REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 354/2011

In the matter between:

ABEL JACOBUS PIENAAR **Applicant**

and

STELLENBOSCH UNIVERSITY **First respondent**

PROF U CHIKTE **Second respondent**

Heard: **8 February 2012**

Delivered: **13 February 2012**

Summary: Referral to Labour Court – incorrect indication by CCMA commissioner on certificate of non-resolution – proceedings stayed and referred to arbitration in terms of s 158(2)(a) of LRA.

JUDGMENT

STEENKAMP J

INTRODUCTION

1] This application raises the question what the court should do in circumstances where the CCMA issued a certificate that an unfair dismissal dispute remained unresolved and indicated that the applicant

should refer the dispute to the Labour Court, whereas the dispute was one contemplated in s 186(1)(a) of the LRA and should have been referred to arbitration. The commissioner also failed to make a ruling on the question whether the applicant was an employee. The applicant, on the basis of the certificate, applied to the Labour Court for a declaratory order that he "had a valid contract" with the respondents; an order that his dismissal was unlawful; and an order reinstating him.

Background facts

2] The Applicant was engaged by the first respondent, Stellenbosch University, to render services to its Nursing Division (Departement Verpleegkunde). On the University's version, he was engaged as an independent contractor to render services on an *ad hoc* basis; on the applicant's version, he was an employee of the University.

3] On 19 January 2011, the University notified the Applicant that his services were no longer required.

4] The Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). In the referral form[1] he indicated that the dispute concerned "unfair dismissal"; and he completed Part B of the form, with the heading "Additional form for dismissal disputes only[2]." He indicated that he was informed of his dismissal in writing. It is perhaps pertinent to note that the applicant was being assisted by his attorney of record, Mr M.I. *Ramalotse* of Matsobane Ramalotse Inc at that stage already. Indeed, the contact details given for the applicant in the referral form are those of his attorneys.

5] The dispute was conciliated on 30 March 2011. It could not be resolved

1 Form 7.11.

2 Underlining as in printed form.

and the conciliating commissioner, Mr JJ Kitshoff, issued a certificate of outcome indicating that the dispute could be referred to the Labour Court.

6] The Applicant, represented by his attorneys of record, delivered an application to this Court on 6 June 2011. The Notice of Motion described the application as follows:

> "An application in terms of section 158(1) read together with section 185 of the Labour Relations Act 66 of 1995."

7] The Applicant asked this Court to make an order in the following terms:

> "1. That the Applicant had a valid contract with the Respondents.
>
> 2. That the dismissal of the Applicant by the Respondents is unlawful.
>
> 3. That the Applicant be reinstated under the same conditions as before with immediate effect.
>
> 4. That the Respondents to pay [sic] the costs of this application.
>
> 5. Further and / or alternative relief."

8] The applicant further notified the respondents – ie the University and Prof Chikte – to "remit the record of proceedings leading to the issuing of the ruling sought to be reviews" [*sic*] to the Registrar; and that the applicant would, "within ten days of such record being filed ... amend its notice of motion to supplement its affidavit or issue a notice of motion and affidavit" [*sic*].

SPECIAL PLEAS

9] The University raised three special pleas:

9.1 The misjoinder of the Second Respondent;

9.2 The absence of jurisdiction of this Court in relation to the Applicant's unfair dismissal cause of action; and

9.3 The Applicant's attempt to bring this matter by way of motion proceedings.

The Misjoinder of the Second Respondent

10] The Applicant joined the Second Respondent, Prof Usuf Chikte, as a party to the proceedings. Prof Chikte is an employee of the University.

11] Mr *Ramalatso* argued that Prof Chikte had been joined to these proceedings because he took the decision to terminate the Applicant's employment after the applicant had refused to desist from communicating with the then head of the Nursing Division, Prof Cheryl Nikodem, who had been suspended. Mr *Ramalatso* could provide no basis for this contention when I asked him to point me to the relevant evidence in oral argument, as I could find no such evidence on the papers. The University dealt with this allegation in its Answering Affidavit where it indicated that it was not Prof Chikte that had terminated the Applicant's relationship with the University, but the HR Manager, Mr Louis Siebert – acting on behalf of the University -- who had informed the Applicant on 19 January 2011 that his services

were no longer required.

12] Mr *Ramalatso* cited *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2003 (4) All SA 471 in his heads of argument[3] in support for the joinder of Prof Chikte. But that case expressly confirms the trite principle that only parties that would be directly affected by the Court's order are necessary parties to the proceedings.

13] In order for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Prof Chikte has no such interest. He should not have been joined to these proceedings and the application stands to be dismissed as against the Second Respondent, with costs.

Jurisdiction of the Labour Court in the unfair dismissal claim

14] It is apparent from the Notice of Motion that the cause of action on which the Applicant relies in instituting these proceedings is an alleged unfair dismissal. Although the relief sought in paragraph 1 of the Notice of Motion is formulated as declaratory relief concerning the status of the Applicant's contract of employment, it is apparent that this is merely ancillary to the further relief sought in paragraphs 2 and 3 of the Notice of Motion. These paragraphs, taken with the reference to section 185 of the Labour Relations Act 66 of 1995 ("the LRA") in the heading of the Notice of Motion, indicate that the Applicant's cause of action in these proceedings is the right not to be unfairly dismissed.

15] The unfair dismissal claim was initiated by the Applicant's referral of a

3 He did not attach a list of authorities to his heads of argument as required by Rule 18(2).

dispute to the CCMA.[4] He alleged that he was unfairly dismissed by the University on 24 January 2011. The unfair dismissal dispute was conciliated on 23 February 2011.

16] An employee may refer an unfair dismissal dispute to this Court only in the circumstances set out in section 191(5)(b) of the LRA. The Applicant has made no allegations in the founding papers that would bring the dispute within the ambit of those provisions, and consequently this Court does not have jurisdiction to determine the dispute which the Applicant has sought to refer to it.

17] When he issued a certificate that the dispute was unresolved, the conciliating commissioner indicated (by ticking the relevant box on the certificate) that the Applicant could refer the matter to the Labour Court. But the certificate of outcome is merely a recordal of the fact that conciliation has been attempted and has failed to resolve the dispute. The commissioner's categorisation of the dispute and his view and indication of the appropriate forum for adjudication is not binding on any party to the dispute and has no legal or jurisdictional consequence.

18] This view is confirmed by two decisions of the Labour Court by Van Niekerk J. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2009] 12 BLLR 1214 (LC) the learned judge referred to two earlier decisions of the Labour Appeal Court, namely *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC) and *NUMSA v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC) in support of his view that the CCMA or the Labour Court assumes provisional jurisdictional upon the referral of a matter and once the body has heard all the evidence, decides on jurisdiction.

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4 As I pointed out, he was already represented by his attorneys of record at that stage.

19] Van Niekerk J pointed out a further reason why a conciliating commissioner should not be permitted or required to make a jurisdictional ruling based on the reason for dismissal as categorized by the referring party. He was of the view that it is the referring party's right to frame an unfair dismissal claim in any way he or she deems fit and that it was not for the commissioner or the employer to decide for that party how the claim should be formulated and which forum should hear the dispute. (at para 17) The learned judge cited the dictum of the LAC in the *Drivelines* case *supra* where it was held that:

> "It is also not for example, the conciliating commissioner to whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee. (See s191(5)(b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour Court, why then should the employee be bound by the commissioner's description of the dispute?"

20] This decision was endorsed by Van Niekerk J's ruling in the subsequent case of *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* [2010] 8 BLLR 840 (LC). In this case and based on his decision in *Goldfields*, he held that there was a third approach to the question of the validity of a certificate of outcome in the face of jurisdictional challenges. He suggested that not all jurisdictional challenges raised in CCMA proceedings involved jurisdictional challenges in the true sense. The learned judge suggested that the distinction to be drawn is between facts which the Legislature has decided must exist before the CCMA acquires power to act and facts which must be proved by the applicant party. In his view, the latter should be decided in the arbitration phase.[5]

21] I aligned myself with the views expressed by Van Niekerk J in these cases, in the subsequent decision of *Mickelet v Tray International (Pty) Ltd.*[6] I do so again.

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5 Paras [13] – [14].

6 (C 717/10, unreported, Labour Court Cape Town, 6 September 2011).

22] The University has not consented to the Labour Court determining this matter as if it were an arbitration in terms of s 158(2)(b) of the LRA. However, if at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may stay the proceedings and refer it to arbitration in terms of section158(2)(a) of the LRA.

23] That is what I intend to do. This Court lacks jurisdiction to determine the dispute referred to it. However, even though Mr *Abrahams* submitted that the application falls to be dismissed with costs for this reason alone, it is apparent that disputes of fact exist. Those disputes should be tested by way of oral evidence. I also bear in mind that the applicant and his attorneys may have been confused by the conciliating commissioner's mischaracterization of the dispute.

The procedure used by the Applicant

24] Not only has the Applicant referred his dispute to the wrong forum, he has also improperly brought his claim by way of motion proceedings.

25] Furthermore, and assuming that he could do so, the Applicant has brought his claim by way of review in terms of section 158 of the LRA. It is submitted that there are no grounds in law on which the Applicant can challenge the fairness of his dismissal by way of judicial review, and that the Applicant has adopted an incorrect procedure.

26] However, given the view that I have taken of the further conduct of this matter, I need not discuss the improper referral any further. The applicant will be able to ventilate his dispute in the proper forum by way of oral

evidence.

Costs

27] The question of costs remains. Mr *Abrahams* submitted that, given the conduct of the Applicant and its attorneys, punitive costs should be awarded on the attorney and own client scale. I do not agree. The applicant has been badly advised, but the conciliating commissioner's indication that the matter should be referred to the Labour Court contributed to his attorney's confusion. In law and fairness[7], the applicant should pay the respondents' costs, but not on a punitive scale.

28] The conduct of the applicant's attorney does warrant a costs order in his personal capacity in one respect, though. He failed to file a practice directive in accordance with the Consolidated Practice Directive of 2010. That Directive has been in force in this Court since September 2010, ie for some 17 months. Clause 9.2 provides that, if the applicant's attorney or counsel does not file the requisite practice note, the respondent party may do so "and may seek a special costs order therefor". That is what Mr *Abrahams* has done, and Mr *Ramalotse* could provide no reason why this request should not be granted.

Order

29] I therefore make the following order:

29.1 The proceedings between the applicant and the first respondent are stayed and referred to the CCMA for oral evidence in order to decide whether the applicant was an employee of the University; and, if necessary, to decide whether his dismissal was fair.

29.2 The application against the second respondent is dismissed.

29.3 The applicant is ordered to pay the respondents' costs.

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7 LRA s 162.

29.4 The applicant's attorney is ordered to pay the costs occasioned by the filing of a practice note in accordance with the Judge President's Consolidated Practice Directive 2010 *de bonis propriis.*

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Steenkamp J

APPLICANT:	MI Ramalotso
	of Matsobane Ramalatso attorneys, Pretoria.
RESPONDENTS	E Abrahams
	of Bowman Gilfillan Inc, Cape Town.