

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO.: 362/2022

Reportable: YES/NO

In the matter between:

TULANI LUMKWANA

Plaintiff

and

**MEMBER OF EXECUTIVE COUNCIL
DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

1st Defendant

**MEMBER OF EXECUTIVE COUNCIL
DEPARTMENT OF PUBLIC WORKS,
EASTERN CAPE PROVINCE**

2nd Defendant

JUDGMENT

Cengani-Mbakaza AJ

The background

[1] This matter raises two special pleas: misjoinder and the ‘once and for all rule’. These special pleas have arisen in the following manner: On 01 October 2018, the plaintiff was employed by the second defendant. In October 2021, she applied for a transfer to work for the first defendant, which was approved on 15 October 2021. The plaintiff assumed her duties with the first defendant on 21 November 2021.

However, the first defendant failed to meet its obligations under the agreement and failed to pay the plaintiff's salary.

[2] On 06 January 2022, the plaintiff approached the court on an urgent basis seeking an order under case number 01/2022, *inter alia*, compelling the first defendant to pay her outstanding salary. In support of her application, she alleged that she had not paid her medical aid policy, and the monthly instalments of her motor vehicle and was unable to make household groceries due to the non-payment of her salary. The court granted the order and subsequently, the plaintiff's salary was partially paid in March 2022.

[3] Pursuant to the granting of the urgent application by the court, the plaintiff instituted action proceedings under case number 362/2022. This relates to the recovery of the damages allegedly incurred due to the defendant's breach of contract. As a result of the alleged conduct by both defendants, she could not meet her financial obligations: she failed to pay her medical aid, life cover policies, the motor finance insurance and the home-loan bond.

[4] She alleges that as a result of the defendants' conduct her debts incurred interests and her credit score was adversely affected. She had to instruct attorneys to institute legal proceedings to compel the defendants to pay her salary which led to her incurring additional expenses. Furthermore, her dignity was impaired as she had to borrow money from friends to compensate for transport fees while going to work. Additionally, her life cover policy had lapsed. Therefore, the defendants' conduct, she contends, was both wrongful and unlawful. In a nutshell, the plaintiff holds the defendants liable for payment of losses incurred as a result of the breach and/or wrongful and unlawful activities.

The parties' legal submissions

[5] Ms Mqobi, counsel for the defendants argues that there was no contract of employment between the second defendant and the plaintiff after 31 October 2021. Therefore, there is no factual or legal basis to cite the second defendant in the plaintiff's claim for the recovery of the damages.

[6] Regarding the 'once and for all rule', counsel contends that when the plaintiff filed an urgent application under case number 01/2022, she ought to have in accordance with the 'once and for all rule' claimed damages already sustained or expected in future in so far, as it is based on a single cause of action. The plaintiff's conduct in pursuing the instant action separately from the initial application amounts to the harassment of the defendants through a multiplicity of actions arising from the same cause of action and is a duplication of the first application and this constitutes abuse of court process, she argues.

[7] To oppose the special pleas, Mr Mdunyelwa on behalf of the plaintiff, argues that while the facts pleaded in case numbers 01/2022 and 362/2022 are identical, the cause of action in the two cases remain distinct. Regarding misjoinder, counsel contends that the plaintiff was informed by the relevant authorities of the first defendant that her salary was not paid due to the second defendant's refusal to sign certain documents, allegedly because the plaintiff owed the second defendant an amount of R53 618. The second defendant's contention was that the said amount was due and payable because the plaintiff had taken unpaid leave during her employment with the second defendant. Therefore, the second defendant is an interested party in the action proceedings brought by the plaintiff under case number 362/2022, so he argues.

Issues for determination

[8] The first point of determination is whether the second defendant is an interested party in the legal proceedings brought by the plaintiff under case number 362/2022. The second is whether there is a single cause of action in respect of case numbers 01/2022 and 362/2022 essentially whether the 'once and for all rule' applies.

Misjoinder

[9] According to Uniform Rule 10(3) of the Uniform Rules of Court, several defendants may be sued in a single action when the same key issues of law of fact

are in dispute. This means that the defendants may be sued together, either as a group, individually or in the alternative scenarios to efficiently resolve the core key issues that would arise in each separate action if the defendants were sued separately. According to the law, multiple defendants may be joined in a single action based on the principles of convenience, equity, cost savings and avoidance of multiplicity actions.

[10] In the matter under consideration, the special plea of misjoinder raised by the second defendant warrants no prolonged discussion. It is common cause that there was no contract of employment between the plaintiff and the second defendant after 31 October 2021. Furthermore, the plaintiff's claim regarding the second defendant's role in halting the payment of her salary, based on information from the relevant authorities appears to hold no probative weight for instituting an action or establishing a proper cause of action against the second defendant. Therefore, the second defendant's special plea of misjoinder stands to succeed.

The 'once and for all rule'

[11] It is settled that all claims generated by or from the same cause of action must be instituted in one action. The case of *Custom Credit Corporation v Shembe*¹ is usually referred to as a *locus classicus* on the rule. According to this landmark ruling, the 'once and for all rule' mandates that a party must consolidate all related claims into a single action. Regard must be given to the underlying rationale and purpose of the rule namely: to prevent a multitude of legal actions, to avoid potentially conflicting judgments, and to ensure that the defendant is not subjected to repeated legal proceedings, thereby preventing harassment and unnecessary litigation.

¹ 1972 (3) SA 462 (A). In this matter Van Winsen AJA held, 'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio under the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief can be met by an exception *rei judicatae vel litis finitae*. The reason for this rule is given by Voet 44.2.1 (Gane's translation, volume 6, p553) as being 'to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in the different judicial proceedings' The rule has its origin in consideration of public policy which requires that there should be a term set to litigation and that an accused or defendant should not be twice harassed upon the same cause'

[12] The Constitutional Court had ruled that the ultimate enquiry is whether the two actions, as a matter of law, are based on two different causes of action, and whether those causes of action have different elements. Referring to the case of *Steven v De Wet*², the Constitutional Court reiterated that a cause of action is not determined by how a party frames his or her particulars of claim, but by the constitutive elements of a particular cause of action.³ Even if there are imperfections in the pleadings, once the court is satisfied that there are two causes of action with distinct elements, that should be the end of the enquiry and the respondent's objection should be dismissed on that basis.⁴

[13] Applying the above legal principles to the facts of this matter, I find it apposite to consider a broader spectrum of the two cases brought by the plaintiff in the case under consideration. It has been established that the first defendant failed to pay the plaintiff's salary in breach of the contract of employment. The plaintiff brought an application in motion proceedings on an urgent basis. Therefore, one concludes that case no 01/2022 was based on the enforcement of an agreement between the plaintiff and the first defendant.

[14] Subsequent to that, the first defendant partially complied with the court order but failed to effect other payments that were due to the plaintiff. This called for an application for contempt of court which was later overtaken by events. It is no surprise that the plaintiff brought the action proceedings under a different case number for recovery of the damages suffered as a result of non-payment of her salary.

[15] I find that there are two causes of action with distinct elements and therefore the special plea of the 'once-for-all rule' raised by the defendants in this matter does not apply.

Costs

² 1920 AD 279 at 289.

³ Mmabasotho Christinah Olesitse N.O v Minister of Police (CCT 183/22 [2023] ZACC 35; 2024 (2) BCLR 238 (CC) (14 November 2023) at Para 58.

⁴ Mmabasotho's case supra footnote 2 at Para 71.

[16] The general principle is that costs follow the outcome of the case. The court has discretionary power to determine costs, and in this case, where both parties have had both successes and failures, I believe it is appropriate to make no order as to costs, as neither party can be said to have been entirely successful or unsuccessful.

Order

[17] The following order shall issue:

1. The special plea of misjoinder is upheld.
2. The special plea of the 'once and for all rule' is dismissed.
3. There shall be no order as to costs.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Counsel for the Plaintiff	:	Adv N Mdunyelwa
Instructed by	:	Y Tsipa Attorneys c/o Bacela Bukula & Associates King William's Town
Counsel for the Defendants	:	Adv N Mqobi
Instructed by	:	State Attorney East London
Heard on	:	18 June 2024
Judgment Delivered on	:	27 August 2024