

SOUTH AFRICA / JUDGMENT

Ivasen v Zeda Car Leasing (Pty) Ltd t/a Avis (JS430/21) [2021] ZALCJHB 370 (22 October 2021) [2021] ZALCJHB 370

COURT

Labour Court Johannesburg

BEFORE

Moshwana

CASE / FILE NUMBER

JS430/21

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****no: JS****430/21****In****the matter between:****KEITH****LEIGH****IVASEN Applicant****and****ZEDA****CAR LEASING (PTY) LTD T/A****AVIS Respondent****Heard: 21****October 2021 (on paper)****Delivered: 22****October 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 22 October 2021 is deemed to be****the date of delivery of this judgment).****Summary: Due****to Covid19 lockdown, this application was determined by having regard to the papers and the parties agreed to this****arrangement. Exception –****vague and embarrassing and no cause of action disclosed. Lack of**

jurisdiction point is taken by way of in limine and does not equate absence of a cause of action. In terms of section 185 of the Labour Relations Act (LRA)[1], every employee has the right not to be unfairly dismissed. That is a cause of action within the contemplation of the LRA. Section 191 (5) (b) of the LRA, an employee may refer the dispute to the Labour Court if the employee has alleged that the reason for dismissal is based on the employer's operational requirements. In order to succeed in a claim for unfair dismissal, an employee must allege and prove that he or she has been dismissed. In order to obtain audience (jurisdiction) in the Labour Court an employee must allege reasons spelled out in section 191 (5) (b) (i) – (iv). Held: (1) The exception is dismissed.

JUDGMENT

MOSHOANA, J

Introduction

- [1] Before me serves an exception raised by the respondent. The respondent contends that it is unable to respond to the averments as the applicant failed to disclose a cause of action as well as that he presented a claim that is vague and embarrassing. The applicant opposes the exception.

Background

facts

- [2] From the impugned pleading (statement of claim) it is apparent that the applicant was an employee of the respondent. It is also apparent that the applicant was retrenched – dismissed for operational requirements. It is further apparent that he referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). It is also apparent that the applicant contends that his retrenchment was procedurally and substantively unfair.
- [3] Based on the above factual allegations, on or about 11 May 2021, the applicant referred a dispute to this Court for adjudication. On 8 June 2021, the respondent raised an exception to the statement of claim. On 21 October 2021, the exception was enrolled before me for

determination.

Evaluation

- [4] The rules of the Labour Court do not make provision for exceptions. In dealing with exceptions, this Court seeks refuge from the Uniform Rules of the High Court, rule 23 (1) thereof. In terms of this rule, a pleading is excipiable if a pleading is (a) vague and embarrassing or (b) it lacks averments, which are necessary to sustain an action.
- [5] With regard to vagueness and embarrassment, the respondent contends that the applicant failed to plead facts on which he claims that his retrenchment is procedurally and substantively unfair. It is trite law that the aim of exception procedure is to avoid the leading of unnecessary evidence.[2] Therefore, it is not a procedure to be invoked for the sake of nitpicking, particularly in the Labour Court, where strictly speaking

there are no pleadings.

- [6] Referrals in this Court are solely governed by rule 6 of the Labour Court Rules. Rule 6 (1) (ii) requires a statement of claim to contain a clear and concise statement of the material facts, in chronological order. The statement of the material facts must be sufficiently particular, simply for enabling the opposing party to reply to the statement of claim. The general principle applicable to pleadings is that parties do not plead conclusions of law. Properly considered, a party in the Labour Court must complain when a statement of claim or response does not meet the requirements spelled out in rule 6. In my view, an exception procedure is incongruent to such complaints[3].
- [7] That said, this Court must ask itself the question whether the exception goes to the heart of the claim and if so whether it is vague and embarrassing to the extent that the respondent does not know the claim it has to meet.[4] In terms of section 185 (a) of the LRA, every employee has the right not to be unfairly dismissed. Section 186 (1) (a) defines dismissal to mean that an employer has terminated employment. The applicant, employed the term retrenched. The literal meaning of this word 'retrenchment' in the South African context is the action of making an employee redundant. Generally, the words like retrenchment, retrenched, are used interchangeably with dismissal for reasons of operational requirements.
- [8] Thus, it cannot be said that in reading the pleading, the respondent does not know that the applicant alleges that he was dismissed for operational requirements reasons. The applicant alleges that his dismissal is procedurally and substantively unfair. The respondent

requires the applicant to plead facts to demonstrate that there is lack of process and substance in the dismissal. Section 188

- (1) (a) (ii) provides that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the employer's operational requirements. In addition, section 192 of the LRA places the onus on dismissal disputes squarely on the shoulders of an

employer, in this instance the respondent. It is sufficient, for an employee to make a factual allegation that a dismissal is procedurally and substantively unfair. That allegation is sufficient to alert the respondent to the law as set out in section 188 (1) (a) (ii) of the LRA. What facts should a party plead to clarify what substantive or procedural unfairness mean?

- [9] Particularly in an instance where that party from whom clarity is sought bears no onus to prove that there was a fair reason and or following of a fair procedure as required by section 188 (2) of the LRA. In my view,

there are no facts that this party can lay bare except conjecture. An employee can only speculate the fair reason or the following of a fair procedure. The respondent knows very well why it dismissed an employee and should be in a position to respond to an allegation of unfairness with regard to substance and process.

- [10] For all the above reasons, the statement of claim is not vague and embarrassing. The respondent, without a shadow of doubt knows that it is meeting a claim of retrenchment, better known as a dismissal based on operational requirements. The respondent knows that the substance and the process fairness of that dismissal is being impugned. That being the case what shall disable the respondent to reply to the statement of case. In my view, there is nothing whatsoever.

- [11] I now turn to the allegation that the statement of claim does not disclose an actionable claim. In order to disclose a cause of action, the statement of claim must set out every fact (material) which would be necessary for the applicant to prove in support to his or her right to judgment of the Court. It is not required to set out every piece of evidence, which is necessary to prove each fact, but only every fact that is necessary to be proved. As indicated earlier, the cause of action of the applicant is embedded in section 185 (a) of the LRA. All that the applicant must prove is that he was dismissed. By alleging that he was retrenched, the applicant has set out a material fact in order to support a judgment by the Court. The applicant has alleged that his dismissal is without a fair reason and was effected without following a fair process.

- [12] Thus, it cannot be said that the statement of claim does not disclose an actionable claim. The fact that the applicant pleaded a fact that he was charged with fraud and given a warning is immaterial to his claim of retrenchment. At the very best, the respondent may attempt, in limine, a jurisdictional point if in addition to the retrenchment claim the applicant is alleging another reason for his dismissal. That has nothing to do with an exception but has a lot to do with jurisdiction as spelled out in section 191

- (5) of the LRA. When faced with an exception, a Court must consider the pleading as a whole and not in piecemeal. The applicant seeks the following relief: 'An order that the retrenchment was procedurally and substantively unfair'. From this relief it is beyond conspicuous that this is a claim for alleged unfair dismissal based on operational requirements.

[13] For all the above reasons, the exception falls to be dismissed. The issue of costs must stand over for determination at the end of the adjudication of this dispute.

[14] In the result the following order is made:

Order

1. The exception is dismissed.

Graham Nasious Moshwana

Judge of the Labour Court of South Africa

Appearances:

On paper.

[1] Act 66 of 1995 as amended.

[2] Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706.

[3] See Liquid Telecommunication (Pty) Ltd v Valerie Carmichael – Brown (JS987/17) dated 27 March 2018. My brother Van Niekerk J correctly in my view discouraged the indiscriminate importation of a rule 23 procedure that is often times astutely tucked under rule 11 of the Labour Court Rules.

[4] See Jowell v Bramwell-Jones and others 1998 (1) SA 836 (W).

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