REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

Reportable

CASE NO: JS 619/13

In the matter between -

REGINALD TSHEHLA **Applicant**

and

EMFULENI LOCAL MUNICIPALITY **First Respondent**

Heard: 05 September 2014

Delivered: 21 January 2015

Summary: Statement of claim- unfair labour practice and unfair discrimination. Court lacks jurisdiction to entertain matters that could be resolved by arbitration in terms of the LRA. Unfair labour practice dispute can be resolved through arbitration- section 157(5) of the LRA. Referral of disputes to Court in terms of section 10 of the EEA. Referring disputes under Chapter 3 of the EEA to court before exhausting the enforcement procedures provided for in Chapter 5 of the EEA.

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this matter has filed both the unfair labour practice and unfair discrimination claims with this Court. The claim was filed outside the prescribed period and for that reason the applicant has applied for condonation for the late filing of his statement of case. The respondent has also applied for condonation for the late filing of its statement of response.

[2] The respondent has raised two points *in limine* relating to the jurisdiction of the Court to entertain the applicant's claim. These issues are dealt with first for they are determinative of the need to consider the condonation application.

The background facts

[3] The applicant is an employee of the respondent who was appointed as an administrative assistance during December 2007 at the salary level 9. He was during 2009 transferred to what later came to be known as the employment equity department.

[4] The employment equity department was established following an investigation by the department of labour concerning compliance with the provisions of the Employment Equity Act[1] (the EEA). The department of labour had recommended that the respondent should establish a dedicated unit to deal with issues of employment equity. In compliance with the recommendations of the department of labour the respondent appointed the manager: employment equity, Mr Mahlaba. The applicant was then transferred to the unit to assist Mr Mahlaba.

[5] Because of the workload in the unit the respondent took a decision to advertise the positions of the senior administrative officer which is at salary level 5 and two administrative officers which are at salary level 6. The

[1] Act 55 of 1988

candidates who were successful in the positions as advertised were appointed on a year's fixed term contracts.

[6] There seem to be some dispute as to whether the applicant did apply for the position that he is contending he ought to have been appointed in. That issue is not at this stage material. It should however be pointed out that the applicant contends that he did apply for the position of administrative officer level 6. He contends that he ought to have been appointed above the two female persons who were appointed because he has the experience.

[7] The applicant contends that the respondent did not appoint him for the position he had applied for because of his union membership. The applicant was unhappy with what had happened to him and accordingly filed a grievance.

[8] The grievance was not resolved and accordingly the applicant referred a dispute to the first respondent (the bargaining council) for conciliation. In the referral form the applicant listed the legal issues that had arisen as follows:

(a) "Non adherence of the Employer to Internal Policies- Transfer Policy,

(b) Non adherence of the Employer to Internal Policies- Affirmative Action and Employment Equity Targets- Recruitment Policy, Employment Equity. . .

(c) Non adherence to the Employment Equity act."

[9] The dispute remained unresolved at the bargaining council and the certificate of non-resolution was issued by the bargaining council's panellist who indicated that the dispute concerning discrimination remains unresolved and it was for that reason that the applicant launched the present proceedings.

The issues

[10] As indicated earlier the respondent has raised a point *in limine* concerning the jurisdiction of the Court to determine the three disputes which the applicant has raised, namely the unfair labour practice, the discrimination and affirmative action disputes.

[11] In relation to the unfair labour practice dispute the respondent contends that the Court lacks jurisdiction to entertain the matter because it concerns a dispute that falls under the jurisdiction of the bargaining council.

[12] The disputes concerning unfair labour practice is dealt with under section 191 of the Labour Relations Act[2] (the LRA),[3] which provides amongst others that the CCMA or the bargaining council must arbitrate a dispute that remained unresolved at the conciliation process. This means that the LRA requires that disputes which remain unresolved after their referral to conciliation must be arbitrated by the CCMA or the bargaining council. In this regard section 157(5) of the LRA states that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires that such dispute should be resolved through arbitration.

[13] It was argued on behalf of the applicant that the respondent failed to raise the issue of jurisdiction timeously as required by the bargaining council's constitution and therefore has lost its right to raise the issue. The copy of the constitution of the bargaining council was not availed to the Court. Assuming that indeed the constitution of the bargaining council does require jurisdictional points to be raised within a reasonable time that would not assist the case of the applicant for the following reason:-

(a) It is trite in our law that a jurisdictional point can be raised at any stage of the proceedings including at the hearing of the matter. I therefore find that the fact that the respondent did not raise the jurisdictional point timeously is irrelevant. In any case the provision of the constitution is of no legal force and effect in that the parties seek to impose jurisdiction on the Court by default. In this respect the Labour Appeal Court held in *South African Motor Industry Employers' Association v NUMSA*,[4] held that the Court cannot assume jurisdiction on a matter to be determined by the CCMA even if the parties purported to confer such jurisdiction by agreement.

[2] Act 66 of 1995.
[3] Act number 65 of 1995.
[4] [1997]9 BLLR 1157 (LAC).

[14] It is thus clear from the above that the Court in the present instance does not have jurisdiction to entertain the unfair labour practice dispute which the applicant had referred to the bargaining council.

[15] It was argued on behalf of the applicant that should the Court find that it did not have jurisdiction to entertain the matter it should exercise its powers under section 158(2) of the LRA and refer the matter back to the bargaining council for arbitration.

[16] It is generally accepted that in applying the provisions of section 158(2) of the LRA the Court has a discretion to exercise. In *Verity v University of the Witwatersrand*,[5] the Court held that section 158 (2) of the LRA applies only when it becomes apparent during the course of adjudication that the matter should have been referred to arbitration. In arriving at this conclusion the Court in that case had the following to say:

> "22. The provision of section 158(2) of the Act does not apply to an instance where a party has brought a main claim that falls under the jurisdiction of this Court, loses and now wants to rely on an alternative claim that should have been referred to the CCMA or relevant bargaining council. It applies to an instance where it only becomes clear during the proceedings what the true nature of the dismissal was. It is important for a party who wishes to bring a claim to decide carefully whether he wants to bring it to this court or to the relevant CCMA or bargaining council. Section 158(2) of the Act was not enacted to deal with a situation as in the present case. It does not cover alternative claims that fall under the jurisdiction of the CCMA or bargaining councils.
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> 23. I am aware that labour matters should be dealt with speedily. There is however a duty on an applicant to bring his or her claim to the relevant body and should not be guided by mere expedience. I do not believe that this is a matter where the court should use its discretion to entertain the claim. Nothing prevents the applicant from referring the dispute to the CCMA with the necessary application for condonation. Nothing also prevents the parties from transcribing a record of the proceedings and placing it before a commissioner for determination."

[5] [2009] 8 BLLR 838 (LC).

[17] In *Ngcobo v KwaZulu Natal Health Service*,[6] the Court exercised its discretion in terms of section 158(2) of the LRA because of the ambiguity in the collective agreement as to where the dispute was to be referred once conciliation has failed.

[18] In my view the facts and the circumstances of the present case do not support the view that the Court should exercise its discretion in favour of staying the proceedings and referring the matter back to the bargaining council for arbitration. The applicant elected to bring this matter before this Court after receiving the certificate of outcome indicating that the dispute concerning discrimination remained unresolved. It is apparent that the certificate was issued in light of the issues listed in the referral form. The certificate did not however take away the right of the applicant to refer the alleged unfair labour practice dispute to the bargaining council for arbitration. In other words the applicant had the right to refer the discrimination dispute to this Court, once all the jurisdictional facts have been satisfied, and at the same time refer the unfair labour practice dispute to the bargaining council.[7] Assuming that there was a proper basis for referring the discrimination dispute to the Labour Court, nothing in law prevented the applicant from also requesting the bargaining council to arbitrate the matter. The applicant was assisted by his union and later by attorneys. It has been suggested that the applicant was incorrectly advised by the union to refer the unfair labour practice to the Court. There is however no indication as to why his attorneys on assuming the responsibility of the matter did not advice that the unfair labour practice

[6] [1999] 2 BLLR 148 (LC).

[7] See *Ditsamai v Gauteng Shared Services Centre* [2009] 5 BLLR 456 (LC); (2009) 30 ILJ 2072 (LC) where the Court held that: "*[63] Whilst the cause of action in both the constructive* dismissal and the sexual harassment cases may arise in the same facts and circumstances, the remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.

> [64] In terms of the constructive dismissal, the matter is firstly, before reaching arbitration or adjudication, processed through conciliation in terms of section 135 of the LRA. If conciliation failed the employee is entitled to refer the matter to arbitration under the auspices of the CCMA or a bargaining council whichever is applicable. However, dismissal disputes, referred to conciliation in terms of section 187 of the LRA, are adjudicated by the Labour Court if conciliation fails."

dispute should be withdrawn from the Court and be referred to the bargaining council.

[19] The argument that the refusal to exercise the discretion in favour of directing the bargaining council to arbitrate the matter will contribute to a further delay in the finalisation of the dispute between the parties is noted. The applicant is however the author of this and can therefore not look to the Court for assistance. This is not a case where the true nature of the dispute became clear during adjudication by the Court. The applicant chose to refer the unfair labour practice dispute to the Court despite the law being clear that such a dispute ought to be referred to the bargaining council.

[20] It should be apparent from the above that this Court does not have jurisdiction to entertain the unfair labour practice dispute which the applicant has referred for adjudication. There is also no basis for referring the matter to the bargaining council in terms of section 158(2) of the LRA. It is for the applicant to decide whether he wantsto pursue the unfair labour dispute in the bargaining council and to do that by following the appropriate channels.

[21] I now turn to deal with the discrimination dispute. In the statement of claim the applicant pleads in relation to the alleged unfair discrimination that in terms of the Employment Equity Targets preference ought to have been given to him as an African male. The alleged discrimination in this respect is based on gender. He further alleges that he was not appointed because he was a shop steward. In summarising the legal consequences that flows from the averments made regarding the alleged discrimination in the statement of case the applicant pleads that:

(a) The respondent in not appointing him failed to adhere to its internal policy on transfer.

(b) The respondent failed to adhere to its internal policies regarding; transfer policy; affirmative action and employment equity targets to eliminate unfair discrimination.

[22] The prohibition against discrimination is dealt with under Chapter 2 of the EEA . The substantive aspects of what constitutes or does not constitute discrimination are dealt with between sections 5 and 9 of the EEA.

[23] The procedure for dealing with disputes that arise from Chapter 2 of the EEA, which is the case in the present instance, is dealt with in terms of section 10 of the EEA. Section 10 of the EEA reads as follows:

> " In this section, the word "dispute" excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.
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> 1) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.
> 2) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).
> 3) The party that refers a dispute must satisfy the CCMA that-
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> (a) a copy of the referral has been served on every other party to the dispute; and
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> (b) the referring party has made a reasonable attempt to resolve the dispute.
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> 4) The CCMA must attempt to resolve the dispute through conciliation.
> 5) If the dispute remains unresolved after conciliation-
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> (a) any party to the dispute may refer it to the Labour Court for adjudication; or
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> (b) all the parties to the dispute may consent to arbitration of the dispute.
>
> 6) The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.

[24] It is clear from the reading of section 10 of the EEA that the legislature had intended that disputes concerning discrimination should be conciliated by the CCMA and not the bargaining councils. This means that the bargaining councils do not have jurisdiction to conciliate disputes concerning discrimination. The bargaining councils are creatures of the

statute and therefore cannot assume powers which they do not have in terms of the law.

[25] The bargaining council in the present instance lacked jurisdiction to conciliate the dispute concerning the alleged discrimination. Accordingly in law the dispute as formulated by the applicant in its pleadings was never conciliated by the relevant forum and thus depriving the Court of the jurisdiction to adjudicate the dispute.

[26] The other problem faced by the applicant in seeking to have the Court to adjudicate his claim is that the pleaded case in the main is based on the provisions of Chapter of 5 of the EEA. It follows therefore that in order to succeed he had to show that he has complied with the provisions of section 34 of the EEA. In terms of section 34 of the EEA any employee or trade union representative may raise an alleged contravention of the EEA with a range of persons and bodies.[8] In dealing with the same issue as, that in the present case, the Labour Appeal Court in *Dudley v City of Cape Town*,[9] held that:

> ". . . it is not competent to institute proceedings in the Labour Court in respect of an alleged breach of any obligation under chapter III of the EEA, prior to the exhaustion of the enforcement procedure provided for in chapter V of the EEA."

[27] It is common cause in the present instance that the applicant filed the matter to the Labour Court without having exhausted the provisions of Chapter V of the EEA.

[28] In the premises the applicant's claim stands to fail for the reason that the Court lacks jurisdiction to adjudicate the matter. I do not however believe that it would be appropriate to allow costs to follow the results.

[8] See Labour Law through Cases page EEA-47 [Issue 18].
[9] (2008)29 ILJ 2685 (LAC). See also *Solidarity and Others v Department of Correctional Services and Others, Solidarity and Others v Department of Correctional Services and Others* [2014] 1 BLLR 76 (LC).

Order

[29] In the circumstances the following order is made:

1. The Court lacks jurisdiction to entertain applicant's unfair labour practice and the discrimination disputes.
2. The applicant's claim is dismissed.
3. There is no order as to costs.

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Judge of the Labour Court Johannesburg

Appearances:

For the Applicant : Advocate A Thomson

Instructed by : Chantell Tim Incorporated

For the Respondent : P Nkutha

Instructed by : Nkaiseng Attorneys