

SOUTH AFRICA / JUDGMENT

Ndlovu and Others v University of Witwatersrand (J 1775/22)

[2025] ZALCJHB 265 (2 July 2025)

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COURT

Labour Court Johannesburg

BEFORE

F Venter

CASE / FILE NUMBER

J 1775/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1775/22

In the matter between:

QINISO
ARTHOLT NDLOVU AND 19 OTHERS
Applicants
and
UNIVERSITY
OF THE WITWATERSRAND
Respondent

Heard:

26 June 2025

Delivered:

2 July 2025

JUDGMENT

VENTER, AJ

Introduction

- [1] The Manual for Acting Judges provides, amongst others, that ‘... Please remember that a judgment is written primarily for the parties to the dispute that you have determined – they are the parties who have a direct and substantial interest in your judgment ...’.

- [2] I refer to the aforesaid as I was confronted with a unique set of facts.
- [3] The respondent (Wits) filed an answering affidavit in response to a catalogue of claims and allegations contained in the applicant's founding affidavit. Wits raised a variety of objections in limine. Prior to the hearing of this application, I issued a directive that the latter objections be disposed of first.
- [4] When the matter was called, two employees appeared on behalf of the applicants. They were not sophisticated, even less legally trained. I adopted a hybrid and practical model insofar as allowing the applicants to vent their views and their contentions. Where they expanded their argument beyond the borders of the papers, I allowed them to do so, as I was of the view that they should not be stifled in their opportunity to have their day in court. I had in mind that it was in the interests of justice to allow the employees to ventilate their application and associated concerns, in a manner they feel appropriate.
- [5] In the same vein, this Court extends its profound gratitude to the maturity and professionalism exhibited by Counsel for Wits, Adv Linde and the equally helpful manner in which his two attorneys, who were in court, allowed the applicants to argue their case. The representatives for Wits had no qualms with the informal process followed. Of equal importance, I mention that the heads of argument introduced by Adv Linde were most helpful, extremely detailed and well researched.
- [6] That being said, what follows is my consideration of the facts and the application of the law to the argument, bearing in mind the relief sought by the applicants. In addition to the aforesaid quote from the said manual, it is also required of me, as acting judge, to '... not rehash well-established legal principles and extensively quote existing law...'. Apart from compliance with said directive, I aim to dispose of this matter by considering who was before me and what they want. I write this judgment with due appreciation that it ought to be done in a manner that may easily be digested by the applicants. This judgment will be terse.

Brief chronology.

- [7] In this matter, the applicants are still gainfully employed by Wits. They are bus drivers. They are employed in terms of written contracts of employment, which equally contain a clause that allows Wits to alter working hours. Various policies, as will appear later, apply to their employment.
- [8] Around 2 February 2019, Wits considered and later introduced a bus driver shift system. Working hours were adjusted or altered in line with the operational requirements. Meetings between Wits and employee representatives took place. That resulted in bus driver schedules being introduced.

[9] The resolution which followed the various consultation sessions was signed by Wits and the employee representatives. Years after the introduction and application of the new scheduling system did it appear that some bus drivers were unhappy therewith.

[10] In June 2022, the applicants referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). This, self-evidently,

took place years after the scheduling agreement and implementation. The referral was made in terms of section 64(4) of the Labour

Relations Act[1] (LRA). A settlement agreement followed.

[11] That agreement provided for nothing more than an undertaking to engage one another, and the applicants were afforded the right to re-refer such dispute if the engagements were unfruitful.

[12] I pause to add that the referred dispute was later withdrawn. The applicants did not refer a fresh dispute to the CCMA thereafter.

[13] What followed is this application, dated 29 June 2023.

[14] The notice of motion contained two prayers. The first was that this Court make a finding that Wits transgressed s 64(4) of the LRA, and once such a finding has been made, then order a restoration of conditions of employment that were changed.

[15] The second prayer is concerned with a claim that Wits, or so the argument goes, must pay the applicants an amount of R3,553,260.94. I shall refer to this as the BCEA claim.[2]

Unilateral change to conditions of employment.

[16] A brief rendition will suffice.

[17] Section 64(4) of the LRA requires that, in the event of an alleged unilateral change to conditions of service, an employee's first port of call is the CCMA or relevant bargaining council. This court does not have the jurisdiction to entertain such a referral at the outset.

[18] The word unilateral means that one party acted on its own, without the involvement or agreement of another. In the context of section 64(4), it really means that the employer made a decision and acted on such decision, without the consent of the other party, usually an employee/s. But what is important to remember is that the change must have affected the conditions of employment. Work practices are not reached by this provision.

[19] As mentioned, premised on the engagement Wits had with employee representatives during 2019, an agreement followed. So, there can be no talk of a unilateral change. It is readily apparent that multiple parties were involved in the 'bus schedule discussions', if one considers Annexure "TM2" attached to the answering affidavit.

- [20] It is also important to consider that Wits sought to introduce a new shift system. It did not seek to introduce a new condition of employment. Wits did not interfere with what the applicants were employed to do, namely, drive buses in terms of driver schedules.
- [21] That being said, it is not necessary for me to reinvent the legal wheel on the rich history of case law on the application of section 64(4) and when this provision may be invoked, but more importantly, at what forum. As mentioned, there was no second referral.
- [22] There was no reactivation of the first referral. If a status quo ante referral is issued by employees, and the employer refuses to budge, may the referral be escalated to this court (usually urgent proceedings)[3] and may the affected employees apply for relief on such basis.
- [23] In *Staff Association for the Motor & Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*[4], this court said:

‘I also do not believe that it is for the Labour Court at this stage to engage in an investigation as to the nature and desirability of the motor vehicle scheme on affidavit. Much of the respondent's case was spent on explaining why the new motor vehicle benefit scheme had to be changed. These reasons may be well founded and completely reasonable. This is a subject-matter to be aired during conciliation.

What is relevant in this matter before me, is that the applicant has declared a dispute which has not yet been resolved and which is pending at the CCMA. Section 64(4) precluded the employer from continuing with the conduct complained of, which the employees have referred to the CCMA. The employees are therefore entitled, if this conduct amounts to a variation of the terms and conditions of their employment, to request the employer to refrain from doing so or to restore the situation in terms of this section. If this request is not adhered to, the employees are entitled to approach the Labour Court to compel the employer to adhere to the request.’

- [24] With referral number 1 being withdrawn and there existing no new referral, then this court’s jurisdiction is not triggered.

- [25] I uphold the jurisdictional objection, i.e. the second objection in limine.

Disputes of fact and the BCEA claim

- [26] What became readily apparent in open court was that both parties are at odds on what is owed, or not, ought to be paid, or not, what happened, or did not and most importantly, whether agreement was reached or not.
- [27] Adv Linde, in a succinct manner, in paragraphs 60.1 – 60.5.3 of his heads of argument, referred me to the material disputes of fact. His references flow from the various annexures and pleadings. At the commencement of the hearing, I requested Adv Linde to, apart from his overall submissions, particularly pay attention to certain paragraphs in his heads of argument, paragraph 64 therein being one of these.

[28] Therein, Wits contended that ‘... where an alleged breach and a claim for resultant damages or specific performance arises, so do material disputes of fact ...’. This reasoning is sound and readily appears to be supported by his reference to National Director of Public Prosecutions v Zuma.[5]

[29] This more so if I consider that the founding affidavit is accompanied by numerous calculations, salary advices, cross references to meeting minutes, emails and the like. The replying affidavit expanded the applicants’ reliance on annexures even more. It contains numerous handwritten calculations, annual schedules, bus timetables, logbooks, emails, minutes of meetings, letters of demand and other documents that I am not in a position to gauge, considering that the context and import of these have not been explained to me.

[30] In the case of SA Airways SOC Ltd & another v National Transport Movement & others[6], this court said:

‘Firstly, granting the ancillary relief would involve the consideration of the issues of the validity of the removal of the Molefe camp and which of the two camps may validly represent NTM, in relation to which there are a series of material disputes of fact. The determination of these disputes would be inappropriate in motion proceedings such as the current matter and I am consequently bound to apply the well-known Plascon-Evans rule and accept the Molefe camp's version that they are the ones who are the lawful leadership of NTM in terms of its constitution...’

(Emphasis added. Footnote omitted)

[31] Considering the disagreement between the parties on various events, what is alleged to be owing and whether there has been a breach of the employment contracts, or not, and whether such breaches (if these exist) resulted in damages, is best suited for trial proceedings in terms of the BCEA regime.

[32] The above finding is supported by the fact that if one considers the last page of the founding affidavit, the applicant’s allege a catalogue of concerns, which they say ought to be remedied by this court, and which complaints, so to speak, directly stem from the employees contractual provisions, i.e. working hours, overtime, night work allowance, weekends off and the provision of transport allowances.[7]

[33] Clause 18 of the employment contracts states that:

‘18.1 The Employee’s entitlement to any benefits other than those recorded in this Agreement shall be governed by the appropriate provisions of the University’s policies and procedures from time to time, more specifically the University’s conditions of service.’

[34] This alone, considering the claims made by the applicants, divests the motion court from deciding any condition of employment, alleged breach of such condition and places the contractual nature of the applicant’s dispute best suited for ventilation in terms of section 77(3) of the BCEA. I was provided with the Regulation of Working Hours and Overtime Policy. Paragraph 1.5.3 of that policy deals with night and shift work.

[35] How this policy is implemented, who becomes aligned with what shift, who becomes eligible for what payment in terms thereof and so on, simply cannot be decided by me. For instance, paragraph 1.5.3.3 of that policy provides that shift work shall comply with the relevant Code of Good Practice, to be read with section 87(2) of the BCEA. It out of hand attracts a dispute of fact.

[36] I agree with Wits that the claims are largely conflated and intersect, and where there is a measure of clarity on the BCEA component, it is best to deal with these during trial proceedings.

[37] On this score, I cannot grant the relief set out in prayer 2 of the notice of motion. The third objection in limine is upheld.

The remaining contentions.

[38] Having upheld the jurisdictional point and the BCEA point, it means that the main relief sought in the notice of motion fails, and as such, the application ought to fail.

[39] But can the prayer 3 carry the day?

[40] As was said in *Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another*:^[8]

‘The court distilled the applicable principles to the following. A court can grant an order under the rubric of ‘further and/or alternative

relief’ where —

1 a basis has been laid for such relief in the founding affidavit and the papers read as a whole; and

2 the order sought is not inconsistent with the substantive relief claimed.’^[9]

[41] In considering my finding on the jurisdictional point (s64(4) of the LRA), my finding that there are factual controversies that cannot be decided by way of motion proceedings and my view that any alleged breach of contract in terms of section 77(3) ought to ventilate in trial proceedings, prayer 3 cannot be sustained.

[42] If I consider the first objection in limine, with which I agree, then prayer 3 cannot be widened to cater for and allow the ventilation, considering that the primary relief is declined.

[43] The substantive relief sought in prayer 2 also cannot be sustained. The application of prescription^[10] certainly appears to find application herein, but this difficulty is compounded when one considers that the monetary claim is disputed,

its quantification is denied and if the parties are able to determine what is indeed owing (which is also denied by Wits), then a substantial part will in any event be impossible to be claimed, perpetually.

[44] That means the fifth objection in limine (prescription point) will find application if the applicants attempt to advance their claim for overtime payment in the future.

[45] Considering my view in upholding the jurisdictional point and BCEA points, it is not necessary to decide the remaining issues, as these are largely disposed of in the context of this judgment.

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

Order

1. The application is dismissed.
2. There is no order as to costs.

F Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: In person

For the Respondent: Adv D Linde

Instructed by: Eversheds Sutherland (SA) Inc.

[1] Act 66 of 1995, as amended.

[2] This claim stems from the provisions of the Basic Conditions of Employment Act 75 of 1997, as amended.

[3] See: Staff Association for the Motor & Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd

(1997) 18 ILJ 374 (LC) (SAMRI).

[4] Ibid at 378D – G.

[5] 2009

(2) SA 277 (SCA).

[6] (2016) 37 ILJ 2128 (LC); See also: Mangope v SA Football Association

(2011) 32 ILJ 1132 (LC) at para 23.

[7] The conditions of employment appear in the contracts of employment. Clause 6 of the contracts of employment provide for hours of work and overtime. Clause 3 of the employment contracts provide that the laws governing the contracts of employment include the BCEA.

[8] (2014) 35 ILJ 2459 (LC) at para 28.

[9] Member of the Executive Council, Department of Education, Eastern Cape v Gqebe
(2009) 30 ILJ 2388 (LAC).

[10] Prescription Act, 68 of 1969.

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Prepared on 10 October 2026 · Esheria