

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO:22/24141

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

05/09/2024

DATE

SIGNATURE

In the matter between:

NAOMI DE GRANDI

Applicant

and

SOUTH AFRICAN AIRWAYS (SOC) LIMITED

Respondent

JUDGMENT

McCAFFERTY AJ:

Introduction

1. The Plaintiff ("Applicant") seeks to Amend her already amended Particulars of Claim, in their entirety, in terms of Rule 28(4), of the Uniform Rules of Court ("the Rules").
2. The Applicant also seeks condonation for the late delivery of her Application for Leave to Amend.
3. The Defendant ("Respondent") opposes the Application for Leave to Amend and the granting of condonation. Briefly, the Respondent contends that:
 - 3.1 this application is another attempt by the Applicant to cure shortcomings in her Particulars of Claim as identified by the Respondent's notices in terms of Rule 23(1) and 30(2), by way of an amendment. Further that, if granted, the amendment will still render the Particulars of Claim excipiable on account of it being vague and embarrassing and lacking the necessary averments to sustain a cause of action;
 - 3.2 the Applicant has furnished an inadequate explanation for the delay and has poor prospects of success and condonation should be denied.
4. Before I consider below the grounds of objection summarised above in subparagraph 3.1, I will deal with condonation.

Condonation

The Applicants case on Condonation – The Founding Affidavit deposed to by Mr Graham, the Applicant's Attorney of Record ("Mr Graham")

5. In summary, the Applicant avers that:

- 5.1 the Applicant delivered her Notice of Intention to Amend on 7 June 2023¹. The Applicant wishes to amend her Particulars of Claim as set out in the Notice and believes that the Respondents objection, served on 22 June 2023² is a mere delay tactic;
- 5.2 the Application for Leave to Amend must be brought within 10 days from the date of objection and the Application for Leave to Amend was delivered two days late;
- 5.3 the degree of lateness is not excessive and the Respondent has not taken any further steps since the objection was raised;
- 5.4 the office of the Applicant's attorney had to consult with the Applicant following the objections raised by the Respondent and further, had to refer the matter to counsel for an opinion on how to proceed. This resulted in the delay in delivering the Application for Leave to Amend;
- 5.5 the Applicant is of the view that the objections raised by the Respondent to the proposed amendments are without merit and the Respondent is merely avoiding the serving of its Plea. It is because of this that the Applicant believes that her Application for Leave to Amend has high prospects of success;
- 5.6 the Applicant is the only one who stands to suffer any prejudice should the condonation not be granted as the action will be dismissed before it can be heard by this Court and she will continue to suffer and be prejudiced without her income.

¹ Founding Affidavit, para 2.2, CaseLines 13-6, Notice of intention to Amend, CaseLines 11-1 to 11-76

² Founding Affidavit, para 2.2, CaseLines 13-6, Notice of Objection, Caselines 12-1 to 12-3

The Respondents case on Condonation – the Answering Affidavit deposed to by Mr Simon Ngwenya, an Employee Relations Specialist, employed by the Respondent

6. In summary, the Respondent avers that:

6.1 the Applicant had no intention to lodge an Application for Leave to Amend. The said application was only brought in response to the Respondent's stated intention to proceed with an exception. This intention was communicated to the Applicants attorneys of record on 10 July 2023 by the Respondent's attorneys of record;

6.2 the Respondent denies that the reasons advanced for the delay by the Applicant are valid. On previous occasions, the Applicant's attorneys had requested an indulgence in circumstances where they needed to consult the Applicant and counsel. The Applicant had asked for eight indulgences previously;

6.3 the period of time provided for in terms of the Rules to file an application for Leave to Amend after receiving an objection to an intended amendment is sufficient to allow the Applicant time to consult with its representatives and prepare a substantive application, where necessary.

6.4 Mr Graham, who has not provided any confirmatory affidavits, also fails to state:

6.4.1 on which date he consulted with his client;

6.4.2 on which date he requested an opinion from counsel;

6.4.3 from which counsel he requested the opinion;

- 6.4.4 when he obtained the opinion from counsel;
 - 6.4.5 why counsel could not provide the opinion within a timeframe which allowed for compliance with the rules;
 - 6.4.6 why no indulgence was sought from the Respondent;
 - 6.4.7 why no correspondence was sent to the Respondent stating an intention to bring the application to amend; and
 - 6.4.8 when drafting of the application to amend commenced.
- 6.5 The only party that stands to suffer prejudice in this matter is the Respondent. Even if it is contended that the Applicant will also suffer prejudice (which is denied) it is submitted that the prejudice that the Respondent stands to suffer, outweighs that of the Applicant, if any.
- 6.6 The Respondent is continuously prejudiced because it incurs unnecessary legal costs occasioned by the Applicant continually seeking a cause of action through numerous attempted amendments.
- 6.7 No purpose would be served in granting the Applicant condonation given that the proposed amendment does not cure the Respondent's cause of complaint.

The Legal Principles – the general approach to applications for condonation

7. The test for the grant of condonation has been stated to entail the factors enumerated in *Melane v Santam Insurance*³, where the Court held, at 532C-F that:

³ *Melane v Santam Insurance* 1962(4) SA 532(A)

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion."

8. The factors usually considered by a Court in considering an Application for Condonation include the degree of non-compliance, the explanation therefore, the importance of the case, the Applicants prospects in the main proceedings, the prejudice caused to the Respondent and the avoidance of unnecessary delay in the administration of Justice.⁴
9. The interests of justice, however, is an overarching consideration.⁵
10. It is trite that condonation is not a formality or merely for the asking. A party seeking condonation must show sufficient cause by providing a full and reasonable explanation for the non-compliance with the Rules or Court's direction.⁶
11. The granting or refusal of condonation is a process which involves the balancing of the competing factors outlined above. Even where the delay is minimal and a satisfactory explanation has been provided for the delay, weak prospects of success may nevertheless warrant the denial of condonation.⁷

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013]2 All SA 251 (SCA) at para 11

⁵ *Grootboom v National Prosecuting Authority and Another* (2014) 1 BLLR 1 (CC)

⁶ *Bathale Holdings v C And H Yard Ltd and Others* (081339/2023)[2023] ZA GP JHC 1062 (17 August 2023)

⁷ *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) at para 38

Analysis on Condonation

12. The degree of delay is only a period of two days. This is not excessive. The explanation put forward by the Applicant for the delay, while lacking in the detail sought by the Respondent, is nonetheless sufficient. It does not seem to me that the nature of the particularity sought by the Respondent, such as the identity of the counsel who was consulted, when the opinion was requested from him/her and when the opinion was received are reasonably necessary. It obviously falls to Mr. Graham to arrange the consultation with counsel, and with the Applicant and to attend to the drafting of the Application. These matters are within his personal knowledge and the lack of a Confirmatory Affidavit from the Applicant similarly does not seem to me to take matters any further. It is not suggested that the Applicant or Mr. Graham have acted *mala fide*. Whilst the prospects of success are under challenge, the case is obviously of considerable importance to the Applicant, who is claiming an amount of more than R 7 million.
13. In the exercise of my discretion, I have considered the balance between the competing factors referred to above, including the interests of justice. In my view, the scale is tipped in favour of condonation being granted.

Background

14. In her Notice of Intention to Amend dated 7 June 2023, the Applicant seeks to amend her Particulars of Claim entirely. I point out that there are errors in the paragraph numbering of the proposed amended Particulars of Claim. The first fifteen paragraphs of her Particulars of Claim are correctly numbered 1 to 15, respectively. The six paragraphs that follow should therefore have been numbered 16 to 21,

respectively. These are currently incorrectly numbered as paragraphs 13 to 18, respectively. I will indicate the correct paragraph number in square brackets below.

15. The main focus of the objection by the Respondent relates to paragraphs 9,14 [17], and 16[19] of the proposed amended Particulars of Claim. For convenience, these paragraphs of the proposed amended Particulars of Claim are set out below:

"9. On or about the 18th of August 2006, the Defendant through its respective HR representative along with UASA(AIWU) and South African Transport and Allied Workers Union (SATAWU) on behalf of the Plaintiff entered into a Collective Agreement on Employment Conditions (hereinafter referred to as the collective agreement). See attached herein a copy of the collective agreement marked Annexure CA"

"14.[17] The Defendant threatened the Plaintiff with dismissal. The Defendant carried out the threats and unlawfully terminated the Plaintiff's employment contract on the 27th of November 2019. The unlawful termination subsequently led to the Plaintiff's income protection claim being terminated and further rendered the Plaintiff without any income. The termination of employment letter is attached herein and marked Annexure E."

"16.[19] The Plaintiff contends that her dismissal remains unlawful for one or more of the following reasons;

16.1[19.1] The Defendant failed to implement its own grievance procedure to resolve the dispute lodged by the Plaintiff to its finality;

16.2[19.2] The Defendant unlawfully and maliciously refused the Plaintiff to have access to her accident report to enable her to file an RAF claim which would have compensated her for the occupational injuries.

16.3[19.3] The Defendant maliciously denied the Plaintiff to prosecute her grievance to her satisfaction and in return crafted charges where they knew would lead to her dismissal and to lose her medical boarding income.

16.4[19.4] The dismissal left the Plaintiff impoverished due to the loss of her medical boarding income.

16.5[19.5] The Defendant intentionally denied the Plaintiff an opportunity to appear in person to address the grievance as per its own grievance procedure and when she enforced the said right, the Defendant unlawfully terminated her employment. The forfeiture of benefit letter is attached herein and marked Annexure F".

16. In its Notice of Objection dated 22 June 2023, the Respondent objects to the paragraphs referred to above as follows:

"4. There are no facts pleaded, however, to demonstrate that the institution of disciplinary proceedings in the absence of resolution of a grievance either (i) breached the plaintiff's contract of employment and if so, which provision; or the (ii) the contract of employment (and if so, which provision) precluded the termination of the agreement whilst a grievance process remained pending; or (iii) there is a rule in law (and if so, what rule) which precluded an employer terminating a contract of employment whilst a grievance process remains pending.

5. Absent such averments being pleaded in the proposed amended particulars of claim, a termination of employment while a parallel grievance process is being run

does not amount to a breach of the plaintiff's contract of employment at common law or a breach of a legal duty on the part of the defendant so as to render the termination of the plaintiff's employment unlawful.

6. As a result, the proposed amendment renders the particulars of claim vague and embarrassing. It is furthermore objectionable because it does not cure the excipiability of the plaintiff's particulars of claim and/or will result in unrepairable prejudice to the defendant.

7. The defendant is therefore prejudiced in its ability to plead to the particulars of claim should the amendment take effect."

The Applicant's Founding Affidavit

17. In summary, the Applicant (under the headings used by it) avers that:

"Background to the Application for Leave to Amend"

18. The Applicant issued summons against the Respondent on 8 July 2022⁸. The Respondent entered an appearance to defend.

19. On or about 31 August 2022⁹, the Respondent served the Applicant with a notice in terms of Rule 23(1) and 30(2)(b), in which the Respondent alleged that the Applicant's Particulars of Claim were irregular, vague and embarrassing, alternatively that they lacked the necessary averments to sustain a cause of action in that:

⁸ Founding Affidavit para 3.2, CaseLines 13-07, read with CaseLines 13-19

⁹ Founding Affidavit para 3.3, CaseLines 13-07, read with, CaseLines 13-20

- 19.1 the Particulars of Claim do not specify the facts relied upon by the Applicant to allege that the termination of her employment was unlawful;
- 19.2 that the Particulars of Claim do not comply with Rules 18(4) and 18(10).
20. The Applicant subsequently requested further documents from the Respondent including the Applicant's Employment Contract and Medical Boarding Policy for the purposes of amending the initial Particulars of Claim to which the said exception was raised. The Respondent furnished the Applicant with some of the required documents and the rest are still outstanding. The Applicant's proposed amendments are based on these documents.
21. On or about 10 February 2023, the Applicant served the Respondent with a Notice of Intention to Amend in terms of Rule 28 (1)¹⁰. The Respondent did not object to the Notice and that amendment was effected.
22. On or about 27 March 2023, the Respondent served the Applicant with a Notice to Remove cause of complaint in terms of Rule 23 and 30¹¹, repeating the allegations made in the Respondents earlier notice of 31 August 2022, referred to above.
23. In response, on 20 April 2023, the Applicant gave Notice of Intention to Amend in terms of Rule 28¹².
24. On or about 8 May 2023, the Respondent served the Applicant with an objection alleging that the proposed amendments do not cure the cause of complaint raised in the Respondents above mentioned notice of 27 March 2023¹³.

¹⁰ Founding Affidavit para 3.5, CaseLines 13-07 read with CaseLines 13-19

¹¹ Founding Affidavit para 3.6, CaseLines 13- 08, read with CaseLines 13-22

¹² Founding Affidavit para 3.7, CaseLines 13-08, read with CaseLines 13-23

¹³ Founding Affidavit para 3.7, CaseLines 13-08, read with CaseLines 13-24

25. On or about 8 June 2023, the Applicant served the Respondent with a Notice of Withdrawal in respect of its above mentioned Notice of Intention to Amend served on 20 April 2023¹⁴.
26. On or about 7 June 2023, the Applicant served another Notice of Intention to Amend, which notice is the subject matter of the current objection by the Respondent.

“The Objection is without merit”

27. Having recited the wording of the objection, the Applicant avers that:

- 27.1 the material terms relied upon by the Applicant are clearly, coherently and specifically pleaded in that the Applicant's claim emanates from an incident which occurred on 21 March 2019 and from that same incident a series of events are further pleaded which resulted in the Applicant's unlawful dismissal and loss of income;
- 27.2 the Applicant need not plead the evidence. Further, that if the Respondent disagrees with the allegations, then the Respondent must simply disprove otherwise and the Applicant will bear the onus to prove her claims;
- 27.3 a simple approach (as adopted by the Applicant) allows the parties to ventilate themselves at trial. Further, that the complaints raised by the Respondent (go to) the *facta probantia* which must not be mistaken to be the *facta probanda*. What the Respondent seeks by way of its objection is the pleading of evidence. Parties do not plead evidence;

¹⁴ Founding Affidavit para 3.8, CaseLines 13-08 read with CaseLines 13-24

- 27.4 what is sought to be pleaded by the Applicant does not in any way prejudice the Respondent to an extent that it cannot plead. It appears from the conduct of the Respondent that no matter how many times the Applicant amends, the Respondent will raise an objection even to the most technical aspects of the pleading;
- 27.5 there is no trial date in this matter and no prejudice caused to the Respondent and no reasonable ground (exists) as to why the amendment should be refused; and
- 27.6 that the objection raised by the Respondent is unsound and/or serves only to delay the process.

The Respondent's Answering Affidavit

28. In summary, the Respondent (*ad seriatim*) avers that:
- 28.1 the Respondent's objection is not "*a mere delay tactic*". The Applicant has sought to amend her Particulars of Claim three times. Despite the proposed amendment, the Particulars of Claim remain vague and embarrassing and do not comply with Rules 18(4) and 18(10);
- 28.2 the Respondent denies the allegation that its objection is without merit and that the Respondent is merely avoiding serving its Plea. The Respondent cannot serve its Plea in circumstances where the Particulars of Claim are unclear, and not concise and do not put forward a proper and ascertainable cause of action which would enable the Respondent to know what case it has to meet;

- 28.3 the Respondent denies that some of the documents requested by the Applicant from the Respondent are still outstanding.¹⁵ The Applicant managed to obtain a legal opinion and thereafter amended her Particulars of Claim subsequent to the furnishing of documents to the Applicant by the Respondent. The Respondent is under no obligation to furnish the Applicant with documents to assist her to advance a coherent cause of action: this in circumstances where she has failed to utilise any mechanisms for the delivery or the disclosure of documents in terms of the Rules;
- 28.4 the Respondent refrains from engaging in a legal debate regarding *facta probanda* and *facta probantia*. It is not appropriate for the Respondent to be left to guess on what basis it purportedly breached the Applicant's contract of employment or acted unlawfully and to prepare for trial without such clarification;
- 28.5 the Respondent is advised that if an amendment will render a pleading excipiable it will not be allowed unless exceptional circumstances exist. The Applicant has not established any exceptional circumstances; and
- 28.6 the prejudice that will be suffered by the Respondent if the amendment is allowed cannot be cured by a costs order.

The Law on Amendments

29. Rule 28 of the Rules regulates amendments to pleadings. In deciding whether to grant or refuse an amendment the court exercises a discretion. A court when

¹⁵ During argument it was conceded by counsel for the Applicant that all of the documents requested by the Applicant from the Respondent had been provided to the Applicant.

exercising a discretion tends towards granting an amendment to ensure that justice is done between the parties.¹⁶

30. Amendments will generally be allowed unless the application to amend is *mala fide* or such amendment would cause an injustice to the other side which cannot be compensated by costs.¹⁷

31. In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9, the court stated:

"... Amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

Principles of Pleadings

General

32. It is trite that the object of pleading is to bring clearly to the notice of the court and the parties against whom a claim is brought, the issues upon which reliance is to be placed.¹⁸ This object can only be attained when each party states its case with precision.¹⁹

33. It is therefore incumbent on an applicant to clearly and concisely state on what facts its claim is based. The plaintiff is required to do so with "such exactness that the

¹⁶ Harms Civil Procedure in the Superior Courts B-189

¹⁷ *Moolman v Estate Moolman* 1927 CPD 27

¹⁸ *Imprefed (Pty) Ltd v National Transport Commission* 1993(3)SA 94(A) at 107C-E ("*Imprefed*")

¹⁹ See Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* quoted in *Imprefed* at 107C-E

defendant will know the nature of the facts which are to be proved against him so that he may adequately meet them in court and tender evidence to disprove the plaintiff's allegations".²⁰

34. This requires the following –

*"...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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."*²¹

Exceptions Generally

35. An exception is a preliminary procedure which operates as an objection to the essence of a pleading. Its aim is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner.²² To this end, an exception provides a "useful mechanism to weed out cases without legal merit".²³

36. In *Southernport Developments (Pty) Ltd v Transnet LTD* 2003 (5) SA 655 (W) the court formulated the test on exceptions as follows:

"In order for an exception to succeed, the excipient must establish that the pleadings is excipiable on every interpretation that can be reasonably attached to it. A charitable test is used on exception especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. The Court

²⁰ *Benson and Simpson v Robinson* 1917 WLD 126

²¹ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 ("McKenzie") at 23

²² *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 (CPD) 627 ("Colonial Industries") at 630

²³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para 3

*should look at a pleading with a magnifying glass of too high power. The pleadings must be read as a whole, no paragraph can be read in isolation."*²⁴

37. The Court in the matter of *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC)²⁵ held that:

"In deciding an exception the court must accept all allegations of fact made in the particulars of claim as true; and may not have regard to any other extraneous facts or documents, it 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 pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an 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 avoided."

Vague and Embarrassing

38. An exception premised on a pleading being "vague and embarrassing" refers to an instance where there is some defect or incompleteness in the manner a cause of action is set out, which results in embarrassment to the defendant.²⁶ An excipient must demonstrate that it will be seriously prejudiced if the offending allegations are not expunged before an exception that a pleading is vague or embarrassing is upheld.

²⁴ *Southernport Developments (Pty) Ltd v Transnet LTD* 2003 (5) SA 655 (W) at para 6 (i)-(iv)

²⁵ *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at para 15

²⁶ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) ("Trope") at 268F

No cause of action

39. The purpose of an exception that a pleading does not disclose a cause of action is to dispose of the case, as pleaded, in whole or in part, in an expeditious and cost-effective manner.²⁷
40. In order to disclose a cause of action, a pleading must set out every material fact which it would be necessary for the party to prove, if traversed, in order to support his right to judgment of the court.²⁸ A pleading which fails to meet this standard is excipiable.²⁹
41. In the context of an application for leave to amend, if an amendment will render a pleading excipiable, it will not be allowed unless exceptional circumstances exist.³⁰

Analysis

42. The Respondent argues that a termination of employment while a parallel grievance process is being run does not amount to a breach of the Applicants contract of employment at common law or a breach of a legal duty on the part of the Respondent so as to render the termination of the Applicants employment unlawful.
43. The Respondent further complains that no facts are pleaded which demonstrate that the institution of disciplinary proceedings in the absence of the resolution of a separate grievance process:

²⁷ Colonial Industries at 630. See also *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553G-I

²⁸ The standard for what is required in pleading a cause of action was established in *McKenzie* at 23, where the court stated it as follows:

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

²⁹ *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-E

³⁰ *Cross v Ferreira* 1950 (3) SA 443 (C) at 450 endorsed by *President Insurance Co Ltd v Yu Kwam* 1962 (3) SA 766 (A) at 772

- 43.1 breached the Applicants contract of employment and if so, which provision;
- 43.2 (whether) the contract of employment (and if so, which provision) precluded the termination of the agreement;
- 43.3 (whether) there is a Rule in Law (and if so, what rule) which precludes an employer from terminating a contract of employment whilst a grievance process remains pending.
44. The Respondent submits that the failure to plead the necessary ingredient of what, if factually established, as giving rise to an "unlawful termination" of a contract of employment, means that the Applicant has failed to meet the requisite standard for the pleading of triable causes of action. That is because, so it is argued, that the Applicants Particulars of Claim fail to advance "every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support [her] right to the judgment of the Court.
45. The Respondent submits that the prejudice to it in the circumstances is manifest: the Respondent is not placed in a position to understand the issues upon which reliance is placed by the Applicant in pursuit of her claim. Further, that this clearly impacts upon its ability to plead an adequate defence to the action.
46. For these reasons it is further submitted that the Applicants pleaded claim, on the express allegations advanced by the Applicant, fail to disclose the averments necessary to sustain the causes of action set out therein.

Do the complaints have merit?

47. The Applicant's claim has its roots in the collective agreement on Employment Conditions which it is alleged has application between the parties. The said

agreement, which is attached to the proposed amended pleadings³¹, contains provisions which deal with, *inter alia*, the Grievance Procedure to be followed by the Applicant and the Respondent should there be a dissatisfaction or feeling of unfair practice or working conditions experienced by an employee.³²

48. In summary, the Applicant alleges that she lodged a grievance in terms of the Grievance Procedure because she was subjected to "*biased and unprofessional behaviour and discriminated upon by the Employees*" of the Respondent.³³ The Applicant's complaint was dismissed by a Manager of the Respondent. This caused her to lodge a grievance against the said Manager.³⁴ Her grievance was dismissed.³⁵ This caused her to lodge a grievance against that decision. Her grievance "was never resolved and the said grievance was never addressed and/or attended".³⁶ In the result she requested a meeting with the General Manager of the Respondent. Her request was denied.³⁷ She insisted on the meeting in order to resolve the dispute. The Respondent responded with threats and a warning to terminate the Applicants employment should she continue sending emails requesting the said meeting.³⁸ The Respondent threatened the Applicant with dismissal, and carried out the threats and unlawfully terminated the Applicants Employment Contract.³⁹

³¹ Collective Agreement on Employment Conditions, Annexure CA, Caselines p 11-17-47

³² Proposed Amended Particulars, para 9, CaseLines 11-3

³³ Proposed Amended Particulars, para 12, CaseLines 11-5

³⁴ Proposed Amended Particulars, para 13, CaseLines 11-5

³⁵ Proposed Amended Particulars, para 14, CaseLines 11-5

³⁶ Proposed Amended Particulars, para 15, CaseLines 11-5

³⁷ Proposed Amended Particulars, para 15, CaseLines 11-5

³⁸ Proposed Amended Particulars, para 13, CaseLines 11-6 (paragraphs incorrectly numbered here)

³⁹ Proposed Amended Particulars, para 14, CaseLines 11-6 (paragraphs incorrectly numbered here)

49. Against this background the Applicant alleges, *inter alia*, in paragraph 16[19]⁴⁰ of her proposed Amended Particulars of Claim that:

- 49.1 the Respondent failed to implement its own grievance procedure to resolve the dispute lodged by the Applicant to its finality;
- 49.2 the Respondent intentionally denied the Applicant an opportunity to appear in person to address her grievance as per the Respondent's own grievance procedure and when she enforced her said right, the Respondent unlawfully terminated her employment;
- 49.3 the Respondent maliciously denied the Applicant to prosecute her grievance and in return crafted charges where they knew would lead to her dismissal and to lose her medical boarding income.

Analysis on excipiability

50. It seems to me that the unlawfulness of the Applicant's dismissal arises because of the alleged malicious intent of the Respondent towards her, as exhibited by the alleged failure by the Respondent to follow its own Grievance Procedure to the detriment of the Applicant and the alleged "intentional denial" of her right to be heard. Further, that because of her complaint and her insistence to exercise her right, the Respondent, in retaliation ("in return") instituted disciplinary proceedings in which it fashioned ("crafted") charges of the sort which the Respondent knew would lead to the dismissal of the Applicant and the loss of her medical boarding income.

⁴⁰ Proposed Amended Particulars, para 16, CaseLines 11-6 (paragraphs incorrectly numbered here)

51. The Respondent's objection is anchored in the premise that the Applicant's grievance was "pending". Hence, the Respondent's complaint is that the Applicant should plead facts which demonstrate that there was a contractual provision breached by the Respondent because of its institution of disciplinary proceedings, "whilst the grievance of the Applicant was pending" or whether there was a provision which precluded the termination of her employment "whilst the grievance process remained pending" or whether there is a rule of law which precludes the employer from terminating a contract of employment "whilst a grievance process is pending".
52. In my view this approach by the Respondent is misconceived.
53. The Applicant does not allege that her grievance procedure was "pending". She alleges that her grievance was "never addressed and/or attended (to)." Further, that the respondent "failed to implement its own grievance procedure" to resolve the dispute lodged by her to finality. Also, that the Respondent "maliciously denied" her (the opportunity) to prosecute her grievance to her satisfaction. On this basis, the grievance procedure was not simply "pending", it was deliberately and maliciously frustrated.
54. If the Applicant is able to lead evidence regarding the allegations of malice, or put another way, the intention to harm her by bringing about her dismissal unfairly, that renders her dismissal unlawful, and it constitutes a proper cause of action which is not vague and embarrassing.
55. There is another issue regarding the alleged failure by the Applicant to comply with the requirements of Rules 18(4) and 18(10). In this regard:

55.1 On 28 February 2023, the Applicant filed her Amended Particulars of Claim⁴¹. Paragraph 11⁴² read as follows:

"As a result of the unlawful termination of the employment by the Defendant, the Plaintiff suffered damages in the amount of R7,850,938.50 as calculated by the actuaries. See attached herein and marked Annexure G the actuaries report."

55.2 On 27 March 2023, the Respondent filed its Notice to Remove Cause of Complaint in terms of Rule 23 and 30⁴³. In its second complaint, the Respondent took aim at the above-mentioned paragraph 11 of the proposed amended Particulars of Claim.

55.3 On 20 April 2023 the Applicant gave notice of Intention to Amend in terms of Rule 28⁴⁴. It was proposed that the contents of the then existing paragraph 11 would be deleted and substituted with the following paragraph:

"As a result of the Defendant's termination of the Plaintiff's services, the Plaintiff suffered damages to the value of R7 850 938.00 as a loss of income calculated at the rate of R12 135 per month from the date of termination to date of retirement alternatively as quantified in the Plaintiff's actuarial report. See attached herein and marked Annexure G."

55.4 On 8 May 2023, the Applicant objected to the Respondents Notice of Intention to Amend of 20 April 2023, above⁴⁵. The said notice did not take issue with

⁴¹ Caselines 06-1-35

⁴² Caselines 06-8

⁴³ Caselines 07-1-4

⁴⁴ Caselines 08-1-39

⁴⁵ Caselines 09-1-4

the proposed amended paragraph 11. The objection was directed solely at the proposed amendment of paragraph 9 of the Particulars of Claim.

55.5 On 8 June 2023, the Applicant withdrew its Notice of Intention to Amend dated 20 April 2023⁴⁶.

55.6 On or about 7 June 2023, the Applicant delivered its (current) Notice of Intention to Amend⁴⁷. The proposed relevant amendment now at paragraph 17[20] is this:

"As a result of the unlawful termination of employment by the Respondent, the Applicant suffered loss of income in the amount of R7 850 938.00 (Seven Million Eight Hundred and Fifty Thousand Nine Hundred and Thirty-Eight Rands) as calculated by the actuaries. See attached herein and marked Annexure G of the actuaries report."

55.7 On 23 June 2023 the Respondents filed its (current) objection to the Applicant's Notice of Intention to Amend of 7 June 2023⁴⁸. The complaint is directed at paragraphs 9, 14 and 16[19], which paragraphs are not concerned with the quantification of the Applicant's claim.

56. Be that as it may. I note that in the Applicant's Founding Affidavit, the deponent cites the provisions of Rule 18(4) and 18(10)⁴⁹. In the Respondent's Answering Affidavit,

⁴⁶ Caselines 10-1-3

⁴⁷ Caselines 11-1-78

⁴⁸ Caselines 12-1-4

⁴⁹ Founding Affidavit paragraphs 4.4 and 4.6, Caselines 13-10

the Respondent states that there has not been compliance with Rule 18(10) but says nothing more about it.⁵⁰

57. The Applicant's counsel, however, dealt with the issue in the Applicant's heads of argument. I observe that the issue was not dealt with in the Respondent's heads of argument. Nevertheless, during the hearing, counsel for the Respondent made it plain that this objection was still very much alive and that the Respondent persisted with it.
58. The Applicant's argument is that, in proper compliance with Rule 18(4) she had set out all of the relevant facts chronologically relied on by her. Further, and having regard to Rule 18(10), she attaches an expert actuarial report which is formulated on the salary which the Applicant was receiving during her medical boarding. The report explains that the Applicant would have received the said income until age of retirement had it not been for the unlawful termination of employment by the Respondent. The report also factors in inflation and deflation.
59. Counsel for the Respondent, as I recall, argued that the actuaries report had based its calculation on a retirement age of 65, whereas it ought to have been 62 years of age.
60. Nonetheless, the approach to the pleading of quantum is robust and practical. The Applicant must plead her damages such that the Respondent may reasonably assess whether to plead. As explained in *Minister van Wet en Orde v Jacobs*:⁵¹

"[A] Defendant is not entitled to insist on such specified details and information which would enable him to make a precise, measured and accurate calculation of the

⁵⁰ Answering Affidavit, para 31, CaseLines 15-8 to 15-9

⁵¹ 1999(1) SA 944(O) at 952J/953B

Plaintiff's damages as to mathematically verify the correctness of the amounts claimed.

The Defendant is also not entitled to insist upon an abbreviated statement of Plaintiff's intended evidence to substantiate the respective claims.

What is therefore required is only such details as would reasonably enable the Defendant to estimate the quantum of the Plaintiff's damages in accordance with the guidelines of Court Rule 18(10) and not such details as would reasonably enable the Defendant to check whether the Plaintiff's estimate of the quantum is correct".

61. By doing so, the other party should be adequately put into the picture as to the basis of the damages so that it can plead or decide to tender and plead.⁵² But there is no present duty upon the Plaintiff to give, as it were, an advance abridged addition of their evidence to establish their damages at the trial.⁵³
62. I consider that the Applicant has complied adequately with the provision of Rule 18(4) read with Rule 18(10).
63. In my view, the Applicant is entitled to a benevolent interpretation of her pleadings. The Applicant has not been shown to be *mala fide*, and the granting of the amendment will facilitate the proper ventilation of the dispute between the parties. Ultimately, I consider it to be in the interest of justice to grant the amendment.
64. In the result I make the following orders:
 - 64.1 the late filing of the Applicants Application for Leave to Amend her Particulars of Claim is condoned;

⁵² *Co Op and Another v Motor Union Insurance Co Ltd* 1959(4) SA273 (W) at 277H

⁵³ *Co Op* at 278A

- 64.2 the Applicant is granted Leave to Amend her Particulars of Claim;
- 64.3 the Applicant is to deliver her amended pages within 5 days of this Order;
- 64.4 the Respondent is ordered to pay the Applicant's costs of the Application.


S McCafferty AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES

For the Applicant	Adv K Letsoalo
Instructed by	Graham Attorneys
For the Respondents	Adv P Moll
Instructed by	Edward Nathan Sonnenburg Inc
Date of Hearing	04 June 2024
Date of Judgment	05 September 2024