

SOUTH AFRICA / JUDGMENT

Phokane v Bokoni Platinum Mines and Others (J 3729/18) [2021] ZALCJHB 123 (19 June 2021) [2021] ZALCJHB 123

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 3729/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 3729/18

In

the matter between:

JACOB
MOKGALABJE PHOKANE
Applicant
and
BOKONI
PLATINUM MINES
First
Respondent
MAKGABISA
PAULINE MALEBYE
Second Respondent
MALESELA
JACK MOLEBANE
Third Respondent
MADIMETJA
MABUELA
Fourth Respondent

Heard:

Decided on the
Papers

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website. The date and time for hand-down is deemed to be 19 June 2021 at 12:00

JUDGMENT

TLHOTLHALEMAJE, J

- [1] In this opposed application, the applicant seeks an order declaring the failure by the first respondent (Bokoni) to consider and/or appoint him in advertised positions, and the appointment of the second to fourth respondents into those positions to be unlawful.
- [2] The dispute emanates from the dismissal of the applicant on account of Bokoni's operational requirements, and the subsequent implementation of the section 189 of the Labour Relations Act (LRA)[1] Separation/Retrenchment Agreement concluded with the representative unions, viz, NUM, TAWUSA, and UASA.
- [3] The Agreement, which was concluded in September 2017, was subsequently extended to all non-parties in accordance with the provisions of section 23 of the LRA. In accordance with its provisions, the services of all employees that were affected were to be terminated with effect from 30 September 2017 on the grounds of Bokoni's operational requirements due to it being placed on care and maintenance.
- [4] Pertinent to this dispute is clause 5 of the Agreement, which provides that Bokoni would advertise the positions required for the purposes of services to be rendered during the period of care and maintenance. All the employees affected could apply for the positions as advertised, and successful candidates were to be appointed based on skills, experience and LIFO.
- [5] The applicant, who was a member of NUM, was employed by Bokoni with effect from August 2013 in the position of Senior Administrator: Incentives. As at 31 October 2017 when his services were terminated, the applicant occupied the position of Junior Accountant (C2).
- [6] Following the retrenchments, Bokoni had in October 2017, advertised the positions of Senior Accountant (D2), Junior Accountant (C2), and Assistant Buyer (C1). The applicant had submitted his application in respect of all the three posts. It is common cause that he was not shortlisted nor interviewed for any of the posts, but was instead placed on long list of candidates in respect of the positions of Buyer Assistant and Junior Accountant.
- [7] Following the interviews, the second respondent (Malebye), who was the Senior Accountant at the time of the retrenchment, was appointed into that position on a fixed term contract, which was extended at varying periods between 1 October 2017 and 31 December 2019. The

third respondent (Molebale), who had occupied the position of Junior Accountant at the time of the retrenchment, and was appointed into that position on a fixed term contract which was extended at various periods between October 2017 and December 2018. The fourth respondent (Mabuela) had also applied for the position of Assistant Buyer and was appointed on a fixed term contract between 1 December 2017 and April 2018.

- [8] The applicant's primary complaint is that he was not shortlisted nor interviewed for any of the three positions despite being suitably qualified for the three positions, and that this failure on the part of Bokoni was unlawful in the light of the provisions of clause 5 of the Agreement. He further contended in the light of the same provisions, it followed that the appointments of the second to fourth respondents into those positions were unlawful.
- [9] Bokoni's contentions were that the applicant did not meet any of the requirements for the positions in question, nor did he have any experience or skills for those positions, hence he was not interviewed. It further raised various preliminary points, contending that the applicant failed to establish the existence of any substantive right that the Court may enforce, and that the matter was moot since the appointments sought to be declared unlawful and to be set aside have already expired.
- [10] The starting point in determining this application is whether in the first place, this Court has jurisdiction in this matter given the applicant's claim as pleaded. Clause 7 of the Agreement provides that the provisions of the LRA will apply if there is any dispute between the parties pertaining to its interpretation or application. In this regard, it is common cause that the applicant

had initially referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) under the provisions of section

186(2)(c) of the LRA[2]. The basis upon which the CCMA dismissed the applicant's referral on account of lack of jurisdiction is unclear in the light of the common cause facts that what the applicant sought, was relief based on the Agreement, the existence of which was not placed in dispute.

- [11] Any suggestion that the applicant could not obtain relief at the CCMA because he was not a former employee at the time of the dispute let alone after the retrenchment, could not have been sustainable in view of the trite principle that the LRA has recognised unfair labour practices under the LRA may extend beyond the end of an employment relationship[3]. It follows that since the applicant sought relief under the provisions of that Agreement, clearly the provisions of section 186(2)(c) of the LRA found application, and I fail to appreciate on what basis it could have been concluded that the CCMA lacked jurisdiction. Be that as it may, to the extent that the applicant did not take any further steps in respect of the CCMA's 'jurisdictional ruling', that ruling, warts and all stands, and this Court cannot assume jurisdiction in circumstances where the matter ought to have been arbitrated at the CCMA.

- [12] Even if the Court may be incorrect in respect of the finding above, more dispositive of the applicant's claim is the contention that he failed to establish the existence of any substantive right that the Court may enforce, and furthermore, that the matter was moot.
- [13] The applicant approached the Court by way of motion proceedings seeking a declaratory order. He had alleged unlawfulness in respect of his non-appointment and the appointment of the second to further respondents. However, no legal basis was laid out under any provision of the LRA upon which unlawfulness was alleged, or upon which it can be said that this Court has jurisdiction. When the provisions of clause 7 of the Agreement made reference to the resolution of any dispute in terms of the provisions of the LRA, at the very least, it ought to have been stated in the pleadings where the power of this Court was located in the LRA for the relief sought to be granted.
- [14] The alleged unlawfulness in this case is however claimed in a vacuum. Even then, the concept of unlawfulness is foreign in circumstances where an employee seeks to assert his or her rights to be reinstated or re-employed in accordance with the provisions of an agreement. This is so in that the provisions of section 186(2)(c) of the LRA specifically relate to unfair labour practices. It nonetheless gets worse for the applicant in that other than the declaratory order he sought, no other forms of relief was specifically sought by him.
- [15] It has further been long stated that Courts should be reluctant to make declaratory orders in circumstances where the applicant has other satisfactory alternative means of obtaining relief. To this end, it has been held that a declaratory order for reinstatement or re-employment would be inappropriate in circumstances where an applicant has access to alternative remedies under the provisions of the LRA. Thus, since the CCMA had clearly erroneously declined to assume jurisdiction over this dispute when it had such jurisdiction, the onus was on the applicant to approach this Court with an application to review and set aside that ruling, and not to approach it with this application.
- [16] A final consideration which is dispositive of this matter in any event as correctly pointed out on behalf of Bokoni is that this matter is indeed moot since the relief sought by the applicant would not have any practical effect. Mootness denotes that a matter "no longer presents an existing or live controversy", and courts generally should avoid deciding matters that are "abstract, academic or hypothetical".[4] It has further been held that the principle of mootness is aimed at avoiding the court concerning itself with cases that no longer affect the interests of the parties concerned, and that it is relevant to cases in which the issues underlying the dispute have been resolved[5].
- [17] The mootness in this case arises from the fact that the applicant seeks a declaratory order that his non-appointment to the positions and the appointment of the second to fourth respondents into those positions be declared unlawful. In the meanwhile, between the launching of the dispute and the hearing date, the fixed term contracts granted to the second to fourth respondents have long expired. Even if his non-appointment were to be declared unlawful, the question would have been what relief to grant. He had however not

sought an order to be appointed into any of those positions, and instead, he sought some alternative remedy, which is left to the Court to think what it is.

- [18] Clearly, in these circumstances, any order to be considered by the Court will have no practical effect. This matter no longer affect the interests of the parties concerned, more particularly those of the second to fourth respondents, and clearly the issues underlying the dispute no longer exists.
- [19] In the end, this application was ill-considered on various fronts, and the consideration of the requirements of law and fairness dictate that the applicant be burdened with its costs. This is particularly so since as apparent from Bokoni's answering papers, valid preliminary points were raised which the applicant failed to reflect on.
- [20] On 28 November 2018, the respondents' attorneys of record had advised the applicant through his attorneys of record that the appointments sought to be declared unlawful would have expired by the time this application was heard, and thus the matter would be rendered moot. In that regard, the advice to withdraw the application went unheeded. Similar correspondence was sent to the applicant through his attorneys advising that Mabuela had since resigned in February 2018, and again, no withdrawal was forthcoming. Instead in December 2018, the applicant's attorneys of record advised that their instructions were to proceed with the matter. In the light of this unreasonable posture on the part of the applicant despite numerous warnings, clearly Bokoni should not be burdened with the costs of this ill-considered application.

[21] Accordingly, the following order is made;

Order:

1. The Applicant's application is dismissed with costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Representation:

For the Applicant:

Bongani Khanyile Attorneys

For the Respondents: Shepstone & Wylie

[1] Act 66 of 1995, as amended

[2] Which Provide: (2) "Unfair labour practice" means an unfair act or omission that arises between an employer and an employee involving- (a) unfair conduct by the employer relating to the promotion, demotion,

probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a

former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

[2] Which Provide:

(2) “Unfair labour practice” means an unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion,

probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employ a

former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

[3] Pretorius and Another v Transport Pension Fund and Others [2018] 7 BLLR 633 (CC)

[4] Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) at para 47

[5] See Loots C: “Ripeness and Mootness” in S Woolman, M Bishop (ed) Constitutional Law of South Africa p 7-19; Skelton A “Constitutional Protection of Children’s Rights” in Boezaart T (ed) Child Law in South Africa (2017) p 331

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