REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JS 633/13

In the matter between:

NKADIMANG EUGENIA KABE **Applicant**

And

NEDBANK LTD **First Respondent**

Heard: 12 March 2014

Delivered: 24 March 2014

Summary: (applications for condonation and amendment – objections based on jurisdiction and failure to disclose a cause of action)

RULING ON CONDONATION AND *IN LIMINE* OBJECTIONS

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LAGRANGE, J

Introduction

[1] The referral in this matter concerns an alleged automatically unfair dismissal in terms of section 187 (1) (h) of the Labour Relations Act 66 of 1995.

[2] The applications before this court are three interlocutory ones concerning:

2.1 a condonation application for the applicants late referral of the statement of case;

2.2 an application by the applicant for leave to amend her statement of case, and

2.3 an *in limine* objection by the respondent to the applicant's statement of claim including the proposed amended statement of claim on the basis that it is vague and embarrassing and, or alternatively, does not disclose cause of action.

[3] For ease of understanding, I will continue to refer to the applicant in the referral as the applicant in this ruling even though she is only the applicant in respect of the condonation application and the application to amend the statement of case. Correspondingly, the respondent in the referral will retain that appellation.

[4] The matter previously was set down for 23 October 2013 when it was postponed at the applicant's request and the applicant was ordered to pay the costs of the postponement. The applicant has filed an application for leave to appeal against the cost order. Once again, just over a week before the matter was set down again the applicant asked the matter to be removed from the role as she had objections to the re-enrolments of the matter. The applicant was unhappy that the registrar had set the matter down for a hearing at the request of the respondent apparently on account of the applicant having taken no steps since October 2013 to have the matter enrolled. The respondent was perfectly entitled to request the matter to be set down and the applicant received the notice of set down well enough in advance on 25 February 2014.

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[5] The principal reason why the applicant did not want the matter to proceed at this stage, as explained by herself at the hearing, was that she was awaiting further information relating to a complaint she had lodged with the Johannesburg Bar Council against an advocate who had been appointed to chair a grievance hearing involving the applicant as the grievance May 2012.

[6] Given the issues the court was required to deal with in the various applications before it, it is apparent that any additional details about this grievance and its handling were unlikely to assist in the resolution of issues germane to the applications, even though it *might* ultimately have some evidentiary value should this matter go to trial. If the applicant's enquiries about matters relating to the grievance ultimately do provide evidence in support of her claim, that is not something that necessitates delaying these applications. Secondly, if information that might be revealed by such further enquiries genuinely necessitated a further amendment of the applicant's statement she could still issue a further notice of amendment, or address the matter in the pre-trial process.

[7] Consequently there was no basis for further delaying the hearing of these applications.

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Condonation application

[8] The applicant referred her unfair dismissal claim to the CCMA on 13 December 2012. It is common cause that when the applicant completed the 7.11 referral form, she was not entirely sure which type of dispute to identify when categorising it and she did not identify her dismissal as one that was automatically unfair. The matter was unsuccessfully conciliated and referred to arbitration on 9 January 2013. Two hearings scheduled for 5 March and 26 April 2013 did not take place for reasons owing to both parties and the matter only commenced on 9 July 2013. The applicant further points out that a scheduled pre-arbitration meeting between her attorneys and the respondent's attorneys at which the nature of the claim would have been discussed never took place prior to the arbitration hearing on 9 July 2011.

[9] It was only 11 July 2013 of the applicant indicated that she was not proceeding with the matter in the CCMA but was referring the matter to the Labour Court as an unfair dismissal as a result of having made an alleged protected disclosure in terms of the Protected Disclosures Act 20 of 2000 ('the PDA'). The applicant claims that it was only after she had terminated the mandate of her former attorney that she was made aware by the Commissioner that the case should have been referred to the Labour Court.

[10] The applicant's statement of claim was filed on 30 July 2013, about three weeks after the aborted arbitration proceedings. Since the certificate of outcome was issued on 9 January 2013, the 90 day period for referring the matter to court expired on 10 March 2013. Consequently, although there may be reason to calculate the commencement of the 90 day period differently[1], on the more common reading of section 191(11)(a) the referral was over three months late.

[11] In the absence of the applicant having done anything during the 90 day period to advance her claim such a delay might ordinarily be fatal to a condonation application but it cannot be said that the applicant folded her hands and watched the clock ticking. Advised by attorneys, she set the arbitration ball rolling without delay. The delays in commencing proceedings appear to be attributable in roughly equal parts to both parties' legal representatives. Regrettably, they also could not conclude a pre-arbitration minute. It is not implausible that the applicant only came to realise the existence of a claim pertaining to an occupational detriment under the PDA during the discussions which took place on 9 July 2013 and the following days. The merits of the PDA claim as pleaded leave much to be desired but that is a matter I will address under discussion of the amendment and exception. The referral of the applicant made three weeks later was obviously one that took some time to draft, even if it may be said that it appears to contain significant amounts of material that might

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[1] See ***Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 *ILJ* 407 (LC)** at 409-410, paragraphs [4] **-** [5].

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not be relevant to her claim of automatically unfair dismissal and even if it is unnecessarily detailed in many respects.

[12] The respondent's representative argued that the applicant ought not to be able to hide behind the apparent failure of her erstwhile attorneys to prosecute her claim in the correct forum. Ms Sibanda argued that, in effect, knowledge of the true nature of the applicant's claim was either attributable to the applicant or her attorneys. However, there is no material evidence from which such an inference can be drawn, and accordingly I am inclined to accept the applicant's claims in this regard.

[13] In the circumstances, although the delay is significant, given the fact that the applicant was not idle in pursuing her rights relating to her dismissal during the 90 day period and bearing in mind that she filed a statement of case within a reasonable time of the true nature of her claim being identified. I'm satisfied that the applicant has justified the delay. Because of the inchoate nature of her protected disclosure claim, the merits of that claim are difficult to assess, but I do not regard that as a decisive factor in this condonation application, given that if she can make out a claim under the PDA, that is a claim that should not lightly be denied ventilation in a hearing. I am also not persuaded that the delay occasioned by this matter by the time she filed a statement of case has caused significant prejudice to the respondent. All things considered, I believe that condonation for the applicants late filing of her statement of case ought to be granted.

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<u>The applicant's notice of amendment and the respondent's objections</u>

[14] On 8 August 2013, the applicant filed a notice of intention to amend her statement of case which she replaced with a new notice of intention to amend on 29 August 2013. The respondent raised *in limine* objections to her original statement of claim and has filed a notice of objection to the intended amendment.

[15] The applicant's statement of claim contains a rambling account of a number of issues that grieve the applicant, which she alleges arose during her employment. Quite apart from those, she claims she was automatically unfairly dismissed on account of having made a protected disclosure in

terms of the PDA. The respondent has objected to some of these claims on the basis that the court lacks jurisdiction and two others on the basis that the allegations of vague and embarrassing and, or alternatively, do not disclose a cause of action.

[16] In part I of the applicant's notice of amendment she sets out her complaints relating to what she calls "Nedbank legal requirements not complied with from 1 August 2010 to December 2012". Under the heading she sets out to be the various requirements relating to be employer's performance management policy, but makes no allegations of what the employer allegedly failed to comply with. Part II of the notice is headed "Nedbank legal requirements in terms of the Performance Management User Guide: Timelines on page 4". In this section also she simply sets out pre-requisites in terms of that document, without making any allegations about the respondent's conduct in that regard. Similarly, parts three, four, five, six, seven and eight nearly appear to be the applicant's summary of the various bank procedures concerning discipline performance evaluation and grievances.

[17] It is only in part IX of the applicant's notice of amendment that she sets out alleged shortcomings of the respondent under the heading Of "Prima-facie evidence "Harassment"". Under this heading, the applicant makes certain allegations, some of which are completely lacking in detail, about the respondent's alleged failure to comply with its own performance evaluation policy. She further complains about various work pressures she was subjected to. It is unclear to me what the legal nature of her claim is in this regard.

[18] In part X of the notice of amendment the applicant deals with what she identifies as the "Occupational Detriment". Under this part the applicant alludes to a "tipoff", which she mentions in the previous section of the notice. In part IX she describes it in the following terms:

> *"12. Subsequent, a tipoff anonymous was logged in terms of section 6 of the protected disclosure act intended to be attended by Deloitte as described on the disciplinary and grievance policy. See annexure B of the Tip-off and Annexure C of the policy."*

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[19] This brief sentence is the only hint in the entire document of what might be a protected disclosure. Under the heading of part X, the applicant provides a fairly lengthy chronology of events after 14 November 2011, which is the date she sent an e-mail request for a transfer to 'HR' in which she says she repeated the contents of the tipoff. In the course of that narrative, the applicant relates amongst other things that:

19.1 she claims to have been falsely accused of not filing a report on 14 December 2011;

19.2 on 18 January 2012 she was given a written warning, apparently for her failure to attend another meeting she had been asked to attend;

19.3 when she was issued with a warning she was denied representation as required by the respondent's policy;

19.4 the applicant lodged a grievance complaining that the disciplinary action amounted to victimisation and when she escalated the matter was confronted with a grievance lodged against herself two years ago at the Glen branch of the respondent;

19.5 the applicant was overloaded with work which she believed was intended to demonstrate her incompetency;

19.6 complaints were made about various work she had prepared, even though she was not responsible for some of it and no training was provided to her to prepare her for some of the work;

19.7 two other staff were transferred allegedly to protect them from "the harasser", a person who is not identified by name, whereas the applicant was not;

19.8 she was accused of having misled the financial services board;

19.9 disciplinary action was not taken in other clusters where there were irregularities;

19.10 she was advised about the implementation of the Performance Corrective Plan, which was in contravention of the performance Management process, and lodged a grievance against this;

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19.11 she was threatened with "recourse", whatever that may mean, when she requested documents and minutes pertaining to a meeting;

19.12 she was unfairly accused of not notifying a superior about her absence from work on 19 June 2012;

19.13 she was required to correct reports from January to June 2012 and when she did was told she had used the wrong report;

19.14 the applicant was called to a grievance hearing in which she believes the chairperson was biased and not independent;

19.15 when she complained about discrepancies in her formal performance review in August 2012 her rating was downgraded further;

19.16 she was falsely accused of failing to redo a July report;

19.17 on 22 October 2012 her application for annual leave was refused;

19.18 the applicant was eventually summonsed to an incapacity hearing, in the course of which charges of incidents and insubordination were added, and the chairperson accused her of acting vexatiously towards the respondent by referring a matter to the CCMA,

19.19 and she was ultimately dismissed on 11 December 2012.

[20] It is not clear from the above, whether or not the applicant is saying that all of the above allegations amount to occupational detriments, which she believes are linked to the vaguely described alleged disclosure. I appreciate that the applicant is a layperson, but judging from her use of language, it is not beyond her to set out her claim in a summary and unambiguous way so that the respondent knows exactly what the nature of the claim is and the facts on which the applicant intends to prove in order to establish her claim.

[21] One of the objections raised by the respondent are that, leaving aside the applicant's dismissal, the actions the applicant complains of have never been referred to the CCMA for conciliation. Section 4(2) of the PDA which sets out the procedures for pursuing rights under that Act, states:

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"For the purposes of the Labour Relations Act, 1995, including the consideration of

any matter emanating from this Act by the Labour Court—

(a) any dismissal in breach of section 3 is deemed [o be an automatically unfair dismissal as contemplated in section 187 of that Act, ond the dispute about

such a dismissal must follow the procedure set out in Chapter VIII of that Act;

and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair Iabour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication."

[22] To the extent that the applicant wishes to include in her claim under the protected disclosure act, all the events excluding her dismissal where she believes she was unfairly prejudiced as a result of the alleged disclosure, those matters should have been referred to the CCMA in terms of section 4(2)(b) of the PDA. In the absence of such a referral, the Labour Court does not have jurisdiction. The applicant makes no claim nor provides any evidence that she referred an unfair labour practice claim relating to an alleged occupational detriment short of dismissal to the CCMA. Accordingly, the only claim over which the Labour Court has jurisdiction in the current matter is one in which the applicant has made out a case that her dismissal amounted to an occupational detriment in terms of the PDA.

[23] This brings me to the respondent's further objection which is along the lines of an exception. This relates to the applicant's failure to plead the detail of a claim under the protected disclosure act. In this regard, the applicant has failed to make a clear allegation that would identify why the anonymous tipoff amounts to a protected disclosure as defined in section

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1 of the PDA.[2] It is necessary for the applicant to make sufficient allegations for it to be possible for the respondent to identify which type of protected disclosure she claims to have made. In this regard, it should also be noted that the applicant has not stated that she actually made the alleged disclosure herself.

[24] Further, the applicant has failed to identify the nature of the disclosure made in the tipoff. This is necessary in order to identify whether the tipoff would qualify as a 'disclosure' as defined in section 1 of the PDA.[3] Even if the applicant had referred to the definitions, she would still have to have set out the facts she intends to prove that would bring her case within the ambit of those definitions.

[25] The applicant's failure to make sufficiently detailed allegations that would show that her claim would amount to a protected disclosure if she could

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[2] Section 1 of the PDA defines the term as follows:

"*(ix) "protected disclosure" means a disclosure made to-*
(a) a legal adviser in accordance with section 5;
(b) an employer in accordance with section 6;
(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
(d) a person or body in accordance with section 8; or
(e) any other person or body in accordance with section 9,
but does not include a disclosure—
(i) in respect of which the employee concerned commits an otience by making that disclosure; or
(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;.."

[3] Section 1 of the PDA defines a disclosure as follows:

(i) "disclosure" means any disclosure of info, mation regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
(a) That a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged;
(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No, 4 of 2000);
(g)or that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"

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prove those allegations, means that she has failed to set out sufficient allegations to make out a case of automatically unfair dismissal on account of having made a protected disclosure.

Costs

[26] As both parties have been partially successful in this matter, I believe it is fair and equitable for them to bear their own costs.

Order

[27] In light of the above, the following order is made,

27.1 the applicant's late referral of her automatically unfair dismissal dispute to the Labour Court is condoned;

27.2 the Labour Court lacks jurisdiction to entertain and determine any unfair labour practice claim based on an alleged occupational detriment short of dismissal, which occurred prior to the applicant's dismissal on 11 December 2012, in the absence of such a claim being referred to in the CCMA for conciliation;

27.3 the respondent's objection that the applicant's statement of claim claim does not disclose a cause of action, even in the form set out in the applicant's notice of the amendment dated 29 August 2013, is upheld;

27.4 in the light of the finding in paragraph 27.3 above, the applicant is granted leave to file a further notice of intention to amend her statement of claim to remedy her failure to disclose a course of action, which must be filed within 21 calendar days of this judgement, and;

27.5 each party must pay their own costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person

RESPONDENT: Z Ngwenya of Cliffe Dekker Hofmeyr

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