

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no J 1544/19

In the matter between

CEDRIC FOURIE

Applicant

and

**ALLEYROADS CONSTRUCTION (PTY)
LTD**

Respondent

And in the matter between:

ALBERTUS CHRISTIAAN BEYER

and

**ALLEYROADS CONSTRUCTION (PTY)
LTD**

Date of application: 6 December 2019

Date of judgment: 29 January 2020

JUDGMENT

VAN NIEKERK J

[1] The applicants have referred disputes to this court in terms of Rule 6, contending that the respondent unfairly dismissed them. The referrals are cast in similar terms, as are the responses to the statement of claim. In essence, each of the applicants contends that he was unfairly retrenched both in a substantive and procedural sense, that the respondent failed to pay them severance pay and other statutory monies, and their salaries for the last month worked. In each response to the statement of case, the respondent denies any relationship of employment and avers that the applicants were engaged in terms of consultancy agreements. Each response contains a counter-claim, to which the applicant has excepted.

[2] The counter-claims, which are conditional on a finding that the true nature between the parties is one of employment, read as follows:

1. The Respondent brings herewith a conditional counter-claim against the Applicant should it be found that this honourable Court has jurisdiction over the matter as a result of the consultancy agreement being found to be an employment contract.
2. The parties in reconvention of the parties as in convention and for the sake of convenience will be referred to as in convention.
3. The Respondent repeats the content of the Response to the Statement of Case above and specifically paragraph 7.

[Paragraph 7.4 reads: 'The Respondent agreed to pay the invoices rendered by the Applicant once completed on condition that the Applicant complete (sic) certain work prior to the end of February 2019 which was

the date which the Applicant wished the retrenchment to take effect.'

Paragraph 7.5 reads: 'The work which was agreed to be completed including but not limited to *inter-alia* the calculation, quantification and reporting back on counterclaims relating to ALU 2000, Thekwini Reinforcing, Viva Bricks and Independent Plumbing Supplies and (sic) well as the completion of cash flow forecasts for the sites of the Respondent and assisting with claims against Live Green, MacSreel and Voltex Weltevreden.']

4. As a result of the Applicant breaching his undertakings to the Respondent the Respondent suffered damages in that it was required to:
 - 4.1 engage the services of another contractor, Chris Muller, in order to complete the work which the applicant had agreed to complete at a cost of R125 000.00;
 - 4.2 purchase a new QS DIM software licensed in the amount of R 80 000.00 as a result of the Applicant unlawfully alternatively negligently reformatting the laptop which he was using, and which was the property of Respondent, which resulted in the QS DIM software including the existing licence being irretrievably deleted.
5. As a result the Respondent has suffered damages in the amount of R 205,000.

[3] The applicants (excipients) contend that the counter-claim is vague and embarrassing, and lacks averments necessary to sustain a cause of action. In particular, the applicants contend that there is uncertainty as to the agreement on which it relies. Secondly, the applicants contend that it cannot be ascertained from the pleadings which terms of what undertakings are alleged to have been breached. Specifically, the excipients contend that:

1. The Labour Court has jurisdiction over the counterclaim provided that it involves a contract of employment. The respondent fails to state, or fails to state with sufficient particularity, which contract of employment relies upon in its counterclaim.
2. The respondent fails to state which terms of the said contract of

employment, if any, it relies upon.

3. The respondent fails to allege what work it engaged the other contractor (Chris Muller) to complete.

4. The applicant is unable to decipher how the respondent's claim in respect of the purchase of QS DIM software is related to the terms of any contract of employment concluded between the applicant and the respondent.

5 The respondent fails to allege how the applicant has acted in breach.

6. In the circumstances, the respondent has failed to plead facts sufficient to establish a cause of action in its counterclaim against the respondent, alternatively the counterclaim is vague and embarrassing.

[4] The test to be applied when an exception is taken to particulars of claim on the basis that they disclose no cause of action is whether the particulars disclose every fact which it would be necessary for the plaintiff to prove if traversed, in order to support the right to judgment. A pleading is excipiable only if no possible evidence led on the pleading can disclose a cause of action (*McKelvey v Cowan* NO 1980 (4) SA 525 (Z)). A distinction is drawn between *facta probanda*, primary factual allegations that must be made, and the *facta probantia*, or secondary factual allegations in support of the former. Generally, the latter are matters for particulars for trial or matters of evidence.

[5] What is not apparent from the terms of the counter-claim is the basis on which the applicants are alleged to have acted in breach of any contract of employment and in particular, the clauses of that contract, or any undertakings given pursuant to its terms or otherwise, that they are alleged to have breached. The respondent has annexed a consultancy agreement to the statement of response, which is presumably the source of the obligations to which the respondent refers. The scope of work is said to be contained in annexure B to the agreement, which is not annexed to the agreement that has been filed. Further, clause 12 of the consultancy agreement contains a number of warranties by the applicants in relation to work to be performed. Clause 9.3 regulates any breach of the agreement and limits the respondent's right to cancel the agreement. While as

indicated above, paragraph 3 of the counter-claim makes specific reference to paragraph 7 of the statement of claim (and the scope of work that the respondent avers was agreed) it is not apparent from the pleading that the agreement to complete an agreed scope of work directly or indirectly constituted a specific term of the consultancy (or employment) contract, or whether the breach of undertaking on which the respondent relies is founded in discrete agreements reached on 20 February 2019.

- [6] In short, the applicants are entitled to be apprised specifically of the nature of the agreement and the specific terms of the agreement and/or other specific undertakings given by them consequent on their employment which they are alleged to have breached. These are *facta probanda* in any claim for damages on account of a breach of contract.
- [7] There is no reason why costs would not follow the result. It is practice in this court in successful exception proceedings to afford the party concerned an opportunity to file an amended pleading. There is no reason why this course of action ought not to be followed in the present instance.

I make the following orders:

1. In case number J1542/19, the exception to the respondent's counter-claim is upheld, with costs.
2. In case number J1544/19, the exception to the respondent's counter-claim is upheld, with costs.
3. In both cases, the respondent is afforded 14 days from the date of this order to file an amended counter-claim that records, with reference to the terms of any contract of employment, the undertakings that the applicants are alleged to have breached.

André van Niekerk
Judge

APPEARANCES

For the applicants/excipients: Adv. Withaar, instructed by Len Dekker Inc.

For the respondent: Adv. M Lennox, instructed by R Stafford.

Labour Court