Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 889/17

In the matter between:

BIFAWU obo W MNCUBE & 60 OTHERS **Applicant**

and

LEGALWISE EXPENSES INSURANCE SOUTH AFRICA t/a LEGALWISE **Respondent**

Heard: 08 September 2017

Delivered: 12 September 2017

Summary: (Rule 11 - opposed exception application – failure to disclose a cause of action either on facts or in law)

JUDGMENT

Introduction

[1] The respondent has objected to the applicant's statement of case filed on 18 April 2017 on the basis that it fails to disclose a cause of action. The applicant decided to oppose the exception, instead of seeking to amend its statement of case.

The exception

[2] Rule 6(1)(b) of the Labour Court Rules requires that the substantive portion of a statement of case must satisfy the following requirements:

> "(b)have a substantive part containing the following information:
>
> (i) The names, description and addresses of the parties;
>
> (ii) a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;
>
> (iii) a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and
>
> (iv) the relief sought;.."

[3] The applicant's statement of claim is anything but concise in stating the factual basis of the claim and the chronological order is confusing at times. It is convoluted and frustratingly vague in places, lacking in the particularity it requires. However, the respondent has not objected to the referral on the basis that it is vague and embarrassing or that it does not satisfy the requirements of Rule 6(1)(b). Its objection is that the statement does not make out a case in law. More particularly, it focuses on the relief sought by the applicant and raises a threefold objection thereto. Firstly, insofar as the applicants asked for the court to review and set aside the respondent's decision to introduce and implement new technology and new work methods using its powers under section 158 (1) (h) Of the Labour Relations Act, 66 of 1995 ('the LRA') the respondent points out that the court has no such power except in relation to decisions of organs

of state. Secondly, it objects to the formulation of the applicants claim that it is entitled to relief in the form of an order of the court directing the respondent to comply with the provisions of the LRA in the exercise of its powers under section 158 (1) (a) (iii) and (b) of the Act. It complains that the applicant has not identified which particular action the respondent must perform that will remedy a wrong and give effect to a primary object of the act. Further, it argues that the applicant has not identified which provision of the Act it should be compelled to comply with.

Evaluation

[4] To fairly appraise the merits of the claim it is useful to try and establish what the applicant appears to be trying to achieve, making allowance for the fact that the statement is drafted by a layperson, albeit someone with a good command of language. The key issue is whether the applicant's case which emerges from the dense fog of its statement discloses one or more recognizable causes of action that this court can adjudicate.

[5] In paragraph 5 of the applicant's statement of case it is claimed that the dispute concerns the respondent's failure to consult with the applicant on behalf of its members on the merits of the decision to restructure or to introduce technological change to achieve various objectives allegedly on the basis that the applicant does not represent the majority of employees in the workplace. The applicant asks the court to review and set aside the decision in terms of section 158 (1) (h) and to make an order "to comply as contemplated by section 158 (1) (a) (iii) and (b) of the LRA.

[6] The relevant provisions referred to are set out below:

> 158. Powers of Labour Court
>
> (1) The Labour Court may-
>
> (a) make any appropriate order, including
>
> (i) the grant of urgent interim relief;
>
> (ii) an interdict;
>
> (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

(iv) a declaratory order;

(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

(vii) an order for costs;

(b) order compliance with any provision of this Act or any employment law;

…

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;..."

[7] In paragraph 5.1.4 of the statement the applicant complains that the introduction of new technology and work methods without complying with section 84 (1) and (b) read with section 189 of the LRA was deliberately done in order to avoid a possible industrial action by the union and its members and any resulting dismissals would, in any event, have been prohibited by section 187 (1) (a) of the LRA.

[8] Section 84 refers to consultations which may take place within the context of the existence of a workplace forum. Nowhere in the applicant's statement of case does it say that a workplace forum exists, so the provisions of section 84 do not appear to have any application on the pleaded facts. *Mr Nhlapo*, representing the applicant argued that it could never have been the intention to provide consultative rights to a workplace forum without extending the same rights to a registered trade union.

[9] Section 187(1)(a) refers to automatically unfair dismissals relating to participation or intended participation in a protected strike. Again, there is no allegation any dismissal of this sort has taken place and consequently the pleaded facts would not appear to support a claim for relief under that section. Section 189 refers to the requirements of consultation where an employer contemplates the possibility of dismissing employees for operational reasons. Although it does not appear that any dismissals for operational reasons have taken place, the union complained on 7 December 2015 that it had been kept in the dark about the respondents

alleged failure to consult on the merits of the decision to introduce technological change “as contemplated in the collective agreement and section 189 (1)” the union complained that it had been bypassed in the consultation process.

[10] It is further alleged that from 2006 until 2013 the union had enjoyed organisational rights of various kinds as well as the right to be consulted when the respondent embarked on a restructuring program that might cause job losses, irrespective of the union not having recruited a majority of the workforce.

[11] According to paragraph 5.13 of the statement of case, following a meeting held on 10 March 2015 the respondent refused to deal with the applicant unless it had 30% representivity in terms of the collective agreement and, in order to represent its members on issues not covered by the collective agreement, it required 50% representivity. It would appear that the question of consulting with the union over technological change came to a head in December 2015. The respondent’s stance had been that it had consulted individually with the employees concerning the new technology and that the union was not a majority union and accordingly it had not breached the LRA or any collective agreement by not consulting with the union about a business decision. The union alleges that the respondent’s direct consultation with employees undermined their rights under section 4 and section 5 of the LRA. In broad terms, these provisions protect employees against victimisation for exercising their right to join and participate in union activities.

[12] The union further alleges that the new technology project as implemented by the employer sought to bypass labour legislation and was at odds with the Skills Development Act 97 of 1998 and the National Skills Development strategy. However, there was no particularity provided as to which provisions if any of either of those acts directly applied to the respondent and which provisions if any it had failed to comply with.

[13] The union further alleges that on account of the respondent stating in a letter dated 29 July 2016 that it accepted the obligation to consult under section 189 of the LR A “once the employer is contemplating

retrenchment" that this was evidence that the employer had misinterpreted the LRA and it contradicted the employer's previous stance on consultation. In essence, the applicant argues that section 189 "is not only applicable when an employer contemplating retrenchment" but is "also applicable when an employer contemplates to change the working conditions as a result of the proposed operational requirements changes as an alternative to retrenchment." However, the applicant could produce no authority for this interpretation of section 189 and I am not aware of any that has gone so far.

[14] The applicant further alleges that section 84 of the LRA concerning the obligation to consult over certain matters was not intended to be confined to companies that had a workers forum, but also included a duty to consult with a registered union. However, the requirements of s 84 were specifically crafted for a new workplace structure to facilitate a form of co-operative workplace governance. Unions were not envisaged as playing an equal role in that forum. The fact that rights were accorded to a workplace forum rather than a registered union, was an inducement to establish such bodies. It is also inconceivable that if the legislature had intended a registered union to enjoy such rights of consultation as a matter of right that this was not provided for in section 84. The interpretation argued for by the applicant is untenable on any reasonable interpretation of that section.

[15] In summary, in so far as the applicant is contesting it has a right to be consulted about workplace changes before any workplace changes are implemented, that is a matter of mutual interest and nothing prevents a union pursuing a demand for such consultation to take place before s 187(1) would be operative, but a right to such consultation is not established by the LRA, and the court cannot impose such an obligation on an employer under the act.

[16] Regarding the employer's failure to consult with the union on the basis of it not being a majority union, that likewise is a matter of mutual interest and, subject to the provisions of any collective agreement binding on the union or its members not to embark on protected strike action on such issues,

nothing would prevent the applicant from pursuing that as a dispute of interest. The applicant did not mention that any industrial action had in fact taken place in relation to these issues, which it ought to have done if it had already embarked on such action in relation to the same dispute. I mention this because the respondent's representative, *Mr Frahm-Arp*, mentioned in argument that the applicant was well aware of its right to attempt to compel the respondent to consult or negotiate with it on these matters by means of protected industrial action because it had already exercised that right and had failed to prevent a lockout being implemented in retaliation.

[17] In relation to an alleged infringement of members rights under s 4 and s 5 of the LRA, the only sense in which this can be understood from the statement of case to embody a cause of action is that by refusing to consult with the union and therefore deal with the members' chosen mouthpiece, that somehow infringed their rights to participate in the union, or unfairly discriminated against them on account of doing so. It is clear that the LRA envisages and promotes collective bargaining between representative trade unions and employers and provides elaborate mechanisms for unions that do not have majority representation to obtain a bouquet of organization rights which will assist them to promote their growth in a workplace.[1] The right of minority unions in certain circumstances to embark on protected strike action to try and achieve bargaining or consultative rights, is also recognized. But the LRA also envisages that minority unions might not obtain those rights and such limitations are not incompatible with the freedom of employees to join and participate in such unions, provided that an employer does not apply a more favourable dispensation to other unions with less or equivalent degrees of representation in the workplace. It is not an infringement of an individual employees' right to freedom of association *per se* if their union is not afforded rights by the employer, subject to the provisions of the LRA governing disputes over organisational rights.

[18] In effect it was argued by the applicant that s 158(1)(h) should be read as containing at least two separate parts, one relating to the review of "any

[1] See Chapter III of the LRA.

decision taken" and the other to "any act performed by the State" . However, it is implausible to read that provision in such a truncated fashion. It must clearly be read as a whole and that only the state as employer was contemplated by that provision. To suggest that the provision was intended to create an entirely new hitherto unknown cause of action in law, namely that the decisions of private employers could now be subject to judicial review, is with respect, nonsensical. Firstly, if that were the case there would be no need to mention the State in its capacity as employer. Secondly, the principles of common law review as encapsulated in section 6 of the Promotion of Administrative Justice Act, 3 of 2000, and their application are confined to administrative action. If the applicant was correct it would mean that the LRA contains an entirely new cause of action in law and that the legislature neglected to devote a single section in the act to the scope, extent and nature of such a novel right despite detailed provisions dealing with other rights created by the statute. It is inconceivable the legislature would have intended to create such an unprecedented right without such elaboration.

[19] I further agree with the respondent in relation to the application of s 158(1)(a)(iii) that the applicant has failed to identify a particular object of the LRA which such an order might give effect to. That is the very least the applicant should have done. Further, it is apposite to repeat what this court said in *Mould v Roopa NO & Others*[2], namely that section 158(1)(a)(iii) "is not an omnibus to ride roughshod over well-established principles of the common law, labour law and practice".[3] Lastly, the applicant failed to identify which provision of the LRA or any other statute the respondent had not complied with that might warrant any relief been granted under s158(1)(b) of the LRA.

[20] In conclusion, the applicant and its members are not without remedies but those remedies are not embodied in rights but lie in persuading an employer through protected strike action, they should be granted such rights. In so far as pursuit of such a strategy has been unsuccessful to

[2] (2002) 23 *ILJ* 2076 (LC)

[3] At 2080, para [9].

date, the applicant cannot expect the court to create remedies to compensate for such failures. In considering the applicant's statement of claim, I have tried to give it the broadest and most generous interpretation and have considered every section of the LRA the applicant relies on, because even if one properly pleaded cause of action can be found in the statement, then the exception should be dismissed.[4] However, I have been unable to find any recognised cause of action which has been pleaded or, in the case of a claim such as the claim for relief under s 158(1)(a)(iii) or (b), there is no factual particularity to support such a claim. Typically, when such exceptions are raised, the deficiency lies in the failure to plead sufficient facts to support a recognised cause of action. In this instance, the more fundamental problem is that, in the main, the applicant has not even articulated a recognised legal claim. The legal claims it makes are claims in law that are not yet established rights.

[21] On the issue of costs, I am satisfied that the applicant had an opportunity to decide whether or not to oppose the exception and whether it should rather seek to amend its statement of claim. Instead, it vigorously defended a manifestly deficient statement of claim and caused the respondent to incur unnecessary costs. Under these circumstances there is no reason why the applicant should not pay the respondent's costs despite the existence of an ongoing relationship between the parties.

Order

[1] The exception is upheld.

[2] The applicant's statement of claim is dismissed with costs.

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[4] See Erasmus:Superior Court Practice, (Juta), Revision Service 37, 2011, *D E van Loggerenberg et al at* Rule-B1-p151-2

"In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld". See also cases cited thereat at fn 6.

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	**M Nhlapo of BIFAWU**
RESPONDENT:	**L Frahm-Arp of Fasken Martineau.**