



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

Not reportable  
Case No: JS 568/22

In the matter between:

**ELEMENT SIX (PRODUCTION)  
(PTY) LTD**

**Excipient/ Second Defendant**

and

**SOLIDARITY**

**First Respondent/ Plaintiff**

**BRITS, P J**

**Second Respondent/ Plaintiff**

**VAN ZYL, S**

**Third Respondent/ Plaintiff**

**NORVAL, K E**

**Fourth Respondent/ Plaintiff**

**HALL, D A**

**Fifth Respondent/ Plaintiff**

**GEEL, JJ**

**Sixth Respondent/ Plaintiff**

**SOMER E J**

**Seventh Respondent/ Plaintiff**

**HUNT D R**

**Eighth Respondent/ Plaintiff**

**DU TOIT G J G****Ninth Respondent/ Plaintiff****EXPERT MINING TOOLS (PTY) LTD****Tenth Respondent/ First Defendant****Heard: 14 February 2025**

**Delivered: 19 March 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 19 March 2025 is deemed to be the date of delivery of this judgment).**

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## **JUDGMENT**

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**RAMJI, AJ**

### Introduction

[1] The excipient filed an exception to the plaintiffs' amended statement of claim, dated 2 September 2024, on the ground that the amended statement of claim failed to disclose a cause of action against the it.

[2] At the hearing, I upheld the exception, but reserved judgment on relief, including costs.

[3] In reaching my decision on relief and costs, I have considered the contents of the exception bundle and the first defendant's plea. Although the excipient did not express any issue with the plaintiffs' response to its exception, I have not considered it to the extent that it seeks to introduce new averments.<sup>1</sup>

### Background

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<sup>1</sup> *Du Toit v Du Toit and another* 2023 JDR 4509 (GP) at para 25.

[4] On 24 August 2022, the plaintiffs filed an action against the first defendant for cancelling post-retirement benefits, in a way that affected terms and conditions of employment of the second to ninth plaintiffs. The second to ninth plaintiffs are represented by Solidarity, the first plaintiff. At the time, the excipient was not party to these proceedings.

[5] The plaintiff's cause of action against the first defendant arose from the first defendant's decision (communicated to employees on 29 October 2021) that it would no longer be making post-retirement medical aid contributions to employees in respect of all employees who retired on or after 1 October 1998 with 25 years of service or more.

[6] The first defendant filed a plea, which included the following averments, though not under the banner of a special plea:

6.1 Of the eight individual plaintiffs, only two (the second and third plaintiffs) were ever employees of the first defendant. The second and third plaintiffs became the first defendant's employees in terms of section 197 of the LRA. Prior to this, they were employed by the excipient.

6.2 The fourth to ninth plaintiffs have never been employees of the first defendant: they retired prior to the section 197 transfer of employees from the excipient to the first defendant.

6.3 The first defendant then pleaded: *"this Court has no jurisdiction to consider any application by the fourth to ninth [plaintiffs]"* and that *"[i]t is apparent from Clause 5.1 of the Contract between the [plaintiffs] and the [excipient] is an interested party in this matter and ought to have been joined."*

[7] To address this point, the plaintiffs first applied to join the excipient to these proceedings. The joinder application was not opposed and was granted on 23 April 2024. At this point, the excipient became the second respondents in the action. The plaintiffs amended their statement of claim, to include the excipient in its pleadings. The excipient lodged its exception on 10 October 2022.

#### The exception

[8] I upheld the exception because the amended statement of claim did not lay a basis for the plaintiffs to argue that the excipient is in any way responsible for past and/or future harm that may be suffered by any of the individual plaintiffs because of the termination of their post-retirement medical aid benefits.

[9] There was no basis for evidence to be led in respect of the excipient's alleged liability for the cancellation of the post-retirement medical aid contribution. The amended statement of claim undermined any case against the excipient through the following averments:

9.1 *"The fourth to ninth plaintiffs' entitlement to post-retirement medical aid subsidy was automatically transferred from the Second Defendant... to the First Defendant on the effective date of the agreement, being March 2018."*

9.2 *"The [post-retirement medical aid subsidy provided by the excipient] has been transferred to the first defendant as a going concern in terms of section 197 of the LRA."*

[10] Even on the most generous interpretation of the amended statement of claim, there is no case made out against the excipient, which also means that the pre-trial procedures (particularly, a request for further particulars) would not assist.

#### Appropriate relief

[11] Is there any value in giving the applicants an opportunity to file an amended pleading?

[12] The excipient seeks relief extending to dismissing the plaintiffs' claim against it. No case for this was made out in the heads of argument. However, counsel for the excipient argued that the statement of claim would not survive further amendments because any amendments to disclose a cause of action against the excipient would eliminate a cause of action against the first defendant.

[13] I do not agree. The excipient's position is that, by virtue of the section 197 transfer in March 2018, the excipient is now completely out of the picture and is not responsible for any decisions concerning the fourth to ninth plaintiffs, even though

they retired before the section 197 transfer, i.e. they retired as the excipient's employees.

[14] The approach does not appreciate the possibilities emanating from the fact that section 197 does not always remove the transferor from the picture. If an agreement is reached in terms of section 197(7), the transferor may remain in the picture. For example, transfer agreements can apportion certain liabilities to the transferor, with the result that the transferor may be liable for some employees or for some claims, and the transferee for others. There may also be an indemnity clause in favour of the first defendant, which applies to this situation. This is what strikes me on the face of the pleadings, though it does not exclude other bases for the excipients' liability, if any.

[15] On this basis, I cannot deny the plaintiffs an opportunity to revise their pleadings.

[16] I have also considered the general approach: even where courts have struck out particulars of claim based on their failure to disclose a cause of action, plaintiffs may be given leave to amend their particulars of claim.<sup>2</sup> The Supreme Court of Appeal has described this as an "*established practice*".<sup>3</sup> The Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*<sup>4</sup> has clearly stated that amendments are only impermissible in exceptional cases:

"[A]mendments 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'."

[17] Although the nature of the amendments in *Affordable Medicines Trust* were of a particularly minor nature, the test relates to the interests of justice. It is in the interests of justice that if the plaintiffs have a contractual or other claim, they are not

<sup>2</sup> *Evrigard (Pty) Ltd Another v Select PPE (Pty) Ltd and Others* (2022-22743) [2024] ZAGPJHC 183 (26 February 2024).

<sup>3</sup> *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G – H.

<sup>4</sup> 2006 (3) SA 247 (CC) at para 9.

denied an opportunity to properly bring one. It is early in the process. The interests of justice are therefore in the plaintiffs' favour. Ultimately, the aim is to accurately ascertain whether the second the ninth plaintiffs have a claim based on the first defendant's decision, and against whom each plaintiffs' claim lies. If the pleadings are amended in a manner that has disadvantaged the excipient in any way, the prejudice is financial and may be cured with a tender of or an order for costs.

### Costs

[18] The principle (not applicable in this Court) that costs automatically follow the result is based on the idea that a party should not have to be out of pocket for litigation that they ought not to have had to engage in in the first place.

[19] The Labour Court departs from this in the interests of justice and fairness. The Labour Appeal Court in *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O*<sup>5</sup> set guidelines as follows:

"In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court."

[20] The plaintiffs' amended statement of claim does indeed fail to disclose a cause of action against the excipient. The plaintiffs no longer have an employment or bargaining relationship with the excipient because of the section 197 transfer.

[21] That said, the plaintiffs are currently represented only by their trade union, in contrast to the excipient, represented in the exception by a firm of attorneys and counsel. I must consider the amended statement of claim (the cause of the complaint) in this light.

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<sup>5</sup> (2008) 29 ILJ 1707 (LAC) at para 19, cited with approval in *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) at para 24.

[22] As counsel for the excipient stated, the proper procedure was to bring this matter directly to this Court, as this is not a complaint of vague and embarrassing pleadings. The plaintiffs could theoretically have corrected the amended statement of claim in the intervening period, but again, the applicants are not legally represented at this point.

[23] At the hearing, the plaintiff's representative did not persist in argument against the exception when answering, focusing rather on the appropriate relief. The excipient, on the other hand, persisted in arguing that the plaintiffs should not be granted the standard relief of leave to amend their statement of claim, without providing authority in heads of argument or in oral submissions as to why the plaintiffs should be denied this stock opportunity.

[24] Finally, the plaintiffs have not brought a frivolous case. They have acted at each turn to build a stable claim, and at each turn been faced with legally represented defendants. They have tried to address these issues as they are being raised against them: first by applying for the excipient to be joined to proceedings, then amending the original statement of claim once the excipient had been joined. That they did so in a manner that fails to provide them with a basis to lead evidence against the excipient at trial is not a vexatious or frivolous act, but rather a *bona fide* error.

[25] I therefore find no justification for ordering costs in the exception.

#### Order

1. The exception is upheld and the plaintiffs' amended statement of claim dated 2 September 2024 is struck out.
2. The plaintiffs are granted leave to amend their statement of claim within 15 days from the date of this order.
3. There is no order as to costs.

B. Ramji

Acting Judge of the Labour Court of South Africa

Appearances:

For the Excipient (the Second Defendant):

HM Viljoen

Instructed by:

Webber Wentzel

For the First to Ninth Respondents (the Plaintiffs):

N Ras, Solidarity

LABOUR COURT