



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 379/12

In the matter between

ZAZI PROMATHEUS NTSHANGASE

Applicant

and

TRANSNET NATIONAL PORTS AUTHORITY

Respondent

Heard: 21 August 2014

Delivered: 26 June 2015

Summary: When the applicant has withdrawn his dispute from the Labour Court, his application to refer the dispute to arbitration cannot succeed as after the withdrawal there is no dispute capable of being transferred before the Labour Court

JUDGMENT

LALLIE J

- [1] The applicant seeks an order referring the unfair labour practice dispute he had referred to the Labour Court to the Transnet Bargaining Council which I will refer to as the bargaining council in this judgement, in terms of section 158 (2) (a) of the Labour Relations Act 66 of 1995 (the LRA). The application is opposed by the respondent.
- [2] The factual background of this matter is that the applicant was employed by the respondent as a dredging operator in its Durban harbour. In December 2011, he responded to an advertisement for five vacant positions of Tug Masters at the Coega Harbour in Port Elizabeth. His application was not successful and only two of the five positions were filled. He felt aggrieved and filed a grievance. He subsequently referred a dispute to the bargaining council. In the referral form, the applicant indicated the nature of his dispute as an unfair labour practice concerning promotion, demotion, probation, training and provision of benefits. He summarised the facts of the dispute as follows: "I have discriminated because I am not from Eastern Cape". The outcome he desired was appointment as Tug Master. The dispute was scheduled for conciliation at the end of which a certificate of outcome was issued. It reflects that the dispute concerns unfair discrimination and directed the applicant to refer the unresolved dispute to the Labour Court.
- [3] On 23 August 2012, the applicant filed a statement of claim in which he alleged that the dispute against the respondent raises the issue of discrimination as a form of an unfair labour practice. He identified section 52 (3) (a) of the Employment Equity Act 55 of 1998 ("the EEA") as the piece of legislation which granted this court the necessary jurisdiction to adjudicate his dispute. He submitted that the respondent discriminated against him unfairly and committed an unfair labour practice that the decision not to appoint him was not fair and objective, the respondent failed to give effect to the result of the assessment process, discriminated against him on the basis that he was not based in the Eastern Cape and that he ostensibly did not have the necessary experience to deal with big ships.
- [4] The respondent raised an exception against the statement of claim. The first ground for exception was that this Court lacked jurisdiction over the applicant's

dispute because of his failure to refer a discrimination dispute to the CCMA for conciliation before referring it to this Court. It added that this Court lacks jurisdiction to adjudicate the unfair labour practice dispute as it falls under the jurisdiction of either the CCMA or the bargaining council. A further ground was that the statement of claim lacked sufficient allegations to sustain a cause of action alternatively, it is vague and embarrassing and that the applicant failed to allege a valid ground of discrimination.

[5] On 16 August 2013, the following order was granted by agreement between the parties:

- '1 The exception is upheld.
- 2 The statement of claim is struck out.
- 3 The applicant is granted fifteen days within which to amend his statement of claim.
- 4 The Applicant to pay the costs occasioned by the bringing of the exception'.

[6] On 22 October 2013, the applicant filed his amended statement of claim to which the respondent raised an exception on 27 November 2013. On 7 August 2014, the present application was filed. Its founding affidavit is attested to by the applicant's attorney. The gist of this application is that the applicant does not intend pursuing his discrimination claim. The only claim he is proceeding with is unfair labour practice in respect of the respondent's failure to promote him. He therefore seeks an order referring his unfair labour practice dispute to the bargaining council. The applicant further submitted that there are no grounds for the respondent to seek costs on the attorney and client scale without giving him prior notice. Some of the grounds on which this application is opposed are that subsequent to the order of 16 August 2013 there was no claim before this Court and there is therefore no claim to be transferred to the bargaining council if this Court lacks jurisdiction to transfer the dispute which has not been conciliated.

- [7] Of all the issues raised, the issue of jurisdiction is dispositive of this application. Section 157 (5) of the LRA provides as follows:

‘Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate in and resolves dispute if this Act requires the dispute to be resolved through arbitration.’

- [8] The applicant submitted that he has withdrawn the unfair discrimination claim against the respondent and intends pursuing the unfair labour practice claim only. It is common cause that the unfair labour practice dispute falls under the jurisdiction of the bargaining council. In terms of section 157 (5) of the LRA, the Labour Court lacks the necessary jurisdiction over the unfair labour practice disputes. By withdrawing the unfair discrimination dispute, the applicant removed his dispute from the jurisdiction of the Labour Court. The applicant submitted that an order should be granted referring the unfair labour practice dispute to the bargaining council. The manner in which the Labour Court may exercise the discretion bestowed on it in section 158 (2) of the LRA is expressed thus in *Wardlaw v Supreme Mouldings (Pty) Ltd*¹:

‘Where as a reason for dismissal the employee has alleged a reason that falls within s 191 (5) (b), the court provisionally assumes jurisdiction but, if the court later takes the view of its later becomes “apparent” to the court that the reason for dismissal is one that falls under s 191 (5) (a), it then declines jurisdiction and follows the s 158 (2) (a) or (b) route’.

- [9] The above interpretation makes it clear that not every matter which has been erroneously referred to this Court may be referred to arbitration in terms of section 158 (2) (a) of the LRA. There is a duty on the applicant to refer a dispute to the correct forum. Section 158 (2) of the LRA provides for those circumstances where it is not clear at the time of the referral of the dispute that the Labour Court lacks jurisdiction. There was a duty on the applicant to decide whether to refer his dispute as an unfair labour practice or discrimination but not both. He made his choice to refer his dispute as an unfair discrimination dispute in terms of the EEA. He chose to withdraw it and there is therefore no dispute before this Court. His case falls outside the purview of section 158 (2)

¹ (2007) 28 ILJ 1042 (LAC) at para 23.

(a) of the LRA. The Labour Court may, in terms of section 157 (5) of the LRA dismiss a claim which has been referred to it although it falls under the jurisdiction of the bargaining council for lack of jurisdiction. The applicant failed to provide grounds justifying the referral of his dispute to arbitration living this Court with no jurisdiction to deal with any aspect of his dispute.

[10] I have considered the submissions made on behalf of both parties on the issue of costs. Considerations of the law and fairness require that the applicant pay the respondent's costs. It is the applicant's failure to determine the correct course of action in good time which compelled the respondent to raise the second exception and oppose the current application.

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

11.1 The application to refer the applicant's unfair labour practice dispute to arbitration is dismissed with costs.

11.2 The applicant is ordered to pay the respondent's costs of the exceptions.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Gajjar

Instructed by: Rushmere Noach Inc.

For the Respondents: Advocate Grogan

Instructed by: Joubert Galpin Searle

LABOUR COURT