IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER:C176/97

In the matter between:

SUSAN VAN ROOY Applicant

and

NEDCOR BANK LTD Respondent

JUDGMENT

MLAMBO J

[1] On 3 June 1997 applicant was found guilty on charges of :

(i) Insubordination, and

(ii)Bad behaviour/verbal abuse and harassment.

She received a final written warning on the first charge and was dismissed on 2 months notice on the second charge. She appealed on 6 June 1997 but her appeal was unsuccessful.

[2] On 24 June 1997 applicant through her union Sasbo, referred her dispute to the Commission for Conciliation, Mediation and Arbitration,("the Commission") for conciliation(first referral). In this referral the nature of the dispute is referred to as "unfair dismissal of Susan Adams". I am not aware why the name "Adams" is used, but presume that there is an explanation. I accept, however, that the referral referred to the applicant before me. This referral was within 30 days from appellant's date of dismissal. The Commission allocated reference No WE3749 to the first referral.

[3] On 10 July 1997 another referral(the second referral) for conciliation was

lodged with the Commission at applicant's behest, but this time the referral was done by Attorneys Chennels, Albertyn. In this referral the nature of the dispute is described as:

> "... the victimization of the applicant by the respondent, the breach of her fundamental right not to be discriminated against on the grounds of race, or on any other arbitrary ground by the respondent, and her unlawful and unfair dismissal on two months' notice from 3 June 1997 which was upheld on appeal on 4 July 1997."

In this referral the dispute is alleged to have taken place on 4 July 1997. I find this strange as nothing of any significance occurred on this date, save that the hearing of the appeal took place on this date. I also did not understand Mr Arendse, Counsel for applicant, to contend that the dispute arose on this date. In fact he was ad idem with Mr McRobert, appearing for the respondent, that the determinative date, i.e when the dispute arose is 3 June 1997, the date of applicant's dismissal. I shall therefore treat the date 4 July 1997 appearing in the second referral as 3 June 1997. Should it however also be the respondent's stance that the determinative date is 4 July 1997 I deal with that scenario later in this judgment. The Commission allocated reference No WE4503 to the second referral.

[4] What is significant about the second referral is that no condonation application accompanied it. The Commission convened a conciliation meeting for 28 July 1997 in respect of the first referral. The Commission made no reference to the second referral in its notice to the parties regarding this conciliation date. The applicant did not attend the conciliation meeting on 28 July 1997 and it appears that the Commissioner "dismissed'

her matter due to her non attendance . In correspondence between the Commission and applicant's attorneys it appears that applicant did not attend the conciliation meeting because it referred to the first referral which she had withdrawn or cancelled in favour of the second. She apparently requested the Commission to schedule another conciliation meeting in respect of the second referral. The Commission was further requested to give direction on what was to happen to the second referral. In response the Commission stated that it had combined the two referrals for purposes of the

conciliation meeting on 28 July 1997. The Commission then, presumably recognising the withdrawal by applicant of the first referral and noting that the 30 day period for conciliation had elapsed, issued the Section 135(5)(a) certificate stating that the dispute described in the second referral remained unresolved. The applicant then referred the dispute to this court for adjudication in terms of section 191(5)(b),as she alleged that it was covered by the provisions of section 187(1)(f).

[5] Respondent has now raised two points in limine for decision before the court deals with the substantive merits of the matter. These points are:

(a) That no factual basis has been laid by applicant regarding her claim of discriminatory treatment, victimisation or that her dismissal falls under section 187. Because of the lack of factual and legal grounds backing such claim, this court has no jurisdiction to adjudicate it and should refer it to the Commission for arbitration.

(b) That the second referral on which applicant relies in this Court was referred beyond the 30 day time period contemplated in section 191 read with section 190, that no condonation was sought and that the dispute was never conciliated. Because of this state of affairs, so respondent argued, the application was not in proper form and the applicant is not properly before this Court.

The respondent argued a third somewhat subsidiary point to the effect that even if the Court accepted that a broad allegation in respect of a section 187 claim was sufficient, the Court is still enjoined to dismiss the present application due to the applicant's failure to properly plead the grounds of discrimination. The respondent further requested the court to uphold its objection to an amendment by applicant which sought to remedy the paucity of pleading the discrimination claim properly.

Lack of particulars to found a claim.

[6] Respondent's argument is basically a complaint that no case has been made out in the statement of claim to found a claim of a section 187(1)(f) dismissal. According to the respondent, this is a simple unfair dismissal claim which should be arbitrated by the Commission.

[7] The final destination of a dispute depends on the allegations made by the initiating party, in this instance, the applicant. Parties are guided by the provisions of the Act in which forums to ventilate their disputes. In this sense therefore, it is the allegations of the parties which direct them to the provisions setting out the procedure to be followed and the forums to go to. In this regard section 191 is relevant to the present inquiry.

Section 191(5) provides that:

> "If a Council or Commissioner has certified that the dispute remains unresolved if 30 days have expired since the Council or the Commission received the referral and the dispute remained unresolved -
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> a) the Council or the Commission must arbitrate the dispute at the request of the employee if
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> (i) the employee has ***alleged*** that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph B(iii)applies;
>
> (ii) the employee has ***alleged*** that the reason for dismissal is that the employer made continued employment intolerable, or
>
> (iii) the employee does not know the reason for dismissal; or
>
> b) The employee may refer the dispute to the Labour Court for adjudication- if the employee has ***alleged*** that the reason for dismissal is -
>
> (i) ...
>
> (ii) ...
> (iii) ...
> (iv) ...."

[8] A notable feature of all these provisions is the unrelenting usage of the word "alleged". An allegation about the nature of the dispute is determinative of the

route the dispute has to follow for resolution. A party need only allege the nature of the dispute to trigger off a process in one or other direction. Further, section 213 describes a dispute to include an alleged dispute. I, therefore, have no doubt that in the scheme of things of the Act it is the allegation about the nature of a dispute that is crucial to confer jurisdiction on any of the forums created by the Act. However, that is not the end of the matter especially in litigation undertaken in this Court. Having made the allegation, rule

> 6(1)(b) of the Rules requires for instance that a statement of claim and a response thereto, should contain

"(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 that 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 that document."

The reason for this rule is very clear. Parties must set out with sufficient particularity the facts of their claim and legal issues arising therefrom to leave no doubt in the mind of the opposing party as to the case to be met. It would be well and good if all statements of claim and responses thereto, for that matter, always contain sufficient particulars. Situations do however arise where the statement of claim is ambiguous or contains no, or insufficient particulars about a claim that the opposing party is left wondering what case he is called upon to meet. In such a case what remedies are available to the opposing party. The answer lies in how one views statements of claim or responses thereto in this Court. Does one regard such documents as mere documents that do not constitute formal pleadings as suggested by Mr Arendse, applicant's counsel?

[9] Statements of claim and other applications do not have to be issued by the Registrar of this court, as for example, in the High Court, and they do not necessarily have to be served by a sheriff although this is permissible. The dissimilarity in essence ends here. Rule 6(1)(b)(ii) is almost identical to rule 18(4) of the High Court rules regarding the issuing of summonses and particulars of claim.

> Section 151 provides that the Labour Court is established as a court of law and is a superior court that has authority and inherent powers and standing in relation to matters under its jurisdiction equal to that which a court of a provincial division of the High Court has in relation to matters under its jurisdiction. The Labour Court is different to the Industrial Court. It is a court of law and its jurisdiction is not based on equity and fairness, but law. It follows that statements of claim and responses thereto and other documents filed in this court should have the same status as pleadings.

The reasoning in National Union of Leather Workers v De Klerk NO and Ano, 1993 14 ILJ 1443 C at 1448G-I, that statements of case in the Industrial Court were not formal pleadings, but mere documents, is not applicable to documents filed in this Court.

[10] If one considers a statement of claim as a pleading, what recourse is there to an opposing party if the statement of claim contains vague and ambiguous particulars or is lacking in sufficient particularity to inform him of the case he has to meet. The rules of the Labour Court are not very helpful, save for Rule 11 which provides in subrule 3 that:

"If a situation for which these rules do not provide, arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances."

The High Court has perfected a procedure open to parties where pleadings are, for instance vague, ambiguous or embarrassing. This procedure is found in Rule 23 of that Court's rules. This rule provides that:

> "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain any 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 or may set it down for hearing, 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."

I can find nothing in the Act, or in the rules militating against such a procedure in the Labour Court. In fact Rule 11(3) permits this.

[11] In casu therefore, the respondent was correct that applicant's statement of claim lacked sufficient particularity regarding the discrimination allegation. The applicant has filed an amendment seeking to cure this defect which defect was in my view cured . In view of my reasoning above regarding the importation of the High Court procedure provided for in rule 23 of that Court's rules, I am disinclined to uphold the respondent's objection to the amendment, simply because that's how

defects of that nature are cured. It follows that respondent's argument on both counts must fail.

Jurisdiction

[12] Section 191(1) provides that

> "If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to-
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> (a) a council, if parties to the dispute fall within the registered scope of that council; or
> (b) the Commission if no council has jurisdiction."

It is common course that the second dispute was referred to the Commission beyond the 30 day time period. What is the effect of a late referral for conciliation?

Section 191(2) provides that:

> "If the employee shows good cause at any time the council or the Commission may permit the employee to refer the dispute after the 30 day time limit has expired."

When the second referral was made it was beyond the 30 day period. No condonation was applied for and no conciliation of that dispute took place.

[13] Mr Arendse has argued that:

(i) this Court cannot entertain the argument advanced by the respondent that the Court has no jurisdiction because this is not a review application;

(ii) that in terms of section 157(4) a certificate that a dispute remains unresolved is prima facie proof that it was conciliated; and

(iii) that it is not for this Court to consider what the Commission did or did not do or to condone the lateness of referrals to the Commission. In a nutshell Mr Arendse suggests that this Court should simply adjudicate the matter without considering what happened to it before it arrived here.

[14] The purpose of the 30 day period set out in section 191(1) is, in my mind, to regulate referrals and to ensure that there is finality in each matter that arises.

> I am of the view that the 30 day time period in section 191 is peremptory . I say peremptory as condonation is necessary for a dispute that was referred beyond that time period to be conciliated.

Thus the fatality of a late referral is cured by condonation if granted and only will the Commission have jurisdiction to conciliate the dispute.

[15] The Commission must consider all referrals to it. The first port of call, however, is whether the referral complies with the Act. The Commission is entitled to check and ensure compliance with the Act. If the Commission finds that there is non-compliance, eg. that there is a late referral, then the Commission must consider if good cause has been shown. If the Commission finds good cause it will condone the lateness and it will then have jurisdiction to conciliate the dispute. If the Commission does not find good cause and does not grant condonation it does not have jurisdiction to conciliate the dispute.

[16] The Commission cannot ignore the lateness of referrals and deal with those referrals as if they are not late for the simple reason that those referrals do not comply with section 191(1).

> In this matter it is clear that the first referral was timeous and it complied with section 191(1), but it was abandoned or withdrawn in favour of the second one. The second referral was filed beyond the 30 day period. There was no application for condonation and none was granted.

How possible was it for the Commission to combine the two different referrals? Further can the Commission combine a valid and invalid referral? There is no provision for a combination of two referrals by the Commission for purposes of conciliation . In fact it is doubtful whether the Commission could successfully combine the two referrals as the nature of the disputes was different. However one cannot rule out the possibility where two referrals are made where the nature of the dispute is the same i.e where one dispute is referred twice. But if one of the referrals does not comply with the Act it cannot be combined with the one that complies. In this matter the first referral was timeous and dealt with a simple dismissal whilst the second referral was late and dealt with a section 187(1)(f) dismissal. My view is that it was not legally possible for the Commission to combine the two referrals.

[17] The Commission could only consider one of the referrals and, in my view, it is the second one, as the first one was withdrawn. The Commission did not apply its mind to the second referral, especially when one looks at the fact that it was late.

That referral was a non-starter until its lateness was condoned. Because the lateness was not condoned, no condonation was granted. Therefore, the Commission's hands were tied: it could not issue a valid section 135(5)(a) certificate regarding the second referral.

> Mr Arendse argued that this Court is not empowered to interfere in what the Commission did, especially because the respondent has not instituted a review application to review the issuing of the Section 135(5) certificate. I do not agree. This Court has a supervisory role to the activities of the Commission. In a sense this Court polices conduct by the Commission and its Commissioners. As was stated by my brother Landman J in the unreported judgment of LINDA DEUTSCH v MR AND MRS PINTO,Case No J28/97 this Court acts in a supervisory role to the Commission and it should make sure that what the Commission does complies with the Act.
>
> For this Court to have jurisdiction to deal with this matter, the Commission must have had jurisdiction too, as the Commission lacked the necessary jurisdiction so does this Court. The certificate issued regarding the second referral is therefore not a valid one.

[18] Even if the applicant's attitude was that the second referral related to a dispute which arose on 4 July 1997 and which was timeously referred to the Commission the matter still suffers from a fatal defect. As already stated this was not argued by Mr Arendse but I consider it to dispel possible doubts. This referral, strictly speaking, related to what happened at the appeal hearing. At that stage a dismissal had already taken place and the appeal hearing did not give rise to a second dismissal. It could have given rise to , arguably, unfair racially discriminatory treatment which on its own does not constitute a dismissal. As the dispute in the second referral is characterised as a dismissal dispute it can only refer to the dismissal mentioned in the first referral which would render the second referral late still as that dismissal occurred on 3 June 1997. If the referral relates to a different dispute not being a dismissal dispute then it was timeously referred but was not conciliated. In this regard the provisions of section 157(4)(a) are very clear.

Costs

[19] As the respondent has succeeded in persuading this Court that it has no jurisdiction to adjudicate the matter, the Court should in an appropriate case award costs. However, the applicant was led to come to this Court because of the failure

of the Commission to do its work in compliance with the Act. In a sense the applicant, a person desirous of having her dispute finally resolved, had to take action to achieve that objective. In that sense, if I were to order costs against her, it would have a punitive effect.

I therefore am not disposed to awarding costs against her. The order I make is:

1. The first point *in limine* set out in clause 5.1 of the respondent's statement in response is dismissed.

2. The respondent's objection to the applicant's amendment is rejected.

3. The second point *in limine* set out in clause 5.2 of the respondent's statement in response is upheld.

4. The matter is remitted to the CCMA to consider if good cause exists or is shown for the late referral of the dispute to it. In doing so it shall be open to the CCMA to call for representations from the parties.

5. There is no order as to costs.

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HONORABLE JUDGE D .MLAMBO

For the Applicant: Mr N.M Arendse
Instructed by Chennels Albertyn Attorneys

For the First Respondent: Mr J.M.J McRobert
Of Herold Gie & Broadhead Inc

Date of hearing : 19 February 1998

Date of order : 27 February 1998

Date of full reasons: 13 March 1998