INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. JA 44/2015

In the matter between:

CYNTHIA THERESIA MOTSOMOTSO **Appellant**

and

MOGALE CITY LOCAL MUNICIPALITY **Respondent**

Heard: **19 May 2016**

Delivered: **21 July 2016**

Summary: Unfair discrimination dispute – Commission for Conciliation, Mediation and Arbitration (CCMA) the only dispute resolution forum clothed with the power to conciliate unfair discrimination dispute in terms of section 10 of the Employment Equity Act – in *casu* unfair labour practice dispute previously conciliated by a bargaining council could not be construed as conciliation of the unfair discrimination dispute. The Bargaining council does not having jurisdiction to conciliate such dispute. Labour Court correct in holding that it lacks jurisdiction to adjudicate an unfair discrimination dispute which had not been referred for conciliation to the CCMA. Appeal dismissed.

Coram: CJ Musi, Sutherland JJA *et* Murphy AJA

JUDGMENT

CJ MUSI JA

[1] This is an appeal against the judgment of the Labour Court (Tlhotlhalemaje J) wherein, it found that it lacked jurisdiction to adjudicate an unfair discrimination dispute which was not referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The appeal is with the leave of this Court.

[2] The appellant is in the employ of the respondent since 1984 as a Community Liaison Officer at post level 10. She worked with five male colleagues who were on post level 14. On 1 September 2000, all five males were promoted to post level 8. According to the appellant, this was done without any advertisement for the posts or applications by the five males. The respondent alleged that all the males applied for and were appointed into vacant post level 8 positions.

[3] The appellant referred an unfair labour practice dispute to the South African Local Government Bargaining Council (SALGBC). Conciliation did not yield a positive result and she referred the matter to arbitration. The arbitrator rendered an award in her favour and *inter alia* ordered the respondent to promote her to post level 8.

[4] The respondent, being dissatisfied with the award, launched a review application in the Labour Court. The Labour Court (Basson J) found that it was not entirely clear whether the appellant based her case on discrimination. The Labour Court however found that on a conspectus of the material before the arbitrator, the latter should have found that the dispute was a discrimination dispute that should have been prosecuted in terms of the Employment Equity Act (EEA).[1] It set aside the arbitration award.

[1] Act 55 of 1998.

[5] Pursuant to the judgment of the Labour Court, the appellant instituted an unfair discrimination claim in the Labour Court. She alleged that the respondent unfairly discriminated against her because she was a female or because she had been part of the employees of the respondent who were inherited from the apartheid era.

[6] The respondent defended the claim and *inter alia* took the point that the appellant did not refer the dispute for conciliation to the CCMA prior to instituting her unfair discrimination claim.

[7] The court *a quo* (Tlhotlhalemaje J) found that "in the absence of the applicant first having referred the dispute to conciliation, the court lacks jurisdiction to determine her alleged unfair discrimination claim". The appellant unsuccessfully sought leave to appeal Tlhotlhalemaje J's judgment. A petition to this Court was successful.

[8] Mr Shakoane, who appeared on behalf of the appellant, argued that the court *a quo* erred in holding that it had no jurisdiction to adjudicate the dispute, despite the valid certificate of outcome issued by the SALGBC. He submitted that, that certificate of outcome was never set aside on review and is therefore still valid. He submitted that the certificate of outcome issued by the SALGBC was sufficient to vest jurisdiction in the Labour court or CCMA to adjudicate or arbitrate the matter. He further submitted that the mere fact that the appellant erroneously referred the dispute to the SALGBC does not deprive the Labour Court of jurisdiction to determine the dispute in accordance with the provisions of sections 10(6) and 49 of the EEA. He contended that the court ***a quo***'s judgment unjustly allows form to trump substance.

[9] Ms Ramela, on behalf of the respondent, submitted that the court *a quo* was correct in holding that it did not have jurisdiction to adjudicate the dispute.

[10] In terms of section 185(b) of the Labour Relations Act 66 of 1995 (the Act), every employee has the right not to be subjected to unfair labour practice. Unfair labour practice is defined in section 186(2)(a) as any unfair act or omission that arises between the employer and the employee involving 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 or relating to the provision of a benefit to an employee.

[11] An employee may refer a dispute about an unfair labour practice in writing, within 90 days of the act or within 90 days of the date on which the employee becomes aware of the act or occurrence, to a council or the CCMA.[2]

[12] A dismissal or dispute about an unfair labour practice may therefore be referred to a bargaining council. A bargaining council's power to conciliate or arbitrate a dispute is derived from the terms of its accreditation.[3] The period for which a bargaining council is accredited and the terms of accreditation must be set out in its certificate of accreditation.[4] Therefore, if a bargaining council is not accredited to perform a particular function it may not perform such function.

[13] In terms of section 10 of the EEA, any party to a dispute concerning unfair discrimination may refer such dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination. The CCMA must attempt to resolve the dispute through conciliation and if it remains unresolved after conciliation any party may refer it to the Labour Court for adjudication or all the parties to the dispute may consent to arbitration of the dispute.[5] In terms of the EEA, "CCMA" means the Commission for Conciliation Mediation and Arbitration established by section 112 of the Labour Relations Act.[6]

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[2] (1) (a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair practice may refer the dispute in writing within 30 days to-
(i) a council, if the parties to the dispute fall within the registered scope of that council; or
(ii) the Commission, if no council has jurisdiction.
(b) A referral in terms of paragraph (a) must be made within-
(i) 30 days of the date of dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[3] See section 127 of the Act.

[4] Section 127(5) (a)(ii) of the Act.

[5] See section 10 of the EEA.

[6] See section 1 of the EEA. Section 112 of the Act states that the Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.

[14] CCMA is clearly defined in the EEA and it does not mean the CCMA and or an accredited council or agency. It means the juristic person established in terms of section 112 of the Act, nothing more nothing less.

[15] In terms of section 135 of the Act, the CCMA must attempt to resolve a dispute referred to it within 30 days or such extended period as the parties agreed to. When conciliation has failed or at the end of the 30 day or agreed period, the commissioner must issue a certificate stating whether the dispute has been resolved.

[16] An unfair discrimination dispute must therefore be referred to the CCMA for resolution in terms of section 135 failing which, it must be referred to the Labour Court unless all the parties agree that it may be referred to arbitration.

[17] In terms of section 157(4) of the Act, the Labour Court may refuse to determine a dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation.[7]

[18] The initial dispute that was conciliated, referred to arbitration and taken on review was an unfair labour practice dispute. Basson J found that the dispute was actually an unfair discrimination dispute and was mischaracterised as an unfair labour practice dispute and set aside the arbitration award.

[19] When the appellant decided to bring an unfair discrimination claim, it was a different dispute that had to be conciliated before the Labour Court could adjudicate it. The unfair discrimination dispute was never referred to conciliation. There was therefore no attempt made to resolve the unfair discrimination dispute through conciliation before it was referred to the Labour Court.

[20] The bargaining council does not have jurisdiction to conciliate any dispute under section 10 of the EEA. The bargaining council in *casu* did not have such dispute before it and it also did not purport to conciliate an unfair

[7] (4)(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.
(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

discrimination dispute. The only dispute that was referred to the bargaining council was an unfair labour practice dispute. Therefore, even if Mr Shakoane's argument is correct that the certificate remained valid, it would only be valid in respect of the unfair labour practice dispute.

[21] The EEA is clear, only the CCMA may attempt to resolve an unfair discrimination dispute through conciliation. A bargaining council has no such power. The governing body of the CCMA also does not have the power to accredit a bargaining council to conciliate unfair discrimination disputes. Mr Shakoane's submission relating to the provisions of sections 10(6) and 49 of the EEA is also of no assistance to the appellant. Section 10(6) only states that if a dispute referred to the CCMA remains unresolved after conciliation, a party may refer the dispute to the Labour Court for adjudication or all the parties to the dispute may consent to arbitration of the dispute. Section 49 on the other hand only states that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the EEA.

[22] The legislature clearly made a policy choice that unfair discrimination disputes be conciliated by the CCMA. This is probably because the CCMA is the specialist body entrusted with the task of conciliating all labour disputes. It has the necessary human resources i.e. a pool of commissioners and senior commissioners who are experienced and well versed in these issues. Unfair discrimination disputes are in most cases very complex and intricate and therefore require specialist commissioners with the necessary skills and experience to adjudicate them. In my judgment, this Court should not interfere, for reasons of expedience or sympathy, with that policy choice. In my view, the appeal ought to be dismissed.

[23] The appellant has over the years tried everything, at great expense, to prosecute this dispute. Unfortunately the merits of the dispute were never adjudicated in a court of law. I do not think that the law and equity requires that a costs order should be made in this matter.

[23] I accordingly dismiss the appeal with no order as to costs.

C J Musi JA

Sutherland JA and Murphy AJA agree with CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT: Adv G Shakoane SC Assisted by Adv S Mathabathe

Instructed by MM Bakloyi Attorneys Johannesburg

FOR THE RESPONDENT: Adv MP Ramela

Instructed by Mapulana Maponya Inc. Pretoria