

SOUTH AFRICA / JUDGMENT

Landman v Deutsche Bank AG Johannesburg Branch (JS395/19) [2023] ZALCJHB 44 (2 February 2023) [2023] ZALCJHB 44

COURT

Labour Court Johannesburg

BEFORE

Snider

CASE / FILE NUMBER

JS395/19

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Source record**THE****LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG****Not****Reportable****Case****No.: JS395/19****In****the matter between:****BRETT****ERIC LANDMAN****Applicant****and****DEUTSCHE****BANK AG****JOHANNESBURG****BRANCH****Respondent****Heard****: 28 June 2022****Delivered****: 02 February 2023 (This judgment was handed down electronically by
circulation to the parties'****legal representatives by email and****publication on the Labour Court's website. The date and time****for hand-down is deemed to****be 02 February 2023 at 10h00).**

Summary: Interlocutory application concerning a default judgment application, an application to strike out and an exception. Default judgment application dismissed as departure from rules by respondent minimal. Exception dismissed as claim for automatically unfair dismissal in terms of the Protected Disclosures Act and the Labour Relations act not incompatible with a claim for actual damages in terms of the Protected Disclosures Act.

JUDGMENT

SNIDER, AJ

[1] This matter deals with three interlocutory applications:

1.1. an application by the Applicant for default judgment;

1.2. an application by the Applicant to set aside, as an irregular step, the Respondents exception dated 18 December 2021 (which followed a notice by the Respondent to remove cause of compliant dated 3 November 2021); and

1.3. the Respondent's exception.

Background

[2] The Applicant was a senior employee of the Respondent and was dismissed in January

2019. On 21 February 2019 the Applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) challenging the fairness of his dismissal.

[3] The CCMA conciliated the dispute on 14 March 2019 and issued a certificate of outcome. On 20 May 2019 the Applicant referred his dispute to the Labour Court filing a statement of claim in which he alleged an automatically unfair dismissal based on alleged protected disclosures.

[4] On 3 June 2019 the Respondent filed a response to the Applicant's statement of case in which it denied any liability in relation to the claim made by the Applicant.

[5] More than a year later, on 16 September 2020, the Applicant delivered a notice of intention to amend his statement of case. The amendment was a substitution of the original statement of claim in its entirety.

[6] On 14 October 2021, this Court, per Nindi AJ,[1] pursuant to an opposed application by the Applicant to amend its statement off case, granted the Applicant leave to amend. The

Applicant's amended statement of case was filed on 19 October 2021.

- [7] The Respondent delivered a notice to remove cause of complaint in terms of rule 11 of the Rules for the Conduct of Proceedings in the Labour Court (the rules) on 3 November 2021 and an exception on 8 December 2021.
- [8] The Applicant brought an application for default judgment on 5 November 2021 and applied, on 20 January 2022, to set aside the exception dated 8 December 2021, in terms of rule 11 on the basis that the exception was an irregular step.
- [9] On 8 March 2022 this Court ordered that the three issues, being the default judgment application; the irregular step application and the exception be determined together.

Default

judgment

- [10] I will deal firstly with the application for default judgment.
- [11] The application for default judgment is based on an allegation, as set out in more detail below, that the Respondent did not, after compliance with the order of Nindi AJ by the Applicant, comply with its obligations timeously. The order of Nindi AJ was that:
 - 11.1. the Applicant is granted leave to amend his statement of claim in accordance with the notice of intention to amend dated 16 September 2020;
 - 11.2. the Applicant is to effect the aforesaid amendment within ten (10) days from the date of the order;
 - 11.3. each party to pay its own costs.
- [12] The Applicant duly, within the said 10-day period, and on 19 October 2021 served and filed the amended pages to the statement of claim.
- [13] The Applicant's complaint is that on 3 November 2021, and it does not appear to be disputed that this was the last day for the Respondent to deliver subsequent pleadings, at 16h53, the Respondent served on the Applicant's attorney, per email, a notice to remove cause of complaint and filed the said notice with the Registrar per email and fax at 17h03. The originals of the said documents were filed on 8 December 2021.
- [14] The exception was subsequently delivered on 8 December 2021.
- [15] The contention on behalf of the Applicant is since the notice to remove cause was out of time, the exception was similarly out of time and the Applicant was thus entitled to apply for summary judgment.
- [16] Reduced to its bare essentials, the complaint of the Applicant in regard to the late filing of the notice to remove cause of complaint is that it was filed with the Registrar, per email, which is permissible, approximately an hour and a half late and on the Applicant's attorney of notice approximately 10 minutes before that.

- [17] As set out above it appears common cause between the parties that the ten days expired on 3 November 2021.
- [18] It is beyond any dispute that the parties are deeply steeped in and committed to the litigation between them. There have already been extensive documents and correspondence exchanged and a previous interlocutory application in relation to the amendment of the Applicant's statement of case in this matter. There can be no question that it is a hard fight with little quarter being asked or given.
- [19] In these circumstances it is difficult to conceive of a short delay, such as the one referred to above, having any material impact on the litigation as a whole, nor is there any sense that the Respondent does not intend to continue with and fully participate in the litigation.
- [20] It would seem to me unduly formalistic, given the nature of proceedings in the Labour Court for, for a party to rely on a point like this where the delay was minimal and there appears to be no prejudice to the Applicant.
- [21] The reason for the delay has been expressly dealt with by Ms Shivani Moodley (Ms Moodley), an employee of the Respondent's legal representatives in an affidavit.
- [22] The affidavit of Ms Moodley[2] is replete with detail as to the reason for the delay and Ms Moodley cogently explains how it came about that the filing and service of the document was minimally late.
- [23] I am of the view that there is no basis on which the Applicant could genuinely have believed that the Respondent was abandoning its defence, or could conclude, in the circumstances, anything other than that the delay was by virtue of an innocent, or, at worst, excusable error on the Respondent or his legal representatives' part in delivering the pleading late. As set out above, there is simply no basis for a claim of any prejudice in regard to these events.

The Respondent itself was certainly in no way culpable.

- [24] The Applicant has adopted a highly technical and formalistic approach which, in the circumstances, is not appropriate. In this light I refer to the judgment of Moshoana J in this Court, *Abrahams v Murray and Roberts Power and Energy*[3]:

"[3] Given the primary aim of the Rules of Courts, it is inappropriate in my view, for litigants to attempt to gain advantage over each other in a litigation process by using the Rules, even where effectiveness and efficiency is not achieved. Labour disputes require speedy and effective resolution. Accordingly, practitioners should be reasonable in their approach when seeking to oppose minimal departure from time periods prescribed in the Rules. It is indeed so where a time period is prescribed in the Rule, litigants are bound to promptly comply with such time periods. However, if a litigant minimally misses the time period, where immense prejudice is not demonstrable, it remains an unreasonable opposition to heavily oppose a quest for indulgence by this Court."

- [25] The Learned Judge went on to state that:

“Practitioners and litigants should know that on application of the de minimis non curat lex – the law is not concerned with insignificant or minor matters, Courts are inclined to indulge where the delay is not excessive. Under those circumstances, opposition becomes reasonable, if immense prejudice is shown to exist. Otherwise, if prejudice is non-existent, opposition must be unreasonable”

- [26] Perhaps the Respondent can be criticised for not bringing a full condonation application. However, in my view the explanation given by Ms Moodley in her affidavit, given the minimal departure from the time periods provided in the rule, is sufficient explanation of the delay. I therefore intend to dismiss the application for default judgment. The Applicant has failed to raise any issue which can be construed as a substantial departure from the rules warranting a dismissal of the Respondent’s case. Regard must be had to the relative insignificance of the Respondent’s departure from the rules compared to the obvious commitment it has demonstrated in relation to this litigation generally.

Exception

- [27] The following issue to be dealt with is the exception.
- [28] The Applicant brought an application to set aside, as an irregular step, the Respondent’s exception dated 8 December 2021, which followed the Respondent’s notice to remove cause of complaint dated 3 November 2021.
- [29] To the extent that this application relies on the slight time delays and technical departures from the rules, as set out above, I do not believe that those are proper arguments in a matter such as this where it is quite clear that the parties fully intend to proceed with the matter and are deeply engaged in it.
- [30] The Applicant’s pleading of his claim makes it quite clear that he relies on the provisions of section 187(1)(h) of the Labour Relations Act (LRA)[4] and section 4(2)(a) of the Protected Disclosure Act (PDA)[5] and in light of those provisions brings a claim for an automatically unfair dismissal (paragraph 610.1 of the statement of case). As an alternative to that, to the extent that the dismissal is found not to be automatically unfair, a dispute is brought in terms of section 188 of the LRA in that it is alleged that there was no fair reason to dismiss the Applicant in terms of the LRA and no fair procedure was followed.
- [31] A further claim is brought in terms of section 4(1B)(b) of the PDA which reads :
- “If the Court or Tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on an account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including –*
- a) payment of compensation by the employer or client, as the case may be, to that employee or worker;
 - b) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker;[6] or

- c) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment.”

[32] It is essentially the case for the Respondent that the Applicant cannot make both of these claims simultaneously. When the application to amend was considered by Nindi AJ as set out above, she stated the following in her judgment[7]:

“[33] On a proper consideration of the section above, actual damages suffered as referred to in section 4(1B)(c)[8] is not capped at any amount and / or fixed period. The Respondent’s submission that the Applicant’s claim is

excipiable because the maximum damages that an employee is entitled to receive for wrongful dismissal is salary for the relevant notice period in respect of the termination of the employment contract, does not accord with the provisions of section 4 of the PDA. Section 4 directs this Court to make a just and equitable order for payment of actual damages suffered by the employee. Accordingly, I do not agree with the Respondent that the Applicant’s claim is capped at the remuneration that would be owing for the relevant notice period, and therefore excipiable, as it exceeds the notice period.

[34] In the circumstances of this particular case, I am of the view that the amendment should be allowed in order to enable the parties to fully ventilate the relevant issues at the trial of the matter.

[33] In essence the Respondent is arguing the same point in the exception.

[34] I can see no basis on which the Applicant should be precluded from making a claim for a so-called solatium in terms of section 187(1)(h) of the LRA on the one hand and, on the other hand, a claim in terms of section 4(1B)(b) of the PDA.

[35] This would not be entirely unlike a claim made in terms of the LRA for an unfair dismissal and a separate claim being made for contractual damages. The only real difference is that the PDA in the section referred to above refers to “actual damages”. These are clearly something different from the soliatum which would be applicable in the case of either an ordinary unfair dismissal claim, or an unfair dismissal claim that is automatically unfair.

[36] The essential question is, as set out by the Applicant in his heads of argument - whether a claim premised upon events which amount to an automatically unfair dismissal based on a contravention of the PDA, can found a claim for both actual damages as contemplated in terms of the provisions of section 4(1B)(b) of the PDA and a claim for compensation as contemplated in terms of the provisions of section 193(1)(c) and 194(4) of the LRA.

[37] The correct way of interpreting section 4(1B) is not to read it as if section 4(1B)(a) is the same compensation referred to in section 193 and 194 of the LRA. If this was the case, it would be specifically stated. Clearly section 4(1B)(a) refers to a different discretion to make an award for compensation relating to a protected disclosure which the Labour Court has in terms of the PDA and not in terms of the LRA. Thus the “or” after section 4(1B)(b) and the interpretation thereof is not relevant.

[38] In terms of section 195 of the LRA any amount claimed under section 4 of the PDA falls under the category of “any other amount” as described in section 195 of the LRA:

“Compensation is an addition to any other amount –

An order or award of compensation made in terms of this chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.”

[39] There is no bar for these two claims to continue in parallel.

[40] The two claims are quite different in character, the one being, as set out above, in the nature of a solatium in respect of injured feelings and humiliation that the employee may have suffered, whereas the other is for monetary, actual, damages which the employee may have suffered.

[41] In the circumstances my intention is to dismiss the application for default judgement and the exception. It is accordingly irrelevant as to whether I grant the Applicant’s application to set aside, as an irregular step, the Respondent’s exception.

[42] Since there are interlocutory issues and the ultimate outcome of the matter is unknown at this stage it is best, in my view, to reserve the costs of this application to the trial court.

[43] Accordingly, the following order is made:

Order

1. The Applicant’s application for default judgment is dismissed.
2. The Respondent’s exception is dismissed.
3. The Respondent is ordered to file its answer to the Applicant’s statement of case, if any, by no later than 15 days after the date on which this judgment is handed down.
4. The costs of these interlocutory applications are reserved to the trial Court.

Snider, A J

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv C Orr SC Instructed by: Burrows Attorneys. For the Respondent: Adv A Redding SC Instructed by: ENSafrica.

- [1] Nindi AJ's order was made on 14 October 2021
- [2] The affidavit of Ms Moodley appears at page 83 of the Respondent's exception and the Applicants application in terms of Rule 11 to set aside the exception.
- [2] The affidavit of Ms Moodley appears at page 83 of the Respondent's exception and the Applicants application in terms of Rule 11 to set aside the exception.
- [3] (JS409/20) [2021] ZALCJHB 382 (19 October 2021).
- [4] Act 66 of 1995 as amended.
- [5] Act 26 of 2000 as amended.
- [6] My emphasis.
- [7] At paragraph [33]
- [8] This is clearly an error, the "c" should be a "b".

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