

SOUTH AFRICA / JUDGMENT

Woolworths (PTY) Ltd v Phala N.O. and Others (JR 2113/21) [2022] ZALCJHB 265 (16 September 2022) [2022] ZALCJHB 265

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2113/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Of interest to Other

Judges

Case

No: JR 2113/21

In

the matter between:

WOOLWORTHS
(PTY) LTD
Applicant
And
MOTLATSI
PHALA N.O.
1st
Respondent
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
2nd
Respondent
SACCAWU
obo
MEMBERS
3rd
Respondent
Heard: 14 September

2022
Delivered: 16
September 2022
(This
judgement was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLII. The date on
which the judgment is delivered is deemed to be 16 September
2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review a ruling issued by the first respondent (the arbitrator) on 14 September 2021, when he dismissed a point in limine raised by the applicant to the effect that the second respondent (the CCMA) lacked jurisdiction to entertain an unfair labour practice dispute referred by the third respondent (the union).
- [2] The substantive dispute between the parties has a long history, but the present application has its roots in a decision by the Constitutional Court delivered on 6 November
2018. The Court required the applicant to reinstate the individual employees on whose behalf the union acts in these proceedings, after they had been dismissed on account of the applicant's operational requirements. The individual employees were part of a group retrenched by the applicant during November 2012, when the applicant sought to introduce what are referred to as flexi-time contracts. The terms of the Constitutional Court's order reflected the Court's finding that the individual employees had indicated an inclination to accept the notion of flexi-time work, in circumstances where the parties had not reached agreement on what the applicable terms and conditions would be. The order of reinstatement thus had as its purpose the exploration of further alternatives to retrenchment and/or further negotiation between the parties on the terms of the flexi-time contracts.
- [3] It is common cause that the individual employees were reinstated on the terms and conditions that applied prior to their dismissal, and that negotiations between the applicant and the union then commenced.
- [4] On 9 December 2020, the union referred a dispute to the CCMA alleging that the applicant had committed unfair labour practices. The referral form records that the dispute arose on 7 December 2020. An annexure to the referral records the issues in dispute:
1. Salary/Remunerations

1.1 The Respondent dismissed Applicant's members on or about 4 November 2012, and the Applicant pursued to challenged (sic) the dismissal and ultimately the Constitutional Court on 9 October 2018, delivered its judgment to the effect of confirming the Labour Court judgment of retrospective reinstatement of the members.

1.2 The members were employed on a full-time basis. These members worked fixed hours totaling 45 hours per week. In 2022, Woolworths decided that in future it would only employee workers on a flexible working hour basis. These members would work 40 hours per week.

Issue in dispute:

1.3 After reinstatement of the Applicant's members, the Respondent failed and/or refuses to pay employees their salaries in terms of their contract of employment but on flexitime of 40 hours per week.

2. Medical Aid Scheme

2.1 The applicant members belonged to the Wooltru Medical Aid prior to their dismissal.

2.2 After reinstatement the Respondent intended to place members into a different Medical Aid scheme with lesser benefits and expensive than the Wooltru Medical Aid.

3. Long service awards

3.1 Prior dismissals (sic) the Respondent paid members long service awards.

3.2 After reinstatement the Respondent failed to pay long service awards to the members.

4. Severance pay

4.1 After reinstatement of the members the Respondent deducted amount exceeding severance payment that it made at the time of retrenchment.

5. Extension of Pension/Retirement.

5.1 The respondent changed or amended retirement age of employees but refuses to the extent (sic) retirement age of the members.

[5] In the interim, the applicant had demanded that the union abandon its demands in relation to the flexi-term contract, and that it accept a contract on the applicant's terms. On 15 February 2021, the applicant referred a dispute to the CCMA, classifying the dispute as one of 'mutual interest' and seeking an outcome to the effect that the union concede to the applicant's demands. This dispute became the subject of a notice of intention to lockout. The lockout was duly implemented and in turn became the subject of an urgent challenge by the union, filed in this court under case number JR 558/21.

[6] In a judgment delivered by my colleague Mahosi J on 25 May 2021, the court observed that consequent on the judgment by the Constitutional Court, the parties had engaged in negotiations on the terms of the flexi-contract. The court specifically rejected the union's

version that the individual employees had accepted the flexi-contract and that there was thus no live dispute between the parties. The court found, as a matter of fact, that the terms and conditions of the flexi-contract had not been unconditionally accepted by the individual employees and further, that the outstanding issues were matters of mutual interest that ought appropriately to be resolved through power play. The court thus accepted that the applicant had a right to implement a lock-out for the purposes of compelling the employees to abandon their demands, and dismissed the application with no order as to costs. A petition addressed to the Labour Appeal Court was dismissed, as was the unions subsequent appeal to the Constitutional Court.

- [7] The jurisdictional ruling under review was issued, as I have indicated, on 14 September 2021, in the course of the arbitration proceedings in the unfair labour practice dispute. The ruling records the material background facts, which I do not intend to repeat here. In his analysis of the parties' respective submissions, the arbitrator noted that the applicant had raised two preliminary points. The first was that the referral to the CCMA had been made out of time, in the absence of an application for condonation. Secondly, the applicant had submitted that the matter had been finalised and that given the judgment by this court to which I have referred, it was *res judicata*. As I have indicated, the arbitrator dismissed both points, finding that the dispute had been timeously referred and that *res judicata* had no application.
- [8] The test to be applied in the present instance is that referred to by the Labour Appeal Court in *SA Rugby Players Association and others v the SA Rugby (Pty) Ltd and others; SA Rugby (Pty) Ltd v the SARFU & another* (2008) 29 ILJ 2218 (LAC). In that decision, the court held that where a jurisdictional ruling is at issue, the reasonableness threshold established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) does not apply. The question on review in these circumstances is whether on the objective facts and the law, the CCMA

had jurisdiction to decide the dispute. In other words, the test is one of correctness, not reasonableness. If the reviewing court comes to the conclusion that the arbitrator erred in assuming jurisdiction, the ruling falls to be reviewed and set aside.

- [9] The attack on the arbitrator's ruling that the unfair labour practice dispute was timeously referred was not seriously pursued in these proceedings, and I do not intend to say any more about it. To the extent that the arbitrator dismissed the plea of *res judicata*, he noted that it was common cause that the applicant had locked-out the affected employees and that in response, the union had approached this court to interdict the lockout. He noted further that this court had found that the lockout was lawful and that the court had stated 'in passing' that what is referred to as the 'outstanding issues' appeared to be matters of mutual interest. The arbitrator considered the referral of the unfair labour practice dispute as one 'which is a different course of action'. Further, the arbitrator held that there was no final judgment by a competent court, in the sense that the decision that the lockout was lawful did not 'put finality to the issues'. The arbitrator concluded 'the observation by the Labour

Court of that the outstanding issues were matters of mutual interest was not the reason for judgement', and that the CCMA had jurisdiction to arbitrate the unfair labour practice dispute.

- [10] While the arbitrator more narrowly concerned himself with the requirements of *res judicata*, the real question that faced him was whether the terms of the referral disclosed any basis for a claim of unfair labour practice on the part of the applicant. In essence, that was the submission raised by the applicant, albeit in the form of a plea of *res judicata* and with specific reference to the judgment by Mahosi J.
- [11] The starting point in assessing the correctness of the arbitrator's decision is the definition of unfair labour practice. Section 186 (2) defines an unfair labour practice to mean any 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) 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 No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.
- [12] This definition marks a deliberate intention to abandon the open-ended definition contained in the 1956 LRA and instead to establish a closed definition limited to those acts and omissions listed. In any referral of an unfair labour practice dispute, it is thus incumbent on the referring party to identify which of the elements of the definition on which it seeks to rely. The referral form in the present instance makes no reference to any element of the definition; it simply characterises the dispute as one that concerns an unfair labour practice and lists the issues recorded above as 'issues in dispute'.
- [13] At best for the union, and I understood the union's representative to concede as much, the applicant relies on unfair conduct by the applicant relating to the provision of benefits. That part of the definition has been the subject of much litigation. Initially, the court determined that unfair labour practice disputes could arise only *ex lege* or *ex contractu* (see *HOSPERSA v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC), where the LAC held that a claim for an acting allowance could not be enforced by way of a claim of unfair labour practice. In *Protekon (Pty) Ltd v CCMA* [2005] 7 BLLR 703 (LC), the court held that an unfair labour practice may extend to circumstances where the employer has exercised the discretion in the award of benefits. This approach was endorsed by the LAC in *Apollo Tyres SA (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC), where the court held that the definition

extended to the performance of an obligation arising ex contractu or ex lege but also when the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits. The courts have always been cautious to limit the scope of application of the definition of unfair labour practice, if only because the more expansive the definition, the more limited the scope of the right to strike, given that the right to strike does not extend to disputes (such as unfair labour practice disputes) that must be determined by arbitration.

- [14] The terms of the referral by the union, as I have indicated, record the issues in dispute as first, salary/remuneration, and in particular, the applicant's refusal to pay the affected employees their salaries in terms of the pre-existing contracts but on flexitime of 40 hours per week. In other words, the union demands that the applicant pay the affected members their salaries in terms of a contract of employment that required them to work 45 hours per week, even if only 40 hours are worked in terms of the flexicontract. This is nothing less than a demand to be paid at 45 hours per week in return for working only 40 hours per week. Put another way, it is a wage demand, and an attempt to secure a new contractual term. In regard to the medical scheme, the union's demand is that the affected members be placed on the Wooltru Medical Aid, in circumstances where the applicant requires that they accept the Discovery Health scheme as a term of contract. There is no right ex lege or ex contractu to membership of the Wooltru Medical Aid. In regard to retirement age, the union seeks an extension of the retirement age to 63 years of age. In regard to severance pay, the union's demand is that amounts it claims were incorrectly deducted should be repaid. I fail to appreciate how these or any other of the unions 'issues in dispute' fall within the definition of 'unfair labour practice'. The parties are engaged in a process of negotiation to create new rights; the conduct complained of is the applicant's refusal to exceed to the union's demands, not the applicant's conduct in relation to any benefit to which the individual employees are currently entitled. On this basis alone, the applicant's point in limine in regard to jurisdiction ought to have been upheld.
- [15] To the extent that the arbitrator sought to distinguish the judgment by Mahosi J or relegate its status to that of obiter, in paragraph 12 of the judgment, the court frames the issue in dispute as being 'whether the issues in dispute [i.e. those that are the subject of the notice of lockout] are of mutual interest' (own emphasis). The demand made by the applicant in the notice of lockout is that the union 'drop and abandon' its demands in relation to each of the issues that is the subject of the unfair labour practice dispute. The judgment goes on to observe that

the Constitutional Court specifically 'left the door open for the parties to engage in negotiations on the issues relating to flexitime'. Further, the court noted that subsequent to the judgment, the parties had in fact continued to engage in negotiations

with the aim of reaching agreement on the terms of the flexicontract. As recorded above, the court found, as a fact, that the dispute

between the parties remained a live dispute and that the outstanding issues were matters of mutual interest ‘that ought to be resolved through power-play’. In the face of this clear identification of the outstanding issues as mutual interest issues

(all of which are issues referred to in the unfair labour practice referral), I fail to appreciate how it can be said, as the union

submits, that ‘the lockout application had nothing to do with whether or not the disputes before the second respondent are unfair labour practice disputes or not’.

[16] In terms of the notice of motion filed by the union, it sought an order that the lock-out was unprotected. It was thus incumbent on the court to establish whether the lock-out met the requirements for a protected lock-out. These include an exclusion from the workplace, with the purpose of compelling the affected employees to accept a demand in respect of a matter of mutual interest. The court was thus required to determine the nature of the demands, and whether they concerned a matter of mutual interest. The court held that they did. That was an integral element of the court’s ruling, which cannot be said, as the union submits, to have been limited to the factual determination of the existence or otherwise of a live dispute

between the parties.

[17] The distinction drawn by the arbitrator between a cause of action in the form of an application to declare a lockout unlawful on the one hand, and the referral of an unfair labour practice dispute on the other hand, is thus entirely artificial given that the outstanding issues identified by the court in its judgment are the same issues that form the subject of the unfair labour practice referral.

[18] A further reason why the CCMA had no jurisdiction to entertain the unfair labour practice dispute is a rule allied to the *exceptio res judicata*, in the form of the rule against collateral challenges. That rule seeks to prevent a party avoiding the consequences of an order issued against it by going to another forum, and provides that a party is not entitled to launch a collateral challenge against an earlier juridical act unless and until the earlier act is set aside (see *NEHAWU obo Kgekwané v Department of Development, Planning and Local Government, Gauteng* (2015) 36 ILJ 1247 (LAC), at paragraph 26). The referral of the unfair labour practice dispute was nothing less than a collateral challenge in the face of the judgment and order by Mahosi J.

[19] Finally, to the extent that the union submits that the referral of the unfair labour dispute relates to the employees’ existing contracts into which they were reinstated and not the terms of any prospective flexi-time contract, it has never been in dispute that the employees were reinstated on the same terms and conditions of employment that pertained at the time of their dismissal. The current dispute can only relate to the creation of new terms to be incorporated into a flexi-time contract, those that the applicant seeks to persuade the union to accept. It is the union’s refusal to accept these terms that gave rise to the lock-out, and which formed the basis of the union’s referral of the unfair labour practice dispute. Given

the context, in which the purpose of the reinstatement order was to afford the parties an opportunity to further negotiate the terms of the flexi-time contracts, I fail to appreciate how it can be said that what is in issue is the applicant's conduct in relation to existing terms and conditions of employment. At the heart of the dispute between the parties is their failure to agree the terms of the flexi-time contracts.

- [20] To summarise: labelling various practices or incidents of employer conduct as an unfair labour practice does not mean that the practice or conduct complained of is an unfair labour practice. The scope of the definition of 'unfair labour practice' in section 186
- (2) is limited to the acts and omissions listed in the section. To the extent that the union relies on unfair conduct by the applicant in relation to the provision of benefits, none of the issues referred by the union to conciliation and contested in arbitration, concern the provision of benefits. The reality is that the applicant and the union are engaged in a negotiation, in consequence of a judgment by the Constitutional Court, on new terms and conditions that might populate a new form of contract. By definition, the issues referred by the union to arbitration do not constitute acts or omissions where the fairness of employer conduct stands to be tested in arbitration proceedings; they are issues that must be resolved by power-play. In any event, this court (per Mahosi J) has held that the issues that are the subject of the unfair labour practice referral are matters of mutual interest. The principle of *res judicata* precludes the union from pursuing what it has been unable to secure in negotiation through the mechanism of the unfair labour practice, as does the rule against collateral challenges.
- [21] In relation to remedy, there is little purpose in limiting the matter for the hearing and decision by a different commissioner. All of the papers are before the court, and the court is in as good a position as any commissioner might be to determine the matter. In these circumstances, I intend to substitute the arbitrator's decision for one that upholds the applicant's objection to the CCMA's jurisdiction.
- [22] Finally, in relation to costs, this court has a discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. I accept that the opposition to the application was neither vexatious nor frivolous. I am also mindful of the fact that the parties remain in negotiation on new contractual arrangements for the affected employees, who have been locked out for more than 18 months. There is also the prospect, not canvased on the papers but a potential remedy in the hands of the applicant that the current impasse may result in a transition from stalemate to the contemplation of dismissals for operational requirements. This is a situation that cries out for compromise; a negotiated solution, as the Constitutional Court recognised, is in the common interest. This court has always been reluctant to make orders for costs where those orders have the potential to harden positions in ongoing negotiations. This case is no exception and in my view, the requirements of the law and fairness are best served by each party bearing its own costs.

Order

I make the following order:

1. The jurisdictional ruling issued by the first respondent on 14 September 2021 and the case number GAJB 382-21 is reviewed and set aside.
2. The first respondent's ruling is substituted by the following:

"The referral is dismissed for want of jurisdiction."

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

B MacGregor, MacGregor Erasmus Attorneys Inc.

For the respondents: Y Dockrat, Dockrat Inc.

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