

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 628/19

In the matter between:

ND DOMBO**Applicant****And****CITY OF TSHWANE METROPOLITAIN MUNICIPALITY****Respondent****Date heard: 25 October 2019****Delivered: 6 February 2020**

JUDGMENT

RABKIN-NAICKER, J

- [1] This judgment deals with three special pleas raised by the respondent in its statement of response to the applicant's claim. In its statement of claim the applicant relies on section 77(3) of the Basic Conditions of Employment Act¹

¹ Act 75 of 1997.

(BCEA) to found jurisdiction of the Labour Court. In the pre-trial minute, the precise relief claimed is recorded by the parties as the following:

“5.1 The Applicant seeks an order compelling the Respondent to restore the breach of his terms and conditions of employment and pay the Applicant his progression and/or notch increments for the period 2011-2014”.

[2] The first special plea as conceived by the respondent is that the matter is *res judicata*, and/or *lis pendens*, and/or that the applicant engages in forum shopping. It submits that on these grounds the Labour Court does not have jurisdiction to hear the claim.

[3] The background to the matter is the following:

3.1 On or about 29 October 2018, the applicant referred a dispute in terms of section 24 of the Labour Relations Act²(LRA) to the SALGBC in which he sought payment of notch increments for the periods 2011-2014.

3.2 A ruling was issued to the effect that the dispute did not pertain to the interpretation of a collective agreement but to an unfair labour practice dispute and that the applicant would have to apply for condonation to the bargaining council for the late referral of the latter.

3.3 The applicant did not file a review of the ruling and did not apply for condonation for the late filing of an unfair labour practice dispute.

[4] The respondent has argued this first plea on jurisdiction relying on the basis set out in paragraph 2 above. However, this Court may *mero motu* consider whether it has jurisdiction and is not bound to the submissions contended on behalf of the applicant.

[5] As I have set out in a judgment in a similar matter³, this type of dispute cannot be characterized as one falling under section 77(3) of the BCEA. In the matter of *National Union of Metalworkers of SA and Others v Micromega (Pty) Ltd*⁴

² Act 66 of 1995 as amended.

³ See judgment in matter J1028/14 *IMATU obo JL Fourie and Others v City of Tshwane Metropolitan Municipality and Others* handed down on 2020

⁴ (2018) 39 ILJ 2048 (LC).

LeGrange, J considered the Labour Appeal Court (LAC) authority on the interpretation of section 77(3):

“[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 & Another*. In that case, the LAC found that an 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’. 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 s 77(3) of the BCEA to entertain such a dispute. ...

[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.’

The court also held (at para 39) that:

‘I am satisfied that s 77(3) read with s 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 s 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 s 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 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 categorization.

39.4 The words “any matter” in s 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.’

- [6] In addition to considering the above, the following dictum in the *Micromega*⁵ judgment is relevant:

“[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....”

- [7] In this matter, the applicant has not pleaded reliance on any clauses of his individual employment contract. Nor is his employment contract annexed to the pleadings. What he does annex to his statement of case is a Collective Agreement dealing with the Fire Grading System for Fire Safety Employees in the Community Safety Department of the respondent.

- [8] This matter is not linked causally directly or indirectly to an employment contract for the purposes of section 77(3) of the BCEA. As is common cause, a binding ruling by the SALGBC has found that the issue in dispute concerns an unfair labour practice. It appears that rather than risking the refusal by the Council to grant condonation, the applicant has gone for a third option. Unfortunately for him, this Court does not have jurisdiction to adjudicate the claim. The applicant is forum shopping (although this is not a ‘special plea’) and given its caseload, the Labour Court can ill afford this type of matter clogging up its rolls.

- [9] It is not necessary for me to deal with the further two special pleas raised by the respondent. I make the following order.

Order

⁵ *Supra* n 4.

1. The applicant's claim is dismissed for want of jurisdiction.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Geldenhuys CJ @ Law Inc

Respondent: Geldenhuys Malatji Incorporated