
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA

## HELD AT JOHANNESBURG

**Case No: JS 454/16**

In the matter between:

**JOELYN KGAOGELO MHLANGA** **Applicant**

and

**SYNERGY GLOBAL CONSULTING (PTY) LTD** **First Respondent**

**SYNERGY GLOBAL CONSULTING LTD** **Second Respondent**

**Heard**: 3 March 2017

**Delivered**: 31 March 2017

**Summary:** (Exception – multiplicity of overlapping claims – court lacking jurisdiction over all claims except unfair discrimination claim – unfair discrimination claim vague and embarrassing – original statement of claim struck out - applicant provided an opportunity to file an amended statement of claim)

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**JUDGMENT**

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LAGRANGE J

Introduction

[1] The respondents have taken exception to the applicant's statement of case after giving the applicant an opportunity to remove the causes of complaint in a notice issued by the respondents on 17 December 2016. The applicant opposed the exception application in as much detail as her original statement of case.

[2] At the hearing of the matter, the applicant was asked to produce the various referrals of the various disputes she had made to the CCMA which are relevant to her claim in order for the court to understand which disputes have been referred to conciliation. The applicant provided copies of the referrals as requested.

[3] Parties are referred to, according to their status as applicant and respondents in the main referral.

Chronology of events

[4] To simplify an understanding of the applicant's various claims, a brief chronology will assist.

[5] The applicant was employed on 1 October 2012 by the first respondent.

[6] A retrenchment consultation process commenced in November 2015. It was during this process that the applicant lodged her first formal grievance on 14 December 2015 alleging victimisation and discrimination in her working environment in relation to her working relationships with various managers. She claimed that the unfair treatment she was subjected to induce in her "a feeling of incompetence, anxiety about job security and tensions in work relationships; my request for a salary increase; changing job title to business operations management and subsequently the possible restructure, redundancy and retrenchments. I requested for the change in my job position title to be reconsidered as per my initial request in 2015 which I had retracted and explained why had I had retracted it in the first place. I stated that I felt these issues were related to the victimisation and discrimination I felt that I had been subject to and this

was a continuation of that unfair treatment." The reference to a continuation of unfair treatment appears to have been a general reference to the state of her working relationship with her managers in the previous two or three years. Without itemising the entire gamut of the applicant's complaints, it is fair to say that most of them related to differences between her and her managers about work performance and attitude. She claims that she was unfairly prejudiced in numerous ways by her seniors.

[7] According to the applicant, after she lodged her grievance, grievance meetings were held from January 2016. According to her this process did not resolve matters and during the course of it, she claimed to have learnt that the reason for the proposed restructuring proposals was that she had not co-operated in incomplete job description and salary review negotiations.

[8] In paragraph 5.16.10 of her statement of claim, the applicant complained that between January and February 2016 "other harassment and discriminatory incidents occurred". Accordingly, on 19 February 2016 she submitted a second grievance "which was linked to the first grievance where I further elaborated on the discrimination and victimisation; how certain procedures and systems were introduced and structured in a way that made me accountable for my colleagues' work and duties, some caused confusion where I was made to take responsibility for the confusion and other systems and procedures made me manage some of my colleagues and how they performed the tasks whereas I did not have the authority to directly address certain issues with my teammates as they did not report to me and had their specific line managers."

[9] The applicant further complained that the person handling her grievance, Mr Sejake ('Sejake'), tried to make her "feel like her understanding of discrimination and victimisation were warped" and that she was "confused" about what she was saying even though she believes she had logically substantiated her understanding of the meaning of those works in line with the applicable legislation. In her debate with Sejake, she claimed that his understanding of victimisation and discrimination was 'political' whereas she advised him that in accordance with the Employment Equity Act,

"unfair treatment is a form of discrimination and victimisation, discrimination and victimisation also listed as harassment as per this Act and that harassment in the workplace covers unfair treatment, victimisation and discrimination and that harassment is one of the issues protected by the law, it is recognised as unfair discrimination, unfair treatment is one of the examples of harassment."

[10] The applicant states that her second grievance was handled by Mr O'Keefe ('O'Keefe') who, like Sejake, did not address most of the issues in his grievance report and also tried to make her feel like she did not understand the meaning of victimisation and discrimination. Both the grievance reports of Sejake and O'Keefe were upheld on appeal by the directors on 6 April 2016. The applicant then appealed against the directors' decision.

[11] On 14 April 2016, she received notice that her position had become redundant and she could either be retrenched or accept an offer of alternative employment, which she regarded as unreasonable because it would reduce her remuneration by two thirds and involve her doing menial work.

[12] 20 April the respondents notified the applicant that they would make use of an independent chairperson to chair the grievance appeal hearing. However, the applicant objected to the nomination of a chairperson because of alleged conflicts of interest. Around this time, the applicant claimed she received an email from one of the senior managers which was not intended for her. The email indicated that the respondents wanted to get rid of her as an employee. She also interpreted this email as 'discriminatory', apparently on the basis that it revealed the respondent's bad intentions towards her and ulterior motives.

[13] On 20 April 2016, the applicant referred a claim of unfair discrimination under section 10 of the Employment Equity Act, 55 of 1998 ('the EEA') to the CCMA under case number GAJB 8644-16. In her summary of the nature of the dispute on the referral form, she described it as "Unfair treatment related to my current employment terms and conditions and harassment resulting in being unfairly selected and compelled to either

take severance pay or unreasonable alternative position due to restructuring." The claim was served on the respondent on 21 April 2016.

[14] On 20 April 2016, the applicant also claims she sent an email raising her concerns about the alleged bias and/or conflicts of interest relating to the chairperson nominated to hear her grievance appeal.

[15] On 22 April she alleges that the respondents suspended her for raising her conflict of interest and/or bias claim regarding the nomination of the 'Tokiso' chairperson who heard her grievance hearing. They also issued her with disciplinary charges which, amongst others, alleged that:

15.1 she had brought the organisation into disrepute;

15.2 created the risk of legal action being taken against the respondent on account of her comments in her email;

15.3 defamed the respondent and other organisations and individuals, and

15.4 other grounds of misconduct.

[16] Her suspension prompted the applicant to refer a claim of unfair suspension to the CCMA under case number GAJB 8893-16 on 26 April 2016.

[17] On 29 April 2016, she was notified of her retrenchment and that May 2016 would be her last month of employment. Notwithstanding the fact that she remained suspended, the pending grievance appeal hearing was held on 5 May 2016 presided over by the external chairperson to whom she had objected.

[18] At the grievance appeal hearing conducted by the external chairperson, the applicant once again felt that the chairperson of the appeal hearing made her feel that she had a warped understanding of discrimination and victimisation and that she was confused, even after she explained how her claim was within the meaning of those terms in the applicable legislation.

[19] Following the grievance appeal hearing, her disciplinary charges were supplemented with other charges relating to:

19.1 Her alleged disclosure of the email sent to her in error which the respondents claimed was privileged and which she had been instructed to delete.

19.2 Disseminating the same email to the grievance appeal chairperson and the CCMA.

19.3 Exposing the respondents to further financial risk.

[20] The applicant's disciplinary enquiry was held on 16 May 2016 and she was found guilty and dismissed on 17 May 2016. In the midst of all these events, the applicant filed another grievance (the 'third grievance') which she claimed was linked to her first two grievances covering the entire period between her employment in 2012 and her dismissal. This grievance does not appear to have led to a further referral of a dispute to the CCMA.

[21] However, on 1 June 2016 she referred a case of unfair dismissal for operational reasons to the CCMA under case number GAJB 11790-16.

[22] The applicant's unfair suspension claim was arbitrated by the CCMA on 14 July 2016 and the arbitrator found that her suspension was substantively fair but procedurally unfair. It appears that the applicant might have subsequently persuaded the arbitrator that her suspension ought to have been found to be substantively unfair as well as procedurally unfair but the arbitrator declined to vary the award and the applicant was advised to take the award on review, which she has done. That review is still pending under case number JR 227016. Although she did not mention it in her original referral of her unfair suspension claim, the applicant also belatedly claims in her statement of claim that her suspension was also an occupational detriment under the Protected Disclosure Act, 26 of 2000 ('the PDA').

[23] On 21 July 2016, the applicant referred a separate claim of unfair dismissal for misconduct to the CCMA under case number GAJB 15614-16. This unfair dismissal dispute claim was consolidated with the first claim of unfair dismissal for operational reasons and an arbitration hearing took place between September and October 2016. According to the applicant, the arbitrator found that her dismissal was for misconduct, not for operational reasons, and that it was substantively unfair. As in the case of

her unfair suspension claim, the applicant also sought to vary this award to include a finding that the dismissal was procedurally unfair as well. In addition, she sought a variation to include findings that her contract of employment had been breached and that the dismissal was also an occupational detriment under the PDA and accordingly an automatically unfair dismissal. Unsurprisingly, the arbitrator did not agree to vary the award. The applicant then sought to achieve the same result by reviewing this award too, but found that the respondent had already filed a review application itself in respect of this award.

[24] On account of the pending review, the respondents advised that it would not comply with the award by paying the applicant back pay or by reinstating her.

The exception

[25] A notice excepting to the applicant's statement of claim was issued on 23 January 2017. The respondents readily conceded that they do not expect the applicant's pleadings to be of the same standard as a legal practitioner's, but asked for a balance to be struck between the unions towards the applicant as a lay person and fairness to the respondents.[1] This is obviously the correct approach though it must also be recognised that the extent to which a lay person's deviation from the normal standard of pleading will be tolerated will also vary according to the education and literacy of the individual. There is a vast difference in the abilities of lay persons who appear in this court and that consideration also plays a role in striking the balance referred to. In this case the respondents express a justifiable concern over the proliferation of litigation initiated by the applicant and the difficulty of responding to the applicant's statement of case because of the way she has set it out.

[26] Indeed, if the applicant's statement of case had been drafted by a legal practitioner, the respondents would have been entitled to demand that the entire statement should be declared defective because of its non-

[1] A position adopted in ***Chauke v Machine Tool Market (Pty) Ltd*** **(2013) 34 *ILJ* 1150 (LC)** at 1154

compliance with rule 6(1)(b)(ii) and (iii) of the Labour Court rules, which states:

> (1) A document initiating proceedings, known as a "statement of claim", may follow the form set out in Form 2 and must—
>
> ...
>
> (b) have a substantive part containing the following information:
>
> ...
>
> (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 ..."

[27] The applicant's statement of claim is anything but concise. The applicant may be a layperson but is an educated person who performed the job of a Business Support Manager. Her statement consists of 37 densely typed pages easily exceeding 17,000 words in length. The alleged facts are not consistently set out in a chronological order and furthermore contain a considerable degree of overlap and repetition. The applicant's style of drafting is such that it is difficult to know where one claim ends and another one begins. It is also difficult to determine the link between the voluminous allegations made, which seem to canvass every issue in the applicant's entire employment history with the respondents that caused her unhappiness, and the wider variety of legal claims she has brought. It is fair to say that, to try and unravel the applicant's statement of case and identify the discreet factual basis of each claim would take a reasonably experienced legal practitioner the more than a full day's work, and even then they might not succeed in knowing which allegations relate to which claim. A statement of claim ought not to require such close scrutiny in order to determine the nature of the legal claims and the essential factual averments on which each of the legal claims rest. Be that as it may, the exceptions noted by the respondent raise problems of a more fundamental

nature than simply the difficulty of sifting through the voluminous narrative of the statement of claim in order to understand it.

[28] Turning to the specifics of the exception, the respondents contend that the statement of case is vague and embarrassing and, or alternatively, lacks the necessary averments to sustain the applicant's legal claims. Although framed as a notice of exception, some of the objections raised are more in the nature of special pleas because they raise jurisdictional questions. However, I accept that where, for example, an employee has not pleaded a necessary averments that, a dispute was referred to conciliation before being referred to this court for adjudication, that can also be dealt with as simply as an excipiable defect in the pleadings because the statement does not set out a basis for the court's jurisdiction. I will address the exceptions in the order in which they are raised.

*First exception*

[29] In paragraph 6.3.48 of her statement of claim the applicant alleges that her dismissal was automatically unfair, as follows:

> "I believe that my dismissal (be it retrenchment or misconduct) will be an automatically unfair dismissal as I believe that I was dismissed due to unfair discrimination and the charges in disciplinary proceedings which contributed to my notice of summary dismissal were partly due to making a protected disclosure which therefore constitutes a contravention by the respondents of the Protected Disclosures Act 2000. This will be an alternative claim dependent on the outcome of my appeal against summary dismissal and conciliation of the CCMA referral for unfair dismissal due to retrenchment. Should the CCMA and/or the labour court decided my dismissal was not automatically unfair, it will still be unfair whether the reason for dismissal was misconduct or retrenchment."

It must be noted in regard to the above that at the time the statement of case was filed, the applicant's unfair dismissal claims had not been determined by the CCMA.

[30] In paragraph 7.4 of her statement of claim the applicant claims relief as per "section 193 of the LRA the applicable remedies for unfair dismissal and unfair labour practices the Labour Court will deem fit."

[31] The respondents point out that the applicant has already obtained relief for her unfair dismissal in the CCMA which is currently the subject matter of a review application and accordingly, she cannot bring a different claim of unfair dismissal when she has already elected to pursue her unfair dismissal claim on a different basis.

[32] Although the exception is framed in terms of the principle of *res judicata,* the real difficulty with the applicant asking this court to adjudicate on an automatically unfair dismissal has less to do with the principle of *res judicata* than, with the principle that in terms of the Labour Relations Act, 66 of 1995 ('the LRA') an unfair dismissal claim is adjudicated on the basis of the real reason for the dismissal.[2] This is because the facts necessary to prove an automatically unfair dismissal are not the same as those necessary to prove an unfair dismissal for misconduct even though some common facts will arise in both claims. Moreover the cause of action is different and the relief may also differ.

[33] The issue raised by the exception nevertheless raises the question if this court is competent to hear a separate claim of automatically unfair dismissal in circumstances where the same dismissal has already be determined as unfair on another basis. In terms of s 158 (2) the LRA if it appears to the Labour Court dealing with an automatically unfair dismissal claim that the real reason for the dismissal is simply misconduct then it may refer the dispute to arbitration or, subject to agreement of the parties, hear the matter sitting in the capacity of an arbitrator in terms of section.[3] A necessary corollary of this approach is that an employee cannot obtain relief for one dismissal by having it adjudicated on the one hand as an automatically unfair dismissal and on the other as an ordinary dismissal for misconduct, incapacity or operational reason. Even if this court is dealing with a claim of automatically unfair dismissal and an alternative claim of

[2] The plea of res judicata is an appropriate one to raise where 'the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of those requisites is wanting, the exception fails'. *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (1999) 20 *ILJ* 82 (LAC) at 85-6, para [7].

[3] See *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC) at 1050-1051, paras [17] – [21] on the substantive approach in terms of which the real nature of the dispute determined whether a dismissal dispute should be referred to arbitration or adjudication.

unfair retrenchment, both of which it has jurisdiction over, it will award relief based on which of the two alternative reasons the court determines the real reason for dismissal.

[34] It also follows from the substantive approach of identifying the nature of the dismissal dispute as set out in *Wardlaw* that where an unfair dismissal claim has been referred to arbitration and a determination on the fairness of that dismissal has been made, then it is implicit that the employee pursued the matter in an arbitration forum on the basis that the real reason for the dismissal was one that falls within the jurisdiction of an arbitrator and that the employee was not advancing a claim that the real reason was a prohibited reason, such as making a protected disclosure.

[35] Of course, it is possible that the employee could have decided to challenge the fairness of the dismissal on the basis that it was for a reason prohibited by section 187, but having made a choice to challenge a dismissal as an unfair dismissal for misconduct, unless the arbitrator decides otherwise the fairness of the dismissal falls to be determined on the basis of that misconduct as that reason, which the arbitrator has jurisdiction over to determine its fairness.

[36] The idea that an employee who has been dismissed must make a choice about the nature of the unfair dismissal claim they intend to pursue is also in conformity with the structure of sections 191 (5) (a) and (b) of the LRA, which channel an employee's unfair dismissal claim to the appropriate forum depending on the nature of the unfairness of the employee alleges. The fact that the Labour Court under section 158 (2), or an arbitrator in the exercise of their power to provisionally determined their jurisdiction, decides that the real nature of the dismissal dispute requires the matter to be heard in the alternative forum does not detract from the fact that a dispute over the fairness of a dismissal must be determined once by the appropriate forum and cannot be determined twice, once on the basis of one reason in one forum and again for another reason in the other forum.

[37] This approach does not of course prevent an employee who has raised an ordinary dismissal dispute on the one hand and an unfair discrimination claim on the other, which does not relate to the dismissal as such, from

pursuing both claims in the respective arbitration forum and the Labour Court.[4]

[38] What the applicant attempts to do in this case is, having obtained a determination that her dismissal was unfair for misconduct and having been awarded relief consequent to that finding, she now wishes to obtain a judgement based on a different reason for the same dismissal. The court is not competent to hear such a claim for the reasons discussed.

*Second exception*

[39] The applicant claims in paragraph 6.3.9 of her statement of claim that she was unfairly discriminated against because the respondents breached the provisions of section 5 (2) (c) (iv) and (v) of the LRA. The respondents point out that a dispute about a breach of these rights which effectively protect an employee against victimisation for exercising their rights under the LRA is a matter that section 9 of the LRA requires should be referred to conciliation and thereafter to the Labour Court if it remains unresolved.

[40] In this instance, there is no allegation by the applicant that she has referred such a dispute for conciliation and consequently the court has no jurisdiction to hear a claim of this nature. In this regard it must be mentioned that none of the dispute referrals handed in to the court by the applicant at the court's request relate to a dispute of this nature.

[41] I agree furthermore that, the rights protected by section 5 of the LRA have a prescribed method of enforcement in terms of section 9 and that is the procedure the applicant ought to have followed. The rights are enunciated in the LRA and the LRA provides the remedy for their infringement.

*Third exception*

[42] Another instance of alleged unfair discrimination referred to by the applicant is a repetition of her claim that she was subjected to an unfair labour practice in terms of Section 186 of the LRA when she was suspended. This claim has also been adjudicated in the CCMA and it is the subject matter of a review. Moreover, that is a matter to be determined

[4] See e.g. *Gauteng Shared Services Centre v Ditsamai* (2012) 33 *ILJ* 348 (LAC)

solely by arbitration and the Labour Court does not have jurisdiction over such a dispute in terms of section 191 (1) (a) read with section 157 (5) of the LRA.

*Fourth Exception*

[43] Similarly, the respondents claim that the applicant's assertion that she was discriminated against for raising a grievance and that this constitutes an arbitrary ground of discrimination is not conduct by an employer which falls within the ambit of section 187 (1) (f) of the LRA or section 6 of the EEA. I agree.

[44] I have already addressed the fact that this is a right provided and enforced by sections 5 and 9 of the LRA respectively. Furthermore, the applicant does not identify an arbitrary ground of the type mentioned in section 6(1) of the EEA as the ground of discrimination. In this regard, I appreciate that the applicant appears to believe that any perceived unfair treatment can be classed as an act of discrimination. However, even harassment under s 6(3) of the EEA is only unfair discrimination if it is on one or more of the grounds listed in s 6(1).

[45] In so far as this claim is alleged to be a claim under section 187(1) (f) of the LRA, the applicant faces the same problem in relation to this claim as she faces in her other claims of automatically unfair dismissal because she has already obtained relief for her dismissal in the CCMA which is the forum in which she elected to pursue an unfair dismissal, albeit that that award is the subject matter of a pending review.

[46] As in her other claims based on sections 5 (2) (c) (iv) and (v) of the LRA, section 9 of the LRA provides the remedy for. It was never intended in my view that s 5 rights for which the LRA which provides specific remedies could found a claim under s 6 of the EEA.

*Fifth and Sixth exceptions*

[47] The respondents also contend that her claim that she has been unfairly discriminated against under section 6 (3) of the EEA is defective because she does not identify a prohibited ground of discrimination on which she is

alleged to have been discriminated. The respondents repeat an earlier contention that prejudicial treatment for "raising a grievance" cannot amount to an arbitrary ground of discrimination. Accordingly, they argue that this claim fails to disclose a cause of action.

[48] In a similar vein, they contend that her claim to have been discriminated or harassed because she exercised her legal rights is similarly defective. Moreover, to the extent that she relies on incidents occurring in a four-year period from October 2012 to May 2016 she fails to particularise which of these incidents relates to which of her claims of harassment, victimisation or discrimination arising from her exercise of her legal rights and in that sense her claim is also vague and embarrassing.

[49] In my view both these exceptions are sound as the applicant has failed to identify an arbitrary ground on which the discrimination is based. The reason an employer may not prejudice an employee for exercising their rights under the LRA is not because it is a form of arbitrary treatment, but because the LRA recognises that if employees are not protected against victimisation for exercising their rights they may be discouraged from exercising them.

*Seventh exception*

[50] In paragraph 7.2 of her statement of claim, the applicant claims a full recalculation of her salary and all bonuses from October 2012 to date. The legal basis for her entitlement to such a recalculation is not set out and accordingly is vague and embarrassing.

[51] There is no right in law to a rectification of salary on the basis of what an employee simply believes ought to be an appropriate level of remuneration. A claim for arrear remuneration must be based on a contractual term or statutory conditions of employment. The applicant has not laid a legal basis for this claim.

Conclusion

[52] In the result, I am satisfied that all the respondents' exceptions must be upheld.

[53] Furthermore, the only claim this court could conceivably consider is the unfair discrimination claim which the applicant referred to conciliation in April 2016 and which she described in the following terms at the time:

> "Unfair treatment related to my current employment terms and conditions and harassment resulting in the being unfairly selected and compelled to either take severance pay or unreasonable alternative position due to restructuring."

[54] If the applicant wishes to pursue this claim, it will be necessary for her to file an amended statement of case addressing this claim alone. In the order below, she is given that opportunity. For the sake of clarity, I have also made a ruling on those disputes which cannot be entertained in this court for the reasons stated above.

[55] On this occasion, I have not made an adverse cost award against the applicant but she is cautioned that if she persists in filing lengthy and convoluted pleadings without merit, she may not always escape such an adverse award.

Order

[56] The first to seventh grounds of exception in the respondents' notice of exception filed on 23 January 2017 are upheld and the applicant's existing statement of claim is struck out in its entirety.

[57] The applicant may not pursue her claim of unfair dismissal which has been adjudicated in the CCMA in these proceedings nor may she pursue an automatically unfair dismissal claim against the respondents in these proceedings or any unfair labour practice claim relating to her suspension.

[58] The applicant may also not pursue a claim of unfair discrimination under section 10 of the Employment Equity Act relating to an alleged breach of her right to exercise her rights under s 5 of the Labour Relations Act.

[59] Insofar as the applicant wishes to pursue her claim of unfair discrimination referred to the CCMA on 20 April 2016, the applicant must file an amended statement of case dealing solely with that claim and her statement of case must, as far as she is reasonably able to, comply with the provisions of Rule 6 of the Labour Court. In particular, it must contain

59.1 a clear and concise statement of the material facts, in chronological order, on which she relies, which statement must be sufficiently particular to enable any opposing party to reply to the document, and

59.2 a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable the respondents to reply to the document.

[60] No order is made as to costs.

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**Lagrange J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT: In person

RESPONDENTS: P Pillay instructed by BKM Attorneys