THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JS 1042/19

In the matter between:

JACOBSON, MERWYN JACK **Applicant**

and

VITALAB **Respondent (Excipient)**

Application heard: 17 May 2019

Judgment delivered: 28 May 2019

JUDGMENT

VAN NIEKERK J

[1] On 3 April 2019, the applicant filed a statement of claim in this court which he seeks an order declaring his dismissal to be automatically unfair, alternatively substantively unfair; declaring his dismissal to be procedurally unfair; and seeking reinstatement alternatively compensation.

[2] The applicant is a specialist medical practitioner; the respondent is a medical practice that until 31 August 2018, employed the applicant. The applicant was a

founding director and shareholder of the respondent. He was also a director (and remains a shareholder) of a property-owning company (Strawberry Bush 3 (Pty) Ltd), the owner of premises in which the medical practice is situated.

[3] During 2016, the directors and shareholders of the respondent held discussions on an appropriate retirement age and agreed that 70 was a reasonable age at which to retire. The applicant expressed the wish to continue working beyond that age, subject to his good health, until the age of 75. To give effect to this wish, the parties agreed that the applicant would be employed on a series on annual fixed term contracts of employment. On 13 May 2017, the applicant and the respondent signed a written fixed term contract of employment. The applicant agreed to be employed in the position of a reproductive medicine specialist for the period 1 July 2017 to 30 June 2018, on the terms reflected in the agreement.

[4] During 2017, the applicant resigned as a director of the respondent and Strawberry Bush, but remains a shareholder. There is a dispute among the shareholders as to the value of the shares in these entities.

[5] In May 2018, the respondent furnished the applicant with a service agreement for the period 1 July 2018 to 31 May 2019. The terms of the draft agreement suggested a settlement of the dispute regarding the applicant's various shareholdings. There was no agreement on the terms of the offer, and the applicant continued working at the practice, on the same terms, beyond the expiry of the fixed term contract on 30 June 2018. On 9 July 2018, a second proposed agreement was sent to the applicant, in terms of which he would agree to retire from active practice and resign as an employee of the respondent, that he would sell his shares in the respondent for a stipulated price, and that he would be re-employed by the respondent until 31 May 2019 at a stipulated net salary. The applicant refused to accept the offer, stating that until he received financial information that he had requested in relation to the respondent and Strawberry Bush, he could not consider selling his shareholding in either entity.

[6] On 26 July 2018, the respondent's attorneys wrote to the applicant and advised him that unless the service agreement was signed by 30 July 2018, his services

would be terminated. The applicant refused to sign the contract, and reiterated that he remained a shareholder in the respondent and Strawberry Bush, and that his shares had not been sold.

[7] On 1 August 2018 the respondent's attorneys wrote to the applicant recording that he had been employed in terms of a fixed term contract that expired on 30 June 2018, and that without prejudice to its rights, the applicant had been permitted to continue in his employment for the month of July. The letter went on to record that the applicant's employment was terminated with effect from 31 August 2018.

[8] The applicant contested the fairness of his dismissal and referred the dispute to the CCMA. On 19 September 2018, a certificate of non-resolution was issued and the dispute was later referred to this court on the terms reflected in paragraph [1] above.

[9] The applicant's first claim, that the termination of his employment constituted a dismissal and that the dismissal was automatically unfair, is premised on the assertion that the main or proximate cause of his dismissal was his refusal to accept a demand in respect of a matter of mutual interest between the applicant and the respondent. In particular, the applicant asserts that he was dismissed because he refused to accept the respondents' demand that he sell his shares in the respondent and/or Strawberry Bush on the terms set out in the proposed service agreement dated 9 July 2018.

[10] The respondent excepts to the applicant's claim on the basis of four discreet complaints. The only compliant pursued at the hearing is that the applicant's claim fails to sustain a cause of action in that the demand on which the applicant relies for the purposes of s 187 (1) (c) does not concern a matter of mutual interest. In particular, the excipient contends that two different relationships emerge from the applicant's pleadings. The first is a corporate relationship, in which the applicant is and remains a shareholder of entities owning shares that have commercial value. The second is the applicant's employment relationship with the respondent. The respondent contends that the first of these

relationships, and any dispute as to the value of the applicant's shares, is not subject to the LRA. To the extent that the applicant contends that he was dismissed for refusing to accept the respondent's demand that he sells his shares in the respondent and Strawberry Bush on the terms set out in the proposed agreement of 9 July 2018, this was a term that concerned the corporate and not the employment relationship between the parties, and thus did not concern a matter of mutual interest for the purposes of s 187 (1) (c).

[11] Although the Rules of this court do not specifically regulate exceptions to a statement of claim, in *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC), Waglay J (as he then was) said the following:

> **5**. Rule 6 of the Rules of this Court deals with referrals of disputes by way of a statement of claim. Rule 6(1) (b) provides that "a document initiating proceedings, known as a 'statement of claim' … must have a substantive part containing the following information:
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> **(i)** The names, description and addresses of the parties;
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> **(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 the document;
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> **(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 the document; and
>
> **(iv)** The relief sought".
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> **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.
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> **7.** The material facts and the legal issues must be sufficiently 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-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.

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-trial 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.

[12] In order to succeed, the excipient must necessarily persuade the court that on every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed (*First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA)). Care must be taken to distinguish the facts which must be

proved in order to disclose a cause of action from the evidence necessary to prove them. The determination of the latter, in each particular case, is essentially a matter of substantive law rather than procedure (*Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T)).

[13] The respondent contends that s 187 (1) (c) has no application in the present dispute, and that the applicant accordingly has no cause of action. During argument, the nature and scope of s 187 (1) (c) was considered at some length, as was its history, which is of some significance to the present dispute.[1]

[14] What emerged during argument is that the essential enquiry in the present instance is not whether the dispute between the parties concerns a matter of mutual interest between them. Rather, the issue to be determined is whether s 187 (1) (c) finds any application in a dismissal dispute that concerns an individual employee.

[15] Under the 1956 LRA, a lock-out could legitimately assume forms other than an exclusion from the workplace, including a termination of employment. This gave rise to the phenomenon of the 'lock-out dismissal' (sometimes referred to as a 'tactical dismissal') as opposed to a common law or 'final' termination of the employment contract. The present LRA amended the definition of a lockout so as to exclude any reference to a termination of employment, and inserted s 187 (1) (c) into the list of reasons that would be automatically unfair. The original wording of the section provided that it was automatically unfair for an employer to dismiss an employee if the reason for the dismissal was <u>to compel the employee to accept a demand in respect of any matter of mutual interest</u> between employer and employee (own emphasis). In other words, an employer could not legitimately resort to dismissal as part of the power play in a collective dispute.

[1] See generally Clive Thompson 'Bargaining, Business Restructuring and Operational Requirements Dismissal' (1999) 20 *ILJ* 755; C Todd and G Damant 'Unfair Dismissal – Operational Requirements' (2004) 25 *ILJ* 896; T Cohen 'Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?' (2004) 25 *ILJ* 1883; Clive Thompson 'Bargaining over Business Imperatives: The Music of the Spheres after *Fry's Metals*' (2006) 27 *ILJ* 704; and Rochelle Le Roux *Retrenchment Law in South Africa* (Lexis Nexis) 2016 at chapter 2.4.

[16] In *Fry's Metals (Pty) Ltd v NUMSA* [2003] 2 BLLR 140 (LAC), the Labour Appeal Court held that when a dismissal was final and irrevocable, by definition, the reason for dismissal could not be to compel the acceptance of a demand. The same principle was applied with a different outcome on the facts in *CWIU v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

[17] Section 187 (1) (c) was amended in 2014 to provide that a dismissal is automatically unfair if the reason is '*a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer'* (own emphasis). The purpose of the amendment (and the difficulty with the pre-2015 formulation of s 187 (1) (c)) is made clear by the Explanatory Memorandum that accompanied the Amendment Bill:

> This section is amended to remove an anomaly arising from the interpretation of section 187 (1) (c) in [Fry's Metals] which held that the clause had been intended to remedy the so-called 'lock-out' dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with decisions such as [Algorax] is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions. The amended provision seeks to give effect to the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept the demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the LRA and is consistent with the purposes of the Act.

[18] Although the pre-amendment version of s 187 (1) (c) was invoked in a number of dismissal disputes concerning individual employees[2], the question that arises consequent on the amendment and the clear statement of its purpose is whether an individual employee may claim the protection afforded by the section.[3]

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[2] See, for example, *Solidarity obo Wehncke v Surf4Cars (Pty) Ltd* (20140 35 *ILJ* 1982 (LAC).

[3] This case does not concern the effect of the amended s 187 (1) (c) on the principle established in *Fry's Metals* – that was a matter dealt with by this court in *National Union of Metalworkers of SA obo members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd* (2018) 39 *ILJ* 1625 (LC), currently on appeal to the LAC.

[19] It would seem to me from the wording of the amended s 187 (1) (c) and the explication of its purpose in the Explanatory Memorandum that the application of the section is limited to the collective sphere. The Explanatory Memorandum makes clear that the purpose of the amended s 187 (1) (c) is to protect the integrity of the collective bargaining process. It precludes the use of dismissal as a legitimate instrument of coercion in the collective bargaining process.[4] That process, by definition, contemplates concerted action and the participation of more than one employee.[5] For the section to find application therefore, there must have been an employer demand made of two or more employees, they must have refused to accept that demand and they must have been dismissed in consequence of that refusal.[6] The conclusion that s 187 (1) (c) is not intended to apply in individual dismissal disputes is fortified by the wording of the provision itself – the reference is to a 'refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer' (own emphasis). The use of the plural makes clear that the extent of the prohibition against dismissal applies only where an employer seeks to extract a concession by employees to demands made in a collective context.

[20] In the present instance, the respondent does not dispute that there was an employment relationship between the parties, or that it demanded that the applicant sell his shares in Strawberry Bush on the terms set out in the proposed service agreement of 9 July 2018. Even if I accept the applicant's contention that the demand is one that concerns a matter of mutual interest (because it is inextricably bound to the employment relationship between the parties, and in particular, an agreement to regulate the applicant's continued employment by the respondent)[7] the reason for dismissal is not one contemplated by s 189 (1) (c)

[4] Clive Thompson 'Bargaining over Business Imperatives: The Music of the Spheres after *Fry's Metals*' (*supra*).
[5] See *Schoeman & another v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC).
[6] (see *National Union of Metalworkers of SA obo members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd* (2018) 39 *ILJ* 1625 (LC), where this court referred with approval to Rochelle le Roux *Retrenchment Law in SA* (Lexis Nexis 2016) pp 44 -50)
[7] See *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 *ILJ* 3241 (LC; *Department of Home Affairs & another v Public Servants Association & others* (2017) 38 *ILJ* 1555 (LC).

since the present dispute does not concern the integrity of collective bargaining, nor does it concern more than one employee.

[21] It follows that the exception stands to be upheld. Given the basis of the conclusion to which I have come, it is not necessary for me to decide whether the distinction that the respondent seeks to draw between a 'commercial' dispute on the one hand and an 'employment' dispute on the other is a valid distinction for the purposes of determining whether there is a 'matter of mutual interest' between the parties for the purposes of s 187 (1) (c).

[22] The parties were agreed that the consequence of any order upholding the exception is that the applicant's claim based on an automatically unfair dismissal be struck out and the matter remitted to the CCMA for an arbitration hearing on the merits of the applicant's alternative claims based on a substantively and procedurally unfair dismissal.

[23] Finally, in relation to costs, s 162 of the LRA confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. Even though the respondent has succeeded in these proceedings, it seems to me that the interests of the law and fairness are best served by each party bearing its own costs. This is particularly so given the respondent's election to abandon three of the four grounds of exception only at the stage of argument, and the unnecessary costs of preparation incurred by the applicant as a consequence.

I make the following order:

1. The exception set out in paragraph 3 of the Notice of Exception is upheld.
2. The applicant's claim that his dismissal constituted an automatically unfair dismissal is struck out.
3. The applicant's claim of unfair dismissal is remitted to the CCMA for an arbitration hearing.

4. There is no order as to costs.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. S Collet, instructed by George Wolff Attorneys

For the respondent (excipient): Adv. P Kennedy SC, instructed by Cranko Karp Attorneys