

SOUTH AFRICA / JUDGMENT

Makgoka v Silverstar Casino (J310/21)

[2023] ZALCJHB 135 (21 April 2023)

[2023] ZALCJHB 135**COURT**

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

J310/21

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Source record**IN THE LABOUR****COURT OF SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: J310/21****In the matter between:**

KOENA
JOSEPH MAKGOKA
Applicant
and
SILVERSTAR
CASINO
Respondent
Heard: 14 April
2023
Delivered: 21 April
2023

JUDGMENT

MAKHURA, AJ

Introduction

- [1] On 8 April 2021, the applicant served the respondent with a statement of claim, alleging a breach of section 24(1) of the Labour Relations Act[1] (LRA), a unilateral change to terms and conditions of employment in terms of section 64(4) of the LRA and an unfair labour practice in terms of section 186(2)(a) of the LRA. Prior to this statement, the applicant had referred a section 64 or unilateral change dispute to the Commission for Conciliation,

Mediation and Arbitration (CCMA) for conciliation. It is unclear whether the dispute was conciliated, but on 7 April 2021, the applicant withdrew the CCMA referral.

- [2] In response, the respondent raised two points in limine, namely that (1) the referral was premature or that this Court lacked jurisdiction to adjudicate the section 64(4) dispute; and
- (2) this Court lacks jurisdiction to adjudicate the section 186 dispute. At the commencement of proceedings on 14 April 2023, Mr Mkhasibe, appearing for the applicant, abandoned the sections 24 and 186 disputes, leaving the “section 64(4)” dispute or the unilateral change dispute.
- [3] In his referral of the dispute to this Court, the applicant referred to, and relied on, various documents which were attached to his statement as annexures. These documents include a three-page document he prepared, which contains the factual allegations which led to the referral. This document sets out that there were several meetings held between him and the respondent where they discussed the proposed amendments to his contract of employment. These amendments, so the applicant alleges, included changing his employment status from full time permanent to a full time flexible employee, in terms of which he would be remunerated for hours worked and would no longer receive his guaranteed 13th cheque. The applicant states in this document that the respondent is in breach of his contract of employment and that he wants the respondent to restore his permanent contract with effect from 1 October 2020, which is the date the change came into effect.
- [4] In addition, the applicant wrote under the legal issues, that:
- ‘having not agreed to the changes of my terms and conditions of my employment contract, they committed a unilateral change. Not paying out my 13th cheque was not performing their side of contract, was denying me my contractual rights. All of the above, illustrate a serious and deliberate breach of contract.’
- [5] In terms of relief, the applicant sought reinstatement of the old contract and the 13th cheque payment.
- [6] The first argument raised by the respondent raised is very convoluted. It argues that the applicant had 30 days to refer the matter to this Court after conciliation of the dispute and that the 30-day period expired on 14 April 2021. Furthermore, that the applicant withdrew his CCMA referral on 7 April 2021 and that the statement of claim was referred on 8 April 2021, “which is six days short of the required 30-day period”. This Court is then asked to dismiss the referral because it is premature, or that it lacks jurisdiction to adjudicate the matter. The argument is, respectfully, inexplicable and has no legal foundation. It is rejected outright.

- [7] This Court has held that because a single employee faced with a unilateral change to terms of employment cannot resort to the right to strike, he cannot refer a dispute in terms of section 64(4) of the LRA.[2] The applicant submitted that his unilateral change dispute is brought in terms of section 77 of the Basic Conditions of Employment Act[3] (BCEA).
- [8] Appearing for the respondent, Mr Cronje's second argument was that, to the extent that the matter is brought in terms of section 77 of the BCEA, the matter must be decided based on the pleadings and that, because there is no reference to section 77 of the BCEA in the applicant's referral, this Court has no jurisdiction to entertain the applicant's claim. In support of this argument, he referred this Court to the judgment of *Ngobeni v Commission for Gender Equality*[4] (*Ngobeni*) and argued that, as jurisdiction must be decided on the basis of the pleadings,[5] the applicant has failed to make the necessary averments for this Court to adjudicate the matter.
- [9] Whilst it is a trite legal principle that each case should be determined based on the pleadings, the respondent's argument that the claim is not based on section 77 of the BCEA is not sustainable. First, in *Ngobeni*, the employee did not plead breach of contract, nor did he seek specific performance. Therefore, the reliance on this judgment is misplaced. Second, the Court in *Ngobeni* referred to an earlier judgment of this Court in which the judgment of *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd and Another (Abrahams)* was distinguished.[6] There, the Court said that in *Abrahams*:
- '... the applicant alleged unilateral change to conditions of employment and sought specific performance in the form of reinstatement of the status quo. The court held that the applicant's failure to refer specifically to s 77(3) did not deprive the court of jurisdiction to hear the matter in terms of that section or to grant an order in terms of s 77(3).'[7]
- [10] In his statement of claim, the applicant has alleged that the respondent has unilaterally changed the terms of his contract of employment with effect from 1 October 2020, that the respondent is in breach of the contract of employment and that he seeks the restoration of the status quo. That there is no specific reference to section 77 of the BCEA does not deprive this Court of jurisdiction to adjudicate the applicant's claim. This Court indeed has jurisdiction to hear contractual claims and is empowered to make orders of specific performance.
- [11] I must also add that the applicant did not have to refer any dispute to the CCMA for conciliation. The referral he made to the CCMA and later withdrew is of no consequence to the current claim. Accordingly, the respondent's point in limine must fail.
- [12] I do not believe that this is a matter that warrants a costs order. Both parties were successful in these proceedings. The applicant withdrew the sections 24 and 186 claims at the commencement of the hearing. There is no doubt that the respondent had correctly raised a jurisdictional point in respect of these two claims. Therefore, each party should pay their own costs.

[13] In the premises, the following order is made:

Order

1. The respondent's point in limine is dismissed.
2. The Registrar is directed to enrol the matter for trial.
3. There is no order as to costs.

M. Makhura

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. B Mkhasibe of Smith Van der Watt Attorneys For the Respondent: Mr. F Cronje of Crowes Attorneys

[1] Act 66 of 1995, as amended.

[2] *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd and Another*

(2012) 33 ILJ 1093 (LC) at paras 25 - 27

[3] Act 75 of 1997. In terms of section 77(3), the Labour Court has concurrent jurisdiction with the civil courts to hear and determine

any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. Section 77A(e) states that this Court may make any appropriate order including an order that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which may include an order for specific performance.

[4] Unreported judgment under case no C685/16 delivered 29 November 2017.

[5] Ibid at para 15. This was with reference to the judgment of *Gcaba v Minister for Safety & Security*

[2009] 12 BLLR 1145 (CC) at para 75.

[6] *NUM obo Maponya v Eskom Holdings SOC Ltd (Kusile Power Station)* unreported judgment under case no JS1018/12 delivered on 12 November 2014, referred to at para16 of the *Ngobeni*

judgment.

[7] Ibid. See *Abrahams* at paras 29 and 30.

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Prepared on 10 October 2026 · Esheria