

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **JS 507/23**

In the matter between:

Mohlabane, Brian

Applicant

and

Sandvik Mining Construction (Pty) Ltd

Respondent

Handed down in chambers on 9 May 2024

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

NORTON AJ

Introduction

1. On 22 March 2024 I made the following orders:
 - 1.1. The Respondent's exception is upheld.
 - 1.2. The Applicant's statement of case is dismissed.
 - 1.3. There is no order as to costs.
2. The Applicant made an application for leave to appeal on 25 March 2024, and filed submissions on 19 April 2024.
3. The Respondent filed its submissions opposing the application for leave to appeal on 17 April 2024.

Applicant's grounds and the Respondent's response

4. With due respect the submissions made by the Applicant in the application for leave to appeal are largely incomprehensible. I have attempted to discern three grounds which I have summarised below.

5. Ground 1: The Applicant submits that the exception was premature, and that the Respondent should have considered the submissions made in the Pre trial minute and the Heads of Argument. ¹

5.1. The Respondent denies that the documents submitted should have been considered by the court when adjudicating the exception application.

5.2. The Respondent called on the Applicant to remove the cause of complaint with respect to his pleadings and he did not do so.

5.3. There was no pre trial meeting so the minutes submitted carry no weight.

5.4. The Applicant delivered Heads of Argument before the trial. This was irregular.

6. Ground 2: The Applicant submits that the Court erred by ignoring evidence which included "*material facts in transcripts placed before it, flowing from a forum purported to have heard the same facts...*"²

6.1. The Respondent submits that the court was not required to consider other evidence.

7. Ground 3: The Applicant submits that the Court erred by finding that the Applicant's pleadings did not disclose a cause of action.³

¹ Paragraphs 1.1; 1.2 and 1.3 in the Application for leave to appeal.

² Paragraph 2

³ Paragraph 6

7.1. The Respondent submits that the court simply needed to consider the statement of case. The statement of case lacked the necessary averments to sustain the Applicant's cause of action.

Legal considerations: the standard in applications for leave to appeal, and the nature of exceptions

8. When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act 2013 (the "Act") applies. That section reads, *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that (a)(i) the appeal would have a reasonable prospect of success; or (a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

9. The threshold to cross for an audience with an appeal court is a high one, requiring a strong prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.

10. In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*⁴ Judge Van Niekerk, discussing the test to be applied states,

"The traditional formulation of the test that is applicable ...requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...the use of the word "would" in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion....Further this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted...The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which that

⁴ (2016) 37 ILJ 1485 (LC). See too *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC)

*there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law...*⁵

11. The late Honourable Judge Steenkamp in the case *Volschenk v Pragma Africa (Pty) Ltd*⁶ with respect to exceptions made the following points:

11.1. The rules of the Labour Court do not specifically deal with the issue, but may be raised under Rule 11;

11.2. Rule 23 of the Uniform Rules of the High Court have application;

11.3. That an exception is a legal objection intended to address a defect inherent in the other party's pleadings;

11.4. There are two generally recognised categories of exception, namely where the pleading is vague and embarrassing; and where pleadings lack averments necessary to sustain a cause of action; and

11.5. A litigant may take an exception to have the action or defence dismissed before the merits of the matter are considered in evidence.⁷

12. The Constitutional Court in *Pretorius & another v Transport Pension Fund & others*⁸ made the following points about exceptions:

12.1. In deciding an exception a court may accept all allegations of fact made in the particulars of claim as true, and may not have regard to any other extraneous facts or documents;

12.2. A court may uphold an exception only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation of the facts; and

12.3. It is a useful procedure to weed out bad claims at an early stage, but an overly technical approach must be avoided.⁹

⁵ At para 3

⁶ (2015) 36 ILJ 494 (LC)

⁷ Paragraph 12. See too paragraph 4 in *Khan v MMI Holdings Ltd* (2018) 39 ILJ 1772 (LC)

⁸ (2018) 39 ILJ 1937 (CC)

⁹ Paragraph 15

Analysis

13. The Applicant in his Statement of Claim dated 29 August 2023 sets out the following facts to establish his claim:

13.1. His pay was below the paygrade of some whites and had been subject to unfair discrimination.

13.2. The employer withheld his bonus which was unfair and discriminatory.

13.3. He was dismissed and that amounted to an automatically unfair dismissal.

14. The Respondent gave notice on 7 September 2023 that it intended to raise an exception on the basis that the statement of case was vague and embarrassing and / or lacks the averments necessary to sustain a cause of action.

15. The Respondents explained that the Applicant had:

15.1. failed to identify the white counterparts who earned more than he did

15.2. failed to specify the ground on which he alleges he suffered discrimination

15.3. already referred an unfair dismissal claim to the CCMA and it had been dismissed and was now the subject of review under JR 1483/23; and that the Applicant could not now rely on the same set of facts to allege an automatically unfair dismissal;

15.4. failed to identify the differential treatment with respect to the issue of the bonus.

15.5. referred an ULP dispute to the CCMA under case number GAJB 7413-23 which had been dismissed, and was part of the review under JR 1483/23.

16. The Applicant was called on within 15 days to remove the cause of complaint and never did.

17. The Applicant fails to set out which whites earn more than he does, and the comparison between what he does and what they do. He fails to set out the differentiation; and that the differentiation amounts to discrimination which is unfair. Similarly he would need to make such a comparison with respect to the complaint about non-payment of a bonus. He has not done so.

18. As the Respondent says in their Heads of Argument, *“Mr Mohlabane has not pleaded his claim to sustain his cause of action and to enable Sandvik to defend his alleged equal pay for work of equal value claim. Without the identity of the white male colleagues who earned more than Mr Mohlabane, the difference in their remuneration and the ground(s) on which Mr Mohlabane alleges he was discriminated on, Mr Mohlabane has not set out the factual and legal basis for a cause of action.”*¹⁰

19. He fails to set out the factual circumstances which gives rise to his claim that he was automatically dismissed. He would for example need to say that his dismissal arose from participation in a protected strike, or related to a section 197 transfer or that he had made a protected disclosure to bring the termination within the spectrum of section 187 of the LRA.

20. I am satisfied that the Applicant has not set out a factual basis to sustain a cause of action for discrimination or an automatically unfair dismissal. The exception defence of the employer is well grounded, and the intention of such a step in the early stages of litigation is to weed out claims which cannot be sustained. It is appropriate to do so in these circumstances.

¹⁰ Para 30 Respondents Heads of Argument

21. Of course the Applicant's lack of merits in the leave to appeal are further aggravated by the fact that he has a review application before this very court on matters which he seeks the LAC to hear. The attack of *lis pendens* would apply.

22. There is no reason for the Labour Appeal Court ("LAC") to hear the matter. The Applicant has not established any grounds upon which he has reasonable prospects of success in the LAC, nor are there any compelling policy or legal reasons warranting the attention of that court.

23. In the circumstances I make the following order

Order

24. The Application for Leave to Appeal is dismissed.

25. No order as to costs.

D Norton

Acting Judge of the Labour Court of South Africa