



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1355/09

CYNTHIA THERESIA MOTSOMOTSO

Applicant

And

MOGALE CITY LOCAL MUNICIPALITY

Respondent

Delivered: 26 May 2015

Decided in chambers

LEAVE TO APPEAL JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This is an unopposed application for leave to appeal against the whole of judgement handed down on 18 December 2014 in terms of which the Court issued the following order:

- i. The Court lacks the requisite jurisdiction to determine the applicant's alleged unfair discrimination claim.
- ii. There is no order as to costs.

Background facts:

- [2] The facts of the dispute are set out in detail in the main judgment and accordingly will not be repeated herein save to mention that the applicant alleged that she had been discriminated against as a result of her male colleagues' remuneration notches being increased while hers remained the same.
- [3] An unfair labour practice dispute was referred to the SALGBC and an award issued in her favour. The award was however reviewed and set aside by this Court on account of lack of jurisdiction on the part of the arbitrator to determine a discrimination dispute as presented and argued at arbitration proceedings. Thereafter, the applicant filed a statement of claim in respect of the discrimination dispute, on the basis of the certificate issued by the SALGBC.
- [4] Significantly, the discrimination dispute, prior to being referred to this Court, was not referred to the Commission for Conciliation, Mediation and Arbitration for conciliation, and accordingly this Court's jurisdiction to adjudicate the matter was in issue.
- [5] It was alleged by the applicant that although the dispute referred to the SALGBC was captured as an unfair labour practice, that the substance of the dispute was in fact that of discrimination. Accordingly, the applicant submits that the Certificate of Outcome issued after conciliation reflecting that the nature of the dispute was an unfair labour practice, was in fact substantively in respect of unfair discrimination. Based on this stance the applicant was of the view that there was no need to lodge a separate referral of the discrimination dispute to the SALGBC. The reasoning behind this view was that the previous Certificate of Outcome as issued by SALGBC was sufficient and that referring a discrimination dispute after the matter came before this Court for the review application would have served no purpose.
- [6] The applicant's argument that this Court had jurisdiction to decide her unfair discrimination dispute was ultimately therefore rejected based on the finding that an essential element giving rise to this Court's jurisdiction was lacking in

the light of the provisions of section 10 of the Employment Equity Act¹ (EEA) which provide for the referral of matters such as this to be referred specifically to the CCMA and not to a bargaining council.

Grounds upon which leave to appeal is sought:

[7] In the present application for leave to appeal the applicant challenges the Court's finding and the reasoning behind it on the same basis as argued during the hearing of the matter. Essentially, it was submitted *inter alia* that;

7.1 Since the Court in the review application had not reviewed and set aside the Bargaining Council's conciliation proceedings and the certificate of outcome, it was not the Court's function to enquire into the validity of the bargaining Council's decision to conciliate the dispute since that process had taken place and a certificate of outcome was issued.

7.2 The Court was over technical in having found that it lacked the requisite jurisdiction to determine the applicant's alleged unfair discrimination claim on the ground that the conciliation process was conducted by the bargaining council.

7.3 The Court's finding causes grave practical difficulties because it made reference to the court being dependent on something over which the parties to the dispute had no control. This accordingly caused the applicant to suffer unintended delays and grave injustice caused by the bargaining council's acceptance of the referral as valid.

Legal framework:

[8] It is trite that in determining applications for leave to appeal, the test is whether there are reasonable prospects that another court (the Labour Appeal Court) may come to a different conclusion reached by the court *a quo*². This

¹ Act 55 of 1998

² *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890B. See also *National Union of Metal Workers of South Africa v Jumbo Products* CC 1996 (4) SA 735 (A) at 742B where Appellate Division (per Corbett CJ) expressed the test in the following terms;

test was restated in *Minister of Safety and Security and Another v Madyibi*³ where the court held that:

“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto.”

- [9] The principles relating to the jurisdiction of the Labour Court to adjudicate matters that are mandatorily required to be conciliated emanate from the provisions of section 157 (4) (a) of the LRA⁴. It was contended on behalf of the applicant that those requisite jurisdictional facts existed in this case. The Constitutional Court in *NUMSA v Intervale (Pty) Ltd and others*⁵ had occasion to consider these jurisdictional requirements, and it would be useful to quote at length the principles as set out by Cameron J. In this regard, the learned Judge held as follows;

“On the point crucial to this case, the majority firmly rejected the proposition that the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all. It said that it was—

“as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication”.

“In such a case the enquiry is whether there are reasonable prospects of success, i.e. whether there is a reasonable prospect that the court of appeal may take a different view and hold the trial Judge to have been wrong (see S v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D)”.

³ (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

⁴ This provides that;

“The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation”

⁵ (2015) 36 ILJ 363 (CC) at paragraphs [31] to [35]

The reasoning of the *Driveline* majority is, in my view, convincing. Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour law history for nearly a century. We should not tamper with it now.

And the *Driveline* minority's approach to section 157(4) seems wrong to me. Section 157(4)(a) confers upon the Labour Court the power to refuse to determine a dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. Section 157(4)(b) then provides that a certificate issued by a commissioner that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation. This means that, in a case where a certificate of non-resolution has been issued at the end of the conciliation process, the Labour Court may not, on the strength of section 157(4)(a), decline to determine the dispute. This is because section 157(4)(b) says that the certificate is sufficient proof that an attempt was made.

Where no certificate has been issued because there was, for example, no conciliation meeting, but a period of 30 days from the date when the council received the referral has elapsed, the statute conspicuously does not provide that the expiry of the 30-day period is sufficient proof that an attempt was made to conciliate the dispute. It is, in my view, in that situation that the Labour Court may, in terms of section 157(4)(a), refuse to determine the dispute. This provision cannot assist in a case where the dispute was not even referred to conciliation. Section 157(4)(a) underlines the importance the LRA places upon the need for attempts to be made to try and resolve a dispute through conciliation before resorting to other methods of resolution. (Emphasis)

What is clear is that subsection (4)(a), despite its appearance in the provision entitled "Jurisdiction of the Labour Court", operates to empower the Court to refuse to determine a dispute, over which it does have jurisdiction, so as to enable the parties to attempt conciliation. Contrary to the conclusion of the

Driveline minority, it does not operate to extend the Court's jurisdiction to disputes that have not been conciliated at all."

Evaluation:

- [10] The principles enunciated in *Intervolve* are applicable to the present matter as it confirms the necessity of conciliation as a prerequisite to this Court assuming jurisdiction in a dispute. The conciliation requirement of section 191 of the LRA is similar to the requirements in the EEA, both being peremptory in nature. The difference being that the EEA specifically requires that conciliation be conducted under the auspices of the CCMA⁶ and not a bargaining council as the latter does not have the jurisdiction to deal with discrimination disputes.
- [11] Further applying the principles as set out above in this case, it was not in dispute that the applicant had initially referred an unfair labour practice dispute to the Bargaining Council for conciliation. Contrary to the submissions made on behalf of the applicant, there was no basis for the respondent to challenge the jurisdiction of the bargaining council to conciliate the unfair labour practice dispute as it was properly referred. Secondly, when the arbitrator assumed jurisdiction over the dispute, but then ended up arbitrating a discrimination dispute as opposed to what was initially referred, the respondent was within its rights to review the arbitration award, which it had successfully done. It was therefore irrelevant whether the respondent had

⁶ Section 10 of the EEA provides that;
"Disputes concerning this Chapter.

(1) In this section, the word "dispute" excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.

(2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

(3) The CCMA may at any time permit a party that show good cause to refer a dispute after the relevant time limit set out in subsection (2).

(4). The party that refers a dispute must satisfy the CCMA that -

(a) a copy of the referral has been served on every other party to the dispute; and

(b) the referring party has made a reasonable attempt to resolve the Dispute

(5). The CCMA must attempt to resolve the dispute through conciliation.

(6). If the dispute remains unresolved after conciliation -

(a) any party to the dispute may refer it to the Labour Court for adjudication; or

(b) all the parties to the dispute may consent to arbitration of the dispute.

(7). The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter."

raised an objection or not, as the Arbitrator clearly had no jurisdiction to arbitrate a discrimination dispute.

[12] As already indicated in the main judgment, once the award was successfully reviewed, and the matter was not taken any further, this disposed of the dispute between the parties. To reiterate, a party cannot utilise a certificate of outcome issued in respect of a different dispute for the purposes of approaching the Court with a new dispute, moreso once the initial dispute had been disposed of.

[13] There was therefore, an obligation on the applicant if she wished to pursue a discrimination claim, to approach the CCMA as required by the provisions of section 10 (2) of the EEA. It is clear from the reading of section 10 of the EEA that the legislature had intended that disputes concerning discrimination should be conciliated by the CCMA and not the bargaining councils. This implies that the bargaining council as in this case, did not have jurisdiction to conciliate disputes concerning discrimination disputes, even if the applicant still holds the view that such a dispute was in any event conciliated. The bargaining councils are creatures of the statute and therefore cannot assume powers which they do not have in terms of the applicable legislation.

[14] The bargaining council in the present instance lacked jurisdiction to conciliate the dispute concerning the alleged discrimination. Accordingly in law the dispute as formulated by the applicant in her pleadings was never referred to, nor conciliated by the CCMA and thus depriving the Court of the jurisdiction to adjudicate the dispute. In the absence of such a referral, the Court was bound to decline to assume jurisdiction as contemplated in section 157 (4) (a) of the LRA.

[15] Having had regard to the grounds for leave to appeal, the submissions made in that regard, and further having had regard to the principles governing the jurisdiction of this Court as elucidated by Cameron J in *Intervale*, it is my view that the prospects of the Labour Appeal Court arriving at a conclusion

that the court *a quo* should have adjudicated the dispute as referred are clearly remote. In these circumstances, the following order is made.

Order:

- (i) The application for leave to appeal is dismissed.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa