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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 752/2013

In the matter between:

Nicole Jacqueline RAHN **Applicant**

and

CHEIL SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **5 June 2015**

Delivered: **12 June 2015**

Summary: Special pleas – jurisdiction – LRA s 187(1)(d) – protected disclosure. Court having jurisdiction to hear alternative claim of unfair dismissal in terms of amended s 158(2)(b).

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Nicole Rahn, was dismissed by the respondent. She says that she was dismissed because she made a protected disclosure

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and exercised her rights in terms of the LRA[1]; and that, therefore, it was an automatically unfair dismissal in terms of s 187(1)(d) and s 187(1)(h) of that Act. In the alternative, she claims that the dismissal was in any event unfair.

[2] The matter has not yet gone to trial. The respondent raised three special pleas *in limine* challenging the court's jurisdiction on the main and alternative claims.

Background facts

[3] The applicant lodged a grievance concerning her working conditions. It was unresolved. She referred an unfair labour practice dispute to the CCMA. During conciliation she referred to the respondent's "Annual Review and Incentive Proposal". On her return to work, the respondent demanded to know how she got hold of the document. The respondent seized her laptop. She was called to a disciplinary hearing and found to have committed misconduct by disclosing confidential information in the form of the report at the CCMA. She was dismissed. She referred the current dispute to the CCMA and, when conciliation failed, to this Court. Her referral to arbitration to determine an unfair dismissal dispute was dismissed for lack of jurisdiction as that dispute is before this Court in the form of her alternative claim and thus the arbitrator ruled that it was *lis pendens*.

Evaluation / Analysis

[4] The respondent raises three special pleas:

4.1 Lack of jurisdiction on the alternative claim.

4.2 Jurisdiction with respect to the main claim under s 187(1)(d) of the LRA – lodging a grievance.

4.3 Jurisdiction / lack of cause of action under s 187(1)(h) – reliance on document produced at conciliation.

[1] Labour Relations Act 66 of 1995.

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First special plea: Jurisdiction over alternative claim

[5] The applicant's main claim is that her dismissal was automatically unfair in terms of s 187(1)(d) and s 187(1)(h) of the LRA. This Court has jurisdiction to hear that claim. But she submits in the alternative, should this Court not uphold her claim of unfair dismissal, the Court should in any event find that her dismissal was unfair.

[6] The employer says that the applicant was dismissed for misconduct. Ordinarily, a dispute of that nature would be referred to the CCMA or a bargaining council for arbitration.[2] That is what the applicant did in this case; but the respondent successfully raised a preliminary point of *lis pendens* in that forum. The applicant is left in a quandary: Should she be unsuccessful in her main claim, would she be non-suited to pursue her unfair dismissal claim in the ordinary course?

[7] This type of situation is foreshadowed in s 158(2)(b) of the LRA. It provides:[3]

> "(2) If at any stage after the dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –
>
> stay the proceedings and refer the dispute to arbitration; or
>
> if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of s 162(2)(a) are applicable."

[8] In this case, should the employee be unsuccessful with her claim of automatically unfair dismissal, it would certainly be "expedient" for the court to consider her alternative claim. The special plea was premised on the wording of the subsection prior to the recent amendment. In terms of the previous wording, the Court could only continue with the proceedings "with the consent of the parties". Those words were removed by the

[2] LRA s 191(5)(a)(i).

[3] The subsection has been substituted by s 26(c) of the Labour Relations Amendment Act 6 of 2014. As the learned authors in Du Toit et al, *Labour Relations Law: a Comprehensive Guide* (6 ed, 2015 LexisNexis p 189) point out, such an order by the Labour Court is open only to appeal and not to review. The contrary view would be untenable.

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Amendment Act that came into operation on 1 January 2015.[4] Hence the employer's consent is no longer needed.

[9] After the amendment, the fact that Cheil SA has not consented to the Court hearing the unfair dismissal dispute becomes irrelevant. Should the Court at that stage, and if the employee is unsuccessful with her main claim, consider it expedient to hear the alternative claim, it will have jurisdiction to do so.

[10] The first special plea is dismissed.

Second special plea: jurisdiction with respect to the main claim under s 187(1)(d) [lodging of grievance]

[11] The applicant contends in her statement of claim that her dismissal was automatically unfair as envisaged in section 187(1)(d) of the LRA as she was dismissed by virtue of having exercised her rights conferred by the Act or participating in any proceedings in terms of the Act. The basis for that claim is that she filed a grievance and enforced her rights in terms of the LRA.

[12] It has been held in *De Klerk v Cape Union Mart International (Pty) Ltd* [5] that this court does have jurisdiction to hear such a claim. In that case, the employer's exception was dismissed.

[13] The respondent in this case argues that, for the employee to sustain this cause of action, it is necessary for her to plead sufficient facts to establish a causal connection between the lodging of the grievance and the dismissal.

[14] This is a matter for evidence which cannot be determined at this juncture. The second special plea is dismissed.

Third special plea: jurisdiction/lack of cause of action under ss 187(1)(d) and (h)

[15] The respondent contends that the controversy between the parties arose when the applicant used its 2012 Annual Review and Incentive Proposal

[4] Proclamation R 87, 2014 (*Government Gazette* No 38317, 19 December 2014).

[5] (2012) 33 *ILJ* 2887 (LC) paras [29] – [38].

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at the CCMA conciliation proceedings. It says that the document is confidential and that the employee did not have permission to use it.

[16] The employee contends that she was dismissed for having made a protected disclosure i.e. by disclosing the document at CCMA conciliation. She says that her dismissal was automatically unfair in terms of s 187(1)(h) of the LRA.

[17] The respondent argues that, as a matter of law, the applicant has not established that she was entitled to be in possession of the document or that she obtained it lawfully. Mr *Boda* argued that her use of the document at conciliation could not amount to a protected disclosure nor was it lawful.

[18] Whether or not the disclosure was a protected one as defined in the Protected Disclosures Act[6] is best determined after hearing evidence at trial. Mr *Lennox*, for the applicant, suggested that the disclosure of the document at conciliation was, quite simply, shielded by rule 16 of the CCMA rules. I agree. That rule reads as follows:

> "1. Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.
>
> 2. No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation."

[19] The intention of the rule was confirmed in *Hofmeyr v Network Healthcare Holdings (Pty) Ltd.*[7] And in *Van Metzinger v Conservation Corporation*[8] the court held that rule 16 does not permit reference to any discussions held during conciliation in subsequent proceedings and evidence relating to such discussions must therefore be rejected. As Van Niekerk J pointed out in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA:*[9]

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[6] Act 26 of 2000.

[7] [2004] 3 BLLR 232 (LC) paras [5] – [6].

[8] (2013) 34 *ILJ* 1309 (LC). See also *Langa v Skyline Logistics* (2014) 35 *ILJ* 1584 (LC) para [39].

[9] [2009] 12 BLLR 1214 (LC) para [11].

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> "The dispute resolution system established by the LRA places a premium on conciliation."

[20] Part of this premium must be that the parties at conciliation can speak freely and refer to documents without a residual fear that they could be disciplined as a result thereof. As the learned authors note in *Labour Relations Law: A Comprehensive Guide*[10], the term 'said' in CCMA rule 16 probably includes documents disclosed during conciliation.

[21] The third special plea is dismissed.

Cots

[22] None of the respondent's special pleas has succeeded. Both parties asked for costs. I see no reason in law or fairness to interfere.

Order

The special pleas raised by the respondent are dismissed with costs.

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Anton J Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M A Lennox Instructed by Stewart-Garden attorneys.
RESPONDENT:	F A Boda (with him S Tilly) Instructed by Kramer Villion Norris.

[1010] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6ed 2015 LexisNexis) p 142 fn 175.

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