

SOUTH AFRICA / JUDGMENT

Nelson v Panda Interiors CC (JS275/16) [2016] ZALCJHB 518 (9 December 2016)

[2016] ZALCJHB 518

COURT

Labour Court Johannesburg

BEFORE

Lallie

CASE / FILE NUMBER

JS275/16

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JS 275/16

In the matter between

JOHN MCDONALD NELSON

Applicant

And

PANDA INTERIORS CC

Respondent

Heard: 29 July 2016

Delivered: 9 December 2016

Summary: For an exception to be upheld, the respondent must prove that the applicant has failed to plead every fact which is necessary to be proved in order to establish his or her cause of action.

Lallie J

Introduction

- [1] The applicant was employed by the respondent as an artisan on 20 October 2008. He turned 60 years of age on 14 May 2014. On 3 December 2014, he was informed on behalf of the respondent that he had to retire with effect from 3 March 2015 as he had reached the retirement age. His employment was consequently terminated on 6 March 2015. As the applicant's contract of employment does not provide for his retirement age, the applicant felt aggrieved by the respondent's decision. He referred an automatically unfair dismissal dispute to the CCMA on 18 March 2015. The dispute was based on section 187(1)(f) of the labour Relations Act 66 of 1995 ("the LRA"), as the applicant alleged that his dismissal resulted from his discrimination based on his age. The dispute was not resolved and a certificate of non-resolution was issued on 16 April 2015. On 8 April 2016 the applicant filed his statement of claim in which he pursued his automatically unfair dismissal dispute at the Labour Court. The statement of claim incorporates averments in which the applicant sought condonation for the late referral of his dispute to this court.
- [2] The respondent opposed the applicant's claim by filing a statement of response in which it raised an exception. The basis of the exception is that the applicant's claim is extremely late. The respondent alleged that the applicant failed to comply with Rule 12 of the Rules of the Labour Court as well as provisions of the LRA. The respondent further excepted to the applicant's claim on the grounds that the applicant failed to make out a proper case for a claim of unfair dismissal or automatically unfair dismissal and/or that his claim does not conform with Rule 6 (b)(ii), (iii), (d)(e) of the Rules of the Labour Court or Rule 18(10) of the uniform Rules of Court and sought the dismissal of the applicant's claim with punitive costs.
- [3] Exceptions are governed by Rule 23 of the uniform Rules which provides as follows:

'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 (4/5) 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 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."

- (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.'
- [4] It was argued on behalf of the applicant, correctly so, that an exception may be raised if the statement of case does not disclose a cause of action or is vague and embarrassing. All the ground that the respondent sought to rely on have no legal basis. A proper reading of the statement of claim does not support the respondent's conclusion that it does not make out a proper case. In *Mckenzi v Farmers' co-operative Meat Industries Ltd*[1] the court defined 'cause of action' in the following terms: '... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'
- [5] The applicant made all the necessary averments. He submitted that an employment relationship existed between the parties. He based his case on discrimination based on age and submitted that the respondent terminated his employment because he turned sixty years old when his contract of employment was silent on his retirement age. The respondent's submission that the statement of claim was filed extremely late is of no relevance to the exception. The applicant was alive to the delay and sought condonation. It is clear that the respondent is concerned about the form in which the applicant dealt with the issue of condonation. The concern does not form a legal basis for an exception.
- [6] The respondent submitted that the applicant has not complied with section 191(9) and/or 157 of the LRA. Section 191(9) which deals with the powers of the Director for the CCMA to refer disputes to the Labour Court. It is not relevant to facts which the applicant has to prove. Contrary to the respondent's view, the applicant did refer his dispute to the CCMA which issued a certificate of the non-resolution of the dispute. His claim is based on automatically unfair dismissal as envisaged in section 187 of the LRA and falls within the jurisdiction of the Labour Court. Rule 6 (b)(ii) and (iii) require the statement of claim to
 - '(ii) a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;
 - (iii) a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document.'

- [7] The applicant's statement of claim speaks for itself. It is in compliance with Rule 6 (b)(ii) and (iii) as it contain all the required facts. Other than making the bald statement that the statement of claim does not conform with Rule 6 (ii) and (iii), the respondent has not illustrated the non-compliance. The applicant's non-compliance with Rule 6 (b)(d) and (e) does not form the basis for the dismissal of the applicant's claim.
- [8] The respondent's submission that the application's claim should be dismissed because it does not comply with Rule 18(10) of the uniform Rules of Court has no legal basis. The Rule deals with pleadings when the plaintiff is suing for damages. The applicant has stated the relief he is seeking in unequivocal terms to which Rule 18(10) of the uniform Rules of Court is of no relevance.
- [9] The statement of claim is drafted in clear and concise terms. Any non-compliance with the Rules of court does not warrant the dismissal of his claim. The applicant should therefore not be out of pocket for opposing the exception/point in limine which was unreasonably raised by the respondent.
- [10] In the premises the following order is made:

10.1 The exception/point in limine is dismissed with costs.

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Swanepoel

Instructed by Minnie Attorneys

For the Respondent: Mr Goldberg

Instructed by Goldberg Attorneys

[1] 1922 AD 16 at 23

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