THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JS267/14

GLEN MARTIN TOBIAS **Applicant**

and

RENASA INSURANCE COMPANY LIMITED **Respondent**

Heard: **28 July 2015**

Delivered: **30 July 2015**

Summary: **Claim for an automatically unfair dismissal in terms of s 187(1)(h) of the LRA; Applicant contending that he made a protected disclosure and was subjected to occupational detriment as a result; At trial, it becoming evident that no 'disclosure' was made as contemplated by s 1 of the Protected Disclosures Act; Court exercising discretion under s 158(2) of the LRA and referred the dispute to the CCMA for arbitration.**

JUDGMENT

VOYI AJ

[1] The matter pertains to an alleged automatically unfair dismissal premised on s 187(1)(h) of the Labour Relations Act.[1] The Applicant contends that he was dismissed by the Respondent for having made a protected 'disclosure' as envisaged by s 1 of the Protected Disclosures Act.[2]

[2] The Respondent resisted the claim and raised a few preliminary points *in limine*. In the main, the Respondent contests the jurisdiction of this Court to pronounce over the matter. The jurisdictional challenge is based on two grounds. In the first place, the Respondent disputes that there was a 'disclosure' made by the Applicant.

[3] Secondly, the Respondent contends that the alleged dispute relating to a protected disclosure was never referred to the CCMA for conciliation. As conciliation is a jurisdictional prerequisite for this Court to adjudicate over an alleged unfair dismissal dispute,[3] the Respondent holds the view this Court is not vested with jurisdiction over the matter.

[4] I summarily disposed of the second jurisdictional challenge. The Applicant did lodge an unfair dismissal dispute with the CCMA for conciliation. The conciliation meeting was held on 07 March 2014. After conciliation failed, the CCMA's Commissioner P Mbatsana issued the certificate of non-resolution. The dispute was, therefore, conciliated. The jurisdictional prerequisite mentioned herein before was, therefore, satisfied.

[5] It would be overtly technical to require of an employee to articulate with precision the exact nature of the case he intends to pursue in the CCMA dispute referral form. After all, the categorisation of the dispute by the employee in the dispute referral form is not decisive.[4] In *NUMSA & others v Cementation Africa Contracts (Pty) Ltd*,[5] in was held thus:

[1] Act 66 of 1995 as amended ("the LRA")
[2] Act 26 of 2000 ("the Protected Disclosures Act")
[3] See: *Feni v Pan SA Language Board* (2011) 32 *ILJ* 2136 (LC) at para 5
[4] See: *NUMSA and others v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC)
[5] (1998) 19 *ILJ* 1208 (LC)

> 'In the circumstances, and having regard to ss 135 and 191 of the Act, I am satisfied that as long as the party who refers the matter to conciliation indicates, for example, that the dispute is about his or her dismissal, both on substantive and procedural grounds, despite any specific issue or issues he or she raises with regard to why he or she disputes his or her dismissal to be fair, if the matter is not resolved at the conciliation, he or she is not barred from raising new issues at arbitration or adjudication.'[6]

[6] There was nothing before me which revealed that what was conciliated was not a dispute which had a bearing on a protected disclosure. To the extent that the issued certificate of non-resolution indicated that the dispute should be referred to arbitration, it is, by now, trite that the certificate of non-resolution is not binding on the parties in terms of the next step in pursuing an unfair dismissal dispute.[7] With the certificate of non-resolution in the present matter, I was satisfied that the dispute was conciliated.

[7] With regard to the first jurisdictional challenge, the Respondent urged this Court to solely determine if there was a protected 'disclosure', as defined, before delving into the subsequent issue for consideration, i.e. whether the Applicant was subjected to occupational detriment as a result thereof.

[8] The Respondent's Counsel, Advocate Nel submitted that the existence of a protected 'disclosure' is a jurisdictional issue. To my mind, what is a jurisdictional issue is the existence of an automatically unfair dismissal in its entirety,[8] and not ideally the constituents thereof.

[9] What the Respondent's Counsel urged may seem pragmatic as the non-existence of a protected 'disclosure' may be dispositive of the matter. However, a piecemeal entertainment of a matter is not ideal. To have a

---

[6] At para 25

[7] *Pienaar v Stellenbosch University and another* (2012) 33 ILJ 2445 (LC). See also: *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others* [2009] 12 BLLR 1214 (LC)

[8] *Booysen v National Union of Metalworkers of South Africa* (JA2013/13) [2014] ZALCJHB 161 (13 May 2014)

separation of the issues in a dispute of this nature can never serve the aim of expeditious resolution of labour disputes.

[10] I, therefore, ruled that I will hear the matter in its entirety and not allow same to be dealt with in a piecemeal fashion. After all, the Applicant exclusively pleaded a case premised on being subjected to occupational detriment on account of having made a protected disclosure. It would, accordingly, be evidence at trial which will determine if such a case succeeds or not.

[11] With the above having been cleared out of the way, the trial commenced. The Applicant testified in person and did not call any witnesses. He appeared on his own without the assistance of a legal representative. I offered whatever assistance the parameters of a fair trial to both parties allowed me to provide to an unrepresented litigant under the circumstances.

[12] The Applicant testified, under oath, that his entire saga with the Respondent commenced after he became aware of what was said about him as an employee in an outcome of a performance appraisal process.

[13] The comments made thereon, about him, engendered a grave concern about his job security as an employee of the Respondent. He then approached Legal Wise who, in turn, addressed a letter of grievance on his behalf to the Respondent's Chief Executive Officer on 2 July 2013.

[14] The Applicant openly disclosed that it was Legal Wise that advised him to also coin his grievance under the guise of a protected disclosure matter. This, so he was advised, was to ensure that he was protected from further victimisation and mistreatment by his superiors.

[15] It is the letter of 2 July 2013 which the Applicant submits constitutes the 'disclosure' in this matter. According to the Applicant, the letter served not only as a grievance against his unfair treatment at the hands of his superiors, it also served to bring '…the evading of legal obligations to the surface as protected disclosures.'

[16] The Applicant pleaded that '[t]he disclosure itself does not constitute a criminal offence.' I understood this to suggest that what was being disclosed were not necessarily criminal matters. Despite this, the Applicant, in his testimony, elevated what he was disclosing to criminal offences.

[17] Having considered that part of his grievance to the CEO of the Respondent which is alleged to constitute a protected 'disclosure', it is clear to me that what was disclosed was not a criminal offence which was being perpetrated at the Applicant's workplace.

[18] Accordingly, the disclosures can only be dealt with as per what is averred in the Applicant's statement of claim, namely that the Respondent '…was evading a legal obligation.'

[19] With regard to the evasion of legal obligations, the Applicant stated in his letter that certain employees were not sufficiently qualified; that the Respondent *might* not be in a position to properly render advice to its individual clients and that two systems of the Respondent were ineffective. With regard to the latter, the Applicant mentioned that the SASRIA and/or FAIS required disclosures do not appear on the policy schedules of these systems.

[20] The Applicant received, through Legal Wise, a response to his letter of grievance to the CEO of the Respondent. The response was under the hand of one Mr Brian Martin, the Respondent's Director: Legal. In his response, Mr Martin pointed out that the Applicant raised two separate complaints, the first dealing with a grievance against his regional manager and the second raising a concern about non-compliance with industry specific legislation.

[21] With regard to the first compliant, the Applicant was requested to lodge a grievance which he did on or about 27 August 2013. As for the second complaint, Mr Martin advised as follows in his letter:

> '6. RENASA has a zero tolerance policy to any legislative non-compliance. We thus take your insured's allegations in relation to non-compliance with industry specific legislation in the most

serious light and confirm that we are already in the process of auditing the relevant branches for possible non-compliance.

7. In order to expedite the current investigation, we require that your insured provide us with full details including dates, parties to and documents relating to the averred transgressions mentioned.'

[22] The Applicant testified that he provided the requested full details to the Respondent's Mr Martin. What was allegedly provided was, however, not put before this Court. As a result of this failure, on the part of the Applicant, the only disclosure that had to be scrutinised for compliance with the provisions of the Protected Disclosures Act was the letter of 2 July 2013, addressed to the Chief Executive Officer of the Respondent.

[23] Under s 1 of the Protected Disclosures Act, what is a 'disclosure' is fully defined. For purposes of the present matter, the relevant definition of a 'disclosure' is that found in s 1(b) under that definition, it being as follows:

'…any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by an employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

(a) …

(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; …'

[24] In the present matter, the Applicant's 'disclosure' sought to suggest that certain employees of the Respondent were not sufficiently qualified in terms of the minimum industry related credits requirements. There was no specific information that was put forward to this end.

[25] This Court has expressed itself in previous cases with regard to what would qualify as a 'disclosure' for purposes of the Protected Disclosures Act.[9]

[26] The Applicant, in the letter to the Chief Executive Officer dated 2 July 2013, did not mention who were the employees that were not sufficiently qualified. He also did not mention in what respect/s they were not sufficiently qualified.

[27] Of note, the Applicant did not categorically state that there were employees that had no qualifications. Instead, he suggested that certain female Broker Consultants '…might not be sufficiently qualified in terms of the minimum industry related credits requirements.'

[28] With the deliberate use of the term 'might', it becomes evident that the Applicant did not have something conclusive regarding the alleged employees' qualifications. If he knew that the alleged employees were not qualified, he would not have used the term 'might' which simply denotes a mere possibility.

[29] The Applicant also suggested that the Respondent as '…an Insurer might not be in a position to properly render "advise" to [its] individual clients.' Again, the Applicant deliberately used the term 'might' to suggest a mere possibility.

[30] As for the two systems, the Applicant stated that there was an '…ineffective operation of these system.' There was simply no mention of what rendered these systems ineffective and in what manner were they ineffective. What the Applicant stated was, therefore, no more than his own views about the two systems.

[31] The fact that the definition of a 'disclosure' under the Protected Disclosures Act, as quoted above, also makes reference to '…likely to fail to comply…' cannot be read to suggest that even speculations can be read into the said definition. A disclosure, proper, is disclosure of 'information' which shows or tends to show an 'impropriety'.

[9] See, *inter alia*, : *Grieve v Denel (Pty) Ltd* (2003) 24 *ILJ* 551 (LC); *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 *ILJ* 1670 (LC); *Tshishonga v Minister of Justice & Constitutional Development and another* (2007) 28 *ILJ* 195 (LC);

[32] In my considered view, a disclosure of what amounts to mere speculations is certainly not a disclosure contemplated by the provisions of the Protected Disclosures Act.[10]

[33] As the Applicant was in the process of presenting his case, it became glaringly apparent that there was no 'disclosure' envisaged by the provisions of s 1 of the Protected Disclosures Act. This being a key element in an automatically unfair dismissal claim founded on s 187(1)(h) of the LRA, the Applicant's case was doomed from the onset.

[34] Without any further ado, I expressed the view that the provisions of s 158(2) of the LRA became operative. The recently amended version thereof reads thus:

> "If at any after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-
>
> (a) stay the proceedings and refer the dispute to arbitration:
>
> or
>
> (c) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of s 162(2)(a) are applicable."

[35] It is, now, no longer a requirement that the parties must consent to this Court continuing with the proceedings if it becomes apparent that the dispute ought to have been referred to arbitration.[11]

[36] To the possibility of continuing with the proceedings as allowed by ss 2(b) of the above quoted provisions, the Respondent's Counsel pointed to the

[10] See: *Ramsammy v Wholesale and Retail Sector Education and Training Authority* (2009) 30 *ILJ* 1927 (LC) at para 51; See also *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd* (*supra*) at para 21
[11] *Rahn v Cheil South Africa (Pty) Ltd* (JS752/2013) [2015] ZALCJHB 180 (12 June 2015)

prejudice the Respondent would suffer should it be subjected to a trial on an ordinary unfair dismissal dispute which it was not prepared for.

[37] This was in view of the fact that the Applicant pleaded a case of an automatically unfair dismissal dispute without any reference to an alternative claim for an ordinary unfair dismissal dispute. It, therefore, became clear that continuing with the proceedings was going to be to the severe detriment of the Respondent.

[38] It would have been expedient to continue with the proceedings if the aforementioned prejudice did not present itself. In the exercise of my discretion, I opted to refer the dispute to arbitration as contemplated by s 158(2)(a) of the LRA.

[39] To postpone the matter for later adjudication by this Court as allowed by s 158(2)(b) would be miles away from expediency. The dispute is likely to be dealt with far more expeditiously by the CCMA than by this Court. After all, s 138(1) of the LRA affords the CCMA Commissioner far more relaxed powers in conducting arbitration proceedings. If this Court was to continue with the proceedings, it would certainly not be sitting as an arbitrator.

Formatted: Add space between paragraphs of the same style

[40] Another benefit to the parties with the dispute being referred to arbitration is the finality and the binding nature of an award that would be rendered at arbitration. For these reasons, I was persuaded that it would be in the interest of both parties that the matter is referred to arbitration.

[41] As for costs, I am of the view that the requirements of law and fairness dictate that I should make no order as to costs. The dispute between the parties, which is about the dismissal of the Applicant by the Respondent, is still on-going. To award costs at this stage would be premature. What has been determined at this stage is that the dismissal was not for a prohibited reason under s 187(1) of the LRA. It is yet to be determined if the dismissal was or was not for a fair reason.

[42] I, accordingly, make the following order:

42.1 The Applicant's claim under s 187(1)(h) of the LRA is refused for failing to meet the requirements of a 'disclosure' as envisaged by the provisions of the Protected Disclosures Act.

42.2 The dispute about the fairness of the Applicant's dismissal is referred to the CCMA for arbitration.

42.3 There is no order as to costs.

VOYI AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant	: In person
On behalf of the Respondent	: Adv Nel,
Instructed by	: Lindeque van Heerden Attorneys