



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1073/18

In the matter between:

CHERYLL LEWARNE

APPELLANT

and

FOCHEM INTERNATIONAL (PTY) LTD

RESPONDENT

Neutral citation: *Lewarne v Fochem International (Pty) Ltd* (1073/18) [2019]
ZASCA 114 (18 September 2019)

Coram Tshiqi, Wallis, Zondi, Mocumie and Plasket JJA

Heard: 23 August 2019

Delivered: 18 September 2019

Summary: Whether the Labour Court has exclusive jurisdiction in matters concerning an employment contract – sections 77(1) and 77(3) of the Basic Conditions of Employment Act 75 of 1997 apply – section 77(3) confers concurrent jurisdiction to the Labour Court and civil courts.

ORDER

On appeal from: Gauteng Division, of the High Court Johannesburg (Thobane AJ) sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the court *a quo* is set aside and substituted with the following order:
 - ‘(a) The respondent’s point of law raised in terms of Rule 6(5)(d)(iii) of the Uniform Rules of the Court is dismissed.
 - (b) The respondent is ordered to make the following payments to the applicant:
 - i A sum of R325 000 (less deductions for UIF and PAYE);
 - ii Interest on the above amount at the rate of 10.25% per annum *a tempore morae*; and
 - iii Costs of the application.’

JUDGMENT

Tshiqi JA (Wallis, Zondi, Mocumie and Plasket JJA concurring):

[1] The narrow issue in this appeal is whether the Gauteng Division of the High Court, Johannesburg, had the jurisdiction to determine the appellant’s application for an order for the payment of her salary by the respondent, Fochem International (Pty) Limited, her employer at the time.

[2] The appellant, Ms Cheryl Lewarne, was employed by the respondent as a Financial Manager for approximately eight years and, thereafter, as a director at a gross monthly salary of R 75000. She was also entitled to be paid a 13th cheque equal to one month’s salary annually on or before 20 December. On December 2016, the

appellant was only paid an amount of R50 000 as a 13th cheque. On 12 January 2017, her attorneys of record received a letter from the respondent's attorneys accusing the appellant of several acts of impropriety ranging from company credit card abuse, unauthorised trade in and purchase of a motor vehicle at company expense, unlawful employment of her son, unauthorised increase of her salary, failure to comply with a company directive and incapacity resulting from constant ill-health. The letter also placed the appellant on suspension with immediate effect.

[3] Correspondence was thereafter exchanged between the appellant's attorneys and the respondent's attorneys. On 24 January 2017, in response to a demand from the appellant's attorneys that the appellant be paid the balance of her 13th cheque, the respondent's attorneys wrote:

'My client concedes that the employment contract provides that a 13th cheque is payable to your client on or before the 20th December of each year. However, neither this amount nor your client's January 2017 salary is being paid to your client as such amounts have been deducted and appropriated towards your client's indebtedness to my client (in excess of R300,000) arising from your client's unlawful personal expenditure on the company credit card. This is in accordance with clause 12 of the employment contract and the common law principle of set-off. This will also apply to any further payments which may become payable to your client. Legal proceedings will be instituted against your client in due course for the balance owing in respect of the credit card indebtedness.'

[4] On 5 May 2017, the appellant launched an application in the high court for an order in the following terms:

'1. Payment to the applicant of

1.1. The sum of R25 000,00;

1.2. The sum of R300 000,00 less legal deductions of UIF and PAYE (net remuneration amounting to R207 405,12, being the total remuneration for the months of January 2017, February 2017, March 2017 and April 2017;

1.3. Such further remuneration as may have become payable as at the date of the hearing of this application.

2. Ordering the respondent to make payment to the [a]pplicant of interest on the aforesaid amounts calculated at 10,25% per annum a tempore morae from the date that the payments fell due to date of payment in full, both days inclusive.

3. Ordering the respondent to make payment of the [a]pplicant's future remuneration as and

when it falls due.

4. Ordering the [r]espondent to pay the costs of the application.’

[5] The application was opposed by the respondent which elected not to file an opposing affidavit but delivered a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court, in terms of which the respondent prayed for an order that the appellant’s application be dismissed on a point of law on the basis that the high court lacked jurisdiction to determine the dispute. In support of the point of law raised, the respondent alleged that on a proper reading of the appellant’s founding affidavit, her pleaded case was essentially that the respondent had made certain unlawful deductions from her remuneration and that for this contention she relied on the provisions of s 34 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) as amended. For this reason, so submitted the respondent, the Labour Court had exclusive jurisdiction to adjudicate the claim in terms of the provisions of s 77(1) of the BCEA. The high court upheld the point of law, and dismissed the application with costs. The appeal is before this court, with the leave of the high court. The issue to be determined is whether the high court was correct in its finding that it did not have the necessary jurisdiction to hear the application.

[6] Both the provisions of s 77(1) and (3) of the BCEA are relevant to the determination of the jurisdiction of the high court in this dispute. Section 77 in relevant parts 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.

(2) . . .

(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.’

[7] When a court’s jurisdiction is challenged, the court should base its conclusion on the applicant’s pleadings, as they contain the legal basis of the claim under which

the applicant had chosen to invoke the court's competence.¹ In a string of cases, the Labour Court and the Labour Appeal Court have refined the parameters of the Labour Court's exclusive jurisdiction in terms of s 77(1) of the BCEA and have held that the provisions of s 77(1) do no more than confer a residual exclusive jurisdiction on the Labour Court to deal with those matters that the BCEA requires to be dealt with by the court.²

[8] Generally in instances where the dispute relates to, is linked to, or is connected with an employment contract, s 77(3) of the BCEA which confers concurrent jurisdiction on the civil courts and the Labour Courts applies. In the present matter, the appellant's action arose out of and related to the contract of employment between her and the respondent. It was for payment of money due to her in terms of her employment contract. It was this action that was before the court and on which it had to decide whether it had the necessary jurisdiction. It was thus not necessary for the court to place any reliance on the appellant's reference, in her founding affidavit, to the respondent's professed reasons for withholding her remuneration, and the fact that that was in contravention of s 34 of the BCEA. These allegations were simply a summary of relevant facts but they did not alter the essential nature of the appellant's action. They amounted to what this court termed, in *Fedlife Assurance Ltd v Wolfaardt*³ as 'mere surplusage'.

[9] Apart from the failure to grasp the nature of the action before it, the high court supported its conclusion that it did not have jurisdiction, by erroneously relying on the minority judgment in *Fedlife Assurance*. It ignored the majority judgment, which, after having found that a clearly identifiable and recognisable common law claim for damages had been pleaded, concluded that the Labour Court did not have exclusive jurisdiction to adjudicate such a dispute. In placing its reliance on a minority judgment, the high court ignored the well-established principle of *stare decisis*. In placing reliance

¹ See *Gcaba v Minister for Safety and Security & others* [2009] ZACC 26; 2010 (1) SA 238 (CC); [2009] 12 BLLR 1145 (CC) para 75.

² See *Ephraim v Bull Brand Foods (Pty) Ltd* (2010) 31 ILJ 951 (LC) para 4; *Makume v Hakinen Transport CC* (2011) 32 ILJ 928 (LC) paras 5, 15-16 and 22.

³ *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) para 21.

on the minority judgment, the high court also overlooked the fact that the minority judgment first classified the dispute as an unfair dismissal and then concluded that it fell within the jurisdiction of the Labour Court.

[10] For all these reasons the high court erred in finding that it did not have jurisdiction, and, in the absence of an answering affidavit, attacking the merits of the application, the appellant is entitled to succeed on the relief sought in its prayers. I therefore make the following order:

- 1 The appeal is upheld with costs.
- 2 The order of the court *a quo* is set aside and substituted with the following order:
 - (a) The respondent's point of law raised in terms of Rule 6(5)(d)(iii) of the Uniform Rules of the Court is dismissed.
 - (b) The respondent is ordered to make the following payments to the applicant:
 - i A sum of R325 000 (less deductions for UIF and PAYE);
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 - iii Costs of the application.'

Z L L Tshiqi
Judge of Appeal

APPEARANCES:

For Appellant:

H M Viljoen

Instructed by:

Lloyd Kieser Inc, Johannesburg

Webbers Attorneys, Bloemfontein

For Respondent:

L M Malan (with him N R Naidoo)

Instructed by:

Edward Nathan Sonnenbergs, Johannesburg

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