



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS542/23

In the matter between:

SAMUEL MAQASHALALA

Plaintiff

and

CONSOL GLASS

First Defendant

ARDAGH GLASS PACKING

Second Defendant

OVERNIGHT LOGISTICS (PTY) LTD

Third Defendant

Heard: 25 July 2025

Delivered: 31 July 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 31st of July 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

ITZKIN, AJ

Introduction

[1] The defendants have raised several points *in limine* including a jurisdictional point, and on 22 October 2024, this Court directed the parties to file heads of argument on the jurisdictional point, which was since enrolled for hearing.

[2] The essence of the point is that the matter falls outside of this Court's jurisdiction and ought to be determined through arbitration at the bargaining council.

[3] It is also evident that the plaintiff has referred a dispute to the bargaining council. In the plaintiff's heads of argument, he made reference to a referral by NUMSA of that dispute under case number RFBC70910, and to a request for arbitration made on 11 August 2023.

[4] In that context, in addition to the jurisdictional point, the defendants allege that the principle of *lis alibi pendens* applies.

Evaluation

[5] Section 191(5) of the Labour Relations Act¹ (LRA) provides as follows:

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—

(a) the council or the Commission must arbitrate the dispute at the request of the employee if—

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided

¹ Act 66 of 1995, as amended.

the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

- (iii) the employee does not know the reason for dismissal; or
- (iv) the dispute concerns an unfair labour practice; or
- (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
 - (i) automatically unfair;
 - (ii) based on the employer's operational requirements;
 - (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
 - (v) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

[6] Section 187(1)(d) of the LRA, which forms part of the section on automatically unfair dismissals, provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is:

- '(d) that the employee took action, or indicated an intention to take action, against the employer by—
 - (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act.'

[7] What is the plaintiff's pleaded case?

7.1 In paragraph 2.9 of the statement of claim, the plaintiff alleges that he '*was dismissed for exercising [his] rights to labour court*'.

7.2 In paragraph 2.10, he alleges that on 15 May 2023, he launched an application in the Labour Court against the third defendant under case number J681-23, which was still pending while he was employed.

7.3 In paragraph 2.11, he alleges that on 18 May 2023 (i.e. three days later), he was shocked to receive a notice to attend a disciplinary hearing pursuant to which he was dismissed.

7.4 In paragraph 3.1, he alleges that his dismissal was substantively unfair as he ‘*was trying to exercise [his] right [and he] was not aware [he] will be dismissed*’.

[8] Although the statement of claim is not pleaded with the precision of a trained legal professional (having been drafted by the plaintiff as a lay-litigant), it is evident that the reason that he alleges for his dismissal falls within the ambit of section 187(1)(d) of the LRA, which in turn, falls within this Court’s jurisdiction under section 191(5)(b)(i) of the LRA.

[9] During argument, the defendants’ representative alleged (from the bar) that the allegations of misconduct that were levelled against the plaintiff prior to his dismissal included references to the Labour Court litigation launched by the plaintiff (which were framed as allegations of bringing the employer’s name into disrepute and threatening the employer). He alleged further (from the bar) that he had been the disciplinary chairperson, and that the plaintiff was not found guilty of those allegations and was not dismissed based on them.

[10] Even if regard was to be had to the content of these submissions (made from the bar), the key consideration at this stage is the reason for dismissal alleged by the employee in his statement of claim; not whether or not that reason is, in fact, the true reason for the dismissal. The latter issue is a matter for determination by the trial court in due course.

[11] It follows that the plaintiff’s pleaded case engages the Court’s jurisdiction.

[12] Turning to the plea of *lis alibi pendens*, the requirements for it to be sustained are well-established.

[13] In *Hassan and Another v Berrange NO²*, the Supreme Court of Appeal expressed them in the following terms:

² 2012 (6) SA 329 (SCA) at

‘Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause...’

[14] It is evident that the same plaintiff (via NUMSA) has instituted proceedings against the same defendants arising from the same cause (i.e. his dismissal) in the bargaining council.

[15] During argument, the defendants’ attorney drew the Court’s attention to a submission made by the plaintiff to the bargaining council on 19 July 2023, which alleged that the bargaining council lacks the requisite jurisdiction to entertain the matter and that *‘[t]he third respondent issued the charge sheet on the 18-05-2023 for misconduct the third respondent regarded the pending case under J681-23 as a misconduct by the applicant’*.

[16] It does not appear that any further developments have occurred in the bargaining council proceedings (in the light of that submission, or more generally).

[17] Although it appears from the submission that the plaintiff does not wish to pursue the matter in the bargaining council, the matter in the bargaining council has not been formally withdrawn by the plaintiff, and it appears that, strictly speaking, it remains pending.

[18] During the course of the hearing, the plaintiff (as a lay-litigant) indicated that he had understood that his submission effectively communicated his intended withdrawal of the matter in the bargaining council in favour of pursuing this dispute, and that although he is unaware of the current status of the referral to the bargaining council, he intends to formally communicate his withdrawal of that matter to the bargaining council to the extent necessary.

[19] In these circumstances, it would be appropriate to make an order that caters for the possibility for the plaintiff (within a limited period) to formalise the withdrawal of the matter from the bargaining council, failing which the plea of *lis alibi pendens* will be upheld.

[20] In the circumstances, the following order is made:

Order

1. The defendants' point *in limine* is dismissed.
2. To the extent that the plaintiff fails to deliver a notification to the bargaining council indicating his withdrawal of his referral under case number RFBC70910 within 15 days of the date of this order (and has not done so prior to the delivery of this order), the plea of *lis alibi pendens* is upheld.
3. There is no order as to costs.

R Itzkin

Acting Judge of the Labour Court of South Africa

Appearances

For the Plaintiff: In person (self-represented).

For the Respondent: N Kellerman

Of: South African United Employers Organisation