

SOUTH AFRICA / JUDGMENT

# Andrews v MEC for Health of the Western Cape (A08/2011) [2011] ZAWCHC 451 (5 August 2011)

[2011] ZAWCHC 451

## COURT

Western Cape High Court, Cape Town

## BEFORE

Fourie, Baartman

## CASE / FILE NUMBER

A08/2011

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## JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A08/2011

DATE: 5 AUGUST 2011

In the matter between:

WINSTON TREVOR ANDREWS Appellant

and

THE MEC FOR HEALTH OF THE

WESTERN CAPE 1st Respondent

THE CITY OF CAPE TOWN 2nd Respondent

## JUDGMENT

FOURIE, J: The appellant is an occupational therapy assistant who occupies a room in the single quarters facility at the Alexandra Hospital in Maitland, Cape Town. He has been in occupation of a room in this facility for approximately the past 20 years. During May 2010 first respondent, in his capacity as the functional head of the Western Cape Department of Health ("the Department"), launched an application in the Cape Town Magistrate's Court in terms of Act 19 of 1998 for the eviction of the appellant from the room occupied by him. Appellant opposed the application, but after hearing argument, the presiding magistrate ordered appellant to vacate the room he occupies on or before 18 February 2011, failing which the sheriff was authorised to evict him on

21 February 2011. Appellant was also ordered to pay the costs of the application. He now appeals against the order made by the court a quo. In view of the conclusion that I have reached in this matter, it is not necessary for me to recount the factual background of this litigation in any great detail. I do, in any event, accept that any person or party interested in this judgment is fully aware of the content of the affidavits filed on behalf of the parties in which their respective allegations and contentions are fully set out. Appellant has at all relevant times been employed as an occupational therapy assistant by the Department at the Alexandra Hospital. He has throughout this litigation maintained that the issue between him and the Department regarding his occupation of the room, is employment related as it concerns the unilateral termination by the Department of his employment benefit of occupying a room at the hospital. He accordingly contends that the dispute which has arisen between him and the Department in this regard, falls to be resolved through the remedies provided in the Labour Relations Act 66 of 1995 ("the LRA"). In particular appellant submits that the provision of the room for his occupation at the hospital constitutes a benefit within the meaning of that term as it is used in section 186(2)(a) of the LRA and, therefore, as held in cases such as *Chirwa v Transnet Limited & Others*

[2007] ZACC 23; 2008

- (4) SA 367 (CC), the ordinary courts are not to deal with this employment related dispute between him and his employer before all the remedies available under the LRA have been exhausted. In *Chirwa* it was put as follows at paragraph 68: "It is necessary that all remedies under the LRA are exhausted before raising such an issue in a different forum. This is required so that the LRA and its structures which were crafted to provide a comprehensive framework for labour dispute resolution are not undermined." In section 186(2)(a) of the LRA, an unfair labour practice is, inter alia, defined as meaning any unfair act or omission that arises between an employer and an employee relating to the provision of benefits to an employee. The LRA further provides that in the event of a dispute between an employer and employee about an unfair labour practice, such dispute is to be dealt with in accordance with the provisions of section 191 of the LRA. It is common cause that in the event of such a dispute arising between appellant and the Department as his employer, the forum that has jurisdiction to determine same in terms of section 191 of the LRA, is the Public Health & Welfare Sectoral Bargaining Council ("the Bargaining Council"). As provided in section 191 of the LRA, the Bargaining Council must first attempt to resolve the dispute through conciliation and if unsuccessful, it has the power to arbitrate the dispute. The first respondent, however, has adopted the stance that the issue regarding appellant's accommodation is not a bona fide labour dispute, particularly as there is no ground for appellant's contention that his occupation of the room in the hospital

constitutes a benefit as defined in section 186(2)(a) of the LRA. First respondent, therefore, contends that the Magistrate's Court had the necessary jurisdiction to hear the matter in terms of the provisions of Act 19 of 1998. In his affidavit, first respondent has stressed that appellant's papers do not show that appellant had taken any steps to have the alleged labour dispute referred to the Bargaining Council, notwithstanding the lapse of some two years after the issue regarding

his occupation of the room had first arisen. This, it was submitted, underscores the view that there is in fact no bona fide dispute between the parties with regard to any unfair labour practice which should be determined in terms of the LRA. However, on the day of the hearing of the eviction application by the court a quo, appellant's counsel informed the presiding magistrate that appellant had by then referred the issue of the unilateral termination of his right to occupy the room, to the Bargaining Council as a dispute concerning an unfair labour practice. Counsel for first respondent attempted to counter this turn of events by submitting that the belated introduction of the referral of a dispute to the Bargaining Council was mala fide and only made with the intention to scupper the eviction application. The magistrate approached the matter by identifying, what she described, as the vital question to be decided, namely whether appellant's accommodation forms part of his employment benefits. She concluded that the adjudication of this issue: "... cannot merely be handed over to the labour fora, because this court is already seized with the question and the applicant (i.e. the first respondent in this court) is entitled to a decision on that point." She held that the court a quo has the necessary jurisdiction to determine this vital question and, therefore, effectively found that the provision of accommodation to appellant by the Department is not a benefit for the purposes of section 186(2)(a) of the LRA. She then proceeded to consider the application in terms of the provisions of Act 19 of 1998 and granted the relief sought by first respondent. In my view the presiding magistrate erred in approaching the matter on this basis. When she was called upon to decide the application, appellant had already referred the issue regarding his accommodation and the purported termination thereof by the Department, to the Bargaining Council for consideration in terms of the LRA. The Bargaining Council is under a statutory duty to deal with disputes referred to it, in which an unfair labour practice in relation to benefits is alleged. In fact in terms of section 23(1) of our Constitution, 1996, the appellant has a constitutional right to fair labour practices, which right the legislature has augmented by affording employees an elaborate set of procedures and remedies in the LRA. This means that appellant has the constitutionally entrenched right to have his dispute with his employer regarding his accommodation heard by the Bargaining Council. The Bargaining Council is bound by statute to deal with the matter in accordance with the mechanisms detailed in section 191 of the LRA. However, what the magistrate did was to pre-empt the finding of the Bargaining Council on whether or not the accommodation constituted a benefit as envisaged in section 186(2)(a) of the LRA. Thereby the court a quo effectively decided that the issue regarding the appellant's accommodation and the termination of his right thereto by the Department, did not constitute an unfair labour practice. Put differently, the appellant was thereby precluded from exercising his constitutional right to have the issue, whether the conduct of the Department constituted an unfair labour practice or not, decided by means of the statutory mechanisms provided by the LRA. As the Bargaining Council was competent and obliged by statute to determine the issue of whether or not the accommodation constituted

a benefit as envisaged in section 186(2)(a) of the LRA, the court a quo should not, having regard to the provisions of section 23(1) of the Constitution and the rule laid down by the Constitutional Court in *Chirwa*, have entertained the first respondent's eviction application while the Bargaining Council had not yet dealt with the dispute referred to it. As submitted on behalf of appellant, the

Bargaining Council may find that the accommodation did not constitute a benefit or that, even though it did, no unfair labour practice had been committed by the employer in relation to that benefit. In such event, first respondent would be free to pursue the application in terms of Act 19 of 1998 before the court a quo. I conclude that the correct approach, particularly in view of the referral of the matter to the Bargaining Council by appellant, would have been to stay the eviction application pending the final determination of the dispute submitted by appellant to the

Bargaining Council. It is true that the referral of the matter to the Bargaining Council took place at a very late stage. This may be relevant in regard to the issue of the costs of the eviction application. However, the fact of the matter is that there was, and still is, a referred dispute pending before the Bargaining Council which should first be determined in terms of the provisions of the LRA. I am also not persuaded that, on the papers before the court a quo, it can be found that the referral of the matter to the Bargaining Council by the appellant was mala fide, particularly as this submission on behalf of first respondent is based virtually exclusively on the delay in referring the matter to the Bargaining Council. Nor, should I add, did the magistrate, after hearing full argument, find that the referral was mala fide. It follows for these reasons that the appeal should succeed and that the order of the magistrate falls to be set aside. As the successful party in the appeal, the appellant is entitled to his costs of appeal. In the result I propose that the following order be made: The appeal is upheld with costs.

The order of the court a quo is set aside and the following is substituted therefor: "Judgment on the application is stayed pending the final determination of the dispute that has been referred to the Public Health & Welfare Sectoral Bargaining Council by the first respondent. The question of costs is reserved and leave is granted to first respondent to approach the court again on the same papers, supplemented as may be necessary, for an order as to costs in the event of applicant not pursuing the application following the determination of the dispute referred to the said Bargaining Council." I agree: BAARTMAN, J It is ordered accordingly: FOURIE J

FOURIE, J:

The appellant is an occupational therapy assistant who occupies a room in the single quarters facility at the Alexandra Hospital in Maitland, Cape Town. He has been in occupation of a room in this facility for approximately the past 20 years. During May 2010 first respondent, in his capacity as the functional head of the Western Cape Department of Health ("the Department"), launched an application in the Cape Town

Magistrate's Court in terms of Act 19 of 1998 for the eviction of the appellant from the room occupied by him. Appellant opposed the application, but after hearing argument, the presiding magistrate ordered appellant to vacate the room he occupies on or before 18 February 2011, failing which the sheriff was authorised to evict him on 21 February 2011. Appellant was also ordered to pay the costs of the application. He now appeals against the order made by the court a quo.

In view of the conclusion that I have reached in this matter, it is not necessary for me to recount the factual background of this litigation in any great detail. I do, in any event, accept that any person or party interested in this judgment is fully aware of the content of the affidavits filed on behalf of the parties in which their respective allegations and contentions are fully set out.

Appellant has at all relevant times been employed as an occupational therapy assistant by the Department at the Alexandra Hospital. He has throughout this litigation maintained that the issue between him and the Department regarding his occupation of the room, is employment related as it concerns the unilateral termination by the Department of his employment benefit of occupying a room at the hospital. He accordingly contends that the dispute which has arisen between him and the Department in this regard, falls to be resolved through the remedies provided in the Labour Relations Act 66 of 1995 ("the LRA").

In particular appellant submits that the provision of the room for his occupation at the hospital constitutes a benefit within the meaning of that term as it is used in section 186(2)(a) of the LRA and, therefore, as held in cases such as *Chirwa v Transnet Limited & Others*

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(4) SA 367 (CC), the ordinary courts are not to deal with this employment related dispute between him and his employer before all the remedies available under the LRA have been exhausted. In *Chirwa* it was put as follows at paragraph 68:

"It is necessary that all remedies under the LRA are exhausted before raising such an issue in a different forum. This is required so that the LRA and its structures which were crafted to provide a comprehensive framework for labour dispute resolution are not undermined."

In section 186(2)(a) of the LRA, an unfair labour practice is, inter alia, defined as meaning any unfair act or omission that arises between an employer and an employee relating to the provision of benefits to an employee. The LRA further provides that in the event of a dispute between an employer and employee about an unfair labour practice, such dispute is to be dealt with in accordance with the provisions of section 191 of the LRA.

It is common cause that in the event of such a dispute arising between appellant and the Department as his employer, the forum that has jurisdiction to determine same in terms of section 191 of the LRA, is the Public Health & Welfare Sectoral Bargaining Council ("the Bargaining Council"). As provided in section 191 of the LRA, the Bargaining Council must first attempt to resolve the dispute through conciliation and if unsuccessful, it has the power to arbitrate the dispute.

The first respondent, however, has adopted the stance that the issue regarding appellant's accommodation is not a bone<sup>^</sup>fide labour dispute, particularly as there is no ground for appellant's contention that his occupation of the room in the hospital

constitutes a benefit as defined in section 186(2)(a) of the LRA. First respondent, therefore, contends that the Magistrate's Court had the necessary jurisdiction to hear the matter in terms of the provisions of Act 19 of 1998.

In his affidavit, first respondent has stressed that appellant's papers do not show that appellant had taken any steps to have the alleged labour dispute referred to the Bargaining Council, notwithstanding the lapse of some two years after the issue regarding his occupation of the room had first arisen. This, it was submitted, underscores the view that there is in fact no bona fide dispute between the parties with regard to any unfair labour practice which should be determined in terms of the LRA.

However, on the day of the hearing of the eviction application by the court a quo, appellant's counsel informed the presiding magistrate that appellant had by then referred the issue of the unilateral termination of his right to occupy the room, to the Bargaining Council as a dispute concerning an unfair labour practice. Counsel for first respondent attempted to counter this turn of events by submitting that the belated introduction of the referral of a dispute to the Bargaining Council was mala fide and only made with the intention to scupper the eviction application.

The magistrate approached the matter by identifying, what she described, as the vital question to be decided, namely whether appellant's

accommodation forms part of his employment benefits. She concluded that the adjudication of this issue:

"... cannot merely be handed over to the labour fora, because this court is already seized with the question and the applicant (i.e. the first respondent in this court) is entitled to a decision on that point."

She held that the court a quo has the necessary jurisdiction to determine this vital question and, therefore, effectively found that the provision of accommodation to appellant by the Department is not a benefit for the purposes of section 186(2)(a) of the LRA. She then proceeded to consider the application in terms of the provisions of Act 19 of 1998 and granted the relief sought by first respondent. In my view the presiding magistrate erred in approaching the matter on this basis. When she was called upon to decide the application, appellant had already referred the issue regarding his accommodation and the purported termination thereof by the Department, to the Bargaining Council for consideration in terms of the LRA.

The Bargaining Council is under a statutory duty to deal with disputes referred to it, in which an unfair labour practice in relation to benefits is alleged. In fact in terms of section 23(1) of our Constitution, 1996, the appellant has a constitutional right to fair labour practices, which right the legislature has augmented by affording employees an elaborate set of procedures and remedies in the LRA. This means that appellant has the constitutionally entrenched right to have his dispute with his employer regarding his accommodation heard by the Bargaining Council. The Bargaining Council is bound by statute to deal with the matter in accordance with the mechanisms detailed in section 191 of the LRA.

However, what the magistrate did was to pre-empt the finding of the Bargaining Council on whether or not the accommodation constituted a benefit as envisaged in section 186(2)(a) of the LRA. Thereby the court a quo effectively decided that the issue regarding the appellant's accommodation and the termination of his right thereto by the Department, did not constitute an unfair labour practice. Put differently, the appellant was thereby precluded from exercising his constitutional right to have the issue, whether the conduct of the Department constituted an unfair labour practice or not, decided by means of the statutory mechanisms provided by the LRA.

As the Bargaining Council was competent and obliged by statute to determine the issue of whether or not the accommodation constituted

a benefit as envisaged in section 186(2)(a) of the LRA, the court a quo should not, having regard to the provisions of section 23(1) of the Constitution and the rule laid down by the Constitutional Court in *Chirwa*, have entertained the first respondent's eviction application while the Bargaining Council had not yet dealt with the dispute referred to it.

As submitted on behalf of appellant, the Bargaining Council may find that the accommodation did not constitute a benefit or that, even though it did, no unfair labour practice had been committed by the employer in relation to that benefit. In such event, first respondent would be free to pursue the application in terms of Act 19 of 1998 before the court a quo. I conclude that the correct approach, particularly in view of the referral of the matter to the Bargaining Council by appellant, would have been to stay the eviction application pending the final determination of the dispute submitted by appellant to the

Bargaining Council.

It is true that the referral of the matter to the Bargaining Council took place at a very late stage. This may be relevant in regard to the issue of the costs of the eviction application. However, the fact of the matter is that there was, and still is, a referred dispute pending before the Bargaining Council which should first be determined in terms of the provisions of the LRA. I am also not persuaded that, on the papers before the court a quo, it can be found that the referral of the matter to the Bargaining Council by the appellant was *mala fide*, particularly as this submission on behalf of first respondent is based virtually exclusively on the delay in referring the matter to the Bargaining Council. Nor, should I add, did the magistrate, after hearing full argument, find that the referral was *mala fide*.

It follows for these reasons that the appeal should succeed and that the order of the magistrate falls to be set aside. As the successful party in the appeal, the appellant is entitled to his costs of appeal. In the result I propose that the following order be made:

The appeal is upheld with costs.

The order of the court a quo is set aside and the following is substituted therefor:

"Judgment on the application is stayed pending the final determination of the dispute that has been referred to the Public Health & Welfare Sectoral Bargaining Council by the first respondent. The question of costs is reserved and leave is granted to first respondent to approach the court again on the same papers, supplemented as may be necessary, for an order as to costs in the event of applicant not pursuing the application following the determination of the dispute referred to the said Bargaining Council."

I agree:

BAARTMAN, J

It is ordered accordingly:

FOURIE J

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