



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JR 1493/16

In the matter between:

**XABISO MSIMELELO LUTHANDO
XOLI**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

TSHEPO MASHIGO (N.O.)

Second Respondent

TELKOM SA SOC LTD

Third Respondent

Heard: 02 June 2017

Delivered: 19 April 2018

Summary: (Jurisdictional ruling-complaint of reduction in remuneration contrary to terms of employment – claiming falling within ambit of unfair labour practice concerning demotion even if contractual remedy might also exist)

JUDGMENT

LAGRANGE J

Background

- [1] This application was enrolled for a pre-enrolment hearing on 2 June 2017. After hearing the applicant and the respondent, it was agreed that the matter could be determined without being re-enrolled subject to the applicant filing any supplementary heads of argument by 9 June 2017.
- [2] Subsequently, the applicant did file supplementary heads of argument. For reasons which are not entirely clear these were only filed in April 2018, though it appears he may have attempted to file them earlier. Be that as it may, the file was only been placed before me again on 16 April 2018.
- [3] The applicant applied to review a jurisdictional ruling of the second respondent ('the arbitrator') which held that the dispute concerned remuneration and not an unfair labour practice and therefore the CCMA did not have jurisdiction.

Review application

- [4] A review of a jurisdictional ruling is essentially a *de novo* determination of whether or not the arbitrator was correct, based on the evidence before the arbitrator.¹ Accordingly, the arbitrator's reasoning as such is not being scrutinised for reasonableness, though it obviously has a bearing on the merits of the jurisdictional claim.
- [5] The applicant claims that he was unfairly demoted because he had been employed on 4 June 2010 in an operational specialist post but was remunerated at a rate one level below the rate he should have been paid, namely, OP1 instead of OS. The applicant only raised this alleged discrepancy in November 2015, when he claims he first became aware of it.

¹ ***Qibe v Joy Global Africa (Pty) Ltd; In re: Joy Global Africa (Pty) Ltd v CCMA and others* [2015] 4 BLLR 415 (LAC)** at 417-8:

"[5] The decision of a CCMA Commissioner relating to the question of its jurisdiction is, consequently, a preliminary matter that may be set aside by the Labour Court on review. The question as to whether the CCMA has jurisdiction is contingent upon the existence of certain objectively pre-determined conditions as set out in the LRA, from which it derives its existence. In order for a party to succeed in a challenge to the jurisdiction of the CCMA on review, it is required to demonstrate objectively that the jurisdictional facts necessary for the exercise of the CCMA's powers are absent. In determining, on review, whether the CCMA had jurisdiction to deal with a dispute, the Labour Court must determine the issue *de novo*." (footnotes omitted)

- [6] The arbitrator held that his position remained unchanged since his appointment and that neither his remuneration, responsibilities or status had been materially reduced during his employment. Accordingly, the applicant had neither been demoted nor did his dispute concern promotion because that would require him to have applied for a higher graded position.
- [7] The applicant contends that the arbitrator contradicted himself in finding that his dispute did not concern demotion while acknowledging that the dispute concerned remuneration, because the concept of demotion included a dispute over remuneration. In his initial heads of argument, the applicant contended that his dispute was clearly a rights dispute flowing from his employment contract. He characterised it thus:

“As per paragraph 7 of the award the Applicants dispute is that the Third Respondent failed to remunerate the applicant at OS grade as per the employment contract and allocate work equivalent to an OS grade, instead the work was allocated and OP 1 grade and the remuneration was also linked to and OP 1 grade.”

In essence, the applicant contends that his dispute was that, from the commencement of his appointment, he was neither given the responsibilities in accordance with the post he was employed in, nor, was he paid commensurate with the responsibilities he was supposed to perform.

- [8] At the arbitration hearing, the applicant intended to lead evidence regarding his grading and remuneration. The only evidence that was tendered, in the course of somewhat informal preliminary discussion with the arbitrator was his contract of employment. Although the contract appears to have been omitted from the bundle of documents forming part of the record, it is common cause that he was appointed at an OS grade and remained on that grade until he left the third respondent's employment. The applicant's contention was that, he was not remunerated in accordance with the contract but was in effect downgraded. The respondent's representative also made representations without leading any evidence. The thrust of those submissions was that the applicant's

case was that, he was effectively seeking promotion in relation to the position he was appointed to.

- [9] It is quite possible that the applicant could have simply sued on the basis of his contract of employment, and indeed the applicant appears to acknowledge that much. However, the mere fact that he might have a contractual claim to obtain similar relief does not mean he could not bring his claim within the ambit of an unfair labour practice as defined in section 186(2)(a) of the Labour Relations Act 66 of 1995. In effect, what the applicant is claiming is that he was engaged on in a post with a particular rate of pay, but after his appointment was remunerated at a lower level, which amounted to an alteration of his actual status after his appointment. This much is clear even in the absence of having sight of the contract of employment. I do not see why such a complaint cannot be construed as a complaint about a demotion, whatever other implications it might have. Accordingly, I am satisfied that the arbitrator did indeed have jurisdiction to deal with the dispute and should not have dismissed it as brusquely as he did. In reaching this conclusion, I make no finding as to what portion of the unfair labour practice claim dating back to 2010 can be pursued, given that the unfair labour practice claim appears to have only been launched in 2016.

Order

- [1] The jurisdictional ruling of the second respondent dated 6 July 2016 under case number GATW5564-16 is reviewed and set aside.
- [2] The jurisdictional ruling is substituted with a ruling that the first respondent does have jurisdiction to determine the unfair labour practice claim of the applicant in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995.
- [3] The applicant's unfair labour practice claim is remitted back to the first respondent for an arbitration hearing before an arbitrator other than the second respondent.
- [4] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

In person

THIRD RESPONDENT:

N Mbuyisa of Maseremule
Inc.