THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS 780/2021

In the matter between:

BRANDT NJEBE **Applicant**

and

TSHIPI-NOTO FUNERAL HOMES (PTY) LTD **Respondent**

Heard: **14 October 2024**

Delivered: **26 November 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 26 November 2024 is deemed to be the date of delivery of this judgment).**

Summary: Amendment of *bona fide* typographical error to be dealt with generously at discretion of Court - What constitutes "benefits" in terms of section 186(2)(a) of the LRA - Court lacking jurisdiction to adjudicate unfair labour practice disputes referred as contractual claims under BCEA.

JUDGMENT

SHABA, AJ

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Introduction

[1] This is an adjudication of the Respondent's point in *limine* about the jurisdiction of this Court and the amendment of the Respondent's Statement of Response.

Background

[2] The background to this matter is set out in the Applicant's Statement of Claim[1] and the Respondent's Statement of Response thereto[2].

[3] This matter was set down for trial on 14 October 2024 and it became apparent that before the trial could proceed, there was a jurisdictional point in *limine* raised by the Respondent in its Statement of Response which ought to have been picked up prior to the trial date and enrolled for hearing on the interlocutory roll, before the merits of the Applicant's claims are proceeded with on trial.

[4] In the sitting of 14 October 2024, this Court *mero motu*, enquired from both parties whether the Respondent's cross-referencing to section 186(2)(b) of the LRA in its Statement of Response,[3] was not intended to be 186(2)(a) instead, particularly, given the content and context of the Respondent's jurisdictional point in *limine?*[4]

[5] In response to the Court's enquiry aforementioned, the Respondent acknowledged and indicated that its cross-referencing to section 186(2)(b) instead of 186(2)(a) was a typographical error and asked for leave to have such amendment accepted from the bar by this Court.

[6] The Applicant objected to the Respondent's request for leave to amend paragraph 2 of its Statement of Response as aforementioned and persists with such objection in argument[5].

[7] In the premises, the following order was made on 14 October 2024:

[1] Paras 5 to 18 of the Applicant's Statement of Claim (Statement of Claim).
[2] Paras 6 to 12 of the Respondent's Statement of Response. (Statement of Response)
[3] Para 2 of the Statement of Response.
[4] Ibid at para 1 to 5.
[5] Paras 27 to 34 of the Applicant's heads.

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'[1] Trial to be preceded by determination of the jurisdictional point which has to be determined first before the merits are dealt with in the trial,

(a) Respondent is to file written Heads of argument on the jurisdictional issue raised,

(b) Such Heads are to include and/or cover the aspect of whether the amendment of paragraph 2 from page 14 of the paginated bundle of the Respondent's Statement of defence, would be in order to be dealt with from the bar, without any notice to the Applicant before today's sitting,

(c) The Respondent must file its written Heads of argument by Friday, 18 October 2024,

(d) The Applicant to file its answering Heads of argument by Friday, 25 October 2024,

(e) The above will enable a just ruling on the jurisdictional issue by this Court,

(f) Costs will be costs in the cause.'

Issues for a decision

[8] Whether the amendment to paragraph 2 of the Statement of Response to reflect section 186(2)(a) of the LRA instead of section 186(2)(b) should be accepted from the bar?

[9] Whether the Respondent's jurisdictional point in *limine* should be upheld?

Amendment and objection

[10] Having considered both parties' submissions on the amendment and objection related thereto, for adjudication, I have no hesitation to accept the Respondent's amendment to paragraph 2[6] of its Statement of Response from the bar to read:

[6] Page 14 of the Trial Bundle and para 26 of the Respondent's heads.

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> 'The relief sought are benefits in terms of section 186(2)(a) of the Labour Relations Act.'

[11] The decision in the above connection is premised on the reasons as advanced hereunder.

[12] This Court is satisfied that the Respondent's explanation for cross-referencing to section 186(2)(b) in paragraph 2 of its Statement of Response, instead of 186(2)(a) as aforementioned, is a typographical error. This much is borne by the totality of the content and context of the Respondent's jurisdictional point in *limine*[7]. It is inconceivable to fathom otherwise.

[13] The Respondent's request for leave to amend its Statement of Response from the bar, based on its earlier undetected typographical error, until this Court, *mero motu,* drew attention to such probable error during the sitting of 14 October 2024, was instantly and timeously made after the Respondent became aware of such error.

[14] Rule 20(9) of this Court Rules states that:

> 'Despite anything to the contrary in this rule, the court may at any stage before judgment and upon application, grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

[15] Regard being had to the aforementioned Rule, this Court has a discretion to grant or refuse the nature and manner of the amendment sought by the Respondent. This much is conceded by the Applicant[8].

[16] There is nothing before this Court, indicative of a phenomenon that, the Respondent after having *mero motu*, been made aware of the error in question by this Court, acted *mala fide*, in seeking the amendment relevant herein from the bar.

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[7] Footnote 4.
[8] Para 30 of the Applicant's heads.

[17] The Supreme Court of Appeal (SCA) in *Foxlake Investments v Ultimate Raft Foundation Design*[9], had the following to say:

> '[11] In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) para 12. Heher JA said:
>
> > 'Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context'
>
> In *Affordable Medicines Trust & others v Minister of Health & another* [2005] ZACC; 2006 (3) SA 247 (CC) para 9, Ngcobo J said:
>
> > 'The principles governing the granting or a refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles *in Commercial Union Assurance Co Ltd v Waymark* [1995 (2) SA 73 (Tk) at 76D-1]. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for cost, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[18] The requested amendment of the typographical error by the Respondent, including the manner in which it was done, can only facilitate a proper ventilation and speedy adjudication of the jurisdictional point in *limine* at hand, before the trial is proceeded with.

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[9] [2016] ZASCA 54 at para 11.

Jurisdiction

Argument on Jurisdiction

[19] The gravamen of the Respondent's submission on its jurisdictional point *limine,* is that the Applicant's claims[10] are *benefits* and disputes of right to be conciliated and arbitrated by the CCMA[11]. Further that this Court has no jurisdiction to adjudicate such claims in terms of section 77(3)[12] and 34 of the Basic Conditions of Employment Act (BCEA)[13].

[20] The thrust of the Applicant's opposition to the Respondent's jurisdictional point in *limine,* is that this Court, has jurisdiction to adjudicate the Applicant's claims of *remuneration* based on section 77(1), 77(3) and 32 of the BCEA[14].

[21] The contestation based on the parties' papers and submissions between the Respondent and the Applicant on the jurisdictional point in *limine,* for adjudication by this Court, simply put, circumlocates around two issues. Firstly, whether the Applicant's claims constitute *remuneration* or benefits. Secondly whether the Applicant's claims are properly before this Court in terms of sections 32,34,77(1) and 77(3) of the BCEA.

Evaluation on jurisdiction

Whether the applicant's claims are benefits?

[22] The distinction between "remuneration" and "benefits" has since been settled by the Labour Appeal Court (LAC), in *inter alia Apollo Tyres South Africa (Pty) Ltd and Commission for Conciliation, Mediation and Arbitration and others*[15] wherein it was *inter alia*, held that:

> '[21] In *Schoeman and another v Samsung Electronics SA (Pty) Ltd*, the court discussed the meaning of the word "*benefit*" which is defined as

[10] Paras 20 to 35 of the Statement of Claim.
[11] Paras 1 to 5 of the Statement of Response and paras 31 to 44 of the Respondent's heads.
[12] Paras 27-29 and 46 to 48 of the Respondent's heads.
[13] Act No 75 of 1997.
[14] Paras 10 to 18 and 19 to 26 of the Applicant's heads.
[15] [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC) at paras 21 to 22.

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"Advantage or an allowance to which a person is entitled to under insurance or social security..." It concluded that:

> 'Commission payable by the employer, forms part of the employee's salary. It is a *quid pro quo* for services rendered just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits." A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.' [footnote omitted]

[22] In *Northern Cape Provincial Administration v Commissioner Hambidge NO and others*, the court found that remuneration is an *essentialia* of a contract of employment and that other rights or advantages or benefits accruing to an employee by agreement are termed *naturalia* to distinguish them from the *essentialia* of the contract of employment.' [footnote omitted]

[23] The LRA [16] states that:

> '(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—
>
> (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.' [emphasis added]

[24] "Remuneration" has the same definition in both the LRA and BCEA[17] and means:

> '**"remuneration"** means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for

[16] Section 186(2)(a) of the LRA.
[17] Section 213 of the LRA and Section 1 of the BCEA.

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any other person, including the State, and **"remunerate"** has a corresponding meaning.'

[25] Over and above these definitions, remuneration is further qualified in section 32 of the BCEA whereas benefit is not defined in any of these acts.

[26] The specific definition of remuneration in both the LRA and BCEA, as aforementioned, can only serve the purpose of distinguishing it from benefits as contemplated in section 186(2)(a) of the LRA.

[27] In differentiating between remuneration and benefit the LAC held further in *Apollo Tyres South Africa (Pty) Ltd v CCMA*[18] *supra* that:

> '[50] In *IMATU obo Venter v Umhlathuze Municipality,* the Labour Court followed the *Protekon* approach. It then concluded that:
>
> > "The more plausible interpretation is that the term 'benefits' was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion.' [footnote omitted]
> >
> > … In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu or ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion… In as far as *Hospersa, GS4 Security* and *Scheepers (supra)* postulate a different approach they are, with respect, wrong.' [emphasis added]

[18] [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC) at para 50.

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[28] Following the LAC's decision *in Apollo Tyres South Africa (Pty) Ltd and CCMA supra*, it was held in *South African Revenue Services v Ntshintshi and others*[19] *inter alia* that travelling allowance is a benefit as stated hereunder:

> '[37] The travel allowance in this case was offered to all fieldworkers in terms of the collective agreement. In the light of *Apollo Tyres*, it must fall within the broad definition of a "benefit" now adopted by the LAC. To this extent the arbitration award is not reviewable. The CCMA had jurisdiction to decide whether SARS fairly exercised its discretion not to approve the travel allowance for the employee.'

[29] In terms of the LRA, this Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any employment law requires the dispute to be resolved through conciliation and/or arbitration[20].

[30] The Respondent's jurisdictional point in *limine,* stands to be upheld based solely on the fact that the Applicant's claims are benefits and have been *qualified* as such in the Statement of Claim. These are to be subjected to the unfair labour practice regime and dispute resolution in terms of section 186(2)(a) of the LRA.

[31] The Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and others*[21] held *inter alia* that litigants cannot bypass the dispute resolution process provided for in chapter VIII of the LRA. They are obliged to follow the proscribed dispute resolution relating to unfair labour practice before approaching the Courts.

[32] Regard being had to all the authorities and prescripts above, I have no hesitation in arriving at the conclusion that the Applicant's claims,[22] are benefits that stand to be conciliated and arbitrated by the CCMA or any of its accredited bargaining councils and not for adjudication by this Court.

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[19] [2013] 9 BLLR 923 (LC); (2014) 35 ILJ 255 (LC) at para 37.
[20] Section 157(5) of Act No: 66 of 1995.
[21] [2018] 4 BLLR 323 (CC); (2018) 39 ILJ 523 (CC) at para 20.
[22] Paras 20 to 35 of the Statement of Claim.

[33] In the premises and having found as above, there is no need to consider the other Respondent's submissions in support of its jurisdictional point in *limine*. If I am wrong in this regard, I nevertheless, continue to deal with the Respondent's jurisdictional point in *limine* as further hereunder.

Whether jurisdiction is found based on BCEA?

[34] The Applicant lodged claims in this Court solely in terms of section 77(3) of the BCEA in the papers.[23] The Applicant subtly relies on other sections 77(1) and 32 of this Act in the Heads[24]. In any event, these additional sections of the BCEA, further relied on by the Applicant, do not take its opposition to the Applicant's jurisdictional point in *limine,* any further.

[35] In the *Passenger Rail Agency of South Africa and Others v Ngoye and Others*[25] the LAC held *inter alia* that:

> '[28] While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims. In my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.'

[36] In order to bring an application or action within the purview of section 77(3) of the BCEA, to clothe this Court with jurisdiction, the Applicant must demonstrate that there is an employment contract and that there is a breach of a specific term of such contract. The Applicant must further claim specific performance or claim damages as relief, in relation to an identified contract of employment.

[23] Para 19 of the Applicant's Statement of Claim.
[24] Para 7 and 9 of the Applicant's heads.
[25] [2024] ZALAC 18; [2024] 7 BLLR 706 (LAC) at para 28.

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[37] That the above ought to be the case, was *inter alia* held by the SCA in *Mhlontlo Local Municipality and Others and Ngcangula and Another*[26]. Wherein it was held inter alia that:

> '[23] If regard is had to the pleadings in the present matter, the notice of motion makes no mention of an employment contract or the breach of any terms thereof.' [footnote omitted].

[38] Other than a mere mentioning of the fact that the Applicant's case is about a claim in terms of section77(3) of the BCEA, there is no iota of any mention or attachment of any Applicant's contract of employment with the Respondent, let alone any cross-referencing to any specific term of any such employment contract, relied on by the Applicant to bring his referral to this Court, within the realm of section 77(3) of the BCEA.

[39] The above, is fatal to the Applicant's case for want of clothing this Court with jurisdiction to adjudicate its claims in terms of section 77(1) and 77(3) of the BCEA.

[40] The jurisdictional point in *limine* of the Respondent, stands to be upheld on solely this ground alone as the Applicant did not adduce his contract of employment as part of the papers and such papers are silent regarding all these claims as part of being specific terms of his contract of employment.

[41] It is trite that jurisdiction is determined on the pleadings as was held in *inter alia Chirwa v Transnet Ltd and others*[27].

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[26] [2024] ZASCA 5; [2024] 3 BLLR 239 (SCA) at para 23. See also: The *National Prosecuting Authority v Public Servants Association obo Meintjies and Others*; *the Minister of Justice and Correctional Services and Director-General: Department of Justice and Constitutional Development v Public Servants Association obo Meintjies and Others* [2021] ZASCA 160; [2022] 1 All SA 353 (SCA) at para 61, which noted: 'Thus, the notice of motion and founding affidavit has to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing this exercise, substance must prevail over form and proper regard must be had to context.'

[27] [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC). See also: *CUSA v Tao Ying Metal industries and others* [2009] BLLR 1 (CC); [2008] ZACC 15 and *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC); (2010) 31 ILJ 296 (CC).

[42] In *My Vote Counts NPC v Speaker of the National Assembly and Others,*[28] the Constitutional Court, quoting *Chirwa v Transnet Ltd and Others*[29] stated as follows:

> 'A court must assess its jurisdiction in light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction…
>
> In the event of the court's jurisdiction being challenged at the outset (*in limine)*, the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence…
>
> It follows that "the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it".'

[43] The Applicant does not plead breach of contract and is not seeking relief consequent upon a breach of a specific term of the contract giving rise to specific performance or a claim for damages.

[44] This Court has already found that travelling allowance is a benefit in terms of section 186(2)(a) of the LRA. Despite bringing this application in terms of *inter alia* section 77(3) of the BCEA, the Applicant also *qualified* his vehicle and cell phone allowance claims and deduction of alleged Medical Aid contribution as benefits[30].

[45] Alleged deductions regarding Medical Aid contributions which are alleged to have been refunded by the Respondent, cannot take the Applicant's case any further in these proceedings as the Applicant's papers do not contain the aspect of such deductions having been made as part of remuneration contemplated in the BCEA without the Applicant's agreement or consent[31].

[46] In the result, the Respondent's jurisdictional point in *limine*, is upheld under the circumstances.

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[28] 2016 (1) SA 132 (CC) at paras 132 to 134.
[29] [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC).
[30] Paras 27 to 28 and 34 of the Applicant's statement of Claim.
[31] Section 34 of the BCEA.

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[47] In light of all the aforegoing, the following order is made:

Order

1. The Respondent's amendment of paragraph 2 of its Statement of Response to cross-reference to section 186(2)(a) of the LRA instead of 186(2)(b), is granted.

2. The Applicant's referral is struck from the roll for want of jurisdiction.

3. There is no order as to costs.

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S.M. Shaba

Acting Judge of the Labour Court of South Africa.

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Appearances:

For the Applicant:	Adv D J Nasser
Instructed by:	Clifford Levin Inc
For the Respondent:	Mr A P Ngubeni
Instructed by:	Ndzondo Kunene Mosea Inc

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