



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 512/13

In the matter between:

ISAAC MAINGANYA

Applicant

and

IMPROCHEM (PTY) LTD

First Respondent

HENKEL SA (PTY) LTD

Second Respondent

Heard: 12 August 2016

Delivered: 01 August 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] In this matter, both the first respondent (Improchem) and the second respondent (Henkel) raised an exception to the applicant's (Mainganya) amended statement of case. Mainganya's claim has a protracted history which is summarised below.

[2] Mainganya was employed by Improchem in May 2012 in terms of a fixed term/temporary employment contract as an operator. He was placed at Henkel's site, who was a client. Mainganya's fixed term contract was

renewed in January 2013 for a further one-year period. On 30 January 2013 however, Henkel served a notice to terminate its contract with Improchem. In return, Improchem issued a notice of termination of the fixed term contract with Mainganya by giving one month's notice.

- [3] Mainganya referred a dispute against Improchem to the Commission for Conciliation, Mediation and Arbitration (CCMA) in February 2013 alleging unfair suspension which he alleged arose on 7 February 2013. On 12 March 2013, the CCMA issued a ruling consolidating the initial suspension dispute with a further dispute pertaining to an alleged unfair dismissal relating to harassment and discrimination, which was referred by Mainganya on 19 February 2013. On 28 March 2013, the CCMA issued a certificate of outcome, indicating that the dispute pertaining to the alleged unfair discrimination remained unresolved.
- [4] Mainganya had also referred another alleged unfair dismissal dispute (section 189 of the Labour Relations Act¹ (LRA) dispute) to the National Bargaining Council for the Chemical Industry, which dispute came for conciliation on 4 April 2013. The dispute could not be resolved and Mainganya had referred it for arbitration. Following arbitration proceedings, that dispute was dismissed on 4 June 2013. Mainganya has since filed an application to review and set aside that arbitration award. That application was still pending before this Court.
- [5] Following the issuing of the certificate of outcome by the CCMA on 28 March 2013, Mainganya filed a statement of claim on 7 June 2013 in terms of which he had alleged unfair discrimination under section 6 (3) of the Employment Equity Act² (EEA); and an automatically unfair dismissal dispute under section 187 (1) (h) of the LRA. He had claimed compensation and damages from Improchem.

¹ Act 66 of 1995.

² Act 55 of 1998.

- [6] On 14 October 2013, Improchem raised an exception to Mainganya's statement of claim. That exception was upheld by Cele J on 4 December 2013. Mainganya was further ordered to amend his statement of claim within 40 days from the date of the court's order.
- [7] On 23 January 2014, Mainganya commenced joinder proceedings against Manie Botha (Botha) and Henkel. Botha is or was Henkel's Operations Manager. The application was granted by Prinsloo AJ (As she then was) on 14 November 2014. Mainganya was further ordered to serve his statement of case at the joined parties.
- [8] Despite having sought the joinder, Mainganya on 3 September 2015, filed a notice of motion, seeking the separation of his case against Botha and Henkel from that against Improchem, on the basis that the two had not opposed his claim. It is not clear as to whether that application was pursued.
- [9] On 21 September 2015, Mainganya filed what appears to be an amended statement of claim. Improchem had filed and served its statement of defence on 28 November 2014. The matter somehow got to be enrolled on the unopposed roll on 9 June 2015 but was removed as both Improchem and Henkel had filed statements of defence.
- [10] On 27 November 2014, Mainganya filed a further notice of amendment. This was followed by yet another statement of claim on 16 November 2015, and it is not clear as to whether this is yet another amendment. On 18 November 2015, Improchem filed its statement of defence and notice of exception. Henkel also filed its exception in terms of Uniform Rule 23³. The exception is based on the ground that Mainganya had not laid the basis for a cause of action.

³ 23 Exceptions and Applications to Strike Out

(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the

The grounds of exception and evaluation:

- [11] I did not understand Mainganya's case to be that he was not employed by Improchem and was assigned to its client, Henkel (Pty) Ltd.'s site. He had further alleged that he was assaulted by Botha of Henkel, who had also verbally and racially abused him. In the light of these incidents he alleged unfair discrimination and automatically unfair dismissal, and seeks damages in the amount of R1.5 million and 24 months' compensation. Thus, his claim is grounded on the provisions of section 6 (3) and 60 of the EEA, and section 187 (1) (h) of the LRA.
- [12] An exception refers to a legal objection intended to address a defect inherent in the other party's pleadings. Where it is alleged that the pleadings lack averments, which are necessary to sustain an action or defence, the litigant is entitled to take an exception to have the action or defence dismissed even before the merits of the matter are considered. I have had regard to the grounds for exception as raised by both Improchem and Henkel, and I agree that they are all sustainable.
- [13] In finding that the exceptions should be upheld, it is taken into account and appreciated that Mainganya has always represented himself and had personally filed his pleadings, and particularly his statement of case by utilising the pro-forma form issued by the office of the Registrar of this Court. Notwithstanding these problems, a party brought to court is entitled to know what the basis of the litigant's claim is, in order to put up a proper defence.

cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[Subrule (1) amended by GN R2164 of 1987, by GN R2642 of 1987 and by GN R1262 of 1991.]

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted. (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated. (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.

- [14] First, I did not understand it to be Mainganya's case that his employment was not with Improchem. In these circumstances, and to the extent that he had alleged that the unfair discrimination and harassment emanated from the conduct of Henkel or Botha, these were clearly not his employers, and it is therefore correct as stated by the respondents that the provisions of the EEA are only applicable as between employers and employees or applicants for employment. The implications therefore are that it would be difficult for Mainganya to convince the Court that it has jurisdiction to determine his alleged unfair discrimination claim.
- [15] A second consideration is that in his amended statement of claim, Mainganya's did not disclose a cause of action against Henkel, Botha or Improchem as contemplated in the EEA. It is trite that a complainant alleging unfair discrimination within the meaning of s 6(1) of the EEA, must establish that the differential treatment complained of, amounts to discrimination that is unfair⁴. Thus, it is required of the complainant to not only allege the discrimination but also to link the differentiation to a listed ground. Sadly, Mainganya's amended statement of claim failed to establish how the discrimination came about, and if so how it was unfair. As already stated, on Mainganya's own version, any form of discrimination or harassment complained of appears to relate to the conduct of Botha or Henkel. As to how this conduct could be imputed to his employer, Improchem for the purposes of the application of section 6 of the EEA, or how a compensation amount of 24 months can be made is not clear from the amended statement of claim.
- [16] Regarding the claim pertaining to an alleged automatically unfair dismissal, and to the extent that Mainganya alleged that there was a breach of the Protected Disclosure Act, it is again not apparent from the amended statement of claim as to the basis of this allegation. As I understand his case, the claim emanated from the fact that he had allegedly complained about the conduct of Botha and was subsequently suspended from duty and forced to go on 'special leave' and thus

⁴ *Numsa and Others v Gabriel (Pty) Ltd* (2002) 23 ILJ 2088 at paras 18 – 20

victimised. The Court has jurisdiction to determine claims emanating from the provisions of section 187 (1) (h) of the LRA. As to whether there is a case for Improchem to answer to in regard to this claim however is still not clear from the amended statement of claim.

- [17] Other than the flaws pointed out in the statement of claim, Mainganya further seeks damages in the amount of R1.5 million. This amount is however not quantified and it is not known on what basis that amount should be due to him. It appears that these figures were merely thumb-sucked.
- [18] On the whole therefore, Mainganya's particulars of claim are clearly excepiable. His contentions in respect of the alleged discrimination, alleged automatically unfair dismissal or even the damages and compensation amount claimed are clearly vague, embarrassing and lacking in particularity.
- [19] Mainganya was afforded an opportunity after the previous exceptions were held to amend his statement of claim, in order for the first and second respondents to understand what his claim was all about and to appropriately respond in that regard. The amended statement of claim clearly failed, despite a second opportunity being afforded to him, to make averments necessary to disclose or sustain a cause of action as against the respondents.
- [20] It was argued on behalf of both Henkel and Improchem that in the light of the statement of case being excepiable, Mainganya's claim should be dismissed, or that in the alternative, the pleadings excepted to should be set aside. I have already indicated that Mainganya is representing himself in these proceedings and had also formulated, filed and served his own papers. To the extent that this Court has jurisdiction to determine his alleged automatically unfair dismissal, considerations of equity dictate under the circumstances that he should be afforded a further opportunity to amend his statement of case.

[21] I have further had regard to the requirements of law and fairness and I am of the view that notwithstanding my order as below, a cost order is not warranted.

Order:

[22] Accordingly, the following order is made;

1. The exceptions raised by the First and Second Respondents are upheld.
2. The Applicant has not established a cause of action in respect of his alleged unfair discrimination claim.
3. The Applicant's alleged unfair discrimination claim is accordingly dismissed.
4. The Applicant is granted a final opportunity to amend his statement of case in respect of the alleged automatically unfair dismissal claim, which must be filed and served within 30 days from the date of this order.
5. In compliance with (4) above, the Applicant is directed to approach the office of SASLAW for *pro bono* assistance.
6. There is no order as to costs.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person

For the First Respondent: Mr. Bongani Masuku of Mervyn Taback INC

For the Second Respondent: Adv. W. Hutchinson

Instructed by: Fluxmans INC

LABOUR COURT