REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 620/2011

In the matter between:

BARBARA DE KLERK **Applicant**

and

CAPE UNION MART INTERNATIONAL (PTY) LTD **Respondent**

Heard: **30 May 2012**

Delivered: **12 June 2012**

Summary: Dismissal after lodging grievance. Applicant alleges automatically unfair dismissal in terms of LRA s 187(1)(d). Respondent raises exception. *Mackay v ABSA* followed.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant alleges that her dismissal was automatically unfair. She was dismissed after having lodged a grievance concerning the respondent's

management. The respondent has raised an exception that this is not a reason for dismissal contemplated by s 187(1)(d) of the Labour Relations Act.[1] The matter raises the question whether the reasoning of Mlambo J[2] in *Mackay v ABSA Group & another*[3] is a correct interpretation of the Act and whether it should be followed.

Background facts

2] The applicant was employed by the respondent from 2 May 2009 until her dismissal on 6 July 2011. At the time of her dismissal she was employed as the group procurement manager.

3] During May and June 2011, the applicant submitted various grievances in terms of the company's grievance procedure. The procedure states in terms that:

> "Employees may lodge grievances without prejudice to their employment".

4] On 8 June 2011 the respondent notified the applicant to attend a disciplinary hearing. The misconduct complained of was phrased in these terms:

> "1. You repeatedly refused, for no good reason, to accept the finding to your grievance that the company is unable to identify the person/s responsible for distributing untrue information regarding your ill health absence, and instead consistently demanding [*sic?*] that the matter be re-opened and heard again in the full knowledge that nothing further can be done by the company.
>
> 2. Escalating your original grievance which has been dealt with by now raising numerous additional complaints against senior members of management, including inter alia, alleged unilateral changes to your employment.
>
> 3. Demanding and attempting to dictate, for no good reason, that various

1 Act 66 of 1995 ("the LRA").

2 As he then was.

3 [1999] 12 BLLR 1317 (LC).

> members of senior management, including the company's chief executive officer attend a meeting to discuss and resolve various spurious and unfounded allegations including (i) their alleged attempts to victimise you, (ii) their failure to correctly implement company policy and (iii) their failure to protect your reputation."

5] It appears that management was frustrated; what is less than clear, is why the raising of the grievances complained of should constitute misconduct. Even more surprisingly, the employee was dismissed on 6 July 2009. But it is not for this court to determine at this stage whether a fair reason for dismissal existed; without having heard any oral evidence, the court is only called upon to consider an exception to the applicant's subsequent referral of an automatically unfair dismissal dispute to this court.

6] Conciliation having failed, the applicant referred a dispute to this court on 1 September 2011. She set out a wide-ranging basis for her complaint, including the following:

> "The applicant avers that the respondent dismissed her unlawfully [*sic*] in contravention with [*sic*] section 187(1)(c) and (d) of the [LRA] in that said dismissal amounts to an automatically unfair dismissal because she initiated grievances against the respondent's directors and senior management.
>
> The applicant further avers that the reasons proffered by the respondent for her dismissal infringed her Constitutional and statutory rights for the following reasons:
>
> 1. Section 23 of the Constitution ... provides that everyone has a right to fair labour practices.
>
> 2. Section 5(1) of the [LRA] precludes any discrimination against an employee for exercising any right conferred by the Act.
>
> 3. Section 187(1) of the Act provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for dismissal is in contravention of s 187(1) of the Act.
>
> 4. Section 6 of the Employment Equity Act 55 of 1998 provides that no

person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice."

7] The respondent filed a notice of intention to except on a number of grounds.

8] Firstly, it pointed out that s 187(1)(c) of the LRA deals with dismissals that are automatically unfair if the reason for dismissal is to compel the employee to accept a demand in respect of a matter of mutual interest. The applicant made no such allegation in her statement of claim.

9] Secondly, the applicant purported to rely directly on the Constitutional right provided for in s 23 of the Constitution. The respondent, relying on legal advice from its attorneys of record, quite properly and correctly pointed out that national legislation – specifically the LRA – has been effected to give effect to those rights. The applicant could not, therefore, rely directly on the Constitution without challenging the legislation.

10] Thirdly, the applicant did not set out any grounds for her purported reliance on unfair discrimination in terms of the Employment Equity Act. And in any event, such a claim would have had to have been dealt with in terms of the dispute resolution processes provided for in that Act.

11] Fourthly, the respondent excepted on the basis that the applicant could not found a claim on s 187(1)(d) of the LRA because she did not have a statutory right to initiate a grievance against her employer.

12] Fifthly, the applicant did not allege in her statement of claim on what she based her claim, ie what right conferred by the LRA she exercised, to found a claim in s 5 of the LRA.

13] For all these reasons, the respondent averred that the statement of claim did not sustain a cause of action; and in any event, was vague and embarrassing.

14] The applicant then filed a "notice of intention to remove the exceptions to statement of claim", purportedly in terms of rule 11. On 20 October 2011, the respondent's attorney, Mr *Harrison*, wrote to the applicant's attorney,

Mr *De Villiers-Mohr*, seeking clarity in this regard and setting out his understanding that the "notice" was intended to be in the nature of a notice by the applicant to amend her statement of claim in an effort to cure the grounds of intended exception.

15] De Villiers-Mohr confirmed that and filed an amended statement of claim, but the applicant persisted with the following averments:

> "The applicant avers that the respondent dismissed her unlawfully [*sic*] in contravention with [*sic*] section 187(1)(d) of the [LRA] and that said [*sic*] dismissal amounts to an automatically unfair dismissal, as she was victimized because she initiated grievances against the respondent's directors and senior management...
>
> The applicant further avers that her dismissal was not in accordance with her Constitutional and statutory rights for the following reasons:
>
> 1. One of the main objects of the [LRA] is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution ... as well as to promote the effective resolution of disputes... The Constitution entrenches the following right:
>
>   'Every person shall have the right to fair labour practices (section 23(1)).'
>
> 2. Section 5(1) of the [LRA] precludes any discrimination against an employee for exercising any right conferred by the Act.
>
> 3. Section 187(1) of the Act provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for dismissal is in contravention of s 187(1) of the Act."

16] The applicant therefore no longer relied on s 187(1)(c) of the LRA or on the Employment Equity Act for her cause of action, but persisted in the other claims.

17] The respondent accordingly persisted with the remaining grounds of exception.

General principles that apply to exceptions

18] The rules of the Labour Court do not specifically provide for exceptions. However, it is now trite that exceptions may be raised under rule 11 of this Court read with rule 23 of the Uniform Rules of the High Court.[4] In dealing with exceptions to a statement of claim, the Court will have regard to the principles developed in the High Court.[5]

19] An exception is a legal objection intended to address a defect inherent in the other party's pleadings. Two categories of exceptions are generally recognised in this regard, namely:

19.1 Where the pleading is vague and embarrassing; and

19.2 Where the pleading lacks averments which are necessary to sustain an action or defence.

20] Thus, where a litigant is faced with a pleading that is vague and embarrassing or that lacks averments to sustain an action or defence, the litigant is entitled to take an exception to have the action or defence dismissed even before the merits of the matter are considered in evidence.[6]

21] Waglay J[7] set out the following principles in *Harmse v City of Cape Town:*[8]

> "[6] The statement of claim serves a dual purpose. The one purpose 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.
>
> [7] The material facts and the legal issues must be sufficiently

4 *Charlton v Parliament of the RSA* [2007] 10 BLLR 943 (LC). (This principle was not overturned on appeal by the subsequent judgments of the LAC and the SCA).

5 *Eagleton & ors v You Asked Services (Pty) Ltd* [2008] 11 BLLR 1040 (LC) para [15].

6 *Davidson & ors v Wingprop (Pty) Ltd* [2010] 4 BLLR 396 (LC) para [25].

7 As he then was

8 (2003) 24 *ILJ* 1130 (LC); [2003] 6 BLLR 557 (LC) paras [6] – [10].

detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim.

[8] The Rules of this Court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. 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-trail 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.

[9] Accordingly the rules of this Court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The Rules of this Court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trail conference. The rules therefore anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadows this activity but is not a substitute for it. It is for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the court is required to decide.

[10] When an exception is raised against a statement of claim, this Court must consider, having regard to what I have said above, whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this Court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing of particulars at the pre-trial conference stage."

22] In the current case, the respondent's attorneys provided the applicant with the opportunity to cure the defects raised in the intended exceptions. Although the applicant addressed some of those, others remain. It would serve little purpose to try and address those exceptions, which are legal

and not factual in nature, at a pre-trial conference before they are dealt with in these proceedings.

The first exception: direct reliance on the Constitution

23] As set out above, the applicant relies directly on the right to fair labour practices enshrined in s 23 of the Constitution.

24] As the applicant herself acknowledges, national legislation – specifically the LRA – has been enacted to regulate and to give effect to the right to fair labour practices. Where legislation has been enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation in question.

25] In *Mazibuko & another v City of Johannesburg and others*[9] the Constitutional Court discussed the principle of constitutional subsidiarity and reiterated that:

> "This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."

26] This *dictum* is consistent with, inter alia, the earlier statement by Ngcobo J in *Minister of Health & ano v New Clicks SA (Pty) Ltd & others*[10]*:*

> "[434] In *NAPTOSA*, the Cape of Good Hope High Court had occasion to consider whether in the context of the Labour Relations Act (LRA) it is appropriate to grant relief directly under section 23(1) of the Constitution without a complaint that the LRA was constitutionally deficient in the remedies that it provides. The Court held that it could not conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes. In reaching this conclusion, the High Court was concerned that were the practice to be permitted, it would encourage the development of two

9 2010 (4) SA 1 (CC); [2010] 3 BCLR 239 (CC) at para [73]; and see also the Constitutional Court decisions cited at footnote 54 of that judgment.

10 2006 (2) SA 311 (CC); [2006] 1 BCLR 1 (CC) paras [434] - [437] (footnotes omitted).

parallel streams of labour law jurisprudence, one under the LRA and the other under section 23(1). It considered this to "be singularly inappropriate".

[435] In *NEHAWU*, this Court considered *NAPTOSA* but refrained from expressing any opinion on it as it found that it had no application in that case. In *Ingledew*, again this Court referred to *NAPTOSA* and observed, that together with other cases referred to in *Ingledew*, it "cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned.

[436] In my view, there is considerable force in the view expressed in *NAPTOSA*. Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on section 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33 is applicable, is in my view inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under section 33 and the common law. Yet this Court has held that there are not two systems of law regulating administrative action – the common law and the Constitution – "but only one system of law grounded in the Constitution." And in *Bato Star (supra)* we underscored this, holding that "[t]he Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself."

[437] Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question."

27] And specifically in the context of the LRA, O'Regan J stated in *SANDU v*

Minister of Defence & ors:[11]

> "Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights."

28] The applicant has not challenged the constitutionality of the LRA in her statement of claim. It lacks the particularity it needs to sustain a cause of action as pleaded. The first exception is upheld.

The second exception: s 187(1)(d) of the LRA principles and *Mackay v ABSA*

29] The second exception is more contentious. It relies on the language of s 187(1)(d):

> "187. Automatically unfair dismissals.—(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) that the employee took action, or indicated an intention to take action, against the employer by—
>
> (i) exercising any right conferred by this Act; or
>
> (ii) participating in any proceedings in terms of this Act."

30] The applicant's reliance on s 187(1)(d) is phrased thus in her statement of

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11 [2007] 8 BCLR 863 (CC) para [52].

claim:

> "The applicant avers that the respondent dismissed her unlawfully [*sic*] in contravention with [*sic*] section 187(1)(d) of the [LRA] and that said [*sic*] dismissal amounts to an automatically unfair dismissal, as she was victimized because she initiated grievances against the respondent's directors and senior management..."

31] It appears from the statement of claim that the applicant's claim of automatically unfair dismissal is premised on the reason for dismissal being that she lodged a grievance in accordance with the company's internal policy. On the face of it, as Mr *Harrison* argued, this is not because she took action by exercising a right "conferred by" the LRA or because she participated in proceedings "in terms of" the LRA; at best, she exercised a right conferred by the company's internal procedures and policies or initiated grievance proceedings in terms of that internal policy. And surprisingly, the applicant did not plead in the alternative that she was simply unfairly dismissed[12] – ie in the alternative to it being an automatically unfair dismissal in terms of s 187(1)(d).

32] The excipient's difficulty is that Mlambo J dealt with exactly such a scenario in *Mackay v ABSA*[13]*.*

33] As that judgment is directly in point, I shall quote extensively from it. Taking a purposive approach to the interpretation of s 187(1)(d), Mlambo J held:[14]

> "[11] [C]an one find that the lodging of a grievance by Mackay amounted to taking action against the respondents by participating in proceedings in terms of the Act[?]. Nowhere does the Act make explicit provision protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such as a grievance procedure or code. A provision of the Act that mentions grievances specifically is section 115(3)(d) which provides:

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12 As contemplated in ss 186(1)(a) read with s 191 of the LRA.

13 *Supra.*

14 *Ibid.* paras [11] – [18].

'(3) If asked, the Commission may provide employees, employers, registered trade unions, registered employers' organisations, federation of trade unions, federations of employers' organisations or councils with advice or training relating to the primary objects of this Act, including but not limited to –

. . .

(d) preventing and resolving disputes and employees' grievances."

On this basis therefore it appears that, on the face of it, there is no explicit provision regarding the lodging of a grievance being regarded as a proceeding in terms of the Act.

[12] Does it mean therefore that the absence of specific provisions regarding the lodging of a grievance by an employee cannot be regarded as a right conferred by the Act or being regarded as a proceeding in terms of the Act? Was this specific conduct intended to be excluded from the ambit of the Act? If this was the intention how are claims based on this situation to be dealt with? A quick glance at section 191 of the Act reveals that the scenario *in casu* is not contemplated. This scenario is also not contemplated in item 2 of Schedule 7[15] of the Act. Could this mean that the Commission and this Court cannot arbitrate or adjudicate a dispute of this nature because the Act does not refer to it in specific terms?

[13] Section 3 enjoins any person applying the Act to interpret its provisions:

1. to give effect to its primary objects;

2. in compliance with the Constitution; and

3. in compliance with the public international law and obligations of the Republic.

This means in short, that one should interpret the Act in a manner that does not lead to absurd consequences.

[14] One of the main objects of the Act is to give effect to and

15 (now repealed).

regulate the fundamental rights conferred by section 27 of the interim Constitution of the Republic of South Africa which is now section 23 of the Constitution of the Republic of South Africa 108 of 1996, as well as to promote the effective resolution of disputes (section 1(a) and (d) of the Act). The Constitution is the supreme law of the land and it entrenches the following right: “Every person shall have the right to fair labour practices” (section 23(1)).

[15] The Act is intended to regulate and govern the relationship between employee and employer... In keeping with the Act’s main objects all disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. In the light of the aforegoing it is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act. One of such disputes is Mackay’s claim which he has chosen to base on section 187(1)(d) of the Act.

[16] This Court is the chief custodian of the responsibilities of resolving labour disputes. It must comply with the Constitution in its quest to guarantee the right to fair labour practices. Section 39 of the Constitution enjoins any court, forum or tribunal when interpreting the Bill of Rights, to promote the values that underline an open and democratic society based on human dignity, equality and freedom, and to consider international and foreign law. In the same section the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, and objects of the Bill of Rights.

[17] This Court must further comply with the public international law obligations of the Republic. The Republic is a signatory to the International Labour Organisation and must therefore comply with its conventions. Convention 158 article 5 provides:

“The following inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity

of, a worker's representative;

(c) the filing of a complaint of participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave."

The filing of a complaint against an employer is specifically mentioned. It is also noteworthy that the provisions of article 5 are mirrored in section 187(1).

[18] Therefore in keeping with the main object of the Act, ie of resolving all labour disputes effectively, and with the constitutional guaranteed right to fair labour practices it must follow that a purposive interpretation of section 187(1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As *in casu*, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act, ie when section 187(1)(d) was enacted. This is on the basis that the disputes specifically mentioned in section 187(1) are of the same kind as the dispute *in casu*."

34] It is so, as Mr *Harrison* persuasively argued, that the absence of a remedy in terms of s 187(1)(d) does not leave an employee in the position of Mr Mackay or Ms de Klerk (the applicant) without any remedy. She can still claim unfair dismissal in terms of s 186; of course, that would cap her compensation at 12 months instead of 24 months.

35] However, I am not persuaded that the purposive interpretation adopted by Mlambo J is clearly wrong. It does seem anomalous that an employee in the position of Ms de Klerk or Mr Mackay should not enjoy special protection. Why would a whistleblower enjoy special protection in terms of s 187(1)(h), but not an employee who lodges a grievance in terms of her own employer's procedures?

36] I should add that *Mackay* was overturned on appeal.[16]But it was overturned on the facts, the LAC finding that, in fact, the lodging of a grievance was not the reason for Mackay's dismissal. The LAC therefore found it unnecessary to rule on the legal question of interpretation discussed above.

37] In the absence of any finding to the contrary by the LAC, I consider the interpretation adopted by Mlambo J to be sufficiently persuasive not to prevent the applicant from pursuing her claim in those terms. The interpretation in *Mackay* appears to me to give effect to the Constitutional values discussed in the quoted passage. I am not in a position to disagree with the learned judge's finding on the legal position.

38] The second exception is therefore dismissed.

The third exception: LRA section 5(1)

39] The applicant also relies on s 5(1) of the LRA as it "precludes any discrimination against an employee for exercising any rights conferred by the Act".

40] The subsection reads, quite simply:

> "No person may discriminate against an employee for exercising any right conferred by this Act."

41] The applicant has not set out any grounds for her claim of alleged discrimination by reference to the specific employer actions outlined in s 5(2), neither has she claimed any ground of discrimination.

42] Regardless of whether the employee exercised any right "conferred by the Act", she has simply not set out any cause of action relating to discrimination. The claim under this heading is vague and embarrassing by virtue of failing to make out a cause of action with the requisite clarity.

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16 *ABSA Bank Ltd & another v Mackay* [2000] ZALAC 18 (CA 89/1999, 22 August 2000).

Conclusion

43] The first and third exceptions are upheld. The second exception is dismissed.

44] Both parties have been partly successful. I do not deem it prudent in law or fairness to make a costs order at this preliminary stage of the proceedings.

Order

45] The first and third exceptions are upheld. There is no order as to costs.

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AJ Steenkamp

Judge of the Labour Court

APPLICANT:	Attorney GJ de Villiers -Möhr, Somerset West.
RESPONDENT:	Attorney SW Harrison of Edward Nathan Sonnenbergs, Cape Town.