



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 265/13

In the matter between:

PHAKISO JOSIAH MAKHANYE

Applicant

and

SOUTH AFRICAN AIRWAYS

Respondent

Date heard: 27 November 2013

Judgment delivered: 28 November 2013

Judgment edited: 6 January 2014

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is a matter heard yesterday in which the respondent in the main action objects to the applicant's notice of intention to amend his statement of claim.

- [2] The brief history of the matter is the following. The applicant filed a statement of claim on 22 March 2013. The claim brought before this court is one in terms of Section 77(3) of the Basic Conditions of Employment Act, in which the applicant contends that the respondent breached his contract of employment. As a consequence he claims the amount of some R25 million. The respondent filed a notice of exception, excepting to the claim on the ground that it lacked a cause of action.
- [3] That matter came before this court on 24 July 2013, where my colleague Molahlehi J upheld the exception and granted to the applicant leave to amend his statement of claim within 30 days of the date of the order, failing which the claim "would be regarded as dismissed".
- [4] The applicant filed an amended statement of claim. However, that claim was not filed within the 30 day period stipulated by the order granted by Molahlehi J. The 30 day period expired on 23 August. The application, it seems, was telefaxed to the respondent on the afternoon of 26 August, and telefaxed to the Registrar's office at the same time.
- [5] While the rules provide that service by telefax is permissible in this court, where service by telefax is effected, although service is deemed to have been effected on completion of the transmission, it is incumbent on the party serving by telefax, to file the original document with the Registrar within five days of telefaxing the process concerned.
- [6] From the bar, the applicant, who appeared in person, conceded that he had not filed the original document. He also conceded that a document referred to in the amended statement of claim, being JD01, a job description, had not been attached to the amended

statement of claim.

- [7] The merits of the matter aside, it is clear to me that by filing the amended statement of claim on 26 august, the applicant failed to comply with the court's order made on 24 July.
- [8] There is no application for condonation that accompanied the amendment to the statement of claim, and at no stage has the applicant sought condonation from this court for what amounts to a breach of the order. We are not dealing here with the breach of a regulation or a rule or a directive, the applicant has acted in breach of a court order, thereby placing himself technically in contempt of this court.
- [9] The terms of the order granted by Molahlehi J on 24 July 2013 are clear - if the applicant failed to file the amended statement of claim within the prescribed period of 30 days, his claim would be regarded as being dismissed.
- [10] I see no reason, given particularly the absence of any application for condonation, or indeed any explanation whatsoever for the late filing of the amended statement of claim, to consider that the consequence foreshadowed by Molahlehi J's order should be any different. On that basis alone, in my view, the referral of the applicant's claim stands to be dismissed.
- [11] Even if I am wrong in coming to that conclusion, the amended statement of claim manifestly fails to deal with the issues that were raised at the hearing of the exception. In particular the claim appears to be one that extends beyond damages ordinarily available in contract. The applicant claims general damages for pain and suffering, loss of enjoyment and amenities, emotional suffering, loss of dwelling, humiliation and embarrassment and the

like.

- [12] The fact that damages under these heads do not flow from a breach of contract was drawn to the applicant's attention at the time the exception was argued, but save to reduce his claim from some R25 to some R16 million, none of the fundamental issues raised in the hearing of the exception have been addressed in the amendment. In particular, the applicant fails to set out any basis on which he is entitled to damages for an alleged breach of his contract.
- [13] There are a number of other instances, all of them particularly drawn to the applicant's attention in the exception, which again have simply not been addressed. I do not intend, for present purposes to deal with each of these, an example might be found in paragraph 10 of the statement of claim where the applicant pleads a non-variation clause to his written contract of employment. Indeed that is the very basis of his claim. Notwithstanding this, he continues to allege a number of further oral agreements that were concluded with him, and on which he specifically relies. The applicant's statement of claim remains contradictory and it remains excipiable. None of the fundamental defects identified in the original statement of claim have been remedied by the notice of amendment. So for those reasons, in my view, the applicant's claim falls to be dismissed.
- [14] In regard to the question of costs, ordinarily this court would have no hesitation in making an order for costs against the applicant. This litigation is misguided to say the least. The applicant was warned by way of the exception that his pleadings were vague and embarrassing and required fundamental rethinking and redrafting.
- [15] Despite this he appears to have learnt no lessons during the course of that process, and as I have indicated, has addressed none of the material issues that were the subject of the exception.

[16] However, I also bear in mind that the applicant is an individual and that this court is reluctant to make orders for costs against individuals who refer their matters to this court for determination, albeit on a misguided basis.

[17] As a matter of interest, I am aware of a similar claim brought before one of my colleagues, where precisely the same pleadings were used and the same claim for damages calculated on the same basis was made. It appears that there is a cottage industry out there where somebody ordinarily specialising in Road Accident Fund claims or the like is dispensing advice to gullible members of the public, and raising their expectations in relation to employment-related litigation that they are encouraged to institute against their employers.

[18] So I accept that perhaps the applicant, to give him the benefit of the doubt, has been badly advised in this matter. But that he has pursued his claim in the genuine belief that it has merit. In my view and in the exercise of the discretion I have in terms of Section 162 of the Act it seems to me that there ought to be no orders as to costs. The effect of the order I make will hopefully put paid to this litigation.

I make the following order:

1. The applicant's claim is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT