REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C180/2016

In the matter between:

ZAMUXOLO WISEMAN MGUMANE **Applicant**

and

MINERAL SANDS RESOURCES (PTY) LTD **Respondent**

Date heard: 2 February 2022

Delivered: 21 February 2022

Summary: ***Jurisdictional point in limine; pro forma statement of claim not founding jurisdiction for a contractual claim; The Labour Court, like the High Court, will sit as a court of law and not as a court of equity in adjudicating contractual - Rand Water v Stoop & another (2013) 34 ILJ 576 (LAC) followed; Where an unrepresented litigant launches a contractual claim the equitable principles of practice and procedure enunciated in Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) may be used to assist such a litigant.***

JUDGMENT

RABKIN-NAICKER J

[1] This judgment deals with a jurisdictional point *in limine* raised by the respondent (the company). The applicant (the employee) launched a claim unassisted to this Court. The referral was in the wake of an unsuccessful conciliation at the CCMA of a dispute referred as a unilateral change to terms and conditions of employment.

[2] In his referral to this Court, dated 10 April 2016, the employee stated the following in his statement of claim:

"I have been forced to go to Koefranap primary and teach there whereas my contract state that I am an ABET facilitator. No consultation was done with me. The reason given is that there are no more adult learners which is a lie."

[3] Under the heading, 'Relief sought', he wrote that: "Because the relations between the company and me have reach a point of mistrust and breakdown they must just release me and pay me out."

[4] The company responded to the statement after some 12 months, having received an application for default judgment from the employee. It obtained condonation for the late filing of the response on the 28 February 2017. The response contains the objection to the jurisidiction of the Labour Court.

[5] In his first direction on 4 September 2020, Lagrange J directed the parties to file a pre-trial minute. Rather than doing so, the parties (the applicant now represented by a pro-bono attorney of record) only agreed to deal *in limine* with the jurisdictional issue. The parties were then directed to file affidavits to deal with the jurisdictional point on the 18 December 2020 by Lagrange J.

[6] Mr Field for the company relied, *inter alia*, on the propositions that the CCMA has jurisdiction to deal with a unilateral change dispute, and that it is trite that the Certificate of non-resolution issued by the conciliating commissioner which directed the employee to come to the Labour Court, was of no legal force and effect. Jurisdiction could not be conferred by the said certificate. These submissions were correct.

[7] However, oral submissions made by Mr Field to the effect that an employee can only bring a Section 73(3) dispute directly to the Labour Court, and not after first relying on an LRA cause of action were incorrect. Nothing prevents a litigant from bringing a contractual claim under section 77(3) to this Court,

even if such a claim follows a finding that the CCMA does not have jurisdiction to hear the referral that employee made. Only prescription would be relevant to the time periods involved.[1]

[8] The issue then that must concern the Court, is whether the way in which the applicant pleaded in his statement of claim precludes the Court having jurisdiction. Mr Field referred the Court to the matter of *Ngobeni v Commission for Gender Equality* in which the late Steenkamp J stated as follows:

"The Court did come to the assistance of a similarly situated employee in *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd.*[2] In that case, this Court held that it had jurisdiction to grant an order for specific performance in the face of a unilateral change to the employee's terms and conditions of employment. The order was granted in terms of s 77(3) of the Basic Conditions of Employment Act.[3]

In this case, the employee's claim is squarely based on s 64(4) of the LRA. And, as the Constitutional Court held in *Gcaba*, jurisdiction must be determined on the basis of the pleadings.[4]

Mr Ngobeni's case is on all fours with that of the applicants in *NUM obo Maponya v Eskom.*[5] In that case, Van Niekerk J commented:[6]

> "To the extent that Adv Malan, who appeared on behalf of the applicants, submitted that the court is empowered to make orders for specific performance (which is, in effect, the order that the applicants seek), the court's powers should not be confused with its jurisdiction. As I have indicated, there is no provision in

[1] SA Commercial Catering & Allied Workers Union on behalf of Radebe & another Development Bank of SA (2014) 35 ILJ 778 (LC) paras 24,25,26; Chimphondah v Housing Investment Partners (Pty) Ltd & others (2021) 42 ILJ 1720 (LC) paras 28 and 29

the LRA (but for s 64(4)) that confers jurisdiction on the court to adjudicate a dispute about an alleged unilateral change terms and condition employment.

To the extent that it was submitted that the dispute referred for adjudication is a matter that concerns contract of employment and that the court therefore has jurisdiction in terms of s 77(3) of the BCEA, that is not the case that has been referred nor is the claim made in the pleadings one for specific performance consequent on any breach of contract by the respondent. Even if the applicants were to be afforded some latitude (on the basis that this court traditionally takes a more tolerant view of imprecision in pleading), it should be recalled that s 77(3) does no more than confirm this court concurrent jurisdiction with the civil courts to hear and determine a matter concerning a contract of employment. *The test is whether the applicants' statement of case would pass muster in a civil court in a claim for breach of contract*[7]*.* The answer, having regard to the terms in which the statement of case is drafted, is manifestly not. Adv Malan referred me to a recent decision by this court in *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd* (2012) 33 *ILJ* 1093 (LC) where the court held that it had jurisdiction to grant an order for specific performance in the face of a unilateral variation to a contract of employment. That case can be distinguished on the basis that it concerned an opposed application referred to oral evidence. It was not, as the present case, a referral made in terms of rule six, in circumstances where the dispute referred to the CCMA and the subject of conciliation, on the applicants' own version, was cast in terms of a unilateral change the terms and conditions of employment. In Abrams, the applicant alleged unilateral change to conditions of employment and sought specific performance in the form of the reinstatement of the status quo. The court held than that the applicant's failure to refer specifically to s 77(3) did not deprive the court of jurisdiction to hear the matter in terms of that section or to grant an order in terms of s77(3)."

The same considerations apply in this case. The referral dismissed for lack of jurisdiction."

[9] The direction made by Lagrange J on the 4 September 2020, that a pre-trial minute be drawn would, if followed, have allowed for the applicant to benefit from a fleshing out of his cause of action and remedy sought. The Directive followed an *in limine* objection contained in the statement of response (filed by respondent's first attorneys of record), that the applicant had not complied with

[7] My emphasis.

Rule 6 of the Rules of the Labour Court in his statement of claim. The Directive to file a pre-trial minute is to be understood in line with the judgment of *Harmse v City of Cape Town*[8] in which Waglay J (as he then was) dealt with the question of practice and procedure in this Court:

"[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

[7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim.

[8] The rules of this court do not require an elaborate exposition of all facts in their full and complex detail - that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings - the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pre-trial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed.

[9] Accordingly the rules of this court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The rules of this court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trial conference. The rules therefore anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadow this activity but are not a substitute for it. It is

[8] (2003) 24 ILJ 1130 (LC)

for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the court is required to decide."

[10] In *Rand Water v Stoop & another*[9], Waglay AJP (as he then was) set the principle in respect of the way in which this Court should deal with a contractual claim:

"[33] The Labour Court is both a court of law and a court of equity. What this implies is that in matters before it, it should apply the appropriate principles. Sometimes it must apply both these principles on an issue: for example when determining whether to grant costs in a matter referred to it, but where the pleadings involve a contractual claim and no reliance is placed on unfair behaviour, principles of law must apply to determine the dispute. In the present case, the Labour Court would do exactly what the High Court would do in adjudicating the damages claim. The Labour Court, like the High Court, will sit as a court of law and not as a court of equity. Its jurisdiction is concurrent to the jurisdiction of the High Court."

[11] *In casu*, this Court is faced with the situation that the parties, by agreement, did not flesh out the pleadings which are terse in the extreme, and certainly do not comply with the standard referred to in *Rand Water* or the *NUM v Maponya* case. The *Harmse v City of Cape Town* approach can facilitate the meeting of this standard where an employee has initially launched such a claim unassisted. In this way, the principle of equity in regard to practice and procedure can be applied in assisting unrepresented applicants to bring contractual claims to this Court.

[12] In the circumstances of this application, the applicant's pleadings do not found jurisdiction in this Court, and consequently his claim must be dismissed. Mr Field left the issue of costs in the Court's discretion. I make the following order:

Order

1. Applicant's claim is dismissed for want of jurisdiction.
2. There is no order as to costs.

[9] (2013) 34 ILJ 576 (LAC)

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant in the main claim: N Mashava instructed by Webber Wentzel (pro bono representation)

Respondent in the main claim: BVPG Attorneys