
SOUTH AFRICA / JUDGMENT

Zinzobe and Others v Fahrenheit Seafood and Grill (J561/14) [2016] ZALCJHB 386 (6 October 2016)

[2016] ZALCJHB 386

COURT

Labour Court Johannesburg

BEFORE

T Ntshebe

CASE / FILE NUMBER

J561/14

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J561/14

In the matter between:

WITNESS ZINZOMBE & 7 OTHERS

Applicants

and

FAHRENHEIT SEAFOOD & GRILL

Respondent

Case no: J1908/12

In the matter between:

PATRICK KHUMALO & 9 OTHERS

Applicants

TSUNAMI SEAFOOD EMPORIUM

Respondent

Heard: 06 July 2016

Delivered: 06 October 2016

NTSHEBE, AJ

Introduction

[1] These are applications in terms of Section 77 (3) of the Basic Conditions of Employment Act[1] (“the BCEA”) wherein the applicants in both cases are claiming the following from the respondents:

1.1 That the respondents be ordered to make payments to the applicants constituting minimum wages not paid to the individual applicants

and/or bonuses and/or unlawful and prohibited deductions that were made from the remuneration of the each individual applicants; and

1.2 The applicants are also claiming interests on the amounts being claimed.

[2] The two cases are the subject of separately filed applications. However, they were argued on the same day and both raised substantially the same factual and legal issues.

[3] The applicants were employed by the respondents as waiters. Their claims are premised on a collective agreement concluded at the Bargaining Council for the Restaurant, Catering and Allied Trades (“BCRCAT”). The collective agreement has been extended to non-parties to the agreement.

[4] In both matters, the applicants’ claims are based on the breach of the collective agreement by the respondents. They are alleging that the respondents by charging them the breakage fee, failure to pay the minimum wages as stipulated in the collective agreement and the failure to pay the applicants the bonuses, breached the collective agreement.

[5] In the Fahrenheit matter it was argued on behalf of the respondent that the applicants’ claim in essence is about the interpretation and or application of the collective agreement. As such, so the argument went, what the applicants seek to do is for the court to assume the powers of the Bargaining Council.

[6] It was submitted that the Bargaining Council has its own dispute resolution mechanism in respect of the agreement which the parties are obliged to follow. Clause 28A of the collective agreement sets out a mandatory dispute resolution procedure in respect of all disputes pertaining to the contravention of the agreement. Clause 28A of the agreement applicable to both matters provides as follows:

6.1 Disputes pertaining to the contraventions of the agreement must be done in the form of a sworn statement setting out all the material fact(s) that form the basis of the complaint;

6.2 On receipt of the complaint the council shall within 14 days appoint a designated agent or official to investigate the dispute and/or may request further information, facts or data from either the employee or the employer;

6.3 Should the complaint not be settled the complainant shall request the council to con-arb proceeding(s) within 30 days of being served with the outcome of the investigation report; and

6.4 The council must give parties at least 14 days in writing that the complaint has been scheduled for con-arb.

[7] The respondents relied on the judgment of Bakker AJ in the matter of Pardon Rukwaya & 31 Others vs. The Kitchen Bar Restaurant.[2] In that matter, the applicants also sought to rely on the provisions of the same collective agreement in enforcing their rights wherein they had alleged that the employer had breached those rights. The court in that matter upheld the preliminary point that this court does not have jurisdiction to adjudicate the applicant's claim. This was so because the collective agreement had its own dispute resolution mechanism created by the council which have to be followed.

[8] The applicants' claims in both matters are based on the alleged contraventions and/or breach of the collective agreement by the respondents. If that is the case, the provisions of the collective agreement are clear on the processes that have to be followed in that respect. This includes the investigation by the Bargaining Council and con-arb proceedings as envisaged in the agreement.

[9] I am in agreement with the findings of this court in The Kitchen Bar Restaurant judgement that the dispute is about minimum wages and other conditions of employment which have been agreed to at the Bargaining Council and therefore, the appropriate manner of dealing with the disputes at this stage is for the applicants to refer the matter to the Bargaining Council which has jurisdiction to deal with the alleged contravention of the agreement. Therefore, this court does not have jurisdiction to adjudicate the applicants' claims.

Costs

[10] On the question of costs, in the Fahrenheit matter, it was argued on behalf of the respondent that the matter should be dismissed with costs on a punitive scale. I am however, of the view that under the circumstances it would be unfair to burden the applicants with a cost order especially when one has regards to the allegations of underpayment and or unlawful deductions.

Order

[11] In the premises, the following order is made.

11.1 Both applications are dismissed and there is no order as to costs.

T Ntshebe AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Ms T. Moyo of Snyman Attorneys

FOR THE RESPONDENT: Advocate J P Spangenberg

INSTRUCTED BY: Vally Chagan & Associates

[1] No 75 of 1997

[2] J591-2013 ((2016) 37 ILJ 1466 (LC)).

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