

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Case no: CA 13/07

In the matter between

Gideon Jacobus Jansen Van Vuuren

Appellant

and

South African Airways (PTY)LTD

First Respondent

Airline Pilots' Association-South African

Second Respondent

JUDGMENT

Jappie JA

Introduction

[1] This is an appeal with the leave of this Court against the whole of the judgement of the Labour Court upholding an exception by the first respondent to the appellant's amended statement of claim.

[2] The appellant, Gideon Jacobus Jansen Van Vuuren is an airline pilot. On 5 August 2005, whilst in the employ of the first respondent, South African Airways (Pty) Ltd, he reached the age of 60 years. On 1 September 2005 he stopped flying duty as he had reached his age of retirement.

[3] On 19 August 2005, the first respondent and the second respondent, the Airline Pilots' Association of South Africa, concluded a collective agreement (the agreement) extending the retirement age of persons such as the appellant from 60 to 63 years. The agreement was signed on 11 November 2005. Thereafter the appellant resumed his duties as a pilot. On 9 December 2005 he attended a pilot's refresher course. This was followed by flying simulator reactivation checks on 10 and 11 December. On 12 December 2005 the appellant operated his first flight since turning 60 years old. He thereafter continued in the employ of the first respondent his terms of employment being governed by the agreement.

The Pleadings

[4] On 4 July 2006 the appellant brought proceedings in the Labour Court at Cape Town in which proceedings he sought relief in terms of the Employment Equity Act, Act 55 of 1998 (EEA). In his amended statement of case the appellant sets out the following relevant averments;

- “ 7 Applicants claim is one of unfair discrimination, founded on section 6 (1) of the EEA, and one of unfair labour practice in the form of unfair act or omission relating to the provision of his accumulated leave benefit.
8. Applicant is employed by SAA as an airline pilot with the rank and title of senior captain. He currently serves as a short range pilot. He is currently over the age of 60.
9. Applicant contends that the SAA has unfairly discriminated against him as an employee on the ground of his age by introducing new terms and conditions of employment which are unfairly discriminating to him and fellow pilots over the age of 60.
10. On 19 August 2005 SAA and the union concluded in principle agreement extending employees retirement ages from 60 to 63.
11. Applicant turned 60 years of age on 5 August 2005.
12. The agreement was signed on 11 November 2005, by which time applicant had turned 60.
13. Applicant was withdrawn from flying duty as from 1 September 2005, his then retirement age. He was instructed to remain at home pending recall to flying duty by SAA. He accordingly remained in SAA's service after turning 60 and never left the service.

14. Applicant was re-deployed, after the final agreement had been signed by SAA on 9 December to attend a SEPPT Refresher course followed by flight Simulator Refresher Checks on 10 & 11 December 2005, and operated his flight on 12 December 2005.
15. Applicant was remunerated at his salary by SAA for the period 1 September 2005 to 9 November 2005 in the form of leave pay which was deducted from applicant's accumulated leave entitlement. Applicant was forced to use up his accumulated leave for the period of 1 September 2005.
16. Applicant contends that this was unfair act or omission relating to the provision of his accumulated leave benefit. This dispute was referred to the CCMA for arbitration. Respondent were invited to agree this Honourable Court hearing this dispute together with the unfair discrimination claim referred to herein after. First Respondent has consented to this and Second Respondent has not opposed."

[5] In paragraphs 8 to 19 of the statement of case, the appellant summarises the relevant terms of the agreement as it applied to his claim. In paragraph 20 to 59 of the statement of case he sets out certain facts and contentions in support of his claim that the first respondent, as against him, had contravened section 6(1) of the EEA by having committed an act/s of unfair discrimination on the basis of his age. He further alleged that the first respondent had committed an unfair labour practice in having utilised a portion of his leave pay to remunerate him for the period 1 September 2005 to 12 December 2005; a period he termed "enforced leave".

[6] The relief sought by the appellant is set out in paragraph 67 of the statement of claim and reads as follows:

- "67.1. An order declaring the differential remuneration policy of the Respondent to constitute unfair discrimination prohibited by section 6 of the Employment Equity Act 55 of 1998;
- 67.2. An order directing the Respondent to remunerate the applicant at the same notch for short range Senior Captains which he enjoyed before age of 60, without any delegation in status or remuneration, with the same full annual and general pay , with the same allowance increases and allowances on the appropriate Senior Captain Scale as enjoyed by other SAA pilots of the same rank under the age of 60.
- 67.3. An order directing the Respondent to make payments to the applicant of compensation , in such amount as this Honourable Court may deem reasonable taking into account inter alia his annual loss of R269, 501.51 in salary;
- 67.4 Payment of damages in respect of the discrimination in the sum of R100,000,00;
- 67.5 Interest on the compensation (that part calculated on loss of salary) at the prescribed interest rate of 15,5% per annum from 1st August to date of payment;

- 67.6 An order declaring the forced leave taking constitute an unfair labour practice within the meaning of section 186(1) (a) of the LRA.
- 6 7.7 An order directing the Respondent to reinstate applicant's accumulated leave credit for the period of enforced leave.
- 6 7.8 An order directing the Respondent to pay out to applicant at full value (including general and annual increases) his accumulated leave as at August 2005 together with interest at prescribed interest.
- 67.9 Cost of Suite
- 67.10 Further and alternative relief."

In the Labour Court

[7] On the 28th August 2006 the first respondent delivered a Notice of Exception excepting to the appellant statement of claim on the grounds that it lacked averments that are necessary to sustain the claims against the first respondent. The essence of the exception to the relief set out in subparagraphs, 67.1 to 67.5 of the statement of claim are summarised as follows: (a) The first and second respondents are bound by the terms of the agreement both at common law and in terms of section 23 (1) (a) of the Labour Relations Act 66 of 1995 (the LRA); (b) The agreement records the terms that regulate the conditions of service of the appellant as well as all other pilots; (c) Conduct which is contrary to the terms of the agreement would constitute a breach of the agreement as well as breach of the LRA.

The first respondent's contention in the Labour Court was that the relief sought by the appellant is in conflict with the terms of the collective agreement. The relief sought would be tantamount to an order that the first respondent breach both the terms of agreement and the provisions of the LRA. Therefore the appellant was not entitled to such relief in the absence of an order declaring null and void the agreement which the appellant contends to be discriminatory alternatively, for being in contravention of the EEA. Further the first respondent contended that the appellant was obliged to seek relief against the second respondent, as the second respondent is a party to the agreement.

[8] The basis of the second exception goes to the relief sought in subparagraph 67.8 of the statement of claim. The essence of this exception can be summarised as follows: The appellant does not have an enforceable claim for an unfair labour practice allegedly committed during the period September to December 2005. The appellant had reached the age of retirement prior to the conclusion of the agreement, his services had been terminated on 30 of August 2005 in accordance with the provisions of section 187 (2) of the LRA. Had it not been for the agreement concluded between the respondents the appellant would have retired at the age of 60. As there are no terms in the agreement which provides that the appellant would be employed retrospectively, there is no enforceable claim that arises for the period September to December 2005.

[9] The exceptions were argued before Nel AJ on the 25th of April 2007. The Court *a quo* delivered an ex tempore judgment upholding both exceptions and ordered the appellant to pay the first and second respondents' costs. In upholding the exception, the Court *a quo* dismissed the argument advanced by the appellant that it was sufficient to make out a cause of action for the appellant to bring his case within the frame-work of the EEA. The Court *a quo* stated its conclusion as follows:

"I am not in agreement with Mr Stelzner, who appeared on behalf of the applicant, that as long as the applicant party brings him or herself within the framework of EEA, and states a case within that framework, which reflects a cause of action, that is good enough".

The Court *a quo* expressed the view that the statement of claim lacked sufficient averments to make out a cause of action because the relief sought appeared to be in conflict with the agreement. On this issue the Court *a quo* stated its reason as follows:

"the fact of the matter is the court is satisfied that applicant needs to indicate with sufficient particularity in his statement of claim what it is that he is seeking. I am of the view that in addition what clauses of the collective agreement struck between the second and third respondent are offensive, a case needs to be made out that they are severable from the agreement."

[10] The Court *a quo* granted the appellant a period of 30 days in which to rectify the statement of case. The appellant declined to rectify the statement of case and sought the leave to appeal against the whole judgment of the Labour Court.

[11] Nel AJ refused the appellant leave to appeal against the aforesaid judgment. The appellant petitioned this Court for leave to appeal and it is with the leave of this Court that the appellant now appeals against the whole of the judgment of the Court *a quo*.

Appeal

[12] Before us counsel who appeared on behalf of the appellant submitted that the judgment of the Court *a quo* did not address the exception as pleaded by the first respondent. He argued that the approach adopted by the Court *a quo* was to treat the exception as if it was based on the ground that the statement of case was vague and embarrassing. Counsel submitted that this was not the correct approach for the Court *a quo* to have adopted.

[13] The first exception taken was that the statement of case lacked averments which were necessary to sustain a cause of action. However, the complaint of the first respondent is that the relief sought by the appellant impacts upon the terms of the agreement. This is apparent from what is set out in paragraph 7 of the Notice of Exception which read as follows;

“the applicant request the relief contrary to the terms of the agreement. The relief sought would be tantamount to the order that the first respondent breach both the terms of the collective agreement and the provisions of the LRA in relation to the applicant.”

[14] Counsel for the appellant argued that all the appellant needed to do is to make out a cause of action was for the statement of case to set out sufficient averments to bring the appellant’s case within section 6 of the EEA. Counsel argued that the averments made in the statement of case and the relief claimed by the appellant were consistent with the remedies available under the EEA.

[15] Counsel who appeared for the first respondent, conceded that the statement of claim contained sufficient averments to state a case under section 6 (1) of the EEA but complained that it contained too much additional information. Nevertheless, he argued that

the statement of case contained averments to the effect that the terms of the agreement were discriminating and therefore, unless the appellant made out a case that the discriminating clauses of the agreement were severable from the main agreement which, he had failed to do, the appellant is obliged to seek an order setting aside the whole agreement which like wise he had failed to do.

[16] Although the Rules for the Conduct of Proceedings in the Labour Court do not expressly provide for exceptions, exceptions are nevertheless allowed under the rule 11(3). The rule provides the following:

“If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances”.

[17] The procedural step taken by the first respondent by raising the exceptions to the appellant statement of claim is akin to that provided for in rule 23 (1) of the Uniform Rules of Court. That rule reads as follows:

“Where pleading is vague and embarrassing or lack averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule 5 of rule (6):...”.

[18] As the first respondent elected the grounds upon which he attacks the statement of claim, it is not open to it to contend that the exception should be upheld on an entirely different ground. The ground of the first respondent’s exception is stated as follows;

“Take notice that the first respondent except to the applicant’s amended statement of claim and the relief sought therein on the grounds that it lacks averments that are necessary to sustain the claims against the first respondent”.

It is on this ground that the statement of claim must be considered. In deciding the exception the court takes the allegation of facts alleged in the statement of claim as true. That is to say, if evidence proved those allegations, a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is excipiable only on the basis that no possible evidence led on the pleading can disclose a cause of action. In this regard see *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 37 H.

[19] In the statement of claim the appellant alleges in paragraph 6 :

“Applicant’s claim is one of unfair discrimination founded on section 6 (1) of the EEA.”

This section of the Act reads as follows:

“6 Prohibition of unfair discrimination-(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, in 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, beliefs, political opinion, culture ,language and birth.”

[20] As the appellant’s claim is expressly based on a contravention of the aforesaid section of the EEA, all he needs do is to plead his case so that it falls within framework of the section. In *Funds Trust (Pty) Ltd (In Liquidation) v Van Deventer* 1997(1) SA 710 at 725 H the Appellate Division approved the following passage from a judgment by Tebbut J in the court a quo;

“It is not necessary in a pleading ,even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly(see *Ketterringham v City of Cape Town* 1934 AD 80 at 90.) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply.(sees *Price v Price* 1946 CPD 59;*Wasmuth v Jacobs* 1987(3)SA 629 9(SWA) at 634 I). In my view the plaintiff has pleaded all the factual allegations as to justify reliance on 53(b).”

It seems to me that the averments set out in paragraph 8 and 9 of the statement of case are sufficient to bring the provisions of section 6 of the EEA into operation. It is plain that the appellant’s complaint of discrimination against him by the first respondent is based on his age. The relevant paragraphs reads as follows:

“8. Applicant is employed by SAA as an airline pilot with the rank and title of senior captain. He currently serves as a short range pilot. He is currently over the age of 60.

9. Applicant contends that the SAA has unfairly discriminated against him as an employee on the ground of his age by introducing new terms and conditions of employment which are unfairly discriminating to him and to fellow pilots over the age of 60...

18. The following are material terms of the agreement:

- 18.1 A pilot is entitled, at his or her discretion, to retire at any time between age 50 and 63;
- 18.2 Pilots reaching the age of 60 must choose whether they wish to fly SAA on either domestic or international routes;
- 18.3 If pilots opt to fly on domestic routes, they are permitted to operate as captains (pilots in command of their flights);

- 18.4 Pilots who opt to fly international, are permitted to operate only in the position of first officer on their flights with SFO insignia, which is a subordinate position to that of the pilot in command ;
- 18.5 Pilots over the age of 60 with the rank of captain who elect to operate as long range first officers need to undergo an orientation programme ;
- 18.6 All pilots over the age of 60 are remunerated at a lesser salary scale, that of SC20, irrespective of whether they fly internationally or domestically ;
- 18.7 Pilots over the age of 60 do not receive notch increases;
- 18.8 Pilots over the age of 57 are not permitted to bid for transfer to a coastal base;
- 18.9 A pilot over the age of 60 cannot exercise a displacement bid for a category at coastal base;
- 18.10 The agreement is to endure for three years. At the end of the 3 years period; any pilot in service over the age of 60, reverts to his normal seniority and notch, on condition that the international operational limitations (referred to hereinafter) have been filled ;
- 18.11 No back pay is payable;
- 18.12 Any leave paid out after the age of 60 is to be paid out at SC20 salary scale.”

Moreover, the relief sought, as set out in paragraph 67 of the statement of claim, falls within the ambit of the EEA. In my view the appellant has set out sufficient averments in the statement of claim for a cause of action under section 6 (1) of the EEA.

[21] Although the statement of claim sets out in great detail the terms of the agreement concluded between the first and the second respondents, these averments serve only to establish the background of the circumstances which led to the complaint of unfair discrimination. The inclusion of these allegations in the statement of claim must be regarded as no more than *plus petitio*.

[22] It may well be that the relief sought by the appellant is in apparent conflict with the terms of the agreement. This without more, is nevertheless insufficient to render the statement of claim excipiable. It is for a court at trial to pronounce upon the relief to which the appellant may be entitled. This is not a matter that can be decided by way of an exception. In my view, the Court *a quo* erred in concluding that the statement of case

lacked averments sufficient to disclose the cause of action. In my view the first exception ought to have been dismissed.

[23] As the Court *a quo* had upheld the second exception simply on the basis that the first exception had merit and provided no further reasoning in upholding the second exception. It follows that if the first exception stands to be dismissed then the second exception likewise must be dismissed. It is therefore, unnecessary to deal in any detail with the merits of the second exception.

[24] For the reasons set out above I am of the view that the appeal must be upheld. In result the following order is made:

1. The appeal is upheld.
2. The first respondent is ordered to pay the appellant cost of appeal which are to include the cost of the application for leave to appeal both in the Labour Court and the petition in this court.
3. The Order of the Court *a quo* is set aside and replaced with the following order:

“(a) The exceptions are dismissed with costs.”

Jappie JA

I agree

Zondo JP

I agree

Davis JA

For the appellant : A J Freund SC
Instructed by : De Klerk & Van Gend Inc
For the respondent : W. La Grange
Instructed by : Deneys Reits Inc

Date of Judgment : 05 June 2009