THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

In the matter between:

CASE NO: P 76/2018

DIRECTOR GENERAL: DEPARTMENT

OF EMPLOYMENT AND LABOUR **First Applicant**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Applicant**

and

GREEN SECURE GROUP **Respondent**

Heard: 23 August 2019

Delivered: 23 August 2019

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JUDGMENT

VAN NIEKERK J

[1] In this unopposed application, the first applicant seeks to have a compliance order issued against the respondent made an order of court in terms of s 77A(a) of the Basic Conditions of Employment Act (BCEA). The second applicant participates in these proceedings at the invitation of the Judge President, in circumstances where the issue to be determined is whether this court has the jurisdiction to make the order sought, and the consequences of any lack of jurisdiction for similar, pending applications.

[2] Until 1 January 2019, s 77A(a) of the BCEA read as follows:

> **77A Powers of the Labour Court**
>
> Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order –
>
> (a) Making a compliance order issued in terms of this Act, an order of the Labour Court, on application by the Director-General in terms of section 73(1) or 73(2) …

[3] Paragraph (a) was deleted by s 21 of Act 7 of 2018, with effect from 1 January 2019. Various other amendments to the BCEA came into force on the same day, including an amendment to s 73, which now empowers the CCMA, on application by the director-general, to issue an arbitration award requiring an employer to comply with a compliance order. In essence, the process for the enforcement of compliance orders has been shifted from this court to the CCMA.

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[4] The compliance order that is the subject of the present application was issued before 1 January 2019 and the application was initiated, served and filed prior to that date.

[5] The applicants submit that the court retains jurisdiction over all matters in which the 'cause of action' arose before the amendment became effective, i.e. 1 January 2019. By this they mean the securing by inspectors of written undertakings from employers alleged to be in breach of the BCEA, or the issuing of a compliance order by an inspector. The applicants thus seek a declaratory order to the effect that the court retains its jurisdiction under the now-repealed s 77A(a) to make a compliance order an order of court where the compliance order was issued prior to 1 January 2019.

[6] As a starting point, the general principle is that no statute is to be construed as having retrospective operation, in the sense of taking away or impairing a vested right acquired under existing law, unless the legislature clearly intended the statute to have that effect (see *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and others; Transnet Ltd (Autonet Division) Division v Chairman, National Transport Commission, and others*.)[1] In *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)*[2] the Constitutional Court confirmed the common law rule that in the absence of express provision to the contrary, statutes should be considered as affecting future matters only and not to take away rights vested at the time of their promulgation.[3] The court held:

> [26] Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and will not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also

[1] 1999 (4) SA 1).
[2] 2007 (3) SA 210 (CC).
[3] *Curtis v Johannesburg Municipality* 1906 TS 308 at 311.

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> central to the rule of law is the principle of legality which requires that law must be certain, clear and stable.

[7] A distinction has been drawn between 'hard' or strong retrospectivity, where a statute provides that from a past date the new law is deemed to have been in operation, and a 'soft' or weaker sense of the term, where the question is merely whether the new statute interferes with or is applicable to existing rights.[4] A further distinction has been made between amending statutes that affect substantive rights, and those affecting procedure only. The courts have held that ordinarily, an amendment that is purely procedural does not trigger the presumption against retrospectivity. In *Curtis v Johannesburg Municipality* [5], the court said:

> Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation… It must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending.

However, this distinction has not been regarded as decisive, if only because of the frequently-encountered difficulty of distinguishing substantive and procedural matters.[6]

[8] Finally, the courts have drawn a distinction between a situation where an amending statute comes into effect before the procedure has been initiated, and those cases where the amending statute comes into effect after the procedure has been initiated and are thus pending.[7]

[9] Both applicants accept that this court does not have jurisdiction where the 'cause of action' arose after the amendment that took effect on 1 January 2019. As I have indicated, the present proceedings concern a matter in which a compliance order was issued by an inspector prior to 1 January 2019.

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[4] *Unitrans* at paragraph [13].
[5] 1906 TS 308.
[6] *Unitrans* at paragraph [15]; *Veldman* at paragraph [28].
[7] *Unitrans* paragraph [16] and [17].

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[9] Although a case could be made to the effect that the amending legislation is procedural (in that it substitutes the power of this court for that of the CCMA), the authorities are clear that the substantive effect of a procedural amendment must necessarily be considered.[8] In *Minister of Public Works v Haffegee N.O*[9] what was then the Appellate Division of the Supreme Court said the following regarding the question of fairness and equity as factors to be considered in deciding whether legislation amending procedure is applicable to pending applications or actions:

> The manifest purpose of the amending legislation was to eliminate compensation courts from the expropriation scene and to direct all future claims for compensation, irrespective of the amount, to the Supreme Court or to arbitration if the parties so agreed. The fact that the Legislature may have had perforce and *ex necessitate* to allow such compensation courts as had already been appointed and were already seized with claims to compensation to complete their tasks does not derogate from the plainly expressed intent of the Legislature to do away with such courts with effect from 1 May 1992. The unavailability after 1 May 1992 of a compensation court to a claimant whose right to compensation arose before that date but had not been invoked in that court by that date is not the consequence of an anomalous act of irrational legislative discrimination against him or her…. The disruption, inconvenience, wastage of time and money, and other complications which could attend insistence upon pending and, *a fortiori*, pending part-heard cases being re-instituted before the Supreme Court are so obvious that they require no elaboration and there is no provision in the legislation for a mere transfer of such cases to the Supreme Court. Indeed, it is difficult to envisage how provision could fairly and effectively be made for the transfer of the case which is actually part-heard.[10]

[10] There is no indication from the amending legislation as to what the intention of the legislature may have been in relation to pending applications to have compliance orders made an order of this court. There is no transitional provision regulating pending cases; specifically, there is no provision made for the transfer

[8] *Veldman* paragraph [34].
[9] 1996 (3) SA 745 (A).
[10] At 754B-G.

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of pending applications from this court to the CCMA. No provision is made for compensating parties for the wasted costs of preparing and presenting any pending application. On an application of the above principles, it seems to me that all applications to have compliance orders made orders of this court that were pending in this court on 1 January 2019 fall to be heard and determined by this court. Put another way, the amending statute does not affect applications in terms of s 73 that were pending before this court prior to 1 January 2019. To be clear, 'pending' means that the application has been delivered (i.e. served and filed in terms of Rules 4 and 5 of the Rules of this court).

[11] In so far as the applicants submit that the same principle should be extended to compliance orders issued or written undertakings given prior to 1 January 2019, this cannot be so. In the absence of a pending application, the first applicant has no vested right to have the matter determined by this court. The processes initiated by labour inspectors are not processes of this court. It does not assist the first applicant to say, as he does, that the standard forms already issued by labour inspectors refer to the first applicant's right to have the compliance order made an order of this court in terms of s 73. I fail to appreciate why mere notice to this effect either establishes a basis for the first applicant to file such an application in this court notwithstanding the amending legislation and conversely, why it precludes the first applicant from seeking to have a compliance order made an arbitration award in terms of the new procedure. The fact that a compliance order records that a failure to comply with its terms will have the result that the first applicant will apply to this court for an order does not bind the first applicant to make such an application. He would remain entitled to approach any forum having jurisdiction to grant the relief that he seeks, in terms of the procedure applicable in that forum.

[12] Finally, the applicants have raised the status of applications that were pending and then withdrawn from the roll pending adjudication on the jurisdictional point raised. The principles enunciated above would not be infringed if the first applicant were simply permitted to re-enroll the applications for hearing.

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[13] The present application was pending in this court on 1 January 2019. The court is thus empowered to make the compliance order an order of this court. I am satisfied that the first applicant has made out a case for the relief sought in the notice of motion.

I make the following order:

1. An order is granted in terms of prayers 1, 2 and 3 of the notice of motion.

André van Niekerk
Judge

APPEARANCES: Officials for the first and second applicants

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