REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 717/13

In the matter between:

REAGAN JOHN ERNSTZEN **Applicant**

and

RELIANCE GROUP TRADING (PTY) LTD **Respondent**

Heard: **17 May 2015**

Delivered: **18 May 2015**

Summary: Claim for automatically unfair dismissal on grounds of disability in terms of LRA s 187(1)(f). Respondent raised point *in limine* on jurisdiction. *Wardlaw v Supreme Mouldings* (2007) 28 *ILJ* 1042 (LAC) followed. Proceedings stayed and matter referred to CCMA for arbitration.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr Reagan John Erntszen, was dismissed by the respondent in May 2013. He says that the reason for his dismissal was his disability and that the dismissal is automatically unfair in terms of section 187(1)(f) of the Labour Relations Act.[1] The respondent says that he was dismissed for incapacity.

[2] The respondent was represented by different attorneys from the time that the dispute was referred until a month ago, when they withdrew as attorneys for the respondent. The respondent's current legal team then came on record. The matter was set down for trial commencing yesterday, 18 May 2015. On the morning of the trial, and for the first time, the respondent raised a point *in limine* that this Court does not have jurisdiction, primarily based on the dictum of the Labour Appeal Court in *Wardlaw v Supreme Mouldings (Pty) Ltd*.[2]

[3] Given the fact that the court was experiencing difficulties with its recording equipment, I handed down an oral ruling yesterday and, in order to save the parties the costs of another day in court, told them that I would hand down the written reasons for judgement today.

Evaluation

[4] The applicant says that he was dismissed on 27 May 2013 "because of his disability thus discriminating against him." He describes the legal issues that arise as follows:

> "1. The real reason for the applicant's dismissal was because of his disability.
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> 2. The dismissal was automatically unfair as provided for by section 187(1)(f) of the Labour Relations Act no 66 of 1995 (LRA)."

[5] The background to the claim is that the applicant was injured because of a car accident in May 2012. An incapacity hearing was eventually held on 19 April 2013. The respondent offered the applicant alternative employment. The respondent formed the view that the applicant was not capable to

[1] Act 66 of 1995 (the LRA).

[2] (2007) 28 *ILJ* 1042 (LAC).

continue performing the duties for which was appointed and dismissed him for incapacity on 27 May 2013.

[6] The respondent, then, says that the reason for dismissal was incapacity. The applicant says that the real reason was disability; that this constitutes discrimination; and that, therefore, his dismissal is automatically unfair.

[7] The problem that arises is that of jurisdiction. If the reason for dismissal is incapacity, an unfair dismissal dispute must be arbitrated by the CCMA in terms of section 191(5)(a)(i) of the LRA. But if the reason for the dismissal is that the employer unfairly discriminated against the employee on the grounds of disability, this court has jurisdiction to hear the dispute.

[8] What, then, is the Court to do? In the recent case of *Department of Correctional Services v PSA*[3] it referred to the guidance of the Constitutional Court and the Supreme Court of Appeal. As Nugent JA stated in *Makhanya* [4]:

> "[T]he power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa* [5], expressed it as follows:
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> 'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.'"

[9] And the Constutional Court in *Gcaba* [6] said that:

> "Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case".

[10] In this case, the applicant bases his case on a claim that the real reason for his dismissal was his disability. Does that mean that the court has jurisdiction to hear it, and that it will only decide whether it is a good or a bad claim after all the evidence is in?

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[3] [2015] ZALCJHB 150 (13 May 2015) paras [20] – [21].

[4] *Makhanya v University of Zululand* [2009] 4 All SA 146 (SCA); 2010 (1) SA 62 (SA) para 54.

[5] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 155.

[6] *Gcaba v Minister for Safety & Security* (2010) 31 ILJ (CC) para 75.

[11] There can be no doubt that this court has jurisdiction to hear the applicant's claim as pleaded. But the principle raised by the Labour Appeal Court in *Wardlaw* [7] is the following:

> "[Section] 157(5), read with s 158(2), clearly envisages a situation where the Labour Court initially takes as correct the employee's allegation of what the reason for dismissal is and proceeds with the process of hearing the matter until it is 'apparent' to it that the reason for dismissal is a different one and it is one falling under section 191(5)(a). In such a case s 158(2) is triggered. Once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court deals with the matter in terms of either s 158(2)(a) or (b). It cannot deal with it outside the ambit of those provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seized with the matter. To do so would be in conflict with provisions of s 157(5) and 158(2) of the Act.
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> The question that arises from s 158(2) is: when does it become apparent to the Labour Court that a dispute is one that ought to have been referred to arbitration? To answer this question within the context of a dismissal dispute, it is necessary to bear in mind the provisions of s 191(5)(a) and (b). In terms of those provisions the employee's allegation of what the reason for dismissal is provisionally channels the dispute to either arbitration or adjudication after conciliation has failed.
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> …
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> In the light of the above it seems to us that the employee's allegation of the reason for dismissal as contemplated in s 191(5) is only important for the purpose of determining whether dispute should be referred of the conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to resolve the dispute on the merits finally. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon its not later becoming 'apparent' to the court within the contemplation of s 158(2) of the Act that the reason for the employee's dismissal is one that falls within s

[7] *Supra* para [21] - [23].

191(5)(a) of the Act. We say it is provisional and conditional because if it later becomes 'apparent' that the dispute is one that ought to have been referred to arbitration, the court will decline jurisdiction and have the dispute referred to arbitration.

…

[In this case] the court a quo heard oral evidence and examined the evidence to establish whether the reason for dismissal alleged by the employee was the reason for the dismissal. In terms of s 158(2) of the Act it seems that it is not necessary to go that far. If 'it becomes apparent [to the Labour Court] that the dispute ought to have been referred to arbitration', this will suffice for the purpose of the invocation of s 157(2)(a) or (b). Probably, the drafters of the Act wanted to avoid, as far as possible, that the court should go too much into the matter to establish the true reason before invoking s 158(2) because that would not be cost-effective, could undermine the objective of an expeditious resolution of disputes and could also result in a duplication of proceedings."

[12] I debated with Mr *De Kock* whether it is possible for the Court, at this stage, and without having heard evidence, to consider what the true reason for dismissal is. His argument is that that is, in appropriate circumstances, what the Labour Appeal Court enjoins us to do in order to be cost-effective, to ensure an expeditious resolution of the dispute and to avoid a duplication of proceedings.

[13] The Court had to consider that position in the light of the common cause facts before it, without having heard evidence.

[14] It is common cause that the applicant was injured in a car accident; that the respondent formed the view that he had been incapacitated for his duties; that an incapacity hearing was held; and that the respondent gave that as its reason for dismissal. Those facts have to be considered against the applicant's claim that he had become disabled and that that was the real reason for his dismissal.

[15] The principles relating to disability and discrimination were considered eloquently and at length by Murphy AJ (as he then was) in *IMATU v City of Cape Town.*[8] He considered the discrimination analysis in the framework

[8] [2005] 11 BLLR 1084 (LC).

of section 6 of the Employment Equity Act.[9] He noted that the approach to unfair discrimination to be followed by courts has been spelt out in *Harksen v Lane NO.*[10] The first enquiry is whether the provision [in an employment policy or practice] differentiates between people or categories of people. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-stage analysis. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[16] The court also pointed out[11] that the word "disability" is not defined in the EEA, but item 5 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, enacted in terms of the EEA, defines "people with disabilities" as "people who have a long-term or recurring physical or mental impairment which substantially limits the prospect of entry into, or advancement in, employment." The definition, he held, is therefore not based on the medical model of disability but rather on the effect the impairment has in limiting the complainant's entry into, or advancement in, employment.

[17] Although this case concerns s 187(1)(f) of the LRA and not the EEA, similar principles apply. The question to be asked is whether the employer has discriminated against the applicant; and if so, whether it is based on disability.

[18] The applicant can only succeed with the claim for automatically unfair dismissal based on discrimination if he can show that the real reason for his dismissal was that he was disabled. Mr *De Kock* referred to *Mouton v*

[9] Act 55 of 1998 (the EEA).

[10] 1998 (1) (SA) 300 (CC) paras [78] – [81].

[11] Para [89].

Boy Burger (Edms) Bpk[12] where it was held that, in cases involving dismissals for alleged discriminatory reasons, the employee must produce sufficient evidence to raise a 'credible possibility' that the main or dominant reason for the dismissal was some form of discrimination. And in *Wardlaw* the LAC held that, if an employee fails to raise a prima facie case that the dismissal was automatically unfair, and the employer persuades the court that it was for reasons relating to the employee's conduct or capacity, the matter must be stayed and referred to arbitration.

[19] In my view, even on the facts as pleaded by the applicant, he does not cross the hurdle of showing that he was disabled. There is no indication on the pleadings or in the evidence that has been introduced by way of an expert witness report that the applicant has a long-term physical impairment which substantially limits his prospects of entry into, or advancement in, employment.

[20] It appears from the report of the expert witness, an occupational therapist, that the applicant secured employment as a fitter and turner for approximately six months with in about two months of his dismissal; and he then started working for a new employer in a similar position to the one that it occupied at the respondent from about January 2014. The injury that led to his incapacity clearly has not transmogrified into a long-term physical impairment which has limited his prospects of entry into, or advancement in, employment.

[21] To use the test in *Wardlaw*, it is apparent that the reason for the applicant's dismissal is incapacity and that it should therefore be referred to arbitration in terms of s 158(2)(a) of the LRA. I must stress that that will not nonsuit the applicant. The dispute will be referred to arbitration. The applicant will still have a full and fair hearing where he can lead evidence and where the employer will have to show that his dismissal (for incapacity) was fair.

[12] (2011) 32 *ILJ* 27013 (LC).

Conclusion

[22] Although this court had jurisdiction to consider the dispute that the applicant referred, as set out in his pleadings, it has become apparent that the dispute is one that ought to have been referred to arbitration. In terms of s 158(2) of the LRA, therefore, the Court has to stay the proceedings and refer it to the CCMA for arbitration.

Costs

[23] This Court is enjoined to take into account the requirements of law and fairness when deciding on costs.[13] The respondent raised the point that led to the ruling in this judgement at a very late stage after it had procured the services of a new legal team. The applicant did not have an adequate opportunity to consider whether he should proceed with litigation in this court. This ruling also does not bring the dispute between the parties to an end. It is merely referred to a different forum. In all these circumstances, I do not consider a costs order to be appropriate.

Order

[24] I therefore make the following order:

24.1 The proceedings are stayed in terms of section 158(2)(a) of the Labour Relations Act and the dispute is referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration.

24.2 There is no order as to costs.

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Anton J Steenkamp

Judge

[13] LRA s 162.

APPEARANCES

APPLICANT:	Theo Potgieter (attorney).
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RESPONDENT:	Coen de Kock
	Instructed by Carelse Khan

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