



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Case no: C588/16

Not Reportable

In the matter between:

**DESMOND LOOTS**

**Applicant**

and

**IZAKAYA MAATSURI SUSHI & JAPANESE TAPAS  
BAR (PTY) LTD**

**Respondent**

**Heard: 25 October 2017**

**Delivered: 30 November 2017**

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**JUDGMENT**

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RABKIN-NAICKER, J

- [1] This matter concerns two *points in limine* raised by the respondent in respect of this court's jurisdiction to hear the applicant's claim.
- [2] It is recorded in the pre-trial minute, dated 24 May 2017, that the applicant "is abandoning his claim for pain and suffering". The relief sought in the statement of claim, taking this into account, is framed as follows:
- "Ordering the Respondent to pay the Applicant maximum compensation;  
Ordering the Respondent to pay the Applicant for the work done, marketing functions and management duties."
- [3] It is the respondent's case that the matter is *res judicata* in that the applicant already referred a dispute to the CCMA where he sought inter alia compensation for unfair dismissal, compensation for unpaid management services and compensation for marketing services. An arbitration award was issued on the 14 March 2016.
- [4] The outcome or the Award in which the issue to be decided is recorded as being "to determine the existence of a dismissal and whether it was procedurally and substantively fair", was as follows:
- "15. In determining the remedy to the dispute I have had regard for the following factors, namely that the Applicant sought compensation for his unfair dismissal, that the dismissal was both procedurally and substantively unfair and that the applicant has not found alternate employment since the dismissal in determining compensation, I have considered the applicant's length of service of one (1) year and (4) four months and his hourly wage rate of R14.50 (fourteen rand and fifty cents), I believe four (4) months compensation to be fair and equitable in the circumstances."
- [5] The applicant was awarded an amount of R7 534.20 by the Arbitrator as compensation for his unfair dismissal. In this claim he pleaded as follows:

“4.6 The Applicant had a verbal agreement with the Respondent that he can do marketing for the restaurant and he will get a 3% of the turnover for that work.

4.7 Indeed the Applicant done a marketing duties and the Respondent started to grow and even got more clients. Attached hereto the documents done marked annexure C.

4.8 The duties included the following:

4.8.1 Creating and distributing menu flyers;

4.8.2 Online campaigns with unpaid meetings with Zomato;

4.8.3 Printing campaigns such as Cape Argus Article;

4.8.4 Updating pricing on POS system year on year and general price changes;

4.8.5 Assisting with contracts for employees;

4.8.6 Staff sourcing;

4.8.7 Training staff;

4.8.8 Communicating with stakeholders negotiating better card rates and machines for the store;

4.8.9 Engage suppliers of table, chairs and certain product where communication was vital;

4.8.10 Assisting with orders when asked.”

[6] Although the applicant sought to deal with the above at the CCMA, as it evident from his referral to it, the Commissioner dealt only with the unfair dismissal claim. The respondents in limine point of res judicata cannot therefore be upheld.

- [7] In its second point in limine in terms of jurisdiction the respondent submits that while section 77 (3) of the Basic Condition of Employment Act stipulated that the Labour Court has concurrent jurisdiction to hear and determine any matter concerning a contract of employment, the applicant is claiming general damages for pain and suffering. The respondent does not appear to have had regard to the pre-trial minute which records that this prayer is not being pursued. The following issues are listed in the pre-trial minute for the Court to decide:

Issues to be determine by the court.

- “6.1 preliminary issues of res judicata and jurisdiction.
- 6.2 Whether the applicant is entitled for payment of the work that he has done.
- 6.3 Merits to be determined by the court.”

- [8] The applicant has pleaded an oral agreement with the Respondent that he would do marketing for the restaurant, over and above his normal duties, and that he would get 3% of the turnover of the business for that work. He is seeking damages for the breach of that agreement. In determining whether this court has jurisdiction to hear the claim in terms of section 77(3) if the BCEA, I take cognisance of the matter of **Rand Water v Stoop & another (2013) 34 ILJ 576 (LAC)** in which the LAC held per Waglay AJP, (as he then was) concerning a counter-claim for damages brought by an employer, as follows:

“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."

- [9] The issue is then whether the oral agreement referred to above was in connection with or about an employment contract. I find that the claim for work performed in terms of the alleged oral agreement is in connection with the applicant's employment relationship with the respondent. I am however persuaded by the respondent's argument that there is a need for the applicant to quantify the damages he is claiming. In the result, and bearing in mind the need for expeditious resolution of disputes, I make the following order:

#### Order

1. The points in limine are dismissed.
2. The parties are to file a supplementary pre-trial minute setting out the quantum of damages being claimed by the applicant and the respondent's plea thereto.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances: Applicant in person

Respondent: Barry Varkel Consulting