IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J65/2022

In the matter between:

MOGAMAT-TAPE PETERSEN **Applicant**

and

SUPPLIER PARK DEVELOPMENT COMPANY SOC LTD t/a AUTOMOTIVE INDUSTRY DEVELOPMENT CENTRE **Respondent**

Heard: 12 October 2023

Delivered: 12 October 2023

***EX TEMPORE* JUDGMENT**

PHEHANE, J

Introduction

[1] The applicant approaches this Court on a claim ostensibly in terms of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA) and seeks

[1] Act 75 of 1997, as amended.

declaratory relief that his claim is one in terms of the aforesaid section of the BCEA, that the "*action of the respondent be declared unfair and unjust*", and that the respondent be ordered to pay the applicant the performance bonus for the financial year 2019 to 2020 "*as required*".[2]

[2] The application is opposed by the respondent. In its answering affidavit, the respondent raises a preliminary point that this Court lacks jurisdiction, as on the pleadings of the applicant, his case is that the respondent committed an unfair labour practice as contemplated in section 186(2)(a) of the Labour Relations Act[3] (LRA) and therefore, the applicant ought to have launched an unfair labour practice dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA).

[3] In response to the preliminary point, the applicant avers that his claim is premised on section 77(3) of the BCEA, as the section provides that this Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. Further, that section 77A(e) of the LRA provides that this Court has the power to make 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.

[4] The applicant claims that a term and condition of his employment contract included the payment of an annual performance bonus. The respondent's failure to pay him his performance bonus that was due and payable to him for the financial year 2019/2020 constitutes an unfair labour practice. In the circumstances, he seeks the relief as prayed for in his notice of motion.

[5] It is trite that jurisdiction is determined on the pleadings.[4]

[2] Notice of motion, prayers 1, 2 and 3, on p 2.
[3] Act 66 of 1995, as amended.
[4] *Chirwa v Transnet Ltd and Others* [2008] 2 BLLR 97 (CC).

[6] In *My Vote Counts NPC v Speaker of the National Assembly and Others,*[5] the Constitutional Court, quoting *Chirwa v Transnet Ltd and Others*[6] stated as follows:

> 'A court must assess its jurisdiction in light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction … In the event of the court's jurisdiction being challenged at the outset (*in limine)*, the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence … It follows that 'the substantive narrative' of a claim cannot determine whether a court has jurisdiction to hear it.'

[7] The applicant's pleadings state that the refusal to pay the performance bonus amounts to an unfair labour practice in terms of section 186(2)(a) of the LRA.[7]

[8] Section 186(2)(a) of the LRA provides thus:

> '"Unfair Labour Practice" means 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* relating to the provision of benefits to an *employee*'. (Emphasis added).

[9] The founding affidavit is replete with allegations regarding the conduct of the respondent constituting an unfair labour practice.[8]

[10] In order for the applicant to bring his claim within the purview of section 77(3) of the BCEA and to clothe this Court with jurisdiction in terms of this section, the applicant must demonstrate that there has been a breach of his employment contract.

[5] 2016 (1) SA 132 (CC) at paras 132 to 134.
[6] [2008] 2 BLLR 97 (CC).
[7] Founding affidavit at para 15 on p 9.
[8] See: Respondent's heads of argument at para 16 and its sub paragraphs and para 17.

[11] In his pleadings, the applicant does not plead breach of contract. The relief sought by him is not relief consequent upon a breach of contract, that is, specific performance or a claim for damages.

[12] It is common cause that the applicant resigned on 28 February 2021. It is unclear when the alleged breach occurred. The Performance Management policy upon which the applicant relies (I deal with this later), states in clear terms, that the performance bonus is discretionary. This is echoed in clause 6.1 of the applicant's employment contract.[9] The applicant in somewhat contradictory terms, states that he complied with this policy, in the same breath, he states that this policy was not applicable to him. Mr. Sadike for the applicant, conceded that the Performance Management policy that is effective from 1 April 2019 is indeed, applicable to the applicant. This policy was incorporated in the applicant's employment contract.

[13] The applicant's case as pleaded is simply this: the failure by the respondent to pay his annual performance bonus is a contravention of the Performance Management policy and this constitutes an unfair labour practice. On the pleadings therefore, the applicant nailed his colours to the mast as his dispute is an unfair labour practice dispute under the dispensation of the LRA. In the circumstances, this Court lacks jurisdiction to adjudicate an unfair labour practice dispute in terms of section 186(2)(a) of the LRA, as such dispute is to be conciliated, failing conciliation, arbitrated by the CCMA or a bargaining council with jurisdiction.[10]

[14] In the circumstances, the preliminary point succeeds.

[15] If I am wrong that this Court lacks jurisdiction (which I do not believe so), then I would dismiss the applicant's claim for the reasons that follow.

[16] The applicant has failed to prove breach by the respondent of his employment contract. The applicant's employment contract stated that the policies of the

[9] p 45.
[10] Section 191 of the LRA, read with section 157(5) of the LRA.

respondent *as they are amended from time to time*, are incorporated into his employment contract. This included the Performance Management policy that was revised and came into effect on 1 April 2019. During the course of 2019 and 2020, the employees of the respondent (including the applicant) were invited to attend workshops where they were appraised of the revised Performance Management policy that would come into operation on 1 April 2019.[11] The applicant attended the workshop in February 2020 and he admits that he attended the policy workshop in 2019.[12] The Performance Management policy states that the payment of the annual performance bonus is discretionary and is dependent on the performance of the respondent for the period under review and is paid on approaval of the Board of the respondent.

[17] The applicant avers that he met the requirements in clauses 6.3.5 (f) to (g) and 6.6.1 of the Performance Management policy, and thus he is eligible to receive his bonus payment.[13] The applicant claims payment for the period 2019/2020. It is common cause of the Performance Management policy came into effect on 1 April 2019 and the operation of the policy falls during the period that the applicant claims payment of his bonus. Put differently, the policy was in effect when he resigned in February 2021 and it applied to him.

[18] The respondent avers that in May 2021, its Board approved[14] the payment of the performance bonus for the financial year 2019/2020 and therefore, in terms of the provisions of clause 6.6.1 (i) (vi) of the Performance Management policy, the applicant forfeited his bonus payment as he was no longer an employee when the performance bonuses were paid out.

[19] Clause 6.6.1 (i) (vi) of the Performance Management policy reads as follows:

> 'Any employee who shall not be in the employment of the GGDA Group at the time when the performance bonuses are paid, he/she shall forfeit performance bonus for the period under review [*sic*].'[15]

[11] See: answering affidavit at paras 31 to 33 and the annexures mentioned there in,
[12] See: replying affidavit at para 8.3 on p 96.
[13] Founding affidavit at para 14 on p 9.
[14] The resolution of the Board appears at annexure "AA1" to the answering affidavit on p 74.
[15] p 31.

[20] The applicant was aware of the aforesaid provisions, as he attended the workshops and the Performance Management policy was made available to all employees before it became operative. Oddly, the applicant avers that he complied with clause 6.3.5 and 6.6.1 of the policy as aforesaid. The provision of employees forfeiting the performance bonus payment as quoted above applies to the applicant as, at the time when the performance bonus was paid, he had resigned and was no longer in the employ of the respondent. In the circumstances, no breach occurred.

[21] When presented with the facts as contained in the answering affidavit that the performance bonus was approved by the Board in May 2021, in reply, the applicant alleges that the respondent pays out performance bonuses in December each finacial year. This simply cannot be, as item 6.3.5 of the Performance Management Policy (which clause the applicant on his own version, states that he complied with), entitled "*Year-end (final) performance assessment,*" states that the *year-end (final)* assessment will be conducted in *April/May each year* to obtain a full view of the performance for the full 12 months of the year and the year end performance shall inform the payment (or non-payment) of a performance bonus.[16] As stated above, the applicant resigned in February 2021 and when he did not receive his bonus payment, on his own version, he was informed by the respondent after he resigned, that this was because he was no longer an employee and therefore forfeited the payment of his bonus.

[22] In my view, if on the applicant's version, the respondent paid bonuses in December 2020 as a norm, the applicant does not explain why he did not make enquiries at that point in time (December 2020 to February 2021) as to the non-payment of his bonus. It is apparent that he only made such enquiries after he resigned in February 2021. In any event, the allegation that bonus payments are usually in December was not pleaded in the founding affidavit – it is trite that an applicant must make out his/her case in the founding affidavit.

[16] See: clause 6.3.5 (a), (d) and (g) of the performance management policy on p 27.

[23] In view of the aforegoing, on the *Plascon-Evans*[17] principle I find that the version of the respondent is more probable, that is, the applicant forfeited the payment of his performance bonus for the year 2019/2020 because he resigned from its employ. This is in terms of clause 6.6.1 (i) (vi) of the Performance Management policy. In the circumstances, no breach of contract would arise.

[24] In light of the afore-going, the following order is made:

Order

1. The preliminary point is upheld.
2. The referral is struck off the roll for want of jurisdiction.
3. There is no order as to costs.

VARIATION OF ORDER

PHEHANE, J

[1] The applicant launched an application in terms of the provisions of rule 7.

[2] Paragraph 2 of the order handed down on 12 October 2023 is accordingly varied as follows:

Order

2. The application is struck off the roll for want of jurisdiction.

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M. T. M. Phehane

Judge of the Labour Court of South Africa

[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Appearances:

For the Applicant	:	Adv T. Sadike
Instructed by	:	Oosthuizen, Du Toit, Berg & Boon Attorneys
For the Respondent	:	Adv O. Mokgotho
Instructed by	:	Malatji & Co. Attorneys