



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 565/11

In the matter between:

GERRIT SNYDERS

Applicant

and

EPIC FOODS (PTY) LTD

Respondent

Heard: 06 July 2012

Delivered: 23 April 2013

Summary: Jurisdiction – In the case of a dispute which is governed by the provisions of section 191(5)(a)(ii) of the LRA, the applicant can rely on the doctrine of *causa continentia* only where there has been a referral of its dispute to the Labour Court by the Director of the CCMA in terms of section 191(6) of the LRA. Applicant's claim of constructive dismissal stayed in the Labour Court and referred to the CCMA for arbitration in terms of section 158(2)(a) of the LRA.

JUDGMENT

MEMANI AJ

- [1] In this matter, the applicant has filed a statement of claim in which he claims the payment of bonuses that he alleges are due to him in terms of an agreement between himself and the respondent.
- [2] The total amount claimed by the applicant is R617 285.11, which the statement of claim states is made up of (a) bonuses of R256 575.77 and R266 827.01 for the years 2009 and 2010 respectively, (b) accrued leave pay for 22 days in the sum of R75 882.33, (c) R18 000.00 for expenses incurred on behalf of the respondent.
- [3] The applicant also alleges that his resignation constitutes a constructive dismissal which was caused by the interference of the shareholders of the respondent in management issues and the non-payment of agreed bonuses. The final straw was when one of the shareholders insulted the applicant's mother.
- [4] The respondent has filed an exception on the following grounds:
- (1) The Labour Court lacks jurisdiction to determine a constructive dismissal claim.
 - (2) The statement of claim does not disclose a cause of action.
 - (3) The statement of claim does not show how the amount of the bonuses was calculated and how the respondent acted *male fide*.
 - (4) The applicant avers that the bonus amounts were agreed upon by the parties, yet in paragraph 15.2.1 he avers that the payment of bonuses was at the sole discretion of the respondent.
- [5] The applicant concedes that ordinarily this Court does not have jurisdiction to hear constructive dismissal claims. However, in his heads of argument he contends that, based on the doctrine of *causa continenta*, *conjunction causarum*, *identitas causarum*, *connexitas causarum* and the once-and-for-all rule, this Court has jurisdiction to hear both his damages claim in terms of section 77 of the of the BCEA and his constructive dismissal claim.

- [6] However, in argument, Mr Snyman who represented the applicant did not refer to the doctrines of name, but I understood him to be contending that a *connexitas causarum* exists which related to the applicant's section 77 claim and his claim for damages in that what led to an intolerable employment relationship between the applicant and the respondent is the fact that despite repeated demands, the respondent has failed to honour its obligations to pay him agreed bonuses. Thus, the facts relied upon in support of the section 77 claim are the same as the facts that will be relied upon in support of the constructive dismissal claim. To the extent that some of the issues fall exclusively within the jurisdiction of the CCMA and some fall exclusively within the jurisdiction of the Labour Court, respectively, there is a *conjunctio causarum* in that there has been an unfair dismissal which has been followed by a timeous referral to the CCMA, conciliation has taken place there, and there is a certificate of outcome. I should, therefore, apply the doctrine of *causa continentia*, to extend the jurisdiction of the Labour Court to the applicant's constructive dismissal claim.
- [7] Ms Tilly who represented the respondent objected to the placing of facts that relate to the dispute having been referred timeously and that conciliation has failed because they do not appear *ex facie* the statement of claim, and Mr Snyman cannot tender evidence from the bar. I do not agree. The applicant's causes of action did not call for the making of the allegations in the statement of case. If it were the case that the matter was not properly referred to the CCMA, one would have expected that the respondent would have taken the point as part of its exception. It is usual in circumstances like these for the bench to accept statements such as the ones that Mr Snyman made from the bar. I, therefore, will follow practice and accept Mr Snyman's statements from the bar.
- [8] For his submissions Mr Snyman relied in the main on *Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd*.¹ The main purpose of the *causa continentia* rule is to avoid an unnecessary multiplication of actions concerning the same subject-matter which might cause inconvenience and result in contradictory

¹ 1962 (4) SA 326 (A).

judgments.² I agree with Mr Snyman that the evidence that will be led in the Labour Court regarding the applicant's claim for section 77 damages is the same as the evidence that will be led in the CCMA in support of his claim of constructive dismissal. The common evidence will be that there was an agreement to pay bonuses which the respondent has breached. He has found the respondent's conduct to be unacceptable, and these facts have led him to terminate the employment relationship or they entitle him to payment of the damages which he has claimed. The fact that he is also going to rely on undue interference in his work does not detract from the validity of Mr Snyman's contentions.³ I also agree with him that there is a real risk that the Labour Court and the CCMA might reach contradictory conclusions on these facts. However, *causa continentia* does not apply where the court lacks jurisdiction to hear the cause concerned.⁴

- [9] In this matter, the cause of action is an alleged unfair dismissal in terms of section 191(5)(a)(ii) of the LRA. The Labour Court has jurisdiction to hear such a dispute only if the Director of the CCMA has referred the dispute to it in terms of section 191(6) of the LRA. In my view, a litigant cannot invoke the doctrine of *causa continentia* unless it has complied with the pre-jurisdictional facts that would entitle it to litigate in the forum concerned. For example, a party who has not yet applied with the provisions of section 3(1) of the Limitation of Proceedings Against Certain Organs of State Act⁵ cannot invoke *causa continentia* in order to prosecute a claim which the Act is applicable. In the context of the LRA, an applicant cannot invoke *causa continentia* unless it has complied with the referral provisions that are applicable to the forum to which it seeks a hearing. In the case of a dispute which is governed by the provisions of section 191(5)(a)(ii) of the LRA the applicant can rely on the doctrine of *causa continentia* only where there has been a referral of its dispute to the Labour Court by the Director of the CCMA in terms of section 191(6) of the LRA.

² *Katz NO v Segal and Others* 1977 (2) SA 1038 (C) at 1042B-D.

³ See *Thomas v BMW South Africa* 1996 (2) SA 106 (C) at 127G-128B, *Geyser v Nedbank Ltd and Others: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) at paras 11-13.

⁴ See *Berger and Others v Aiken and Others* 1964 (2) SA 396 (W) at 403E-F.

⁵ 40 of 2002.

- [10] The applicant's dispute has not been referred to the Labour Court by the Director of the CCMA acting in terms of section 191(1)(6) of the LRA. This means that the applicant's reliance on the doctrine of *causa continentia* must fail. I therefore, have to uphold the exception that this Court lacks jurisdiction to hear the constructive dismissal claim, but I will, in terms of section 158(2)(a) of the LRA, stay its prosecution in this Court and refer it to arbitration by the CCMA.
- [11] The respondent also avers that the statement of claim fails to disclose a cause of action. The first complaint in this regard is that the applicant avers that his functions and authority became watered down, but does not plead sufficient facts to indicate in what respects his functions and authority became watered down. I do not agree with this allegation, taken alone, or together with the rest of the averments that have been made do not disclose a case of action. What may be a problem is a failure to plead sufficient particularity which is an irregular step. As I have decided to refer the applicant's constructive dismissal claim to the CCMA, I refrain from making any ruling in this regard.
- [12] The second complaint is that in paragraph 9 of his statement of claim, the applicant avers that there was an agreement relating to the payment of profit shares, but does not plead the terms of the agreement. In construing a pleading, I have a duty to construe it in a manner that makes sense of it rather than in a manner that destroys it. Flowing from this duty is that I must not read this paragraph in isolation, but I must read it in conjunction with the rest of the statement of claim. Paragraph 15.2 bears particular reference. Therein, the applicant avers that in addition to his remuneration, the applicant was also eligible for the payment of an annual bonus in terms of the written contract of employment referred to in paragraph 15.1. In paragraph 16, he then avers that on 26 July 2010, and at or near Johannesburg, the applicant and one Swanepoel who represented the respondent, agreed on the calculations for 2009 and 2010 to be paid to the applicant. In paragraph 17.1, it is averred that the bonuses would be payable not later than 15 July 2010. In construing the allegation, in support of the non-payment of profit shares, I have taken into account the fact that sometimes bonuses are referred to as profit shares, and

the words “profit share” occur only in paragraph 9 which appears to have been intended as a background to both claims A and B. I, therefore, have come to the conclusion that the applicant used the words “bonus” and “profit share” interchangeably and that paragraph 9 must be read together with the other paragraphs that deal with bonuses. Accordingly, I dismiss the complaint.

[13] The third complaint is that in paragraph 11 of the statement of claim, the applicant avers that he was entitled to the payment of bonus amounts for 2009 and 2010, but does not plead how the amounts were calculated and in what respect the respondent acted *mala fide*. My understanding is that the applicant relies on an agreement with traceable methods of calculation or formulae. If that is not so, it is open to the respondent to assert the contrary. It follows, therefore, that this ground also falls to be dismissed.

[14] The fourth complaint is that in paragraph 11 of the statement of claim, the applicant avers that the bonus amounts were agreed upon by the parties, yet in paragraph 15.2.1, the applicant avers that the payment of bonuses was at the sole discretion of the respondent. However, the complaint goes on, the applicant has failed to prove⁶ that the discretion was exercised in bad faith, and the details of the agreement. My understanding of the applicant's statement of case is that the agreement between the parties stipulates that the applicant does not have a right to claim the payment of a bonus unless and until the respondent has exercised its discretion favourably. The respondent, indeed, exercised its discretion to pay bonuses and thereafter, agreed with the applicant what the amount of the bonuses would be. I do not see how, on the facts of this case, the decision to pay bonuses could have been made in bad faith. This, therefore, makes nonsense of the complaint that the applicant has failed to allege that the respondent's discretion was exercised in bad faith. I, therefore, have decided to dismiss this complaint as well.

[15] In argument, Ms Tilly pointed out that in paragraph 20.3 that the applicant simply claims payment of an amount of R18 000.00 for expenses that he incurred on behalf of the respondent. The problem with this complaint is that it

⁶ For “prove” read “allege” or “aver”.

does not form part of the case that the applicant was invited to meet. Even if it were, if one has regard to paragraph 15.2.2 of the statement of case, it cannot be said that a cause of action is not disclosed regarding this claim. The difficulty might be that the applicant does not set out how this amount is arrived at, which is an irregular step. However, the respondent's case was that the applicant's statement of case failed to disclose a cause of action. I, therefore, will not make any order against the applicant in this regard.

- [16] Paragraphs 16 and 17 of the statement of claim appear to be vague and embarrassing in that it is alleged that the agreement to pay bonuses was concluded on 26 July 2010, but the bonuses were payable on 12 July 2010, a date which preceded the alleged date of agreement. This point was not raised in the heads of argument, nor was it raised when the exception was heard. However, I do not wish to make any finding with regard thereto without having heard the applicant as it might be that had the issue been better pleaded, it would emerge that there was backdating. I, therefore, recommend that the applicant should amend these paragraphs so as to remove uncertainty.

Costs

- [17] The applicant has been partially successful. Therefore, costs must follow the cause. However, in making a costs order against the applicant, I am mindful of the fact that he has been dismissed from his employment, and I have no reason to believe that he has another source of income, that makes his dismissal financially immaterial. I take into account the fact that it is not consonant with the constitutional principle of *ubuntu* not to have concern for the fact that a costs order that I make might affect his ability to live a dignified life and to care for his children if he does have. I have also taken into account that the cause of this application was that he attempted to save litigation costs and avoid the possibility of contradictory judgments on the same factual issues.
- [18] In the result, I make the following order:

1. The exception that the Labour Court lacks jurisdiction to hear the applicant's case of constructive dismissal ("Claim B") is upheld.

2. The exception that the statement of case does not disclose a cause of action is dismissed.
3. Claim B is stayed in the Labour Court, and is referred for arbitration by the CCMA in terms of section 158(2)(a) of the LRA.
4. The applicant, respondent in the exception is ordered to pay the costs which costs must not exceed R20 000.00. The costs is payable over a period of 12 months commencing as and from the date of this judgment in equal instalments.

MEMANI AJ.

Acting Judge of Labour Court of South Africa

APPEARANCES

For the Applicant: Van Niekerk Attorneys

For the Respondent: Sikander Tayob Attorneys

Labour Court