THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1829/18

In the matter between:

GLORIA TSAKANI MOKOENA **Applicant**

and

CREDIT GUARANTEE INSURANCE CORPORATION AFRICA LIMITED **First Respondent**

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED **Second Respondent**

ADVOCATE RAIMUND SYNDERS **Third Respondent**

Heard: **01 March 2019**

Delivered: **07 March 2019**

Summary: A preliminary point of lack of jurisdiction – when the point was timeously raised and the party against whom it is raised ignores the point, there would be no reason why a cost order should not be made. Held (1): The special pleas are upheld. (2): The applicant to pay the costs of the respondents.

JUDGMENT

MOSHOANA, J

[1] It has become crystal clear that some practitioners believe that since section 151(1) of the Labour Relations Act[1] (LRA) refers to this Court as one of law and equity, this Court is incapable of making cost orders. Such a belief is wrong and inconsistent with section 162 of the LRA. Before me is an interlocutory application dealing with the special pleas raised by the respondents against the applicant's claim as set out in the statement of case.

[2] For the purposes of this judgment, it is unnecessary to traverse all the facts pertaining to the dispute between the parties. The applicant's statement of case filed in terms of Rule 6 comprised of a solid 27 pages. In it the applicant raises allegations of unfair discrimination, grievances lodged, the so-called Act Now principles, Constitutional issues, Disciplinary hearing issues, analysis of the evidence and the Commission for Conciliation, Mediation and Arbitration (CCMA) arbitration process. In one word, the statement of case is unintelligible and a mixed bag.

[3] It was not surprising for the respondent to raise almost six *points in limine*. As if that wasn't enough, the applicant's attorney filed a 21 paged heads of argument in respect of this interlocutory application.

Background

[1] 66 of 1995, as amended.

[4] Pertinent to this case is that the applicant was employed by Credit Guarantee Insurance Corporation of Africa Limited (CGICA) on 19 October 1994. Pursuant to a disciplinary enquiry, she was found guilty and dismissed on 19 December 2014. Aggrieved by her dismissal, she referred a dispute alleging unfair dismissal to the CCMA. At the scheduled arbitration, the parties settled the dispute and all other claims of any nature that may arise between the parties. The settlement agreement was concluded on 2 June 2015.

[5] The terms of the settlement may be summarized thus: (a) The employer (CGICA) was to pay to the applicant an amount of R 1 018 274.96, which was an equivalent of eight months' salary. (b) The employer was to pay an amount of R 509 137.48, which was an equivalent of four months' salary, as a contribution towards her legal fees. (c) The parties also agreed about future conduct with regard to specific matters.

[6] The employer complied with the terms related to the financial settlement. Almost three years later, on 23 May 2018, the applicant launched a statement of case seeking reliefs of unfair discrimination and post-retirement benefits. On or about 18 October 2018, the respondents filed a statement of response and raised the special pleas I mentioned above. As required by the Practice Manual, the special pleas were enrolled on the opposed motion roll.

[7] Before I deal with the special pleas, it is befitting for me to deliver this comment. It is absolutely unclear to me as to what prompted this litigation after almost three years of the resolution of the dispute. The applicant was paid almost R1 700 000.00. That amounted to maximum compensation. This aspect would reign supreme in my mind when I decide the issue of costs. I now turn to the special pleas.

The special pleas

[8] As pointed out earlier, the respondents raised about 6 special pleas. The bulk of the pleas attack the jurisdiction of this Court. The first plea relates to the lack of jurisdiction following a settlement agreement, which settled all disputes of any nature. The applicant's representative, attorney Makhanya, submitted that not all disputes were resolved. The outstanding issue was one that was recorded in annexure A of the settlement agreement. Clause 3 of annexure A read thus: "*The applicant will contact the respondent in the event she wishes to discuss possible pension fund contributions from the compensation referred to in this agreement*."

[9] Properly construed, this clause simply means that if for any reason the applicant harboured the desire to have pension fund contributions deducted from the amount of compensation settled on, she could contact the employer to discuss that. I fail to understand the basis upon which it could be said that the dispute was not settled. Also, the ball would have been in the applicant's court to initiate the discussions contemplated in this clause. The applicant, whom it is apparent was under legal advice at the time of settlement, hence the half a million legal fees contribution, understood that the settlement agreement resolved all the disputes. It must be for this reason that she went lull for almost three years. This special plea is upheld. There is no longer a dispute justiciable in this court. This court lacks jurisdiction.

[10] Ordinarily, the judgment should end here. However, for the sake of posterity, I venture to deal with the remaining pleas. The second plea relates to a failure to adhere to the timeframes set out in the LRA and the

Employment Equity Act[2] (EEA). The applicant alleges unfair discrimination within the contemplation of section 187(1)(f) of the LRA and one contemplated in section 6 of the EEA[3]. Section 10 of the EEA, requires referral to the CCMA within six months of the alleged unfair conduct. Section 191 of the LRA first requires a referral to the CCMA within 30 days of the dispute and thereafter, 90 days of non-resolution. It is common cause that there was no referral to the CCMA in any of the disputes alleged. The Labour Court therefore, lacks jurisdiction. For these reasons, the second special plea is also upheld.

[11] The third plea relates to making no case in terms of section 77(3) of the Basic Conditions of Employment Act[4] (BCEA). In setting out the nature of the claim in the statement of case, the applicant alleges a civil claim as contemplated in section 77(3). This section grants this Court concurrent jurisdiction to deal with matters arising from the contract of employment. I enquired from Mr. Makhanya as to which contract is alleged to have been breached. He mentioned the settlement agreement, in particular clause 3 quoted above. Nowhere in the statement of case does the applicant allege any facts of breach of that clause. Other than referring to the section, no case at all was made that relates to the section. Ordinarily, if a party does not comply with a term of a settlement agreement, parties approach this court in terms of section 158(1)(c) of the LRA. Therefore, this court's jurisdiction contemplated in section 77(3) of the BCEA has not been raised. This plea must be upheld too.

[12] The fourth plea relates to non-compliance with the Rules of this Court in particular Rule 6(1)(b)(ii) and (iii). The statement of case contains a whole host of facts that are not relevant to a claim. The legal issues raised therein are not concise and are not actually relevant. This plea

[2] 55 of 1998.

[3] This is a duplication of claims.

[4] 75 of 1997.

goes to the statement of case, and it ought to have been raised before responding to the claim. However, I agree that the statement is not compliant. Striking it and or directing the applicant to amend it would have been an appropriate order to make. Since the horse has bolted such an order would be academic. Accordingly, this plea is not upheld at this stage of the proceedings.

[13] The fifth plea relates to a material misjoinder. It is common cause that the applicant had an employment relationship with the first respondent only. Therefore, the other respondents had no material interest to the outcome of these proceedings. In that regard, there is a material misjoinder and the point is equally upheld.

[14] The sixth and the last plea is actually an exception. Like the fourth plea, this plea is belated. Again, I agree that the averments do not sustain a cause of action. However, in the light of its belatedness, this point is not upheld.

[15] Regard had to the above, it follows that this claim must be dismissed for want of jurisdiction.

The issue of costs

[16] During argument, I invited Makhanya to address me as to why cost *de boni propiis* should not be considered. In response, he pleaded for leniency and submitted that this Court is a court of equity. This case was poorly pleaded from the onset. Mr Makhanya is the attorney that drew up the 27 paged document. It is clear to me that he did not have regard to the Rules of this Court when he drafted the document. He did not care to

consider the provisions of the LRA, the EEA and the BCEA. Other than employing good language, the statement of case lacks the necessary averments. To my mind, Mr Makhanya was not diligent. I can only attribute this to lack of experience in labour matters. It is for that reason that I do not find any measure of recklessness on his part. Otherwise, I was minded to mulct him with costs *de boni propiis*.

[17] However, I am of a firm view that the applicant and her attorney would not have proceeded with this litigation had they brought their mental faculties to bear. This litigation was frivolous and vexatious from the get go. The applicant waited for almost three years after having being paid a huge sum in settlement before springing this vexatious litigation on the respondents. This litigation was sprung onto the respondents like manna from heaven. There was a lull for almost three years. One wonders what prompted this action.

[18] During the proceedings, I adjourned the matter after debating the legal issues with Mr Makhanya. I had hoped that the applicant would realise the difficulties in her case and abandon it. This did not help. To my mind, the applicant was unreasonable in proceeding with this application despite stern warnings from the bench with regard to the deficiency in her case. For the above stated reason, I believe that fairness dictates that a cost order must be made. The applicant and his attorney were warned of the deficiency in her case as early as October 2018, when the respondents responded to her case. She ought to have abandoned her case then. The warning clearly fell on deaf ears. It is elementary by now that this court cannot exercise its jurisdiction when a, which ought to be referred has not been referred to conciliation. I expected the applicant's attorney to at least know that. If he did not know, at least by October 2018, he was told. I was actually minded to make a cost order at a punitive scale, however, I observed that the applicant was not necessarily reckless. She was a victim of poor legal advice.

[19] For all the above reasons, the special pleas dealt with above must be upheld and I accordingly make the following order:

Order

1. The applicant's claim in terms of section 187(1)(f) of the LRA and section 6 of the EEA is dismissed for want of jurisdiction.

2. The applicant's claim in terms of section 77(3) of the BCEA is also dismissed for want of jurisdiction.

3. The applicant to pay the respondents' costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney F M Makhanya, of Floyd Makhanya Inc, Lynwood, Pretoria.

For the Respondents: Attorney F Malan of ENSafrica, Sandton.