

SOUTH AFRICA / JUDGMENT

Solidarity obo Van Schalkwyk v University of South Africa (JS668/24) [2025] ZALCJHB 239 (19 June 2025)

[2025] ZALCJHB 239

COURT

Labour Court Johannesburg

BEFORE

A Anestidis

CASE / FILE NUMBER

JS668/24

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS668/2024

In the matter between:

SOLIDARITY OBO DR R D
VAN SCHALKWYK
AND 5
OTHERS
Plaintiffs
and
UNIVERSITY OF SOUTH
AFRICA
Defendant
Heard: 26 March 2025
Delivered: 19 June
2025

JUDGMENT

ANESTIDIS, AJ

Introduction

- [1] The matter concerned an exception brought by the defendant against the plaintiffs' statement of claim.

- [2] By way of summary, the plaintiffs' statement of claim entails a claim for alleged outstanding monetary incentives owed to the plaintiffs by the defendant.
- [3] After delivering its notice of intention to defend during December 2024, the defendant delivered a notice in terms of rule 14 (1) of the Rules Regulating the Conduct of the Proceedings of the Labour Court during February 2025. The defendant excepted to the plaintiffs' statement of claim on the grounds that the statement of claim is vague and embarrassing and/or does not contain averments necessary to sustain a cause of action.
- [4] The specific grounds upon which the defendant relies in support of its exception are outlined as follows:

4.1 on the papers, the plaintiffs' claim seems to be based on entitlement to the payment of an incentive and a contractual claim for breach of contract. It is unclear which claim the plaintiffs are pursuing as the claims have been interwoven pleaded, which renders the statement of claim excipiable, as it is vague and embarrassing.

4.2 a claim founded in contract must meet the following requirements, namely that:

4.2.1 a contract exists or existed;

4.2.2 the obligations of the parties under the contract;

4.2.3 the wronged party complied fully with the terms of the contract;

4.2.4 the contract was breached by the defaulting party; and

4.2.5 the wronged party suffered damages (loss) as a result of the defaulting party's breach.

4.3 as the statement of claim seems to suggest that the plaintiffs' claim is based on a breach of contract, the plaintiffs ought therefore to have pleaded that:

4.3.1 a contract exists or existed;

4.3.2 the obligations of the parties under the contract are set out therein;

4.3.3 the wronged party complied fully with the terms of the contract;

4.3.4 the contract was breached by the defaulting party; and

4.3.5 the wronged party suffered damages (loss) as a result of the defaulting party's breach.

4.4 the plaintiffs pleaded that the Policy on Short Learning Programmes (Nonformal Tuition) (the SLP Policy) constitutes a contract

between the plaintiffs and the defendant but failed to plead how the SLP Policy constitutes a binding agreement for purposes of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA).

4.5 in the absence of a contract, the plaintiffs were therefore unable to meet the requirement to plead what the parties' alleged obligations under the contract were, or that they met those obligations.

4.6 in the absence of a contract, the plaintiffs are therefore unable to meet the requirement to plead in what manner they suffered damages, and how such damages have been computed. Instead, the applicant seems to be pursuing an entitlement to an incentive. The shortpayment of an incentive does not constitute damages arising out of a contractual breach.

4.7 in the absence of a contract, the plaintiffs are unable to plead in what manner or to what extent, the defendant breached the contract.

4.8 only when a contract exists (whether in writing or orally) can the plaintiffs plead a breach of that contract.

4.9 in order to sustain a contractual claim based on section 77(3) of the BCEA, the plaintiff must plead that the matter which warrants the Court's attention concerns a contract of employment and more particularly how that relates to a condition of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

4.10 the plaintiffs claim, to the extent that it is a claim to recover the short payment of an incentive, is a claim that falls under the "unfair labour practice concept" and cannot be determined by the Labour Court.

4.11 as stated above, the plaintiffs' claim appears also to be based on an entitlement to an incentive, which does not constitute a contractual dispute. In the papers before this Court, the plaintiffs' entitlement claim is dressed up as a contractual claim.

4.12 the plaintiffs' statement of claim is accordingly vague and embarrassing and/or does not contain averments necessary to sustain a cause of action.

[5] Against the above, we can now turn to the facts of the matter as pleaded by the plaintiffs.

Background facts

[6] The plaintiffs have alleged that it was an express, alternatively, tacit, further alternatively, implied term of their employment contracts with the defendant that all employment policies of the defendant are contractually incorporated into the terms of their employment contracts and will remain applicable to the employment relationship of the plaintiffs and defendant.[2]

[7] The plaintiffs allege further that, in terms of the SLP Policy, all academics and professional staff members can develop short learning

programmes (SLP) wherein they and the defendant can share in the distributable income.[3] The preface of the SLP Policy states:

“The Policy on Short Learning Programmes (Non-formal Tuition) regulates short learning programmes within UNISA. It allows academics and professional staff members to be entrepreneurs and to develop short learning programmes so that they, as well as UNISA as their partner, can share in the distributable income.”

- [8] The plaintiffs go on to plead[4] that the distributable income and incentives payable to participating employees are regulated by the SLP Policy and the Financial

Guidelines of Short Learning Programmes (FGSLP), which includes a financial model. The FGSLP defines its purpose to be as follows:

“The purpose of the Financial Guidelines is to give effect to the financial arrangements as provided for in the Policy: Short Learning

Programmes (NonFormal Tuition) and will govern all financial transactions and activities of short courses (nonformal tuition)

offered by academic departments and colleges of the University of South Africa (UNISA).”

- [9] The plaintiffs plead[5] further that, in terms of the financial model of the FGSLP, income from a specific SLP consists primarily of student fees received from students enrolled for that particular programme. Expenses comprise of operating expenditure, levy payable to the UNISA centre of lifelong learning (UCL) and levy payable to the defendant, all relating to the specific SLP.

- [10] Thereafter, the plaintiffs’ statement of claim sets out, in lengthy detail,

- (i) the various SLP and modules developed and worked upon by the plaintiffs (ii) the exact basis upon which they are entitled to monetary incentives, in terms of the defendant’s various policies, and (iii) the calculations of the incentives themselves. In addition, the plaintiffs plead[6] that, during January 2024, the defendant partially complied with its contractual obligations and partially paid the plaintiffs’

incentives for the years 2020 and 2021.

- [11] Furthermore, the plaintiffs plead[7] the following:

11.1 a tacit agreement came into existence between the plaintiffs and the defendant in accordance with the SLP Policy and the FGSLP. In terms of the SLP Policy and the FGSLP, the staff of the Business Management SLP will be entitled to 40% of the distributable surplus of the Business Management SLP at the end of each financial year, as an incentive;

11.2 the parties had tacit consensus between each other that the terms and obligations of the SLP and incentives payable would remain the same; and

11.3 the conduct of the defendant is mala fide and constitutes a breach of contractual terms between the parties emanating from the contractual relationship between them.

[12] Finally, the plaintiffs' statement of claim is replete with allegations that the defendant has breached its contractual obligations towards the plaintiffs by failing to pay certain monies which are owed to them by the defendant.

Analysis

The legal principles regarding exceptions

[13] Exceptions are designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence.

The aim of the exception procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and costeffective manner. Thus, pleadings whose contents are so vague that it is impossible to determine the nature of the claim or the defence and pleadings which are bad in law in that their contents do not support a discernible and legally

recognised cause of action or defence are set aside.

[14] For the purposes of an exception, no facts may be adduced by either party and an exception may thus only be taken when the defect

objected to appears *ex facie* the pleading itself. It is trite that when an exception is taken, the Court must look at the pleading excepted to as it stands. The Court must assume the facts stated in the pleading to be true, unless they are palpably untrue or so improbable that they cannot be accepted. In order to succeed with the exception, the defendants must persuade the Court that the pleading is excipiable on every interpretation that can reasonably be attached to it.

[15] The onus of showing that a pleading is excipiable rests on the excipient. In *Odendaal v Van Oudtshoorn*, [8] De Kock J went so far as to state that the tendency on the part of the courts is to try to uphold the validity of pleadings if at all possible. In a similar vein, Basson J in *Nel and others NNO v McArthur and others* [9] remarked that a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is also entitled to a benevolent interpretation and the pleadings must be read as a whole, with no paragraph being read in isolation.

Consequently, it has been held, an excipient who alleges that a pleading lacks the averments necessary to sustain an action or

defence must show that the pleading excepted to, is (not may be) bad in law. It has thus been said that an excipient should make out "a very clear, strong case before he should be allowed to succeed".

[16] Exceptions should be dealt with sensibly. They provide a mechanism to weed out cases without legal merit. An overtechnical approach destroys their utility. The response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability.[10]

[17] A pleading is not vague and embarrassing simply because the other party cannot prepare for trial. Whether a pleading is vague, is

a question of degree. An exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action

pleaded, that is, if the other party will be seriously prejudiced if the allegations remain and are not expunged. An exception that the pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.

The defendant's grounds of exception

[18] Against the above, I now turn to deal with each distinct ground of exception, as summarised above.

[19] The first ground of exception is exceptionally poor. It is abundantly clear that the plaintiffs' claim is based on contract, as thoroughly outlined in their statement of claim, and there is no confusion or vagueness whatsoever in this regard. The defendant's efforts to unnecessarily convolute issues, create confusion and conflate an "incentive" with a "contractual claim" are entirely misplaced, misguided and unfortunate.

[20] The second and third grounds of exception simply have no merit. The plaintiffs duly complied with the pleading requirements in regard to their contractual claims.

[21] The fourth ground is, similarly, poor and devoid of any merit whatsoever. The plaintiffs clearly and comprehensively pleaded exactly how and on what basis the SLP Policy was part of their contract with the defendant.[11] There is absolutely no ambiguity, vagueness or confusion, and I can see no prejudice, at all, for the defendant in having to plead to the plaintiffs' allegations in this regard. When considering the statement of claim as a whole, it is abundantly clear that the plaintiffs' claim is purely based on their employment contracts with the defendant, which is inclusive of, inter alia, the defendant's own policies, one of which is the SLP Policy.

[22] I deal with the fifth to eighth grounds collectively, since these four grounds of exception, are entirely premised upon an alleged "absence of a contract". It is simply astounding that the defendant contends that the plaintiffs' statement of claim does not allege a contract between the parties. One is left to wonder whether the defendant even read or considered the plaintiffs' statement of claim, at all, before filing its exception. Quite clearly and unequivocally, the plaintiffs' have pleaded and based their claim on their contract with the defendant.[12] Therefore, all these grounds of exception are, yet again, devoid of a scintilla of substance or merit.

- [23] The ninth ground of exception is somewhat similar to the fourth ground. As a starting point, the defendant has incorrectly interpreted and/or quoted section 77(3) of the BCEA, and has read words into the section which simply do not exist. The section simply reads that: “[t]he Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”
- [24] However, the defendant has read into the section words which simply do not exist or apply, by contending that: “... the plaintiff must plead that the matter which warrants the court’s attention concerns a contract of employment and more particularly how that relates to a condition of employment...”. [13] The underlined words do not appear in section 77(3) of the BCEA.
- [25] The defendant’s contentions concerning section 77(3) of the BCEA are entirely misplaced and misguided. In fact, that section does not assist the defendant at all and, on the contrary, confirms the Court’s jurisdiction in this matter, since the plaintiffs have clearly relied on a contract to substantiate their claim against the defendant, as more fully summarised above.
- [26] Regarding the final tenth and eleventh grounds of exception, which overlap with and/or are similar to the first ground, these too must be treated similarly as the previous grounds. The plaintiffs rely on their contract with the defendant, and contend that they are owed monies based on their contract, simply put.
- [27] When considering the statement of claim as a whole, the plaintiffs are clearly not seeking to make out a case for an unfair labour practice. This argument is wholly contrived and concocted by the defendant, and it is not for the defendant to alter or dictate what the underlying substance and/or cause of action of the plaintiffs’ claim is. The grounds are flawed and confused. This Court must consider the statement of claim as a whole and treat the content thereof as true, unless palpably farfetched. On this basis, the plaintiffs are clearly not contending or relying on any unfair labour practice and such words do not even appear in the pleading itself.
- [28] In the eleventh ground, the defendant contends that the plaintiffs’ “entitlement claim is dressed up as a contractual claim”. [14] This is seriously problematic for the defendant, as it, inter alia, is tantamount to a concession that the plaintiffs have indeed pleaded a contractual cause of action against the defendant.
- [29] Accordingly, the defendant’s exception is exceptionally poor and meritless. The entire exception falls to be dismissed. It appears that the exception was merely filed as nothing more than a delay tactic and was patently mala fide.

Costs

[30] In relation to costs, the Court has a broad discretion in terms of section 162 of the Labour Relations Act[15] (LRA) to make orders for costs according to the requirements of the law and fairness.

[31] The exception was exceptionally poor and devoid of a semblance of merit. The filing of the exception was a clear delay tactic.

[32] In the matter of Liquid Telecommunication (Pty) Ltd v CarmichaelBrown,[16] van Niekerk J (as he then was) pertinently held as follows concerning a frivolous and timewasting exception, as is the case in casu:

“[22] In so far as costs are concerned, s162 of the LRA confers a discretion on the court to make orders for costs according to the requirements of the law and fairness. Although the filing of the Rule 30 notice by the respondent was nothing less than frivolous, it pales into insignificance in comparison to the terms on which the excipient has sought to except to the statement of claim. The exception has served to do no more than protract proceedings that are intended to be efficient and expeditious, and has no doubt

considerably increased the costs associated with a process of litigation that is intended to be relatively inexpensive.

[23] The respondent seeks costs on a punitive scale, on the basis that the excipient’s persistence with these proceedings is nothing

more than an abuse of the court process, and an attempt to frustrate the respondent’s case and to increase the costs of litigation.

There is merit in these submissions. Technical pointtaking has never been encouraged in this court, inimical as it is to the statutory purposes to which I have referred above. Litigating in the manner in which the excipient employer has approached this matter is to be discouraged in the strongest terms. This is particularly so in litigation between dismissed employees and their erstwhile employers, where the promotion of access to justice may be frustrated by the cost of litigation conducted in a manner other than that envisaged by the Rules. At best for the excipient, the terms of the exception evince an overly technical approach to litigation, one that is not welcome in this court. At worst, it is an attempt consciously to frustrate the statutory purposes to which I have referred. Either way, in my view, a punitive costs order is warranted.”

(Own emphasis)

[33] I unreservedly share the above sentiments, which are wholly applicable in this matter and to the defendant’s illconceived and poor exception.

[34] In the plaintiffs’ reply to the defendant’s exception[17], the plaintiffs claimed that “given the nature of this entirely frivolous and vexatious exception, the plaintiffs seek a cost order consequent upon the dismissal of said exception.”

- [35] However, when addressing the Court during argument, the plaintiffs' representative, being a trade union official, conceded (in reply to the defendant's submissions on costs) that the plaintiffs are not entitled to legal costs. Notwithstanding this concession, this Court still has a discretion,[18] and the concession, in my view, does not prohibit or restrict the Court's discretion in regard to costs, as contemplated in section 162 of the LRA.
- [36] I must add that, as a show of immense displeasure towards the illfated exception filed by the defendant, the Court seriously grappled with awarding costs de bonis propriis against the defendant's attorneys, in terms of section 162(3) of the LRA. However, the Court has, reluctantly, stopped short of making such an order.
- [37] Rather, I have decided to follow the same ratio and reasoning given by this Court in the judgment of *University of South Africa v Socikwa and others* and a related matter[19], involving the very same defendant.
- [38] The following passages from that judgment aptly apply in casu (again, involving the same defendant), and I can only fully endorse those sentiments in relation to this matter:

"[38] In the December 2017 edition of the Advocate, Justice Owen Rogers posed a crucial question in his article entitled 'The

Ethics of the Hopeless Case': If counsel argues a hopeless case, is she not guilty of wasting court time and of abusing the court's process?

- [39] In *Mashishi v Mdladla and others*, this Court through the prolific pen of Van Niekerk J, in a way responded to Justice Rogers's pertinent question. Perhaps, Van Niekerk J cautioned by stating:

'... those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences.'

- [40] It is without doubt that the applicants in this consolidated judgment have paraded the traits for the court to

ascertain when a case is hopeless.

- [41] Two learned academics from Unisa, Prof Angelo Nicolaides and Prof Stella Vetorri, collectively penned an article that was published by Athens Journal of Law in April 2019 entitled: *The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case*. In their article, they too and primarily for ethical reasons, discourage any pursuit of a hopeless case by officers of the court. They further emphasise that the conduct of legal practitioners must exhibit professionalism in all respects. They caution as follows:

‘Lawyers cannot fail to exercise competence and care as this may give rise to an action against them for damages by their client. If a court is misled by a lawyer, the latter has then acted unvirtuously and failed in his or her duty to assist the court in legal proceedings. Equally without virtue and also lacking in professionalism, are lawyers who are obstructionist and delay proceedings of a court.’

[42] A plethora of legal literature on the duties of lawyers is well documented in various tomes. In pursuit of its absolutely hopeless urgent application, Unisa's legal research did not even consult the journal article penned by its own consummate legal commentators/educators.

[43]

Perhaps, it is apt to conclude with the pearls of wisdom from Justice RPB Davis (as he then was) on the Foreword to the First Edition of Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*. He said:

‘Ours is a fine profession: it is the pursuit of justice and the truth, and these are surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too regardless of consequences . . .’

[44] Understand: it must be deprecated by those who attach premium and prestige to their trade as legal practitioners to align themselves

with cases that are absolutely hopeless for pecuniary reasons and thereby, rendering courts as instruments to frustrate employees or employers with worthy cases for the court to adjudicate. This Court must firmly and without fear, favour or prejudice apply the provisions of section 162 of the LRA in hopeless cases.”

[39] In the premise the following order is made:

Order

1. The defendant’s exception is dismissed;
2. The defendant must file its statement of response within 15 (fifteen) days of this Order, in terms of Rule 13 of the Labour Court Rules;
3. The defendant’s legal practitioners (Advocates and Attorneys) are ordered not to charge any fee for their legal services rendered, in relation to the exception. If the defendant’s legal practitioners have already been paid for their legal services in relation to the exception, they are ordered to reimburse the defendant within 60 (sixty) calendar days of the granting of this order.

A. Anestidis

Acting Judge of the Labour Court of South Africa

Appearances:

For the plaintiffs: N Ras of Solidarity trade union

For the defendant: Advocate Bart Ford

Instructed by: Phakedi Attorneys

[1] Act 75 of 1997.

[2] See para 5.7 of the plaintiffs' statement of claim.

[3] See para 5.8 of the plaintiffs' statement of claim.

[4] See para 5.9 of the plaintiffs' statement of claim.

[5] See para 5.10 of the plaintiffs' statement of claim.

[6] See para 5.97 to 5.99 of the plaintiffs' statement of claim.

[7] See para 5.20, 5.27, 5.65 and 5.102 of the plaintiffs' statement of claim.

[8] 1968 (3) SA 433 (T) 436D–E.

[9] 2003 4 SA 142 (T) 149F–G. See also *First National Bank of Southern Africa Ltd v Perry NO and others* 2001

(3) SA 960 (SCA) at para 36, where Schutz JA added at para 36, however, that “the test is less charitable where vagueness and embarrassment is the basis of an exception.”

[10] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006

(1) SA 461 (SCA) at para 3; *H v Fetal Assessment Centre* 2015

(2) SA 193 (CC) at para 10; *Pretorius and Another v Transport Pension Fund and others* 2019

(2) SA 37 (CC) at para 15; *Trustees for the Time Being of the Burmilla Trust and another v President of the Republic of SA and another* [2022] 2 All SA 412 (SCA) at para 64.

[11] See paras 5.8, 5.9, 5.20, 5.27, 5.65 and 5.102 of the plaintiffs' statement of claim.

[12] This is clearly apparent from, inter alia, paragraphs 5.8, 5.9, 5.20, 5.27, 5.65 and 5.102 of the plaintiffs' statement of claim.

[13] See para 9 of the defendant's exception.

[14] See: para 11 of the defendant's exception.

[15] Act 66 of 1995, as amended.

[16] (2018) 39 ILJ 1779 (LC) at paras 22 and 23.

[17] Pages 40 – 45 of the bundle.

[18] See: *Macdonald's Transport Upington (Pty) Ltd v AMCU and others*

[2017] 2 BLLR 105 (LAC) para 48.

[19] [2023] 8 BLLR 836 (LC) at paras 38 onwards.

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