THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1162/20

In the matter between:

RALEGOGO PHINEAS & 74 OTHERS **Applicant**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Respondent**

Heard: **25 January 2022**

Delivered: **02 February 2022 (through email)**

Revised: 06 February 2026

Summary: Breach of contract claim – motion proceedings inappropriate where a dispute of fact is anticipated. Failure to pay a salary is a breach of a contract of employment claim, which entitles a party to make an election to either cancel the employment contract and sue for damages or hold the other party to the contract and sue for specific performance. A specific performance claim is one that compels a party to adhere to the terms of the contract and does not involve an order for payment of damages.

The Labour Court has concurrent jurisdiction with the High Court to determine any matter arising from a contract of employment. A claim for failure to pay any money, salary, leave pay and bonus included constitutes a breach of a contract if the payment is guaranteed in a

contract. Accordingly, a party who is faced with a failure to pay any money, and he or she falls under the prescribed threshold must approach the CCMA and not the Labour Court for a dispute concerning the failure to pay the money. Section 73A (3) of the Basic Conditions of Employment Act (BCEA) ousts the jurisdiction of the Labour Court. The point of lack of jurisdiction is upheld.

Costs – the applicants approached the Labour Court under section 77 (3) of the BCEA jurisdiction. It being a civil matter, the principle of costs following the results finds application.

Held: (1) The application is dismissed for want of jurisdiction. Held: (2) The applicants to jointly and severally pay the costs of this application.

JUDGMENT

MOSHOANA, J

Introduction

[1] The Labour Court is a creature of a statute. Where a statute ousts the jurisdiction of the Labour Court, the Labour Court is not empowered to act. Should it act without the necessary jurisdiction, its order becomes *brutum fulmen*. Prior to 1 January 2019, the Labour Court under section 77 (3) of the Basic Conditions of Employment Act (BCEA)[1], was empowered to entertain claims relating to payment of any money arising from an employment contract. With the advent of section 73A of the BCEA, the legislature empowered the Commission for Conciliation, Mediation and Arbitration (CCMA) to resolve a dispute concerning the failure to pay any amount owing to an employee in terms of the BCEA, the National Minimum Wage Act, a contract of employment, a sectoral

[1] Act 75 of 1997 as amended.

determination or a collective agreement, if the employee falls within the prescribed earning threshold. The present application involves an alleged failure to pay a salary, leave pay and interest. The applicants chose to approach this Court by way of motion as opposed to an action. In opposing the application, the respondent, the City of Tshwane Metropolitan Municipality (Tshwane) raised a barrage of preliminary points of law. Inasmuch as there is merit in all of the preliminary points, this judgment shall deal with only the jurisdictional impugn. In the Court's view upholding the point is dispositive of the entire application.

Background

[2] For the purposes of this judgment, it is unnecessary to punctiliously narrate the facts of this matter. It suffices to state upfront that there exists a material dispute of facts, which is incapable of resolution on the papers. Later in this judgment, this Court shall *en passant* deliver a comment on the choice of process by the applicants. This matter involves about 74 "former employees" of Tshwane. I must upfront reveal the strange and most puzzling feature of this application, which beggars belief. Since 1 November 2019 until 31 October 2020, the former employees never performed a day's work and continued as such without being paid a proverbial cent.

[3] This application was conceived on 30 September 2020, a month before the expiry of the fixed term contracts of employment involved herein. Before conception of the present application, the former employees approached the South African Local Bargaining Council (SALBGC), which declined jurisdiction over the salary dispute. Briefly, on or about 12 November 2019, Tshwane and the former employees concluded fixed term contracts of employment. In terms thereof, Tshwane was to employ the former employees as General Workers in its Department of Environmental and Agricultural Management, at an all-inclusive salary package of R10 735.00 per month.

[4] Since the conclusion of the fixed term employment contracts, none of the former employees performed a day's work. According to the former employees, Tshwane failed in its contractual obligations to provide them with any work. Tshwane disputes 61 of the alleged fixed term contracts of employment. It testified that there was a syndicate that fraudulently generated fixed term contracts of employment with a number of employees. Nevertheless, after a failed attempt to resolve what was termed by the former employees as "unfair treatment", on 30 September 2020, the former employees launched the present application and alleged a breach of contract alternatively a breach of section 32 of the BCEA. I pause to mention that the founding affidavit in support of the present application is shoddily drafted and fail in many respects to make the necessary averments. Other than baldly alleging a breach of contract, not a single clause of the contract allegedly breached, has been identified in the papers. As pointed out earlier, the jurisdiction of this Court to entertain the present application was challenged.

<u>Evaluation</u>

Jurisdiction of the Labour Court

[5] In motion proceedings, a party stands and fall by the allegations made in the founding papers. In addition, the jurisdiction of a Court is sourced from the allegations made in the pleadings. In alleging jurisdiction of this Court, the deponent to the founding affidavit alleged that he had been advised that this Court has jurisdiction in terms of section 77 (3) and 77A (e) of the BCEA. Section 77 (3) affords this Court concurrent jurisdiction to hear and determine any matter concerning a contract of employment. Section 77A (e) gives this Court powers to order specific performance, award damages or compensation.

[6] In order to place a matter within the reach of section 77 (3), a party must allege and prove a matter concerning a contract of employment. It must be so that non-payment of a salary and leave pay is a matter concerning a contract of employment. Therefore, prior to the introduction of section

73A, the Labour Court had jurisdiction to deal with matters involving salaries and leave pay in respect of all employees. That the Labour Court did by exercising its jurisdiction under section 77 (3).

[7] Section 77 (1) affords the Labour Court an exclusive jurisdiction in respect of all matters in terms of the BCEA. Recently, the Constitutional Court in *Amalungelo Workers Union and Others v Phillip Morris South Africa Ltd and Another*[2] clarified the meaning of section 77 and held that:

> [24] What locates a matter within the jurisdiction of the Labour Court is the application of the Basic Conditions Act to it. All claims to which this Act applies fall within the exclusive jurisdiction of the Labour Court…"

[8] It must follow that where the BCEA itself ousts the exclusive jurisdiction of the Labour Court, the Labour Court cannot appropriate jurisdiction to itself. What then guides the jurisdiction is the BCEA itself. Section 77 (1) itself provides that 'except where this Act provides otherwise' the Labour Court retains exclusive jurisdiction.

[9] There is no dispute that all the former employees were to earn below the prescribed threshold. There can be no dispute that the former employees are claiming money owed to them either in terms of the fixed term contracts of employment or sections 32 and 75 of the BCEA. Section 73A (3) of the BCEA, specifically provides that:

> "(3) An employee or worker, <u>other than the employee or worker referred to in subsection (1)</u> may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court…"

[2] [2019] ZACC 45 (26 November 2019)

[10] Subsection (1) refers to *any* employee. The only employees excluded from the dispute resolution process to be undertaken by the CCMA is the ones falling outside the prescribed threshold. The former employees do not fall outside the threshold. Mr Mokoape, who appeared on behalf of the former employees, submitted that an employee enjoys an election either to approach the CCMA or the Labour Court under section 77 (3). The former employees elected to approach the Labour Court and should not be non-suited, so went the submission. I am unable to agree. Once an employee falls within the prescribed threshold, such an employee must approach the CCMA to resolve a dispute concerning the failure to pay any amount arising from various sources including a contract of employment and the BCEA. Reference to '*may refer a dispute to the CCMA*' made in subsection 73A (1) does not create an election but a discretion to refer a dispute to the CCMA. In other words, an employee may decide and is entitled to not to raise and refer the dispute to the CCMA. However, if an employee falling under the prescribed threshold, like the former employees before me, decides to raise a dispute concerning failure to pay any money, the only legislated forum to deal with that dispute is the CCMA. In *Director General: Department of Employment and Labour and Another v Green Secure Group*[3], this Court per my brother Van Niekerk J had to deal with the issue of the retrospectivity of the section that ousted the jurisdiction of the Labour Court. Of significance, Van Niekerk J recorded the following:

> "[9] Both applicants accept that this Court does not have jurisdiction where the <u>'cause of action' arose after the amendment that took effect on 1 January 2019…"</u>

[11] This acceptance as recorded is correct and well made. The phrase '*other than'* as employed in subsection (3) of section 73A, simply implies that employees falling within the prescribed threshold should not come

[3] (2020) 41 ILJ 189 (LC).

anywhere closer to the Labour Court to seek resolution of disputes concerning the failure to pay any money. The dictionary meaning of the word '*other*' denotes a person or thing that is different or distinct from one already mentioned or known. The phrase, *'other than'* means apart from or except.

[12] Accordingly, the former employees are excluded from approaching the Labour Court in order to resolve their dispute concerning the failure to pay salaries, leave pay and interest in terms of section 75. Thus, the application falls to be dismissed for the want of jurisdiction. The jurisdiction of the Labour Court is additionally controlled by section 157 of the LRA. In terms of section 157 (5) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if any employment law requires the dispute to be resolved through arbitration. The BCEA is an employment law and it requires that an unresolved dispute must be resolved through arbitration (Section 73A (5) of the BCEA).

[13] It is indeed so, that what the former employees did was to astutely avoid the provisions of section 73A of the BCEA. Had they employed the provisions of the section, they had to refer the dispute to the CCMA for con-arb. It is a matter of law that they must head to the CCMA and not of choice. The Constitutional Court in *Chirwa* has long stamped out the malady of forum shopping. It cannot be allowed to rear its ugly head again.

Choice of process.

[14] Motion proceedings are not designed for resolution of dispute of facts[4]. Action proceedings are the best mechanism in resolution of dispute of facts. By now, it is expected of any practitioner to have developed an

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[4] *NDPP v Zuma* [2009] 2 All SA 243 (SCA).

expertise with regard to the choice of process. It must be elementary that when a material dispute of fact is anticipated and or foreseen, motion proceedings must be ruled out. On the former employees' own version, prior to the institution of the present application, there has been various correspondence made with regard to the alleged unfair treatment – not being paid salary since 11 November 2019 – and Tshwane rejected the allegation.

[15] Having not given the former employees any work or pay for a solid period of eleven months, it must have dawned on the former employees and their legal team that Tshwane is mounting a serious and material dispute against the alleged unfair treatment. Indeed, when Tshwane responded, it squarely placed in dispute the existence and the authenticity of 61 of the alleged fixed term contracts of employment. With regard to the 14 admitted fixed term contracts, it placed in dispute performance by those employees. Despite all these, the former employees did not even consider a request for the material dispute of fact to be referred for oral evidence. Instead, Mr Mokoape brazenly persisted that there is no genuine dispute of fact. One of the main allegations that a party suing for a breach must allege and prove is the existence of the contract allegedly breached. When the existence of a contract is placed in dispute, a Court shall be faced with a material dispute of fact, which shall call for the application of the *Plascon Evans* principle.

[16] In conclusion, motion proceedings are inappropriate in a matter involving an alleged breach of contract. On application of the *Plascon Evans* rule, the former employees would have failed had this Court accepted jurisdiction over the matter.

The issue of costs

[17] An interesting argument emerged from Mr Mokoape regarding the scale of the costs to be awarded in this matter. Although the argument is, with respect, nonsensical, it requires entertainment by the Court since it has emerged. Mr Mokoape argued that should the Court award costs in favour of the former employees, it must do so on a punitive scale because the fixed term contract of employment provides so. In this regard he made reference to clause 8 of the agreement which reads:

> "8 You hereby indemnify the Municipality against any claim of any nature whatsoever, including legal fees <u>on an attorney/client scale</u>, arising from the deliberate or gross negligent action or failure by yourself, <u>unless the claim arises directly or indirectly out of the deliberate or gross negligent action or failure by the CoT, its employee(s) or agent(s)."</u>

[18] In the first instance, this clause has nothing to do with litigation costs. It is rather perplexing that counsel could remotely make a submission on costs and rely on the above clause. The less said about this perplex the better. The suggestion was that since Tshwane acted negligently by failing to place facts about the alleged syndicate and corruption, it must be mulcted with attorney/client costs. This, with respect to counsel, is the most preposterous suggestion to make. Even on a benign selective reading of the clause, no reasonable reader will emerge with such a suggestion.

[19] When the Labour Court acts under section 77 (3) of the BCEA jurisdiction, it acts as a civil Court. In civil matters, the principle of costs following the results finds firm application. Tshwane has achieved success in this matter. Thus, it is entitled to its costs. Regard being had to the shoddy manner in which the Court papers were drafted; I, with the greatest of respect, take a view that the poor former employees are the victims of remarkable ineptitude and apparent dearth of skills on the part of the legal team they employed. Unfortunately for them, they chose the legal team and must suffer the consequences of the ineptitude that is, in

the Court's view, so obstreperous. I truly believe that the legal team involved herein is not entitled to any remuneration from the former employees. At the time of conceiving the present application, section 73A was almost two years in the statute books. Had this dispute – failure to pay salaries – been referred to the CCMA, as it should have been, the poor former employees may have received justice swiftly.

[20] Nevertheless, Tshwane is entitled to its success costs. Accordingly, the former employees must jointly and severally be liable to pay the costs, the one paying absolving the others.

[21] In the results, I make the following order:

<u>Order</u>

1. The jurisdictional point is upheld and the applicants' application is dismissed for want of jurisdiction.
2. The applicants are jointly and severally liable to pay the costs of this application, the one paying the others to be absolved.

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Graham Nasious Moshoana

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicants:	Mr LJL Mokoape.
Instructed by:	Mwim and Associates, Pretoria.
For the Respondent:	Mr PH Kirsten
Instructed by:	Machaka NC Incorporated, New Muckleneuk.