



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 453/24

In the matter between:

ROBERT MHLUPHEKI MTHEMBU

Applicant

and

KITSO BOTLHALE CONSULTING

ENGINEERING (PTY) LTD

Respondent

Heard: 15 May 2025

Delivered: 02 October 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an application in which the respondent has filed an exception against the statement of case delivered by the applicant on the basis that it lacks averments which are necessary to sustain a cause of action.

The Applicant's Case

[2] The applicant's statement of case sets out the following:

- 2.1. The parties;
- 2.2. In respect of the facts which the applicant intends to rely upon to establish a claim, the applicant simply refers to a number of annexures;
- 2.3. With reference to the legal issues that arise from the facts, the applicant once again only makes reference to annexures; and
- 2.4. In respect of the relief sought by the applicant, the applicant is claiming his overtime pay for the period 1 February 2021 to 31 January 2024, a request for a comprehensive overtime review and that the settlement agreement concluded on 22 February 2024 at the Commission for Conciliation, Mediation and Arbitration (CCMA) be set aside.

The respondent's exception

[3] The respondent excepted to the statement of case on the following basis:

- 3.1 The applicant has failed to set out the material facts upon which he relies to establish his claim, referring only to annexures without articulating the factual basis of the claim;
- 3.2 In terms of paragraph 6 of the statement of case, the applicant is required to set out the legal principles relevant to the claim. The applicant has, however, failed to identify or rely on any legal principles capable of sustaining such a claim;
- 3.3 In relation to the relief sought for payment of overtime for the period 1 February 2021 to 31 January 2024, the applicant has not pleaded the existence of an agreement as required by section 10(1)(a) of the Basic Conditions of Employment Act¹ (BCEA). In the absence of such an averment, the applicant has failed to disclose a cause of action in respect of the overtime claim;

¹ Act 75 of 1997.

- 3.4 Regarding the applicant's request for a comprehensive overtime review, and in the absence of an agreement to work overtime, there is no legal obligation on the respondent to provide such a review;
- 3.5 In relation to the relief sought to set aside the settlement agreement, the applicant has failed to establish why the agreement is not legally binding on the parties and has not pleaded any basis upon which the agreement is not enforceable;
- 3.6 The respondent further disputes this Court's jurisdiction on the grounds that, even if it were found that the applicant has pleaded sufficient facts to sustain a claim for overtime, this Court lacks the authority to adjudicate the claim. This is due to the settlement agreement concluded between the parties at the CCMA in February 2024, which was intended to constitute a full and final settlement of the dispute and, according therefore extends to any future disputes arising from the employment relationship. The respondent contends that, unless and until this settlement agreement is set aside, this Court lacks jurisdiction to entertain the overtime claim; and
- 3.7 A portion of the applicant's overtime claim has prescribed, as the applicant only served his statement of case in August 2024.

[4] In opposition the applicant, in what purports to be a letter to Mr Derik van der Linde, *inter alia* records the following:

- 4.1 Case law pertaining to the applicant's request for a comprehensive overtime review and that an employer is required to maintain accurate records and has a duty to account, with specific reference to the settlement agreement;
- 4.2 The applicant reiterates the relief he seeks by requesting that this Court compel the respondent to provide a detailed account of all the payments made under the settlement agreement;

- 4.3 In respect of the legal principles, the applicant refers to his heads of argument contained in the annexures attached to his statement of case;
- 4.4 The instructions to work overtime were verbal and were consistent, and the applicant considers that each verbal instruction and the resulting overtime worked constitutes an acknowledgement of debt. Prescription is not applicable as the period of prescription should only be calculated from the last date of overtime worked, being 31 January 2024, and accordingly, the period would only expire in January 2027;
- 4.5 The applicant further reiterates that he has provided detailed reports attached as annexures in confirmation of his claim;
- 4.6 This Court has jurisdiction in terms of section 77 of the BCEA, which grants this Court exclusive jurisdiction in respect of all matters in terms of the BCEA. Furthermore, that section 77(3) of the BCEA provides this Court with concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment.
- [5] The applicant further raised a number of concerns during the Court proceedings, in relation to what the applicant considers to be a “*serious procedural irregularity that affects the fairness and lawfulness of these proceedings*”.
- [6] The basis of the applicant’s objection to the exception relates to the respondent’s failure to serve a complete indexed bundle as is required in terms of Rule 4(1)(a) of the Labour Court Rules². The applicant confirms having received certain annexures, however ‘key’ documents, as referred to by the applicant, were omitted.
- [7] The applicant further makes reference to the respondent’s failure to deliver the pre-trial minute, and it is therefore ‘irregular’ in the applicant’s view that

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

these proceedings continue. Furthermore, there had been no proper service by the respondent on the applicant.

The Legal Framework

- [8] Rule 41 of the Labour Court Rules³ allows for interlocutory applications and procedures not specifically provided for in other rules. Rule 41 requires that the application be brought on notice and in applications dealing with procedural aspects, no affidavit is required.
- [9] The High Court in *Living Hands (Pty) Ltd and another v Ditz and others*,⁴ summarised the basic principles governing exceptions as follows:
- ‘(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
 - (b) The object of an exception is not to embarrass one’s opponent or take advantage of a technical flaw, but to dispose of the case or portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
 - (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties...
 - (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
 - (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
 - (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

³ GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court.

⁴ 2013 (2) SA 368 (GSJ); [2012] ZAGPJHC 218 at para 15.

- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.’

[10] An exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial.⁵

[11] It is evident that the court grants parties considerable flexibility in how they frame their pleadings, as there are numerous opportunities later in the proceedings to elaborate on issues, including a pre-trial conference, the exchange of documents, and ultimately, the presentation of evidence.

[12] It must also be kept in mind that the Court’s role at this stage is not to determine whether the applicant’s contention is correct, but rather whether the respondent is unable to plead or properly prepare for trial. This is assessed in light of the further opportunities available to obtain additional information and clarification as the proceedings progress.

[13] In respect of Rule 6⁶ of the Rules of this Court, in *Harmse v City of Cape Town*⁷ Waglay J (as he then was) said the following:

‘[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which Applicant will rely to succeed in its claims.

[7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual

⁵ *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* 2008 (6) SA 87 (W); [2008] 4 All SA 103 (W).

⁶ Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.

⁷ (2003) 24 ILJ 1130 (LC); [2003] 6 BLLR 557 (LC).

and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim.

[8] The Rules of this Court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pre-trial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed.’

[14] In *Liquid Telecommunication (Pty) Ltd v Carmichael – Brown*⁸ Van Niekerk J (as he then was) quoted with approval the views expressed by Waglay, J (as he then was), as to the emphasis on complying with Rule 6 so as to inform the Court and the respondent of the facts, not the evidence, upon which the applicant wishes to rely. Both the Court and the respondent need to know what the applicant’s case is about in respect of factual allegations and legal issues.

[15] In *Association of Mineworkers and Construction Union (AMCU) v Chamber of Mines South Africa and Others*⁹ this Court had the following to say relating to exceptions raised in this Court:

‘It is my view, that such court in deciding on this aspect has to take into account, *inter alia*, (i) the manner in which the pleadings have been crafted, (ii) the onus of proof, (iii) burden to adduce evidence, (iv) the manner in which such point has been raised, (v) the relief sought, and (vi) the type of exception (either lacks averments which are necessary to sustain an action or vague and embarrassing) that has been raised by such party and other factors.’

⁸ (2018) 39 ILJ 1779 (LC); [2018] 8 BLLR 804 (LC).

⁹ [2017] ZALCJHB 462.

[16] In respect Rule 11 of the Rules of this Court¹⁰, an applicant is required to file a statement of claim in order to initiate proceedings in this Court, which statement of claim must *inter alia* include:

- ‘(ii) a clear and concise statement of the material facts, in chronological order, on which the party relies, in sufficiently particular terms to enable any opposing party to plead to the statement of claim;
- (iii) a clear and concise statement of the legal issues that arise from the material facts, in sufficiently particular terms to enable any opposing party to plead to the statement of claim.’

Analysis

[17] As aforementioned, the applicant has simply filed the template document provided by this Court and only refers to annexures in support of the statement of material facts he is required to provide and the legal issues that arise from the material facts similarly, no statement is provided, and the applicant simply attaches annexures in support hereof.

[18] The applicant, in terms of the statement of case, has not set out a clear and concise statement of the material facts, in chronological order and in sufficient particularity to enable the respondent to plead to the statement of case.

[19] It would seem from the reading of the statement of case that the applicant attaches his annexures in support of his claim, however, he does not provide any statement to substantiate his reliance on the annexures and accordingly fails to provide sufficient particularity to enable the respondent to plead thereto.

[20] Similarly, the applicant has also not provided a clear and concise statement of the legal issues that arise from the material facts as he once again only refers to annexures. It can only be gleaned from the relief sought by the applicant that the applicant seeks to set aside the settlement agreement concluded in the CCMA in February 2024, the payment of overtime for the period 1 February 2021 to 31 January 2024 and a comprehensive overtime review.

¹⁰ *Supra*.

- [21] In considering Rule 11 of the Labour Court Rules, the applicant has not complied with his obligations, and it is for this reason that the exception raised by the respondent must succeed.
- [22] In relation to the concerns raised by the applicant, particularly regarding the respondent's service of the Notice in terms of Rule 41 of the Labour Court Rules, there is no basis for such concern given that the applicant has responded to the respondent's exception. As for the documents the applicant alleges he did not receive, this issue need not be addressed in view of the relief granted below.
- [23] I have further considered whether there would be any value in giving the applicant an opportunity to file an amended statement of case.
- [24] The applicant ultimately seeks to have the settlement agreement in respect of an unfair dismissal dispute filed under case number GATW1592/34, concluded in the CCMA in February 2024 set aside, and to compel the respondent to conduct a comprehensive overtime review and to make payment of outstanding overtime.
- [25] With reference to the settlement agreement, the parties had specifically agreed that the agreement was in full and final settlement of the dispute referred to the CCMA, as well as in full settlement of all statutory payments due to the applicant as reflected in paragraph 5 of the settlement agreement.
- [26] I have further considered the jurisdictional ruling made by Commissioner Christine Levey on 29 July 2024 under case number GATW9757/24, in respect of a dispute the applicant had subsequently referred to the CCMA in terms of section 73A of the BCEA in July 2024.
- [27] The ruling ultimately concluded that in light of the fact that the parties had settled the dispute, in terms of the settlement agreement signed in February 2024, which settlement agreement was in full and final settlement of the dispute, the applicant was directed to approach this Court to have the settlement agreement set aside.

- [28] Having regard to the applicant's opposition to the exception, the applicant submits that the dispute in relation to the unpaid overtime remains unresolved and for this reason is not included in the settlement agreement. Notwithstanding this submission, the applicant has set out no basis in the statement of case as to why the settlement agreement should be set aside.
- [29] Whilst the applicant's statement of case does not comply with Rule 11 of the Labour Court Rules, in the matter of *Evrigard (Pty) Ltd and Another v Select PPE (Pty) Ltd*¹¹ this case highlights that a court has permitted, in instances where the court has struck out particulars of claim based on the failure to disclose a cause of action, plaintiffs may be given leave to amend their particulars of claim. The Supreme Court of Appeal has described this as an "established practice".¹²
- [30] The Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*¹³ 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.'
- [31] As was underscored in *Affordable Medicines Trust and Others v Minister of Health and Others*, the applicable test is one grounded in the interests of justice. Having regard to this principle, I am satisfied that it would be in the interests of justice to afford the applicant an opportunity to amend his statement of case. Such an amendment would enable the Court, in due course, to properly consider whether the applicant is able to establish a basis for setting aside the settlement agreement.
- [32] In the premises, I make the following order:

¹¹ [2024] ZAGPJHC 183; [2024] JOL 63283 (GJ) as referred to in the matter of *Element Six (Production) (Pty) Ltd v Solidarity and Others* [2025] ZALCJHB 109; (2025) 46 ILJ 1426 (LC).

¹² *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G – H.

¹³ 2006 (3) SA 247 (CC) at para 9.

Order

1. The exception is upheld, and the applicant's statement of case dated 8 August 2024 is struck out.
2. The applicant is granted leave to amend his statement of case within 15 days from the date of this order.
3. There is no order as to costs.

H. Schensema

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Self-represented

For the Respondent: Advocate P Kirstein

Instructed by: Couzyn Hertzog & Horak Attorneys

LABOUR COURT