IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 1212/2020

In the matter between:

MLUNGISI BOOI Plaintiff

and

WESLEY PRETORIUS & ASSOCIATES Defendant

JUDGMENT

RUSI AJ:

[1] This is an exception taken by the Defendant to the Plaintiff's particulars of claim. In his particulars of claim the Plaintiff claims an amount of R25 000 000.00 (twenty-five million rand) for damages in respect of pain and suffering, 'a bank loan', loss of property and legal expenses. While the Plaintiff represents himself in these proceedings, the Defendant, a firm of attorneys, is represented by Mr Rorke, assisted by Ms Young.

Background

[2] It is common cause that proceedings were held in the South African Local Government Bargaining Council in respect of an employment dispute between the Plaintiff and the Amathole District Municipality ("ADM"). An arbitration award ("the award") was issued on 17 December 2016 in terms of which the ADM, as employer, was ordered to reinstate the Plaintiff, as its employee.

[3] An application was subsequently made by the ADM, in terms of section 145(1) of the Labour Relations Act[1] ("the LRA"), to the Labour Court for the review of the award ("the review application"). The Defendant represented the ADM in the review proceedings held in the Labour Court. A security bond was furnished by the Defendant as envisaged in section 145(7) and (8) of the LRA, as a result of which the operation and execution of the award was suspended, pending the finalisation of the review application. In the security bond the Defendant stated as follows, *inter alia*:

> "**NOW THEREFORE**, I the undersigned **Wayne Smith** of **Wesley Pretorius and Associates** confirm that **Wesley Pretorius and Associates** holds in security an amount equivalent to 24 months' remuneration which will be paid over to the **First Respondent** within fifteen days of the Application for Review being dismissed by the above Honourable Court or any appeal being dismissed."

[1] Labour Relations Act, 1995 (Act 66 of 1995).

[4] The review application was dismissed, whereupon the security bond furnished by the Defendant took effect. However, there was a delay in the payment to the Plaintiff of the amount set out in the security bond. When the amount was eventually paid, it was paid by the ADM, not the Defendant.

Proceedings in this Court

[5] Aggrieved by the delay in the payment of the amount stipulated in the security bond, and the fact that it was not the Defendant who effected the payment, the Plaintiff instituted an action in this Court claiming a globular amount of R25 000 000.00 for unspecified damages. The Plaintiff alleged that the amount stipulated in the security bond was not paid within fifteen days from the date of dismissal of the review application, as the Defendant undertook.

[6] The Plaintiff furthermore pleaded that the late payment made by the ADM, and not the Defendant, was indicative of the fact that the security bond was non-existent, to begin with, and that it was a ploy by the Defendant to secure the hearing of the review application by the Labour Court.

[7] On 13 January 2021, the Defendant delivered a notice in terms of Rule 23(1) of the Uniform Rules of Court, contending that the Plaintiff's particulars of claim were vague and embarrassing, alternatively do not disclose a cause of action. In this notice, the Defendant gave the Plaintiff fifteen days within which to remove the cause of its complaint, failing which the Defendant would deliver its exception.

[8] The crux of the Defendant's complaint was that the Plaintiff's particulars of claim were not in compliance with the Rule relating to pleadings[2], in that the Plaintiff did not set out how the claimed amount of damages was computed. The Defendant furthermore alleged that it was a contradiction in terms for the Plaintiff to allege that the security bond was non-existent, yet the Plaintiff annexed the security bond to its particulars of claim.

[9] The Defendant furthermore contended that, while on the face of it, the security bond was in compliance with the LRA, the Plaintiff alleged that the security bond was a deliberate lie by the Defendant, without which the application for review would not have been allowed. This, said the Defendant, the Plaintiff alleged without making any corresponding averment to the effect that the security bond was not in compliance with section 145(7) of the LRA.

[10] In response to the Defendant's Rule 23(1) notice, the Plaintiff delivered his amended particulars of claim on 2 February 2021. What appears hereunder is an extract from the Plaintiff's amended particulars of claim:

4.

> "On the **24th November 2016** the Defendant misled and/or deceived the Labour Court into believing that it held security in an amount equal to 24 months of the Plaintiff's remuneration by filing in court a document titled "Security Bond". Annexed hereto marked **"A"** is the Security Bond document.

[2] Uniform Rule 18(10)

5.

The Defendant further claimed in the "Security Bond" document that such amount/security it held would be paid over by the Defendant to the Plaintiff within 15 days should the Review Application that been instituted by its client (Amathole District Municipality – "ADM") being dismissed by the Labour Court.

6.

When at the conclusion of the Review Application the Defendant was directed by the Labour Court, by way of an award in favour of the Plaintiff, to make payment to the Plaintiff within the timelines stipulated in the Defendant's "Security Bond" document, it failed to do so. Instead, the Defendant's client ("ADM"), and not the Defendant, made the payment far beyond 15 days and after the plaintiff engaged the services of Attorneys for the purposes of demanding such payment.

7.

The events as conversed **[sic]** in the preceding paragraphs *vis* **[sic]** lead up to and eventual payment by ADM to the plaintiff, confirms/ed **[sic]** that the "Security Bond" document filed by the Defendant was solely to mislead/deceive the Labour Court, as indeed, the Defendant did not hold such security as claimed in the said document.

8.

Without the misleading /deceiving "Security Bond" document, the Review Application would not have been entertained by the Labour Court, and

instead, the Plaintiff would have been re-instated in terms of the Arbitration Award that ADM had taken on review.

9.

Attached hereto is a letter of Demand marked **"B"**, as well as Defendant's response marked **"C".**

[11] On 5 March 2021, the Defendant delivered its exception to the Plaintiff's amended particulars of claim on the ground that they do not disclose a cause of action on the grounds that:

1. it is wrong in law, for the Plaintiff to conclude as he did in paragraph 8 of its amended particulars of claim, that without the deceptive security bond the review application would not have been entertained by the Labour Court, and that he would instead be reinstated in his employment with the ADM. The hearing of the review application by the Labour Court was not conditional upon the filing of the security bond, as paragraph 8 of the Plaintiff's amended particulars of claim suggests; and

2. the facts alleged by the Plaintiff in paragraphs 4 to 7 of the amended particulars of claim regarding the security bond, do not support the conclusion of law made by the Plaintiff in paragraph 8 of his amended particulars of claim, when regard is had to the relevant provisions of the LRA.

The provisions of section 145 of the LRA

[12] The relevant provisions of section 145 of the LRA read as follows:

> (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.
>
> (3) The Labour Court may stay the enforcement of the award pending its decision.
>
> (7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the court in accordance with sub section (8).
>
> (8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must –
>
> (a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or
>
> (b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

Submissions of the parties

[13] At the hearing Mr Rorke submitted that the fundamental allegations of the Plaintiff's cause of action are contained in paragraphs 7 and 8 of the amended particulars of claim. Counsel submitted that those averments are insufficient to sustain a cause of action.

[14] The Plaintiff, on the other hand, was at pains to explain that what he intended to convey in paragraphs 7 and 8 of the amended particulars of claim was that, owing to the filing of the security bond by the Defendant, he was prevented from enforcing the arbitration award. The submission continued that, as a result of the hearing of the review application after the security bond was filed, he suffered financial loss as he could not earn a salary from the ADM. He was subjected to humiliation, pain and suffering. The Plaintiff however conceded that this was not his pleaded case.

[15] The Plaintiff further submitted that the hearing of the review application was founded on the Defendant's deception when it filed the security bond. The Plaintiff submitted that after the review application was dismissed, he suffered further due to the delay in the payment of the 24 months' salary stipulated in the security bond.

[16] Indeed, on reading the Plaintiff's amended particulars of claim as a whole, taken as they stand, the Plaintiff postulates that no review application would have ensued if the Defendant had not filed the security bond. The Plaintiff further pleaded that he would instead have been reinstated in his employment with the ADM.

Legal principles

[17] It is trite that in adjudicating an exception on the ground that a pleading does not disclose a cause of action, the court considers the pleading as a whole, taken as it stands. The court is not entitled to consider any facts outside the pleading. In ***Minister of Safety and Security v Hamilton***[3], the court stated thus:

> "An exception on the ground that a pleading discloses no cause of action or defence strikes at the root of the entire claim or defence, since it charges that the pleading objected to, taken as it stands, is legally invalid for its purpose."

[18] Equally trite is the principle that, the duty rests with the party excepting, to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.[4] In his quest to sustain the contention that the Plaintiff's amended particulars of claim taken as they stand, disclose no cause of action, Mr Rorke made reference to the context and purport

---

[3] *Minister of Safety and Security v Hamilton* 2001(3) SA 50 (SCA) at 52 G-H.
[4] *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A).

of section 145(1), (7) and (8) of the LRA. Counsel further submitted that a determination of whether the Plaintiff's particulars of claim disclose a cause of action, implicates as of necessity, a consideration of the proper interpretation of these provisions. I now turn to the interpretation of the provisions of the above subsections.

The analysis

[19] Section 145(1) of the LRA confers a right on a party aggrieved by an arbitration award to challenge it on review. This right is, however, not conditional upon the filing of a security bond. It is abundantly manifest from section 145(7) of the LRA that the institution of review proceedings does not suspend the operation of an arbitration award.

[20] Thus, in order for the operation of the arbitration award to be suspended while the aggrieved party applies for its review, one of two things must take place. The one is that an application must be made to the court for the stay of the enforcement of the award pending finalisation of the review. The other is that a security bond must be furnished to the satisfaction of the court in accordance with section 145(8).

[21] The converse is that the Plaintiff would have been able to enforce the arbitration award despite the application by the ADM for the review of the award, where no application for the stay of the enforcement of the award was made and granted by the court, or no security bond was furnished by the Defendant. Any contrary interpretation of these provisions will, with respect, result in absurdity.

[22] The parties referred to ***Rustenburg Local Municipality v South African Local Government Bargaining Council and Others***[5], where Snyman AJ, said the following:

> [12] From the outset, an arbitration award issued under the dispute resolution process under the LRA is final and binding. It is now trite that the filing of a review application to challenge such an award, does not suspend the operation of the arbitration award. The arbitration award remains executable, despite the pending review.
>
> [13] It is in this context that the enforcement provisions of section 143 of the LRA have been adopted. It enables the beneficiary under the arbitration award to nonetheless, and despite the award being the subject of challenge, still execute and enforce compliance with it.
>
> [14] The above being the default position, the duty is then squarely upon the applicant for review to seek relief, in terms of what is

[5] *Rustenburg Local Municipality v South African Local Government Bargaining Council* [2017] 11 BLLR 1161 (LC).

specifically provided for in section 145, to stay the execution of the arbitration award pending the conclusion of the applicant's review application. In other words, the applicant must go out and secure the stay or suspension of the award, failing which the arbitration award will always remain executable and enforceable.

[15] The design of section 145 of the LRA is specific. It provides that a stay or suspension of the execution or enforcement can either be in effect purchased by way of security, or obtained by leave of court. (**emphasis added**).

Conclusion

[23] It is the view of this Court that, any suggestion that the filing of a security bond is the requirement to be met for a review application to be heard, is incongruous with the design of section 145 of the LRA, as set out in *Rustenburg Local Municipality.*

[24] It follows that, once the security bond furnished by an applicant for review is to the satisfaction of the court as section 145(8) of the LRA requires, the suspension of the enforcement of the award follows, and its execution is not competent while the review is pending. *In casu*, the Plaintiff conceded, correctly I believe, that it is not his pleaded case that the security provided was defective or not to the satisfaction of the Labour Court. It cannot then avail him to contend that he was prevented by the security from enforcing the award. By

the operation of section 145(7) of the LRA, the Plaintiff could not have been in a position to enforce the award while the review application was pending.

[25] As regards the Plaintiff's conclusion that the security bond provided by the Defendant was a facade, the Plaintiff appears to have drawn this inference from the delay in the payment of the security bond amount after the review application was dismissed, and the fact that such payment was not made by the Defendant, but by its client, the ADM.

[26] It is true that when the review application was dismissed by the Labour Court, the Plaintiff was entitled to have the amount stipulated in the security bond paid over to him within fifteen days of the dismissal of the review application. Put differently, when the review application was dismissed, the ADM became indebted to the Plaintiff in the amount stipulated in the security bond.

[27] It follows that if no such payment was made within the specified period, the Plaintiff was well within right to claim such payment, coupled to a claim for any appropriate relief as to interest as may be applicable. It is of no moment that it was the ADM, and not the Defendant, who eventually effected payment to the Plaintiff of the amount stipulated in the security bond.

[28] When the plaintiff's amended particulars of claim are taken as they stand, this Court accepts that the genesis of the Plaintiff's claim, is the provisions of subsections (7) and (8) of section 145 of the LRA. A cause of action, as stated in ***McKenzie v Farmers' Co-operative Meat Industries Ltd***,[6] comprises every fact which it would be necessary to prove, if traversed, in order to support the plaintiff's right to judgment of the court. Such facts do not comprise of every piece of evidence which is necessary to prove each fact, but every fact necessary to be proved.

[29] It was therefore essential that the plaintiff makes an averment in his particulars of claim, that despite the filing of the security bond, he was entitled to enforce the award. However, in light of the above interpretation of the relevant provisions of section 145 of the LRA, such an averment would also be insufficient to sustain a cause of action.

[30] I have come to the conclusion that, on any interpretation that the Plaintiff's particulars of claim may reasonably bear, they do not disclose a cause of action. The exception taken by the Defendant must therefore succeed.

---

[6] Mc Kenzie v Farmer's Co-operative Meat Industries Ltd 1922 AD 16, at 23

Costs

[31] The general rule is that the successful party should be given his costs, unless good grounds or exceptional circumstances exist for the court to deviate from the rule. *In casu*, there are no such grounds or exceptional circumstances justifying a departure from the general rule.

[32] At first blush the Plaintiff's action might appear not to be one of those cases involving complicated issues of law such that they require the expertise of two Counsel. However, Plaintiff not only claims a large amount of money for damages, but also makes serious allegations of fraud or dishonesty against the Defendant. The Defendant, being a firm of attorneys, was placed at risk of serious repercussions of the allegations made against it by the Plaintiff. This strikes at the good name of the Defendant as a business entity, and a legal practice.

[33] It was significant therefore, for the Defendant to avert judgment of against it for payment of the amount claimed or any amount that the court might determine; and the far reaching implications of allegations of dishonesty that the Plaintiff makes against it. The Defendant was put out of pocket in order to achieve this goal. It is in the interest of fairness that the Defendant be reimbursed for the financial inconvenience that the Plaintiff put it through in defending the claim, including the costs of two counsel, where so employed.

[34] In the result, the following order is made:

1. The exception is upheld with costs, such costs to include the costs of two counsel, where so employed.

2. The Plaintiff shall, if he elects to do so, serve, within 15 days of the date of this judgment, a notice of his intention to amend his particulars of claim.

_____

L. RUSI
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Plaintiff	:	The Plaintiff appeared in person
Defendant's Attorneys	:	Wesley Pretorius & Associates
Counsel for the Defendant	:	Mr S. Rorke SC, with him Ms C. Young
Date Heard	:	17 June 2021
Date Delivered	:	29 June 2021

[by electronic mail transmitted to the plaintiff and defendant's Counsel, in terms of paragraph 68 of the Eastern Cape National State of Disaster Management Directions]