

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 6356/21

(1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO

Date: 26 October 2021

E van der Schyff

In the matter between:

MARTIN TUDU MPE

EXCIPIENT

and

MAMOTABO ROSSY MATSHELA

RESPONDENT

 JUDGMENT

Van der Schyff J

- [1] The plaintiff issued summons against the defendant during February 2021. The defendant raises an exception in terms of Rule 23 of the Uniform Rules of Court. The defendant avers the particulars of claim fail to disclose a cause of action. In the consideration of the exception, regard will first be had to the particulars of claim, and

thereafter to the grounds in support of the exception. For purposes of clarity, the parties are referred to as the plaintiff and the defendant.

- [2] The plaintiff pleads in her particulars of claim that she concluded an oral agreement with the defendant during February 2016 in terms whereof she was to be hired as a '*locum tenen*' cardiologist for a period of six months. The essential terms of the oral agreement are the following:

- i. The plaintiff would examine private patients between Tuesdays and Thursdays for a period of 6 months;
- ii. She was to attend to after hours, non-private work, clinical trials, and mentoring of the defendant's B tech and Master's students;
- iii. She was to be paid an annual wage of R923 076.22;
- iv. In 2017, the defendant paid an amount of R569 400.00 to the plaintiff. The outstanding amount of R546 226.28 remains unpaid;
- v. During 2017 the plaintiff demanded payment of the outstanding money and the defendant undertook to transfer the outstanding amount, but failed to do so;
- vi. The defendant terminated the agreement during March 2018;
- vii. Despite demand the amount of R546 226.28 remains outstanding.
- viii. The defendant submits that, on the plaintiff's pleaded agreement, the defendant would have employed her for a period of six months, and that her "annual wage" amounted to R923 076.22. Accordingly, she would be entitled to an amount of R461 538.11 as payment for the six months' period of employment. She was paid an amount of R569 400.00 in 2017, resulting in an over-payment in the amount of R107 861.89. On the plaintiff's pleaded version, the defendant has duly performed in terms of the oral agreement, and in the result, the plaintiff's particulars of claim fail to disclose an action.

- [3] Rule 23 of the Uniform Rules of Court distinguishes between pleadings that are vague and embarrassing, and pleadings lacking averments which are necessary to sustain a cause of action. An excipient relying on this ground must persuade the court that upon every reasonable interpretation of the averments, no cause of action

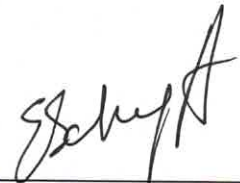
is established.¹ The Supreme Court of Appeal explained that a charitable test is used on exception, especially in deciding whether a cause of action is established and the pleader is entitled to a benevolent interpretation.²

- [4] The plaintiff does not plead that she was indeed employed by the defendant pursuant to the conclusion of the oral agreement. No nexus between the 'annual wage of R923 076.22' and the confirmed period of 6 months has been pleaded. Based on the pleaded amount of the annual wage and assuming the plaintiff was only employed for a period of 6 months, she would have been entitled to only R461 538.11, resulting, as defendant correctly pointed out, an over-payment of R107 861.89. The particulars of claim, accordingly, do not disclose a cause of action, and the exception is well founded.

ORDER

In the result the following order is made:

1. The exception is upheld.
2. The plaintiff's particulars of claim are struck out.
3. The plaintiff is granted leave to amend the particulars of claim within 10 days of the date of this order is order.
4. The plaintiff is to pay the costs of the exception.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 26 October 2021.

¹ *Theunissen en Andere v Transvaalse Lewendehawe Koöperasie Beperk* 1988 (2) SA 493 (A) at 500E –F.

² *First National Bank Southern Africa v Perry NO and Others* 2001 (3) SA 960 (SCA) at 965D.

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| Instructed by: | MJ SEEMELA ATTORNEYS |
| Date of the hearing: | 25 October 2021 |
| Date of judgment: | 26 October 2021 |