IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Reportable

In the matters between:

CASE NO J33/10

MAKUME, SIMON MOSIUWA Applicant

and

HAKINEN TRANSPORT CC Respondent

CASE NO J732/10

MOYI, RAOUI BAYAMBA MUKOLE Applicant

and

INKHUNZI CONTRACTORS (PTY) LTD Respondent

CASE NO J427/10

SHASHAPE, ELIZABETH KOLOJANE Applicant

and

TSWAING LOCAL MUNICIPALITY Respondent

JUDGMENT

TIP AJ:

1. This judgment concerns three applications which came before me on the same day. There is a common central question which involves the jurisdiction of this Court in respect of demands that have been made of employers in terms of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). I will briefly outline the circumstances of each of the applications and then proceed to a consideration of the legal issues that arise.

2. **J33/10**: Mr Makume was employed by Hakinen Transport CC as a driver on 20 September 2005. He resigned on 27 October 2006. In his application he seeks an order directing the respondent to furnish a certificate of service in terms of section 42 of the BCEA as well as certain forms relating to a retirement claim which he wishes to lodge with the Motor Industry Autoworkers Pension – Provident Fund (as he described it). The application was launched on 29 January 2010.

3. **J732/10**: Mr Moyi was employed by Inkhunzi Contractors (Pty) Ltd on 1 March 2008 as a site residential engineer and was dismissed on 12 November 2008. On 15 July 2010 he served an application in which he seeks one month's notice pay in terms of section 38 of the BCEA, pay for accrued leave in terms of sections 40 and 20 of the BCEA, outstanding pay for the period from 1 October to 12 November 2008, remuneration information in terms of section 33 of the BCEA and a certificate of service in terms of section 42 thereof.

4. **J427/10**: Ms Shashape was employed by the Tswaing Local Municipality as a traffic officer from 17 September 2007 to 30 May 2009. On 20 March 2010 she commenced application proceedings for four weeks' notice pay in terms of section 38 of the BCEA, outstanding pay for the month of May 2009 and a certificate of service in terms of section 42.

5. All three of these applications were instituted in the wake of the decision of Van Niekerk J reported as *Ephraim v Bull Brand Foods (Pty) Ltd* (2010) 31 ILJ 951 (LC) which was delivered on 27 November 2009. It was there

held that the jurisdiction of this Court is of a residual nature in respect of the operation of section 77(1) of the BCEA and that an employee with a non-compliance complaint should seek relief through the enforcement provisions of Chapter Ten of the Act rather than to approach the Labour Court. The learned Judge's reasoning is captured in paragraphs [4], [5] and [6] of the judgment:

> "*Section 77(1) of the BCEA reads as follows:*
>
> > *'Subject to the Constitution and the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.'*
>
> *In my view, the provisions of this section do no more than confer a residual exclusive jurisdiction on this court to deal with those matters that the Act requires to be dealt with by the court. The wording of the section does not confer jurisdiction on the court to deal with matters that must be dealt with, in the first instance, by duly appointed functionaries. ....*
>
> *In the absence of any provision in the BCEA that confers jurisdiction on this court to enforce the provisions of the Act directly and as an agent of first instance, the applicant's claim is misconceived. To hold otherwise would entirely undermine the system of enforcement established by chapter 10 of the Act. Chapter 10 establishes the mechanisms to monitor and enforce the protections guaranteed by the Act. In summary, the entry point into the system is the office of the labour inspector, to whom complaints may be made. ... What relevance and purpose would this carefully crafted system continue to have if an employee were entitled to bypass it and approach this court for orders directly enforcing the provisions of the Act?*
>
> *The BCEA clearly contemplates that this court has a general supervisory function in the statutory scheme of enforcement (given its appellate functions in terms of s 72), that it should facilitate the enforcement of orders made by the appropriate functionaries (given its powers to make compliance orders of court) and that it should ultimately act to impose punishment for continued breaches of the Act (given the court's powers to impose fines in terms of schedule 2 to the Act), [but] the Act does not extend to this court those functions that are reserved for the labour inspectorate, and in particular, it does not contemplate that this court may grant orders that would effectively amount to the compliance orders contemplated by s 69.*"

6. Basson J has expressed her full agreement with this approach, in *Indwe Risk Services (Pty) Ltd v Van Zyl; In re Van Zyl v Indwe Risk Services*

(Pty) Ltd (2010) 31 ILJ 956 (LC) (delivered on 18 February 2010) at paragraphs [32] to [34]. I respectfully add my concurrence.

7. In both those matters the issues were framed in terms of section 77(1) of the BCEA as involving the enforcement of statutory obligations, as distinct from those invoking contractual provisions. Mr Schöltz represented the applicant in those cases, as does he the applicants in the three applications before me. Notwithstanding the essential congruence of the nature of the relief sought in all these matters, the present applications have been couched primarily in terms of prayers based on section 77(3) of the BCEA and, in that way, they have been repositioned as contractual rather than statutory claims.

8. A similar recasting of the relief had been done by Mr Schöltz in a total of 48 matters which were enrolled for hearing in a specially convened motion court before Van Niekerk J on 25 March 2010. Each of those matters had initially relied on section 77(1) of the Act but, evidently in consequence of the *Bull Brand* judgment, substantially identical supplementary affidavits were filed in each case, comprising two elements. Firstly, the relief was alleged to be based on the contract of employment, pursuant to section 4 read with section 77(3) of the BCEA. Secondly, each applicant contended that he or she was exercising a right to elect to proceed with an application in the Labour Court instead of recourse to the Department of Labour, which was described as operating with a number of resource and other limitations, to the extent that complainants were said to be unable to obtain effective assistance from it.

9. Judgment in respect of this gathering of matters was delivered on 23 September 2010: *Fourie v Stanford Driving School and 34 related cases* under case number J2218/08, as yet unreported. After observing that the allegations concerning the Department of Labour were patently not within the knowledge of the individual applicants, Van Niekerk J went on as follows, in paragraph [7]:

> "*That issue aside for the moment, the question that arises in each of the applications before me is whether the BCEA entitles an aggrieved party to enforce the provisions of the Act as contractual terms, and to rely on the concurrent jurisdiction that this court enjoys under s 77 of the BCEA to enforce them. The starting point is s 4 of the Act which provides, with some exceptions, that a basic condition of employment constitutes a term of any contract of employment. A 'basic condition of employment' is defined in s 1 to mean "a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment". In* Bartmann & another t/a Khaya Ibhubesi v De Lange & another *(2009) 30 ILJ 2701 (LC) Todd AJ expressed his reservations about whether it could be said that an obligation under the BCEA to furnish certificates, information regarding remuneration and the like could be said to constitute basic conditions of employment (at paragraph [38] of the judgment). For the purposes of these proceedings, I am prepared to accept that they are, and that they may be enforced as contractual terms. I deal with this issue below in the context of the prayers for costs on a punitive scale that accompanies virtually every application before me.*"

10. On this basis the learned Judge concluded in paragraph [10] that the BCEA established dual enforcement mechanisms and that an employee could choose to refer a complaint to the labour inspectorate or seek to enforce a basic condition of employment in a civil court or the Labour Court as a term of the employment contract. The matters before him were accordingly disposed of by granting the relief but applying a suitable formula as to costs: (i) no costs were awarded where documents were sought; (ii) no costs were awarded where a payment was sought that fell within the jurisdiction of the Small Claims Court; and (iii) costs were denied or ordered on the Magistrates Court scale where a payment was sought that fell between the limits of the Small Claims Court and the Magistrates Court.

11. As is apparent from the above, Van Niekerk J refrained from deciding the reservation which had been articulated by Todd AJ concerning the ambit of 'a basic condition of employment'. In my view, it is appropriate for me to undertake that enquiry in the context of the manner in which the applications before me have been formulated. The legal foundation for them rests in essence upon section 4 read with section 77(3) of the Act. Section 4 reads:

"*A basic condition of employment constitutes a term of any contract of employment except to the extent that-*

(a) any other law provides a term that is more favourable to the employee;

(b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or

(c) a term of the contract of employment is more favourable to the employee than the basic condition of employment."

Section 77(3) reads:

"*The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.*"

12. These sections were relied on by Mr Schöltz to support an argument that the effect of section 4 is that all basic conditions of employment are imported into an employee's contract of employment and that section 77(3) therefore vests this Court with the jurisdiction to deal with 'any matter' relating to such contract. Hence, runs the argument, it is permissible for an aggrieved employee to approach this Court directly with *any* compliance issue without first having to seek the assistance of the labour inspectorate.

13. These propositions may *prima facie* appear to be sound, but that is so only if the two provisions relied upon are abstracted from their context within the framework of the BCEA as a whole. As already indicated, Van Niekerk J has concluded that the point of entry for an employee with a BCEA compliance complaint is the Department of Labour inspectorate and not this Court. I would respectfully underscore that conclusion with some supplementary considerations arising from the Act. A useful springboard for that is section 2:

"*The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are-*

(a) to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution-

(i) by establishing and enforcing basic conditions of employment; and

(ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."

It is immediately apparent from this that the BCEA gives expression to a constitutional right and that one element thereof is the detailed enforcement structure contained in Chapter Ten. The role assigned to the labour inspectorate must be interpreted and applied in that context.

14. Patently, not every provision of the Act amounts to a basic condition of employment, which is defined as meaning: "*a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment*". The scope of this may be illustrated through a few examples. Thus, the requirement in section 14(1) that a meal interval must be at least one continuous hour is plainly a minimum condition. An employer may give more, but it cannot give less. By contrast, the stipulation in section 43(1) that no person may employ a child who is less than 15 years of age is not a minimum condition. It is simply a prohibition which could not on any sensible basis find its way into a contract of employment. Likewise, the obligation on an employer set out in section 29(1) to supply a new employee with written particulars of employment cannot meaningfully be described as a minimum condition. It is there to ensure that there is certainty, that the employee understands the terms of his employment and that there is a record thereof which must be retained for three years after termination of the employment. It must be complied with but can barely be viewed as a minimum condition which an employer might improve upon. Accordingly, I would endorse the view of Todd AJ in *Bartmann* at paragraph [38]:

"*.... While this is not something that it is necessary for me to decide for the purpose of the present application, it seems appropriate ... for me to express my view that an employer's obligation under s 29 of the BCEA is not a 'basic condition of employment' as defined in that Act. It may well follow from that, it seems to me, that the subject-matter of that*

application falls outside the jurisdiction conferred on this court by the provisions of s 77(3) of the BCEA, and that those obligations may be enforced only by means of the enforcement provisions set out in chapter 10 of the BCEA ..."

15. Aside from the question of what is or is not part of the employment contract, there is a further set of considerations which define the jurisdiction of this Court. These concern the role of the enforcement provisions in the BCEA as well as the distinction drawn in the Act between, on the one hand, a range of non-compliance complaints and, on the other hand, claims for money and other contractual disputes.

16. Complaints of the first sort are ordinarily to be dealt with through the detailed enforcement mechanisms of, in particular, Part A of Chapter Ten. Various provisions point to this. A departure point is to be found in section 64(1)(d) which describes the functions of labour inspectors:

"*A labour inspector appointed under section 63 (1) may promote, monitor and enforce compliance with an employment law by- ...*

(d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders ..."

17. Significantly, securing an undertaking must be an inspector's first endeavour. Section 68(1) requires this:

"*A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act must endeavour to secure a written undertaking by the employer to comply with the provision.*"

The approach underlying this is consonant with the premium that our system of employment law places on the resolution of disputes through consensus rather than compulsion. See, comparatively, section 157(4)(a) of the Labour Relations Act 66 of 1995 ("LRA"):

"*The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.*"

18. If no undertaking is secured or having been given is not implemented, then a labour inspector would move to the next step, being to issue a compliance order. Section 69(2) of the BCEA details the required content of such an order, which must include *inter alia* particulars of the employer's conduct constituting the non-compliance and the steps that it must take to correct the position. Subsections 3(a) and (4) stipulate that the order must be served on all affected employees if practicable and that it must be displayed prominently at a place accessible to the employees. Evidently, these publication requirements are calculated to inform and thus enhance employees' understanding of their rights and the consequences for the employer of a contravention. The publication is not confined to a particular complainant but must reach all affected employees.

19. Measures of this sort reflect the careful composition of these enforcement provisions. At a practical level, they may be distinguished from the role of the Labour Court which generally deals only with the applicant or applicants before it and involves no attempt to secure an undertaking or to publish the equivalent of a compliance order. This plainly forms part of the legislative intention, for Chapter Ten goes on to delineate precisely when recourse may be had to the Labour Court. Section 72(1) allows an employer to appeal to the Court against an order made by the Director-General in respect of that employer's objection to a compliance order issued by an inspector. Section 73 permits the Director-General to apply to the Court to have a compliance order made an order of the Court. In the face of that definition of the Court's part in the compliance process, it is not open to an employee with a complaint of that sort to simply bypass the inspectorate altogether and to come to this Court directly for an order that an employer must provide, say, a certificate of service in terms of section 42 or must bring the employee's leave entitlement into line with the minimum requirements of the BCEA. Such complaints are not matters for this Court but for enforcement in terms of Chapter Ten. There is nothing novel about a conclusion that detailed monitoring and enforcement provisions of this kind implicitly operate to exclude the

jurisdiction of the Labour Court, at least temporarily. A comparable result has been reached in the context of the Employment Equity Act 55 of 1998: *Dudley v City of Cape Town and another* (2008) 29 ILJ 2685 (LAC) at paragraphs [43], [48] and [49].

20. I likewise hold in the matters before me that this Court has no jurisdiction as a forum of first instance to entertain compliance issues other than, as set out below, when there is a claim for money.

21. I may add that the terms of section 77(3) (cited above) do not alter this conclusion. Bearing in mind that the Labour Court has no inherent jurisdiction, this section does not confer any capacity on the civil courts. Rather, the jurisdiction of the civil courts is extended to the Labour Court within the parameters of the section. See in relation to the construction of section 157(2) of the LRA, which has similar wording: *Gcaba v Minister for Safety and Security and others* (2010) 31 ILJ 296 (CC) at paragraphs [71] and [72]. An examination of the Small Claims Court Act 61 of 1984 shows that it has no jurisdiction to order compliance with the provisions of the BCEA: sections 15 and 16. The same emerges from the Magistrates' Courts Act 32 of 1944: section 29(1) read with section 46(2)(c). I have no doubt that the legislature did not intend that compliance orders of that sort should be sought in the High Court.

22. In instances where an employee's claim is for money which is due to him in terms of the BCEA but which the employer refuses to pay, a different picture is to be seen. The Act puts in place an election, either to secure payment through a complaint to a labour inspector or through proceedings instituted in a competent court. That an inspector has the power to enforce payment which is owed in terms of the Act is clear from *inter alia* section 68(2)(a):

> "*In endeavouring to secure the undertaking, the labour inspector may seek to obtain agreement between the employer and employee as to any amount owed to the employee in terms of this Act;*"

There is a similar provision in respect of a compliance order: section 69(2)(c).

23. It is likewise clear that the BCEA contemplates civil proceedings for the recovery of money due to an employee, without the necessity of a preceding referral to a labour inspector. This follows from section 70(c):

> *A labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act if - ... any proceedings have been instituted for the recovery of that amount or, if proceedings have been instituted, those proceedings have been withdrawn ...*".

The effect of this is that an employee may choose to institute civil proceedings for a money claim and if he has done so, even if he should later withdraw those proceedings, an inspector would no longer have the capacity to require compliance through payment by the defaulting employer. Put differently, once an employee makes the election to proceed through civil action he cannot thereafter revert to the inspectorate in order to secure payment. An inspector is similarly barred from enforcing compliance if the employee is governed by a collective agreement which provides for an amount owing in terms of the Act to be dealt with through arbitration: section 70(a). These provisions may be read with the dual stream of enforcement possibilities which are accorded an employee in section 78(1):

> "*Every employee has the right to-*
>
> *(a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act; ...*
>
> *(f) participate in proceedings in terms of this Act*; *...*".

Once it is so that resort by an employee to civil proceedings for a monetary claim excludes the making of a statutory compliance order, it would be artificial to nonetheless require such employee first to report the claim to an inspector for an attempt to be made to secure an undertaking. I do not consider that the BCEA lends itself to a fragmentation of that sort in respect of the enforcement mechanisms detailed in Chapter Ten.

24. In sum, it is my conclusion that this Court ordinarily has no jurisdiction concerning the enforcement of employee rights as contained in the BCEA, other than those which consist of monetary claims. In the latter class of cases there is concurrent jurisdiction with the civil courts, with the proviso that any orders as to costs should be reflective of the quantum of the claim, in accordance with the approach of Van Niekerk J in the *Stanford Driving School* case referred to above.

25. A corollary of the conclusion that the Labour Court 'ordinarily' has no jurisdiction regarding non-monetary compliance complaints is that it may in certain extraordinary circumstances assert jurisdiction over them. Two such instances are as follows:

    25.1. As is the position in case number 732/10, monetary claims may be accompanied by demands such as those seeking compliance with the obligation to furnish remuneration particulars and a certificate of service in terms of sections 33 and 42 of the BCEA. On their own, for the reasons set out above, claims of that kind would not be entertained. However, where they accompany monetary claims which *do* fall within the Court's jurisdiction the question arises whether they should not be disposed of by that Court at the same time. Plainly, there are considerations of convenience that they should be and it would in my view be competent to do so on the basis of the *causae continentia* rule. In this context it is pertinent that the Act does not impose an absolute jurisdictional prohibition concerning compliance orders of that kind, for they could potentially and unexceptionably present themselves in terms of *inter alia* sections 72(1) and 73(1) of the Act.

    25.2. The requirement of jurisdiction could be satisfied also in those cases where a proper case is made out for the intervention of this Court despite there having been no prior referral to a labour inspector. A clarifying example may be outlined in relation to four aspects of the right to annual leave: (i) If a new employee is given a contract of

employment which provides for less leave than the minimum set out in the BCEA, that should be referred to a labour inspector. (ii) If an employee is informed by his employer some months before his annual leave falls due that it has been cancelled (without good cause), that should be referred to a labour inspector. (iii) If an employee is similarly informed, but so soon before the leave is due that it is not feasible for a timely resolution of the issue to be achieved through the inspectorate (bearing in mind that Chapter Ten involves a number of steps that may potentially have to be taken before a complaint is finalised), then the issue of the withholding of leave could be placed before this Court on an appropriately urgent basis for an order of specific performance. To use the language of the *Bull Brand* decision, this would be an instance of the exercise of the Court's residual jurisdiction. (iv) If an employee is told that he may take leave but that he will not be paid for it, that could be referred to an inspector or found a monetary claim pursuant to section 77(3).

26. I turn now to the application of these conclusions to the three matters before me.

J33/2010

27. The first claim in this matter is for a certificate of service in terms of section 42 of the BCEA. It does not fall within this Court's jurisdiction. The second claim is for documents in respect of a retirement benefit claim. That claim is to be directed to the Motor Industry Autoworkers Pension – Provident Fund which plainly has its own rules. No case has been made out on the papers that those rules contemplate the intervention of this Court in order to secure an employer's observance of the relevant certificates. To the contrary, illustratively, the Pension Funds Act 24 of 1956 prescribes the manner of dealing with a 'complaint', which is defined in broad terms as meaning: "*a complaint of a complainant relating to the administration of a fund, the investment of its funds or the*

interpretation and application of its rules, and alleging - ... (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;". In terms of section 30A of that Act a complainant may place his complaint before the board of the fund and, if not satisfied with the outcome, may refer the issue to the Pension Funds Adjudicator. I may add that it would surprise me if even simpler measures are not available through the Motor Industry Bargaining Council.

J732/10

28. Mr Moji has three claims for payment. The first is for notice pay which, in terms of clause 17.1 of his employment contract, amounts to one month's pay. In this regard, it is relevant that a CCMA arbitrator has held that his dismissal was unfair both substantively and procedurally. Although he was awarded compensation in an amount of R30,000 he remains entitled also to this notice pay: *Evans v Japanese School of Johannesburg* [2006] 12 BLLR 1146 (LC); *SABC v CCMA and others* [2002] 8 BLLR 693 (LAC) at para [20]. His second claim is for *pro rata* leave pay in the sum of R4,924.95 and the third for unpaid salary in the amount of R15,000. Those claims are properly before this Court, save only that the costs are to be limited to the Magistrates' Court scale.

29. There are also claims for remuneration particulars and a certificate of service in terms of sections 33 and 42 of the BCEA. For the reasons set out above, those claims can be disposed of as falling within the scope of the convenience rule.

J427/10

30. This application is similar. There is a notice pay claim for R5,607.20 and a claim for unpaid wages amounting to R6,074 together with a demand for a certificate of service in terms of section 42. An order should be made in respect of all three of these claims but, since the amounts fall

within the jurisdiction of the Small Claims Court, no order as to costs will follow.

Order

31. Accordingly, the following orders are made:

1. In respect of case number J33/2010:

    1.1. The application is dismissed.

    1.2. There is no order as to costs.

2. In respect of case number J732/10:

    2.1. The respondent is directed to pay the applicant the amount of R29,924.95.

    2.2. The respondent is directed to pay the applicant interest on the said sum at the rate of 15,5% per annum *a tempore morae* until date of payment.

    2.3. The respondent is directed to provide the applicant with a certificate of service in terms of section 42 of the Basic Conditions of Employment Act 75 of 1997.

    2.4. The respondent is directed to provide the applicant with particulars of remuneration in terms of section 33 of the Basic Conditions of Employment Act 75 of 1997.

    2.5. The respondent is directed to pay the applicant's costs of this application in respect of the monetary claims on the Magistrates' Court scale.

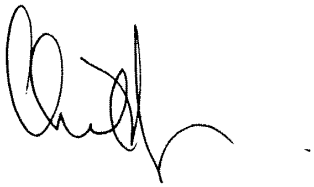
3. In respect of case number J427/10:

3.1. The respondent is directed to pay the applicant the amount of R11,681.20.

3.2. The respondent is directed to pay the applicant interest on the said sum at the rate of 15,5% per annum *a tempore morae* until date of payment.

3.3. The respondent is directed to provide the applicant with a certificate of service in terms of section 42 of the Basic Conditions of Employment Act 75 of 1997.

3.4. There is no order as to costs.



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K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	23 September 2010
DATE OF JUDGMENT:	12 November 2010
FOR APPLICANTS:	Mr W P Schöltz of Jansens Incorporated