



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 523/24

In the matter between:

YAMMIE SITHOLE

First Plaintiff

KAMOGELO MOGALE

Second Plaintiff

and

HALEON SOUTH AFRICA (PTY) LTD

Defendant

Heard: 1 July 2025

Delivered: 22 August 2025

JUDGMENT

EDWARDS, AJ

Introduction

[1] The defendant raised two challenges to this Court's jurisdiction to adjudicate

this matter in its response to the plaintiffs' statement of claim in which they allege that their dismissal for operational requirements was unfair.

[2] A further jurisdictional challenge was raised by the defendant in its heads of argument which were delivered for the purposes of the hearing of these two jurisdictional challenges on the interlocutory roll.

[3] The first challenge is that the plaintiffs referred their unfair dismissal disputes to the incorrect forum, that is, they referred their disputes to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') rather than to the National Bargaining Council for the Chemical Industry ('the NBCCI') of which the defendant is a registered member.

[4] The second challenge to this Court's jurisdiction, which relates only to the second plaintiff, is that the real reason for the second plaintiff's dismissal was misconduct and not operational requirements. The defendant submits that the second plaintiff's unfair dismissal dispute ought therefore to have been referred to the CCMA and not to this Court.

[5] The third jurisdictional challenge, which the defendant contends is dispositive of the matter, is that the plaintiffs referred their unfair dismissal disputes to the CCMA prematurely.

[6] The Court shall deal firstly with the third jurisdictional challenge.

Premature referral

[7] It is common cause that the plaintiffs were notified on 6 February 2024 in retrenchment letters addressed to them individually that their employment would terminate on 31 March 2024 due to the defendant's operational requirements.

[8] It is also common cause that both plaintiffs referred unfair dismissal disputes to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') on 28 March 2024.

[9] It is the defendant's case that the first plaintiff's employment with the defendant terminated with on 31 March 2024 in terms of the retrenchment letter issued her on 6 February 2024. In respect of the second plaintiff, it contends that she was charged with misconduct on 25 March 2024, a disciplinary enquiry was held on 28 March 2024 and, thereafter, the retrenchment letter of 6 February 2024 was withdrawn by the defendant on 4 April 2024 and she was dismissed for misconduct with effect from 5 April 2024.

[10] According to the defendant, it is clear from the timeline set out above that the plaintiffs' referrals to the CCMA were premature in that both employment relationships with the defendant still existed at the date of their referrals to the CCMA on 28 March 2024.

[11] In making this argument, the defendant relies on this Court's judgment in *Le Grange v Visser trading as Skukuza Medical Practice and another*¹ in which another judgment of this Court in *Avgold - Target Division v Commission for Conciliation, Mediation and Arbitration and others*² and the judgment in *CWIU v Darmag Industries (Pty) Ltd*,³ were relied on.

[12] It was found in those matters (and in a number of others)⁴ that, as there were no dismissals as at the date of the referrals to the CCMA, the referrals were premature and that, consequently, the CCMA did not have jurisdiction to conciliate the disputes.

[13] In opposition to the defendant's argument, it was argued on behalf of the plaintiffs that they had been notified that their employment would terminate on 31 March 2024 and, as 29 March 2024 was a public holiday for Good Friday and 31

¹ (JS463/21) [2023] ZALCJHB 144 (11 May 2023). This judgment was overturned on appeal in *Le Grange v Visser t/a Skukuza Medical Practice & Another* (2025) 46 ILJ 947 (LAC).

² (2010) 31 ILJ 924 (LC) at paragraph 30.

³ [1999] 8 BLLR 754 (LC) at paragraph 20.

⁴ *P Moeller & Co (Pty) Ltd v Levendal & others* [2002] 8 BLLR 782 (LC), at para 2. *Fowlds v SA Housing Trust Ltd & another*, unreported case no J561/98; *Steel Mining Commercial Workers Union & others v Tiger Plastics (Pty) Ltd* 1999 20 ILJ 2112 (LC) at para 2, and *PPWAWU & others v Nasou-Via Afrika (A division of the National Education Group (Pty) Ltd)* [1999] 10 BLLR 1092 (LC) at para 2.

March 2024 was a Sunday, the plaintiff's employment would have in actual fact terminated on 28 March 2024 as they would not have worked on the public holiday or the weekend. On this basis, it was submitted that the referrals to the CCMA on this date were not premature.

[14] It is correct that, at the time of the plaintiffs' referrals to the CCMA on 28 March 2024, they had not yet been dismissed. It may also be that their last working day would have been 28 March 2024 due to the Easter weekend, however, if they were both dismissed for operational requirements as they allege, their notice period only elapsed on 31 March 2024 in terms of the retrenchment letters they were given on 6 February 2024. On the defendant's version that the retrenchment letter issued to the second plaintiff was withdrawn on 4 April 2024 and the second plaintiff was dismissed for misconduct with effect from 5 April 2024, her referral to the CCMA was also prior to her dismissal.

[15] Section 191(1) of the Labour Relations Act⁵, ('the LRA') provides that disputes about the fairness of a dismissal must be referred to a bargaining council or the CCMA within 30 days of the date of a dismissal.⁶

[16] On reading this subsection on its own, it appears that the defendant's jurisdictional challenge must succeed as the section suggests that such a referral must be made after the dismissal. However, subsection 191(2A), which came into effect on 1 August 2002, provides that an employee whose contract of employment is terminated by notice may refer a dispute to the council or the CCMA once the employee has received that notice.

[17] In this case, both plaintiffs received notice of their dismissals in the retrenchment letters dated 6 February 2024. In terms of subsection 191(2A), they were therefore entitled to refer their unfair dismissal disputes to the CCMA after this date.

⁵ Act 66 of 1995, as amended.

⁶ Or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.

[18] On this basis, the Court finds that this jurisdictional challenge must fail.

[19] In light of this finding, the Court now turns to consider the other jurisdictional challenges raised by the defendant.

Referral to incorrect forum

[20] With regard to the defendant's first jurisdictional challenge (that the plaintiffs referred their unfair dismissal disputes to the incorrect forum), section 191(1)(a) of the LRA provides that a dismissed employee may refer a dispute about the fairness of a dismissal to a bargaining council, if the parties to the dispute fall within the registered scope of that council, or to the CCMA, if no council has jurisdiction. Thereafter, the bargaining council or the CCMA must attempt to resolve the dispute through conciliation.

[21] Subsections 147(2) and (3) of the LRA provide that:

'(2) (a) if at any stage after a dispute has been referred to the CCMA, it becomes apparent that the parties to the dispute are parties to a council...

(3) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute fall within the registered scope of a council and one or more parties to the dispute are not parties to the council, the Commission may –

(i) refer the dispute to the bargaining council for resolution; or

(ii) appoint a commissioner or, if one has already been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.'

[22] The defendant's point is that the CCMA did not have jurisdiction to conciliate the plaintiffs' disputes because it is a registered member of the NBCCI.

[23] In this regard, the defendant relies on a letter to it from the NBCCI confirming that it is a registered member. This letter was not disputed on behalf of the plaintiffs at the hearing of this matter. Instead, it was simply contended on the plaintiffs' behalf that the referrals of the disputes to the CCMA instead of the NBCCI were *bona fide* as they had not been aware that it was the NBCCI and not the CCMA that had

jurisdiction to deal with the disputes. It was further submitted that, as the facts available to the CCMA at the time of the conciliations did not include this fact, this gave the CCMA jurisdiction to conciliate the disputes and therefore this matter was properly before this Court.

[24] The defendant relies on this Court's judgment in *Food Lovers Holdings (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁷ in which this Court noted that the issue of the jurisdiction of the CCMA never arose in the proceedings before it. The commissioner in the matter simply dealt with the dispute as if the CCMA had jurisdiction.

[25] In that case, the employer argued that, in the absence of a clear exercise of the choice in terms sections 147(2) or (3) of the LRA to either refer the matter to the bargaining council, or to appoint a commissioner or confirm the appointment of a commissioner already appointed to deal with the matter, the CCMA had no jurisdiction to determine the dispute.⁸

[26] The employer in *Food Lovers* relied on the decision of the Labour Appeal Court ('the LAC') in *Nehawu obo Kgekwane v Department of Development Planning and Local Government*,⁹ in which it was noted that the incorrect referral must be *bona fide* and not an exercise in forum shopping for a "sympathetic or preferred" forum; where a dispute is referred to the CCMA, the matter may not proceed before the CCMA once it is discovered that the parties are parties to a bargaining council or fall within the registered scope of a bargaining council with one party not being a party to the council, until the options set out in sections 147(2) or (3) have been exercised by the CCMA; it is for the CCMA or its delegate to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or, if one has already been appointed, to confirm his or her appointment; and where the CCMA elects to appoint a commissioner to arbitrate the dispute or to confirm the appointment of one who has already been appointed to do so, the matter

⁷ (JR1768/19) [2021] ZALCJHB 40 at para 9.

⁸ At para 9.

⁹ [2015] 6 BLLR 575 (LAC) at para 18 - 19

may only then proceed as the CCMA would then have jurisdiction to determine that dispute.

[27] In *Food Lovers*,¹⁰ the Court noted that this dictum was confirmed by the LAC in *Qibe v Joy Global Africa (Pty) Ltd, In re: Joy Global Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*.¹¹

[28] It is evident that the issue of the CCMA's jurisdiction also did not arise at either conciliation in this matter given that, according to the plaintiffs' representative, the defendant did not attend at the conciliation proceedings¹² and the plaintiffs were unaware that the NBCCI had jurisdiction over the disputes.

[29] In the absence of exercising one of the options in section 147(3)(a), the CCMA did not have jurisdiction to entertain the disputes given the defendant's membership of the NBCCI. The fact that the plaintiffs were unaware of the membership of the defendant does not detract from the fact that it was the NBCCI that had jurisdiction to deal with the disputes.

[30] In this matter, it only became apparent that the defendant was a registered member of the NBCCI and that the CCMA did not have jurisdiction to conciliate the disputes when it raised a challenge to this Court's jurisdiction on this basis in its statement of response to the plaintiffs' claim.

[31] In all of the cases the Court has referred to above, the disputes were arbitrated in the CCMA whereafter the unsuccessful parties brought applications to review and set aside the arbitration awards on the basis of the CCMA's lack of jurisdiction. In this case, however, the CCMA only conciliated these disputes before they were referred to this Court for adjudication.

[32] If the Court finds that the CCMA did not have jurisdiction to conciliate the disputes and that therefore this Court does not have jurisdiction to entertain this

¹⁰ *Supra*, at para 11.

¹¹ (2008) 29 ILJ 2218 (IAC) at para 41..

¹² The defendant's attorney was not able to confirm or deny this.

claim, the plaintiffs will have to go back to the CCMA and apply for a ruling in terms of section 147(3)(a)(ii) and then go through the conciliation process again before referring the disputes for adjudication by this Court for a second time. Alternatively, if the plaintiffs elect to refer their disputes to the NBCCI, they will have to apply for condonation for the late referrals, go through the conciliation process again and then refer the disputes back to this Court for adjudication. In the Court's view, this would go completely against one of the imperatives of the LRA, namely, the effective and expeditious resolution of labour disputes.

[33] This is not a matter in which the CCMA has issued an arbitration award that must be set aside due to its lack of jurisdiction. This is a matter where all the CCMA has done is conciliate the disputes referred by the plaintiffs. As Landman AJ (as he then was) remarked in *Spilhaus & Co (WP) Ltd v CCMA & others*:¹³

'In this case the certificate was issued by the commission itself which had assumed jurisdiction to conciliate. From a substantive point of view there seems to be no distinction to be drawn at all because whether conciliation was done by the bargaining council or the CCMA it would amount to the same thing. This is not however to say that there may not be material reasons why the autonomy of a bargaining council should not be undermined. In the present case I do not think it makes any difference and it would be over-technical for this Court to find that the senior commissioner lacked jurisdiction to arbitrate the matter on this ground.'

[34] In the Court's view, in the circumstances of this matter, it does not make any difference that it was the CCMA that conciliated the disputes before they were referred to this Court for adjudication and not the NBCCI and that to uphold this point would be over-technical and antithetical to the effective and expeditious resolution of labour disputes.

[35] The Court is also mindful of the fact that the defendant elected not to attend the conciliation processes at the CCMA in order to challenge the CCMA's jurisdiction

¹³ [1997] 8 BLLR 1116 (LC) at 1115.

there but instead only raised it once the disputes had been referred to this Court for adjudication and the plaintiffs had delivered their statement of claim.

[36] In the premises, the Court finds that this jurisdictional challenge must also fail.

Real reason for second plaintiff's dismissal

[37] In respect of the defendant's second challenge to this Court's jurisdiction (that the second plaintiff's unfair dismissal dispute ought to have been referred to the CCMA and not to this Court), the defendant submits that this Court does not have jurisdiction to entertain this claim in respect of the second plaintiff as the real reason for her dismissal was misconduct and not operational requirements.

[38] When the Court questioned the defendant's representative at the hearing of this matter as to whether the second plaintiff was informed prior to being issued with the notice of dismissal dated 4 April 2024¹⁴ that the disciplinary action against her in respect of misconduct would supersede her dismissal for operational requirements, she was unable to confirm or deny this fact.

[39] In any event, it is trite that an employer may discipline an employee during their notice period, provided that such disciplinary proceedings are held and concluded within the employee's notice period.¹⁵ In this case, the second plaintiff was given notice on 6 February 2024 of her dismissal for operational requirements with effect from 31 March 2024. She was then notified on or about 25 March 2024 that she was to attend a disciplinary enquiry on 27 March 2024 which was then postponed to 28 March 2024 at her request. The enquiry took place on this date and, in a letter dated 4 April 2024, the second plaintiff was notified that her employment with the defendant would terminate with effect from 5 April 2024.

¹⁴ Which it was alleged from the bar that she did not receive as her access to the defendant's email system had been blocked since 31 March 2024.

¹⁵ *Standard Bank of South Africa Limited v Chiloane* [2021] 4 BLLR 400 (LAC) at paragraph 23; *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 ILJ 313 (CC) at paragraph 142.

[40] Importantly, in the second paragraph of this letter, the defendant informed her that, as a result of the disciplinary enquiry which was held on 28 March 2024, 'we hereby withdraw the letter of termination issued to you dated 6th of February 2024 advising you of your termination due to operational requirement (sic) i.e. redundancy'.

[41] In the Court's view, this confirms that the retrenchment letter was not withdrawn prior to the disciplinary enquiry. In the circumstances, the purported termination of the second plaintiff's employment for misconduct came after the notice period for the dismissal for operational requirements had already come to an end. At that time, there was no longer an employment relationship between the defendant and the second plaintiff for the defendant to terminate.

[42] The reason for the second plaintiff's dismissal was therefore operational requirements, in circumstances where none of the exceptions listed in section 191(12) applied. It was therefore correct to refer her dispute to this Court for adjudication, rather than to the CCMA for arbitration.

[43] On this basis, this jurisdictional challenge must also fail.

Costs

[44] Neither party made any submissions regarding the issue of costs. The Court therefore sees no reason to deviate from the principles set out by the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and others*¹⁶ and *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and others*¹⁷ that costs do not follow the result in this Court. Had the plaintiffs sought an order for costs, the Court may have been inclined to make such an order given the fact that I have not upheld any of the jurisdictional points raised by the defendant.

[45] In the premises the following order is made:

¹⁶ [2018] 4 BLLR 323 (CC) at paragraph 24.

¹⁷ [2021] 12 BLLR 1173 (CC) at paragraphs 33 and 35.

Order

1. The defendant's jurisdictional points are dismissed.
2. There is no order as to costs.

M. Edwards

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	T. Dyasi
Instructed by:	Mgobo Dyasi Attorneys
For the Respondent:	L. Foot
Instructed by:	Cliffe Dekker Hofmeyr Incorporated