



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

**CASE NO: JS128/12**

In the matter between:

**CHAUKE, ELIAS**

Applicant

and

**MACHINE TOOL MARKET (PTY) LTD**

Respondent

**Heard: 12 September 2012**

**Delivered: 13 September 2012**

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**JUDGMENT**

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*Exception to statement of case – vague and embarrassing pleading alleged –*

*pleading drafted by a layman – exception dismissed – issues relating to the standard of pleading required of lay litigants and access to justice raised.*

## **MYBURGH AJ:**

### *Introduction*

- 1] This is the hearing of an exception raised by the respondent against the applicant's statement of case. The matter raises important issues about the standard of pleading required of lay litigants and access to justice.
- 2] The applicant is employed by the respondent as a security guard. He resides in Tokoza, with his February 2011 payslip reflecting his earnings as being little more than R2300 net per month. English is not his first language and it is clear that he is not proficient in it. He has now become embroiled in a dispute about whether his handwritten statement of case is vague and embarrassing.

### *Statement of case and exception*

- 3] On 14 February 2012, following an unsuccessful referral to conciliation by the CCMA, the applicant delivered a handwritten statement of case. Three paragraphs thereof warrant mention.
- 4] Paragraph 7 (statement of facts) records:
  - *'Issue started about a query of overtime payment.*
  - *Worked on Sunday and was due to be paid R350 – equal to other colleagues but was only paid R59 only for a whole night-shift. And for the whole day shift he paid me R54.*
  - *He does not count the hours that I've worked like he does with the other colleagues. It does not reflect on my payslip the amount I'm supposed to*

*earn per hour.'*

5] Paragraph 8 (legal issues) goes on to record:

- *'Unfair discrimination.*
- *Not paid for the hours worked.*
- *Overtime not paid fairly.*
- *Not being honest about the hours that I've worked.'*

6] Finally, paragraph 9 (relief sought) records:

*'Issue started when I worked for over time and my normal time and he pay me my normal hours and don't pay me my over time from 2009 till now which is 2012.'*

7] From what I can gather from the handwriting and language used, someone appears to have written paragraphs 7 and 8 for the applicant, while he wrote paragraph 9 himself. The text of paragraph 9 and the poor quality of the applicant's physical handwriting demonstrate that he is not highly literate (certainly not in English).

8] On 28 February 2012, in response to the applicant's statement of case, the respondent's attorneys of record filed a notice of intention to except to the applicant's statement of case. It runs to 5 pages and raises every possible criticism. To give a few examples, it is contended that the statement of case is vague and embarrassing because it:

a) does not *'identify the "issue" that [the applicant] refers to that sparked the litigation'*;

b) does not state *'who does not count the hours that the applicant has*

*worked and which other colleagues' hours are counted';*

c) does not state '*what legal foundation is it that the applicant relies upon in support of his claim that his work hours must be reflected on his payslip*';

d) does not '*set out what relief [the applicant] seeks. He merely makes an allegation that he was not paid for overtime from 2009 till 2012*'; and

e) does not include '*proof as to the amount of hours overtime worked between 2009 and 2012*'.

9] On 3 May 2012, and after the applicant had failed to react, the respondent filed a notice of exception.

#### *Proceedings in court*

10] The matter came before me as part of a pilot project being run by the court aimed at expediting interlocutory matters.

11] When the matter was called, Ms Ewang (who appeared for the respondent) asked that it be removed from the roll because she wished to amend the notice of exception by adding a prayer that the respondent sought the dismissal of the applicant's claim. In circumstances where the applicant was present in court and unrepresented, I declined the request, allowed the amendment, and referred the matter to the SASLAW *pro bono* advice office with a view to the applicant obtaining legal representation. This resulted in Mr Wilken (an attorney on duty at the advice office at the time) then appearing on behalf of the applicant. The court is indebted to him for the efficiency with

which he dealt with the matter at short notice.

- 12] In argument, Ms Ewang pursued the exception in all respects, save that she no longer sought the dismissal of the applicant's claim, but rather an order that he be required to supplement his statement of case. Wisely, Ms Ewang did not seek any order as to costs.
- 13] Mr Wilken, in turn, argued in favour of the dismissal of the exception. In so doing, he clarified (as appeared to me on a reading of the statement of case) that the applicant's claim is not based on discrimination in the legal sense of the term, but rather simply on the fact that, while paying others correctly for overtime worked, the respondent has failed to pay the applicant either at all or not at the agreed rate. As far as Mr Wilken was concerned, the respondent should have all the records at its disposal to determine what overtime the applicant worked during the period 2009 to date, what he was paid and what the agreed rate (on its version) was / is. Mr Wilken also stressed that the applicant remained in the employ of the respondent, and that it was remarkable that it had apparently not taken the trouble to find out what his complaint actually is. In the result, Mr Wilken sought the dismissal of the exception and an order that the respondent pay the applicant's disbursements.

### *Evaluation*

- 14] Rule 6(1)(b)(ii) and (iii) require an applicant to provide a clear and concise statement of the '*material facts*' and legal issues. Significantly, only material facts need to be stated. Material facts, of course, are those which must be proved in order for an applicant to succeed in his claim, and not the facts that are evidence to prove those facts. If further statements had been required, then arguably the rule would have required '*relevant*' rather than '*material*'

*facts*'.<sup>1</sup> In practice, statements of case prepared by practitioners in this court often do not exhibit the required degree of succinctness, and instead assume the form of unsigned affidavits containing heaps of facts outside of the material facts. It is perhaps familiarity with this practice which informed the decision to bring the exception in this matter.

- 15] On the interpretation of rule 6(1)(b)(ii) set out above, the applicant's statement of case is by no means as lacking as contended for by the respondent. Indeed, the majority of particularity that is said to be lacking does not involve material facts, but rather facts going to establishing them.
- 16] But more importantly than an interpretation of the aforesaid rule, this case raises the issue of the standard of pleading that should be required of a lay litigant, particular one who is not proficient in English. Here a balance needs to be struck between access to justice in favour of the lay litigant and fairness to the respondent party.
- 17] If this court were to set the standard as being equivalent to that expected of a legal practitioner (which is what the respondent is effectively contending for), this has the potential to deprive huge numbers of unrepresented applicants from access to justice. This would run counter to this court's mandate to ensure the effective resolution of labour disputes, and undermine the various initiatives that this court has undertaken to promote access to justice, including the housing of *pro bono* advice offices at the Labour Courts around the country. If, on the other hand, this court were to countenance total laxity in the compliance with its Rules when it comes to the drafting of pleadings by lay litigants, this would no doubt serve to prejudice respondents, which must also be guarded against.

- 18] To my mind, the middle road is this. At a minimum, a statement of case

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<sup>1</sup> See Landman & Van Niekerk *Practice in the Labour Courts* at D-29 (revision service 7, 2003).

drafted by a lay litigant (such as the applicant) must set out the essential nature of his or her claim and the essential basis therefor in broad terms. Provided the respondent is apprised of these essentials, it would typically be in a position to investigate the matter itself and would not be prejudiced by pleading to the claim. This is particularly so where the dispute, as occurred in this matter, has formed the subject of CCMA conciliation, during the course of which the respondent typically comes to learn of the substance of the complaint.

- 19] If the aforesaid essentials are not stated, then the statement of case would be excipiable. But if they are stated, then the respondent should plead to those essentials. If in the process of doing so, the respondent legitimately cannot plead to some of the allegations in the absence of particularity, then the respondent would be at liberty to state as much in its reply. Further particularity could then be obtained in the process of preparing for trial through the pre-trial process.
- 20] Returning to the applicant's statement of case, in my view, it measures up to this standard. This is so because the applicant has set out the essential nature of his claim and the basis therefor – the claim is one for the payment of overtime for the period 2009 to 2012, it being the applicant's contention that he was either not paid or short paid for overtime worked during this period. This places the respondent in a position of being able to investigate the claim, with the result that it is unlikely to suffer any prejudice through the formulation of its reply.
- 21] As Mr Wilken correctly submitted, the respondent knows what its practice is in relation to the payment of overtime, and should have records reflecting what overtime the applicant worked and what he was paid. Indeed, Ms Ewang herself confirmed that her instructions are that the applicant has been paid everything due to him. If that is so, and given that the applicant is a lay litigant,

then it would surely be in the interests of justice – and access to it – that the respondent pleads to the applicant's statement of case, instead of pursuing the technical route it has chosen.

22] In summary, save in circumstances where the statement of case drafted by a lay litigant does not set out the essential nature of the claim and the essential basis therefor, it is not appropriate to challenge it by way of an exception on the grounds of it being vague and embarrassing. The standard of pleading in this matter meets the proposed standard, with the result that the exception is without merit.

23] Turning now to the issue of whether the respondent should be held liable for the applicant's disbursements in the form of travelling costs to court, as Mr Wilken correctly pointed out, this must be assessed in the context of the fact that the applicant appears to take home little more than R100 per day. Seen thus, the applicant's travelling expenses are no doubt a burden to him.

24] While I am of the view that this court does have the power to award costs limited to actual disbursements reasonably incurred by a lay litigant,<sup>2</sup> I have decided not to do so in this matter in circumstances where, through the intervention of Mr Wilken, the applicant certainly received value for his money.

### *Order*

25] In all the circumstances, the following order is made:

- 1) the exception is dismissed;

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<sup>2</sup> See generally *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (Nm).

- 2) the respondent shall deliver its response to the applicant's statement of case within 10 days hereof.

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**A.T. MYBURGH**

**ACTING JUDGE OF THE LABOUR COURT**

For the applicant:

St E Wilken (SASLAW advice office /  
Tabacks)

For the respondent:

J Ewang (Eversheds)