THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: J 737/2020

In the matter between:

NATIONAL UNION OF MINEWORKERS obo MEMBERS Applicant

and

SIBANYE STILLWATER Respondent

Date of hearing: 7 August 2020 (via Zoom)

Date of judgment: 11 August 2020. Judgment delivered by email at 13:00

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks an order, by way of an urgent application, to interdict and restrain the respondent from implementing a Covid-19 mutual separation

package pending proper consultation with the applicant. There is a suggestion in the founding affidavit that the applicant further seeks an order directing the parties to conclude a collective agreement to regulate all issues set out in the guideline on vulnerable employees and workplace accommodation published by the department of health. At the hearing, this claim was not pursued.

[2] The facts on which the applicant relies are that on 2 July 2020, the respondent called a meeting with union representatives to present a plan to implement the guideline on vulnerable employees published by the department of health, and referred to above. On the same date, the respondent submitted a draft separation agreement on account of incapacity. The terms of the agreement contemplate that employees not in possession of a certificate of fitness to work and thus incapable of performing their work and incapacitated on that account, to mutually agree to terminate the employment relationship on defined terms. The applicant states that on 14 July 2020, it proposed that the issue of a Covid-19 plan be dealt with in terms of a collective agreement. The applicant records the respondent's contention that the parties were engaged in a consultative process and that the last meeting would be held on 24 July 2020. In submission, the applicant states that the 'so-called' mutual separation agreement imposed on its members would have the effect that its members would be dismissed without recourse. On this basis, the applicant contends that the respondent is using the guidelines as a means of '*getting rid of employees under the guise of Covid 19*…'.

[3] In its answering affidavit, the respondent records that the guideline contemplates that employees will only be permitted to work after receiving a certificate of fitness to work from an occupational medical practitioner, and further sets out the requirements for the screening and testing of Covid-19 by an employer. Those employees who are regarded as 'vulnerable employees may return to work only after being declared fit to do so. Insofar as the applicant contends that the respondent failed properly to consult over the mutual severance package, the

respondent records that an initial meeting was convened with representative trade unions on 2 July 2020 to discuss the need to develop systems to protect vulnerable employees. No objection was received from the applicant (nor any other union) on the proposal to the effect that qualifying employees be permitted to apply for special mutual severance package, and a proposal for the calculation of this package. On 8 July 2020, the applicant presented written submissions (together with another union) on the proposals. In this document, the unions were explicit that "mutual separation is fine only if it's voluntary". On 14 July 2020, follow-up meeting was convened to respond to the queries and representations raised by the unions following the initial meeting. The respondent's management responded to the questions raised and on 17 July 2020, issued a written response to the key issues that arise during the meeting. In response to a demand by the unions that a collective agreement be concluded after a process of collective bargaining, the respondent recorded that the process was of a consultative nature and not require collective agreement. Also on 14 July 2020, the respondent issued a further communication addressing particular issues related to its proposal. On 16 July 2020, a further invitation was extended to the unions to meet. That meeting was postponed to 17 July 2020 to permit the unions to caucus. Following a meeting with some unions (not including the applicant) further issues related to the respondent's proposal were discussed and the company distributed to all of the unions a pack of documents, including the mutual separation package application form and agreement. On 24 July 2020, a further meeting was convened with the applicant and another union to discuss the Covid-19 incapacity procedure and at this meeting, the mutual separation package was again extensively increased. During that meeting, the unions informed the respondent's management that they disputed the process. On 30 July 2020, the present application was filed.

[4] The applicant filed a replying affidavit in which none of the material facts recorded above were denied.

[5] The respondent submits that the court lacks jurisdiction to entertain the applicant's claim. The Constitutional Court has affirmed on at least two occasions, the question of jurisdiction must necessarily be determined on the basis of the pleadings and not the substantive merits of the case (see *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) at par 155, *Gcaba v Minister of Safety and Security* (2010) 1 SA 238 (CC) para 75). This court is a creature of statute. In terms of s 157 (1), subject to the Constitution and s 173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. In other words, a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that provides for that dispute to be determined by this court.

[6] I have had some difficulty establishing from the founding affdiavit precisely what the nature of the applicant's claim might be. This court has generally tolerated a standard of pleading that might not pass muster in other courts, especially when lay people seek to pursue their grievances in a *bona fide* manner. But should be recalled though that this court is a superior court, and that the applicant has had the assistance of an attorney throughout. The applicant's pleadings in the present instance fall woefully short of what might be considered to be an acceptable standard and simply fail to articulate a proper cause of action. As the replying affdiavit suggests, the applicant's real complaint is that the respondnet intends to finalise the terms of a mutual separation agreement without there being maningful consultation with the applicant. The applicant has not pointed to any provision of the LRA (or any other law) which confers jurisidction on this court to determine such a dispute. To the extent that the applicant submits that the respondent is acting in breach of a collective agreement in the form of the recognition and procedural agreement that is annexed to the founding affidavit, that agreement appears to be attched with no apparent purpose. The applicant does not point to any provision of the agreement that it contends the respondent has breached. The

high water mark in the applicant's case is an averment to the effect that the applicant has established a right in terms of the recognition agreement *'to represent the interest of its members in all decisions taken by the respondent that affects those members*'. What these contentions overlook is that this court has no jurisiction, certainly not as a court of first instance and by way of final relief, to determine disputes that concern an alleged breach of a colletive agreement.

[7] In short, the applicant has failed to establish a claim that is justiciable by this court, and the application stands to be dismissed on that basis.

[8] Even if the court were empowered to assume jurisdiction to adjudicate the applicant's claim, the application fails on the facts. The record of the engagements between the applicant and the respondent establish that a consultation process was undertaken by the respondent, in which the applicant participated. There was in addition an exchange of comprehensive question and answer documents. The founding affidavit is selective in its recordal of the frequency and content of the engagements between the parties and the attempts to address the issue of vulnerable employees. The applicant does not dispute that at the meeting on 2 July 2020, and in its written submissions of 8 July 2020, it effectively consented to the proposed mutual separation package. The applicant's contention that the implementation of the mutual separation process and signature of the proposed agreement will have the effect that its members will be 'dismissed without recourse' is without substance. First, any termination of employment consequent on signature of the agreement would not constitute a dismissal, and in any event the affected employees have the right to take advice from their representative unions prior to signature. Indeed, the proposed process contemplates representation by a fellow employee, who may be a union representative.

[9] Insofar as costs are concerned, the respondent acknowledged the existence of a collective bargaining relationship between the parties and the convention adopted in this court that in matters where an order for costs might prejudice that relationship, the court should be hesitant to make orders for costs. Nonetheless, the respondent submitted that the application was misguided, to the extent that an order for costs was warranted. The court has a broad discretion in terms of s 162 of the LRA to make an order according to the requirements of the law and fairness. In my view, those interests are best satisfied by an order to the effect that the applicant be liable for the respondent's costs. The application was misguided, and borders on an abuse of the process of this court. In fairness, an order to the effect that the costs of one counsel be recoverable is appropriate.

I make the following order:

1. The application is dismissed, with costs, such costs to be limited to the costs of one counsel.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv. Baloyi, instructed by Mohale Inc.

For the respondent: Adv. AT Myburgh SC, with him Adv. P Maharaj-Pillay, instructed by Webber Wentzel.