

SOUTH AFRICA / JUDGMENT

Louw v Absa Bank (8214/20) [2021] ZAGPPHC 137 (10 March 2021)

[2021] ZAGPPHC 137**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

8214/20

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE NUMBER: 8214/20**

DATE:

March 2021
SARAH
LOUW Plaintiff
V
ABSA
BANK
Excipient

JUDGMENT**MABUSE J**

- [1] This is a claim for payment of money. On 4 February 2020 the plaintiff issued combined summons against the defendant in which she claimed:
1. Payment of the sum of R4.5 million.
 2. Interest on the set some of R 4.5 million at the legal rate of interest prevailing from time to time from 1 December 2019 to date of final payment.
 3. Costs of suit including the costs of two counsel where employed.

[2] The plaintiff's cause of action is a written agreement called the Separation Agreement which was signed by the plaintiff, acting personally on one side and the defendant, then represented by one Maria Ramos, she being duly authorized in her capacity as the Chief Executive Officer on 8 March 2018 at Johannesburg. The said agreement is attached to the plaintiff's particulars of claim (POC) as annexure 'A'. For purposes of convenience I shall, in this judgment, refer to it as a "Separation Agreement".

[3] The defendant has, on certain grounds that will be highlighted later, raised an exception against the plaintiff's summons. It contends that the plaintiff's POC are vague and embarrassing or fail to disclose

a cause of action. Furthermore, the defendant has delivered a notice in terms of Rules 30A and 23(1) of the Uniform Rules of Court. I will set out the grounds of the Rule 30A later in the judgment.

[4] The parties have delivered heads of argument in the matter.

THE BACKGROUND

[5] The plaintiff has pleaded her case as follows. On or about 8 March 2018 and at Johannesburg the parties concluded a written agreement relating to the termination of the plaintiff's employment with the defendant.

[6] The plaintiff acted personally while the Defendant was represented by a certain Maria Ramos, its Chief Executive Officer, who had been duly authorized thereto by the defendant. As indicated earlier, the said

Separation Agreement is attached to the plaintiff's POC as annexure "A".

[7] The salient terms of the said agreement after that:

7.1 the plaintiff's employment with the defendant was to terminate on 30 April 2018;

7.2 the plaintiff was to be paid six months' notice, calculated on a guaranteed package in accordance with the contract of employment dated 7 November 2012;

7.3 between the date of signature of the Separate Agreement and the termination date, the plaintiff was to complete a handover of any of the tasks to a person designated by the defendant. Furthermore, the plaintiff was to be reasonably available to assist with any queries that may be directed to her from 30 April to 31 October 2018;

7.4 the plaintiff was to be paid a short term performance incentive in March 2018 equivalent to that which she was awarded in March 2017. This incentive would be subject to the conventional deferral requirements applicable to a Material Risk Taker;

7.5 the plaintiff was to be paid the value of her accrued leave, which leave accrued until the date of termination of employment;

7.6 it was agreed between the parties that the plaintiff had been granted “Eligible Leaver Status” by the defendant for all awards made to the plaintiff, including all bonus deferrals, the Restricted Share Awards and Long-term incentives [in terms of the Rules of the Share Value Plan, Cash Value Plan and Long-Term Incentive Plan] in

accordance with Schedule 1 to the Separation Agreement;

7.7 any awards that may be granted to the plaintiff in terms of the “Eligible Leaver Status” remained subject to all claw-back provisions at the discretion of Barclays Africa Group Remuneration Committee [Remco];

7.8 claw-back may apply to any awards made to the plaintiff as a Material Risk Taker on or after 1 January 2015;

7.9 the plaintiff accepted that the Separation Agreement and the benefits conferred upon her in terms of the agreement were in full and final settlement of any and all disputes, claims, actions and rights of action which existed or might exist or arise between the plaintiff and the defendant, Absa Group Companies, Barclays Africa and or Barclays African Group Companies arising out of the employment contract and relationship which the plaintiff had with the defendant and the termination to such employment contract relationship;

7.10 the said Separation Agreement constituted the sole record of the agreement between the parties in regard to the subject matter thereof and contained non-variation provisions;

7.11 schedule 1 to the agreement set out the treatment of long-term incentives and cash and share plans for the Plaintiff. It also included a summary of outstanding long-term rewards and when those rewards would vest in the plaintiff;

7.12 clauses 2 to 4 of Schedule 1 recorded that Remco had approved the plaintiff’s “Eligible Leaver Status”. This meant that the plaintiff remained eligible for the release of any remaining portions, cash portions or shares due to her in terms of the Share Value Plan Awards Cash Value Plan Awards and Absa Long-Term Incentive plan [LTIP] Awards, subject to the discretion of Remco in terms of any malus and clawback considerations and in respect of which;

§ 7.12.1 the plaintiff’s 2017 Share Value Plan Restricted Award valued at R4.5 million;

§ 7.12.2 it was recorded that the Award Date of the 2017 Share Value Plan restricted award was 1 October 2017

[8]

8.1 The plaintiff’s employment with the defendant came to an end on 30 April 2018. The plaintiff had complied with her obligations in terms of the Separation Agreement.

8.2 The plaintiff’s 2017 Share Value Plan restricted award payment of R4.5 million vested during the September 2019.

8.3 Accordingly, the amount of R4.5 million became due and payable by the defendant to the plaintiff the latest on 30 September 2019.

8.4 The defendant is in breach of its obligations arising from the Separation Agreement in that it has failed, despite despite lawful demand, to make payment of the Plaintiff's 2017 Share Value Plan Restricted Award award to her timeously or at all.

[10] Against the foregoing allegations, the defendant has filed firstly, a notice in terms of Rule 30A of the Uniform Rules of Court in which it seeks and order that the plaintiff should be compelled to comply with 18(6) of the Uniform Rules of Court at the risk of her claim being struck out and she being ordered to pay the costs of the application. Rule 18(6) states as follows:

"A party who is pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or part relied on in the pleading shall be annexed to the pleading."

[11] The defendant has raised an exception to the plaintiff's particulars of claim on the ground that they are vague and embarrassing or alternatively, do not disclose the cause of action. The grounds for the exception are set out as follows:

11.1 the plaintiff's is based upon a Separation Agreement, a copy of which is attached to the particulars of claim as Annexure "A";

11.2 the plaintiff pleads that the defendant has failed to make a restricted award payment to her and that this is in breach of the defendant's 2017 Share Value Plan.

11.3 from the particulars of claim, read with the annexure, it is clear that the defendant's alleged obligation to make the payment of any award to the plaintiff arises from an award granted by the defendant in terms of the Share Value Plan rules of 19 May 2015. It is apparent from clause 5.4 of the Separation Agreement (attached to the particulars of claim), read with clause 2 of Schedule 1 to that agreement, that the award is contained in a letter to the plaintiff.

11.4 neither the Share Value Plan rules nor the letter is attached to the particulars of claim. This is despite those documents and these allegations being necessary and integral to the plaintiff's claim, based on breach of contract. This is in breach of the provisions of Rule 18 [6] of the Uniform Rules.

11.5 further, there is a failure to allege [1] that the plaintiff received an award from the defendant, [2] the details and terms of that award, and [3] the terms of the rules of the Share Value Plan which create any liability to pay the award. These are necessary allegations to establish a proper cause of action.

[12] I am of the view that the plaintiff has satisfied the requirements of Rule 18(6) of the Uniform Rules of Court. In this regard see paragraphs (5) and (6) supra. In the said paragraphs it is clear that in the particulars of claim, the plaintiff relies, as her cause of action, on a written agreement called a Separation Agreement. The plaintiff has pleaded all the relevant salient

terms of the agreement. The plaintiff is simply obliged to alleged the facta probanda in the particulars of claim which will be clarified and elaborated on by the facta probantia with oral evidence. See *Makgae v SentraBoer (Ko-operatiewe) Bpk* 1981 (4) SA 239(T) at page 245C-E.:

“Word Reëls 17(2), 18(4), 20(2) en 23(1) saamgelees dan kom dit my voor dat ‘n gedingvoerder, ten einde te verseker dat

besonderhede van voeding nie eksipeerbaar is op grond daarvan dat dit “bewerings mis wat nodig is om die aksie te staaf”

nie, moet toesien dat die wesentlike feite (dit wil sê die facta probanda en nie die facta probantia of getuienis ter bewys van die facta probanda nie van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien bestaan van sodanige feite aanvaar, dit sy regs konklusie staaf en hom nie in regte sou moet laat slaag t.a.v. die regshulp of uitspraak wat hy aanvra.”

[13] In casu, I am satisfied that in her particulars of claim, the plaintiff “het die wesentlike feite van haar eis met voldoende duidelikheid en volledigheid uiteengesit”.

[14] As correctly contended by advocate AJ Troskie SC, counsel for the plaintiff, in his heads of argument, the plaintiff has:

14.1 pleaded that a written contract was concluded between the parties;

14.2 has set out the salient terms of the written contract in her particulars of claim;

14.3 annexed the said written contract to the POC.

[15] The plaintiffs has accordingly complied with rule 18(6):

15.1 in the POC, the plaintiff pleaded that she was granted “Eligible Leaver Status” by the defendant for all awards made to her, including “Restricted Share Awards (in terms of the Rules of the Share Value Plan) in accordance with Schedule 1 to “the agreement.”;

15.2 pleaded that the award has vested;

15.3 annexed Schedule 1 to the agreement, which similarly recorded that the plaintiff remained eligible for the

release of any remaining portions of her SVP award(s), granted in accordance with the SVP rules of 19 May 2015, on or around the

scheduled release dates as set out in her SVP award letter(s). See clause 2 of Schedule 1 to the agreement.

[16] The Court is satisfied on the basis of the POC, read together with the Separation Agreement that:

16.1 the plaintiff has been granted SVP awards;

16.2 the awards had been made in terms of the defendants SVP Rules;

16.3 the awards letter contains “scheduled release dates”;

16.4 her status entitled her to payment on or around those dates.

16.5 the plaintiff has pleaded that the award which was recorded as having vested in her was due for payment on a specific date and in a specific amount.

16.6 that the SVP award was made to the plaintiff is pleaded in the particulars of claim and recorded in the Separation Agreement.

According to counsel for the plaintiff these are factual allegations upon which the plaintiff’s claim is predicated. He has furthermore submitted that the particulars of claim establish both that the necessary Rules were complied with and that the SVP Award was made to the plaintiff. Accordingly, a cause of action has been established.

[17] An exception that the summons is vague and embarrassing cannot be employed to strike out a particular

paragraph; the exception must be directed at the whole cause of action which must be demonstrated to be vague and embarrassing. In this regard see *Carelsen v Fairbridge, Ardeen & Lawton* 1918 TPD 309.

[18] Bearing in mind that the defendant’s complaint is that the plaintiff’s s particulars of claim are vague and embarrassing, I conclude by referring to the words of David J in *Khan v Stuart* 1942 CPD at 309, where he remarked as follows:

“In my view, it is the duty of the Court when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must ... if there is any embarrassment, which is real and as such cannot be met by the asking of particulars as a result of the defaults in the pleading to which the exception is taken and, unless the excipient can satisfy the Court “that there is a point of law or such real embarrassment then the exception should be dismissed.”

[19] In the instant matter the defendant’ exception does not involve a point of law taken against the plaintiff’s pleading. There is no point of law which will dispose of the case in part or in whole to be decided. The defendant has not satisfied the Court that there is a real embarrassment in the plaintiff’s pleading and that such

embarrassment cannot be met by the asking of particulars. As a consequence, the exception cannot be upheld.

Accordingly, the exception is dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

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Adv W Shapiro

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MacGregor

Erasmus

c/o Macintosh Cross & Farquharson

Counsel for the Excipient:

Adv A Redding SC

Instructed by:

ENSAfrica

Attorneys

c/o Gerhard Botha and Partners Inc

Date on the opposed roll before Mabuse J: 18 November 2020

Date of

Judgment:

10 March 2021

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