

SOUTH AFRICA / JUDGMENT

MEDWUSA obo Maile v Zanthé Floral (Pty) Ltd (JS924/11) [2014] ZALCJHB 281 (22 July 2014) [2014] ZALCJHB 281

COURT

Labour Court Johannesburg

BEFORE

Maenetje

CASE / FILE NUMBER

JS924/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 924/11

In the matter between

MEDWUSA obo MAILE, J Applicant

and

ZANTHE FLORA (PTY) LTD Respondent

Heard: 30 October 2013

Delivered: 22 July 2014

Summary: Unfair labour practice dispute – Court lacks jurisdiction to adjudicate it – must be referred to arbitration

MAENETJE, AJ:

[1] On 30 October 2013 I gave an ex tempore judgment in this matter. This is the edited version of that judgment.

[2] The applicant referred an unfair labour practice dispute to the CCMA. The dispute remained unresolved. In the certificate of outcome, the Commissioner crossed the box for “Unfair Labour Practice”. The Commissioner did not tick or cross the box for “Unfair Discrimination”. However, the Commissioner wrote the following statement: “Unfair demotion due to discrimination (victimisation)” and indicated that the matter can be referred to this court.

[3] In this Court, the applicant filed a statement of case, which is stamped 2 November 2011. In the statement of case, the applicant alleges an unfair labour practice dispute. This is clear from paragraphs 4.8 to 5.3 of the statement of case, which follow upon a narration of the statement of facts on which the applicant relies. In paragraphs 4.8 to 5.3 of the statement of case, the applicant states:

‘4.8 On the 21st June 2011 the Applicant referred a dispute to the CCMA in terms of section 182(2) (a) of unfair labour practice. The dispute was

conciliated on the 18th August 2011 and certificate of outcome is attached herein as annexure “D”.

4.9. On the 28th June 2011 the union phoned the Respondent regarding the suspension and was immediately uplifted to enable the Applicant to start working on the 29th June 2011.

4.10. The Applicant reported for work on the 29th June and he was not only treated rudely by Jan Breeweg but also demoted from being a driver to being a general worker digging trenches. The demotion was not only unfair but was without any reasonable justification.

4.11 The Applicant was not paid the salary of June 2011 but paid for the month of July 2011. The payment for July 2011 was short by at least with R3 504.06 but only to be rectified on the date or just before the conciliation date. At present the Applicant works as a general worker but earning a salary he earned whilst as driver. Refer to annexure “E”.

[4] Under legal issues, the applicant identifies the following three issues for determination by the court:

‘5.1 Whether reinstatement of the employee to all terms and conditions of employment means all terms and conditions inclusive of the alleged “misconduct” committed by the employee prior to reinstatement (and/or dismissal)?

5.2 Whether the suspension of the Applicant from the 30th May to 28th June 2011 was fair and lawful?

5.3 Whether the Applicant was demoted and if so the lawfulness of the demotion.’

[5] Under the relief sought, the applicant asks for the following:

‘7.1 That the lateness of the referral of this matter to this Honourable Court is condoned;

7.2 An order declaring that the conduct of the Respondent (as stated in the statement of facts) constitutes unfair labour practice and therefore unlawful;

7.3 An order directing the Respondent to cease the unfair labour practice or restore the Applicant to his previous position on the same terms and conditions of employment which existed before 31 May 2011;

7.4 An order directing the Respondent to pay the Applicant the outstanding salary for the month of June 2011;

7.5 A cost order against the Respondent.

7.6 Further and/or alternative relief.'

[6] The respondent has raised an objection that this Court lacks jurisdiction to determine the unfair labour practice dispute and the dispute should have been referred to arbitration. For the same reason that the Court lacks jurisdiction, the respondent opposes a condonation application for the late referral of the unfair labour practice dispute to this Court. The respondent concedes that

if the jurisdiction objection is dismissed, condonation should be granted. Therefore, the jurisdiction issue is decisive.

[7] The jurisdiction issue has to be decided on the pleadings as they stand, in the absence of any evidence being tendered. I refer in this regard to the LAC decision in *Rand Water v Stoop and Others*,^[1] where the LAC referred to *Gcaba v Minister of Safety and Security and Others*,^[2] that where there is no evidence led, the issue of jurisdiction should be determined on the pleadings as they stand.

[8] From the applicant's statement of claim, especially from the paragraphs that I have quoted above, it is clear that the substance of the applicant's complaint is an unfair demotion, which is an unfair labour practice in terms of section 187(2)(a) of the LRA. Such a claim must be referred to arbitration if the dispute remains unresolved at conciliation, unless the provisions of section 191(13)(a) of the LRA apply. Section 191(13) of the LRA does not apply because that relates to a complaint regarding an occupational detriment in terms of the Protected Disclosures Act.

[9] It follows that this dispute, being an ordinary unfair labour practice dispute should have been referred to arbitration once it was clear that it was not resolved in terms of section 191(5)(a)(iv) of the LRA. If the applicant wishes to pursue the dispute, the applicant may refer the dispute to arbitration and it may be necessary to apply for condonation. On the pleaded facts, this court lacks jurisdiction to determine the unfair labour practice dispute and the objection to the court's lack of jurisdiction

is upheld and the referral is dismissed.

[10] In relation to the issue of costs, counsel for the respondent referred me to the judgment of Zondo J, as he then was, in *Education, Health and Allied Workers Union v Pressing Metal Industries*. [3] In that case, the court found that the Labour Court lacks jurisdiction to determine an unfair dismissal dispute and that the dispute could be referred to arbitration. [4] Because the objection to jurisdiction did not dispose of the dispute between the parties, the Court declined to order the applicant to pay costs. I am persuaded that this is the right approach and, therefore, do not order the applicant to pay costs in this matter.

Order

[11] The referral is dismissed. There is no order as to costs.

Maenetje, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Jacob Tshabalala (Union Official)

For the Respondent: Advocate A P Landman

[1] [2013] 2 BLLR 162 (LAC) at para 15.

[2] [2009] 12 BLLR 1145 (CC) at para 75.

[3] (1998) 19 ILJ 1477 (LC).

[4] Ibid at para 5.

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