IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 124/19 & JS 178/19

In the matter between:

FUSI ELIAS SIFO **First Applicant**

FLOSI PULE LEPHOI **Second Applicant**

and

CHUBBY CHICK T/A FOURIE'S POULTRY FARM (PTY) LTD **Respondent**

Heard: **25 May 2019**

Delivered: **9 July 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] Messrs Elias Sifo and Flosi Lephoi (the first and second applicants) as represented by GIWUSA, referred separate claims under case numbers JS 124/19 and JS 178/19 alleging breaches of their constitutional rights under section 23 of the Constitution, and their rights as contemplated in Chapter II of

the Labour Relations Act (LRA)[1]. These matters were set down on the same date and were accordingly consolidated.

[2] The facts in respect of the claim under case number JS 124/19 as can be gleaned from the statement of claim are summarised as follows:

2.1. Sifo was employed by the respondent with effect from 2 February 2013. He alleged that at some point of his employment, he was demoted by the respondent on account of his trade union activities.

2.2. The respondent asserts that Sifo was demoted for a fair reason as confirmed in an arbitration award issued under the auspices of the CCMA. It is common cause that the arbitration is a subject of pending review proceedings under case number JR 2390/16.

2.3. On 28 September 2018, Sifo was absent from duty. He alleged that on 25 September 2018, he had approached the assistant farm manager (Mr Selepe) with his application for leave of absence in order to attend proceedings held at the CCMA under case number NWKD 1750-18 as a witness. On 27 September 2018, Selepe informed him that there was a shortage of employees in his department and that the leave of absence could not be granted. Sifo nonetheless attended the CCMA proceedings on 28 September 2018, and his contention was that management of the respondent was aware of his whereabouts, as he was in the same CCMA proceedings with them.

2.4. The respondent's version was however that Sifo and his co-employee, Mr Gorewang, approached Selepe in the morning of 27 September 2019, to seek leave of absence. In view of the company's leave policy, which required at least two days' prior notice, Selepe advised Sifo and Gorewang to approach their trade union GIWUSA so that it could submit a special application for leave of absence.

[1] Act 66 of 1995 (as amended)

2.5. On 28 September 2018, Gorewang reported for duty whilst Sifo was absent. Upon his return, Sifo was charged with *inter alia*, a refusal to obey instructions and absence without authorisation. Following a disciplinary enquiry, Sifo was issued with a final written warning.[2]

2.6. Aggrieved with the sanction, Sifo referred an alleged unfair labour practice dispute to the CCMA under case number NWKD 2947-18. The appointed Commissioner had in terms of an arbitration award issued on 12 February 2018, found that the final written warning issued did not constitute an unfair labour practice.

2.7. Sifo thereafter referred another dispute to the CCMA related to freedom of association. A certificate of outcome was issued on 5 November 2018, and a statement of claim was delivered on 2 March 2019.

[3] In his statement of claim, Sifo alleged that the charges against him and the subsequent final written warning issued to him in the light of the facts outlined elsewhere in this judgment constituted an infringement of his rights under the provisions of section 5[3] of the LRA and the provisions of section 23(1) and 39(2) of the Constitution of the Republic[4]. In this regard, he alleged that:

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[2] Charges of misconduct:
1. Refuse to carry out a lawful instruction in that you were instructed to go on leave.
2. Not complying with Company leave policy and contract in that you did not apply for leave.
3. Absent from your workplace without permission
4. Not informing Company of your whereabouts after returning from your absence from the farm.

[3] Section 5. **Protection of employees and persons seeking employment**
(1) No person may discriminate against an employee for exercising any right conferred by this Act.
(2) Without limiting the general protection conferred (1), no person may do, or threaten to do, any of the following –
(a) require an employee or a person seeking employment –
(i) not to be a member of a trade union or workplace forum;
(ii) not to become member of a trade union or workplace forum; or
(iii) to give up membership of a trade union or workplace forum;
(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
(c) prejudice an employee or a person seeking employment because of past, present or anticipated –
(i) membership of a trade union or workplace forum;

3.1. The instruction and/or the prohibition of an employee from attending proceedings at the CCMA offends the spirit, purport and objective of the bill of rights in that it [unjustifiably] limits his right to fair labour practice in terms of the provisions of section 23 of the Constitution of the Republic.

3.2. The charges against him were discriminatory as they were intended to dissuade him from exercising his right to attend the proceedings at the CCMA in contravention of the provisions of section 5(1) and (2)(b) of the LRA.

3.3. He further contends that charges against him constituted an infringement of the provisions of section 5(2)(c) of the LRA, in that, they were prejudicial to him on basis that the respondent had no authority in terms of the provisions of subsection 2(c)(iv) of the LRA to instruct him not to attend the CCMA proceedings.

[4] The respondent in its statement of defence raises two preliminary points *viz res judicata* and lack of jurisdiction on the basis that the issues raised in the statement of claim were not referred for conciliation. In this regard, it was submitted that:

4.1. Sifo had referred a dispute to the CCMA under the provisions of section 186(2)(b) of the LRA. An arbitration award was issued on 12 February 2019 under case NWKD 2947/19 dismissing the referral.

4.2. Sifo has however referred the same facts to this Court for adjudication under the guise of a breach of a protected right. In the respondent's view, Sifo has not laid any factual basis for that claim. The respondent

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(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;
(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
(v) disclosure of information that the employee is lawfully entitled required to give to another person;
(vi) exercise of any right conferred by this Act; or
(vii) participation in any proceedings in terms of this Act.

[4] The Constitution of the Republic of South Africa, 1996 (Act 108 0f 1996, as amended)

further contends that Sifo now seeks to obtain relief from any alternative forum after being unsuccessful at the CCMA, and that forum shopping should be discouraged.

4.3. The respondent further submitted that this Court lacked jurisdiction to adjudicate the dispute. In this regard, it was further submitted that conciliation was a *pre-condition* for this Court to adjudicate a dispute and, and that the *pre-condition* in this case had not been satisfied as the dispute that was referred for conciliation pertained to *freedom of association,* whilst his claim before the Court was in respect of another issue pertaining to infringements of his rights.

[5] The background to the dispute under case number JS 178/19 is summarised as follows:

5.1. Lephoi commenced his employment with the respondent on 10 October 2013. Despite not being an elected or recognised shop steward, he was appointed by GIWUSA to represent its members during disciplinary enquiries at the workplace.

5.2. At some point, Lephoi was appointed to represent a fellow employee in a disciplinary enquiry. He alleged that he was approached by the assistant farm manager (Mr Jacobus van der Bergh), who enquired from him whether the employee facing discipline would pay his (Lephoi's) wages. Moreover, subsequent to the disciplinary enquiry, an amount of R36.99 was deducted from Lephoi's remuneration.

5.3. The respondent denied these allegations and submitted that Lephoi had in fact made an application for unpaid leave, which application was processed and an amount of R36.99 was deducted as a result.

5.4. Lephoi subsequently referred an unfair labour practice dispute to the CCMA under case number NWKD 2216-18. He however withdrew that referral on 30 October 2018. The respondent contends that the withdrawal followed the settlement of the dispute by way of payment of

the deductions of R36.99 initially made to his salary, after it also became clear at those proceedings why he sought to take leave.

5.5. On 10 October 2018, Lephoi referred another dispute to the CCMA and sought the CCMA to resolve a dispute concerning freedom of association. On 5 November 2018, the CCMA issued a certificate of non-resolution.

[6] On 2 March 2019, Lephoi referred his claim to this Court and contends that the conduct of the respondent in respect of the deduction was intended to dissuade Lephoi from representing his colleagues in breach of the provisions of section 5 of the LRA.

[7] The respondent raises the same preliminary points of *res judicata* and lack of jurisdiction as under case number JS 124/19.

Evaluation:

Issue of Jurisdiction and res judicata:

[8] In respect of Sifo's claim as currently before the Court, and emanating from the common cause facts, he was charged with misconduct related to refusing to obey a lawful instruction and absenteeism, as he took leave without authorisation. He had without leave of absence, failed to report for duty and instead, attended CCMA proceedings. He was subsequently issued with a final written warning for his troubles, which was confirmed by the CCMA as not constituting an unfair labour practice. He has since launched a review application in that regard, and the matter is pending before this Court.

[9] Insofar as the respondent had raised a defence of *res judicata* to Sifo's claim, in *Molaudzi v S*[5]*,* it was stated that;

> *"Res judicata* is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. Claassen defines *res judicata* as—
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> > "[a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment,

[5] [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC)

> even if it is erroneous. In regard to *res judicata* the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.""[6]

And,

> "The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts." [7]

[10] In the light of the common cause facts, the issue in relation to the claim before this Court is how and when did the above allegations of misconduct that resulted in a final written warning, morph into the respondent's conduct being illegal, unlawful, discriminatory, an affront on Sifo's constitutional rights to his freedom of movement, dignity, privacy, and a violation of his rights under the provisions of section 5 of the LRA?

[11] It is accepted that different causes of action may emanate from the same set of facts[8]. The contents of the statement of case are however convoluted and it is difficult to comprehend what the basis of the claim is. Elaborate and tedious references were made to provisions of section 23(1) of the Constitution, section 5 of the LRA, and the respondent's leave policy. It is not clear from the papers as to how his claim fits into those provisions.

[12] To the extent that he had claimed a breach of his constitutional right to fair labour practices, the fact of the matter remains that he had already utilised the

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[6] At para [14]
[7] At para [16]
[8] See *Gcaba v Minister for Safety and Security and Others* (2009) 30 ILJ 2623 (CC) at para 53, where it was held that;

> 'First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the actio iniuriarum in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalization should be avoided.'

provisions of section 186(2) (b) of the LRA, and his review application in the light of an unfavourable arbitration award is pending before this Court.

[13] Sifo's reliance on the provisions of section 5 of the LRA[9] is equally misplaced. The fact that section 5(1) of the LRA prohibits discrimination against an employee for exercising any right conferred by the Act does not mean that it extents to employees seeking to testify at CCMA proceedings as witnesses. That is not the purpose of that provision, and in any event, a basis for any discrimination claim was not laid in the pleadings. If an employee seeks to testify on behalf of a fellow employee at arbitration proceedings before the CCMA, the employer's procedures in regards to leave of absence must be followed. An employee cannot just fail to attend to his or her duties and attend CCMA proceedings without seeking leave of absence. If for whatever reason the employer refuses to release a witness to testify at CCMA proceedings, it is for the CCMA to issue a subpoena under the provisions of section 142(1) of the LRA to secure that witness.

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[9] **5. Protection of employees and persons seeking employment**

(1) No person may discriminate against an *employee* for exercising any right conferred by *this Act*.

(2) Without limiting the general protection conferred (1), no person may do, or threaten to do, any of the following –

(a) require an *employee* or a person seeking employment –

(i) not to be a member of a *trade union* or *workplace forum*;

(ii) not to become member of a *trade union* or *workplace forum*; or

(iii) to give up membership of a *trade union* or *workplace forum*;

(b) prevent an *employee* or a person seeking employment from exercising any right conferred by *this Act* or from participating in any proceedings in terms of *this Act*; or

(c) prejudice an *employee* or a person seeking employment because of past, present or anticipated

(i) membership of a *trade union* or *workplace forum*;

(ii) participation in forming a *trade union* or federation of *trade unions* or establishing a *workplace forum*;

(iii) participation in the lawful activities of a *trade union*, federation of *trade unions* or *workplace forum*;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an *employee* to do;

(v) disclosure of information that the *employee* is lawfully entitled required to give to another person;

(vi) exercise of any right conferred by *this Act*; or

(vii) participation in any proceedings in terms of *this Act*.

(3) No person may advantage, or promise to advantage, an *employee* or a person seeking employment in exchange for that person not exercising any right conferred by *this Act* or not participating in any proceedings in terms of *this Act*. However, nothing in this section precludes the parties to a *dispute* from concluding an agreement to settle that *dispute.*

(4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by *this Act*.

[14] Reliance on section 5(2)(b) of the LRA is clearly misplaced as those provisions are irrelevant to his case. To the extent that there is reference to *'participation in any proceedings in terms of this Act',* even if this was extended to participating in arbitration proceedings as a witness, I have already made conclusions in that regard as to what is required of an employee.

[15] Any further suggestion by Sifo that the provisions of section 5(2)(c) of the LRA are applicable to him as the respondent had prejudiced him by disciplining and issuing him with a final written warning because he was not guilty when he failed to attend to his duties and had attended at the CCMA without leave of absence, is clearly red herring. An employer is within its rights to demand employees be at the workplace when they are supposed to be, as this right emanates from the parties contractual obligations. There is nothing prejudicial if an employer demands that an employee complies with its leave policies before taking leave of absence.

[16] As to how disputes related to the interpretation of the respondent's leave policy can end up in this Court for adjudication is not clear, and I fail to appreciate the relevance of this policy insofar as this dispute is concerned.

[17] In the end however, it is clear as contended on behalf of the respondent, that is a classic case of forum shopping, and Sifo's approach to litigation is that of one size fits all. This cannot be permissible. To the extent that the review application in respect of the final written warning arising from the same set of facts is pending before this Court, effectively the matter is *lis pendens* rather than being *res judicata*, and Silo ought to pursue that review application.

[18] It is trite that this Court would lack jurisdiction in instances where a dispute was not referred for conciliation. This is in line with the principles set out in *National Union of Metal Workers of SA v Intervalve (Pty) Ltd*[10]*.* It is further accepted as can be extrapolated from *September and Others v CMI Business Enterprise CC*[11] that the parties are not bound by the categorisation of the

[10][2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC)
[11] [2018] ZACC 4; 2018 (4) BCLR 483 (CC); (2018) 39 ILJ 987 (CC); [2018] 5 BLLR 431 (CC) at para [50]

dispute in the certificate of outcome. Be that as it may, if a party refers a dispute to this Court that is not in sync with what was referred for conciliation or characterised on the certificate of outcome, at most, an attempt needs to be made in the statement of case, to lay a factual and legal basis for the new claim. This is so in that it is trite that the issue of jurisdiction whenever raised, has to be determined on the basis of the pleadings and not the merits of the case[12].

[19] In this case, the certificate of outcome related to freedom of association. The pleadings however and the cause of action pertains to constitutional rights to fair labour practices, and the rights and protections afforded to employees under section 5 of the LRA. Employees' rights to freedom of association are covered under the provisions of section 4 of the LRA, and in any event, no basis was laid in the pleadings as to the reason reference is made to 'freedom of association'. In the end, I agree with the respondent's contentions that the Court lacks jurisdiction over Silo's claim.

[20] The facts and circumstances of Lephoi's case are even more curious. It was common cause that he was not a recognised shop steward. Having been asked to represent a fellow employee at a disciplinary enquiry, he had done so, and an amount of R36.99 was deducted from his salary for being away from his workplace. This was in circumstances where *he had applied for and was granted unpaid leave.*

[21] He had exercised his rights to refer a dispute to the CCMA, which dispute was subsequently withdrawn as the respondent had repaid him the amounts that were deducted from his salary. According to the respondent, it was only at the CCMA proceedings that it became aware of what the purpose of seeking unpaid leave of absence was. Having withdrawn his dispute on the basis that 'he did not want to take the matter further', he nonetheless referred another dispute based on the same set of facts.

[12]See *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para169; *Mahumani v Member of the Executive Council: Finance, Economic Affairs and Tourism, Limpopo* (2010) 31 ILJ 2009 (NGP)

[22] Lephoi's case before this Court is similar to that of Sifo. A certificate of outcome was also issued characterising the dispute as pertaining to freedom of association. In his statement of claim however, he alleged that his rights under the provisions of section 5 of the LRA were violated, and that the matter is about unlawful deductions. He further claimed that the respondent unfairly discriminated against him and also breached his constitutional rights to fair labour practices. Significant with the relief he claims is that the Court should find that the respondent violated his protected rights and also made an unlawful deduction to his salary, which calls for maximum compensation.

[23] I have difficulties in appreciating how an employee can apply for and be granted unpaid leave, and to thereafter complain about his less pay after he had taken that leave. In the same vein, I have the same difficulties in appreciating how those set of circumstances can lead to a claim that he was discriminated against, or that his statutory rights were violated. Lephoi's case is an abuse of this Court's processes. Any alleged unfair labour practice was resolved by his withdrawal of the dispute before the CCMA. There is no basis in either law or fact that can be gleaned from the pleadings, upon which reliance can be placed on the provisions of section 5 of the LRA. Lephoi cannot complain when a deduction was made to his salary as a result of his own request for unpaid leave. Any allegations of discrimination or violation of statutory or constitutional rights are clearly red herrings. This is even moreso since these are not issues that were referred for conciliation.

[24] It follows from the above conclusions that the circumstances of the two claims are such that the matter of Sifo in regard to his alleged unfair labour practice is still pending before the Court. In respect of Lephoi, his dispute before the CCMA in regards to alleged unfair labour practice was withdrawn. In both matters, the Court would in any event lack jurisdiction to adjudicate them as the issues sought to be determined were not referred for conciliation. To this end, it follows that the respondent's preliminary points ought to be upheld.

[25] These two matters ought not to have come before the Court as they represent an abuse of this Court's processes. They are a classic case of forum

shopping. In the circumstances, and upon a consideration of the requirements of law and fairness, I fail to see any reason why the respondent should be burdened with their costs.

[26] Accordingly, the following order is made;

Order:

1. The respondent's preliminary points under case numbers JS 124/2019 and JS 178/19 are upheld.
2. The Court lacks jurisdiction to adjudicate both matters.
3. GIWUSA is ordered to pay the respondent's costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: J. Mogase, (Union Official) of GIWUSA

For the Respondent: H Wissing, of Henk Wissing Incorporated