IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 622/07

In the matter between:

DAVIDSON MARGARET	1ST APPLICANT
SIKHAKHANE DUDUZILE	2ND APPLICANT
CHAUKE RISIMATE	3RD APPLICANT

AND

WINGPROP (PTY) LTD	RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an interlocutory application in terms of which the respondent, seeks to have the applicants claim dismissed for reasons related *inter alia* to the contention that the applicants' statement of claim does not contain a clear and concise statement of the material facts, in a chronological order to enable it to reply thereto as required in terms of rule 6 (1) (b) (ii) of the Rules of the Labour Court and that the statement of claim does not contain a concise statement of legal issues that arise from the material facts to enable the respondent to reply thereto as required by rule 6 (1) (b) (iii) of the Rules of the Labour Court.

[2] The applicants have applied for condonation for the late filing of their response to the respondent's application to have their claim dismissed. The application is 3 (three) days late and for that reason I am of the view that condonation should be granted.

[3] The applicants have also filed an application to have the respondent bared from filing its statement of response.

[4] The other matter that needs attention in this case is an issue that arose after judgment was reserved and relates to the status of the union representative who appeared on behalf of the applicants. This issue was raised by the Court *mero motu* the issue having come to its attention through an affidavit which the secretary general of the union had filed with the Registrar of this Court.

Right of appearance by Mr Sebola, the union official

[5] The status of Mr Sebola as a representative of the applicants was raised in a strange manner and happened after judgment was reserved. It happened in a strange manner in that it was raised by Mr Sebola's union, the Retail and Allied Workers Union (RAWU). The objection which was by the general secretary of the union, Mr Khoza was raised in a very strange manner in that it was apparently raised at the end of the motion Court roll and after Mr Sebola had left the Court. However, be that as it may the Court is enjoined to investigate whenever the issue of the status and qualification of a representative is raised.

[6] In essence the objection of Mr Khoza which is contained a in an affidavit he had submitted to the Registrar of this Court is that Mr Sebola did not have authority

to appear in Court. He complains that despite his letter dated the 27th March 2008 to the Registrar, Mr Sebola is still allowed to appear in Court. The letter indicates that Mr Sebola is no longer associated with RAWU.

[7] It was in the light of the above that this Court issued a directive calling on Mr Sebola to show cause why, if the above information was true and correct, his appearance in this matter and in the matter of *Novo Nordisk (Pty) Ltd v Thulani Manqele case number JR214/01,* should not be regarded as irregular. The directive was copied to the other parties involved in the matters.

[8] Mr Sebola responded to the directive only after filing a complaint about the directive. I do not intend dealing with the issues raised in the complaint except for the contention that suggest that this Court does not know what it is doing as the approach it adopted is one which the High Court would never have adopted. I deal with this contention later in this judgment. I need however to point out that in my view the allegations contained in the complaint are baseless, frivolous and vexatious and are intended to undermine the integrity of the presiding Judge and the Judge of the High Court.

[9] The essence of Mr Sebola's response is that his mandate to represent members of the union has never been terminated and that Mr Khoza is abusing his powers by alleging that he no longer has the authority to represent union members. In support of his contention that he still has the right to act as a representative of the union he attached a letter which was written by Mr Khoza regarding this issue to his response. The letter reads as follows:

"Dear Sir

This is to confirm that Mr Shadrack Sebula, is an official of the above trade union (referring to RAWU) in charge of our satellite office situated in Braamfontein.

For further information, please contact the writer hereto.

Regards

_____

M W Khoza (Mr)

General Secretary."

[10] The essence of Mr Khoza's reply is that Mr Sebola became involved with RAWU in 2005 and was assigned to the Braamfontein office of RAWU, with the instruction that he should report and refer all correspondence to the Pretoria office. Mr Sebola is accused of having failed to follow that instruction and continued to operate using fictitious letter heads of RAWU. The most telling of Mr Khoza's complaint is contained in paragraphs 3.5 and 3.6 of his replying affidavit which read as follows:

"3.5 It should be noted that not only once did I bumped (sic) and or met Mr. Sebola at the (sic) Labour Court where I requested him to refrain from appearing in his capacity as RAWU official representing people unknown to the union, I further requested him

to report to the union's offices in Pretoria to enable him to see correspondence thereto.

3.6 Despite the said request, Mr Sebola failed to report at the union's office, but continued to appear at the CCMA and the Labour Court without RAWU knowledge appearing on behalf of unknown people to RAWU alleging to be RAWU members."

[11] The issue of the right of appearance of a party to any proceedings before the Labour Court, is governed by the provisions of section 161 of the Labour Relations Act 66 of 1995. In the case of an employee, the representative could either be a legal practitioner, another employee, office-bearer or official of the employee's union. In the present instance Mr Sebola appeared on behalf of the applicants as a as a union official who ostensibly had the full mandate to do so from the union.

[12] As a general rule the Court has the power to call on any party appearing before it, at any stage of the proceedings, to satisfy it that that party complies with the requirements of section 161 of the Labour Relations Act. Failure to satisfy the requirements set out in section 161, would disqualify such a person from appearing before the Court. If the disqualification of the representative is discovered later those proceedings would be rendered irregular and the Court would be entitled to set them aside and remit them to start afresh.

[13] In *S v Shabangu & Another [2005] JOL 14401 (T),* the two accused were charged with housebreaking with intent to steal and theft. Accused number

1(one) conducted his own defence but accused number 2 (two) was represented by a person who had no right of appearance. When the Court discovered this fact the proceedings were at an advanced stage. A qualified representative was appointed. The matter was referred on special review to determine whether the proceedings conducted thus far were irregular. The full bench of the High Court unanimously held that the proceedings were irregular and were accordingly set aside and the matter was remitted to the magistrate to start afresh.

[14] In *S v Abraham [2003] JOL 11512 (T),* the Court held that the candidate attorney who had represented the accused was found not to have a valid appearance certificate. The Court was bound by a decision in which it was stated that the appearance of a person not authorised to appear is irregular, that such irregularity constitutes a miscarriage of justice and that for that reason alone a conviction should be set aside. It was also for that reason that the Court ordered that the matter be heard *de novo.*

[15] Whilst the above authorities were concerned with criminal proceedings the principle enunciated therein is equally applicable to labour matters. Thus in the present matter I would have to declare the proceedings irregular, set the matter aside and order a rehearing, if I was to find that Mr Sebola did not satisfy the requirements of section 161(c) of the Labour Relations Act.

[16] In the present instance it is apparent to me that there exist tension between Mr Sebola and Mr Khoza. It would also seem to me that Mr Khoza as the general secretary of the union has been grappling with dealing with the tension between

him and Mr Sebola to no avail. Whatever happened in Court on the day Mr Khoza raised the issue of the mandate to represent members of the union, seem to have provided him (Mr Khoza) with a *"short gun approach"* to dealing with his adversary, Mr Sebola.

[17] Mr Khoza has not produced evidence that show how the mandate of Mr Sebola was terminated by the union. In this regard there is no evidence indicating either that Mr Sebola was dismissed by the union or that there was some resolution of the union terminating his mandate to represent the union members in Court. It is not good enough for Mr Khoza to simply say that he met or bumped into Mr Sebola in the corridors of the Court and told him to see him at the union offices in Pretoria. There are other appropriate processes which he could have adopted to clarify the stand (if any) the union may have taken in relation to the mandate of the Mr Sebola. It is not the function of this Court to manage the internal affairs of unions through the back door. If Mr Khoza is unable to manage his subordinates he should rather approach the union structures in particular the Executive Committee, if one exist, for assistance and not the Court. The union would of course be entitled to approach the Court for assistance where a proper decision has been taken to terminate Mr Sebola's mandate and he persist in representing union members in that capacity.

[18] In the light of the above I find that Mr Sebola is qualified as a RAWU representative to appear in this matter on behalf of the applicants in terms of the provisions of section 161 (1) (c) of the Labour Relations Act. However, this Court reserves the right to call on Mr Sebola in future matters to produce proof

that may be more recent than the letter of 8th March 2005, confirming his mandate to appear for and on behalf of RAWU members. I will now proceed to deal the merits of the respondent's application to have the applicants' claim dismissed.

The applicant's claim

[19] In their statement of case the applicants, Ms Davidson and Ms Sikhakhane state that at the time of their dismissals they were employed by the respondent, Wingprop (Pty) Ltd, as receptionists at the Hillbrow Building. They also claim in the alternative that they were employed as security officers at the time of their dismissals.

[20] The applicants claim to have been dismissed by the respondent for reasons related to operational requirements on 31st March 2007. Their claim is based on the allegation that their dismissal was both substantively and procedurally unfair in that the respondent failed in dismissing them to comply with the requirement of section 189 of the Labour Relations Act 66 of 1995.

[21] The applicants pleaded in the alternative that they were not paid the same salary as the male security officers. And in relation to Ms Sikhakhane the applicants pleaded that her dismissal was in contravention of the provisions of section 187(1) (e) of the Labour Relations Act, in that at the time of her dismissal for operational requirements she was *"pregnant and long overdue for maternity leave."*

The respondent's application to dismiss the statement of case

[22] In essence the respondent's application to dismiss the applicants' claims is base on an exception founded on the contention that the applicants' statement of claim does not contain a clear and concise statement of the material facts, in chronological order to enable it to reply thereto as required in terms of rule 6 (1) (b) (ii) of the Rules of the Court. The second ground upon which the respondent relies on is that the statement of claim does not contain a concise statement of legal issues that arise from the material facts to enable it to reply thereto as required by rule 6 (1) (b) (iii) of the Rules of the Court.

[23] The other two grounds upon which the respondent relies on in seeking to have the applicant's claim dismissed is that the statement of claim is not signed by the applicants or in the alternative, the person who signed it claim has failed to comply with rule 21 of the Rules of the Court in that the person who signed the statement of claim has failed to notify the registrar of his intention to represent the applicants. And secondly that the applicants' statement of claim is not accompanied by a schedule listing the documents that are material and relevant to the claim.

The legal principles

[24] In terms of rule 6 of the Labour Court Rules, a statement of claim must contain a clear and concise statement of material facts, in a chronological order on which the applicant relies on. The rule further requires the statement to contain sufficient particulars to enable the respondent to respond thereto. The statement

of claim must also include the legal issues that arise from the material facts also for the purpose of enabling the respondent to reply to the allegations contained in the document.

[25] An exception is a legal objection intended to address the defect inherent in the other party's pleadings. It is thus trite that a litigant faced with pleadings that are vague and embarrassing or which lacks averments necessary to sustain an action or a defence is entitled to take an exception to have the action or defence dismissed even before the merits of the matter are considered in evidence.

[26] In *Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC)***,** the Court held that a statement of claim serves a dual purpose. The one purpose according to that decision is to bring a respondent before the Court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

[27] The general principles governing exception is summarized by *Erasmus in Superior Court Practice (at B1-154 to B1-154A)* as follows:

> *"(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning.*
>
> *(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the*

excipient can show is caused to him or her by the vagueness complained of.

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

(f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness."

[28] In *Badenhorst v Maluti-A-Phofung Municipality [2008] JOL 21078 (O),* the Court in adding to the above principles held that an exception must relate to the whole of the cause of action or claim and not to a particular paragraph in the

cause of action and that it must state in clear and concise terms the particulars upon which the exception is based. In other words it is not enough to simply state that the particulars of claim are vague and embarrassing.

[29] In *Harmse's case (supra)* Wagley J, as he then was, held that the rules of this Court do not require an elaborate exposition of all facts in their full and complex details. The Learned Judge further observed that the details and the texture of the factual dispute are to be dealt with at the trial. And more importantly he observed that:

> *"The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4) (b) the parties in the pre-trial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed."*

[30] A proper analysis of the Labour Court rules reveal that it was envisaged that there are instances where statements of cases may not be pleaded in absolute and precise terms to ensure that a cause action is disclosed without any shortcoming. This is congruent with the general test of determining whether or not to uphold the complaint of a party complaining of the defect in the statement of case. The test is whether the complaining party would be prejudiced if his or her exception is not upheld.

[31] In considering whether or not to uphold an exception the Court must give consideration to the possibility of the parties being able to address the defects in

the statement of case at the pre-trial conference. This consideration must weigh in favour of not readily upholding the exception regard being had to the underlying policy of the Labour Relations Act which is founded on the notion that disputes should be dealt with on their merits rather than on technicalities.

[32] In the present instance whilst the respondent has not yet filed the statement of opposition, there seem to be no dispute about the existence of the employment relationship between the parties. There also seem to be no dispute about the reason for the termination of the employment relationship. That being the case I am of the view that the material facts relating to the allegation of both procedural and substantive fairness of the dismissals in terms of section 189 of the Labour Relations Act, do indeed disclose the cause of action with a certain level of clarity. In essence the material facts point to the cause of action being termination of employment for operational reasons. Further clarity should emerge in the pre-trial conference in particular when the parties formulate their response to the Judge President's directive on Pre-trial Minute Guideline in respect of disputes involving dismissals for operational requirements.

[33] The same applies to the case of Ms Sikhakhane concerning the allegation that her dismissal was in breach of the provisions of section 187 (1) (e) of the Labour Relations Act. Whilst the facts as pleaded may not be as clear and precise as to how the issue of pregnancy connects to the reason for dismissal, the cause of action as envisage in that section is fairly clear and should be clarified further in the pre-trial minute.

[34] Turning to the other two grounds upon which the respondent seeks to have the applicants' claim dismissed, I find them to be too technical and highly formalistic and should for that reason alone be dismissed.

[35] In the premises I make the following order:

(i) The respondent's application to have the applicants' claims dismissed is dismissed.

(ii) The application by the applicants to have the respondent bared from filing a statement of response is dismissed.

(iii) The respondent is granted leave to file its response to the statement of claim within 10 (ten) days of date of this order.

(iv) The costs are reserved.

Molahlehi J

Date of Hearing : 29th April 2009

Date of Judgment : 2nd September 2009

Appearances

For the Applicant : Mr S Sebola (Union Official)

For the Respondent: Adv F Bezuidenhout

Instructed by : Schindlers Attorneys