



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

**Not Reportable**

Case no: C154/2017

In the matter between:

**NUPSAW obo M PAULSE**

Applicant

and

**DEPARTMENT OF HEALTH WESTERN CAPE**

Respondent

**Date heard: 11 November 2020**

**Delivered: 30 March 2021 by means of scanned email**

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**JUDGMENT**

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RABKIN-NAICKER J

[1] The respondent has raised a point in limine that the Court does not have the requisite jurisdiction to adjudicate this referral, for the following reasons:

- 1.1 The applicant is not an employee as contemplated in terms of the LRA 66 of 1995 (as amended) his dismissal having been confirmed by the Commissioner Erasmus in terms of her Award dated 13 September 2017;

- 1.2 The Applicant has not applied to have the Commissioner's aforesaid Award reviewed and set aside (the time for which has lapsed in or about mid-November 2017) and the award consequently stands;
- 1.3 The applicant's dispute is *res judicata*;
- 1.4 Insofar as the Applicant alleges that he is an ex-employee of the Respondent, the former has failed to refer the dispute for conciliation prior to applying to the above court for relief.
- [2] In as far as the first issue is concerned, all persons who refer unfair dismissal disputes in terms of the LRA are ex-employees. The submissions on this point do not merit any further consideration and are ill considered.
- [3] The point on *res judicata* relies on an assertion that the applicant referred an automatically unfair dismissal dispute to this Court *per se*. However his statement of claim refers to having suffered an "occupational detriment" in respect of the following: "when he was harassed, suspended, subjected to a disciplinary enquiry and ultimately dismissed." This despite the Notion of Motion filed of record, which simply refers to an automatically unfair dismissal.
- [4] As to the issue of conciliation not taking place, the applicant referred an unfair labour practice dispute to the PHSHS 871-16/17 on the basis that he was being victimized for having made protected disclosures (prior to the unfair dismissal arbitration), which culminated in a certificate of non-resolution dated 1 December 2016. Thus there has been a conciliation dealing with a referral of a protected disclosure under section 186(2)(d) of the LRA. This fact is contained in a document entitled "Agreed Stated Case for Determination" filed by the State Attorney.
- [5] I am of the view that the said document does not conform to the requirements of Rule 33 (1) of the Uniform Rules read with Rule 11 of the Labour Court. As the majority in the Constitutional Court judgment of **Mtokonya v Minister of Police**<sup>1</sup> stated:

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<sup>1</sup> 2018 (5) SA 22 (CC) (2017 (11) BCLR 1443; [2017] ZACC 33)

'[61] Rule 33(1) of the Uniform Rules of Court provides that parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of points of law. This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions. Rule 33(3) gives the court the discretion to draw any inference of fact or law from the facts and documents as if proved at trial..."

- [6] The questions of law arising from the pleadings in this matter have not been sufficiently ventilated in the purported Stated Case.<sup>2</sup> This must be done before this Court can determine whether, because there is a binding award in respect of a misconduct dismissal dispute in existence, the issues in dispute before this Court are res judicata or whether the matter before this Court has been conciliated. I therefore make the following order:

Order

1. The parties are to file an amended Stated Case which includes the questions of law in dispute between them as well as their contentions in respect thereto.
2. The Amended Stated Case is to be filed on or before April 29 2021;
3. The issues as to whether the matter is res judicata and whether it has been conciliated, must then serve before a judge in Chambers.



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

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<sup>2</sup> This may well be because a pre-trial minute was not filed as per the Order of Tlhothalemaje J of 13 August 2018 but rather the "Agreed Statement".

Appearances

For the Applicant in the points in limine: J Van Der Schyff instructed by the State Attorney

For the Respondent in the points in limine: Nupsaw Official

LABOUR COURT