

SOUTH AFRICA / JUDGMENT

Baloyi and Others v Kwathlano Shuttle & Chauffeur Service CC (JS410/2020) [2021] ZALCJHB 403 (26 October 2021)

[2021] ZALCJHB 403

COURT

Labour Court Johannesburg

BEFORE

K Naidoo

CASE / FILE NUMBER

JS410/2020

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No.: JS410/2020

In

the matter between:

JOHN

ZED

BALOYI First

Applicant

NAKAMBE

ZACHARIAH MABULANE Second

Applicant

BUWA

ALEX

MATHEVULA Third

Applicant

and

KWATHLANO

SHUTTLE & CHAUFFEUR SERVICE CC Respondent

Heard: On

papers

Delivered: 26

October 2021 (In

view of the measures implemented as a result of the Covid-19

outbreak, this judgment was handed down electronically by circulation

to the parties' representatives by email. The date for hand-down is

deemed to be 26 October 2021)

JUDGMENT

NAIDOO, AJ

Introduction

- [1] On 9 April 2021, the applicants referred an unfair dismissal dispute to this Court in terms of section 191(5)(b)(i) and/or (ii) of the Labour Relations Act (LRA).[1] They allege, amongst others, that the respondent failed to engage them in a meaningful joint consensus-seeking process prior to the termination of their employment, ostensibly on the basis of the respondent's operational requirements.
- [2] The respondent has opposed the claim on several bases. For present purposes, it contends in limine that this Court does not have jurisdiction to adjudicate the unfair dismissal dispute because no live dispute exists between the parties. The respondent also contends that in any event, no attempt to resolve the dispute through conciliation was attempted by the parties.

Background

Facts

- [3] The first applicant was employed by the respondent as an Operations Supervisor and the second and third applicants were employed as Drivers. On 20 March 2020, the respondent issued a notice in terms of section 189(3) of the LRA inviting the applicants to a retrenchment consultation process. The notice cited the national lockdown due to the Covid-19 pandemic and the associated travel ban as one of the reasons for the contemplated retrenchments.
- [4] In a notice dated 23 March 2020, the respondent informed the applicants that in light of the situation with the national lockdown and the resulting impact on the respondent's business, they will each be required to take extended leave with immediate effect and until further notice. That notice was followed by a further notice from the respondent to its clients on 24 March 2020 indicating that the respondent would be "going on a full lockdown as of 18:00 on Thursday 26 March 2020 until further notice". By that time, no consultations were held between the parties pursuant to the invitation to consult that was issued to them on 20 March 2020.

- [5] On 5 May 2020 the applicants reported to the workplace in accordance with a request to do so issued by the respondent the day before. There is a dispute between the parties as to the precise nature of what then took place in individual discussions between the applicants and the respondent's human resources manager. Those discussions culminated in the applicants each signing a mutual separation agreement with the respondent purporting to terminate their employment with the respondent by agreement.
- [6] In June 2020, the applicants referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). It is not clear exactly what dispute was referred. The applicants contend that an unfair dismissal dispute was referred but the respondent contends that the dispute related only to severance pay. The referral itself has not been made available to this Court.
- [7] The dispute was then enrolled for conciliation on 22 June 2020. On that day, the applicants withdrew the dispute. In the notice of withdrawal, they indicated that they no longer wished to pursue the dispute and intended to approach this Court. No conciliation appears to have taken place and no certificate of outcome was issued.
- [8] On 7 August 2020, the applicants then referred the present dispute to this Court for adjudication.

Evaluation

- [9] Though the relief that the applicants seek includes a declaration that their dismissals were unlawful, a plain reading of the substance of the claim reveals that they in fact challenge the fairness of their dismissals both substantively and procedurally.
- [10] The claim is based entirely on alleged breaches of the applicants' rights under the LRA and the Basic Conditions of Employment Act[2]. They allege that the respondent failed to embark on a meaningful joint consensus-seeking process as required under section 189(2) of the LRA and failed to consult at all on the method of selecting employees for retrenchment. They also allege that the respondent failed to pay them severance pay in accordance with section 41(2) of the BCEA. The claim for severance pay is, presumably, referred to this Court pursuant to the provisions of section 41(10) of the BCEA. The relief that the applicants seek is 24 months' remuneration.
- [11] Though the applicants have, on either party's version, referred at least a part of this claim to the CCMA, for reasons not disclosed to this Court they have elected to formally withdraw that dispute. As a result of the withdrawal, no attempt to resolve the dispute through conciliation appears to have been made.

- [12] Section 191(5) of the LRA requires a dispute relating to the fairness of a dismissal to either have been certified unresolved after conciliation or for a period of 30 days to have expired since a council or the CCMA received the referral (and the dispute remained unresolved) before a referring party may then act in terms of sub-section 5(b). If neither condition is fulfilled, there is no avenue available to an applicant to refer the dispute to this Court for adjudication.[3]
- [13] Similarly, in relation to the claim for severance pay, section 41(6) of the BCEA requires the dispute to have been referred to the CCMA and in terms of section 41(8), for a mandatory attempt at conciliation to have been made before the dispute can be arbitrated or adjudicated by this court, as the case may be.
- [14] In the present matter there was also no certificate of outcome that was issued by the CCMA and, perhaps more fundamentally, given that the dispute was in fact withdrawn in its entirety, no dispute is capable of remaining unresolved between the parties. In other words, the effect of the withdrawal of the dispute is the same as if no dispute was referred for conciliation at all.
- [15] Section 157(4)(a) of the LRA states the following:

“The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.”

- [16] This is indeed a matter where no attempt has been made to resolve the dispute through conciliation. Given the withdrawal of the dispute on 22 June 2020, I am also of the view that the dispute referred to the CCMA in June 2020 has not remained unresolved between the parties. I am accordingly of the view that this Court has no jurisdiction to adjudicate the dispute.

Costs

- [17] The general approach in this Court is that the ordinary rule of practice that costs follow the result does not apply to matters in this court.[4] I have no reason to depart from that rule.
- [18] In the circumstances, the following order is made:

Order

1. The Labour Court has no jurisdiction to adjudicate this dispute.
2. There is no order as to costs.

K. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: No appearance

For the respondent: No appearance

[1] Act 66 of 1995.

[2] Act 75 of 1997.

[3] National Union of Metalworkers of SA v Intervale (Pty) Ltd & Others

(2015) 36 ILJ 363 (CC) at 32.

[4] Zungu v Premier of the Province of KwaZulu-Natal (2018) 39 ILJ 523 (CC); Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd & others (CCT192/20) 7 September 2021.

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Prepared on 11 October 2026 · Esheria