

SOUTH AFRICA / JUDGMENT

Anglogold Ashanti Limited v Moloko (J 1199/20) [2022] ZALCJHB 64 (9 March 2022)

[2022] ZALCJHB 64

COURT

Labour Court Johannesburg

BEFORE

Moshwana

CASE / FILE NUMBER

J 1199/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case no: J

1199/20

In the

matter between:

ANGLOGOLD
ASHANTI
LIMITED
Applicant
and
SIMEON
MIGHTY
MOLOKO
Respondent

Heard:

02 March 2022

Delivered:

09 March 2022 (This judgment was handed
down electronically by emailing a copy to the parties. The 15th
March 2022 is deemed to be the date of delivery of this judgment).

Summary:

Opposed application launched in terms of section 2 (1) (b) of the Vexatious Proceedings Act, 1956. Where an applicant fails to meet the requirements of the section an order contemplated in the section shall not be granted. Institution of five proceedings cannot constitute recurrent proceedings. The requirements of persistence and litigating without reasonable cause not met. Failure to meet any of the requirements leads to the refusal of the order. Held: (1) The application is refused. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] A supposition may be made that a litigant who holds a view that he or she is possessed with a meritorious case should take a further view that the other party to the litigation is bereft of merits and is litigating not to vindicate his or her rights but to frustrate him or her. Regard being had to that natural supposition, Courts of law exist to resolve concrete disputes on application of the law. It does not axiomatically follow that a litigant who feels triumphant prior to a Court of law determining the merits of the dispute is faced with vexatious litigation simply on the basis of that triumphant feeling. The Vexatious Proceedings Act[1] (VPA) is a piece of legislation aimed at imposition of restrictions on the institution of vexatious legal proceedings. By definition,

vexatious means causing or tending to cause annoyance, frustration, or worry. In law it simply means denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the defendant. Another default supposition to be made is that litigants in the Labour Court litigate with one frame of mind and that is to win. When Simeon Mighty Moloko (Moloko) instituted the five legal proceedings, he wanted pyrrhic subjugation. It may appear to be a farfetched enterprising win, but his objective is to win.

[2] Before me is an opposed application which rarely graces the Labour Court, in terms of which Anglogold Ashanti Limited (Ashanti) seeks an order to declare Moloko a vexatious litigant and impose restrictions on how he should litigate in this Court. After hearing submissions from both parties, this Court reserved its judgment.

Material

facts

- [3] On 28 September 2018 Moloko and Ashanti amicably ended their employer and employee relationship. Moloko was handsomely remunerated following the fraternal termination of the employment relationship. Months later, Moloko made some discovery which, in his ebullient view, afforded him some legal rights emanating from the Labour Relations Act (LRA)[2] and other employment legislations.
- [4] Following that treasurable discovery, Moloko referred disputes to the dispute resolution body, the Commission for Conciliation, Mediation and Arbitration (CCMA) for resolution. The applicant alleges that no less than 10 referrals were made by Moloko. I pause to mention that these referrals shall not be considered for the purposes of this application. It is so that Moloko's failure in some of the referrals, ignited the legal proceedings involved in this application.
- [5] Material to this application is that, on 10 March 2020, Moloko launched a review application in terms of section 145 of the LRA, seeking to review and set aside an arbitration award that had dismissed his claim for unfair dismissal. Moloko litigated this review up to a point of petitioning the Labour Appeal Court (LAC). At the time of this judgment, the LAC had dismissed the petition. Available to Moloko is the right to seek leave to appeal from the Constitutional Court. At the time of this judgment, it was unclear whether Moloko wished to exercise his right in that regard. A success of this application may see him exercising that right in a restricted and muzzled manner.
- [6] On 23 October 2020, Moloko launched another review application seeking to review and set aside a jurisdictional ruling made by a CCMA commissioner. The review application was heard by this Court together with this application. A separate written judgment was handed down dismissing the review application.
- [7] On 29 October 2020, Moloko instituted action proceedings and laid a claim of unfair discrimination. This action is still pending the decision of this Court. As at the time of this judgment, the parties were at a pre-trial stage.
- [8] On 11 March 2021, Moloko instituted another action proceedings and laid a claim of unfair discrimination. Similarly, this action is still pending the decision of this Court. At the time of this judgment, the parties were also at a pre-trial stage.
- [9] On 5 August 2021, Moloko launched a section 77 (3) of the Basic Conditions of Employment Act (BCEA)[3] referral in this Court. In this action, he alleges a breach of his employment contract. This action is still pending the decision of this Court.

Evaluation

- [10] Other than outlining the five legal proceedings instituted by Moloko, Ashanti in its founding papers raises issues that are not relevant to the present application. The legislation invoked by Ashanti concerns itself with legal proceedings. Referrals to the CCMA and complaints to

chapter nine institutions do not constitute legal proceedings and thus completely irrelevant in this application. The Supreme Court of Appeal (SCA) in *MEC for the Department of Co-operative Governance and Traditional Affairs v Maphanga*[4] authoritatively concluded that referrals to dispute resolution bodies does not amount to legal proceedings within the contemplation of the VPA. The ten referrals complained of in this application are thus irrelevant. Mr Norval sought to persuade this Court to consider the referrals a legal proceedings because they are related to the legal proceedings launched in this Court. This Court remain unpersuaded. It has long been decided that the CCMA and the bargaining council perform administrative functions. Legal proceedings means action taken in a Court to settle a dispute. True, referrals at the CCMA or bargaining council do constitute proceedings in general terms. They are contemplated[5] in section 15 (1) of the Prescription Act.[6] However, that does not morph them into legal proceedings. The fact that a referral for conciliation is a jurisdictional pre-condition

for adjudication in the Labour Court does not in itself afford the referrals a legal proceedings character.

[11] The LRA, the Employment Equity Act (EEA)[7] and the BCEA are social justice legislations. All of them stem deep from the provisions of the Bill of Rights. Section 185 of the LRA gives every employee the right not to be unfairly dismissed. Section 6 of the EEA prohibits unfair discrimination. Section 77 (3) of the BCEA accords this Court concurrent jurisdiction to determine any matter arising from an employment contract. A breach of contract claim breeds two remedies. Firstly, one for specific performance. Secondly, one for damages.

[12] There can be no doubt that the legislation invoked by Ashanti predates the Constitution of the Republic of South Africa, 1996 (the

Constitution). To be exact it was promulgated some 66 years ago. It was aimed at augmenting the inherent jurisdiction of the erstwhile

Supreme Courts of South Africa. The question whether the legislation is constitutional or not is long resolved[8]. Section 39 (2) of the Constitution impels every Court when interpreting any legislation and when developing the common law to

promote the spirit, purport and objects of the Bill of Rights. Section 7 (1) of the Constitution informs us that the Bill of Rights

is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

[13] Section 23 (1) of the Constitution guarantees everyone the right to fair labour practices. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a Court. Therefore, the departure point is that Moloko has a right to approach this Court to resolve his disputes by application of law. The SCA in *Maphanga* aptly stated the following:

“[20] ...Although constitutionally valid, the legislation [VPA] must nonetheless be accorded a narrow construction as it interferes with a protected right and restricts the right to courts, to avoid undue limitation of the right.”[9]

[14] The constitutional validity of the legislation was only tested against the right in section 34 of the Constitution. In the employment

sphere, added to the right to access the employment Courts exists the right to a fair labour practice. An undue limitation of this right should also not occur. Section 5 (1) of the LRA provides that no person may discriminate against an employee for exercising any right conferred by the LRA. This protection is replicated in section 51 (1) of the EEA. Regard being had to these protections, if section 2 (1)

(b) of the VPA is not interpreted within the prism of the Bill of Rights and restrictively, Moloko and other employees will remain vulnerable and without protection contemplated in sections 5 of the LRA and 51 of the EEA because indirectly he or other employees shall be discriminated because of the exercised rights in terms of the LRA and the EEA. Referring a dispute for adjudication in the Labour Court is a special and sui generis institution of legal proceedings. Unlike any other ordinary legal proceedings, its commencement symbiotically amounts to an exercise of a right in terms of the LRA. Once instituted an armory of protection descends in favour of that employee. Litigation in the Labour Court must be viewed as an advancement of economic development, social justice, and labour peace. Where such litigation is lightly curtailed by a stroke of a pen, social justice, labour peace and economic development shall be unduly stifled.

[15] Inasmuch as the Constitutional Court has found in Beinash that the purpose of the VPA is to restrict the access to Courts contrary to section 34 of the Constitution, and such limitation is reasonable and justifiable, within the meaning of section 36 of the Constitution, it remains questionable, in my view, whether access to specialized Courts like the Labour Court was kept in mind when the restriction was found to be reasonable and justifiable. This owing to the fact that accessing the Labour Court is not just a simple access but an exercise of a right enshrined in section 23 (1) of the Constitution. In view of the above, I take a view that a stringent approach must be adopted by the Labour Court when seeking to limit the access to it in championing the provisions of the VPA. This approach is prominent when an awarding of costs in this Court is considered. The intention is not to scare litigants from approaching the Labour Court by awarding costs[10]. More often than not litigants approach this Court unassisted. Like any matter involving lay litigants, they are bound to find themselves in a trial and error zone, which may be mistaken as an abuse of process and give birth to applications of this nature. It is important to note that section 151 (1) of the LRA considers the Labour Court as a Court of equity as well. Equity considerations

mitigates strongly against a light and unrestricted granting of applications of this nature.

- [16] The SCA in Maphanga approved that persistent contextually means recurring or constantly repeated or continuous institution of legal proceedings. In this instance, Moloko instituted five legal proceedings in this Court. In that regard, the first requirement of institution of legal proceedings have been met by Ashanti. It is doubted that the second and third requirements has been met; namely; persistence and without reasonable cause.
- [17] With regard to persistence, same is demonstrated where an individual (a) keeps on litigating when, on any rational basis and objective assessment, the time has come to stop; and (b) displays an obsessive resort to litigation and a disregard of the need to have reasonable grounds for making an application to the Court[11].

Has the time come for Moloko to stop?

- [18] When a party pursues appeal rights, it cannot be said, in my view, that he or she recurrently institutes legal proceedings. Appeal process does not give rise to multiplicity of processes. It is one process taken through various legally permissible stages. The time to stop comes when a party exhausts all his or her appeal rights. This view received endorsement in Maphanga, when Maya P stated the following:

“[23] ...To my mind, the fact that the claim was subsequently dismissed by the High Court does not change the situation as one does not know the basis on which it was dismissed and whether or not Maphanga will take it further on appeal...”

- [19] It may be said that there is recurrence when an individual reinstitutes the same legal proceedings even if the time to stop –exhaustion of appeal rights – had come. With regard to the reviews in this Court, although Moloko had lost both, the time to stop has not come as yet. Admirably, Ashanti may be feeling triumphant throughout, but that is not the core consideration. The core consideration is: has the time to stop come or not?
- [20] With regard to the unfair discrimination claims, the time to stop is still a proverbial mile away. Ashanti is entertaining the claims, it has put up a defence which still requires an evaluation by a Court of law. The fact that the two discrimination cases are predicated on different grounds cannot suggest persistence. The learned Maya P stated the following in Maphanga:

“[22] Neither can it be found that Maphanga approached the courts without any reasonable grounds. As I have pointed out, none of the proceedings in the Labour Courts (and the Industrial Court) were resolved on their merits. An unequivocal finding that the claims had no reasonable basis cannot be made on the available record...”

[21] Similarly, the time to stop with regard to the breach of contract claim is still far. It is by now settled law that the same set of facts may give rise to a number of causes of action. For instances a dismissed employee can claim unfair dismissal under the LRA; a breach of contract under the common law; or a delictual claim under common law[12]. The fact that an employee chooses to engage all of the available causes of action at once or one after the other shall not mean

recurrence of legal proceedings. To conclude, the time to stop has not come for Moloko.

Does Moloko display an obsessive resort and disregard to reasonable grounds for applying to Court?

[22] On the facts of this case the answer is an emphatic NO. Section 145 of the LRA accords Moloko an automatic right of review. In terms of section 33 of the Constitution, Moloko acquired as a right, the right to an administrative action that is lawful, reasonable and procedurally fair. The fact that Moloko took a view, even if such a view, was shown to be wrong by Courts a quo, that the arbitration awards and rulings are not constitutionally compliant, does not demonstrate obsession. Obsession occurs when

there is a continual pre-occupation on the part of someone. All Moloko is after is the vindication of his rights to fair labour

practice as constitutionally guaranteed.

Is Moloko litigating without reasonable cause?

[23] This second requirement does not equate reasonable prospects of success. Any litigant enters litigation with one frame of mind; namely vindication of rights and the need to win. Moloko is no exception in this regard. Seeking to review an arbitration award that is not constitutionally compliant is acting with a reasonable cause and not an abuse of the Court process. Recognizing the right in section 33 of the Constitution, the legislature accorded aggrieved parties an automatic right of review against arbitration awards and rulings. In order to enter the space, there is no gate keeping process – application for leave to review – where prospects of success may be assessed. Accordingly, Moloko had a reasonable cause. The SCA in Maphanga remarked thus:

“[25] Legal proceedings were vexatious and an abuse of the process of court if they were obviously unsustainable as a certainty and not merely on a preponderance of probability[13]”

[24] It cannot be said that when Moloko instituted the reviews and the actions, there was certainty that these proceedings were obviously unsustainable. Ultimate failure on the first lap – Court a quo – is not the certainty required at the time of the institution of the legal proceedings. With regard to the EEA claims, section 11 of the EEA only requires Moloko to allege unfair discrimination, thereafter Ashanti must prove on the balance of probabilities that such discrimination did not take place or is rational, fair or otherwise justified. With such legislative requirements, it is hard to conclude that Moloko is bereft of reasonable

cause.

Is the fact that Moloko concluded a mutual separation agreement (MSA) of any relevance?

[25] Mr Norval passionately and persistently argued that because Moloko concluded the MSA and was paid handsomely, same is a factor that must weigh heavily with this Court in considering the present application. With considerable regret I do not agree with this passionate argument. Section 2 (1)

(b) of the VPA has nothing to do with pre-litigation arrangements between the parties. It may well be so that contractually a party is gagged by operation of waiver principles from instituting any claim against another contractant. However, such a gag will not arise statutorily but contractually. In bolstering his argument, Mr Norval placed reliance on the decision of *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd* and another^[14] where the Court said:

“[24] The public and indeed our courts have powerful interest in enforcing agreements of this sort. The applicant must be held bound. When the parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled the dispute with his employer.”

[26] In order to comprehend the above statement contextually, it is important to briefly reflect on the facts of this case. The employee in question, like Moloko in the pending section 77 (3) of the BCEA application, sought to have the separation agreement set aside by this Court. The basis of seeking a rescission of the separation agreement was that it contained an unenforceable clause which imposed a limitation on the employee to approach Courts or forums, which limitation was, as argued by the employee concerned, at odds with section 34 of the Constitution.

[27] Accordingly, this decision may assist Ashanti to fend off the section 77 (3) of the BCEA action, perhaps as well as the EEA actions. However, the decision certainly does not apply to applications in terms of section 2 (1) (b) of the VPA. What led to the failure of that employee was not that his action was vexatious and an abuse of the Court but that the dispute is settled – upholding the *pacta servanda* principle. This may be said by this Court when the time comes for the Court to determine the pending claims.

Concluding remarks

[28] Inasmuch as I endorse the views expressed by my late brother Steenkamp J at paragraph 34 of the judgment of *Andile Maseko v CCMA and others*[15], I venture to say that in interpreting the provisions of the VPA, regard must be had to the rights protected in the LRA and the EEA. A restrictive interpretation is required to not only trammel the justifiable limitations to section 34 but also to trammel the trampling of other corresponding rights in the Bill of Rights.

[29] In the final analysis, this Court is constrained to dismiss the present application because Ashanti failed to demonstrate persistence and litigating without reasonable cause on the part of Moloko. As demonstrated above, Moloko has not been persistent and without

reasonable cause. The Court in *Beinash* described a vexatious litigant as one who manipulates the functioning of the Courts so as to achieve a purpose other than that for which the Courts are designed. Moloko does not fit this description. His quest is to win, the question whether he has a winnable case, it is a matter for a Court of law, and not to manipulate this Court. The recent decision of the High Court by the learned Acting Justice Nziweni in *PWC Inc v Pienaar and others*[16] is distinguishable. The respondents in that matter persisted with litigation even after the Constitutional Court dismissed their

matter. The respondents sought to rescind orders granted against them by the Constitutional Court. Such is not the case in *casu*. I tend to agree with Moloko that the purpose of this application is to muzzle him whilst his matters are still pending the decision of this Court. It is not far-fetched to conclude that an astute employer may bring applications of this nature in order to silent an employee in pursuit of his or her fair labour practice rights. Clearly that should be discouraged at all costs.

[30] In the results, the following order is made:

Order

1. The application is refused.
2. There is no order as to costs.

Nasious Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Norval of ENSAfrica, Sandton.

For Respondent: In Person.

[1] No. 3 of 1956

[2] Act 66 of 1995 as amended.

[3] Act 75 of 1997.

[4]

[2020] 1 All SA 52 (SCA).

[5][5] See FAWU obo Gaushubelwe v Pieman's Pantry (Pty) Ltd

[2018] 6 BLLR 531 (CC)

[6] Act 68 of 1969

[7] Act 55 of 1998

[8] Beinash and another v Ernst and Young and others 1999 (2) SA 116 (CC).

[9] Id fn 4 at para 20.

[10] The Constitutional Court in one of its many judgments of awarding of costs in the Labour Court went to the lengths of suggesting that awarding of costs in the Labour Court threatens labour peace. Equally, unrestricted granting of VPA orders also threatens labour peace.

[11] See: Society of Lloyd's v Noel [2015] 1 WLR 4407.

[12] See Archer v The Public School-Pinelands High School and others (case CA12/18) delivered on 25 November 2019 and section 195 of the LRA.

[13] Id fn 4 at para 25.

[14] 2016 (12) BCLR 1515 (CC).

[15] (Case JR 1282/10) dated 23 August 2016.

[16] (Case 1845/2021) dated 21 September 2021.

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