
- [4] Subsequent to the written warning, the Applicant was suspended on 22 October 2013 and thereafter subjected to another disciplinary enquiry on 25 November 2013. He was dismissed on 3 December 2013 on account of alleged dereliction of duties. An appeal hearing on 20 January 2014 upheld his dismissal.
- [5] The Applicant referred an alleged unfair dismissal dispute to the CCMA on 23 December 2013. A conciliation hearing held on 27 January 2014 failed to resolve the dispute. The Applicant contends that he had referred the dispute for arbitration whereas the First Respondent contends that no such referral was lodged.
- [6] There is a dispute as to how the matter ended up in this Court. The Applicant's contention is that there was an agreement between the parties on 7 March 2014 that since his dispute related to an unfair labour practice and unfair dismissal, the matter should be referred to this Court. He had further contended that the agreement was in terms of section 158 (2) (b) of the Labour Relations Act as the matter was complex, had raised legal issues, and also due to the 'substantial and procedural errors involved in the matter'.

The submissions:

[7] The First Respondent's contention was that the Court lacked jurisdiction to adjudicate the dispute on any of the allegations made by the Applicant in his statement of case. It was submitted that on 28 March 2014, it was brought to the attention of the Applicant's attorney of record that the court lacked jurisdiction; that the First Respondent had not agreed to the jurisdiction of the court as alleged; that the applicant's attorneys had merely informed the First Respondent's attorneys that the Applicant intended to proceed with litigation in this Court. It was further submitted that the Applicant had on his own accord, withdrawn the unfair labour practice dispute at the CCMA on 7 March 2014.

[8] It was submitted on behalf of the Applicant that there was indeed an agreement to refer the dispute to this Court, and that if this was not the case, the dispute would have been left for the CCMA to determine. Reference was made to correspondence of 7 March 2014 from the First Respondent's attorneys, which stated that;

"2. We confirm that the unfair labour practice arbitration scheduled for Monday 10 March 2014 will not proceed and the matter will be joint with your client's unfair dismissal dispute and perused in the Labour Court "(Sic)

[9] It was further submitted on behalf of the applicant that reliance was also placed on s158 (2) of the LRA, which provide that where it becomes apparent that the issue in dispute should have been referred to arbitration, the Labour Court has the power to stay the litigation proceedings and order that the dispute be referred to arbitration, or with the consent of the parties, continue with the proceedings with the Court sitting as an arbitrator.

Evaluation:

[10] Where the jurisdiction of the Labour Court is placed in dispute, its duty is to determine the true nature of the issue in dispute between the parties, irrespective of how an applicant may have chosen to label or describe that dispute. The Court is not bound by the description of the dispute as may be

articulated by an applicant¹, nor should it assume jurisdiction over a dispute simply on the parties' say so.

- [11] The true nature of the issue in dispute can simply be gleaned from the Applicant's own statement of case, and more in particular, from the type of relief that he seeks. The Applicant seeks an order *inter alia*;

"1 (a) That the outcome of the incapacity hearing and the appeal thereto to be an unfair labour practice, in the light of several substantial and procedural errors involved.

(b) That the applicant was unfairly dismissed, and that the dismissal be set aside.

2. That the applicant be reinstated in the employment with the first respondent with full benefits and the position he held before the unfair labour practice and unfair dismissal"

- [12] Based on contents of the statement of case and the relief that the Applicant seeks, it is apparent that the nature of his dispute pertains to an alleged unfair labour practice, and an alleged unfair dismissal on account of incapacity. Section 191 of the LRA deals with disputes about unfair dismissals and unfair labour practices. The relevant subsections are;

"5. If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-

(a) the council or the Commission must arbitrate the dispute at the request of the employee if-

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity. Unless paragraph (b) (iii) applies

.....

(iv) the dispute concerns an unfair labour practice; or

¹ National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another 2003) 24 ILJ 305 (CC) at para.52.

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-

(i) automatically unfair;

(ii) based on the employer's operational requirements;

.....

.....

(13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act”

[13] The Applicant in contending that the Court has jurisdiction does not rely on the provisions of sections 191 (5) (b) or 191 (13) (a) of the LRA. Ordinarily therefore, his dispute remains to be determined by the CCMA. There are of course exceptions to the rule. These are to be found in section 191 (6) of the LRA, which provides that the Director of the CCMA must refer the dispute to this Court if she decides on application by any party to the dispute that it would be appropriate to do so having taken into account a variety of factors.

[14] It is common cause that in this case that no such application was made by either party. It therefore follows that the Applicant cannot on his own, decide to approach the Court on that basis that the matter is complex or that it raises legal issues. On the contrary, and having had regard to the contents of the statement of claim, there appears to be nothing complex about the facts of this case, nor are there any legal issues that the CCMA is not adequately equipped to deal with.

[15] The Applicant also sought to rely on the provisions of section 158 (2) of the LRA in contending that the Court has the requisite jurisdiction. This section provides that;

“If at any stage after the 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.”*

[16] By virtue of the use of the word ‘*may*’ in these provisions, the Labour Court does not have to assume jurisdiction over the dispute. It still has discretion to act under subsection (a) or (b), bearing in mind that any election under (b) is subject to the consent of the parties. Based on his statement of case, this Court cannot assume jurisdiction over the alleged unfair labour practice dispute as well as the alleged unfair dismissal dispute simply because the Applicant had deemed it fit to bring such issues before it in the absence of compliance with the procedures and provisions of section 191 (6) of the LRA. The Court it is not the proper forum to deal with such issues simply because the Court may now be seized with it. This view is further fortified by the decision in *Parliament of the Republic of SA v Charlton*² where the LAC held that;

‘Therefore, once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court may stay the proceedings and refer the dispute to arbitration or it may, with the consent of the parties, and if it is expedient to do so, continue with the proceedings sitting as an arbitrator. It cannot deal with the dispute outside the ambit of these provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with the provisions of s 157(5) and s 158(2) of the LRA.

And

“In resolving labour disputes a clear line must be drawn between the different fora that have been set up by the LRA.....’

[17] In regards to the issue of consent as may be contemplated in section 158 (2) (b), the First Respondent had vehemently disputed that such consent was granted. The alleged consent according to the Applicant emanates from the correspondence from First Respondent’s attorneys of record following the withdrawal of the initial unfair labour practice dispute before the CCMA. The

² (2010) 31 ILJ 2353 (LAC) at paras 34 – 35

difficulty with the consent relied upon by the Applicant is that on a proper interpretation of section 158 (2) (b) of the LRA, such consent must be obtained “at any stage after the dispute has been referred to the Labour Court,” and not before the matter is referred to the Court.

[18] In this case, following the withdrawal of the unfair labour practice dispute at the CCMA and before the dispute could be referred to the Court, the Applicant had assumed that there was such consent. In my view, in the absence of the provisions of section 191 (6) of the LRA having been complied with, the parties cannot on their own decide where their dispute should be determined. To do so would as it was pointed out in *Parliament of the Republic of SA v Charlton*, would be in conflict with the provisions of section 157 (5)³. This Court cannot countenance a situation where parties pick and chose which forum must determine their dispute, or in the alternative, refer a dispute to it with the hope that the Court would exercise its discretion in terms of section 158 (2) (b) and assume jurisdiction over the matter. The mere fact that the parties may even consent after the dispute has been referred to the Court does not imply that the Court will readily assume jurisdiction. The Court still has to exercise its discretion even if there is consent. To allow parties to forum shop will lead to the scheme of dispute resolution as set out in the LRA being undermined, and would burden this Court with matters that should not in the first place be before it. In these circumstances, the point *in limine* raised by the First Respondent should be upheld.

Costs:

[19] The statement of case was served on the First Respondent on 26 March 2014. The First Respondent's contention is that on 28 March 2014, its attorneys had brought it to the attention of the Applicant's attorneys that the Court lacked jurisdiction over the matter. In the correspondence, it was pointed out to the Applicant's attorneys that there was no agreement to the jurisdiction of this court as the Applicant had alleged in his statement of case.

³“(5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration”

The Applicant's attorneys were given until 1 April 2014 to withdraw the statement of case failing which the First Respondent will be forced to serve and file opposing papers, raise the preliminary points, and seek a punitive cost order. That deadline came and went without the matter being withdrawn.

- [20] On 3 March 2014, the First Respondent had indicated to the Applicant's attorneys of record that since the applicant was *dominus litis*, he did not require the First Respondent's consent in the event that he wished to litigate in this Court. On 7 March 2014, the First Respondent's attorney had confirmed that the unfair labour practice dispute was withdrawn, and that the matter will be joined with the applicant's unfair dismissal dispute to be pursued in the Court. In the event that it may be argued that the correspondence of 7 March 2014 may have been equivocal, any uncertainty in that regards was clarified with the First Respondent's attorneys' correspondence of 28 March 2014. The applicant was warned of the folly of persisting with this claim in this Court, and had failed to heed the warning. This had caused the First Respondent to file opposing papers and at unnecessary legal expenses. I do not see any reason, having taken into account considerations of law and fairness, why the Applicant should not be burdened with these costs

Order:

- i. The point *in limine* raised by the First Respondent is 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.



Tlhotlhallemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv. Artsen

Instructed by:

Buks Croucamp Attorneys

On behalf of First Respondent:

Mr. J Du Randt of Du Randt Du Toit Pelser
Attorneys

LABOUR COURT