

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 31767/2012

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

DIRK CORNELIUS ASPELING

Applicant

And

NEDBANK LTD

Respondent

JUDGMENT

VICTOR J:

- [1] The plaintiff in this matter seeks contractual damages arising out of breaches of various terms of his employment contract with the defendant.

[2] The plaintiff has not sought to pursue his claim in terms of the Labour Relations Act 66 of 1995, (the LRA). During the course of his employment with the defendant in South Africa the parties concluded a secondment agreement of services to Nedbank Namibia as from 1 July 2006. On 5 February 2009 the plaintiff gave notice of termination of his secondment agreement since Nedbank Namibia failed to obtain a work permit. Upon his return to South Africa he was retrenched for operational reasons.

[3] A perusal of the secondment agreement indicates the following:

‘At the end of your contract/secondment you will be accommodated in Nedbank Africa or alternatively where possible you will be placed in an appropriate or suitable position in another division within Nedbank Limited.’

The final sentence in this covering letter states:

‘You will remain an employee of Nedbank Limited in South Africa.’

[4] A notice of exception was filed and the plaintiff had two attempts at amending his particulars of claim. The plaintiff had commenced his initial employment with the defendant in South Africa some time before the secondment agreement. The material terms of the secondment agreement included that he would occupy a position of Senior Manager Credit Risk. Whilst occupying such position the plaintiff’s employment with the defendant was not terminated and he remained an employee of the defendant. The defendant could also extend the terms of the secondment agreement having regard to the circumstances prevailing

in Namibia at the relevant time. It is quite clear that without the necessary work permit the plaintiff could not continue in Namibia. The Namibian authorities refused to issue him with a work permit.

[5] The first tranche of amendments related to an appropriate or suitable position being available to the applicant and a pre-dismissal hearing. The defendant's exception is directed to the plaintiff's particulars of claim as being vague and embarrassing since the defendant avers that it is up to the plaintiff to allege the necessary facts to prove that there was not an appropriate or suitable position available. Secondly a further exception being vague and embarrassing was based on the allegation that it was an implied term that the plaintiff was entitled to a pre-dismissal hearing and/or a pre-dismissal consultation. Although the latter is suggestive of the provisions of the LRA, actual reliance on the LRA is not pleaded.

[6] It is trite law that an amendment should be refused if the amended pleading would result in further excipiability. See *Krischke v Road Accident Fund* 2004 (4) SA 358 (W). It is trite that in determining an exception the court must assume the correctness of the factual averments made in the particulars of claim. See *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at 151 and *Theunissen & Andere v Transvaal se Lewendehawe Co-op Bpk* 1988 (2) SA 493 (A) at 500 E.

- [7] It is the obligation of the defendant to persuade the court that upon every possible interpretation of the pleading it is vague and embarrassing and is excipiable. The purpose of an exception is to avoid the leading of unnecessary evidence at the trial. See *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553 F-I.
- [8] The secondment agreement provides expressly that the plaintiff would remain an employee of the defendant in South Africa. The contract further expressly provides that the plaintiff will be accommodated in Nedbank Africa. As already indicated he was retrenched for operational reasons although operational reasons are within the jurisdiction of labour relations. In my view the plaintiff can legally pursue that avenue of his claim. It is not necessary for him to prove at this stage of pleadings that there was a possible position for him within the South African business of the defendant.
- [9] The secondment agreement also provides in the alternative that where possible the plaintiff would be placed in an appropriate or suitable position in another division in Nedbank Limited. The use of the word 'or' is disjunctive and 'where possible' refers to a position in another division in Nedbank Limited. It is necessary to interpret the word 'or' as used in the latter part of this clause.
- [10] Counsel for the excipient submitted in its heads of argument that the word 'where possible' should be interpreted to mean that the obligation

existed on the defendant to accommodate the plaintiff in Nedbank Africa or Nedbank only where possible. The word 'or' must be interpreted so that the true meaning of the clause may be established. In many cases reference to the word 'or' within the context of statutes can also be read as the word 'and'.

[11] In this contractual context however it is my view that the word 'and' cannot be read into the present context and therefore it was correctly pleaded that the defendant was to accommodate the plaintiff in Nedbank Africa and the words 'or alternatively where possible' must not be read as 'and' and that an appropriate or suitable position was to be found for him within Nedbank Limited. This in my view is not an excipiable pleading.

[12] It is trite law that words in any legal instrument must be interpreted according to their grammatical and ordinary meaning and therefore the word 'or' in this case should be interpreted disjunctively. The cardinal rule of construction is that words must be given their ordinary literal grammatical meaning and not to do so must only be resorted to where the word 'or' simply would not make sense. See also *Volschenk v Volschenk* 1945 TPD 486. Whilst the *Volschenk* case referred to 'or' in the context of a statute, the case is still relevant because the same principles of interpretation which apply to statutes also apply to contracts and other legal instruments. See *Southall v Bowditch* 1876 (1) CP 374.

[13] It is clear from the case of *Volschenk* that the ordinary meaning of 'or' is a disjunctive one and this is confirmed in the case of *R v Mditla* 1951 (1) SA 763 (SR) in relation to the context of the then Forestry Act.

[14] In my view, therefore, in relation to the exception taken to the amendment in relation to the first portion, it is not necessary for the plaintiff to plead facts as to whether an appropriate or suitable position in another division within the defendant was available as these facts would be within the knowledge of the defendant.

[15] The second tranche of amendments relate to the following. The plaintiff alleges he wishes to delete paragraph 17 and replace it with the following (renumbered 16):

16. 'The plaintiff's eventual retrenchment was unlawful in that:

...

16.3 the defendant's decision to terminate was founded on personal resentments and other unlawful motivations.

16.4 The defendant did not act with the utmost good faith and therefore unlawfully in that the defendant did not afford the plaintiff a pre-dismissal hearing and/or pre-dismissal consultation prior to the repudiation of the agreement.'

[16] The exception to the alternative cause of action relates to the common law contractual right to a pre-dismissal hearing and/or pre-dismissal consultation. It is the defendant's contention that the common law does not recognise a right to a pre-dismissal hearing and/or pre-dismissal consultation nor does it recognise a right not to be retrenched unlawfully.

- [17] The contract itself is silent on what has come to be recognised as labour relations rights emerging from the statute - see *Lamprecht and Nissan SA (Pty) Ltd v McNeillie* 1994 11 BLLR 1 AD.
- [18] The decisive point in South African law on this aspect is *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA), where Wallis AJA held that contracts outside of the protection of the LRA are not subject to an implied term that employees will not be unfairly dismissed or subject to unfair labour practices. The LRA does not itself confer such right in a common law situation.
- [19] It follows therefore that although the plaintiff does not place specific reliance on section 185 of the LRA, a substantial amount of evidence will have to be adduced on this point. It was made clear in *South African Maritime Safety Authority* supra that in the absence of a specific provision for a pre-dismissal hearing in the contract this cause of action would fail in any event.
- [20] In the English case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* *Botham v Ministry of Defence* 2011 UKSC 58 where Lord Phillip, Lord Walker, Lady Hale, Lord Mance, Lord Kerr, Lord Dyson and Lord Wilson concurred as follows:

‘It is now well established that an employment contract is subject to the implied term that the employer and employee may not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them.’

[21] In *Johnson v Unisys Limited* 2001 UKHL 13 the claimant sought to rely on an alleged breach of this implied term, not as a foundation for a statutory claim for unfair dismissal or as a foundation for a claim for damages unrelated to dismissal but as a foundation for a claim at common law for damages for the manner of his dismissal. The House of Lords refused to extend the implied term to allow an employee to recover damages for loss arising from the manner of his dismissal, because such a development of the law would be contrary to the intention of Parliament that there should be such a remedy, but that it should be limited by the statutory code regarding unfair dismissal found in the English Employment Rights Act 1996.

[22] Therefore loss arising from an unfair manner of a dismissal is not recoverable as damages for breach of the implied term of trust and confidence and it falls within what has been called the Johnson exclusion rule. If this were not so there would be a plethora of claims for damages and this would result in confusion and would be contrary to the evident intention of Parliament. The co-existence of a common law right in those circumstances overlapping with the statutory right would be a recipe for chaos. See judgment of Lord Hoffman at paragraph 25.

[23] In the result the exception taken against the second tranche of amendments, that is that the right to a pre-retrenchment hearing or pre-dismissal consultation is bad in law, must be upheld.

[24] On the question of costs, as this is a matter involving an employment relationship there will be no order for costs. See *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA). A further motivating factor for there not to be a costs order is that each party has been successful in respect of one of the two exceptions raised and the appropriate order would in the circumstances be that each party pay their own costs.

The order therefore that I would make is the following:

1. The defendants' exception to paragraphs 1 and 2 of the plaintiff's notice of intention to amend dated 23 November 2013 is dismissed.
2. The defendants' exception to paragraph 4 of the plaintiff's notice of intention to amend dated 23 November 2013 is upheld.
3. Neither party shall be entitled to costs.

VICTOR J

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INSTRUCTED BY

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K ILES

INSTRUCTED BY

CLIFF DEKKER HOFMEYER INC

DATE OF HEARING:

26 May 2014

DATE OF JUDGMENT:

2 July 2014