



Of interest to other judges

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

Case no: JS 779/15

In the matter between:

**NATIONAL UNION OF
METALWORKERS OF SOUTH
AFRICA**

First Plaintiff

MONAISA CLEMENT & OTHERS

**Second and further
Plaintiffs**

and

MICROMEGA (PTY) LTD

Defendant

Heard: 7 May 2018

Delivered: 8 May 2018

Summary: (Jurisdictional ruling-ex gratia offer of payment by holding company to changed employees of wholly owned subsidiary-whether enforcement of claim justiciable by Labour Court-section 77 of BCEA – s 157 of LRA – claim not a matter concerning a contract of employment)

JUDGMENT

LAGRANGE J

Background

- [1] This dispute originates in a retrenchment dispute between the plaintiffs' former employer, Kolbenco (Pty) Ltd ('Kolbenco'), and the plaintiffs. An offer of a cumulative retrenchment package amounting to R 10.5 million was made by Kolbenco on 6 February 2009. The defendant company ('Micromega'), which owned Kolbenco at the time, guaranteed the offer made by Kolbenco up to the value of R 3 million. A payment of R 3 million was made by Micromega to the plaintiffs in fulfilment of that guarantee. However, Kolbenco did not fulfil its obligation to pay the balance of the retrenchment package amounting to R 7.5 million.
- [2] It also appears to be common cause that in the various interactions of the two companies with Numsa, both companies were represented by Mr I Morris, who was a director of both the subsidiary and the holding company.
- [3] It is common cause that in April 2013 Micromega made an *ex gratia* offer of payment to the Plaintiffs of R 1.5 million on behalf of Kolbenco. There is a dispute whether or not this was accepted. Micromega maintains that the offer was rejected by the applicants, whereas the Plaintiffs maintain it was verbally accepted. The applicants have brought this action against Micromega to enforce payment of the R 1.5 million. Before that dispute can be entertained the jurisdictional question must be determined.
- [4] On 13 October 2015, the Plaintiffs claimed R 7.5 million, or alternatively the R 1.5 million, from Micromega. On 6 May 2016, the Labour Court found that the claim for R7.5 million was had prescribed.
- [5] Somewhat belatedly, on 12 April 2018, following a further pre-trial conference on 23 February 2018, Micromega filed a notice of intention to amend its statement of response. The plaintiffs did not oppose the application to amend, but are opposing the jurisdictional objection raised by Micromega in the notice of amendment.

The jurisdictional issue

- [6] Micromega maintains that the Labour Court has no jurisdiction to determine its liability to pay the R 1.5 million. The basis for this court's jurisdiction is found in section 157 of the Labour relations act, 66 of 1995 ('the LRA'), which states:

157. Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

(Emphasis added)

- [7] Section 77 of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') is one of the other laws referred to in S 157 (1), which confers jurisdiction on the Labour Court to determine certain issues arising under that act. The pertinent provision for the purposes of this application is s77(3), which states:

77 Jurisdiction of Labour Court

(3) 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.

(emphasis added)

- [8] Further, S 77A sets out the powers of the Labour Court to make orders and provides that :

“... the Labour Court *may make any appropriate order, including an order –*

(e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.”

(emphasis added)

- [9] Micromega argues that the claim is not one for which a remedy is provided in the LRA and does not concern a contract of employment. The starting point is to consider the basis on which Numsa pleaded that Micromega is liable for the payment. In the statement of case, Numsa claims that Micromega “in its capacity as the parent company of Kolbenco, assuming the liability of Kolbenco, alternatively offered to make payment of R1.5 million to the plaintiffs in full and final settlement of Kolbenco’s debt.” Numsa then alleges that a union official telephonically informed Morris that the R1.5 million offer was accepted, but despite demand, Micromega had refused to make the payment.
- [10] The portion of the claim in respect of which it was alleged Micromega assumed the liability of Kolbenco referred to the payment of 7.5 million. As mentioned, that was the subject of a special plea of prescription which was upheld. In relation to the remaining claim for R 1.5 million, Micromega admits that it made the offer on behalf of Kolbenco but the offer was rejected in writing on 30 May 2013 and accordingly, no legal obligation to make the payment arose.
- [11] In essence, Numsa’s claim for payment of the R 1.5 million is based simply on the existence of a purported contractual agreement between it and Micromega.

- [12] In argument, Numsa contended that this agreement was 'a matter concerning a contract of employment' and accordingly this court has jurisdiction to hear it under section 77 (3) of the BCEA. Another argument advanced at the hearing of this application was that, as the parent company and controlling mind of Kolbenco, Micromega could be held liable for the obligations of Kolbenco as the employer of the individual plaintiffs under section 20(9) of the Companies Act 71 of 2008. A further alternative argument was that, Micromega as the parent company could be held liable for the payment on the basis that it owed a 'duty of care' towards the employees of its subsidiary.
- [13] The first point to mention is that the plaintiffs did not state in their pleading that their claim was a matter concerning a contract of employment, nor were the two last mentioned claims foreshadowed in any form in the plaintiffs' statement of case. In so far as either of the principles mentioned might conceivably have provided a basis for holding Micromega liable for the payment they are distinct from any direct contractual obligation owed by Micromega to the plaintiffs, which was the pleaded basis of liability. Even if the phrase 'in its capacity as the parent company of Kolbenco' was intended also to apply to the offer to pay R1.5 million, the plaintiffs should have specifically pleaded their reliance on section 20 (9) of the Companies Act or their reliance on a duty of care it wished to rely on those legal principles to establish liability.¹ Accordingly, the statement of case does not disclose a cause of action falling within this court's jurisdiction.
- [14] Even the failure to specifically plead a case based on a matter concerning a contract of employment might be overlooked, I am not persuaded that the case can be brought under that part of the court's jurisdiction for the reasons below.
- [15] The leading case on interpreting what is meant by the phrase 'a matter concerning a contract of employment' in s 77 (3) of the BCEA is **Rand Water v Stoop and others**.² In that case, the LAC found that an

¹ See *Gcaba v Minister for Safety and Security and others* [2009] 12 BLLR 1145 (CC) at para [75]

² [2013] 2 BLLR 162 (LAC)

employer's counterclaim for fraud arising from an alleged breach of an employee's contractual obligation to act in good faith could be entertained simultaneously with a claim for unfair dismissal. Importantly, the LAC held that in that case, the appellant employer's "counterclaims are pleaded as arising out of and related to the contract of employment that existed between the appellant and the respondents".³ The LAC, amongst other findings stated:

[21] Generally the Labour Court and this Court have held that if an issue in dispute relates to; is linked to; or connected with an employment contract then the Labour Court does have jurisdiction in terms of section 77(3) of the BCEA to entertain such a dispute.⁴

[30] ... The word "concerning" while conveying a cause and effect does not convey a meaning that some causes and effects are acceptable and others not or that there has to be a direct or indirect link between the contract of employment and the claim.⁵

[16] The court also held that:

[39] I am satisfied that section 77(3) read with section 77A(e) favours an interpretation bringing within its ambit the type of claim instituted by the appellant in this matter as;

39.1

The word "concurrent" in section 77(3) places the Labour Court in exactly the same position as the High Court with the same powers and authority in relation to matters concerning a contract of employment.

39.2

The last part of the section 77(3) provides the Labour Court with jurisdiction irrespective of whether any basic condition of employment constitutes a term of the employment contract. This demonstrates that the Labour Court

³ At 168, para [16].

⁴ At 170

⁵ At 172.

has jurisdiction over any claim as long as it involves a contract of employment

39.3

The words “concerning a contract of employment” mean about or in connection with an employment contract. The pleaded claim clearly falls within this categorisation.

39.4

The words “any matter” in section 77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and illiquid, are included.

- [17] What is important to notice in all of the above is that the issue in dispute must in some way be linked causally, whether directly or indirectly, to an employment contract. It is also noteworthy that in all of the cases cited in the judgement, the claims sought to be enforced were between an employer and employee or where it was alleged an employment relationship had existed between the parties.
- [18] Applying those considerations to the case at hand, the only employment contracts to which the claim might conceivably be linked are with the employment contracts the individual plaintiffs had with their former employer Kolbenco, in the sense that if they had not been employees of Kolbenco whose services were terminated by it, they would not have had a legal interest in the outcome of this claim because they would not have been potentially eligible to receive any portion of the *ex gratia* payment made by a non-party to the employment relationship.
- [19] Further, that legal interest does not arise directly or indirectly from any obligations or duties related to their contracts of employment or the termination thereof, but simply relates to the fact that Micromega made an *ex gratia* offer of a payment when their former employer Kolbenco failed to honour its obligation to pay the agreed global severance package. The offer was made quite independently of the obligations undertaken by Kolbenco arising from the termination of the plaintiffs' employment contracts. Any obligations incurred by Micromega to pay the R1.5 million

to the plaintiffs arose entirely from whether or not Micromega made that offer and if it was accepted. That is all the plaintiffs needed to establish to succeed with their claim. Merely because their employment relationship with Kolbenco was an antecedent fact in the genesis of the offer by a third party who was never their employer, it does not follow that their claim is a matter concerning their contracts of employment. In this case, the link between their claim to the R 1.5 million and their contracts of employment is too tenuous to make it a 'matter concerning a contract of employment'.

[20] Consequently, the jurisdictional objection must succeed.

Costs

[21] Although the defendant is successful it only raised this issue after several months had elapsed since the first part of the claim was dismissed on account of prescription and this claim should have been raised and dealt with at the same time. Strictly speaking it also should have been raised by way of an exception rather than a special plea.⁶ In the circumstances, law and fairness do not warrant an award of costs in its favour.

Order

[1] The plaintiffs claim is dismissed for lack of jurisdiction.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

⁶ See *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) at paras [28]-[31].

APPEARANCES

PLAINTIFFS:

S Chetty of Serena Chetty
Inc.

DEFENDANT:

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LABOUR COURT