




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

DATE 05 January 2023


SIGNATURE

CASE NUMBER: 6055/2021

In the matter between:

MACGREGOR KUFA

PLAINTIFF

and

NATIONAL RESEARCH FOUNDATION

FIRST DEFENDANT

DR MOLAPO QOBHELA

SECOND DEFENDANT

MR BISHEN SINGH

THIRD DEFENDANT

DR DOORSAMY PILLAY

FOURTH DEFENDANT

DR NOEL SAMUEL ROCKY SKEEF

FIFTH DEFENDANT

DR NOMPUMELELO OBOKOH

SIXTH DEFENDANT

PROF LOYISO NONGAXA

SEVENTH DEFENDANT

MR JACOB MAHLANGU

EIGHTH DEFENDANT

DR BEVERLY DAMONSE

NINTH DEFENDANT

REASONS FOR ORDER OF 11 APRIL 2022

TLHAPI J

[1] These reasons pertain to a requested for them as a result of an order granted on 11 April 2022 in the exception to the plaintiffs particulars of claim, which read:

- “1. The Defendants’ Exceptions are upheld with costs;
2. The costs in question shall:
 - 2.1 Be paid by the plaintiff on the scale as between party and party;
 - 2.2 Include the costs of two counsel; and
 - 2.3 Include the costs occasioned by the Plaintiff’s Rule 28(1) Notice of 6 November 2021, the Defendants’ Rule 28(3) Objection of 10 November 2021 and postponement of this matter when it was previously set down for 16 November 2021.
3. The Particulars of Claim are set aside.
4. 4.1 The Plaintiff is granted leave to deliver amended Particulars of Claim having regard to this order, within 15 days of the date of this order.

4.2 Should the Plaintiff fail to do so, then the Plaintiff's action will be automatically regarded as dismissed with costs on the scale as between party and party, including the costs of two counsel.

[2] This order was preceded by one granted by agreement between the parties on 15 November 2021 which read:

"By agreement between the parties and in light of the Plaintiff's Rule 28(1) Notice dated 8 November 2021 and the Defendants' Rule 28(3)) objection dated 10 November 2021, it is ordered as follows with regard to the Defendants' exceptions that were enrolled for hearing on the opposed roll of 15 November 2021;

1. It is recorded that the Plaintiff is entitled (if so advised) to bring application in accordance with Rule 28(4) within 10 days of the Defendants' Rule 28(3) Objection, and that if the Plaintiff should do so, then the Rule 28(4) application and the remaining Exceptions should best be heard together, with the consequence that the remaining exceptions cannot be heard in the week of 15 to 19 November 2021.
2. In the premises the remaining exceptions are postponed *sine die* for later hearing (together with the Plaintiff's Rule 28(4) application, should such an application be timeously brought).
3. The costs of the postponement are reserved."

The purpose of the agreement was to give the plaintiff an opportunity to bring an application to amend the particulars of claim in terms of Rule 28(4) which application, in terms of the above order, the plaintiff agreed to bring within 10 days of the Defendant's Rule 28(3) objection. The plaintiff failed to bring the said application

within the 10 days so allowed and the period expired on 24 November 2021.

[3] Prior to the order of 15 November 2021 the defendants had already filed and served its Index to the Exception Application and the Heads of Argument for the hearing on 15 November 2021. An application for the exception to be placed on this opposed roll was made by the defendants' on 2 February 2022 and a set down for the hearing of the exception 11 April 2022 was served by email and receipt was acknowledged on 7 February 2022 by the plaintiff's attorneys. There can therefore be no excuse or mistaken belief that the exception would not be heard on 11 April 2022.

[4] On CaseLines the Amended Particulars of Claim and proof of service were filed on 6 April 2022. The proof of service by email is dated 9 January 2022. The Plaintiff filed an application on 9 April 2022 for an order condoning the late service and or filing of the amended particulars of claim in terms of Rule 28(5) read with Rule 27 of the Rules of Court; Condoning and extending the time frames of the Rule 28(1) Notice to Amend the particulars of claim served on the first to the ninth respondent on 21 December 2021; that the amended particulars of claim be deemed to be filed in terms of Rule 28(5) and (7) and costs if opposed. The Plaintiff's Heads of Argument were loaded on CaseLines on 10 April 2022, a day before the hearing and were seen by me on the morning of the hearing.

[5] Both counsel Mr Mullins for the excipient and Mr Mahasha for the plaintiff had discussions prior to the hearing. The Mr Mullins contended that the Rules under which the application for condonation was brought in particular Rule 27 does not apply to a failure to file amended pages, that failure to do so, the amendments would fall away. Furthermore, except for exception six, relating to the 10% of the pension, the proposed amendment does address that it seeks to withdraw the plea relating thereto, even though he contended, the withdrawal did not remedy the excipiability in that regard. Otherwise, it was contended that the remainder of the exceptions

were good, that it was better for the exceptions to be upheld if the court agreed, that the plaintiff consider the exceptions and seek to amend.

Another issue addressed by Mr Mullins was the possibility of the matter being postponed having regard to state the papers, the heads for the plaintiff being filed late, the duration that would be required to argue the matter if proceeded with, which would exceed five hours which in terms of the practice manual the matter would have to be allocated to the third court motion, that if I was amenable to the matter being postponed, which the excipients did not agree with, the excipients would ask for wasted costs, which costs would include costs of two counsel. Mr Mahasha was not in agreement regarding the issue on costs he contended that since there was a main matter still to be adjudicated upon, the excipients were not losing anything and that the costs be reserved.

[6] I took the view that before me were the exceptions which remained extant and having appraised myself of the heads of argument, which were the only ones filed, the exceptions were good, and indicated that I would uphold the exceptions and a draft order was presented. The only objection raised by Mr Mahasha was again the issue of costs of two counsel and that these be reserved. Both parties have engaged more than one counsel, the plaintiff in preparation of the pleadings expect for this application for condonation and the defendant has always had two counsel throughout also with regard to the exception before me and I regarded the issues as complex, hence my allowing costs as requested.

[7] In giving a brief outline of the matter it is such that the plaintiff is suing the defendants after his dismissal for exposing alleged corrupt activities of the defendants. He seeks to set aside a decision taken by the First Defendant to use a forensic report and that of the Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Defendants to dismiss him from the employment of the First Defendant. Summons were accordingly issued on 5 February 2021 against the defendants, and the following was prayed for:

- a) A declaratory order that the Plaintiff's dismissal by the First Defendant was unlawful and the contract deemed to be extant;
- b) In respect of Claim on breach of employment contract, payment of R17 000 000 (seventeen million rands);
- c) With ten percent of the claim being paid from the pension interest of the Second, Third, Fourth, Fifth, Eighth and Nine Defendant jointly and severally each paying the other to be absolved;
- d) Interest on the amount at the rate of 15.5 percent per annum;
- e) Costs of suit on an attorney and client scale against the second to the ninth defendants personally inclusive of the employment of three counsel;
- f) Alternatively, costs against all the Defendants jointly and severally on an attorney and client scale each paying for the other to be absolved inclusive of costs of employment of three counsel;

[8] The plaintiff alleged his dismissal was unfair and that this court had jurisdiction to hear the matter. The dismissal constituted a material breach of his contract of employment and he claimed damages being the loss of emoluments up to retirement age for the alleged "wrongful and intentional" dismissal. He relied on the Common Law; on the Basic Conditions of Employment Act 57 of 1997 in terms of section 77(3) read with 77A(e) thereof; on section 157(2) of the Labour Relations Act 66 of 1965(as amended), Furthermore, the summons was issued in the public interest in terms of section 38 of the Constitution Act 108 of 1996.

[9] In light of the order granted on 11 April 2022 it is necessary to mention the exceptions. The defendants excepted to the Plaintiff's Particulars of claim as lacking averments necessary to sustain an action, that some allegations were vexatious,

irrelevant and scandalous and that some allegations had no bearing to the actual claim or claims as briefly stated below. Not all exceptions have been quoted:

“1. The First Exception- Incoherence: That the 91-paragraph particulars of claim are replete with irrelevant, scandalous and vexatious allegations, so as to fail to make out an action, Examples were outlined in 1.3.1 -1.3.16.

1.3.1 In paragraphs 14 -19 the second, third, fourth, and eighth defendants (para 14) or the second, third, fourth, sixth, seventh and eighth defendants (para 18) are alleged to have misappropriated funds “either individually or collectively” without laying a foundation for the allegations;

1.3.2;

1.3.3 Allegations about ghost workers. An “elaborate fraudulent scheme, sexual impropriety or delinquency that have no bearing on the actual claims or claims as seen in paragraph 21; 30,3 41, 61 and 62 of the particulars of claim;

1.3.4

1.3.5;

1.3.6 Allegations about the first defendant’s board’s tenure “marked by decay and financial ruin (para 25);

1.3.7;

1.3.8 Allegations about the ‘unlawfulness of [the] actions’ of the first defendant and that they ‘keep evading legal consequences and fly under the radar of corruption’ (para 28);

1.3.9;

1.3.10;

1.3.11 Paragraph 31 contains the allegation that an unspecified factor 'is one of the reasons why the employment contract of the second defendant could not be renewed;

1.3.12;

1.3.13;

1.3.14 (a) *a number of paragraphs contain gratuitous remarks which cannot be pleaded and do not belong in pleadings;*
 (b) three examples are (a) paragraph 40.9 ('was hell bent and had an inkling'), (b) paragraph 40.10 ('[u]ndeterred by the onslaughts of victimisation'), and (c) paragraph 40.16('that's when the night to (*sic*) the long knives transpired');

1.3.15 (a) the particulars of claim are replete with footnotes, sourcing authority for one purpose or another.
 (b) footnotes have no part in particulars of claim and cannot be pleaded to.
 (c) the inclusion of the footnotes renders these particulars of claim incoherent.

1.3.16 There is an allegation in paragraph 68 to the effect that the 'plaintiff will in due course be bringing a review application to set aside the Deloitte Report which is nonsensical

2. The Second Exception – A Claim for contractual damages is inconsistent with a challenging of the dismissal allegedly giving rise to the contractual damages:

2.1 It is apparent from prayers (a) and (b) of the particulars of claim that the plaintiff claims both reinstatement ('that the..... contract [is] deemed extant') and payment of damages consequent upon dismissal.

2.2 see also, to the same effect, paragraphs 78 and 81 (the dismissal must be set aside) and 82 (the plaintiff must be paid damages for what he would allegedly have earned up to retirement age, had he not been dismissed) of the particulars of claim.

2.3 claiming damages for breach of contract on the basis of the consequences of that breach (loss of employment) is inconsistent with at the same time, and in the same document, claiming the setting-aside of that breach, which setting aside if granted, obviate the alleged contractual damages.

2.4.....the claim for the alleged breach of contract of employment is inconsistent with (and in effect contradicted by) the claim for reinstatement, and by virtue of this contradiction the allegations in the particulars of claim consequently do not sustain an action against any of the defendants.

3. The Third Exception – Parallel Proceedings in the Labour Court:

3.1 It is apparent from paragraph 4 of the particulars of claim, read together with Annexure "M2" thereto, that at the same time as the plaintiff is pursuing this action in the High Court seeking the setting aside of his dismissal (and payment of damages based on the consequences of that dismissal), he is seeking reinstatement in the Labour Court.

3.2 See in this regard annexure 'M2' to the particulars of claim and the allegation in paragraph 4 of the particulars of claim that the plaintiff is challenging such [allegedly] automatically unfair dismissal at the

Labour Court under the statutory framework in question.

3.2 A claim for contractual damages pursuant to dismissal is inconsistent with a challenging of that dismissal under the statutory framework in question.

3.3.....

3.4.....

3.5.....

4. The Fourth Exception – Contractual Damages are limited in Common Law:

4.1the plaintiff's claims are couched in the particulars of claim as being common law contractual claims for contractual damages for alleged breach of contract in the form of an alleged unlawful dismissal.

4.2 The plaintiff's contract of employment:

4.2.1 is not on the face of it a fixed term contract (no allegation to that effect is made in the particulars of claim.

4.2.2 On a proper construction of the allegations contained in the particulars of claim, read with section 37 and 38 of the Basic Conditions of Employment Act 75 of 1997, is a monthly contract terminable at the instance of either party on a month's notice; and

4.2.3 Does not, on the face of it, entitle the plaintiff to continued employment until retirement, without the possibility of termination by notice.

4.3 A common law claim for contractual damages for alleged unlawful dismissal is limited to the amount the plaintiff would have earned were it not for the alleged breach.

4.4.....

4.5.....

4.6.....

4.7.....

5. The Fifth Exception – The particulars of claim do not make out a case for contractual breach:

5.1.....

- 5.2 The grounds on which the plaintiff was dismissed are outlined in paragraph 40.21 of the particulars of claim (insolence, verbal abuse, making false allegations against a fellow employee, bringing of the name of the first defendant into disrepute).

5.3

5.4

- 5.5 The allegations in paragraphs 45 to 56 of the particulars of claim do not go far enough to establish that the plaintiff's dismissal constituted a breach of his contractual rights.

5.6.....

5.7.....

6. The Sixth Exception – No basis for the plaintiff's predilection for payment out of the second, third, fourth, fifth, eighth and ninth defendant's pension funds:

- 6.1 The sixth exception:

6.1.1. Relates to the component of the plaintiff's claim against the second, third, fourth, fifth, eighth and ninth defendants.

Personally, in terms of 10% thereof 10% is claimed from their pension interests, as per paragraph 84 read together with prayer (c) of the particulars of claim; and

6.1.2.....

6.2.....

6.3. The particulars of claim lack averment necessary to sustain this distinct component of the claim

6.4 More particularity, but without thereby derogating from the generality of what was stated in paragraph 6.3 above:

6.4.1. The particulars of claim do not make out any basis on which the plaintiff would be entitled to payment out of the second, third, fourth, fifth, eighth and ninth defendant' pension interests (as opposed to any other source) in the event the plaintiff is entitled to any payment whatsoever from them;

6.4.2. The particulars of claim lack averments that would be necessary to overcome the provisions of section 37A of the Pensions Funds Act 24 of 1956 in terms of which 'no benefit provided for in the rules of a registered fund....or right to such benefit ...shall, be capable of being reduced, transferred or otherwise ceded...all be liable to be attached or subjected to any form of execution under a judgment or order'.

6.5.....

6.6.....

7. The Seventh Exception – No case is made out for the Personal Liability of the second to ninth defendants:

7.1.....

7.2.....

7.3. As appears from paragraphs 40.1 and 42 to 44 of the particulars of claim, the plaintiff's contract of employment was with the first defendant.

7.4. The plaintiff fails to make averments that would render the second to ninth defendants personally liable to the plaintiff for an alleged breach of the plaintiff's contract of employment with the First Defendant.

7.5. More particularly, but without thereby derogating from the generality of the foregoing:

7.5.1. The plaintiff does not allege that any of the second to ninth defendants were party to his employment contract, and in the premises does not, and cannot allege that any of them breached contractual obligations to him.

7.5.2. The plaintiff does not allege grounds on which any of the second to ninth defendants owed him a duty of care in relation either to his employment, or to the termination thereof.

7.5.3. Although the plaintiff alleges certain conduct on the part of the second (paragraph 86.1), third, fifth and eighth (paragraph 86.2), sixth and seventh (paragraph 86.3) and ninth (paragraph 86.4) defendants:

(a) the plaintiff does not even allege conduct on the part of fourth defendant; and

(b) the allegations which the plaintiff makes with regard
to the second, third, fifth, sixth, seventh, eighth and
ninth defendant do not lay a basis for personal liability
on the part of such defendants

7.6.....

7.5.....”

[10] It is common course that the plaintiff on 8 November 2021 by notice in terms of Rule 28(1) informed the defendants of the intention to amend the particulars of claim. The defendant objected by the filing of a notice of objection in terms of Rule 28(3) on 10 November 2021. The parties agreed and consented to an order being made allowing the plaintiff within 10 days of the objection so filed to launch an application to amend his particulars of claim in terms of Rule 28(4). Applicable in the circumstance are Rules 28(1), 28(2), 28(3) and 28(4). The plaintiff failed to comply with his undertaking to bring such application which period expired on 24 November 2021. The failure to bring such application and the failure to file the amendments sought rendered the exceptions extant. The plaintiff was served with a set down for the hearing of the exception on 7 February 2022, service was acknowledged and the plaintiff did nothing.

[11] The plaintiff proceeded to effect its amendments and ignored that in terms of Rule 28(4) an application had to be launched since the proposed amendments were objected to. The application in terms of Rule 28(4) would have allowed the parties to engage the legal principles governing applications for amendment as summarised in *Commercial Union Assurance Co Ltd v Waymark NO¹* and would have also addressed some of the issues in exception.

¹ 1995 (2)SA 73 (TK) at 77F-I

[12] The plaintiff brought an application for condonation in terms of Rule 28 (5) read with Rule 27. Counsel for the defendant correctly pointed out that reference to these Rules were not applicable to the application before the court which was solely for the determination of the exceptions which remained extant after the plaintiff failed to comply with the deadline to bring an application in terms of Rule 28(4) by the 24 November 2021. There was an objection filed in terms of Rule 28(3) on 10 November as confirmed by the parties in the Order dated 15 November 2021. In as far as Rule 28(5) is referred to by the plaintiff, this does not reflect the true status of the matter before the court on 11 April 2022. Rule 27² of the Uniform Rules of Court deals with removal of bar, extensions of time and condonation for late pleas and had no relevance in determining the issues at hand. In my view the papers as they stood meant that there was virtually no opposition to exceptions raised by the defendants, furthermore, the amendments raised after the 24 November 2021 are not as a result of an application launched in terms of Rule 28(4).

[13] In as far as the plaintiff's heads of argument which deal in particular with the exceptions are concerned, Mr Mullins for the excipient contended that the exceptions taken were good. The heads of argument filed on behalf of the plaintiff a day before the hearing and were seen by me on the morning of the hearing deal primarily with the application for condonation as it was contended that the exceptions could not be dealt with in view of the condonation application which stayed such hearing. I have already expressed agreement that the Rule 28(5) read with Rule 27 were not

² Rule 27

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as it seems meet,
- (2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the result of the expiry of anytime so prescribed or fixed whether such results flow from the terms of any order or from these Rules.
- (3) The court may on good cause shown condone any non-compliance with these Rules.
- (4) After a rule nisi has been discharged by default of appearance by the applicant the court or a judge may revive the rule and direct that the rule so revived need not be served again.

applicable to the condonation application, therefore there was no opposition to the exceptions, which are good and remain extant. I have appraised myself of all the exceptions summarised above and accompanying heads of argument of the excipient and deal very briefly with a few (while not excluding the remaining not dealt with) , which in my view render the particulars of claim excipiable.

[14] The Second, Third, Fourth and First Exceptions:

Second Exception

(a) It is contended for the defendants that the plaintiff could have sued for damages for dismissal in the alternative to his claim for reinstatement before the Labour Court, that is 'without in any way rendering the one remedy dependent on the other not being granted'. The second claim as stated in paragraph 78 and 81 and in the prayers sought are inconsistent " in paragraph 78: *"the plaintiff seeks to set aside a decision taken by the first defendant ...to dismiss"* and paragraph 81: *"as a result the plaintiff seeks a declaratory order that his dismissal by the first defendant was unlawful and the contract deemed extant"*. Prayer (a) *"a declaratory order that the plaintiff's dismissal by the first defendant was unlawful and the contract deemed extant"*, of the particulars of claim the plaintiff seeks both orders to be granted simultaneously.

Third Exception

(b) It is contended for the excipient that this court cannot entertain a claim for damages arising out of a dismissal when the exact relief is sought in another court (the Labour Court as per annexure "M2" to the particulars of claim – seeking reinstatement in the Labour Court and seeking damages for dismissal in this court). The particulars of claim "should have explicitly stated the claim for damages is conditional upon the reinstatement failing".

Fourth Exception

(c) It is contended for the excipient that the plaintiff had a choice to seek his remedy under the Common Law or in terms of the Labour relations Act and Basic Conditions of Employment Act both referred to as the Labour Law dispensation³. It was contended that a claim based on the Common Law had limitations. Where the employment was not for a fixed term, on termination by the employer the employee would be entitled to a salary equivalent to a month⁴; the employee had no right to a 'perpetual employment'. Furthermore, it was contended that the plaintiff's claim to entitlement of a salary 'he would have earned had he been in the first defendant's employ until retirement isn't in accordance with his common law rights. Where the plaintiff relies on a Labour Law dispensation the remedy available to the plaintiff rests with such statutory remedies afforded by the statutes. For example in *Baloyi supra*⁵

First Exception

It is contended that the particulars of claim as submitted in paragraphs 1.1 and 1.4 consist of irrelevant, scandalous and vexatious allegation and innuendo rendering them totally defective. Further, that a striking out application would be unnecessarily

³ Fedlife Assurance Ltd v Wolaardt 2002 (1) SA 49 (SCA) ; Transman (Pty) Ltd v Dick and Ano 2009 (4) SA 22 (SCA); Baloyi v Public Protector & Others 2021 (2) BCLR 101 (CC) paras [28]. [39], [40], [48]....."[But] the fact a cause of action is limited in certain for a must not be interpreted as obliging an applicant only to pursue that particular cause act.....

.....[D]isputes arising from contracts of employment do not, without mare, fall withing the exclusive jurisdiction of the Labour Court.....

The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court notwithstanding the fact that other potential causes of action exist.....

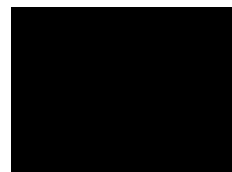
A claim for contractual breach, absent reliance on any provision of the LRA can be identified on Baloyi's papers.

⁴ South African Maritime Safety Authority v Mckenzie 2010(3)SA 601 (SCA) "[a] cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanism of the LRA to obtain a remedy provided for in the LRA"

⁵ Paragraphs [38] and [30] "Had Ms Baloyi sought a claim of unfair dismissal, she would have been required, in terms of section 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court. The reason for this delineation is that the Labour Court and the Labour Appeal Court were 'designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining"

burdensome especially where it would require of the excipient to deal with each and every allegation. In my view, this would render the task burdensome where the excipient would still in addition have to deal with the rest of the grounds of exception.

[15] The above concludes my reasons for the order granted.



V.V. TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCE

ORDER GRANTED ON	: 11 APRIL 2022
FOR THE FIRST APPLICANT	: Adv L Mahasha
INSTRUCTED BY	: MAKHAFOLA & VERSTER INCORPORATED
FOR THE 1st to 9th DEFENDANTS	: Adv K Magano
INSTRUCTED BY	: SAVAGE JOOSTE & ADAMS INC
DATE OF JUDGMENT	: 05 JANUARY 2023