THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS489/2022

In the matter between:

KGOBEDU SELINA NHLAPO Plaintiff

and

DEPARTMENT OF HEALTH: FREE STATE Defendant

Heard: 1 November 2024

Delivered: 10 December 2024

Summary: Claim brought under section 73A of the BCEA. Jurisdictional issue considered; dispute concerns the application of a collective agreement; the court has no jurisdiction.

JUDGMENT

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DANIELS J

Introduction

[1] The plaintiff is an employee of the defendant, and brings a claim for remuneration which she alleges is due to her under a collective agreement. The claim is brought under section 73A(3)[1] of the Basic Conditions of Employment Act No. 75 of 1997 as amended (the "BCEA"). The court raised the matter of its jurisdiction, and directed that this issue be determined first.

Material facts

[2] The plaintiff was appointed by the defendant as a health advisor on 1 March 1988.

[3] Plaintiff alleges that, during 2002, she was appointed as a professional nurse within the Primary Health Care Mobile Services, based at a mobile clinic in Nala Local Municipality of the Free State Province. The defendant, on the other hand, alleges that the plaintiff was not a professional nurse but an assistant nurse. During 2005, and 2006, the plaintiff experienced certain difficulties with her transfer to the K-Maile Clinic. These difficulties are not relevant to the issue of jurisdiction.

[4] During 2007, the parties to the Public Health and Social Development Sectoral Bargaining Council (the "Bargaining Council") concluded a collective agreement, known as Resolution 3 of 2007 ("Resolution 3"). Resolution 3 relates to the implementation of an occupational specific dispensation for nurses.

[1] It is common cause that plaintiff earns in excess of the earnings threshold contemplated in section 6(3) of the BCEA.

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[5] Plaintiff believed that she qualified, under Resolution 3, to be translated into a higher position and remunerated at that level (namely PN-B3, applicable to Operational Manager Nursing: Primary Health Care) but this did not occur.

[6] On 10 June 2013, the plaintiff referred a grievance to the defendant regarding its failure to place her into the position of Operational Manager Nursing and remunerate her accordingly.

[7] On 11 December 2013, the Office of the MEC issued a notice to the plaintiff recording, inter alia, that she was entitled to be remunerated at PN-B3.

[8] Despite this, the defendant refused to remunerate the plaintiff at PN-B3.

Defendant's submissions

[9] The defendant states that Resolution 3 did not apply to the plaintiff in 2007 because she was not a professional nurse. The defendant states that the true dispute concerns the interpretation or application of the collective agreement.

[10] The defendant's submissions are premised on two sections of the LRA:

10.1 Section 24(1) states: "*Every collective agreement … must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation, and, if the dispute remains unresolved, to resolve it through arbitration*." (own emphasis)

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10.2 Section 157(5) provides that "… *the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any other employment law requires the dispute to be resolved through arbitration*." (own emphasis)

[11] The defendant points out that Resolution 3 states that any dispute about its interpretation or application must be dealt with under the dispute procedures of the Bargaining Council.

[12] The defendant referred to *Rukwaya and others v Kitchen Bar Restaurant* ("*Rukwaya*")[2] where the Labour Appeal Court held that the Labour Court had no jurisdiction if the claim arises from a collective agreement but is formulated as a breach of the employment contract.[3] In addition, said the court, because collective agreements have an elevated status the dispute processes in the collective agreement must be used where they are applicable.

Plaintiff's submissions

[13] The plaintiff submits that this court has jurisdiction because section 73A(3) expressly permits employees to claim unpaid monies, including those due under a collective agreement.

[14] If the court were to ignore the inclusion of "collective agreement" in section 73A this would undermine the legislation. The plaintiff contends that section 73A does not exclude disputes which involve the interpretation or application of a collective agreement.

[15] The plaintiff contends that section 24 is not applicable because it does not permit employees to refer disputes about collective agreements to

[2] (2018) 39 ILJ 180 (LAC)

[3] *Rukwaya* at paras 8 – 10

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arbitration. Plaintiff relies on *Arends & others v South African Local Government Bargaining Council and others*[4] ("*Arends*") where the court held at para. 17: "*I conclude by saying that a non-party cannot refer a dispute in terms of s24 of the Act. Since employees are generally non-parties but beneficiaries, they cannot in my view refer a dispute in terms of s 24*."

Analysis

[16] Section 73A(1), (2) and (3) read as follows:

> "*73A (1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement.*
>
> *(2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed in terms of section 6(3).*[5]
>
> *(3) An employee or worker, other than the employee or worker referred to in subsection (1) may institute a claim concerning the failure to pay any amount contemplated in subsection 1 in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates Court or the small claims court.*"
>
> (own emphasis)

[4] (2013) 34 ILJ 2560 (LC)

[5] Prior to 1 April 2024, the earnings threshold contemplated in terms of section 6(3) of the BCEA was R241 110, 59 per annum. After 1 April 2024, the earnings threshold was R254 371,67 per annum (or R21 197, 64 per month). The plaintiff earned above both thresholds.

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[17] In *Nimfasha and* others *v Bokwe Trading CC t/a Bokwes Security Services*[6] the plaintiffs sought an order from this court compelling the employer to make certain payments, but the jurisdiction of the court was challenged. Because the plaintiffs earned less than the BCEA threshold, the court found that they should have referred their dispute to the CCMA. The court noted that section 73A is confined to claims for payments. At para 20, my brother, La Grange J stated:

> "[20] *Considered in context, s 73A(1) provides NMWA employees with an arbitration mechanism to resolve payment disputes, which is unavailable to other employees. Correspondingly, other employees may continue to pursue payment claims in the courts (leaving aside the undertaking and compliance order mechanisms in s 68 to s70 of the BCEA) but have no access to the arbitration mechanism. The fact that it does not provide NMWA employees with a court remedy does not undermine their right to a fair public hearing before a court or other impartial tribunal to resolve their dispute as provided for in section 34 of the Constitution. The arbitration mechanism effectively complies with section 34, and was most probably intended to provide a low cost procedure for NMWA employees*." (own emphasis)

[18] Section 73A finds application in relation to payment related disputes, but not when the parties are also in dispute about the interpretation or application of a collective agreement. Where the parties are in dispute about the interpretation or application of a collective agreement then section 24, read with section 157(5) of the LRA, comes into play. In my respectful view, *Arends* is clearly wrong insofar as it limits section 24 to the parties to the collective agreements. The court failed to consider that section 24(2) expressly relates to "*any party to the dispute*". The words chosen by the Legislature cannot be ignored. The role of the court is to

[6] (C444/2021) [2024] ZALCCT 49 (4 November 2024)

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interpret and apply the legislation, and not to redraft it. As I see it, employees are not precluded from making a referral under section 24(2) of the LRA.

[19] The facts of this matter distinguish it from *Kgasane v MEC Department of Health: Free State and Another.*[7] In *Kgasane* this court found that there is no tension between section 33A of the LRA and section 73A of the BCEA. In *Kgasane* the dispute related solely to the enforcement of a collective agreement, and did not involve the interpretation or application of the agreement.

[20] In this matter, however, the parties are in dispute about the application of a collective agreement, which may be referred to arbitration in terms of section 24. In the circumstances, section 157(5) of the LRA, which holds that this court has no jurisdiction, is applicable. Section 73A finds no application because the dispute is not only about enforcement of the agreement but also about the application of the agreement.

Conclusion

[21] In the circumstances, this court has no jurisdiction to hear and determine the plaintiff's claim. The matter is struck from the roll. There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

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[7] (C507/2022) [2024] ZALCCT 57 (19 November 2024)

Appearances:

For the Plaintiff:
Adv GS Van Vuuren
Naidoo & Associates Inc

For the Defendant:
State Attorney

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