

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 227 / 2023

In the matter between:

TUMELO CLEMENT MAKGELEDISE

Applicant

And

DSV SOLUTIONS (PTY) LTD

Respondent

Heard: 26 January 2024

Delivered: 29 January 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 29 January 2024.

JUDGMENT

PRINSLOO J

Introduction

[1] The Applicant filed a statement of case on 14 June 2023, wherein he identified the legal issues as sections 6 and 10 of the Employment Equity Act¹ (EEA). The Applicant seeks compensation *“in the form of damages for hurt, discrimination and the loss of rights...”*

[2]

[3] On 28 June 2023, the Respondent filed a notice to remove a cause of complaint, stating that the Applicant's statement of case is vague and embarrassing and does not disclose a cause of action, in that it does not contain the necessary averments to

¹ Act 55 of 1998, as amended.

sustain a cause of action relating to unfair dismissal or unfair discrimination. The Applicant was afforded 15 days to remove the causes of complaint raised by the Respondent. The Applicant did not remove the causes of complaint raised by the Respondent and on 28 July 2023, the Respondent filed an exception, which was set down for hearing on the interlocutory roll.

The Applicant's pleaded case

[4] The Applicant pleaded that he was informed on 19 January 2023 that the Respondent was going to restructure and he received a notice in terms of section 189(3) of the Labour Relations Act² (LRA). On 23 January 2023, he was presented with a letter of retrenchment and an option to settle with the Respondent. The Applicant subsequently referred his dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter remained unresolved. The Applicant pleaded that his *"dismissal [constitutes] discrimination for reasons unknown to me"*.

[5] The Applicant's case concerns *"the discriminatory practices meted out to the applicant during the process leading to dismissal"*. The legal issues are identified as sections 6 and 10 of the EEA and the relief sought is compensation for damages suffered.

Applicable legal principles

[6] A statement of claim must inform the respondent of the material facts and the legal issues arising from those facts upon which the applicant will rely to succeed with his or her claim(s). Those must be sufficiently detailed to enable the respondent to respond and to be informed of the nature or essence of the dispute.³

[7] A statement of claim must establish a factual foundation for the pleaded cause of action to stand. For a pleading to disclose a cause of action, it must set out every material fact which would be necessary for the party to prove, if traversed, in order to

² Act 66 of 1995, as amended.

³ See: *Harmse v City of Cape Town* [2003] ZALC 53; (2003) 24 ILJ 1130 (LC), *Candy and others v Coca Cola Fortune (Pty) Ltd* [2014] ZALCJHB 320; (2015) 36 ILJ 677 (LC).

support its right to a judgment of the court. A pleading which fails to meet this standard is excipiable.⁴

[8] The Applicant must plead the material facts and legal issues in sufficient detail to enable the Respondent to respond and the pleadings must inform the Respondent with sufficient factual and legal particularity what it is that the Applicant would be relying upon to succeed in its claim.

[9] In *Candy and others v Coca Cola Fortune (Pty) Ltd*,⁵ the Court considered the purpose of a statement of claim and held that:

‘In its simplest terms, the statement of case must at least inform the respondent party what the pertinent facts are on which the applicant will rely in the case, and further, what the cause of action is that the applicant will pursue as founded on these facts. That must be done in sufficient particularity so as to enable the respondent to provide a proper answer to these facts and the related cause of action. The statement of claim and the answering statement thereto are not just for the benefit of the parties. They also serve the court, in that the issues in dispute are properly determined and other possible alternative causes of action are eliminated from having to be considered by the court. A proper statement of claim and answering statement are imperative to the fundamental requirement of expeditious resolution of employment disputes in terms of the LRA. As the court said in *Harmse v City of Cape Town*:

[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

[7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim”.’ [Footnotes omitted]

⁴ *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) (*McKelvey*) at 526D - E.

⁵ [2014] ZALCJHB 320; (2015) 36 ILJ 677 (LC) at para 38.

[10] The test to be applied when an exception is taken to particulars of claim on the basis that they disclose no cause of action is whether the particulars disclose every fact which it would be necessary for the plaintiff to prove if traversed, in order to support the right to judgment. A pleading is excipiable only if no possible evidence led on the pleading can disclose a cause of action.⁶ A distinction is drawn between *facta probanda*, primary factual allegations that must be made, and the *facta probantia*, or secondary factual allegations in support of the former. Generally, the latter are matters for particulars for trial or matters of evidence.

Analysis

Section 6 of the EEA

[11] It is evident from the Applicant's pleaded case and legal issue identified in the statement of case that his case is firmly based on the provisions of the EEA and that he pleaded no case and sought no relief in terms of the LRA.

[12] Section 6(1) of the EEA provides that:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[13] It is evident from the statement of claim that the Applicant's claim in terms of the EEA is pleaded as a self-standing claim and separate cause of action. The Applicant must set out explicitly and disclose in no uncertain terms what the ground for discrimination is.

[14] The Respondent's case is that the Applicant failed to plead a ground of discrimination which meets the requirements and as such, it lacks the necessary averments to sustain a cause of action based on the EEA.

[15] The Applicant in his statement of claim, does not allege a listed ground of discrimination, thus his case can only be premised on an arbitrary ground of

⁶ McKelvey *supra*.

discrimination and he has to disclose such an arbitrary ground. In *Naidoo and others v Parliament of the Republic of SA*,⁷ this Court considered the interpretation of the phrase any arbitrary ground and held that:

[36] Differentiation *per se* does not constitute discrimination. Differentiation on a specified ground of discrimination is presumed to constitute unfair discrimination, which presumption is rebuttable. Given that an arbitrary ground is synonymous with an unlisted/unspecified ground, the test for whether discrimination is established, is that set in *Harksen*, namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[37] Although the Constitutional Court did not provide a comprehensive description of what 'attributes and characteristics' would comprise, it held that:⁸

"What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features."

[38] The test set out in *Harksen v Lane NO and others*⁹ will apply and, in order for the alleged grounds of arbitrary discrimination to qualify as such, they must, objectively, constitute grounds based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground. In short: the unequal treatment must be based on attributes and characteristics attaching to a person before it will fall within the meaning of 'discrimination'.

⁷ (2019) 40 ILJ 864 (LC) at paras 36 - 38, which was upheld by the Labour Appeal Court in *Naidoo and others v Parliament of the Republic of South Africa* [2020] ZALAC 38; (2020) 41 ILJ 1931 (LAC).

⁸ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 50.

⁹ *ibid*.

[16] Even on the most generous reading of the pleadings, it is evident that the facts pleaded by the Applicant do not foreshadow a case for unfair discrimination. The Applicant did not disclose a cause of action in respect of the claim for unfair discrimination and did not make the necessary averments to sustain such a cause of action, in terms of the provisions of the EEA.

[17] There are however two other pertinent issues in respect of the Applicant's claim in terms of the EEA which requires the attention of this Court. They relate to the issue of jurisdiction.

[18] Notwithstanding Mr Nel's argument that this Court should first decide the exception, whereafter a special plea relating to jurisdiction would be raised, I am of the view that the issue of jurisdiction is the primary issue to be decided first. Absent jurisdiction, this Court cannot adjudicate the dispute, including deciding the exception.

[19] The LRA 7.11 form shows that the Applicant has referred a dismissal dispute relating to operational requirements to the CCMA. The dispute was conciliated and a certificate of outcome was issued on 13 March 2023. The certificate of outcome shows that a section 189 unfair retrenchment dispute was referred to conciliation on 9 February 2023, was conciliated on 13 March 2023 and as the dispute involved more than one employee, it was referred to the Labour Court for adjudication. It is evident from the certificate of outcome that the dispute that was referred and conciliated, was an unfair dismissal dispute.

[20] Sections 10(2), (5) and (6) of the EEA provide that any dispute concerning Chapter II may be referred to the CCMA, that the CCMA must attempt to resolve the dispute through conciliation and if it remains unresolved, it may be referred to the Labour Court for adjudication. It is evident that the EEA dictates that a dispute regarding unfair discrimination must be conciliated before it is adjudicated by the Labour Court.

[21] In *National Union of Metalworkers of SA on behalf of members and others v Bell Equipment Co SA (Pty) Ltd*¹⁰ and *National Union of Metalworkers of SA v Intervolve*

¹⁰ [2010] ZALC 217; (2011) 32 ILJ 382 (LC).

(Pty) Ltd and others¹¹ (Intervalle), it was confirmed that referral for conciliation is indispensable and that it is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. The same applies where the EEA prescribes conciliation before a dispute is referred to the Labour Court for adjudication.

[22] In *Tlou v University of Zululand*,¹² a similar question was considered and the Court held that where the applicant referred an unfair discrimination dispute in terms of section 10 of the EEA to the CCMA for conciliation, it did not include an unfair dismissal dispute in terms of the LRA. An unfair dismissal dispute was never referred and the referral of an unfair discrimination dispute could not cure the failure to refer an unfair dismissal dispute, because the disputes are materially different and provided for in separate pieces of legislation, namely the EEA and the LRA. Referral of the one does not automatically include the other. The Labour Court has no jurisdiction to adjudicate a dispute that has not been conciliated.

[23] *In casu*, the same principles apply. The Applicant has not referred an unfair discrimination dispute in terms of the EEA to the CCMA, no evidence was placed before this Court to show that such dispute was indeed referred and conciliated and as such, the Court has no jurisdiction to adjudicate the Applicant's unfair discrimination dispute. The only dispute referred and conciliated was an unfair dismissal dispute in terms of the LRA and such referral and subsequent conciliation do not include a dispute in terms of the EEA.

[24] The second difficulty is that the Applicant's pleaded case is that "*my dismissal [constitutes] discrimination for reasons unknown to me.*"

[25] Section 10(1) of the EEA specifically excludes a dispute about an unfair dismissal. An unfair discrimination dispute, pursued in terms of the EEA, does not include an unfair dismissal dispute and the Applicant's pleaded case in this regard is incompetent.

¹¹ [2014] ZACC 35; (2015) 36 ILJ 363 (CC).

¹² (2018) 39 ILJ 1841 (LC).

[26] Absent a referral for conciliation, this Court has no jurisdiction to adjudicate the Applicant's claim in terms of the EEA. In my view, this is a fatal defect that cannot be cured by an amendment to the pleadings.

Costs

[27] This Court has a wide discretion to make orders for costs according to the requirements of the law and fairness.

[28] It is trite that the general rule that costs should follow the result does not apply in labour matters. In my view, this is a matter where the interests of justice and fairness will be best served by making no order as to costs.

[29] In the premises, I make the following order:

Order

1. The Applicant's case pursued in terms of the provisions of the Employment Equity Act is struck off the roll for lack of jurisdiction;
2. There is no order as to costs.

Connie Prinsloo
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	No appearance
For the Respondent:	Advocate A J Nel
Instructed by:	Darran Ledden Inc Attorneys