



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 562/19

In the matter between:

MOREMI, MORIBULA TYSON

Applicant

and

THE RAILWAY SAFETY REGULATOR SOE

Respondent

Heard: 29 November 2019

Delivered: 21 January 2020

JUDGMENT

LALLIE, J

- [1] This is an application to enforce a contractual term contained in an employment contract. The applicant and the respondent entered into a written contract of employment in terms of which the former was employed as a security officer with effect from October 2015. The applicant's job grade was level B2. In 2017 the respondent embarked on a job evaluation exercise which culminated in the regrading of the applicant's position from grade level

B2 to level B5. The applicant's remuneration should consequently have been adjusted to R271 733 per annum with effect from 1 April 2019. The outcome of the job evaluation exercise was communicated to the applicant by the respondent in writing in September 2017.

- [2] On 21 June 2018 the respondent informed the applicant in writing that it would not be implementing the salary adjustment in terms of the outcome of the job regrading exercise. Aggrieved by the respondent's decision, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) alleging that the respondent's refusal to increase his salary in terms of the outcome of the job regrading exercise constituted an unfair labour practice. The CCMA issued an arbitration award dated 17 December 2018 in which it found that the respondent did not commit an unfair labour practice.
- [3] On 31 July 2019 the applicant filed a statement of claim in this Court. The relief the applicant seeks is an order compelling the respondent to implement fully the remuneration adjustment contained in the job evaluation result and the adjustment of his salary in accordance with the same result with effect from 1 April 2018.

Point in limine

- [4] The respondent disputed the applicant's claim by filing a response to the statement of claim in which it raised a point in *limine* to the effect that the dispute before this Court is *re judicata*. It submitted that this Court lacks jurisdiction to adjudicate the dispute as the same issue has already been determined by the CCMA. The point in *limine* is opposed by the applicant, mainly, on the grounds that the cause of action in the matter he referred to the Labour Court is completely different from the one in the dispute which has been determined by the CCMA. The one at hand is based on his contract of employment and is justiciable in the Labour Court and falls outside the jurisdiction of the CCMA.
- [5] For the respondent's point in *limine* of *res judicata* to be upheld the respondent was required to have proved that the applicant is demanding the

same relief he sought at the CCMA based on the same cause of action. The issue whether *res judicata* may be successfully raised against an employee whose dispute has been determined by the CCMA but approaches the Labour Court for relief based on his or her contract of employment is elucidated by the Labour Appeal Court in *Jerry Edward Archer v Public School Pinelands High School and Another*¹. Although the Court in that matter was dealing with an unfair dismissal dispute which had been determined by the CCMA and a contractual claim which had subsequently been referred to the Labour Court the principles the Court dealt with are relevant to the matter at hand.

[6] In *Kerry Edward Archer* the Court expressed the following view:

“[16] On application of these principles to the decision on appeal, the appellant has both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA which provides that 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”. The appellant elected to pursue his contractual claim in the Labour Court. In relation to this election, the SCA in *Makhanya* observed as follows:

‘...[i]t is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for ‘forum shopping’ by allowing the litigant that choice. But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.’

¹ Unreported judgment (case number CA12/18).

[7] The Court expressed the application of *res judicata* in the following words:

“[18] The upshot of this is that the appellant was not precluded by the principle of *res judicata* from pursuing his two claims in different fora. This is because the claim that was before the Labour Court, and the one that was pursued in the CCMA were not the same claims. The one is for payment of damages arising from a purported breach of contract by the first and second respondents, and the other is for compensation arising from an unfair dismissal as envisaged under the LRA. The two claims do not have the same cause of action. The pleadings bear this out.”

[8] It is common cause that both the dispute the applicant referred to the CCMA and the one he referred to the Labour Court are based on the respondent's refusal to pay his remuneration in terms of the outcome of the job evaluation exercise. It is further common cause that the relief the applicant sought from the CCMA was that the respondent's refusal to implement the outcome of the job evaluation exercise constituted an unfair labour practice. The applicant had a right to refer the unfair labour practice dispute to the CCMA in terms of section 191 of the Labour Relations Act² which did not preclude him from seeking relief at the Labour Court based on his contract of employment in terms of section 77 of the Basic Conditions of Employment Act³.

[9] An unfair labour practice claim is not the same as the claim based on the contract of employment. The former is justiciable at the CCMA and the latter at the Labour Court. The applicant's pleaded case is based on the alleged amendment of his contract of employment. The respondent's argument of the invalidity of the outcome of the job evaluation and regrading exercise and the denial that its refusal to implement it did not constitute a breach of the contract of employment is of no relevance at this stage as the merits of the applicant's case are not taken into account in determining whether the respondent proved its point in *limine* of *res judicata*.

² Act 66 of 1995, as amended

³ Act 75 of 1997

[10] The respondent has failed to prove that applicant's claim is founded on the same cause of action as the unfair labour practice dispute he referred to the CCMA. The point in *limine* can, in the circumstance, not succeed. The applicant did not seek a costs order against the respondent.

[11] In the premises, the following order is made:

Order:

1. The point in *limine* of *res judicata* is dismissed.
2. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr David Morgan

For the Respondent: Advocate Ramolefe

Instructed by: Madiba Motsai Masitenyane & Githiri Attorneys Inc.

LABOUR COURT