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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 1016/16

In the matter between:

Emmanuel MAZIBUKO & 44 others	**Applicants**
and	
JJF CONSTRUCTION CC	**First respondent**
JJF READYMIX (PTY) LTD	**Second respondent**
JJF PLANT HIRE CC	**Third respondent**
JPH PLANT HIRE	**Fourth respondent**
T/A JJF PLANT HIRE CC	
JJF ROOFING CC	**Fifth respondent**
JJF LOCHNER	**Sixth respondent**

Heard: 21 April 2017

Delivered: 13 June 2017

Summary: Exception – applicants given opportunity to amend statement of claim.

RULING ON EXCEPTION

STEENKAMP J

Introduction

[1] The applicants are 45 former employees of one or more of the six respondents. The respondents are all under the control of the sixth respondent, Mr JJF Lochner. All of the respondents carry on business in the building and plant hire trades from the same premises in Springs.

[2] The applicant's claim that they were all dismissed, ostensibly for operational requirements, on 2 December 2016. They say that the dismissal was automatically unfair, as the real motive or primary reason was because of the membership of a trade union. Alternatively, they claim that the dismissal was in any event procedurally and substantively unfair.

[3] The respondent are all represented by Du Randt, Du Toit & Pelser attorneys. They have raised a number of exceptions.

Exceptions

[4] The overriding exception raised by the respondents is that the statement of claim is vague and embarrassing because various causes of action have been initiated against all six respondents. Five of them are either close corporations or companies and therefore separately registered legal entities. They say that it is unclear which applicants have been employed by which respondents and why all six respondents should be liable to all of the applicants in respect of all the various alleged causes of action.

[5] The respondents further raise the following specific exceptions:

5.1 The applicants have not pleaded the facts or complied with the procedural requirements in support of a referral or application in terms of section 189A(13) of the Labour Relations Act.[1]

5.2 There is no proof that the matter has been referred to conciliation.

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

5.3 The applicants have not pleaded the facts with sufficient particularity to substantiate a claim in terms of s 74(2) of the Basic Conditions of Employment Act.[2] More particularly, the respondents are not in a position to determine whether any part of the claims may have prescribed.

5.4 The applicants have not identified which of them were employed by which of the respondents.

5.5 The applicants claim that they were "laid-off" without pay and that they have a contractual claim for wages in terms of s 77 of the BCEA. They have not pleaded the details of the employment contracts on which they rely.

5.6 One of the applicants, TE Mamhunze, claims refunds for Unemployment Insurance Fund (UIF) contributions. He does not set out the basis on which this court has jurisdiction to adjudicate such a claim.

5.7 The applicants claim alleged unpaid amounts of overtime pay, pay for Sunday work and pay for public holidays. They do not state the dates on which they are alleged to have worked overtime and the total number of hours in respect of each of those days.

Exceptions raised by the applicants in turn

[6] The applicants, in turn, have raised an "exception to the exception". They say that the respondents did not indicate:

6.1 the basis upon which they claim that this court lacks jurisdiction to entertain the applicants' claims;

6.2 that the applicants are not the former employees of the respondents;

6.3 that all six respondents are not correctly cited; and

6.4 that an application for joinder should have been made.

[2] Act 75 of 1997 (BCEA).

Evaluation / Analysis

[7] I shall deal first with the applicants' exception. Although this is an unusual step, since an exception itself constitutes a pleading, the courts have entertained an "exception to an exception".[3] An exception is bad in law if it does not properly set out the grounds on which it is based.

[8] Having said that, I do not agree with the applicants that the respondents have not properly set out the grounds on which they based their exceptions. The have stated the grounds properly; whether they should succeed, is a different question.

[9] The general principles governing exceptions are summarised by Erasmus:[4]

(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning.

(b) If there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the commission thereof may give rise to vagueness and embarrassment, but the same point made in another case be only a minor detail.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[3] Theophilopoulos et al, *Fundamental Principles of Civil Procedure* (LexisNexis 2 ed 2008) at 218, citing *Buthelezi v Minister of Bantu Administration* 1961 (3) SA 256 (N).

[4] *Superior Court Practice* B1-154.

(f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness."

[10] In *Harmse v City of Cape Town*[5] the Court noted that the Rules of this Court "do not require an elaborate exposition of all facts in their full and complex detail – that is the role of evidence, whether oral or documentary." And what is more, the pre-trial conference provides an occasion "for the detail or texture of the factual dispute to begin to take shape".

[11] Bearing that cautionary note in mind, and bearing in mind that the parties in this case have not yet had a pre-trial conference, the Court must decide if the respondents are prejudiced because of the vagueness in the statement of claim as it stands.

[12] Firstly, I agree that the applicants have not set out the factual or legal basis for their reliance on s 189A with sufficient particularity to enable the respondents to plead meaningfully thereto. They say that they were dismissed for operational requirements on 2 December 2016. But apart from an oblique reference to an earlier request for a facilitation process in terms of s 189A, they do not explain why this dismissal falls within the parameters of s 189A; or, if it does, why s 189A(13) is applicable in circumstances where they have already been dismissed.

[13] The applicants have also not alleged that they the dispute (or those disputes that require conciliation) have been conciliated. That is a jurisdictional prerequisite. They need to do so.

[14] I also agree that the applicants have not pleaded the facts with sufficient particularity to substantiate a claim in terms of s 74(2) of the Basic Conditions of Employment Act. The alleged unlawful UIF deductions and overtime payments are not pleaded with sufficient particularity. It is so that some of the documentation will have to be provided by the employer or employers; more of that later.

[5] [2003] 6 BLLR 557 (LC) par 8.

[15] Perhaps the most important and overriding exception is that the applicants have not set out which of them was employed by which employer. The applicants are all listed, together with their clock numbers. The respondents do not deny that they are all under the control of JJF Lochner – either as sole owner, sole director or sole member -- and that they operate from the same premises. The applicants say that they worked for the different entities interchangeably. That is, perhaps, a matter for evidence; but more importantly, it is something that is in the peculiar knowledge of the respondents. They are compelled to have records of their employees in terms of the BCEA; they must know who worked for whom, especially in the light of having been furnished with clock card numbers. That is typically something that can be established at a pre-trial meeting; but even more simply, it can be done by a proper and courteous exchange of documents and information even before such a conference. The applicants must be given an opportunity to provide these details once the employer has given them the necessary information; it is, in my view, incumbent upon the employer in a court of equity to help the court to come to the truth by providing the information within its knowledge. It cannot simply sit back and wait for the applicants to prove even the underlying common cause facts. As Zondo JP commented in *NUM v Hernic Exploration*[6],

> "in certain circumstances it is possible for the employer to know which employees are concerned in proceedings or in a referral even though the union has not furnished the names of the employees. For example, where an employer dismissed all its employees on a certain date, he would know which employees the union was referring to if it referred to 'all employees dismissed' on that date by the employer. A failure by the union to give the names of the employees concerned would not affect the jurisdiction of the CCMA nor that of the Labour Court but may affect issues such as relief because, for example, in defending the unfair dismissal claim the employer may well wish to put up specific facts relating to specific individuals which he cannot do if he does not know who the dismissed employees are."

[6] [2002] ZALAC 1 par 41.

[16] And in *Board of Executors Ltd v McCafferty*[7] Satchwell J pointed out that "[a] multiplicity of employers in certain circumstances and on appropriate and objective facts is not unknown to this court."

[17] It must also be borne in mind that the applicants may be able, through evidence, to pierce the corporate veil and show the interrelationship and liability of all the respondents. In *Zeman v Quickelberge*[8] this Court relied on the judgment of the LAC in *Footwear Trading cc v Mdlalose*[9] , summarising the facts of that case, to point out the following:

> "The respondent was dismissed. She referred her dispute to the CCMA, obtained an award in her favour, and asked for her employer, Fila (Pty) Ltd, to pay her the compensation as awarded. Fila declared that it was dormant as a company and that Footwear Trading had taken over certain of its assets. The respondent sought an order declaring Footwear and Fila to be co-employers and as such jointly and severally liable to comply with the award. Footwear filed an answering affidavit stating that Fila was a separate juristic entity and that it merely performed administrative functions for Fila.
>
> The court *a quo* found that Footwear was jointly and severally liable with Fila for complying with the order.
>
> On appeal the Labour Appeal Court upheld the principle that if circumstances warrant it a court will be justified in regarding a company as a separate personality in order to fix liability elsewhere for what are ostensibly acts of the company. This is referred to as lifting or piercing the corporate veil. In determining whether or not it is appropriate to lift the veil in the given circumstances the court quoted with approval from *Dadoo Ltd & Others vs Krugersdorp Municipal Council*, where the court confirmed the fundamental doctrine that the law in these circumstances will have regard to the substance rather than the form of things.
>
> Nicholson JA went on to say that the general principle underlying the lifting of the corporate veil is that when a corporation is the mere alter ego or business conduit of a person it may be disregarded.

[7] [1997] 7 BLLR 835 (LAC) par 74.

[8] (2011) 32 *ILJ* 453 (LC).

[9] [2005] 5 BLLR 452 (LAC).

> While the corporate veil is normally lifted to identify the shareholders or individuals who are the true perpetrators of a company's acts, the court extended the principle to situations where companies and close corporations are juggled around like "puppets to do the bidding of the puppet master."
>
> The willingness of our courts, and in particular the Industrial and Labour Courts, to pierce the veil is not new and there have been a number of decisions in the old Industrial Court as well as more recently in the Labour Court that have upheld the principle:
>
> Substance and not form is determinative.
>
> The liquidation of a close corporation and the simultaneous creation of a second one to take its place was a deceptive device used to get rid of the workforce without having to retrench them.
>
> In another instance it was held that the business of a close corporation was so enmeshed with that of the respondent company that the respondent could be regarded as the real employer of the applicant.
>
> It is not necessary for the purposes of establishing an employment relationship formally to pierce the corporate veil."

[18] The contractual claim for wages during a "lay-off" period is based on s 77 of the BCEA. The respondents say that the applicants have not pleaded the details of the employment contracts on which they rely. But again, the respondents have those contracts. Once they provide copies, at a pre-trial meeting or earlier, the applicants will be able to state with more clarity what their starting dates were and what amounts they claim; and the respondents can respond thereto. The respondents are not seriously prejudiced by the fact that the applicants have not put up the very documents that are in the respondents' possession.

[19] With respect to the overtime claims, the same considerations apply. The applicants must set out the claims with more clarity; but the respondents cannot claim ignorance and refuse to provide them with the relevant information and documents in the respondents' possession.

[20] The applicants have indeed not stated on what basis this Court has jurisdiction to adjudicate the claims in respect of UIF. They must do so in their amended statement of claim.

[21] The same holds true for the allegation of automatically unfair dismissal. The applicants have claimed that "the respondents" refuse to recognise the applicants' chosen trade union and victimised them for trade union membership, but it is not clear if this allegation holds true for one, some, or all of the respondents.

Conclusion

[22] The exceptions are upheld; but the applicants must have an opportunity to amend their statement of claim. In order to enable them to do so, the respondents cannot simply sit back. They have to provide the underlying and uncontentious information that is within their peculiar knowledge. That will enable the parties to set out their cases with greater clarity and to expand on that in the pre-trial conference; and it will provide a clearer picture to the Court before the parties start leading their evidence. I intend to incorporate such an order in my ruling which, I believe, will help rather than hinder the interests of justice. I do so, mindful of the underlying policy of the LRA that "disputes should be dealt with on their merits rather than on technicalities".[10]

[23] I take into account that the applicants are not legally represented and that this is merely an initial skirmish in a long battle. A costs order at this stage is not called for in law or fairness.

Order

[24] I therefore make the following order:

24.1 The respondents' exceptions are upheld.

24.2 The applicants must request from the respondents the specific documents they need in order to address the exceptions, such as their contracts of employment, by 23 June 2017.

24.3 The respondents must provide all relevant documents by 7 July 2017.

[10] *Davidson v Wingprop (Pty) Ltd* (2010) 31 *ILJ* 605 (LC) par 31.

24.4 The applicants must deliver an amended statement of claim by 21 July 2017 and the respondents must respond by 4 August 2017.

24.5 The parties must convene a pre-trial meeting and file a pre-trial minute by 18 August 2017.

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Steenkamp J

APPEARANCES

APPLICANTS: D Maluleke (trade union official).

RESPONDENTS: Linda Erasmus
Instructed by Du Randt, Du Toit & Pelser.