



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D935/15

In the matter between:

THULISANI MBONGENI SHOZI & 204 OTHERS

Applicants

and

PETCON INVESTMENTS CC

t/a PETCON OUTSOURCING SOLUTIONS

First Respondent

UNILEVER SOUTH AFRICA (PTY) LTD

Second Respondent

Heard: 4 March 2016

Delivered: 29 June 2016

Summary: Once and for all rule - changing a cause of action mid-stream

JUDGMENT

WHITCHER J

[1] On 4 March 2016, I upheld the second respondent's preliminary point that it was not the employer of the applicants.

- [2] This court must decide whether any of four preliminary points raised by the first respondent (Petcon) serves as a bar to the applicants pursuing an action concerning breach of contract in accordance with Section 77 (3) of the Basic Conditions of Employment Act of 1997.
- [3] The background is that Petcon provided labour to the second respondent ('Unilever') in terms of a temporary employment service contract.
- [4] In or about September 2012, Unilever informed Petcon that it was not prepared to pay the prevailing hourly rate for the services of the applicants. It offered a reduced rate or termination of the TES contract. In due course, the applicants' salaries were paid at the reduced hourly rate.
- [5] It is not important to decide whether the applicants agreed to the new rate or not. Nor is the date on which the applicants referred a mutual interest dispute to the CCMA seeking a restoration of their old pay rates important for present purposes. Suffice it to say that, in 17 July 2013, the applicants were still so dissatisfied with the reduction in their pay and this led to the referral of a dispute concerning a "matter of interest" to the CCMA and industrial action. There is also an allegation that the respondents effected a lock out.
- [6] On 23 July 2013, Unilever cancelled its TES contract with Petcon. On 24 July 2013, in accordance with its understanding of the contracts of employment it had with the applicants, Petcon then purported to terminate the applicants' employment contracts. This gave rise to a dismissal dispute that was referred to the CCMA. On review, the court found, *inter alia*, that the dismissal dispute should have been referred to the Labour Court for adjudication. An appeal has been lodged against the review judgment.
- [7] The applicants in the present matter seek relief that predates their dismissal. This is to enforce the payment of the higher wage rates in place before October 2012, up until the date of their dismissal. To do so, they seek to cast the reduction in wages not as an unfair labour practice but as a breach of their contract. They seek to enforce payment of the higher wage rates against Pecton.

Points *in limine*

- [8] Petcon raises the following points *in limine*. They argue that the real dispute is an unfair labour practice as contemplated in Section 186 (2) of the LRA and, as such, this court lacks jurisdiction to adjudicate it. They argue further that the applicants' claim should have been raised at the time of pursuing their unfair dismissal dispute in terms of the 'once and for all rule'.

Analysis of argument

- [9] The pleaded dispute is plainly one that falls within the jurisdiction of the Labour Court by way of section 77 (3) of the BCEA¹. As such, Petcon's first point *in limine* must fail. In making this finding, I follow the position adopted by Waglay JP, on jurisdiction where he states:

"While I appreciate that the suite of statutes that make up our principal labour laws must as far as possible be read harmoniously, it is not open to a court to substitute one cause of action for another simply because it believes that a particular formulation is more appropriate"².

- [10] Indeed, a litigant is entitled to frame a dispute in terms of the statutory provision he thinks will best aid him. His case will consequently stand or fall on the basis of how the proven facts meet the legal provision he has invoked. If there is any conflict of laws, the question will be displaced to whether the legal provisions he has invoked prevail or not.
- [11] This strikes me as being in accordance with the view of the Constitutional Court's in *Gcaba v Minister of Safety and Security*.³ Here, jurisdiction was decided based on whether the court had jurisdiction over the pleaded claim, and not whether it had jurisdiction over some other claim that were not pleaded but could possibly have arisen from the same facts.

¹ "77. 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"

² *Ekurhuleni Metropolitan Municipality v SAMWU* [2015] 1 BLLR 34 (LAC)

³ [2009] 12 BLLR 1145 (CC)

- [12] I am also not persuaded that the once-and-for-all rule applies *in casu*. It is certainly undesirable that disputes are decided in a piecemeal fashion. The emergence of a rule that bars litigants from claiming ‘damages’ in separate actions that arise from the same cause of action is therefore to be welcomed⁴. However, it strikes me that this rule can only be fairly and sensibly applied if the same court or tribunal had jurisdiction to award the separate instances of relief sought. I have already found that the applicants were at liberty to plead their claim as a contract dispute. Since the CCMA, which determined the dismissal dispute, did not enjoy the jurisdiction to entertain a contract law dispute in terms of section 77 (3) of the BCEA, the applicants could hardly be expected to have brought this claim ‘once and for all’.
- [13] During argument, a further issue arose. This was whether the applicants are barred from proceeding with their contractual claim on the basis that they seemingly first elected to deal with the issue as a matter of mutual interest. A rule against changing a cause of action mid-stream is closely related to the ‘once and for all’ rule in terms of which a party who elects to pursue a matter in a particular manner is held to that election and is confined to the fruits his chosen route may yield.
- [14] In *Chirwa v Transnet Ltd & others*⁵, the Constitutional Court noted that the appellant had commenced her action in the CCMA by referring the matter for conciliation under the LRA, but had then switched to the High Court with a claim under the PAJA. The Constitutional Court held the matter could have been disposed of on that narrow basis. The court stated:

“Ordinarily, and as a matter of judicial policy, even if the High Court had concurrent jurisdiction with the Labour Court in this matter, it should be impermissible for a party to initiate the process in the CCMA alleging one cause of action, namely, unfair labour practice, and halfway through that process, allege another cause of action and initiate proceedings in the High Court. It seems to me that where two courts have concurrent jurisdiction, and a party initiates proceedings in one system alleging a particular cause of action, the party is bound to complete the process initiated under the system

⁴ *Sgt Pepper’s Knitwear v SACTWU* (2012) 33 ILJ at 2184 - 2185

⁵ (2008) 29 ILJ 73 (CC).

that she or he has elected. Concurrent jurisdiction means that a party must make an election before initiating proceedings. A party should not be allowed to change his or her cause of action mid-stream and then switch from one court system to another”.

- [15] However, according to the Supreme Court of Appeal in *Makhanya v University of Zululand*⁶, the fact that an employee referred a dispute under the LRA was not considered a bar to the institution of an action for breach of contract in a civil court even if the matter had been disposed of by the relevant labour forum. Grogan states that it follows from this ruling that employees may switch from the labour forums to the civil court before the labour process is complete, and may also seek relief in the High Court which they have failed to obtain in the labour forums. However, he writes, if the ‘once and for all’ rule, which is designed to prevent a multiplicity of actions and bring finality to litigation, has any bearing in this context, there must be some limit to the number of times employees may try their luck in the respective forums.⁷
- [16] In this case, the applicants admit commencing legal action in respect of the reduction of their wages in the CCMA as a matter of mutual interest. This ended up as a concerted refusal to work in which they pressed for the unilateral variation of the wages to be reversed. This unfortunately ended up in their dismissal.
- [17] Not to add to the uncertainty I have identified above, it is tempting to seek refuge in the highest-ranking case on the matter, *Chirwa*. It is not only rank but, with respect, a fine appreciation of public policy that distinguishes *Chirwa* above *Makhanya* on the issue at hand. In my opinion, it should be impermissible for a party to initiate a process in the CCMA alleging one cause of action and halfway through that process, allege another cause of action and initiate proceedings in the Labour Court. Why should the applicants not be held to their initial cause of action?
- [18] But for the fact that the applicants were dismissed in the midst of their mutual interest dispute, I would have found that their changing tack is impermissible.

⁶ (2009) 30 ILJ 1539 (SCA).

⁷ John Grogan *Labour Litigation and Dispute Resolution* (1st ed 2010, Juta) 96.

However, a countervailing policy issue arises in cases where a dismissal interrupted the pursuit of a matter of mutual interest. The case at hand presents us with the one exception where allowing a party to reframe their cause of action mid-stream would be in the interests of fairness. This is because one cannot meaningfully engage in industrial power-play if already dismissed.

[19] Whereas a party seeking two different forums to adjudicate a factually identical case should, for policy reasons, be prevented from doing so, this case is different. Strictly in the circumstances of this case, I find that it was permissible for a party seeking to resolve a dispute ultimately by means of power, to change tack and seek adjudication of this dispute when the option of persisting with a mutual interest dispute disappeared. This exception is necessary to prevent dismissal being used cynically to avoid dealing with demands to reverse a unilateral variation of terms and conditions, especially when a TES is involved.

[20] In the circumstances then, I find that there is nothing barring the action proceeding against Petcon, all its points *in limine* having no merit.

Order

[21] The first respondent's points *in limine* are dismissed with costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicants: Adv NSV Mfeka, instructed by Maseko Mbatha and Associates

For the first respondent: Snyman Attorneys

