

SOUTH AFRICA / JUDGMENT

Nxazonke v Commission for Conciliation, Mediation and Arbitration and Others (J1138/2022) [2022] ZALCJHB 366 (5 October 2022) [2022] ZALCJHB 366

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J1138/2022

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THE

LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

case

: J1138/2022

Not

reportable

In

the matter between:

VUYISILE
COLLIN NXAZONKE
Applicant
and
THE
COMMISSION FOR CONCILIATION,
First Respondent
MEDIATION
AND ARBITRATION
CAROLINE
HLONGWANE N.O
Second Respondent
CAPITAL
ACCOUNTING SOLUTIONS
Third Respondent
CC
TRADING AS CAPITAL PFS

Date
of Hearing: 28 September 2022
Date
of Judgment: This judgment was
handed down electronically by circulation to the parties' legal
representatives by email, publication on
the Labour Court website and
release to SAFLII. The date and time for handing down judgment is
deemed to be 12h00 on 5 October
2022

Summary: (Urgent – multiple forms of
relief – Costs)

JUDGMENT

LAGRANGE J

[1] This is an urgent application supposedly brought under section 77(3) and 73A of the Basic Conditions of Employment Act 75 of 1997 ('BCEA'). The applicant represented himself and claims to have drawn up his founding papers himself.

[2] In the application, which is supported by an affidavit of approximately 100 pages, the applicant ('Nxazonke') seeks the following relief:

2.1 A rule nisi should be issued calling upon the employer to show cause why an order should not be made:

2.1.1 correcting arithmetic calculations in the payment of his salary;

2.1.2 declaring a 'verbal loan advance agreement' null and void;

2.1.3 declaring his dismissal at the instance of the third respondent ('CAS')

2.1.4 unfair, unlawful and invalid and reviewing and setting it aside;

2.1.5 declaring his dismissal unlawful and invalid void ab initio;

2.1.6 declaring his salary deductions unlawful;

2.1.7 ordering the repayment of deductions made an error;

2.1.8 preventing the employer from communicating to any third parties about the dismissal of the applicant until the merits of his case have been determined by an appropriate tribunal, and

2.2 directing that the employer is 'in breach' and ordering it to perform specifically by re-employing him on just and equitable terms and compensating him by declaring salary deductions of approximately R 52,000. It appears this claim concerns an alleged breach of contract by CAS.

[3] Although the relief sought was cast in the form of interim relief pending a final determination his notice of motion made it clear that he only sought alternative relief if the court could not grant final

relief.

[4] This application is the second he launched on the same day, 21 September

2022. He had also launched a review application under case number JR 1879/22, in which he sought substantially the same relief.

CAS raised an objection that there were two applications dealing with the same relief. When Nxazonke was asked by the court why he had brought this application, he said he was advised that he could not launch urgent proceedings under a case number issued for review applications. Hence he launched this one. Accordingly, he confirmed in court that he withdraws the application issued under JR 1879/22.

Background

[5] Nxazonke was employed as a Project Procurement specialist by CAS with effect from 7 March 2022. He claims he was offered a salary of R 91,000-00 per month, but signed an offer of employment at a salary of R 81,000. He claims he intended to get it corrected once he was working. He was given a salary advance, apparently in the form of an interest bearing loan, when he started.

[6] He was dismissed on 22 July 2022, having been found guilty of a number of charges of misconduct relating to his alleged failure to perform his duties. He referred a dispute with three components to the CCMA, namely:

“(1) Dismissal and unfair labour practice for any reason relating to probation.

(2) Basic Conditions of Employment Act disputes/claims.

(3) Reason for dismissal is poor work performance/incapacity/unknown.”

It is not clear whether it was attached to his referral for but it did not appear to be in dispute that Nxazonke had applied for a written undertaking, concerning mainly alleged short payments in his remuneration from 7 March until 10 June, to be made and arbitration award. This claim was lodged using BCEA form 15 in terms of sections 68 (3) and 73 (1) of the BCEA.

[7] His dispute was enrolled for conciliation-arbitration proceedings. On 1 August, CAS notified the CCMA that it objected to ‘the con/arb in terms of the Rules for the Conduct of Proceedings before

the CCMA.” Nxazonke agreed there were discussions which took place at the CCMA on the date the dispute was first enrolled, but he did not understand these to be conciliation proceedings. From Nxazonke’s argument in court it became apparent that he had assumed the objection filed by CAS was an objection not only to arbitration but also to conciliation. For this reason, he filed a

request for arbitration on 3 August before the con-arb proceedings scheduled for 17 August had already taken place. Accordingly, when the Commissioner failed to deal with his dismissal dispute, having stated that she could not deal with his claim concerning his application to have a written undertaking made an award, he was of the view that she had wrongly refused to proceed immediately with the arbitration of his dismissal dispute.

- [8] Nxazonke agreed that he had been told that he had to refer his request for arbitration again after the conciliation on 17 August, but he could not understand why this was necessary because he had already done so on 3 August. Accordingly, he has not done so. In court, Nxazonke explained that one of the reasons he had brought the urgent application was because of the way proceedings had been conducted in the CCMA.

Evaluation

- [9] As mentioned above, Nxazonke seeks final relief and only interim relief as an alternative. It is trite law that a party seeking final relief must demonstrate: a clear right; an injury actually committed

or reasonably apprehended, and the absence of any other satisfactory remedy. Obviously this assumes also that the party has brought their claim in the right forum that has jurisdiction to determine the dispute.

Claims relating to remuneration

- [10] In terms of section 77 (3) of the BCEA, this court has jurisdiction to determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. Accordingly, the court would have jurisdiction to rectify salary underpayments and to declare deductions unlawful, if need be.
- [11] Whether the court should do so on an urgent basis is another matter altogether. In *Munthali v Passenger Rail Agency of SA* (2021) 42 ILJ 1245 (LC) at paragraphs 7 -9, this court reiterated that it is only in exceptional circumstances that financial hardship would justify a court intervening on an urgent basis. Although Nxazonke spells out the economic consequences he is suffering at some length, I am not satisfied that Nxazonke has demonstrated any exceptional circumstances which are different from any other person, with dependents, who loses their employment. As aptly remarked in *Turro & others v Taxaid (Pty) Ltd* (2000) 21 ILJ 2719 (LC):

“It must be borne in mind that in all cases of lay-off and dismissal, financial hardship follows and if the applicants' argument is to be accepted, then all cases of dismissal would be dealt with by way of urgent application and on affidavit which is clearly not what was intended by the drafters of the Labour Relations Act.”

- [12] Nxazonke claims that the verbal loan advance agreement is invalid on the basis that the employer was extending credit to him without being registered as a credit provider, which would be in breach of the National Credit Act 34 of 2005. This is not an employment contract

question which this court has jurisdiction to determine under s 77(3) of the BCEA. Likewise, because it concerns the underlying validity of a credit agreement, rather than the lawfulness of a deduction it is doubtful that s 33 of that Act could be invoked to invalidate the deductions made. Even if it was possible Nxazonke would still have to demonstrate that exceptional circumstances warrant the court intervening on an urgent basis.

- [13] It must also be mentioned that insofar as Nxazonke has a claim regarding his remuneration, the deductions which he disputes, commenced months' ago, and he has failed to explain why he has only launched proceedings to recover these after his dismissal.
- [14] As mentioned, Nxazonke claimed the arbitrator should not have declined to make the alleged written undertaking an award. Whatever reason the arbitrator gave for declining to do so, it is clear that the procedure Nxazonke seeks to invoke, is not a remedy that can be initiated by an employee. The undertaking referred to is one obtained by a labour inspector under s 68 of the BCEA using the procedure set out there. In terms of either s 68(3) or 73A(1) of that Act, the arbitrator was correct if she declined to issue it on the basis she had no jurisdiction.
- [15] Although not part of the pleaded relief, Nxazonke also asks the court to hand down summary judgment in respect of his monetary claim. Even assuming that this court did have a procedure for obtaining summary judgment, his application does not conform to the requirements of a summary judgment application and his claim is not for a liquidated amount. It is clear that there is some dispute about the quantification of his claim, which would be sufficient reason not to entertain an application for summary judgment.
- [16] In short, Nxazonke has failed to establish a ground for having his remuneration related claims heard as a matter of urgency. Accordingly, he should invoke the remedies available to him in the ordinary course.

Specific performance and unfair dismissal

- [17] Specific performance of a contract of employment is a remedy this court is competent to consider and determine under s 77(3) of the BCEA as it is a matter concerning a contract of employment. The court has, on occasion declared a dismissal unlawful *ab initio* and reinstated an employee in employment. However, Nxazonke does not set out grounds why his dismissal was in fundamental breach of his contract, even though he does advance grounds why it was unfair. In the absence of clearly pleading why his dismissal was a fundamental breach of his contract, there is no basis for entertaining an application for specific performance in the form of reinstatement.

The fairness of his dismissal whether it was for misconduct, incapacity or for an unknown reason is supposed to be determined in arbitration proceedings convened by the CCMA[1]. That is the procedure the legislature has decided should deal with such dismissal disputes. Moreover, this court is expressly prevented from determining these type of dismissal disputes in terms of s 157(5) of the Labour Relations Act, 66 of 1995 ('the LRA')[2]. Nxazonke admits he was advised to

make another request to refer his unfair dismissal dispute to arbitration. Rather than taking the commissioner's advice, he preferred his own counsel, or that of someone else, and instead chose to approach this court. Had he referred his dispute to arbitration shortly after the conciliation in all likelihood it would have been set down for an arbitration hearing already. Nothing prevents him from still doing so, though he will also have to apply for condonation if his request for arbitration is outside the time limits for making the request.

Communication with third parties about the dismissal

[18] This claim is asserted baldly as a right without explaining the legal basis thereof, and no evidence is advanced that CAS has in fact communicated the reason for Nxazonke's dismissal to any third party. Even assuming in Nxazonke's favour that CAS ought not communicate anything about the reasons for his dismissal to a third party, a court will not issue interdictory relief in the absence of evidence to support a real apprehension of such a communication being made or being likely to be made. Ironically, Nxazonke seeks such relief pending his dismissal dispute being determined by the appropriate tribunal but he has not pursued his right to have the fairness of his dismissal claim determined by arbitration, which is the appropriate tribunal.

[19] In any event, no basis has been laid for this being determined on an urgent basis.

Costs

[20] It is apparent that Nxazonke put considerable effort into his application and I accept he genuinely believed he understood the legal position well enough to bring this multifaceted application. If he were not a layperson I would be more inclined to believe the application was coloured by a vexatious intent. On this occasion, I do not think considerations of law and fairness warrant a cost award. However, the applicant must be cautioned that he should follow the processes and procedures that are specifically provided to obtain relief for his claims, or he might attract an adverse cost award in future if he pursues this kind of 'shotgun' approach to litigation.

Order

- [1] The Applicant's various claims for recovery of remuneration or deductions from his remuneration from the Third Respondent, and the determination of the quantum of such claims, are struck off the roll for lack of urgency.
- [2] The Applicant's claim for specific performance of his contract of employment in the form of an order invalidating his dismissal and ordering his reinstatement is dismissed.
- [3] The Applicant's claim for adjudication of his alleged unfair dismissal by this court is struck off the roll for lack of jurisdiction.
- [4] The Applicant's claim for interdictory relief regarding the disclosure of reasons for his dismissal by the Third Respondent is struck off the roll for lack of urgency.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant

In person

For the Third Respondent

W Hutchinson instructed by Joubert Attorneys

[1] Section 191(5)(a)(i) and (iii) of the LRA.

[2] Viz: S197(5) Except as provided for in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration.

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