



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 259/21

In the matter between:

ZIBUSISIO KGANYAGO

Applicant

and

TSOGO SUN CASINO MANAGEMENT COMPANY

First Respondent

TSOGO SUN GAMING LIMITED

Second Respondent

Heard: 25 October 2023

Delivered: 30 January 2024

JUDGMENT

ADAMS, AJ

- [1] I was advised by counsel for both parties that there was no objection to the Applicant's application for condonation for the late delivery of her application for leave to amend and accordingly condonation was granted from the outset.

- [2] The test for determining whether to grant an amendment is whether the interests of justice permit the granting of such an amendment.¹ This is a broad test.
- [3] In deciding whether to grant or refuse an application for amendment courts lean in favour of granting them in order to ensure that justice is done between the parties by deciding the real issue between them. An application for amendment will always be allowed “*unless it is mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as postponement*”.
- [4] These principles are set out and were applied by this Court in *SATAWU v SAA*.² That is one of the many examples where this Court has adopted and applied the Uniform Rules in situations governed by Rule 11(3)³.
- [5] It is trite that the primary objective of allowing an amendment is to obtain a proper ventilation of the dispute between the parties and to determine the real issues between them, so that justice may be done.⁴
- [6] One of the prime considerations in the decision of whether to grant an amendment is whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.⁵
- [7] In the matter of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en ‘n ander*⁶, the Court stated that an applicant for an amendment must, in his application for the amendment, show *prima facie* that he has something deserving of consideration – a triable issue.

¹ *Stainbank v SA Apartheid Museum at Freedom Park and Another* 2011 (10) BCLR 1058 (CC); [2011] ZACC 20 at para 23.

² *SATAWU & another v SAA (Pty) Ltd* [2010] JOL 24956 (LC) paras 15 - 19.

³ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

⁴ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D); [1967] 4 All SA 105 (D) at 638A.

⁵ *Ibid* at 638A-B.

⁶ 2002 (2) SA 447 (SCA).

- [8] A triable issue is (1) a dispute which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant, or (2) a dispute which will probably be proved by the evidence so foreshadowed.

Background

- [9] The Applicant sought an amendment to her Statement of Claim in terms of a notice to amend (notice) dated 21 November 2022.

- [10] This was objected to by the Respondents in a Notice of Objection delivered on 6 February 2023.

- [11] As a result of the objections raised by the Respondents, the Applicant has applied for leave to amend.

- [12] In terms of the Respondent's Notice of Objection, it is contended, *inter alia*, that the objection is premised on the following:

12.1. The applicant pleads two claims: an unfair dismissal claim, and an unfair discrimination claim. Both claims are vague and embarrassing and/or fail to establish a cause of action recognised in law;

12.2. The proposed amendment is the fourth attempt by the applicant to set out her claims arising from her employment and the termination thereof (the applicant having delivered a statement of claim, alternatively a notice of her intention to amend her statement of claim, on the following dates: 18 June 2021, 6 September 2021, 26 August 2022 and 21 November 2022;

12.3. The proposed amendment re-introduces Tsogo Sun Gaming Limited as the second respondent. This party was cited as the second respondent in the applicant's first and second iteration of her statement of claim (dated 18 June 2021 and 6 September 2021);

12.4. The respondents successfully excepted to the statement of claim dated 6 September 2021 and the Court ordered, *inter alia*, that Tsogo Sun Gaming Limited was mis-joined. The Applicant was granted leave to

amend her statement of claim to limit it to an unfair discrimination claim and with no reference to Tsogo Sun Limited. Accordingly, Tsogo Sun Gaming was not cited in the next iteration of the statement of claim dated 26 August 2022 and the applicant only attempted to plead an unfair discrimination claim;

- 12.5. Following a further exception raised by the respondents to this version of the applicant's statement of claim, the applicant is now intending to again amend her statement of claim and to re-introduce Tsogo Sun Gaming Limited as the second respondent. She also proposes to re-introduce the unfair dismissal claim;
- 12.6. For the first time in four versions of the statement of claim prepared by her attorneys and legal advisors on her behalf, the applicant has now alleged that the second respondent was also the applicant's employer;
- 12.7. The belated introduction of the second respondent, coupled with the allegations of co-employment, appear to have been made in order to attempt to support the legal claims of unfair dismissal and unfair discrimination but are not based on facts which the applicant can prove in evidence. The proposed amendment is not *bona fide*;

The dismissal claim

- 12.8. A dismissal in a retrenchment scenario is substantively unfair if it is not for a fair reason based upon the employer's operational requirements (Section 188(1)(a)(ii) of the Labour Relations Act⁷ (LRA)). No, alternatively insufficient, allegations are made in the proposed amended Statement of Claim to establish that the dismissal as not for a reason related to the employer's operational requirements;
- 12.9. The proposed amended Statement of Claim at paragraph 45 (read with the paragraphs referred to therein) is vague and embarrassing, alternatively fails to establish that the termination of the employee's employment was unfair or "*grossly unfair*". The facts alleged in the

⁷ Act 66 of 1995, as amended.

proposed amendment, if proved, do not establish a basis upon which a Court can conclude that the conduct on one or both of the Respondents caused or is a reason for a dismissal which was not based on the employer's operational requirements;

The Discrimination Claim

12.10. There are no or insufficient facts alleged which support the allegation that the Applicant was unfairly discriminated against by the First or Second Respondent on the basis of her race or gender in breach of the Employment Equity Act⁸ (EEA);

12.11. The application fails to plead that the persons against whom she compares herself are similarly placed either in terms of their own employment with the alleged employers of the Applicant, or, if they are employed by one or more of her alleged employers, that their circumstances are comparable to her own;

12.12. For these reasons the proposed amended claims, if allowed, would be excipiable as being vague and embarrassing, or as failing to make out a cognisable claim or cause of action;

12.13. The Respondents are accordingly prejudiced by the intended amendment on one or more of the grounds as set out above.

[13] The Applicant contends in her proposed amended statement of claim that at all times material to her retrenchment, she was employed by the first respondent and the second respondent.

[14] The Applicant's employment was allegedly terminated by the First Respondent on 21 December 2020, following a process under section 189(A) of the LRA. The Applicant's claim has been brought under section 189A(8) of the LRA, being an unfair dismissal claim which is categorised as Claim 1 in the proposed amended Statement of Claim.

⁸ Act 55 of 1998.

[15] In addition to the above, the Applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation alleging unfair discrimination in terms of the EEA, which is categorised as Claim 2 in the proposed amended Statement of Claim.

[16] The Respondents contend, in their heads of argument, that the objections to the amendments are premised, in summary, on the following:

16.1. The amendment is excipiable, in that it makes out no cognisable cause of action;

16.2. It is not *bona fide*, in that the Applicant has no supporting evidence or foundation for what she has pleaded.

[17] Notably, the second ground above is not a ground that was contained in the Notice of Objection. It is, however, trite that a party is not required to provide all of the evidence for their claim in their Statement of Claim, in any event.

[18] After argument of the matter and considering the papers filed in this matter it is clear that the objection raised by the Respondents is, in summary, premised on the following aspects:

18.1. The purported excibiability of the pleadings (with regards to both the unfair dismissal and the unfair discrimination claim);

18.2. This is the fourth attempt that the Applicant has made to amend her pleadings (although it was unclear whether the Respondents still persisted with this ground I still deal with same hereunder);

18.3. The re-introduction of the Second Respondent and unfair dismissal claim was done in bad faith and is not made *bona fide*.

The excipiability of the amendment

[19] The Applicant has contended that with the Respondents' contentions that the pleadings are vague and embarrassing, the Respondents' should have

delivered the requisite notice in terms of Rule 23(1)⁹ to remove the cause of complaint (after the amendment having been effected).

[20] Instead, the Respondents followed this process of raising an objection to the amendment of the Statement of Claim.

[21] I am mindful of the findings made in *Manyatshe v South African Post Office Ltd*¹⁰, as referred to in the Applicant's Heads of Argument.

[22] I am also mindful of the matter of *De Klerk and Another v Du Plessis and Others*¹¹, where the Court held that:

'The grounds of objection are appropriate to an exception and accordingly the Application will be dealt with as if it is an exception. This is preferable to allowing the amendment in the sure knowledge that the Defendant would immediately note an exception.'

[23] I therefore intend to treat the Respondents' objection, insofar as the excipiability of the pleadings is concerned, as though it were an exception.

[24] With regards to pleadings that are vague and embarrassing, the following principles are trite:

24.1. An exception on the grounds that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not at its legal validity;¹²

24.2. An exception to a pleading on the ground that it is vague and embarrassing entails a two-fold consideration. The first consideration is whether the pleading lacks particularity to the extent that it is vague. The second consideration is whether the vagueness causes prejudice.¹³

⁹ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

¹⁰ [2008] ZAGPHC 253; [2008] 4 All SA 458 (T) at para 3.

¹¹ 1995 (2) SA 40 (T); 1994 (6) BCLR 124 (T) at 43I-44B (Also reported at 1994 (6) BCLR 124 (T) – ED)

¹² *Trope and Others v South African Reserve Bank (Trope 2)* 1993 (3) SA 264 (A); [1993] ZASCA 54 at 269; *Venter and Others NNO v Barritt, Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C); [2008] JOL 21239 (C) at para 10.

¹³ *Trope v South African Reserve Bank (Trope 1)* 1992 (3) SA 208 (T) at 211B.

[25] With regards to prejudice, the Court is “*obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of*”.¹⁴

[26] What must also be borne in mind with regards to the lack of particularity in the pleading resulting in vagueness is that the object of pleadings is to set forth a clear and succinct summary of the grounds on which a claim is made. Where a pleading is vague, it is either “*meaningless or capable of more than one meaning*”.¹⁵

[27] In respect of Rule 6 of the Rules of this Court, in *Harmse v City of Cape Town*¹⁶, Waglay J (as he then was) said the following:

[6] The statement of claim serves a dual purpose. The one purpose is to bring a Respondent before the Court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the Respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

[7] The material facts and the legal issues must be sufficiently detailed to enable the Respondent to respond, that is, that the Respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the Applicant is relying upon to succeed in its claim.

[8] The Rules of this Court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of Rule 6(4)(b) the parties in the pre-trial

¹⁴ *Quinlan v McGregor* 1960 (4) SA 383 (D) at 393F – G.

¹⁵ *Lockhat and Others v Minister of the Interior* 1960 (3) SA 765 (N); 1960 (2) PH K86 (D & CLD) at 777 D.

¹⁶ [2003] 6 BLLR 557 (LC); [2003] ZALC 53.

conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the Court is required to decide and the precise relief claimed.'

[28] In *Liquid Telecommunication (Pty) Ltd v Carmichael - Brown*¹⁷, Van Niekerk J quoted with approval the views expressed by Wadley, J (as he then was), as to the emphasis on complying with Rule 6 so as to inform the Court and the Respondent of the facts, not the evidence, upon which the Applicant wishes to rely. Both the Court and Respondent need to know what the Applicant's case is about in respect of factual allegations and legal issues.

[29] When the Respondent pleads to the Statement of Claim, it will also be expected of the Respondent to similarly state the facts and legal issues to enable the Applicant at the pre-trial conference to deal with same.

[30] In *Association of Mineworkers and Construction Union and Others v Chamber of Mines South Africa and Others*¹⁸, this Court had the following to say relating to exceptions raised in this Court:

'It is my view, that such court in deciding on this aspect has to take into account, inter alia, (i) the manner in which the pleadings have been crafted, (ii) the onus of proof, (iii) burden to adduce evidence, (iv) the manner in which such point has been raised, (v) the relief sought, and (vi) the type of exception (either lacks averments which are necessary to sustain an action or vague and embarrassing) that has been raised by such party and other factors.'

[31] Insofar as a party relies on claiming that a pleading lacks averments which are necessary to sustain an action, the following principles need to be taken into consideration:

31.1. The challenge on the basis that a pleading does not disclose a cause of action or defence is directed at its legal validity;¹⁹

¹⁷ (2018) 39 ILJ 1779 (LC); [2018] ZALCJHB 153.

¹⁸ [2017] ZALCJHB 462; [2017] 7 BLLR 641 (CC).

¹⁹ *Manyatshe v SAPO* at para 6.

31.2. In *McKenzie v Farms' Co-operative Meat Industries Ltd*²⁰ the following definition of “*cause of action*” was adopted by the Appellate Division:

‘... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved’;

31.3. A pleading is excipiable if no possible evidence led on the pleadings can disclose or make out a cause of action or a defence;²¹

31.4. In deciding an exception, a Court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleadings cannot be supported on every interpretation that can be on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against any embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided²²;

31.5. The defendant must persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed.²³

[32] With the above in mind, I now turn to the Respondents’ Grounds of Complaint raised in their Notice of Objection insofar as the excipiability of the pleadings is concerned.

²⁰ 1992 AD 16 at 23 – quoted with approval in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226H-L.

²¹ *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] ZASCA 53; [2001] 3 All SA 350 (A) para 7.

²² *Pretorius and another v Transport Pension Fund and others* 2019 (2) SA 37 (CC); [2018] 7 BLLR 633 (CC) para 15.

²³ *Theunissen en andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E (also reported at [1998] 1 All SA 289 (A) – Ed) and *Lewis v Oneanate (Pty) Ltd and another* 1992 (4) SA 811 (A) at 817F-G (also reported at [1992] 2 All SA 498 (A) – ED).

[33] The Respondents have contended that the Applicant was granted leave to amend her Statement of Claim to limit it to an unfair discrimination claim and with no reference to the Tsogo Sun Gaming Limited. I deal with this further below in my judgment.

[34] I do not believe that the Applicant was limited in only being able to plead an unfair discrimination claim. I turn to deal with the dismissal claim hereunder.

Dismissal claim

[35] The Respondents have contended at paragraph 8 of their Objection that, *“A dismissal in a retrenchment scenario is substantively unfair if it is not for a fair reason based upon the Employer’s operational requirements (Section 188(1)(a)(ii) of the LRA). No, alternatively insufficient allegations are made in the proposed amended Statement of Claim to establish that the dismissal was not reason related to the employers’ operational requirements”*.

[36] At paragraph 9 of the Respondents’ Objection, the Respondents contend that *“the proposed amended Statement of Claim at paragraph 45 (read with the paragraphs referred to therein) is vague and embarrassing, alternatively fails to establish that the termination of the employer’s employment was unfair or “grossly unfair”. The facts alleged in the proposed amendment, if proved, do not establish a basis upon which a court can conclude that the conduct of one or both of the Respondents caused or is a reason for a dismissal which was not based on the employers’ operational requirements”*.

[37] I agree with the Applicant’s submissions that no basis has been set out by the Respondents for such a claim especially when one considers the Respondent’s objection in comparison to the argument made out in the Respondent’s Heads of Argument.

[38] Paragraph 45 of the proposed amended Statement of Claim states that, *“the conduct of the Second Respondent and the First Respondent set out in paragraphs 18 to 29 and 34 above was grossly unfair and rendered the retrenchment of the Applicant substantively unfair as contemplated in Section 189(a)(8) of the LRA”*.

- [39] Applying *AMCU supra*, this excerpt is a legal conclusion in terms of the averments made by the Applicant at paragraphs 18 to 29 and 34 of her proposed amended Statement of Claim. This paragraph must be read in the context of those paragraphs and cannot be isolated as the Respondents attempt to do insofar as their objection is concerned.
- [40] These paragraphs (namely paragraphs 18 to 29 and 34) may give credence to the Applicant's claim. Due to the nature of the dismissal dispute, the Applicant will have the burden to lead evidence relating to her claim. The Respondents will still have an onus to show that the dismissal was fair.
- [41] What is also important is that the Respondents' objection turns on the Respondents relying on a claim in terms of Section 188(1)(a)(ii) of the LRA. The Applicant has stated in argument, as well as in the papers that were filed, that her claim is premised on Section 189A of the LRA. This is also clearly set out at paragraph 45, being the offending paragraph raised by the Respondents.
- [42] In essence, the Respondents have contended that no case is made out in respect of the substantive unfairness of the Applicant's dismissal. If one, however, has regard to paragraphs 18 to 29 and 34 of the Applicant's proposed amended Statement of Claim, the Applicant has pleaded the facts leading to the legal conclusion of the substantive unfairness of her dismissal.
- [43] I also agree with the Applicant's submissions that it has been decided on more than one occasion that:
- 43.1. It is not always possible and appropriate to separate substantial and procedural issues in a retrenchment context. They are often inextricably intertwined²⁴;
- 43.2. It has been held by this Court that if an employee believes that an issue which on its surface appears to be procedural in nature but has

²⁴ *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC); (2004) 25 ILJ 2358 (LC); *Watts v Fidelity Corporate Services (Pty) Ltd* [2007] 6 BLLR 579 (LC); *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC); [2003] JOL 11143 (LAC).

significant substantive fairness ramifications, then this issue should be raised in the course of the substantive fairness claim.²⁵

[44] From the pleadings, it is clear that the Applicant's case is premised on Section 189(A) of the LRA.

[45] It would seem from both the objection and the argument led that the Respondents are attempting to argue the merits of the matter. It is, however, not for this Court to make a determination on the merits, at the stage of a party requiring an amendment to the pleadings.

[46] As the rules of this Court do not require an Applicant to elaborate exposition of all fact in their full and complex detail, as *Harmse (supra)* concluded, I conclude that the Applicant has presented enough background in terms of her claim and that such amendment will not render the amended statement of claim excipiable by either being vague and embarrassing and/or lacking the necessary averments to sustain a cause of action.

[47] The grounds for objection in terms of the dismissal claim therefore stand to fail.

The Discrimination Claim

[48] Section 6 of the EEA provides:

'Prohibition of unfair discrimination – (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[49] The case of the Applicant is that based on her race and/or gender she was unfairly discriminated against by the respondents in respect of not being afforded the benefit of participation in a special share loan scheme and payment of 'ex gratia payments'.

²⁵ *SACCAWU and Others v Southern Sun Hotel Interests (Pty) Ltd* [2017] 1 BLLR 90 (LC); (2017) 38 ILJ 463 (LC) at para 21.

[50] The Respondents contend at paragraphs 10 and 11 of their Objection that:

'[10] There are no insufficient facts alleged which support the allegation that the Applicant was unfairly discriminated against by the First and Second Respondent on the basis of her race or her gender in breach of the Employment Equity Act 66 of 1995;

[11] The Applicant fails to plead that the persons against whom she compares herself are similarly placed either in terms of their own employment with the alleged employers of the Applicant, or, if they are employed by one or more of her alleged employers, that their circumstances are comparable to her own.'

[51] An excipient in an ordinary exception has to demonstrate that no matter how one interprets the pleading, no cause of action is disclosed. Ambiguity does not make a pleading excipiable; what is needed is that the excipient has to show that the ambiguity causes the pleading to be excipiable and that it will be substantially embarrassed if the alleged pleading is not dismissed.

[52] Again, the entire pleading needs to be read in its context. The Applicant has pleaded the following in her proposed amended Statement of Claim:

'50. The Second Respondent employed a number of senior executives who carried on the business of the TS Group.

51. Until 2019, a number of senior executives were members of TS Group Executive Committee ("GEC"). Since 2014, the Applicant was a member of the GEC. She was one of two black female executives who were members of the GEC, the other being Laurelle MacDonald.

52. In addition, the Applicant was a member of the boards of several companies within the TS Group.

53.. As a member of the GEC and as a board member as stated above, the Applicant carried responsibilities and enjoyed a status similar to those of other senior executives employed within the TS Group, including those senior executives who were members of the GEC.

54. By reason of the foregoing the applicant fell within the identifiable category of senior executives within the TS Group.
55. Subject to what is stated below, the said category of senior executives consistently enjoyed generous standards of terms and conditions of employment and entitlement and benefits on termination of employment (on a no-fault basis).
56. In particular and subject to what is said below, when members of the said category of senior executives terminated their employment within the TS Group, they received generous *ex gratia* payments.
57. The said payments were made by the Second Respondent as *ex gratia* payments, over and above other retrenchment and resignation entitlements and benefits they received on termination of employment.
58. Subject to what is stated below, the said payments were made as part of their consistent practice applied to the above category of senior executives.'

[53] The Applicant then goes on further at paragraph 59 on her proposed amended Statement of Claim to list examples, including, names, races, genders, and positions of other senior executives that received *ex-gratia* payments over and above other retrenchment and resignation entitlements and benefits.

[54] The Applicant then continues to plead as follows:

- '60. In addition to the above, certain senior executives who belonged to the category referred to in paragraph 54 were afforded participation in a special share participation scheme. The details of the scheme will be dealt with in evidence. The said scheme afforded those who were allowed to participate therein the opportunity to borrow money from the Second Respondent to buy shares in the Second Respondent. On termination of employment, certain participants in the said scheme were afforded a relaxation of the terms of repayment of the loan. The relaxation allowed them an extension of the date of repayment of the loan beyond the date of the termination of their employment. Certain of the said participants were also afforded the possible future release from any loan repayment obligations.

61. Despite her request therefor, the Applicant was not afforded the benefit of participation in the special share loan scheme. It followed that she did not receive the further benefit referred to in paragraph 60. Had she been allowed to participate in the said scheme, she would have also been afforded the further benefit on termination of employment.'

[55] The Applicant then pleads at paragraph 62 to 62.5 of her proposed amended Statement of Claim, names, races, genders, and amounts received by the certain participants that she refers to at paragraphs 60 to 61 of her proposed amended Statement of Claim.

[56] The Applicant then goes on to plead as follows in her proposed amended Statement of Claim:

- '63. Initially the interest free loans were repayable upon the earlier of the realisation of the shares or on termination of employment.
64. The Second Respondent (together with the First Respondent) extended a special dispensation to messrs Huddy and Tyrrell:
- 64.1 extending the date for repayment of the interest free loan;
- 64.2 determining that if at the time of maturity of the interest free loans the shares were still trading below the price at which messrs Huddy and Tyrrell acquired their shares, the Second Respondent would:
- 64.2.1 consider a further extension of the duration of the interest free loans; or
- 64.2.2 write off the interest free loans.
65. In addition, Mr Booysen was granted an extension to dispose of his shares and repay his interest free loan to September 2022.
66. All the above persons received ex gratia payments and benefitted from the special share participation scheme were executive employees of the TS Group and belonged to the category of senior executives referred to in paragraphs 54 and 55 above.

67. The Applicant's services were terminated by the First Respondent and the Second Respondent on 21 December 2020.
68. Despite the Applicant's request for an ex-gratia payment on termination of her employment commensurate with her status as a senior executive as was received by other employees who fell within the category of senior executives referred to in paragraphs 54 and 55 above, the First Respondent and Second Respondent refused to do so.
69. The Second Respondent's refusal to treat the Applicant on the same basis as the other senior executives who fell within the same category as she did:
 - 69.1 the constituted conduct relating to the remuneration and employment benefits of an employee;
 - 69.2 was irrational and incapable of reasonable explanation;
 - 69.3 offended the dignity of the Applicant; and
 - 69.4 constituted unfair discrimination on the ground of the Applicant's race and gender as contemplated in Section 6 of the Employment Equity Act 55 of 1998 ("EEA").'

[57] Accordingly, I find that the Applicant has pleaded every fact which it would be necessary for the Applicant to prove, if traversed, in order to support her rights to judgment of the Court. This is the test in terms of the authorities which have already been dealt with above.

[58] As the Rules of this Court do not require an Applicant to elaborate exposition of all facts in their full and complex detail, as *Harmse (supra)* concluded, I conclude that the Applicant has presented enough background which links the Applicant's contentions that she was unfairly discriminated against by the First or Second Respondent on the basis of her race or gender in breach of the EEA.

[59] Accordingly, the grounds of objection pertaining to the excipiability of the pleading insofar as the discrimination claim is concerned, stands to fail.

Applicant's Fourth Attempt to Amend

[60] It is unclear whether the Respondents intended proceeding with this Objection as raised at paragraph 2 of the Objection. There is, however, nothing in the rules or authorities limiting a party's ability to amend their pleadings and the number of amendments a party is entitled to make.

[61] This ground therefore too stands to fail.

Reintroduction of the Second Respondent as well as the Unfair Dismissal Claim seen as not acting *bona fide* and acting in *bad faith*

[62] The Respondents have contended that the Applicant was granted leave to amend her Statement of Claim to limit it to an unfair discrimination claim and with no reference to *Tsogo Sun Gaming Limited*.

[63] The Respondents have also contended that, *"the belated introduction of the Second Respondent, coupled with the allegations of co-employment, appear to have been made in order to attempt to support the legal claims of unfair dismissal and unfair discrimination but are not based on facts which the Applicant can prove in evidence. The proposed amendment is not made bona fide"*.

[64] Importantly, the judgment of my Learned Brother Mahomed AJ, consisted of the following findings having been made by him in terms of the Second Respondent:

'[18] Whilst the Applicant positively asserts that she was an employee of the First Respondent she fails to make any such allegation in respect of the Second Respondent or even an allegation of co-employment between the Respondents. This is a material omission.

...

[21] Effectively what the Applicant seeks to do in the citation of the Second Respondent and was clear to me in submissions, is through the back door, to pierce the corporate veil. I indicated to Mr Ngcukaitobi that it appeared to me that what the Applicant sought to do in relation to the

Second Respondent was to impute liability on such party under Section 2(B) of the LRA. Clearly, there are no averments made in the Statement of Claim to lay the basis for such liability.

[22] I am not persuaded that a cause of action is made out for the second respondent to be a co-employer of the Applicant in the Statement of Claim. It has been mis-joined in the proceedings and must now be let loose.'

[65] I do not, in that, see my Learned Brother Mahomed AJ limiting the Applicant's claim or ordering that the Applicant may not join the Second Respondent ever again the future.

[66] This Court, could not, in any event, limit a litigant's ability to amend its claim and/or to join further parties if one considers that a party may amend to introduce a new cause of action or to add or substitute a party, at any time before judgment, in any event.²⁶

[67] It was the shortcomings in terms of the citation of the Second Respondent at that stage of the pleadings that led to the finding that the Second Respondent had been mis-joined at that stage, which I agree with insofar as the Statement of Claim stood and the allegations that were made in the Statement of Claim at that stage.

[68] In terms of the allegations involving the Second Respondent's joinder now, however, the Applicant has clearly pleaded the following regarding the Second Respondent:

'5. At all times material to her retrenchment, the Applicant was employed by the First Respondent and the Second Respondent.

6 In her capacity as an employee of the First Respondent and the Second Respondent, the Applicant worked under the control and direction of the Second Respondent and assisted in the carrying on and the conduct of the business of the First Respondent and the Second Respondent.

²⁶ *Levi Strauss & Co v Coconut Trouser Manufacturers (Pty) Ltd* [2001] ZASCA 60; [2001] 4 All SA 1 (A) at para 11.

7. The First Respondent is a wholly owned subsidiary of the Second Respondent.
8. The Second Respondent is and was the holding company of several subsidiary companies. The Second Respondent together with the subsidiary companies which existed as such from time to time formed or form the group of companies referred to herein as the TS Group.
9. The Second Respondent became the holding company of the TS Group in or about 2010.
10. Prior to 2010, the business of the TS Group was owned and conducted by various holding companies and subsidiary companies. Since 1997, the applicant was employed by one or more companies within the TS Group as it was comprised from time to time.
11. In 2019, the Second Respondent underwent a name change from Tsogo Sun Holdings Limited to Tsogo Sun Gaming Limited.
12. Throughout the course of her employment as outlined above, the Applicant performed the same or similar functions for the benefit of the business of the TS Group.
13. The operation of Section 197 of the Labour Relations Act, 1995 ("the LRA") or as agreed between the Applicant and her employer or employers from time to time, all of the Applicant's employment rights and entitlements that accrued to her from time to time remained in place for the full duration of her employment, commencing 6 January 1997. Concomitantly, all the employer obligations and duties relevant to the employment of the Applicant since 1997 devolved upon the First Respondent and the Second Respondent.'

[69] I agree with the Applicant that whether as a matter of law any of, any combination of or all of the above establish an employment relationship with the Second Respondent, is not a matter for this Court to determine at this stage. This is for the Trial Court to decide. All that I am required to satisfy myself with at this stage, is that there are sufficient allegations that the Applicant is an employee of the Second Respondent. The evidence in this regard, does not need to be produced by the Applicant at this stage. If the Respondents take

issue with this, they may do so in their Statement of Defence and this aspect will then be determined by the Trial Court in due course.

[70] In terms of the contentions made by the Applicant in her proposed amended Statement of Claim, however, I am satisfied that there are sufficient averments to demonstrate the joinder of the Second Respondents to the proceedings. Accordingly, this ground too stands to fail.

[71] I also do not find that my brother Mahomed AJ placed any restrictions on the Applicant in terms of the claims it may or not may bring. The exception raised to the cause of action at the stage that it was argued before my learned brother was different to the objection/s raised by the Respondents at this stage.

[72] I thus do not find that the amendment sought by the Applicant is *mala fide*, done in bad faith or prejudicial to the Respondents.

[73] In the premises I make the following Order:

Order

1. Condonation is granted for the late filing of the Applicant's Application;
2. The Applicant is granted leave to amend her Statement of Claim as per her Notice of Amendment attached as Annexure "ZK1" to the Founding Affidavit;
3. The Applicant is authorised to deliver her amended Statement of Claim within ten days of this Order;
4. No order as to costs.

R Adams

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv. Paul Pretorius SC & Ndumiso Luthuli

Instructed by: Harris Nupen Molebatsi Attorneys

For the Respondents: Adv. Andrew Redding SC

Instructed by: ENS Africa