IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1621/2008

Reportable

In the matter between:

NDLOVU, SIBUSISO AND 25 OTHERS Applicant

and

THE SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS' UNION Respondent

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JUDGMENT

BHOOLA J:

Introduction

[1] The applicants claim delictual damages for past and future loss of earnings arising from the respondent's breach of a duty of care towards them in failing to act on their mandate in settling a dispute with their employer.

[2] The respondent, in a notice of amendment to its response, raised two points *in limine* as follows:[1]

(a) Lack of jurisdiction, with reference to section 157(1) of the Labour Relations Act, 66 of 1995 ("the LRA"), on the basis that a claim for damages arising out of delict does not fall within the jurisdiction of the Labour Court.

(b) The applicants' statement of claim does not disclose a cause of action.

[1] The applicants did not object to the amendment and the pleadings were deemed to have been duly amended.

[3] The parties agreed that the *in limine* points should be determined separately from the merits.

Background facts

[4] It is common cause that the applicants are members of the respondent and are employed as salespersons by Makro. It is further common cause that the respondent is a trade union registered as such in terms of the LRA, and has at all material times been the representative trade union with the power to bind its members, including the applicants, in collective agreements with Makro.

[5] The applicants allege that the respondent, at all times:

(a) Was obliged to act in the best interests of its members, including the applicants, and in terms of any mandate and / or instructions given to it by its members, including the applicants;

(b) Owed its members, including the applicants, a duty of care to act in their best interests and in terms of any mandate and / or instructions given to it by its members, including the applicants.

[6] Pursuant to the unilateral alteration by Makro of the terms of remuneration of the applicants in 2006, which resulted in a new remuneration and commission structure ("the 2006 Structure"), the respondent was instructed by its affected members, including the applicants, to engage in collective bargaining with Makro. This process resulted in the respondent referring a dispute concerning, *inter alia*, the unilateral alteration of terms and conditions of employment of its members, to the Commission for Conciliation, Mediation and Arbitration ("CCMA").

[7] Pending the hearing of the dispute on 6 March 2006, the respondent consulted its affected members, including the applicants, about the 2006 Structure in its different geographic regions. The applicants rejected the terms of the 2006 Structure, formulated a counter-proposal and mandated and instructed the respondent not to accept any terms less than those proposed in their counter-proposal. The terms of the applicants' counter-proposal were as follows:

(a) A basic salary of R3500.00 per month; plus

(b) A year on year annual basic salary increase / adjustment of 10% per annum to alleviate the 10% reduction in commission earnings; plus
(c) A commission of 10%.

[8] Thereafter communication continued between the parties until on or about 14 March 2006 when the respondent and Makro entered into an agreement settling the dispute, referred to in the statement of claim as "the contentious agreement". The terms of the contentious agreement were the terms of the proposed 2006 Structure, which had been rejected by the applicants. The applicants allege that by signing the contentious agreement, the respondent:

(a) acted without their knowledge or consent;
(b) bound them in a collective agreement;
(c) acted contrary to their instructions and mandate given in the form of their counter-proposal;
(d) breached the mandate given by them in the form of their counter proposal;
(e) acted contrary to their best interests;
(f) breached its duty of care towards them.

[9] In consequence of this conduct they suffered damages in the form of past and future loss of earnings in that they have earned and will continue (until retirement age), to earn less remuneration from Makro than they earned prior to the conclusion of the contentious agreement.

The applicable legislation

[10] The provisions of the LRA on which the applicants rely for the relief sought are:

> ***157. Jurisdiction of Labour Court.***—*(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
>
> *(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—*

(a) employment and from labour relations;..."

***158. Powers of Labour Court.**—(1) The Labour Court may—*

(a)make any appropriate order, including—…

(v)an award of compensation in any circumstances contemplated in this Act;

(vi)an award of damages in any circumstances contemplated in this Act; and…

(e)determine a dispute between a registered trade union, or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with—

(i)the constitution of that trade union or employer's organisation as the case may be; or…

(j)deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

Lack of Jurisdiction

[11] The applicants submit that jurisdiction in respect of the cause of action they rely on arises from the LRA in that:

(a) it involves a matter contemplated within the term *"matters*" in section 157 (1) of the LRA; and/or
(b) it arises from *"employment and from labour relations*" as contemplated by section 157 (2) of the LRA; and/or
(c) it relates to a "*matter*" necessary or incidental to performing the Labour Court's functions under the LRA as contemplated by section 158 (1)(j);
(d) an award of compensation and /or damages as envisaged in section 158 (1) (a) (v) or (vi) of the LRA would be competent.

[12] Mr Hollander, appearing for the applicants, submitted that following authorities confirm that this court has jurisdiction in a delictual claim : *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* (2007) 28 *ILJ* 897 (LC) and *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers' Union and*

others (2005) 26 *ILJ* 1458 (LC).[2] *Piliso* dealt *inter alia* with a delictual claim arising from the employer's alleged failure to provide a safe working environment, and Nel AJ adopted the approach that jurisdiction in respect of delictual claims arising from employment and from labour disputes does not fall within the sole jurisdiction of the civil courts. Mr Hollander urged this court similarly to adopt a purposive approach to section 157(2) (a). Jurisdiction, he submitted is evident from the words *"employment and labour relations*" in section 157(2) (a), affording this Court concurrent jurisdiction with the High Court.

[13] In relying on *Mond*i (supra), Mr Hollander submitted that Francis J had likewise adopted a purposive approach in considering whether the Labour Court had jurisdiction in an employer's delictual claim against a trade union for damages arising out of a protected strike. He correctly conceded however, that *Mondi* was not directly in point as the court dealt with jurisdiction to adjudicate delictual claims arising out of a labour dispute as envisaged in section 67 of the LRA. On this point Francis J had held as follows:

> *"[27] I am of the view that if the legislature had deemed it necessary to oust the jurisdiction of the Labour Court in delictual claims in a protected strike it would have done so in clear terms. If a broad and purposive view is taken of the Act and the jurisdiction conferred on this Court then it is apparent that this Court has jurisdiction over all strikes and lock-outs and conduct in contemplation or in furtherance of a protected strike or lockout which constitute both a criminal offence and a delict".*

[14] In my view, although Mr Hollander made the concession only in respect of *Mondi* (supra), *Piliso* is similarly distinguishable from the present matter, as neither of the authorities confirm that this Court has jurisdiction. Nel AJ dealt with the trite common law duty on the part of an employer to take reasonable care for the safety of its employees and to provide a safe working environment.[3] Furthermore, the learned Judge's remarks made in regard to jurisdiction were *obiter*, with the matter finally being determined on the basis of constitutional damages arising from a breach

[2] At para [13] – [28].
[3] Supra at para [26].

of the fundamental right to fair labour practices, which does not form part of the *causa* in the present matter.

[15] Mr Hollander submitted however that there are conflicting authorities in *Mohlaka v Minister of Finance & Others* (2009) 30 *ILJ* 622 (LC) and *Walters v Transitional Local Council of Port Elizabeth and another (*2000) 21 *ILJ* 2723 (LC), which imply that the issue of jurisdiction in delictual claims has not been finally determined by this Court. I disagree. In my view it is clear from *Mohlaka* that this Court has no jurisdiction in a delictual claim. Pillay J's *ratio* (where an employee claimed damages for loss of dignity arising from being blacklisted by his employer) would appear to me not to limit lack of jurisdiction to a claim in delict arising from loss of dignity, but to any delictual claim. The learned Judge said so in the following terms:

> *"[46] Likewise, his delictual claim for loss of dignity must also fail for reasons which Cheadle AJ advanced in Booysen paras 34-35: there is no independent right to dignity for the purposes of s 157(2). Such a right is embraced in the right to fair labour practices. Furthermore, nothing in s 157 confers jurisdiction on the Labour Court to try a claim for delict".*[4]

[16] Similarly, in *Walters*[5] Landman J agreed, in an *obiter* remark, with Du Toit et al *Labour Relations Law* (3ed) at 614 that the Labour Court has no jurisdiction to determine delictual claims. He did not have to decide the issue as the applicant had not formulated her claim in delict but instead sought a mandamus. [6] *Walters* is in my view further distinguishable in that the applicants do not rely on breach of a constitutional right and thereby an extended application of the law of delict (as was

[4] My emphasis.
[5] Supra at para [55].
[6] The court held: "[54] Although delictual remedies are primarily focused on compensation, Mr *Niehaus* submitted that the granting of an interdict is also one of the remedies available to a litigant in a delictual action. See Neethling et al *Deliktereg* (2 ed B Butterworths 1992) at 260. The granting of such relief may take the form of a mandamus, which is consistent with the relief sought by Ms Walters in respect of her being appointed to the position in question.
[55] Although he has argued cogently, Mr *Niehaus* is aware that his argument is contentious. He has referred me to Du C Toit et al *Labour Relations Law* (3 ed) at 614 who state that the Labour Court has no jurisdiction to determine delictual claims. I am inclined to think that Du Toit et al are correct. But it is not necessary to decide this for it was not Ms Walters's case that she suffered a delict. The council would suffer prejudice if this claim were to be considered at this late stage".

the case in *Walters* and in respect of which Landman J discussed the horizontal application of the Bill of Rights at para [52]). I deal with this issue in regard to the second point *in limine* below.

[17] In my view, Mr Hollander's interpretation of section 157 (2) as conferring jurisdiction on the Labour Court *either* in a constitutional violation or arising from employment and labour relations cannot be countenanced on the express wording of the section. More importantly, it is unsustainable in the light of *Chirwa v Transnet Ltd & others* (2008) 29 *ILJ* 73 (CC), where the Constitutional Court clarified that section 157(2) extended the jurisdiction of the Labour Court to employment matters that implicated constitutional rights (my emphasis), but that this did not derogate from the High Court's jurisdiction in this regard.

[18] Ms Hardy, for the respondent, submitted that the nub of the jurisdiction issue is that the relationship between the respondent and its members in the context of collective bargaining is not regulated by the LRA : see S*A Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale and Others* (1994) 15 *ILJ* 277 (LAC). This Court only has jurisdiction, as provided for in section 158(1)(e), in respect of a dispute concerning non-compliance with a trade union's constitution. This does not form the basis of the cause of action *in casu.* As Ms Hardy correctly submitted, all the authorities cited by the applicants deal with the employee as a party on the one hand and the employer on the other. The applicants do not rely on any specific provision of the LRA nor do they rely on any employment relationship between the parties for their submission that this Court has jurisdiction. In my view it is axiomatic then that irrespective of the cause of action this Court lacks jurisdiction in a claim between the respondent and the applicants.

No cause of action

[19] The applicants have pleaded their cause of action on the basis of delict arising from breach of the duty of care. Mr Hollander argued that the duty of care arose from the role of a trade union in representing the interests of its membership in the collective bargaining process. This process resulted in the present matter in a collective agreement with an employer which substantially varied the terms and

conditions of employment of the applicants and caused them damages in the form of significant loss of income. The duty owed by the respondent can only be exercised on the mandate and instructions of its membership, and where it fails to act accordingly it has to be held liable for such damages. However, insofar as there is a material dispute of fact as to whether or not the respondent acted on a mandate from its affected regions, the applicants submit that this is a separate leg of the claim, founded in contract, and should be permitted to proceed if this Court should find that it lacked jurisdiction in the delictual claim. This is the first time the applicants seek to rely on a breach of contract as giving rise to the delict as this is not part of the original cause of action as set out in the statement of claim. Moreover the question of whether or not a mandate existed[7] can only be relevant once a duty of care is established and this is in turn dependant on whether there is a justiciable claim in delict.

[20] Ms Hardy, correctly in my view, submitted that the applicants have pleaded their claim in delict but do not set out the basis in law on which they allege that a duty of care arises. They do not refer to a contractual provision which would give rise to the duty of care in these circumstances, nor do they rely on a contract of employment under section 77(3) of the Basic Conditions of Employment Act, 75 of 1997. Insofar as the applicants appear to rely on the relationship between them and the respondent, this issue has been disposed of in *SA Municipal Workers' Union v Jada and others* 2003 (6) SA 294 (W), and which is binding authority. She submitted that even if (notwithstanding *Jada*) this court were to find that a duty of care arose between the parties, the claim pleaded was not contemplated in "*matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court*" as referred to in section 157(1) (a).

[7] On the issue of the mandate the respondent denies that it failed to comply with a mandate and pleads that the instructions received from the applicants were not in accordance with the mandate received from their co-workers, which instructions comprised the majority vote and thus constituted its mandate in the relevant dispute. It appears not to be applicants' case that the respondent did not act on the instructions of a majority of its membership but that their specific instructions (i.e. in the form of the counter-proposal) were not acted upon, alternatively that a proper mandate from all affected regions was not provided.

[21] In *Jada* (supra) Horwitz JA said the following on the duty of care between a trade union and its members:[8]

> *"Before one can determine whether there was such a duty, .. one must identify the nature of the relationship between the plaintiff and the defendant. It cannot be equated, for example, to the relationship between a client and his attorney whom he consults for advice and whom he pays for that advice. I have difficulty with the notion that a number of persons cooperate to form a body as a negotiating forum, which is then alleged to stand in relation to its members in a similar relationship to them as does, for example, the attorney. The terms 'relationship' and 'special relationship' were bandied about as if it were axiomatic that a relationship which would give rise to a delictual action of the nature in issue, existed. It was erroneous to take what in my view was a conclusion and make it the starting-point.*
>
> *I referred above to the plaintiffs' allegation at the pre-trial conference that the relationship stemmed from the defendant's constitution, which contained contractual provisions which obliged the defendant to see to its members' interests in the field of their employment. Whilst I can conceive of a contractual relationship between two unrelated parties (such as an attorney and his client) bringing into being a situation in which the one becomes obliged to display a duty of care towards the other, I have difficulty contemplating how that occurs in a situation in which one party (in casu, the defendant) comes into existence at the behest of other party(s), who are responsible for chartering the course which it takes, or is a party to whom others (future employees) ally themselves and take part in its decision-making process. In most cases in which a special relationship between two parties is alleged to exist, the party claiming that the other owed the former a duty of care would usually have no control over how the latter acted, for otherwise it would be inappropriate to speak of a breach of duty. In a case such as the present, in which a trade union exists as the medium through which its members can bargain and negotiate with their employer, I fail to perceive how it can be said that the defendant owed the plaintiffs a duty of care, especially*

[8] At 301H-302A.

where, as in the present case, the plaintiffs embarked on industrial action beyond the scope of their union's collective bargaining process."

[22] The Court accordingly found that the employees had failed to prove that the union owed them a duty of care; and insofar as there may have been a duty of care resting on the union, the latter did not breach that duty. Although it may be that a distinction can be drawn on the facts in that *Jada* dealt with members acting outside the scope of the collective bargaining process in embarking on an unprotected strike, and *in casu* it is the conduct of the respondent in collective bargaining that is at issue, this is not an issue I need to determine given my finding in the jurisdiction point.

[23] Ms Hardy submitted that the relationship between the respondent and its members, including disputes arising between them, is determined by the respondent's constitution. The respondent is moreover a voluntary association and cannot in law be liable for loss of income, with the analogy being that membership fees cannot be claimed back if the union has acted negligently unless its constitution provides otherwise. All rights of membership are therefore regulated by the constitution. The applicants do not rely on the constitution and the cause of action as pleaded is therefore not justiciable in this Court. Insofar as the claim arises from section 157(2) it is trite that this presupposes a dispute between an employer and employee party. Even if a cause of action is made out on the pleadings this Court lacks jurisdiction in a matter between a union and its members that is alleged to arise from a claim outside the ambit of its constitution. Furthermore, insofar as it may be relevant, it is a key principle of majoritarianism in collective bargaining that the mandate of a trade union is determined by the majority decision of its members: see *Ramolesane and Another v Andrew Mentis and Another* (1991) 12 *ILJ* 329 (LAC) and also *Don Products (Pty) Ltd v Monage and Others* (1992) 13 *ILJ* 900 (LAC). *In casu* the applicants constitute a minority of affected members.

[24] Mr Hollander submitted that it simply cannot be that it trade union does not owe its members a duty of care to *inter alia* act in their best interests, and to act in terms of any mandate and / or instructions given to it by its members. In his view, to construe labour relations as requiring an employer on the one hand an employee on

the other lends itself to a restrictive interpretation of the LRA especially when regard is had to its purpose as expressed in sections 1 and 3, and to the fact that the dispute arose in the context of collective bargaining. The dispute *in casu*, he submitted, is therefore not one directed against the respondent directly but in its capacity as the collective bargaining representative of the applicants. Thus they are seeking in essence to challenge the agreement entered into with Makro, which constitutes a collective agreement and hence is contemplated within the ambit of "*employment and labour relations*" in section 157(2). He conceded that the claim is not a contractual claim *per se* in that it does not contain the typical averments necessary to establish such a claim, and that the essence of the applicants' assertion is that the Labour Court has jurisdiction in a delictual claim arising out of employment and labour relations. It would appear that Mr Hollander was constrained to attempt to make this submission in order to rescue the fatal flaw in the pleadings.

[25] The applicants do not seek to declare a dispute arising from the collective agreement under section 24 (2) of the LRA nor do they seek to base their challenge on the respondent's constitution. It is a claim pleaded squarely in delict based on the wrongful breach of a duty of care in the collective bargaining process in concluding an agreement without the knowledge and consent of the applicants. Even if it were however, to be pleaded in terms relating to the lack of implied or explicit authority of the respondent to contract on behalf of the applicants provided it acted *bona fide* and in terms of its constitution, this would in my view lend itself to a civil remedy outside the ambit of labour relations. The alleged factual dispute regarding the mandate would then become relevant. However, the key issue is that this Court has no jurisdiction in respect of a claim between the parties in these circumstances, irrespective of the cause of action. It follows then that even if this Court had jurisdiction in respect of the parties to the claim, it would lack jurisdiction in respect of the cause of action.

[26] The only other issue to be determined is the submission by the applicants that the second point *in limine* is akin to an exception. They cite various authorities in support of the submission that the legal principles relating to exceptions should be applied. They rely on the fact that the second point *in limine* does not relate (save for

paragraphs B1 and B3d of the response)[9] to allegations made *ex facie* the statement of claim but to the merits i.e. whether the respondent acted on a mandate from the affected regions. This is disputed by the applicants and is therefore an evidentiary issue. Accordingly, they submit, relying on various authorities relating to exceptions, that paragraph 7.4 of the statement of claim falls to be considered together with and part of the averments in paragraphs 6, 6.1 to 6.6,7 and 7.1 to 7.3. Adopting this approach must lead to the conclusion that the statement of claim contains sufficient averments necessary to disclose a cause of action in that it contains a factual basis for the legal duty contended for. I am not inclined to determine this issue on the basis submitted in that the respondent has not excepted to the statement of claim but has objected *in limine.* In my view, even on a broad and generous interpretation the pleadings do not disclose a cause of action justiciable in this Court.

[27] In the premises, I make the following order :

The points in limine are upheld, with costs.

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BHOOLA J
JUDGE OF THE LABOUR COURT
Date of hearing : 26 August 2010
Date of judgment : 1 October 2010
Appearances
For the applicants: Adv L Hollander instructed by Ashley Slamat Attorneys
For the respondent: Adv G Hardy instructed by Allardyce & Partners

[9] B1 reads: "The applicants' rely on the bald allegation that a duty of care exists between the applicants and the respondent (and a breach of that duty of care) in order to establish a cause of action".
B3 (d) reads "There is no provision in the constitution, and the applicants make no assertion in this regard, that establishes a duty of care based in delict".