



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR700/23

In the matter between:

TAU PHALANE INCORPORATED ATTORNEYS

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

COMMISSIONER PAUL BOTHA N.O.

Second Respondent

SIPHIWE FAKUDE

Third Respondent

Heard: 18 March 2025

Delivered: 10 April 2025

JUDGMENT

KIRSTEIN, AJ

Introduction

[1] The applicant delivered a review application to review and set aside an arbitration award issued by the second respondent in his capacity as an arbitrator of the third respondent. The dispute before the second respondent concerned proceedings in terms of section 73A of the Basic Conditions of Employment Act¹ (BCEA).

[2] The third respondent claimed outstanding remuneration whilst he was still in the employment of the applicant.

[3] In the arbitration award dated 8 March 2023, the second respondent found in favour of the third respondent and ordered the applicant to pay to the third respondent the sum of R198,056.92, being the total of outstanding remuneration. In the founding affidavit attached to the Notice of Motion in the review application, the applicant raised a number of review grounds:

3.1. The second respondent should have recused himself on the basis of a conversation between the second respondent and the third respondent's legal representative;

3.2. The first respondent awarded compensation in excess of what the third respondent claimed;

3.3. The first respondent continuously interfered with cross-examination of the witness on behalf of the applicant and during cross-examination of the third respondent;

3.4. The third respondent was no longer in the employ of the applicant since May 2021 and despite that, the first respondent awarded compensation to the third respondent for a period of June 2021 and July 2021;

3.5. The first respondent incorrectly found that the third respondent's remuneration fell within the threshold as envisaged in section 73A of the BCEA.

¹ No. 75 of 1997 (as amended).

[4] The third respondent opposed the review application on the following basis:

4.1. In the Notice of Motion of the applicant the applicant only requested to review and set aside the arbitration award;

4.2. The review application was not properly served on the third respondent;

4.3. In relation to the review grounds raised by the applicant, the third respondent contends that the arbitration award is not reviewable on the grounds of review raised by the applicant.

Background

[5] The third respondent was employed as a receptionist at the applicant's Mbombela Office, earning a monthly remuneration of R18,459.72. The third respondent's services were terminated on 29 July 2021 due to operational requirements of the applicant. The third respondent did not refer a dispute relating to the termination of her services due to operational requirements, but elected to refer a claim in terms of section 73A of the BCEA for outstanding remuneration.

Analysis

[6] The third respondent correctly indicated that the applicant in the Notice of Motion only seek to review and set aside the arbitration award dated 8 March 2023. On 10 September 2022 the first respondent issued a ruling that the second respondent has jurisdiction to determine the dispute and made the following remark:

"[6.4.] It does appear that the applicant is simply fortunate in the sense that the Minister chose to update the threshold of earnings, thereby allowing the applicant to bring a claim before the CMA prior to prescription of her claim becoming an issue."

[7] The applicant did not request to review and set aside the jurisdictional ruling dated 10 September 2022. In the founding affidavit in support of the review application, the applicant stated that the second respondent *inter alia* exceeded his powers by not considering a second point *in limine* that the first respondent's salary

fell outside the threshold set by the BCEA that the Commission for Conciliation, Mediation and Arbitration (CCMA) lack jurisdiction.

[8] In the Constitutional Court judgment of *Booi v Amatola District Municipality and Others*² it was stated that:

“It is trite that Courts are bound by the issues that the litigating parties raise. However, a Court can raise an issue *mero motu* where
i.raising it is necessary to dispose of the matter; and
ii.it is in the interest of justice to do so, which depends on the circumstances at hand.”

[9] Although the applicant did not include the prayer that the jurisdictional ruling dated 10 September 2022 be reviewed and set aside, the jurisdictional issue was indeed raised by the applicant in its founding affidavit. The Court is further entitled to consider *mero moto* a jurisdictional issue. Under the further and/or alternative relief prayer in the Notice of Motion, the Court can consider any relief, consistent with the case made out by the applicant, that is not explicitly requested, but is within the scope of the dispute and was contemplated already at the arbitration.³

[10] The third respondent raises a number of issues why the review application was not properly served in terms of the Rules and Directives of the Rules of Proceedings in the Labour Court. The applicant contends that there was indeed service and compliance with a directive from the Judge President in respect of service by electronic mail. The third respondent's representative correctly conceded that no prejudice was suffered by the third respondent if there was no proper service of the review application. It is determined that the applicant complied materially with the service of the review application and that there is no prejudice suffered by the third respondent due to the alleged failure to serve the review application in terms of the Rules and Directives of the Labour Court.

² (2022) 43 ILJ 91 (CC) at para 35.

³ *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC).

[11] The review ground raised by the applicant that the third respondent's salary fell outside the threshold set by the BCEA and that the CCMA lack jurisdiction to entertain the dispute, is an issue of jurisdiction that this Court is entitled to determine. In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*⁴ the Court stated the following:

"The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter, is a matter to be decided by the Labour Court ..."

[12] Section 73A(1) of the BCEA reads as follows:

"Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectorial determination or a collective agreement."

[13] The provisions of section 73A of the BCEA constitutes a jurisdictional fact that must exist in order for the first respondent to exercise jurisdiction. A claim for an amount owing to an employee under section 73A(1) of the BCEA can only be pursued if the employee earns less than the earnings threshold as contemplated by section 6(3) of the BCEA.⁵

[14] Section 73A(2) of the BCEA reads as follows:

"(2) Subsection [1] does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of section 6(3)."

[15] Section 6(3) of the BCEA reads as follows:

"(3) The Minister must, on the advice of the Commission, make a determination that excludes the application of this chapter or any provision of it

⁴ (2008) 29 ILJ 2218 (LAC) at para 40.

⁵ *Prestige Campworld (Pty) Ltd t/a Comet Caravans v Botha and Others* (2022) 43 ILJ 2379 (LC) at para 9.

to any category of employees earning in excess of an amount stated in that determination.”

[16] The third respondent testified that her claim is for remuneration for the period from September 2020 until May 2021.

[17] The earnings threshold for the period from 1 July 2014 to 28 February 2021 was R205,433.30 per annum.⁶ The earnings threshold for the period from 1 March 2021 to 28 February 2022 was R211,596.30 per annum.⁷ It is common cause that the third respondent’s remuneration during the period of September 2020 to May 2021 was R221,516.64.⁸ The determination issued by the Minister in terms of section 6(3) of the BCEA therefore excluded the third respondent in terms of section 73A(1) of the BCEA to refer a dispute to the third respondent regarding outstanding remuneration.

[18] During argument the third respondent’s representative referred the case of *M J Vorster v Clothing City (Pty) Ltd*.⁹ The Supreme Court of Appeal dealing with the jurisdiction of a Magistrate’s Court, stated that the Magistrate’s Courts are creatures of statute and have no jurisdiction beyond that provided for in the enabling statute. It was further stated that the crucial time to determine whether a court has jurisdiction to entertain a matter, is at the time when the action commences. The third respondent’s argument therefore follows that the action commenced when the third respondent referred the dispute to the CCMA. At the time of the referral to the first respondent, the remuneration level of the applicant fell within the determination of the Minister in terms of section 6(3) of the BCEA. The applicant’s representative argued that the matter of *Vorster v Clothing City (Pty) Ltd* is distinguishable from the issue to be determined on the basis that the *Vorster* matter relates to a civil claim of damages in the Magistrate’s Court whilst the issue to be determined by this Court relates to payment of remuneration, with specific reference to the directive issued by the Minister in terms of section 6(3) of the BCEA and section 73A of the BCEA.

⁶ GN531 as contained in GG No 37795 dated 1 July 2024.

⁷ GN77 as contained in GG No 44137 dated 8 February 2021.

⁸ Pleadings, p 36, para 12.2.

⁹ 2025 (2) SA 156 (SCA).

[19] The wording of section 6(3), read with section 73A(2) of the BCEA, is unambiguous and can only be interpreted that an employee earning above the threshold within a specific period, cannot refer a dispute in terms of section 73A(1) of the BCEA to the third respondent. Section 73A(1) of the BCEA can only be pursued if the employee earns less than the earnings threshold as contemplated by section 6(3) of the BCEA when the dispute of non-payment arose. The dispute of remuneration arose when the third respondent was earning more than the threshold that was applicable during the mentioned period. The second respondent was therefore wrong in determining that the third respondent was fortunate in that the Minister chose to update the threshold of earnings prior to the prescription of the third respondent's claim. The third respondent was compelled to have pursued her claim under section 77 of the BCEA to the Labour Court or bring a claim in the Civil Courts.

[20] In view of the conclusion as set out above, it is not necessary to consider the other review grounds raised by the applicant. In the circumstances the first respondent had no jurisdiction to entertain the third respondent's claim for outstanding remuneration by virtue of the fact that the third respondent earned in excess of the threshold as contemplated by section 6(3) of the BCEA, when the cause of action arose. The applicant's review application must therefore succeed and the arbitration award of the second respondent falls to be reviewed and set aside.

Costs

[21] In terms of section 162(1) and (2) of the Labour Relations Act¹⁰, the Court has a wide discretion when it comes to the issue of costs. Both parties argued that costs should be awarded. It is determined that it would not be fair and just to make a cost order.

[22] In the premise the following order is made:

Order

¹⁰ No. 66 of 1995, as amended.

1. The arbitration award issued by the second respondent dated 8 March 2023 under Case No GAJB12664/22 is reviewed and set aside;
2. The arbitration award of the second respondent is substituted with an award that *'the first respondent had no jurisdiction to entertain the claim of the third respondent'*;
3. There is no order as to costs.

P.H. Kirstein

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant :

P S A J Jacobsz

Instructed by:

Tau Phalane Inc.

For the respondent :

M. Schermers of CJ Geldenhuys Attorneys