



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS162/24

In the matter between:

EDWARD MAHOFA

Plaintiff

and

PROTOBAC (PTY) LTD

First Defendant

THE PACIFIC CIGARETTE COMPANY (PTY) LTD

Second Defendant

Heard: 18 February 2025

Delivered: 3 March 2025

JUDGMENT

MAKHURA, J

[1] These interlocutory proceedings relate to an exception taken by the defendant against the plaintiff's amended statement of claim dated 1 July 2024.

[2] In April 2024, the plaintiff referred a claim for payment of accrued leave and payment of salary in terms of the Basic Conditions of Employment Act¹ (BCEA). This was met with a notice of exception to the statement of claim by the defendants. The plaintiff filed a notice of amendment, which the defendants elected not to object to. On 1 July 2024, the plaintiff effected the amendments and filed an amended statement of claim.

[3] In response, the defendants have again raised an exception against the plaintiff's amended claim on the grounds that his claim does not disclose a cause of action and/or is vague and embarrassing.

[4] In terms of the amended claim, the plaintiff seeks payment of R79 649.86 in accrued leave against the defendants jointly and severally the one paying the other to be absolved. The plaintiff further seeks payment of R1 380 810.00 in unpaid salary against the second defendant.

[5] The plaintiff claims that he was employed by the two defendants with effect from 1 June 2022. He referred to a contract of employment concluded and signed between him and the first defendant. This contract of employment with the first defendant provides that he is employed as a "*Finance Controller (Proto & PCCSA)*".

[6] With regard to the claim for accrued leave payment, the plaintiff alleged that during his employment, he accrued 18.75 leave days. He then claimed that an amount of R79 649.86 in unpaid leave is due and payable and that the first and second defendants "*are liable to pay [his] accrued leave, the one paying the other to be absolved*" and that, because he was employed by and worked for both defendants, one of them, should be liable to pay the amount.

¹ Act 75 of 1997.

[7] The defendants noted that the plaintiff seeks payment of this amount from both of them jointly and severally. They contend that the plaintiff has failed to plead the basis for their joint and several liability. The defendants referred to the contract of employment and contended that the plaintiff was employed by the first defendant and that the second defendant was not a party to the contract of employment and therefore not his employer. The defendants also contend that the plaintiff's salary was paid by the first defendant and that his UI19 form also indicated that his employer was the first defendant.

[8] In conclusion, the defendants contend that *ex facie* the contract of employment, the payslips and UI19 form, the plaintiff was employed by the first defendant. Therefore, his amended claim does not disclose a cause of action for a joint and several liability between the first and second defendants for his accrued leave claim.

[9] The second claim is one of non-payment of salary. The plaintiff claims that he earned a monthly salary of R92 054.00. The first defendant, the plaintiff alleges, paid him his full salary but the second defendant did not. He raised grievances which were not attended to. He then alleges that he worked for a period of 15 months and that the amount due, owing and payable by the second defendant is R1 380 810.00.

[10] In excepting to the non-payment of the claim, the defendants contend that the amended claim does not disclose a cause of action alternatively is vague and embarrassing. The plaintiff, despite his allegation that he was employed by both defendants and that he was paid his full salary by the first defendant, failed to plead any basis upon which the second defendant should be held liable to pay him the salary.

[11] The plaintiff's opposition to the exception is primarily based on the submission that the defendants' second exception was improper. He argued that the defendants were precluded from raising a second exception based on similar grounds as the first exception because he has, so continued the argument, considered and addressed the

issues in the first exception notice through the amendment process and the defendants failed to object to the notice of amendment. The plaintiff could not refer to any authority that supports this legal proposition. This contention is untenable and unsound in law. It would be absurd to deny a defendant an opportunity to raise an exception to a claim that *ex facie* does not disclose a cause of action and in the process force him to plead to a non-claim or a vague and/or embarrassing claim.

[12] The plaintiff argued that he made the necessary averment to disclose the cause of action in respect of his two claims. With regard to the accrued leave claim, the plaintiff contends that the contract of employment was concluded with the two defendants and that he made the necessary calculations for the claim and the joint and several liability.

[13] The plaintiff's opposition to the exception against the alleged non-payment of salary is that the claim is only against the second defendant, that he had calculated his claim and that the second defendant's liability is its failure to pay him the salary.

[14] Exceptions are to be dealt with sensibly. Their purpose is to raise a substantive question of law in order to weed out a case or part of it that is without legal merit and to protect an excipient from embarrassment if he is to plead to the claim. They therefore have the potential to bring a case to an end. A party should not raise it as a technicality because that would defeat its purpose. The test is whether on all possible readings and interpretations of the facts as pleaded, the document does not disclose a cause of action or defence. The court is only limited to considering the exception on the pleading that is being excepted to and nothing else.²

[15] The contract of employment was concluded between the plaintiff and the first defendant and was signed by the first defendant as the employer and the plaintiff as the

² For a summary of the legal principles applicable to exceptions, see *Living Hands (Pty) Ltd and Another v Ditz and Others* [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) at para 15, and the cases referred therein by Makgoka J (as he then was); *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 3.

employee of the employer. The contract of employment states that the plaintiff was employed as a Finance Controller (Proto & PCCSA). Other than the reference to the fact that the contract of employment clearly stipulates that the plaintiff's employer is the first defendant. It is signed between the plaintiff and the first defendant. Nowhere in the contract is the second defendant referred to as a joint employer with equal responsibilities and/or liabilities to the plaintiff.

[16] The question then is, what would be the basis of the plaintiff claiming a joint and several liability for accrued leave against a company that is not and that he had failed to establish that it is his employer. Secondly, on what basis would the plaintiff claim any salary payment, or any payment for that matter, against a company that never employed him?

[17] The plaintiff fundamentally misconstrued the defendants' exception against his two claims. The crux of the two points raised by the defendants is the contract of employment. Ultimately, the plaintiff should have pleaded the necessary facts to sustain the allegation that he was employed, not only by the first defendant but also by the second defendant.

[18] The plaintiff's salary was paid by the first defendant, nothing in his claim establishes any form of relationship with the second defendant for him to claim a joint and several liability on the accrued leave pay claim and for payment of his salary. Further, he makes no allegation on what basis he is entitled to payment of salary from the second defendant when he had received his salary from the first defendant, his employer. His allegation that he was employed by the second defendant is, *ex facie* the statement of claim together with the documents, an illusion. The plaintiff may have a claim against the first defendant for accrued leave pay, however, that is not what the defendants raised as an exception.

[19] Accordingly, I am satisfied that the plaintiff's amended statement of claim does not disclose a cause of action for the joint and several liability in respect of the accrued

leave pay claim. The plaintiff conceded that he received his full salary from the first defendant. The amended statement of claim together with the documents attached show *ex facie* that he was employed by the first defendant. Nowhere in the contract is there a provision that he employed by the second defendant. His claim for salary payment from the second defendant is bad in law. The defendant's exception must therefore be upheld and the plaintiff's claim as amended must be struck out for failing to disclose a cause of action.

[20] Both parties sought costs. The plaintiff sought costs on an attorney and client scale. The defendant only sought costs on a party and party scale.

[21] In the premises, the following order is made:

Order

1. The defendants' exception is upheld.
2. It is declared that the plaintiff's amended statement of claim does not disclose a cause of action in respect of the two claims and the claims are struck out.
3. The plaintiff is granted leave to amend his amended statement of claim dated 1 July 2024 within 15 days of receipt of this judgment.
4. The plaintiff is ordered to pay the defendant's costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: Ms B Vos of CGG Inc. Attorneys

For the Defendants: Mr L Hollander

Instructed by: Swartz Weil Van der Merwe Greenberg Inc.