IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1028/14

In the matter between:

THE INDEPENDENT MUNICIPAL AND
ALLIED TRADE UNION **First Applicant**

JL FOURIE **Second Applicant**

EM MABATSI **Third Applicant**

C OLIVIER **Fourth Applicant**

IM LEWIS **Fifth Applicant**

and

CITY OF TSHWANE METROPOLITAIN MUNICIPALITY **First Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL **Second Respondent**

Date heard: 15 November 2019

Delivered: 6 February 2020

JUDGMENT

RABKIN-NAICKER, J

[1] This is a point *in limine* arising from a pre-trial minute signed by the parties. The first respondent contends that the dispute between the parties is a dispute of interest and that this Court does not have jurisdiction to hear the matter. The point *in limine* arises subsequent to the amendment of the statement of case and answer thereto.

[2] Crisply put, it is the applicant's case that once a decision was taken by the Municipality to implement the Migration Collective Agreement (Migration CA), which contained a migration and placement policy, the individual applicants had a right to be progressed to the top notch of their salary scale. The legal effect of such a decision, they contend, is that the terms of their contracts were amended to increase the remuneration that they were entitled to. On this basis they submit that this Court has jurisdiction to hear their claim under the provisions of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA).

[3] It is submitted on behalf of the applicants that they do not rely on the Migration CA *per se*, but rather a decision that was taken later, to give effect to the Migration CA, in respect of the applicants.

[4] On 25 May 2005, the acting general manager: human resources of the Municipality, informed the individual applicants in writing, after they had objected to their placement as administration officers to the Appeal Committee in terms of the Migration CA, that they had been placed as financial officers "contractual to incumbent" and that the finance department amended its organizational structure to accommodate the position.

[5] A further grievance laid by them in 2012 complained that although they had been finally placed in the finance department as financial officers, they were

[1] Act 75 of 1997.

not progressed to the top notch of the salary scale which applied to the position.

[6] It is the Municipality's case that the applicants' amended statement of claim attempts to circumvent the jurisdictional difficulty which was presented by their initial reliance on the terms of the Collective agreement: Migration, which required the application and interpretation of the Collective Agreement in order to ascertain the rights of the applicants regarding their claim or salary progression.

[7] The Municipality further points out that the applicants failed to attach their contracts of employment to the papers or the 'conditions of service document'. The latter, it points out, is also a Collective Agreement. It is also pointed out that the salary notch progression is based on annual merit increment assessment in any event. The following paragraphs in the amended statement of response bear recording:

> "10. The difficulty facing the Applicants case as set out in the amended statement of claim is that, the primary source documents dealing with the progression of salary notches is the Migration CA and the CA: conditions of service, however as they pose a jurisdictional conundrum for the Applicants, they resorted to ulilise unrelated documents and facts in a piecemeal fashion in an attempt to substantiate their claim.
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> 11. Without the Migration CA and the CA conditions of service, the Applicants cannot sustain a cause of action for the relief they seek.
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> 12. For the purposes of completion, the CA: Conditions of service……., specifically clause 9.4. with the heading Salary Increments provides as follows under Clause 9.4.1:
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> > 12.1 An employee's salary may be increased by at least one notch on the anniversary date after a performance appraisal had been conducted in terms of the First Respondent's approved system and if the results indicate that the employee complied with the standards required."

[8] This Court can determine the issue of jurisdiction *mero motu* or on application. The Municipality argues that this is in fact an interest dispute and what the

applicants in fact seek are higher salaries. Their case could also be characterized as an unfair labour practice dispute regarding the failure to effect notch increases which the Municipality states is a discretionary power. What the dispute is not, as the applicants' assert, is one in terms of section 77(3) of the BCEA. No terms of the contracts of employment are referred to in the amended statement of claim, and as pointed out above, reference to the conditions of service are to a collective agreement.

[9] Section 77 of the BCEA is one of the other laws referred to in section 157(1), which confers jurisdiction on the Labour Court to determine certain issues arising under that Act. The pertinent provision for the purposes of this matter s 77(3), which states:

> '77 Jurisdiction of Labour Court …
>
> (3) 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.' (Emphasis added.)

[10] Section 77A sets out the powers of the Labour Court to make orders and provides that:

> '[T]he Labour Court may make any appropriate order, including an order— …
>
> (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.'

[11] In the matter of *National Union of Metalworkers of SA and Others v Micromega (Pty) Ltd*[2] LeGrange J considered the Labour Appeal Court (LAC) authority on the interpretation of section 77(3) and stated:

> "[15] The leading case on interpreting what is meant by the phrase 'a matter concerning a contract of employment' in s 77(3) of the BCEA is *Rand Water v Stoop & Another*. In that case, the LAC found that an employer's counterclaim for fraud arising from an alleged breach of an

[2] (2018) 39 ILJ 2048 (LC).

employee's contractual obligation to act in good faith could be entertained simultaneously with a claim for unfair dismissal. Importantly, the LAC held that in that case, the appellant employer's 'counterclaims are pleaded as arising out of and related to the contract of employment that existed between the appellant and the respondents'.

The LAC, amongst other findings stated:

'[21] Generally the Labour Court and this court have held that if an issue in dispute relates to; is linked to; or connected with an employment contract then the Labour Court does have jurisdiction in terms of s 77(3) of the BCEA to entertain such a dispute.

…

[30] … The word "concerning" while conveying a cause and effect does not convey a meaning that some causes and effects are acceptable and others not or that there has to be a direct or indirect link between the contract of employment and the claim.'

[16] The court also held (at para 39) that:

'I am satisfied that s 77(3) read with s 77A(e) favours an interpretation bringing within its ambit the type of claim instituted by the appellant in this matter as:

39.1 The word "concurrent" in s 77(3) places the Labour Court in exactly the same position as the High Court with the same powers and authority in relation to matters concerning a contract of employment.

39.2 The last part of s 77(3) provides the Labour Court with jurisdiction irrespective of whether any basic condition of employment constitutes a term of the employment contract. This demonstrates that the Labour Court has jurisdiction over any claim as long as it involves a contract of employment.

39.3 The words "concerning a contract of employment" mean about or in connection with an employment contract. The pleaded claim clearly falls within this categorization.

> 39.4 The words "any matter" in s 77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and illiquid, are included.'

[12] In addition to considering the above, the following dictum in the *Micromega*[3] judgment is relevant:

> "[17] What is important to notice in all of the above is that the issue in dispute must in some way be linked causally, whether directly or indirectly, to an employment contract…."

[13] In the Court's view the true issue in dispute in this matter is the failure of the first respondent to increase the salary notches of the applicants over time which would have resulted in increases to their remuneration. The applicants' pleadings do not rely on clauses of their individual employment contracts and further do not allege breach of those contracts. The "legal Issues" pleaded are as follows:

> "13.1 The issue whether the second to fifth applicants obtained legal rights in terms of the aforementioned Standard Conditions of Service, the second to fifth applicants' Standard Condition of Service, contracts of employment; the first respondent's staff policy, and the aforementioned resolution adopted by the council of the first respondent and had obtained the right to be progressed to the top notch of the first respondent's salary grade D1;
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> 13.2 Whether the first respondent has a duty to comply with the aforementioned right of the second to fifth applicants; and
>
> 13.3 Whether the above honourable court has the power to direct the first respondent to remunerate the second to fifth applicants on the top notch of their applicable salary scale, to wit D1".

[14] I find that the claim does not relate to a contract of employment for the purposes of section 77(3) of the BCEA for the reasons set out above. In my view, it would not be entertained in a civil court as a contractual claim. This Court does not have jurisdiction to entertain the matter.

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[3] *Supra* n 2.

[15] The first respondent has submitted that given this referral was frivolous, a cost order should be made. However given the ongoing relationship between the parties, I decline to make such an order. My order is as follows:

Order

1. The referral is dismissed for want of jurisdiction.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Rudolf Kuhn Attorney

First Respondent: Gildenhuys Maaltji Attorneys