



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Reportable

Case no: C444.2021

In the matter between:

OBED JOHN NIMFASHA & 55 OTHERS

**First to Fifty-sixth
Plaintiffs**

and

**BOKWE'S TRADING CC T/A BOKWE'S
SECURITY SERVICES**

Defendant

Heard: 31 October 2024

Delivered: 4 November 2024

Summary: (Claim for statutory and, or alternatively contractual payments under BCEA - Interpretation of s 73A – employees falling under scope of National Minimum Wage Act – Claim for severance pay – Labour Court lacking jurisdiction under s 41(10) of the BCEA. - Claims for payments of NMWA employees to be referred to arbitration under s 73A(1) - Labour Court lacking jurisdiction - No order as to costs)

JUDGMENT

LAGRANGE, J

[1] The plaintiffs in this matter are claiming various payments from the former employer, the defendant¹, namely, alleged unlawful deductions, one month's salary for July 2020, annual leave pay due on termination (section 40 of the Basic Conditions of Employment Act, 75 of 1997 [‘the BCEA’]), severance pay (section 41 of the BCEA), bonus pay and remuneration for working on Sundays and public holidays.

[2] The plaintiffs’ services terminated on or about 20 June 2020. There is a dispute whether they were retrenched or resigned.

[3] The matter was set down for trial on 31 October 2024. However, the defendant had raised a number of jurisdictional points, which have to be determined before the trial can proceed. The parties agreed that, if the jurisdictional points were decided in favour of the plaintiffs, both parties would require an adjournment before they could commence leading evidence. Following argument, the trial was postponed pending determination of the jurisdictional points.

[4] The two jurisdictional points concern whether:

4.1 the plaintiffs should have referred their claim to the CCMA because they fall under the National Minimum Wage Act 9 of 2018, and

4.2 the court has jurisdiction to determine a claim for severance pay.

[5] I will deal with the second issue first.

¹ Designation of the parties amended to confirm to new Labour Court Rules.

Labour Court's jurisdiction to hear dispute over severance pay

[6] At this stage there is still a dispute whether the plaintiffs were retrenched or had resigned but that does not prevent a ruling being made on whether the court has jurisdiction to adjudicate the claim for severance pay.

[7] The following provisions of s 41 of the BCEA are relevant:

"41 Severance pay

1) For the purposes of this section, 'operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer.

(2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act 24 of 1936), severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.

....

(6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the CCMA, if no council has jurisdiction.

...

(8) The council or the CCMA must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, the employee may refer it to arbitration.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount."

(emphasis added)

[8] The dispute which is before the court is a claim for payment of various components of remuneration and severance pay. It not a dispute about a dismissal based on the employer's operational requirements. The payment of statutory severance pay is due if the plaintiffs were retrenched, or their services are terminated under the Insolvency Act as contemplated by section 41 (2) of the BCEA. In this case, there is no dispute that the plaintiffs' employment was terminated. The only Issue in dispute is whether it terminated because they were retrenched or because they resigned. Determination of that issue will decide if they are entitled to statutory severance pay or not. That question clearly falls within the ambit of section 41 (6) of the BCEA, in terms of which the entitlement must be determined by the CCMA. The plaintiffs have not referred a dispute about an unfair dismissal for operational requirements to the court. It follows there is no dispute before this court about a dismissal for operational reasons, in which the liability for the payment of severance might arise as an issue incidental to the determination of the main dispute.

[9] Consequently, I am satisfied that the determination of the plaintiffs' entitlement to severance pay in this instance falls to be determined under section 41(2) of the BCEA and this court has no jurisdiction to determine it.

Jurisdiction to determine other claims for various statutory payments claimed by the plaintiffs

[10] The defendant has objected to the court determining these other claims because it contends that s 73A(1) of the BCEA requires the plaintiffs to refer their payment claims to the CCMA for arbitration. The pertinent provisions of s 73A are set out below.

[11] Section 73A was introduced by the Basic Conditions of Employment Act 7 of 2018, which came into effect on 1 January 2019².

"73A Claims for failure to pay any amount

² GN R1378 in GG 42104 of 12 December 2018

(1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.

(2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of section 6 (3).

(3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates' Court or the small claims court.

(4) The CCMA must appoint a Commissioner in terms of section 135 of the Labour Relations Act, to attempt to resolve by conciliation any dispute that is referred to the CCMA in terms of subsection (1).

(5) The CCMA must commence the arbitration of a dispute contemplated in subsection (1) immediately after certifying that the dispute remains unresolved in terms of section 135 (5)."

(emphasis added).

[12] Prior to this amendment, the CCMA had no power to determine any claim due to an employee by virtue of the BCEA, an employment contract or sectoral determination³. Barring the powers of labour inspectors to issue compliance orders under s 69 of the BCEA, it was the Labour Court and civil courts which had the jurisdiction to hear and determine any dispute about an employment contract for any class of employee.⁴ To complement its contractual jurisdiction under s 77(3), s 77A(e) of the BCEA endows the Labour Court with the power to make "... a determination that it considers reasonable on any

³ Perhaps the only exception to this concerns disputes about the interpretation and application of collective agreements, which could result in an award requiring a payment to be made to employees such as the award under consideration in *Civil & Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 2055 (LC).

⁴ S 77(3) of the BCEA.

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”.

[13] It needs to be mentioned that the BCEA deems basic conditions of employment under the Act to be terms of the employment contract, subject to certain exceptions, such as being superseded by more favourable legal provisions⁵. Consequently, statutory entitlements due under the BCEA are enforceable under s 77 as deemed terms of the employment contract.

[14] What was the effect of introducing s 73A? The first point to note is that s 73A is confined to claims for payments. Thus, a claim for specific performance of an obligation not sounding in money remains within the scope of claims under s 77A(e) of the BCEA. The second obvious effect of the new section is that the CCMA is given the power to deal with some claims for payments due under the Act, minimum wage determinations, collective agreements, sectoral determinations and individual contracts of employment, without the need to bundle up that claim with a claim for severance pay or unfair dismissal. However, it is only employees identified in section 1 of the National Minimum Wage Act, 2018 ('the NMWA') who may utilise the dispute resolution process of conciliation and arbitration⁶ to pursue claims for payments due.

[15] In this matter, it is common cause the plaintiffs were employees who fell under the scope of the NMWA. The central interpretive question is whether those employees are precluded from pursuing their claim in this court or other civil courts, under s 77A(e) of the BCEA or, to put it differently, whether they can choose to proceed by way of arbitration under s 73A(1) or by way of adjudication under s 77A(e). The plaintiffs maintain they have an option which channel to follow. By contrast, the defendant argues that s 73A creates an exclusive channel for the determination of claims of employees covered by the NMWA and excludes them from pursuing claims for payment in the court system.

⁵ S 4 of the BCEA.

⁶ S73A(1) read with sub-sections (4) and (5).

[16] During argument much emphasis was placed on whether the word ‘may’ in the phrase “*may refer a dispute to the CCMA*” in s 73A(1) was intended to be permissive or imperative. In my view, it is only when the other provisions of s 73A are considered as a whole that one can arrive at the correct interpretation of 73A(1) and whether it offers NMWA employees a choice of arbitration or adjudication to resolve payment disputes, or actually restricts them to arbitration.

[17] Before s 73A was introduced, there were two other channels by means of which employees could claim for amounts due to them under the BCEA in arbitration proceedings. Under s 17 of the Act, employees could institute claims for payment of such amounts in conjunction with claims of unfair dismissal before an arbitrator or before this court.⁷ Secondly, such claims could be launched jointly in arbitration proceedings to obtain severance pay⁸. Both these conditional remedies remain intact. Since the 2018 amendments, a claim for payment under the NMWA can also be made jointly in those two kinds of proceedings.

[18] What s73A(e) provided, for the first time, was an opportunity for NMWA employees to use arbitration proceedings to enforce payment claims under that Act or the BCEA, without having to bring that claim jointly with an unfair dismissal claim or a claim for severance pay. Thus, it expanded their arbitration options. However, if that was the only purpose of introducing s 73A, that object would have been achieved by sub-sections (1), (4) and (5) of the section.

[19] The rights of NMWA employees under S 73A are not only set out in subsection 73A(1) though. Section 73A(3) reaffirms the right of all other employees to refer their claims of non-payment to the courts for adjudication. Claims for non-payment were always capable of being pursued under s 77A(e) read with s 77(3). There was no reason to repeat this in s 73A(3) because that right is unaffected by sub-sections 73A(1),(4) and (5). What is different is that s

⁷ S 17(2) of the BCEA.

⁸ S 17(3) of the BCEA.

73A(3) limits recourse to the courts for payment claims only to employees “*other than the employee or worker referred to in subsection (1)*”. On any plain reading of that qualifying phrase, it is difficult to see how it can bear any other meaning than to exclude NMWA employees from the class of employees who can use the courts to pursue payment claims.

[20] Considered in context, s 73A(1) provides NMWA employees with an arbitration mechanism to resolve payment disputes, which is unavailable to other employees. Correspondingly, other employees may continue to pursue payment claims in the courts (leaving aside the undertaking and compliance order mechanisms in s 68 to s70 of the BCEA) but have no access to the arbitration mechanism. The fact that it does not provide NMWA employees with a court remedy does not undermine their right to a fair public hearing before a court or other impartial tribunal to resolve their dispute as provided for in section 34 of the Constitution. The arbitration mechanism effectively complies with section 34, and was most probably intended to provide a low cost procedure for NMWA employees.

[21] In light of the discussion above, I am satisfied that the correct forum for the plaintiffs to pursue their claims for payment of statutory entitlements under the BCEA or in contract is the CCMA and not this court. In the circumstances, the objection that this court lacks jurisdiction to hear their claim must be upheld.

Costs

[22] Both parties agreed that in the absence of a clear precedent dealing with the jurisdiction of the court over remunerative claims of NMWA employees, an award of costs would not be appropriate. I agree.

Order

1. In light of the reasons given above, I find that:

a. The Labour Court has no jurisdiction to consider a claim for severance pay as the claim is not brought under s 74(3) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA').

b. The Labour Court has no jurisdiction to determine the plaintiffs' claims for statutory payments as they were employees in terms of the National Minimum Wage Act 9 of 2018, which fall within the jurisdiction of the CCMA in terms of s 73A(1) of the BCEA.

2. Accordingly, the *in limine* objections of defendant are upheld and the referral is struck from the roll, for lack of jurisdiction.

3. No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa.

Representatives:

For the Applicants: C May of BDP Attorneys

For the First respondent: T Du Preez

Instructed by: Van der Spuy and partners