



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 502/16

In the matter between:

ASSOCIATION OF MINE WORKERS

CONSTRUCTION UNION

THE MEMBERS AS PER ANNEXURE "A"

First Applicant

Second to Further

Applicants

and

NGULULU BULK CARRIERS (PTY) LTD

Respondent

Heard: 26 August 2016

Delivered: 30 March 2017

JUDGMENT

MAHOSI AJ

- [1] The applicants have delivered a statement of case in respect of an alleged unfair dismissal dispute in which it is contended, *inter alia*, that the dismissal of the second to further applicants ("the individual applicants") by the

respondent was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act¹ ("LRA"); and in doing so, unfairly discriminated against the individual applicants on the basis of their trade union membership. In its statement of case, the applicants summarised the legal issues as follows:

- '6.6.1 whether the individual applicants' dismissal was automatically unfair in terms of section 187(1) of the LRA; alternatively
- 6.6.2 whether the individual applicants' dismissal for participation in the alleged unprotected strike action was substantively fair; alternatively
- 6.6.3 whether the individual applicants were unfairly dismissed in terms of section 186(1)(d) of the LRA; and
- 6.6.4 whether the individual applicants' dismissal was procedurally fair; and
- 6.6.5 if it is found that the individual applicants were guilty of the misconduct for which they were dismissed, whether dismissal was an appropriate sanction; and
- 6.6.6 whether the Company consistently applied discipline.'

[2] In its reply to the statement of case, the respondent has raised the following preliminary grounds:

'No referral in terms of section 187(1)(f)

1. The first applicant referred a dispute under case number NELRFBC 39260 to the Bargaining Council for the Road Freight and Logistics Industry ("Bargaining Council") relating to a dismissal on account of unprotected action. A certificate of non-resolution was issued on the 9th of March 2016.
2. The respondent thereafter referred an unfair dispute to the CCMA in terms of section 186(1)(d). A certificate of non-resolution has been issued on the 4th of May 2016 under case number NELRFBC 40165;
3. The present referral to Court relates to the Applicants' claim that the dismissal is automatically unfair in terms of section 187(f)(1) on

¹ Act 66 of 1995.

account of the union membership. However, no referral was made in terms of section 187(f)(1);

Forum Shopping

4. The applicant is forum shopping and it will be contended that the applicants' referral be dismissed;

Principle of *Lis Pendens*

5. The respondent also contends that the principle of *lis pendens* is of application.
6. The applicant has referred the dispute in terms of section 186(1)(d) to the CCMA under case number NEFLRBC 40165. The ruling and certificate of outcome issued is the subject of review proceedings under case number JR 919/16;

Non-compliance with Rule 6(1)(b) and (d)

7. The Applicants have not provided full details of the applicants' positions, remuneration and commencement date. The allegations are vague and unsubstantiated.'

[3] The applicants allegedly embarked on an unprotected action on a number of occasions during January and February 2016. On the 2nd of February 2016, the respondent issued notices of dismissal to some 476 employees. On the same day, Association of Mine Workers Construction Union (AMCU) on behalf of the individual applicants referred an unfair dismissal dispute to the bargaining council in terms of section 191(5)(b)(iii) of the LRA ("the first unfair dismissal dispute") under case number NELRFBC 39360 alleging that the individual applicants were unfairly dismissed for participation in an unprotected strike. The dispute was conciliated on the 9th of March 2016 and a certificate of non-resolution was issued.

[4] On the 5th of April 2016, a number of individual applicants referred an unfair dismissal dispute in terms of section 186(1)(d) of the LRA to the bargaining council ("the second and third dismissal dispute") under case number NELRFBC 40165. A certificate of no resolution was issued by the bargaining

council on the 4th of May 2016. As aforesaid, the respondent submitted that the ruling and certificate of outcome issued in this matter is the subject of review proceedings under case number JR 919/16.

- [5] On the 7th of June 2016, the applicants filed a statement of claim in terms of which it is alleged, *inter alia*, that the applicants' dismissal was automatically unfair in terms of section 187(1)(f) of the LRA in that the respondent allegedly dismissed AMCU members, and in so doing, unfairly discriminated against the individual applicants on the basis of their specific trade union membership. In the alternative, the applicants submitted that the dismissal of the individual applicants was substantively unfair in that they did not participate in an unprotected strike action and/or that they were unfairly dismissed in terms of section 186(1)(d).
- [6] On the issue of the non-referral of the dispute in terms of section 187(1)(f), the applicants submitted that it is common cause that the dispute was referred to the Bargaining Council and that they omitted to indicate that the unfair dismissal dispute included an automatically unfair dispute. The applicants further submitted that the respondent "adopts an unduly technical and formalistic approach, which is out of step with relevant jurisdiction". They relied on the judgment of *CUSA v Tao Ying Metal Industries* to argue that the referral forms at the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Bargaining Council are not pleadings and that they are not determinative of the true nature of the dispute.
- [7] Section 187(1)(a) renders automatically unfair dismissals of employees for participating in a protected strike. Section 187(1)(f) provides that a dismissal is automatically unfair if an employer, in dismissing the employee, acts contrary to section 5 or, if the reason for dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.
- [8] Section 191(5)(b)(iii) of the LRA provides that:

'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is:

- (i) automatically unfair;
- (ii) based on the employer's operational requirements;
- (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
- (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

[9] Therefore, if disputes relating to dismissal for participating in a protected action are automatically unfair, then the disputes referred in terms of section 191(5)(b)(iii) are disputes relating to dismissals that are automatically unfair. It follows that the dispute that was referred to the bargaining council in terms of section 191(5)(b)(iii) under case number NELRFBC 39360 alleging that the individual applicants were unfairly dismissed for participating in an unprotected strike falls within the ambit of section 187(1)(a). Thus, the respondent's argument that there has been no dispute referred in terms of an automatically unfair dismissal is inaccurate.

[10] The question is whether the unfair discrimination dispute referred to this Court in terms of section 187(1)(f) was referred to the bargaining council or the CCMA for conciliation. It is apparent from the above that there were two disputes that were referred to the bargaining council for conciliation, that is the dispute referred in terms of section 191(5)(b)(iii) ("the first unfair dismissal dispute") under case number NELRFBC 39360 alleging that the individual applicants were unfairly dismissed for participating in an unprotected strike and the dispute referred in terms of section 186(1)(d) of the LRA to the bargaining council ("the second and third dismissal dispute") under case number NELRFBC 40165 review proceedings of which are pending under

case number JR 919/16. It follows that the applicants have not referred an unfair discrimination dispute to the bargaining council or the CCMA for conciliation.

[11] Section 191 of the LRA provides that:

- ‘(1)(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.
- (b) A referral in terms of paragraph (a) must be made within -
- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
 - (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[12] The LRA requires the council or the commission to attempt to resolve the dispute through conciliation.² The Labour Court may, in terms of section 157(4) of the LRA, refuse to determine any dispute if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. The dispute filed by the applicants to this Court in terms of section 187(1)(f) by a way of a statement of claim is a different dispute that had to be conciliated before it could be adjudicated. The applicants never referred the unfair discrimination dispute for conciliation. There was, therefore, no attempt to resolve the unfair discrimination dispute through conciliation before it was

² Section 191(4) of the LRA provides that “the council or the commission must attempt to resolve the dispute through conciliation.”

referred to this Court. As such, it is my view that this Court lacks jurisdiction to adjudicate the unfair discrimination dispute prior to it being conciliated by the bargaining council or the CCMA.

- [13] The other issue raised was a special plea of *lis pendens* in that the alternative relief sought by the applicants in paragraph 6.6.3 of its statement of claim is a dispute that was referred in terms of section 186(1)(d) to the bargaining council under case number NEFLRBC 40165. To this end, the respondent contends that the ruling and certificate of outcome issued in this matter is the subject of review proceedings under case number JR 919/16. It is trite that the requirements for the granting of a plea of *lis pendens* are pending litigation between the same parties or their privies based on the same course of action and in respect of the same subject matter. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*³, the court appropriately summarised the principles relating to a plea of *lis pendens* as follows:

'[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.

[3] The plea bears an affinity to the plea of *res judicata*, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from *Voet* 44.2.7:

'*Exception of lis pendens also requires same persons, thing and cause.* The exception that a suit is already pending is quite akin to the exception of *res judicata*, in as much as, when a suit is pending before another judge, this

³ 2013 (6) SA 499 (SCA).

exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.' [Footnotes omitted]

[14] In *Shongwe and Others v The City of Johannesburg Metropolitan Municipality*,⁴ this Court dealt with the principle of *lis pendens* and stated as follows:

[26] In *Dumisani and Another v Mintroad Saw Mills (Pty) Ltd*, the Labour Appeal Court held that it was against public policy that litigants should be able to consistently demand the same relief and on the same grounds from the same adversary. Furthermore, the primary purpose of the LRA is the effective and speedy resolution of disputes, and in line with that purpose, this court and other tribunals are duty bound to a measure of both finality and certainty in dealing with disputes between parties.

[27] In the light of the above, it is therefore untenable for the applicants to approach this Court with essentially the same claim under a different guise and effectively seek the same relief that was determined by the CCMA.' [Footnotes omitted]

[15] In this case, the applicants did not dispute that the parties in this matter were the same as those that were before the bargaining council in respect of disputes under case number NELRFBC 40165 and further that the review proceedings are pending in this Court under case number JR 919/16. When the applicants filed the statement of claim in which they required this Court to determine whether the individual applicants were unfairly dismissed in terms of section 186(1)(d) of the LRA, it essentially brought the same claim under a different guise and they are effectively seeking the same relief that was determined by the bargaining council. I agree with the respondent's view that this amounts to forum shopping and it is indefensible. To the extent that the

⁴ Unreported judgment JR 483/14 (25 February 2016).

review proceedings are pending in this Court, it follows that the matter is *lis pendens*.

[16] On the issue of non-compliance with Rule 6(1)(b) and (d) of the Rules of this Court, the respondent contends that the applicants have not provided full details of the applicants' positions, remuneration, commencement date and further that the allegations are vague and unsubstantiated. The applicants correctly submitted that none of these aspects are required to be set out in terms of Rule 6(1)(b) and (d) of the Labour Court Rules.⁵ There is, therefore, no basis for the respondent's contention in this regard.

[17] I have considered the issue of costs and I see no reason, in law and fairness, why costs should not follow the results.

Order

[18] In the premises, I make the following order:

- (i) The preliminary points raised by the respondent, and in particular, the pleas of non-referral in terms of section 187(1)(f) and *lis alibi pendens* are upheld.
- (ii) The applicants' main claim as per their statement of case is dismissed with costs.

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⁵ Rule 6(1)(b) and (d) of the Labour Court Rules⁵ requires that the Statement of claim must -

- (b) have a substantive part containing the following information:
 - (i) The names, description and addresses of the parties;
 - (ii) a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;
 - (iii) a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and
 - (iv) the relief sought;
- (c) be signed by the party to the proceedings;
- (d) express all dates, sums and numbers contained in the document in figures;
- (e) be accompanied by a schedule listing the documents that are material and relevant to the claim; and
- (f) be delivered.'

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:

Adv. Riaz Itzkin

Instructed by Larry Dave Attorneys

FOR THE THIRD RESPONDENT:

Adv L. Pillay

Instructed by Yusuf Nagdee Attorneys

LABOUR COURT