

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 6732/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE <u>5/12/19</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

MOLATELO PRECIOUS MAMABOLO

PLAINTIFF

AND

SOUTH AFRICAN NATIONAL BLOOD SERVICE

FIRST DEFENDANT

NICOLE ZIEROLD

SECOND DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff has instituted action against the defendants claiming an amount of R 6 852 913-44 for all alleged loss of income. The plaintiff alleges that whilst employed at Ampath Trust as a registered nurse, she saw an advertisement for a position of a Donar Care Officer at the defendants' workplace. She applied

for the position and she was invited to attend the interviews on the 6th July 2018. On the 2nd August 2018 the second defendant phoned her to attend a driving assessment of which she did.

- [2] On the 3rd August 2018 the second defendant phoned her notifying her that she was the successful candidate for the position of a Donar Care Officer. The plaintiff resigned from her employment with the intention of resuming her duties at the respondents' workplace with effect from the 1st September 2018. However, the defendants did not send her an appointment letter. When she enquired about the appointment letter she was taken from pillar to post. When realising that it seems that the new appointment will not materialize, she went back to her old employer to try and withdraw her resignation of which she was unsuccessful. On the 30th August 2018 the second respondent informed her that the position she had been appointed for has been put on hold. Later she was informed that they have advertised two positions but has filled one position with the candidate that has scored the highest marks, but that the person assigned to inform her of the outcome has failed to do so.
- [3] Based on the explanation given to her, the plaintiff issued summons against the defendants alleging that the defendants have acted negligently, and that their negligent conduct led her to resign from her employment. The plaintiff alleges that as a results of resigning, she acted to her detriment as she is now being unemployed and without income of which the defendants are to blame.
- [4] The defendants defended the plaintiff's action. The defendants have raised an exception to the plaintiff's particulars of claim alleging that they lack averments which are necessary to sustain her action. The grounds of the defendants'

exception are that the withdrawal of the alleged offer amounts to a dismissal and that the plaintiff should have enforced her rights at the CCMA or Labour Court. According to the defendants, the particulars of claim reveal that the plaintiff essentially seeks redress for unfair dismissal.

- [5] The defendants argues that this court lacks jurisdiction to adjudicate this matter since section 185 of the Labour Relations Act (LRA)¹ creates certain rights for employees that include the right not to be unfairly dismissed, and the right not to be subjected to unfair labour practice. The defendants submit that in terms of section 193 (1) of the LRA, the remedies for unfair dismissal and unfair labour practice are reinstatement and compensation.
- [6] The plaintiff argued that the contract of employment was not concluded as the offer by the defendants was based on a mistake other than factual. The plaintiff contends that the defendants acted negligently and that no valid contract ever existed. It is further the plaintiff's contention that her claim for damages is based on the fact that she acted to her detriment as a results of the defendants' negligent misrepresentation. The plaintiff contends that there was no existing employment contract which the defendant has withdrawn, and therefore she could not have referred her claim to either the CCMA or the Labour Court as a dispute in terms of the LRA.
- [7] It is settled law that in order to succeed, an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld.

¹ Act 66 of 1995 as amended

[8] In **Living Hands v Ditz**² Makgoka J as he was then said:

“Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

- (a) In considering an exception that the 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 a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
- (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. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
- (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 merits.
- (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”

[9] The defendants' exception is based on the jurisdiction of this court to hear the plaintiff's claim. Normally an objection that a court lacks the necessary jurisdiction to hear the matter is ordinarily raised by way of a special plea.

² 2013 (2) SA 368 (GSJ) at 374G- 375C

[10] In **Makhanya v University of Zululand**³ Nugent JA said:

“Jurisdictional challenges will be raised either by an exception or by a special plea, depending on the ground upon which the challenge arises. There will be some cases in which the jurisdiction of a court is dependent upon the existence of a particular fact (often called a ‘jurisdictional fact’). Where the existence of that fact is challenged it will usually be in a special plea, and matter will proceed to a factual enquiry confined to that issue. In other cases the existence or otherwise of jurisdiction to consider the case will appear from particulars of claim and in those cases the challenge will be raised by an exception. In such cases the court that considers the challenge might not even be aware of whether or not the plaintiff intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first, because upon it depends the power of the court to make any further orders.”

[11] In the case at hand the challenge is not based on the existence of a jurisdictional fact, but on the nature of the claim, and that appears from the plaintiff’s particulars of claim. It was therefore appropriate for the defendants to raise the challenge by way of an exception.

[12] The second defendant when he informed the plaintiff that she was successful in her interviews, was basically making an offer of employment to the plaintiff. That is supported by the fact that he even asked her as to when she will be available to commence working. By telling the second defendant that she will have to serve a month notice, she was accepting the offer. The acceptance of the offer was confirmed when she resigned from her previous employment in order to take the new position.

³ 2010 (1) SA 62 (SCA) at G-I

- [13] The question to be determined is whether the plaintiff was an employee in order to qualify for protection under the LRA. In **Wyeth SA (PTY) Ltd v Manqele and Others**⁴ Nkabinde AJA said:

“Given the resultant gross hardship, ambiguity and absurdity in the adoption of the literal interpretation, I am of the view that this court is thus entitled to depart from such a literal and ordinary construction and extend the literal construction of the definition as including a person who concluded a contract of employment which is to commence at a future date. Common sense, justice and values of the constitution would, in my view, best be served by extending the literal construction to include such a person. That interpretation will be in line with the meaning of ‘dismissal’ in s 186 (1) (a). It will also in my view, avoid limiting the constitutional right to ‘unfair labour practice’ to a person who works or has rendered services and is entitled to remuneration. The focus in s 186, like its English counterpart, is on the ‘termination of a contract of employment.’ Grogan ‘Employment Law’ vol 19 part 3 pp 15-17 opines that had the contract not been repudiated, the - would be employee would have become an employee. Grogan continues to draw an analogy between a person in the position of Manqele and unborn children. He states that –

‘... in a sense, a situation is similar to unborn children, to whom the law is prepared to extend legal rights by way of a fiction. The only way the court can now remove the absurdity to which Pillar J refers in Jack’s case-that unsuccessful applicants for employment are awarded greater rights under the LRA than those who have actually been appointed-is to extent the statutory definition by means of a similar fiction. They might be assisted by the fact that the Constitution gives “everyone” – not only employees the right to fair labour practices’

I could not agree more”

- [14] A contract of employment was concluded when the plaintiff accepted the defendants’ offer. It was therefore no longer possible for the defendants to

⁴ (SA 50/03) [2005] ZALAC 1 (23 March 2005) at Para 45

unilaterally withdraw the offer of employment of the plaintiff. In **Du Preez v SALGBC and Others**⁵ Lagrange J said:

"... I am inclined to agree with the applicant that it was his employment which was terminated, even though he had not started to render services. The Labour Appeal Court has held that common sense, justice and values of the Constitution would be best served by extending the literal construction of the definition of an employee in section 213 of the LRA to include someone who had concluded a contract of employment which would commence at a future date."

[15] In my view the plaintiff for all intendeds and purposes was an employee of the defendants immediately after she had accepted the offer and thereafter perfected that by resigning from her previous employment. She therefore enjoyed all the rights of an employee and was protected by the LRA against any form of unfair conduct by the defendants. The unilateral withdrawal of the offer by the defendants amounted to a dismissal.

[16] The LRA has created specialized forums to deal with disputes of alleged unfair dismissals. In **SAMWU v Mokgatla**⁶ Dambuza JA said:

"[12] But what the court *a quo* missed as did the court in Valuline, are the fundamental guiding principle underlying the determination of the jurisdiction of the respective courts over disputes provided for under the LRA. These were laid down by the Constitutional Court in *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC); (2008) 29 ILJ 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23 and *Gcaba* (above). In para 123 of *Chirwa* the Constitutional Court said:

'While s 157 (2) remains on the statute book it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the

⁵ [2017] ZALCC 11 (29 March 2017) at paras 12 and 13

⁶ 2016 (5) SA 89 (SCA) at Para 12

labour and employment relations between employers and employees in all section. The other is the objective to establish the Labour Court and Labour Appeal Court as superior Courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of section 157 (2) and harmonise them with those of section 157 (1) and the primary objects of the LRA is to give s 157 (2) a narrow meaning. The application of section 157 (2) must be confined to those instances if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle that we have recently reinstated, namely, that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standards’.

[13] And in *Gcaba* the Constitutional Court held the following in para 56

*‘(A)nother principle of policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognized in the Constitution. Different kinds of relationships between citizens and the state and citizens and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of the disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees. “*

[17] The plaintiff’s contention is that her claim for damages is premised on the fact that she acted to her detriment as a result of the defendants’ negligent misrepresentation, and that the contract of employment never came into existence. I have already held that the employment contract was concluded and therefore there was an employer and employee relationship. It is therefore immaterial in the manner in which the plaintiff has drafted her particulars of

claim. Even though the plaintiff contends that it relies on negligent misrepresentation, it can be determined from the particulars of claim that the main issue in this matter is a labour dispute.

[18] The plaintiff's dispute falls within the provisions of the LRA and must therefore be resolved within the dispute resolution mechanism provided for in the LRA. In **Gcaba v Minister for Safety and security and Others**⁷ the court held that labour issues are to be dealt within the specialized fora and pursued through the purpose-built mechanism established by the LRA. In my view, there is merit in the dependants' exception and it stand to be upheld.

[19] The question which must now be determined is whether to struck out the plaintiff's particulars of claim or to grant the plaintiff leave to amend. In my view, it will be fruitless to grant the plaintiff leave to amend her particulars of claim since the plaintiff's dispute does not belong to this court. The proper remedy will be to struck out the plaintiff's particulars of claim.

[20] In the results I make the following order.

20.1 The defendants' exception is upheld.

20.2 The plaintiff's particulars of claim are struck out in its entirety.

20.3 Plaintiff to pay the defendants' costs on party and party scale.



M F KGANYAGO J

**JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCE:

COUNSEL FOR APPLICANT	: ADV LUNGA SIYO
INSTRUCTED BY	: C N PHUKUBJE ATTORNEYS INC.
COUNSEL FOR 1ST & 2ND RESPONDENTS	: ADV MJ MOLAPO
INSTRUCTED BY	: HLM MAMABOLO ATTORNEYS
DATE OF HEARING	: 4TH NOVEMBER 2019
DATE OF JUDGEMENT	: 5TH DECEMBER 2019