



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 20/18

In the matter between:

AMALUNGELO WORKERS' UNION

First Applicant

FURTHER 75 APPLICANTS

2nd to 76th Applicants

and

PHILIP MORRIS SOUTH AFRICA (PTY) LIMITED

First Respondent

LEONARD DINGLER (PTY) LIMITED

Second Respondent

Neutral citation: *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another* [2019] ZACC 45

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Judgment: Jafta J (unanimous)

Decided on: 26 November 2019

Summary: Basic Conditions of Employment Act 75 of 1997 — Section 77 — Labour Court's jurisdiction — Labour inspector's functions

ORDER

On appeal from the Labour Appeal Court:

1. Leave to appeal against the order pertaining to claim one is granted.
2. The order of the Labour Court is set aside to the extent that it refers to claim one.
3. The matter is remitted to the Labour Court.

JUDGMENT

JAFTA J (Mogoeng CJ, Froneman J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This application for leave to appeal concerns the question whether, barring claims based on contracts, the Labour Court's jurisdiction under the Basic Conditions of Employment Act¹ (Basic Conditions Act) is deferred until a matter has been resolved by a labour inspector, appointed in terms of section 63 of the Basic Conditions Act. The present claim arises from an alleged breach of section 34 of that Act.²

¹ 75 of 1997.

² Section 34(1) provides:

- “(1) An employer may not make any deduction from an employee's remuneration unless—
- (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
 - (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.”

[2] The applicants are Amalungelo Workers' Union and 75 of its members who were employed by Philip Morris South Africa (Pty) Limited and Leonard Dingler (Pty) Limited, the first and second respondents in these proceedings.

Facts and litigation history

[3] The applicants alleged that the respondents have, in contravention of section 34 of the Basic Conditions Act, deducted from their salaries tax in respect of company cars. Based on this allegation, the applicants instituted proceedings in the Labour Court for an order compelling the respondents to refund them for the deducted amounts. They sought an interdict restraining the respondents from continuing to make the deductions in the future.

[4] The applicants also advanced four other claims which do not form part of this judgment. Leave in respect of those claims was refused by this Court on 23 May 2018 in terms of an order that was then issued.³ In the Labour Court the respondents opposed relief in respect of all claims. They filed exceptions and special pleas. One of the points taken in those pleas was that the Labour Court lacked jurisdiction to adjudicate the claims. But the respondents did not dispute the jurisdiction of the Court in respect of the current claim. Instead, that issue was raised by the Labour Court of its own accord and the parties were asked to present argument on the point.

[5] Having heard the parties on the point and relying on earlier decisions, the Labour Court concluded that it had no jurisdiction to entertain the claim. The

³ “The Constitutional Court has considered the applications for condonation and leave to appeal. It has concluded that the application for condonation should be granted but [that the] application for leave to appeal in respect of claims 2, 3, 4 and 5 should be dismissed as it bears no prospects of success. The Court has decided not to award costs. Claim 1 is the subject of separate directions.

Order:

1. The application for condonation is granted.
2. The application for leave to appeal in respect of claims 2, 3, 4 and 5 is dismissed.”

Labour Court ruled that it lacks competence to directly enforce provisions of the Basic Conditions Act in the absence of the assertion that those provisions form part of contractual terms envisaged in section 77(3) of the Act.

[6] The *ratio* of the Labour Court was articulated in these terms:

“To the extent that the applicants object to the Court raising the point of jurisdiction *mero motu*, there can be [no] objection to this; indeed, the court has an obligation to raise any concerns relating to its jurisdiction. To proceed to determine the matter in the absence of jurisdiction would amount to a breach of the rule of law. In so far as the substance of the point is concerned, section 77(1) of the [Basic Conditions Act] provides that subject to the Constitution [and] the jurisdiction of the Labour Appeal Court, and except where the [Basic Conditions Act] provides otherwise, this Court has exclusive jurisdiction in respect of all matters in terms of the Act, except for certain specified offences. Section 77(3) provides that this 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. In *Ephraim v Bull Brand Foods (Pty) Ltd*, this Court held in relation to a claim for notice [to] pay brought in terms of section 77(1) that 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 at least, by a duly appointed functionary. In other words, this Court has no jurisdiction directly to enforce the provisions of the [Basic Conditions Act] – to hold otherwise would undermine the system of enforcement created by chapter 10 of the Act. However, this does not preclude an employee from electing to cast his or her claim in contract and seeking to enforce a basic condition of employment as a contractual claim in terms of section 77(3) – see *Fourie Stanford Driving School*.

While the applicants are correct when they contend that they are not required by the [Basic Conditions Act] to enforce a basic condition of employment relating to what they allege to be unlawful deductions made from their remuneration through the monitoring and enforcement mechanisms established by chapter 10 of that Act, claim 1 is not cast in contractual terms. Indeed, the applicants’ cause of action is the breach of a statutory obligation. The applicants do not assert the existence of a contract, they do not assert its terms or a breach by the respondents of any one or more of those terms. In short, claim 1 discloses a claim that would require this Court

directly and acting in the first instance to enforce section 34 of the [Basic Conditions Act] as a statutory right, and not as a term of an employment contract. In these circumstances, and in the absence of any contentions that bring the claim within the scope recognised by *Stanford Driving School*, this Court has no jurisdiction to entertain claim 1.”⁴

[7] Accordingly, the Labour Court dismissed the claim. Unhappy with this outcome, the applicants sought leave to appeal but their application was also dismissed. And their petition to the Labour Appeal Court suffered the same fate for the reason that there were no prospects of success. The applicants have now approached this Court for leave.

Leave in this Court

[8] As mentioned, this Court dismissed the application for leave in respect of claims other than the current one. In respect of this claim, directions were issued calling on the parties to file written submissions on whether the Labour Court was right to hold that it had no jurisdiction.⁵ The parties have since filed written submissions and the matter is disposed of without an oral hearing.

[9] Given that the matter concerns the jurisdiction of the Labour Court, it cannot be gainsaid that it raises a constitutional issue which brings it within the jurisdiction of this Court.

⁴ *Jacobs v Philip Morris South Africa (Pty) Limited*, unreported judgment of the Labour Court, Case No. JS 870/16 (12 May 2017) (Labour Court judgment) at paras 8-9.

⁵ “The Chief Justice has issued the following directions:

1. The parties are directed to deliver to the Registrar and serve on all other parties written submissions on:
 - (a) whether, the Labour Court was correct in holding that it had no jurisdiction in respect of claim 1.
2. The written submissions must be lodged by—
 - (a) the applicant on or before 15 June 2018; and
 - (b) the respondent on or before 22 June 2018.
3. Further directions may be issued.”

[10] This Court has not had occasion to interpret the relevant provisions and determine the scope of the Labour Court's jurisdiction under the Basic Conditions Act. Its decision on the matter would provide valuable guidance to workers and their trade unions on the one hand and the employers, on the other. A clarification of the law on this point will also be useful to the Labour Courts. Moreover, prospects of success appear to be reasonably good. Therefore, leave to appeal must be granted.

Issue

[11] The sole issue that arises is whether the Labour Court has jurisdiction to adjudicate the current claim. The answer to this question lies in the proper interpretation of the relevant provisions of the Basic Conditions Act.

[12] But before I interpret those provisions, it is necessary to describe the claim we are concerned with and also outline the correct approach to the interpretation of the provisions in question.

The claim

[13] This is how the applicants have formulated the claim:

- “4. From the date of acquisition to the date the car is granted to the employee, the value of the car depreciates.
5. Likewise, from the date on which an employee is granted the right of use of any motor vehicle the value of the motor vehicle also depreciates.
6. The practical effect of depreciation on motor vehicles is (and should be) the reduction of the employee's payment of tax on motor vehicle fringe benefit. Therefore, the employee should pay less tax annually as the cars depreciate annually.
7. Notwithstanding the depreciation on motor vehicles and notwithstanding the above-mentioned practical effect of depreciation on motor vehicles, since the date on which the car was granted to each affected applicant until today the respondents are, without affected applicants' prior written agreement, making one and [the] same tax deductions from their remuneration. For example, if

monthly tax on the car was R2000 in 2014 (when the car was given to the employee in 2014), the respondents still knowingly continue deducting R2000 tax from the same car since 2014 until today regardless of the depreciation on the same car since 2014 until today.

8. The respondents knowingly make the above-mentioned deductions from the affected applicants' remuneration:
 - (1) before and without the applicants having agreed in writing to the said deductions;
 - (2) in the circumstances where the deductions are not required or permitted in terms of a law, collective agreement, court order or arbitration award;
 - (3) in the circumstances where such deductions are not made to reimburse the respondents for any loss or damage which might have occurred in the course of employment and might have been due to the fault of the affected applicants.
9. The respondents' above-mentioned deductions are unlawful because they:
 - (1) violate the provisions of section 34 of [the Basic Conditions Act], as amended;
 - (2) are not required or permitted in terms of tax laws.
10. In the premises, the affected applicants hereby:
 - (1) claim refunds of the said deductions with full retrospective effect, together with applicable mora interest;
 - (2) pray for an order restraining the respondents from making such deductions from the applicants' remuneration without the applicants' validly obtained written agreement."

[14] It is apparent from the claim that what the applicants seek is to stop the respondents from unlawfully deducting tax from their salaries. And for present purposes we must assume that the allegations are correct. As reasons for asserting that the deductions were unlawful, the applicants aver that those deductions violate section 34 of the Basic Conditions Act and that they are not permitted under the tax laws.

[15] Significantly, in the pleadings the applicants do not say that the claims for a refund and an interdict are based on section 34 of the Basic Conditions Act. Nor do they assert that they seek to enforce that section.

Proper approach to interpreting section 77

[16] The provision that addresses the Labour Court's jurisdiction is section 77 of the Basic Conditions Act. As that section facilitates access to the Labour Court, it must be construed in a manner that complies with section 39(2) of the Constitution.⁶ In various decisions this Court has held that this section enjoins courts to interpret legislation through the prism of the Constitution.⁷ What this entails is that when construing legislation that implicates rights in the Bill of Rights, a court is duty-bound to promote the spirit, purport and objects of the Bill of Rights.

[17] The promotion of those objects is achieved by choosing a meaning that avoids limiting the guaranteed rights. If the provision under interpretation reasonably bears a meaning that advances those rights, the court is obliged to give the provision the meaning that promotes those rights. Undoubtedly here, section 77 of the Basic Conditions Act was designed to promote access to the Labour Courts in relation to claims based on that Act. As it appears below, the section does not only advance access but it also seeks to limit claims under the Act to the Labour Court, except in respect of claims arising from employment contracts in relation to which that Court and civil courts have concurrent jurisdiction.

[18] Therefore, we are obliged to assign to section 77 a meaning that promotes access to the Labour Court rather than a meaning that prevents that access. This is because section 34 of the Constitution guarantees access by the applicants to the

⁶ Section 39(2) of the Constitution provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

⁷ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 87-9 and *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

Labour Court which must resolve their dispute in a fair hearing and by the application of law.⁸

Meaning of section 77

[19] Section 77 provides:

- “(1) 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.
- (1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.
- (2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.
- (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.
- (4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.
- (5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.”

[20] As the heading to this provision suggests, the subject-matter of section 77 is the jurisdiction of the Labour Court. The section tells us in unambiguous terms that the Labour Court has exclusive jurisdiction over matters arising from the Basic Conditions Act. The only exception is in respect of where the Act itself

⁸ Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

provides otherwise. For example, section 77(3) stipulates that the Labour Court enjoys concurrent jurisdiction with civil courts in matters concerning contracts of employment.

[21] On a proper interpretation of section 77(1), the Labour Court has jurisdiction in respect of all matters arising from the Act. And barring the exception, that jurisdiction is exclusive to the Labour Court. However, that exclusivity is subject to the Constitution and the jurisdiction of the Labour Appeal Court. This means two things. First, where the Basic Conditions Act is in conflict with the Constitution, the Constitution takes precedence. This requires that the section be read through the lens of the Constitution.

[22] Second, the section acknowledges the appellate role played by the Labour Appeal Court in relation to decisions of the Labour Court. Therefore, the exclusive jurisdiction of the Labour Court as envisaged in the section does not operate against the Labour Appeal Court. Nor does it operate against the jurisdiction of this Court which derives directly from the Constitution.

[23] But what is important is the point that section 77(1) confers jurisdiction on the Labour Court in the widest of terms. It declares that the Labour Court has jurisdiction “in respect of all matters” arising from the Basic Conditions Act. Section 77(3) expands the Labour Court’s jurisdiction to cover disputes arising from contracts of employment even if they are not regulated by the Act. But in that event, the jurisdiction is not exclusive. It is shared with the civil courts.

[24] What locates a matter within the jurisdiction of the Labour Court is the application of the Basic Conditions Act to it. All claims to which this Act applies fall within the exclusive jurisdiction of the Labour Court. In addition, section 77(1A) grants the Labour Court exclusive jurisdiction to award civil relief arising from a

breach of certain provisions of the Act.⁹ And if a matter that falls within the exclusive jurisdiction of the Labour Court is brought before another court, section 77(5) mandates the transfer of that matter to the Labour Court, regardless of the stage at which the transfer is effected.

[25] The scheme that emerges from the reading of section 77 as a whole is that the Labour Court, subject to few specified exceptions, enjoys exclusive jurisdiction over all disputes and claims arising from the provisions of the Basic Conditions Act. This means that on a proper reading of section 77, as soon as a dispute is ripe for litigation, the claimant is entitled to refer it to the Labour Court.

[26] As noted in the statement quoted in paragraph 6, the Labour Court here relied on two of its decisions for the proposition that disputes must first be referred to a labour inspector and that they should reach the Labour Court only in the form of an appeal.¹⁰ While it is true that when *Fourie* and *Ephraim* were decided, the Basic Conditions Act authorised appeals against decisions of labour inspectors to the Labour Court, at the time that Court adjudicated the current matter the law had changed materially. The provisions that facilitated appeals had been repealed as from September 2014.¹¹

[27] But apart from the appeal process which the Labour Court relied on for its interpretation, the real issue is whether at the relevant time the Basic Conditions Act obliged litigants to submit their disputes to labour inspectors before they could approach the Labour Court. There was simply no provision in the Basic Conditions Act which expressly required that disputes be submitted first to labour inspectors before the Labour Court could entertain them.

⁹ Section 77(1A) of the Basic Conditions Act provides:

“The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.”

¹⁰ *Fourie v Stanford Driving School & 34 Related Cases* (2011) 32 ILJ 914 (LC) and *Ephraim v Bull Brand Foods (Pty) Ltd* (2010) 31 ILJ 951 (LC).

¹¹ The Basic Conditions of Employment Amendment Act 20 of 2013 repealed sections 71 and 72 of the Basic Conditions Act.

[28] In *Fourie* and *Ephraim*, apart from the appeal structure, the Labour Court also relied on the fact that Chapter 10 of the Basic Conditions Act establishes a mechanism in terms of which compliance with the Act is monitored and enforced. That mechanism is administrative in nature and the labour inspectors are pivotal to its functioning. The question is whether they had the power to resolve disputes where they have arisen or to determine legal claims.

[29] The functions of labour inspectors are listed in section 64(1) which at the time the present claim arose read:

- “(1) A labour inspector appointed under section 63(1) may promote, monitor and enforce compliance with an employment law by—
- (a) advising employees and employers of their rights and obligations in terms of an employment law;
 - (b) conducting inspections in terms of this Chapter;
 - (c) investigating complaints made to a labour inspector;
 - (d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and
 - (e) performing any other prescribed function.”¹²

[30] None of these functions covered dispute resolution. In fact, it did not appear to be competent to refer a dispute to a labour inspector. The only issue that could be referred to a labour inspector before the section was amended was a complaint for him or her to investigate. Although a labour inspector was authorised to issue a compliance order, these orders could be issued for a singular purpose of securing

¹² The following additions which came into effect on 1 January 2019 have since been effected:

- “(dA) referring disputes to the CCMA concerning failure to comply with this Act, the National Minimum Wage Act, 2018, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act; and
- (dB) appearing on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to in paragraph (dA).”

But these additions do not apply to this matter.

compliance with employment law. If compliance was secured by means of an undertaking from an employer, the need for a compliance order did not arise.

[31] The proposition that the Labour Court may not determine a dispute about compliance with the Basic Conditions Act is not accurate. Take for example, the case where a complaint is submitted to an inspector for investigation but the latter fails to conduct an investigation. Surely the complainant in that case is entitled to approach the Labour Court for an order directing the labour inspector to perform his statutory function and investigate the complaint. In adjudicating that claim, the Labour Court would be enforcing the Basic Conditions Act if it grants the *mandamus* requested.

[32] To hold otherwise would effectively frustrate the objects of the Act. If the Labour Court were to have no jurisdiction, no court would be available to enforce the Act. This is because section 77(1) confers exclusive jurisdiction upon the Labour Court in relation to all matters which arise from the Act. What that Court may not do is to perform the specific functions of a labour inspector. The Court may not advise employers and employees of their rights and obligations; conduct inspections; investigate complaints made to an inspector or endeavour to secure compliance with the law by securing undertakings from employers or issuing compliance orders.

[33] Determining disputes or adjudicating legal claims arising from the Basic Conditions Act is the function of the Labour Court. This interpretation is consistent with the applicants' right to have their dispute resolved by the application of law in a fair manner before a court and this is guaranteed by the Bill of Rights. This right cannot be exercised before a labour inspector who may be impartial but not independent.

[34] Unlike the Labour Relations Act¹³ (LRA) which creates special non-litigation dispute resolution mechanisms, the Basic Conditions Act at the relevant time did not

¹³ 66 of 1995. In Chapter VII, the LRA establishes the CCMA to which ordinarily disputes must first be referred for resolution before the Labour Court may be approached.

establish such mechanisms. Furthermore, the Basic Conditions Act did not have a provision equivalent to section 191 of the LRA which obliges parties to refer disputes on dismissals to the CCMA before submitting them to the Labour Court.

[35] It follows that the Labour Court erred in concluding that it did not have jurisdiction to entertain claim one and dismissing the claim for that reason alone.

Order

[36] In the result the following order is made:

1. Leave to appeal against the order pertaining to claim one is granted.
2. The order of the Labour Court is set aside to the extent that it refers to claim one.
3. The matter is remitted to the Labour Court.

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