



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case No: JS1171/12

In the matter between:

PROMISE MOYO

First Applicant

ALWYN LINZI MALAN

Second Applicant

and

CITY OF JOHANNESBURG

Respondent

Heard: 13 March 2015

Judgment: 31 March 2016

Summary: Claim for *inter alia* automatically unfair dismissal and unfair discrimination; Respondent raising an exception and a special plea to the statement of claim; Both exception and special plea upheld; Departure from the established practice, of granting leave to file an amended pleading within a certain period of time, found to be warranted; Claims assailed by the exception and special plea dismissed with costs.

JUDGMENT

VOYI, AJ.

- [1] The Applicants instituted proceedings against the Respondent contending, *inter alia*, unfair discrimination. The original statement of claim, which was delivered on or about 23 January 2013, also raised issues of unfair labour practice, breach of contract as well as violation of right to security of employment tenure in terms of the Constitution.¹
- [2] Following delivery of the statement of claim, as aforesaid, various notices were delivered by the parties dealing with shortcomings in the manner in which the Applicants' claim was formulated. There were attempts to amend the statement of claim and these were, ultimately, met with an objection² and a special plea by the Respondent.
- [3] The matter was eventually enrolled for hearing on 10 October 2014 to deal with the Respondent's objection and special plea. On this date, an Order was granted, *inter alia*, upholding the Respondent's exception and affording the Applicants an opportunity to file an amended statement of claim within 14 calendar days. The Order granted reads thus:
- '1. The application for condonation for the late filing of the applicants' statement of claim, to the extent that the applicants' claim is brought in terms of the Employment Equity Act, is granted.
 2. The respondent's Exception is upheld.
 3. The applicants are to file an amended statement of claim that both conforms with Rue 6 of the Rules of this court and which

¹ Constitution of the Republic of SA 1996.

² The objection, in particular, was to the Applicants' Notice of Intention to Amend their Statement of Claim.

addresses the excipiable material that is the subject of the Notice of Exception within 14 calendar days of the date of this order.

4. The applicants are to pay the costs of today's proceedings, excluding the costs of the application for Condonation.'

[4] On 28 October 2014 and pursuant to the granted Order, as aforesaid, the amended statement of claim was delivered by the Applicants. In reaction, the Respondent delivered an exception and a special plea to the Applicant's statement of claim, as amended. It is trite that a litigant may raise an exception in proceedings launched under Rule 6 of the Rules of the Labour Court.³

[5] As relief, the Respondent sought an Order upholding the exception and special plea, and dismissing the Applicants' case with costs, alternatively, granting the Applicants 20 days to file a fresh statement of claim, failing which their claim against the Respondent will be dismissed.

[6] It is easily discernible that the amended statement of claim filed on 28 October 2014 still does not conform with Rule 6 of the Rules of the Labour Court. The provisions of Rule 6(1)(b), in particular, state that a statement of claim must 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;'
- [own emphasis]

³ See: *Chauke v Safety and Security Sectoral Bargaining Council and Others* (2016) 37 ILJ 139 (LC) at para's 10 and 11.

- [7] The amended statement is claim fails dismally to set out ‘...a clear and concise statement of the material facts, in chronological order, on which the [Applicants rely]...’ The amended statement of claim contains what can simply be classified as a hodgepodge.
- [8] The allegations made by the Applicants are miles away from being clear and concise in a legal sense. There is no chronological order of the material allegations advanced.
- [9] In as much as the exception delivered by the Respondent places no specific reliance on any non-compliance with the provisions of Rule 6(1)(b) of the Rules of the Labour Court, I hold the view that the non-conformity has some relevance to this matter. An order was granted by this Court directing the Applicants to file an amended statement of claim that conforms with Rule 6. Failure to do so cannot simply be disregarded.
- [10] Now turning to the exception delivered, the Respondent complains that the claim for unfair discrimination as set out in the amended statement of claim does not disclose a cause of action. The grounds upon which the exception is based are set out as follows:
- ‘1.1 In paragraph 3.1 of the statement of case the Applicants stated that their case is one of automatically unfair discrimination as provided for in section 187(1)(f) of the Labour relations Act 66 of 1995 (the Act) and section 6 of the Employment Equity Act 1998 (the EEA).
- 1.2 In paragraph D of the statement of case the Applicants set out the alleged acts of unfair treatment and conduct. These include the aborted disciplinary hearings, the appointment of Mr Siwedi, employment discrimination that included discrimination in respect of the supply of staff, equipment and recourses in comparison with other regions, refusal of leave, withholding of salary, permanency and security of employment.

- 1.3 In paragraph 43 of the of the statement of case the Applicants state that the policy in terms of which employees from a certain managerial level were appointed on fixed term contracts, is discriminatory and constitutes “an absolute barrier against promotion”.
- 1.4 The Applicants do not allege any direct or indirect discrimination on any arbitrary or other ground as contemplated in the provisions of section 187(1)(f) of the Act or section 6 of the EEA.
- 1.5 The allegations contained in the Applicants’ statement of case do not disclose a recognised ground on which the Respondent discriminated against them.
- 1.6 The allegations contained in the statement of case relating to inter alia aborted disciplinary hearings, the appointment of Mr Siwedi, discrimination in respect of the supply of staff, equipment and resources in comparison with other regions and the refusal of leave do not constitute grounds for discrimination as contemplated in the provisions of section 187(1)(f) of the Act or section 6 of the EEA.
- 1.7 None of the averments relating to the alleged discrimination supports a claim for unfair discrimination and the ground upon which the discrimination is allegedly based, is not identified and this claim cannot be sustained.
- 1.8 In paragraph 39.2 of the statement of case it is alleged that the arbitrary discrimination against the Applicants is “a fall out of favour” with Mr Ehlers. A “fall out of favour” can never *per se* constitute a ground for discrimination.’

- [11] From the relief sought by the Applicants in their amended statement of claim, it seems to me that the case advanced broadly stands on four pillars. First, there is a claim for contravention of section 6 of the Employment Equity Act.⁴
- [12] Second, the policy and practice of permanent employees losing their permanency status when appointed on fixed-term managerial positions is challenged as being unlawful, invalid and unfair in terms of section 185(a) of the Labour Relations Act.⁵
- [13] Third, there is a claim for automatically unfair dismissal as contemplated by section 187(1)(f) of the LRA. Fourth and lastly, breach of contract is claimed in terms of section 77(3) of the Basic Conditions of Employment Act.⁶
- [14] However and judging from the legal issues allegedly arising from the facts, as set out in paragraph E of the amended statement of claim, the Applicants' case appears somewhat distorted. The legal issues that, according to the Applicants, are to be decided by this Court are stated as follows:

50.1 The automatic unfair dismissal of the Applicants on 26 April 2012 on arbitrary discriminatory grounds in terms of section 187(1)(f) of the LRA;

50.2 Alternatively, the Applicants reasonably expected the Respondent to renew their fixed term employment contract or to be transferred back to their previously permanent contracted posts, but the Respondent failed to do so and dismissed them unfairly in terms of section 186(1)(b) of the LRA;

50.3 Alternatively, the Respondent unfairly discriminated the Applicants in terms of section 186(1)(a) or (d) of the LRA and failed to prove that a fair reason existed to dismiss the Applicants

⁴ No. 55 of 1998 as amended ("the EEA").

⁵ No. 66 of 1995 as amended ("the LRA").

⁶ No. 75 of 1997 as amended ("the BCEA").

and that a fair procedure was applied to dismiss them – in terms of section 188(1) of the LRA;

50.4 The alleged discriminatory treatment the Applicants were subjected and exposed to by the employees of the Respondent, meted out by way of harassment and bullying conduct in contravention of section 5(1) of the LRA and section 6(3) of the Employment Equity Act of 1998.

50.5 The alleged unfair deductions / non-payment of the salaries of the Applicants and not granting them leave in terms of their contract of employment, in contravention of section 34 read with section 77(3) of the BCEA 1997; and

50.6 The alleged unfair non-payment of bonuses to Applicant by terminating their services two months before the end of the business year in contravention of section 186(2)(a) of the LRA.’

[15] With the perceived variances on the relief sought and the legal issues allegedly arising from the facts, it becomes extremely difficult to navigate one’s way into the real substance of the matter.

[16] In dealing with this matter, my point of departure will be the legal issues allegedly arising from the background facts. There can be no other feasible approach to the matter. In fact, paragraph 50 of the amended statement makes it clear that the legal issues outlined above are what has to be decided by this Court.

[17] I must mention, in passing, that there is no mention, under legal issues allegedly arising from the facts, of the relief sought pertaining to the alleged unlawful, invalid and unfair policy and practice of the Respondent in terms of which permanent employees lose their permanency status once appointed on a fixed-term managerial position.⁷

⁷ A case is made out for this relief under paragraph VI of the amended Statement of Claim.

[18] Now zooming into the substance of the matter based on the legal issues allegedly arising from the facts, I can easily dispose of the following legal issue, namely:

‘The alleged unfair non-payment of bonuses to Applicant by terminating their services two months before the end of the business year in contravention of section 186(2)(a) of the LRA.’

[19] The alleged non-payment of bonuses is grounded on the provisions of section 186(2)(a) of the LRA, which define and deal with ‘unfair labour practice’. The alleged unfair labour practice dispute ought to have been referred to arbitration in terms of section 191(5)(a)(iv) of the LRA.

[20] Under section 157(5) of the LRA and except as provided for in section 158(2), this Court lacks jurisdiction to adjudicate a dispute that has to be resolved through arbitration.

[21] The Applicants contend that the special plea falls to be rejected. They persist with their view that this Court has the requisite jurisdiction to adjudicate the alleged unfair dismissal dispute. Under such circumstances, I am unable to invoke the provisions of section 158(2) of the LRA. I, accordingly, uphold the Respondent’s special plea.

[22] It is clear to me that it is with regard to the alleged automatically unfair dismissal claim in terms of section 187(1)(f) of the LRA as well as the unfair discrimination claim in contravention of section 6 of the EEA that the Respondent’s exception is directed.

[23] In essence, the Respondent complains that the allegations contained in the Applicants’ amended statement of claim do not disclose a recognised ground on which the Respondent discriminated against them.

[24] The Respondent, on this score, placed reliance on the decision of this court in *Aarons v University of Stellenbosch*,⁸ where it was held that thus:

‘An applicant before this court must do more than just allege discrimination on arbitrary grounds. In addition, an applicant before this court must allege more than merely differentiation in respect of the treatment meted out by the employer or attributable to the employer.

[25] In *Aarons (supra)*, this Court went further and held thus:

‘The applicant does not allege that the reason for the different treatment is based on one of the grounds listed in s 187(1)(f) or an analogous ground that adversely affects some characteristic that impacts upon her human dignity. The applicant does no more than allege that she was being persecuted. This is insufficient.’

[26] I cannot agree more. In this matter, I recall vividly the Applicants’ legal representative, Mr D W de Villiers, stating that the Applicants are unable to state the arbitrary ground upon which they were allegedly unfairly discriminated against as they do not know it.

[27] To me, that is the end of the matter. If the Applicants do not know the arbitrary ground, then on what basis do they persist that same existed? Mere suspicion that there must have been such arbitrary ground is not enough.

[28] The Applicants’ observable inability to plead the alleged arbitrary ground upon which they were, allegedly, unfairly discriminated against applies to both claims under section 187(1)(f) of the LRA and section 6 of the EEA. That inability renders such claims excipiable as no cause of action would be disclosed by the absence of the arbitrary ground upon which the Applicants were unfairly discriminated against.

[29] In *Stojce v University of KwaZulu-Natal and Another*,⁹ this Court held thus:

⁸ (2003) 24 ILJ 1123 (LC).

⁹ (2006) 27 ILJ 2696 (LC) at para’s 26-27.

[26] The test is that the differentiation must impair the fundamental dignity of people as human beings because of attributes or characteristics attached to them. Not every attribute or characteristic qualifies for protection against discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires, as a class, do not qualify for protection. What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalization, powerlessness, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination (*Davina Cooper Challenging Diversity* (2004) at 3 and *Iris Marion Young Justice and Politics of Difference* (1990) at 15-44).

[27] An employee who relies on an unlisted ground as being discriminatory must establish the difference, show that it defines a group or a class of persons and that the difference is worthy of protection. To warrant protection, the applicant must show that the conduct complained of impacts on him as a class or group of vulnerable persons, such as persons with disabilities or family responsibility, or that the conduct is inherently pejorative as a racist or sexist utterance might be.'

[30] I am inclined to agree with the contention articulated at paragraph 1.6 of the Respondent's exception, namely, that the allegations contained in the amended statement of claim do not constitute grounds for unfair discrimination as contemplated in the provisions of section 187(1)(f) of the LRA or section 6 of the EEA.

[31] The Applicants' reliance on section 6(3) of the EEA does not alter their predicament. That section reads thus:

'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

- [32] It is, therefore, clear to me that even if the Applicants were ‘harassed’ in the wider sense of that term, their harassment must still be associated to one or a combination of the grounds of unfair discrimination listed in section 6(1) of the EEA.¹⁰ No such link is established by the allegations contained in the amended statement of claim.
- [33] More importantly, in this matter, the alleged automatically unfair dismissal claim has to be linked to the actual dismissal complained of. The alleged dismissal of the Applicants was the kind defined under section 186(1)(b) of the LRA. I am finding it difficult to connect the alleged discriminatory treatment on an arbitrary ground to the sort of dismissal in issue in this matter.
- [34] In the first place, the aborted disciplinary hearings have no connection to the alleged dismissal as contemplated by section 186(1)(b) of the LRA. Also, the appointment of Mr Siwedi does not speak to the dismissal envisaged by section 186(1)(b) of the LRA. Further, the alleged discrimination pleaded under the rubric “Employment Discrimination” does not speak at all to the dismissal defined under section 186(1)(b) of the LRA.
- [35] The same applies to the alleged refusal of leave and withholding of salary as well as the termination of the Applicants’ employment under paragraphs IV and V of the amended statement of claim. The allegations pleaded in relation to the latter do not address any reasonable expectation that was entertained by the Applicants concerning the renewal of their fixed-term contracts of employment.
- [36] Before there can be a claim for automatically unfair dismissal under section 187 of the LRA, there must have been a dismissal, as defined under section 186(1) of the same Act.
- [37] In this matter, the Applicants do not lay any factual foundation for a dismissal as envisaged by section 186(1)(b) of the LRA in their ‘statement of facts –

¹⁰ See: Grogan, J. *Dismissal, Discrimination and Unfair Labour Practices*, (2007), 2nd Edition, Juta and Co. at p 152.

background'. They simply gallop into an automatically unfair dismissal claim as contemplated by section 187(1)(f) of the LRA.

[38] In my view, the Applicants ought to have laid such foundation as dismissal is not a common cause issue in this matter. From the allegations advanced by the Applicants, it is clear that their fixed-term contracts expired by effluxion of time on 31 July 2012. If they contend that they were dismissed, their alleged dismissal must fit within the ambit of section 186(1)(b) of the LRA.

[39] Returning to the claim under section 6 of the EEA, I must point out that the Applicants' amended statement of claim further fails to address the essentials under section 11(2) of the EEA.

[40] In this matter, I have no hesitation in upholding the Respondent's exception. As it stands, the Applicants' amended statement of claim does not disclose a cause of action; whether based on section 187(1)(f) of the LRA or on section 6 of the EEA.

[41] It would, in my view, serve no purpose to afford the Applicants another opportunity to file a fresh statement of claim. I am very much mindful of the distinct authorities to the effect that the upholding of an exception does not, therefore, carry with in the dismissal of the summons or of the action.¹¹

[42] In my view, such authorities are distinguishable on the facts and circumstances of this matter. In any event, the following was stated in *Rowe v Rowe*¹² regarding one of such authorities:

'All I wish to add to the remarks in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602C--604I is that it is doubtful whether this established practice

¹¹ See: *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37; *Berrange v Samuels II* 1938 WLD 189 at 190; *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H-I; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C-H, and *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H-349A. See also: *Marnitz v Transnet Ltd t/a Portnet* (1998) 19 ILJ 1501 (LC) at para 31.

¹² 1997 (4) SA 160 (SCA) at 167H.

brooks of any departure and that, in the rare cases in which a departure may perhaps be permissible, one expects to find the reasons in the Court's judgment.'

[43] In my view, departure is warranted by the facts and circumstances of the present matter. There is an order of this Court directing the Applicants to address the excipiable material in their previous statement of claim. Based on my reasoning above, the Applicants have still not addressed the Respondents' causes of complaint.

[44] Of significance in this matter, the Applicants are simply unable to state the so-called arbitrary ground upon which they were allegedly unfairly discriminated against. In *Volschenk v Pragma Africa (Pty) Ltd*,¹³ this Court departed from the established practice based on the following apt reasoning:

'[31] In some cases where exceptions have been upheld, the court has nevertheless given the applicant a further opportunity to amend his or her statement of claim. (footnote omitted)

[32] But in this case the applicant has had more than enough time and more than one opportunity to remove the cause of complaint. He did not respond to the initial invitation to do so in July 2013. And even after he eventually delivered a notice of his intention to amend the statement of claim shortly before the exception was first set down for hearing in February 2014, he did not deliver an application to amend. There is no reason why the company should be further prejudiced and be forced to incur further costs in order to grant Volschenk yet another indulgence.'

[45] In the premises, the Applicants' claims concerning an automatically unfair dismissal and an unfair discrimination are, therefore, dismissed.

[46] There is no reason as to why costs should not follow the results. I make no pronouncement on any other claims which fall outside the ambit of the exception and the special plea.

¹³ (2015) 36 *ILJ* 494 (LC) at para's 31 and 32.

Order

[47] I, accordingly, make the following Order:

47.1 The Respondent's special plea is upheld.

47.2 The Respondent's exception is upheld.

47.3 The Applicants' automatically unfair discrimination claim in terms of section 187(1)(f) of the LRA as well as the unfair discrimination claim under section 6 of the EEA are dismissed with costs.

Voyi, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr D W de Villiers of Riki Anderson Attorneys

For the Respondent: Advocate C Prinsloo

Instructed by: Helena Strydom Attorneys

LABOUR COURT