

SOUTH AFRICA / JUDGMENT

Tshitundu v Simba (Pty) Limited (JS283/21) [2021] ZALCJHB 339 (7 October 2021) [2021] ZALCJHB 339

COURT

Labour Court Johannesburg

BEFORE

F Coetzee

CASE / FILE NUMBER

JS283/21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Not

of interest to other judges

Case

no: JS283/21

In

the matter between:

GEOFFREY

TSHITUNDU Applicant

and

SIMBA (PTY)

LIMITED Respondent

Heard: 6

October 2021

Delivered: This

judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The

date and time for hand-down is deemed to be 10h00 on 7 October 2021.

Summary: Exception – vague and embarrassing and no cause of action – reiterate approach to exceptions – not possible to cure defect at pretrial meeting – exception upheld
The applicant has filed a notice on 4 October 2021 to remove cause of complaint in that exception constitutes an irregular step – misplaced notice – procedure to have an irregular step set aside not followed by the applicant.

JUDGMENT

COETZEE AJ

- [1] The respondent excepted to the applicant's statement of claim.
- [2] The applicant was unrepresented when he delivered his statement of case.
- [3] The applicant is now represented and his representative has filed a notice on 4 October 2021 to remove a cause of complaint. The applicant submits that the exception constitutes an irregular step as the exception is an interlocutory application that must be brought on notice supported by an affidavit, which is not the case. Secondly, the exception is one in respect of the substance of a pleading and cannot be brought as an interlocutory application.
- [4] The notice that the exception constitutes an irregular step is misplaced. If the applicant wants the exception to be set aside, it should have either opposed the exception or applied by way of notice of motion supported by an affidavit to have it set aside.
- [5] In fact the notice itself constitutes an irregular step. Such a step must be taken within ten days of the irregular step which is not the case. The applicant has also taken further steps after the exception was taken which also renders the notice itself irregular.
- [6] There is no merit in the notice that the exception constitutes an irregular step.
- [7] The respondent submitted that the notice is of no legal effect and that it caused the respondent to incur costs in preparing heads of argument to deal with it.
- [8] The applicant approached this Court by way of statement of case claiming re-instatement, compensation and damages arising from an alleged unfair dismissal.
- [9] The applicant essentially pleaded that on 17 August 2020 he was charged with gross insubordination. During the disciplinary hearing, however, he was, instead, called upon to answer charges of poor work performance. He was unable to prepare an answer to the poor performance charges. The respondent also failed to provide him with a copy of the disciplinary guide which he only received after the hearing.

- [10] He referred the alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration who issued two certificates: one for an unfair dismissal which was referred to arbitration, and a second for unfair discrimination to be referred to the Labour Court.
- [11] Under the heading "Legal Principles" he repeated the allegations that he was charged with gross insubordination but dismissed for poor performance. The poor performance allegedly related to his mental health condition for which he had provided medical reports.
- [12] Under the heading "Legal Issues" he pleaded the same theme of being charged for gross insubordination but being dismissed for poor performance. He repeated that he raised the fact that he was suffering from a mental health condition that caused the poor performance and required the respondent to assist him.
- [13] He sought the following relief: Reinstatement, backdated salaries, and compensation as a result of loss of income, emotional and reputational damages, and cover for all legal and medical fees.
- [14] The respondent served a notice to remove causes of complaint, and when the applicant refused to effect any amendment to his statement of claim, served its notice of exception.

The approach to exceptions

- [15] Rule 11.3 of Labour Court gives the Court a discretion to adopt any procedure it deems appropriate to deal with an issue such as an exception which is not covered in its rules. The Court has recognised that parties may have recourse to the High Court rules which deals specifically with exceptions.
- [16] The High Court in *Living Hands (Pty) Ltd and Another v Ditz and Others*[1] summarised the basic principles governing exceptions:

"(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs.
- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) An over technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

- (f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."
- [17] The Labour Court rules do not provide for further particulars or for particulars for preparation for trial. The pretrial meeting plays a more important role in this regard where "minor blemishes and unradical embarrassments should be cured".
- [18] The Labour Court in *Irving v Amic Trading (Pty) Ltd*[2] formulated the test in deciding exceptions based on vagueness and embarrassment as follows:

"(a) In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where the statement is vague it is either meaningless or capable of more than one meaning.

- (b) If there is vagueness in this sense, the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient could show is caused to him or her by the vagueness complained of.
- (c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. (A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.)
- (d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced ..."

- [19] The role of pre-trial proceedings resulting in a pre-trial minute are very important. In the *Irving – matter*[3] and *Harmse v City of Cape Town*[4] the Court emphasise the importance of sorting out the factual disputes at the pre-trial meeting. The Court in *Harmse* further stated:

"When an exception is raised against the 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."

- [20] The respondent avers that the statement of claim is vague and embarrassing, alternatively does not disclose a cause of action.

First ground of exception

- [21] The first ground is that the statement of claim does not comply with Rule 6(1)(b)(ii) of the Labour Court Rules in that the statement of claim does not contain a clear and concise statement of material facts on which the applicant relies and that the facts are not sufficiently particular to enable the respondent to reply to the statement of claim.
- [22] In support of the first ground the respondent contends that the statement of claim contains only brief statements which do not appear to be relevant to why the applicant alleges his dismissal was unfair. The respondent also complains that the applicant does not allege the basis upon which his dismissal was unfair and whether the dismissal allegedly was substantively or procedurally unfair.
- [23] It is clear from the statement of claim that the allegations are in fact brief. What is also clear from the statement of claim is that the applicant alleged that he was called before a disciplinary hearing to answer to an allegation of gross insubordination, but instead faced a poor performance procedure and a failure by the respondent during the disciplinary proceedings to provide him with a copy of the disciplinary guide.
- [24] The pleaded case in this respect is not meaningless or capable of more than one meaning. It is rather lacking in allegations as to procedural or substantive unfairness. In my view the excipient is not prejudiced by the way the cause of action is pleaded. In view of my finding in respect of the other grounds, the applicant should address this aspect.
- [25] The second leg of the first ground of exception is that the applicant does not state whether he relies upon a listed ground in section 6(1) of the Employment Equity Act, 55 of 1998 or on an arbitrary ground, and if so what ground. Further the applicant failed to allege that he was unfairly discriminated against.
- [26] There is merit in this complaint. Save for the heading " Unfair discrimination S10 EEA" the applicant does not inform the respondent of the ground upon which he relies for the allegation of discrimination and why, if there is such a ground, it is unfair discrimination. The statement of case is defective in that it does not list the ground of discrimination, does not state the facts upon which the applicant relies for the allegation of discrimination and there are no allegations or facts why such discrimination constitutes unfair discrimination. The respondent is prejudiced thereby.
- [27] The last leg of the first ground is that the applicant does not set out the material facts upon which he relies and does not state whether the applicant relies upon an unfair dismissal, unfair discrimination, or an automatically unfair dismissal.
- [28] There is merit in this complaint. The applicant sets out the material facts and allegations why his dismissal is an alleged unfair dismissal. What he does not specifically plead, is whether he relies upon an automatically unfair dismissal and/or unfair discrimination. The pleaded case nowhere deals with the facts and allegations relating to unfair discrimination or an automatically unfair dismissal. The only case is that of an alleged unfair dismissal.

The second ground of exception

- [29] The second complaint is that the statement of case does not comply with Rule (6)(1)(b)(ii) as it does not set out the legal issues that arise from the material facts, sufficient to enable the respondent to plead.
- [30] In his formulation of the legal issues the applicant regurgitates the factual allegations that he was called to answer to gross insubordination charges but was dismissed for poor performance.
- [31] The applicant does not address the legal issues that may arise from the material facts pleaded. For instance, the applicant fails to set out the legal issues relating to section 10 of the EEA that he refers to in passing. He thus also does not plead a cause of action in respect of unfair discrimination or an automatically unfair dismissal. This prejudices the respondent who is unable to plead.

The relief

- [32] The only aspect of the applicant's case that could possibly be further refined at a pre-trial meeting, is the alleged unfair dismissal claim. In the absence of a cause of action that sustains alleged unfair discrimination or an alleged automatically unfair dismissal, there simply is nothing to discuss at a pre-trial meeting. In the absence of the latter claims, the Labour Court does not have jurisdiction to entertain the alleged unfair dismissal on itself.
- [33] It is in the applicant's interest for him to set out the material facts upon which he relies for his claim or claims. It is in the interest of the respondent to know what claim(s) and causes of action it faces.
- [34] The applicant should amend his claim to disclose a cause of action and to set out with clarity what his claim or claims are.

Costs

- [35] The applicant asks for costs in opposing the notice that the respondent took an irregular step. There is merit in the submissions that the notice had no legal basis and should not have been issued a few days before the hearing of this matter. The time spent thereon is minimal and does not warrant a cost order.
- [36] The respondent submitted that the way in which the applicant conducted his case warrant a cost order. The applicant contends that he was unrepresented and only appointed a legal representative recently and that he should not be punished with a cost order. In my view there are no grounds for a cost order.

Order

- [37] I make the following order:

1. The exception is upheld

2. The applicant is granted leave to amend his statement of claim within 15 days of this order failing which the statement of claim is struck out with no order as to costs.
3. In the event that the applicant satisfactorily removes the cause of complaint by an amendment then the respondent is granted 10 days from receipt of an amended statement of claim to submit its response.
4. There is no order as to costs

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Ms T Mojapelo

Of: Mojapelo

Attorneys Inc

For the Respondent: Adv A L Cook

Instructed by: Cowan-Harper

Madikizela Attorneys

[1] 2013 (2) is a 368 (GSJ)

[2] JS 104/2014 ZALC JHB 418 at para 14

[3] Irving supra par 15

[4] Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC) at paras 8 - 10

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2021/339.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tshitundu-v-simba-unknown-topic-alcjhb-2021>

Prepared on 23 October 2026 · Esheria