



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C507/2022

In the matter between:

NKAU KGASANE

Plaintiff

and

MEC DEPARTMENT OF HEALTH: FREE STATE

First Defendant

DEPARTMENT OF HEALTH: FREE STATE

Second Defendant

Heard: 16 October 2024

Delivered: 19 November 2024

Summary: Claim for accrued leave brought under section 73A of the BCEA.
Jurisdictional challenge dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] The plaintiff is a former employee of the second defendant, who brings a claim for leave pay due to him. The claim is brought under section 77(3), read with section 73A(1) and (3) of the Basic Conditions of Employment Act No. 75 of 1997 as amended (the “BCEA”). The defendants raised a preliminary issue relating to jurisdiction, as discussed below.

Material facts

- [2] The plaintiff, who earned approximately R35 395, 60 per month was employed by the second defendant until he retired on 31 March 2021.
- [3] The plaintiff claims that the second defendant failed to pay him out for his accrued leave as at 1 July 2000 - 37.29 leave days. In terms Resolution 7 of the Public Service Coordinating Bargaining Council (“PSCBC”) Resolution of 2000 the employer is obliged to pay out any leave accruing before 1 July 2000 on retirement.
- [4] Resolution 7 is a collective agreements concluded by the parties to the PSCBC.

Legal submissions

Defendants’ submissions

- [5] The defendants allege that the Labour Court has no jurisdiction to hear and determine the dispute because the plaintiff seeks to enforce a collective agreement concluded at the PSCBC. The defendants allege that the court cannot enforce collective agreements concluded at Bargaining Councils, because section 33A of the Labour Relations Act No. 66 of 1995 (“the LRA”) permits Bargaining Councils to enforce their own collective agreements through arbitration. Furthermore, 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.*”

- [6] The defendant drew the court’s attention to two judgments of the Labour Appeal Court namely *Ekurhuleni Metropolitan Municipality v SAMWU on behalf of members (“Ekurhuleni”)*¹ and *Rukwaya and others v Kitchen Bar Restaurant (“Rukwaya”)*.² In summary, prior to the introduction of section 73A, the appeal court held:

6.1 The Labour Court has no jurisdiction where the claim arose from a collective agreement and, because collective agreements have primacy, it is proper that the collective agreement is enforced. Furthermore, in that matter, the resolution of the dispute would require an interpretation of a collective agreement.³

6.2 The Labour Court has no jurisdiction where the claim is formulated as a breach of the employment contract, but the true dispute relates to non-compliance with a collective agreement.⁴

Plaintiff’s submissions

- [7] The plaintiff submits that the court has jurisdiction because of section 73A of the BCEA. The plaintiff contends section 73A gives recognition to the importance of claims for non-payment of remuneration. It allows employees to bring such claims with relative ease while avoiding jurisdictional pitfalls. The plaintiff submits out section 73A was legislated

¹ (2015) 36 ILJ 624 (LAC)

² (2018) 39 ILJ 180 (LAC)

³ *Ekurhuleni* at paras 21, 22, 25, and 26

⁴ *Rukwaya* at paras 8 – 10

after the judgments in *Ekurhuleni* and *Rukwaya* and it was introduced to deal with the difficulties created by those judgments.

Analysis

[8] 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)

[9] Though of limited value, the preamble to the Amendment Act does set out the purpose of the amendments, which include the extension of the jurisdiction of the CCMA and making provision for claims for underpayment.

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.

[10] When read in the context of subsection (2), it is clear that section 73A(3) is applicable only to employees or workers who earn in excess of the threshold in section 6(3) of the BCEA. It is common cause that plaintiff earned in excess of the threshold.

[11] In *Nimfasha and others v Bokwe Trading CC t/a Bokwes Security Services*⁶ the plaintiffs sought an order from the Labour 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)

[12] On a plain reading of section 73A, the section *inter alia* permits employees to bring claims for payment, regardless of whether such monies are due under the employment contract or a collective agreement. The claim must be brought in either the CCMA or the Labour

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

Court - depending on whether the employee falls below or above the threshold in section 6(3) of the BCEA.

- [13] Section 157(5) states “...*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.*” In my view, disputes *between employees and their employer about compliance with collective agreements* of the Bargaining Council are not “required” to be referred to arbitration under section 33A. Firstly, section 33A relates only to disputes between the Bargaining Council itself and the parties to the Bargaining Council. Secondly, only the Bargaining Council may refer a dispute to arbitration under section 33A. Accordingly, there is no tension between section 157(5) of the LRA, and section 73A of the BCEA.

Conclusion

- [14] In the circumstances, this court has jurisdiction to hear and determine the plaintiff's claims. The defendants' jurisdictional point is dismissed, and the Registrar directed to enrol the matter for trial.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff

Adv Du Preez

Kramer Weihmann Inc

For the Defendants

Adv Lechwano

State Attorney