



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 381/15

In the matter between:

JAN BOEYENS

Applicant

and

MURRAY & ROBERTS (PTY) LTD

(PROJECTS)

Respondent

Date heard: 10 November 2015

Date delivered: 04 February 2016

JUDGMENT

EVERETT, AJ

Introduction

- [1] The applicant, Mr Boeyens, seeks a default judgment in his favour. He claims that he was unfairly discriminated against in terms of section 6 of the Employment Equity Act 55 of 1998 and automatically unfairly dismissed in terms of section 187(1)(f) because of his illness and in terms of section 187(1)(h) of the Labour Relations Act 66 of 1995 after making a protected disclosure.

Evidence

- [2] Boeyens testified that he worked as boilermaker foreman at the Medupi project from May 2011 and he earned just over R43,000 per month. During October 2011, he was diagnosed with colon cancer and when he returned to work in November 2012, his doctor specified that he could no longer work in close proximity to x-ray activities. He was placed at the fabrication area.
- [3] In April 2013, Boeyens was told to go back to the boilers. He refused because of his health and this was accepted by the manager, Mr Swanepoel. The supervisor, Mr John Kennedy, was apparently unhappy with this.
- [4] In about August 2014, Boeyens noticed that certain employees were unlawfully using company material to make braais and he reported this. He believed this was a protected disclosure and that he had a duty to report the conduct. Kennedy was unhappy about this and a week later, he made threatening remarks to Boeyens.
- [5] Shortly after this incident, the employer required Boeyens and Kennedy to undergo polygraph tests. Boeyens was found to have shown deception (apparently relating to the altercation with Kennedy) whereas Kennedy was not. Following the polygraph test, Boeyens was given notice to attend a disciplinary hearing. He was charged with deliberately supplying incorrect and falsified

information and dishonesty. The results of the polygraph test were used at the hearing and he was dismissed.

- [6] Boeyens referred a dispute to the Metal and Engineering Industries Bargaining Council and the matter was set down for con-arb on 30 October 2014. Boeyens attended but asked for postponement of the matter because the employer had “a lot of management and its legal representatives present” and he (Boeyens) also wanted to arrange legal representation. The commissioner refused the application and Boeyens, feeling bulldozed, walked out of the process.
- [7] The commissioner issued a certificate stating that the matter remained unresolved after conciliation. The commissioner also issued a ruling dismissing the matter because Boeyens was not in attendance.
- [8] Subsequently, Boeyens sought legal advice and he referred an unfair discrimination dispute to the CCMA. A certificate in respect of this dispute was issued on 25 February 2015.

The nature of the Applicant's claims

- [9] This court has noticed a tendency on the part of applicants to frame and reframe a dispute in terms of every conceivable cause of action in the apparent hope that at least one will succeed. This may be an abuse of dispute resolution processes or merely a misunderstanding of the scheme of workplace discrimination law in South Africa and, in particular, how the Labour Relations Act and the Employment Equity Act operate.
- [10] The applicant in his “statement of legal facts” alleged the following, which demonstrates total confusion and repetition of the causes of action that may be brought in terms of the LRA and the EEA (my emphasis):

‘The respondent unfairly discriminated against him after he was dismissed at a disciplinary hearing which the applicant beliefs (sic) was an automatically unfair discrimination practice in that the Respondent took action to:

- o Discriminated against the Applicant to let him work in an unsafe working environment being fully aware of the Applicant's medical conditions and disability in terms of section 6 of the EEA [that is, unfair discrimination] and section 187(1)(f) of the LRA [that is an automatically unfair dismissal where the reason for dismissal is discrimination];
- o Discriminated against the applicant in terms of section 187(1)(f) of the LRA directly or indirectly on an arbitrary ground by dismissing the Applicant after he made a protected disclosure in terms of section 186(2)(d) [that is, a type of unfair labour practice] and section 187(1)(h) of the LRA [that is dismissal for making a protected disclosure];
- o The dismissal is an automatically unfair discrimination and was unfair in terms of section 187 of the LRA and section 6 of the EEA.'

[11] The applicant also alleged the following under "unfair discrimination":

- '- ...an occupational detriment as defined in the PDA and also discrimination directly or indirectly on arbitrary grounds in terms of section 6(1) of the EEA
- ...dismissal in breach of section 3 of the PDA constituting an automatically unfair dismissal in terms of section 187(1)(h) and 187(1)(f), read in conjunction with section 4(2)(a) of the PDA and section 51(1) of the EEA

[12] Finally, the applicant claimed relief, summarised as follows:

- '1. 24 months' salary for dismissal on the grounds of automatically unfair discrimination;
2. An order declaring that the applicant made a protected disclosure;

3. An order declaring that Respondent in harassing, intimidating, disciplining and ultimately dismissing the applicant constitutes an occupational detriment as defined in the PDA;
4. An order declaring the dismissal automatically unfair in terms of section 187(1)(h);
5. 24 months' compensation;
6. Costs of suit.'

[13] In an attempt to make some sense of these claims, and based on the statement of claim and the evidence presented, the applicant alleges:

- 13.1 unfair discrimination on basis of illness and the protected disclosure he made [s 6 of the EEA];
- 13.2 an automatically unfair dismissal on arbitrary grounds, due to a protected disclosure (s 187(1)(h) and on the basis of discrimination [s 187(1)(f)]; and
- 13.3 an occupational detriment in terms of the PDA, which is a type of unfair labour practice dispute [s 186(2)(d)];
- 13.4 Discrimination for exercising a right conferred by the EEA [s51(1) of the EEA].

[14] These are related but different claims even if they arise from the same set of facts. Unfair discrimination is claimed in terms of section 6, read with section 10, of the Employment Equity Act whereas an automatically unfair dismissal is claimed in terms of section 187 of the Labour Relations Act. An unfair labour practice relating to a protected disclosure is claimed under section 182(2)(d) of the LRA and it excludes a dismissal.

[15] Section 10(1) of the EEA states:

'In this section, the word 'dispute' excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VII of the Labour Relations Act.'

- [16] This makes it clear that discrimination disputes must be distinguished from dismissal disputes and the two types of disputes have different dispute resolution procedures.
- [17] Automatically unfair dismissal disputes must be conciliated by the CCMA or a bargaining council with jurisdiction and may then be adjudicated by the Labour Court, unless the applicant earns less than the threshold and elects CCMA arbitration. In this case, no automatically unfair dismissal dispute was referred to the CCMA or the MEIBC, nor conciliated by the CCMA or the MEIBC. The only dismissal dispute that was referred and conciliated was the dispute about unfair dismissal for misconduct which was correctly referred to the bargaining council.
- [18] In dismissal disputes, the law is clear that there must be an attempt to conciliate the dispute before it can be adjudicated by the Labour Court. This is evident from the structure of the dispute resolution system contained in the LRA and it has recently been confirmed in the Constitutional Court decision of *NUMSA v Intervale (Pty) Ltd*.¹
- [19] In this case, no dispute concerning automatically unfair dismissal, whether in terms of s 187(1)(f) or s 187(1)(h), was referred or conciliated. Given that there was no attempt to conciliate the dispute about an automatically unfair dismissal, there is no basis for the Labour Court to adjudicate that matter. I should mention in passing that one of the advantages of conciliation (even if it fails to resolve the dispute) is that it assists parties to identify the real dispute between them and going through this process would in all likelihood have filtered out the multiple types of automatically unfair dismissal disputes that have been alleged.

¹ [2015] 3 BLLR 205 (CC).

- [20] I turn now to the occupational detriment alleged in terms of section 186(2). This is a type of unfair labour practice dispute and it specifically excludes dismissal following protected disclosure in order to avoid duplication because there is specific provision for such a dispute as a form of automatically unfair dismissal. A dispute in terms of section 186(2)(d) also has a specified dispute resolution procedure: Such dispute must be conciliated by the CCMA or a bargaining council and it must be referred to the Labour Court within 90 days. In this case, again, there is no referral relating to such a dispute and obviously no attempt to conciliate it. Again, the applicant's claims in relation to an occupational detriment must be dismissed on this basis.
- [21] I turn now to the claim of discrimination for exercising a right conferred by the Employment Equity Act [s 51(1) of the EEA]. Besides that no factual basis was set out for this claim, or any indication of which right is in question (unless it is a duplication of the right not to be dismissed for making a protected disclosure), this dispute must, in terms of section 52(1) and (2), be referred to the CCMA for conciliation and an attempt to conciliate must have been made. Such a dispute cannot be brought directly to the Labour Court for adjudication because there is specific provision for conciliation.
- [22] Finally, I turn to the unfair discrimination dispute which was indeed referred to conciliation and an attempt to conciliate it was made. This, accordingly, is the only dispute which is adjudicable.
- [23] In his referral to the CCMA, Boeyens described his dispute as follows:
- ‘I informed my employer about my working conditions. Result in to my illness obtain in work. They did not want to listen and suddenly started with unlawful disciplinary actions against me thus discriminating against me.’
- [23] At the time of the referral, the applicant was alleging that he was discriminated against because of his illness and this resulted in unlawful disciplinary action against him.

[24] The first question to determine is whether the applicant was treated differently because of his illness. Section 6(1) of the EEA provides that:

‘(1) No person may unfairly discriminate, directly or indirectly, against an employee, *in any employment policy or practice*, on one or more grounds, including race, gender, sex... disability... or any other arbitrary ground (my emphasis).’

[25] Disability is a listed ground, whereas illness is not. However, illness may be regarded as analogous as the consequences of serious illness are very similar for the afflicted individual to those of disability.

[26] Section 11(2) of the EEA provides:

(1) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that -

(a) the conduct complained of is not rational;

(b) the conduct complained of amounts to discrimination; and

(c) the discrimination is unfair.

[26] Boeyens' evidence was that when John Kennedy wanted him to move to operations that were close to x-rays, he objected and the manager supported him. The outcome was that he was not required to move. Kennedy may have been unhappy with the outcome but there is no question that management took into consideration Boeyens's medical condition and acted fairly towards him by not requiring him to move.

[19] The employer's conduct did not amount to unfair discrimination and this would be so even if the employer bore the onus as per section 11(1) of the EEA. The employer clearly accommodated Boeyens's medical condition. There is, accordingly, no merit in the claim of unfair discrimination on the basis of illness.

[26] In any event, Boeyens's evidence did not support his contention that he was discriminated against on the basis of his medical condition. His case was that it was because of the protected disclosure that he was discriminated against.

[27] Making a protected disclosure is clearly not a listed ground, nor can it be regarded as an arbitrary ground of discrimination. First, a protected disclosure is an act committed by a person which then results in certain consequences whereas a ground of discrimination refers to a characteristic or attribute which is associated with belonging to a particular group. In *Harksen v Lane NO*,² the Constitutional Court held:

'What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize and oppress persons who have had, or *who have been associated with these attributes or characteristics* (my emphasis).'

And in *President of the RSA and Another v Hugo*,³ Judge Goldstone said:

'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'

[28] Second, the LRA makes specific provision for disputes about occupational detriments and dismissals following a protected disclosure and that is the appropriate route to follow. As stated above, that dispute was not framed as such, nor referred to conciliation, nor conciliated and this court cannot adjudicate it.

[23] Boeyens's remedy lay in claiming an ordinary unfair dismissal which is where he started this process and he was in the correct forum which had jurisdiction to arbitrate – that is, the bargaining council. Had he not walked out of the con-arb

² 1997 11 BCLR 1489 (CC) at para 47.

³ [1997] 6 BCLR 708 (CC) at para 41.

process, whether in temper or on a whim, his situation may have been very different.

Order

[25] I make the following order:

1. The applicant's claim of unfair discrimination on basis of illness and the protected disclosure he made is dismissed.
2. The applicant's claim of an automatically unfair dismissal on arbitrary grounds, due to a protected disclosure (s 187(1)(h) and on the basis of discrimination [s 187(1)(f)] is dismissed.
3. The applicant's claim of an occupational detriment in terms of the PDA is dismissed.
4. The applicant's claim of discrimination for exercising a right conferred by the EEA [s 51(1) of the EEA] is dismissed.
5. There is no order for costs.

Everett, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: M.E Coetzee

Instructed by: Manong Badenhorst Inc.

For the Respondent: Unopposed