



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 365/24

In the matter between:

HILTON KARNOVSKY

Applicant

and

HKA GLOBAL (PTY) LIMITED

Respondent

Heard: 25 February 2025

Delivered: 06 October 2025

JUDGMENT

MILO, AJ

[1] This judgment concerns two interlocutory matters. First, the applicant seeks leave to amend his statement of claim. The application follows the respondent's delivery of a notice of objection to the applicant's notice of intention to amend.

[2] Secondly, the respondent, acting as an excipient, takes exception to the applicant's current statement of claim on two grounds, namely (i) that it lacks

averments necessary to sustain a cause of action; and (ii) that it is vague and embarrassing. These complaints feature likewise in the objection raised by the respondent to the applicant's notice of intention to amend his statement of claim.

- [3] The application for leave to amend and the exception were argued together.
- [4] At the hearing, Mr Bishop, who appeared for the applicant, contended that the exception was 'stillborn'. He argued that, firstly, it was delivered four days after the time for a statement of response had expired; secondly, it purported to invoke both grounds of exception, namely (i) a failure to plead averments necessary to sustain a cause of action and (ii) vagueness and embarrassment. He submitted that an excipient must elect between these grounds and may not advance both.
- [5] At the hearing, Mr Naidoo, who appeared for the respondent, submitted that if leave to amend is granted, the pending exception to the existing statement of claim becomes academic and this Court need not determine it. The decisive question, he contended, is whether the applicant's proposed amendments cure the defects raised by the respondent; conversely, if they do not, the objection to the amendment should be upheld and, to the extent warranted, the exception sustained.
- [6] To appreciate and assess these points, it is necessary to set out, briefly, the pleading and procedural history, commencing with the statement of claim as originally delivered; the exception taken to it; the applicant's successive proposed amendments and the respondent's objection to the notice of intention to amend, which culminated in the application and the exception presently before this Court.

Background

- [7] On 20 June 2024, the applicant instituted action in this Court against the respondent by delivering a statement of claim. In it, he alleges that he was retrenched and that his dismissal is automatically unfair on the ground of unfair discrimination. In the alternative, he advances an 'ordinary' unfair dismissal claim, alleging that the retrenchment was both procedurally and substantively unfair.

[8] For reasons that will become apparent, it is necessary to record that the parties agreed to a brief extension for the respondent to deliver its response to the statement of claim. The ambit of that agreement, namely whether it extended only to the delivery of a statement of response or also permitted the delivery of an exception outside the ordinary period, later became contested in argument. I return to this in due course.

[9] The respondent did not deliver a statement of response. Instead, on 10 July 2024, within the time period of the agreed upon extension, the respondent filed a notice of exception (the Notice of Exception). As alluded to above, this exception was brought on two main grounds. Firstly, the respondent contended that the statement of claim lacked averments necessary to sustain the automatically unfair dismissal claim. In this regard, the respondent levelled a number of complaints, including:

- 9.1. That the applicant allegedly failed to plead sufficient averments to sustain a case that the reason for his dismissal was his conscience and belief, as envisaged under section 187(1)(f) of the Labour Relations Act¹ (LRA).
- 9.2. That the statement of claim did not contain an adequately and properly pleaded causal legal and factual nexus between the alleged discrimination and the dismissal.
- 9.3. That there were insufficient averments pleaded to sustain the grounds of discrimination on the grounds of conscience and belief.
- 9.4. That the applicant failed to identify and plead any comparators; and
- 9.5. That the applicant, generally, failed to plead the requirements for an automatically unfair dismissal based on alleged unfair discrimination.

[10] Under the next ground of exception headed 'vague and embarrassing' the respondent contended that the applicant failed to plead material facts and/or legal issues so as to enable the respondent to plead, alternatively the allegations

¹ Act 66 of 1995, as amended.

pleaded are vague and embarrassing. Under this heading, four complaints were raised.

- [11] The first complaint targets the automatically unfair dismissal claim. The respondent contends that the applicant fails to identify with sufficient precision the ground(s) on which the claim rests (whether a listed ground under section 187(1) of the LRA or an unlisted analogous ground) and to delineate the factual basis supporting it. On that footing, the respondent contends that the pleading is excipiable for want of averments and, in any event, is vague and embarrassing.
- [12] The second complaint relates to an averment in the statement of claim which the applicant makes in relation to the notice that had been issued to him in terms of section 189(3) of the LRA, where the applicant states: *"In the absence of providing the Applicant and Cawood with sufficient and relevant information, and in circumstances where the Respondent had a statutory duty to provide that information, the response to Diseko's invitation became a difficult exercise..."* (Own emphasis). The respondent's complaint is that the applicant fails to plead and specify this alleged statutory duty, rendering this averment vague and embarrassing.
- [13] The third complaint, advanced under the rubric 'vague and embarrassing', is directed at the alternative unfair retrenchment claim. The respondent contends that in the statement of claim the applicant avers that his retrenchment was unfairly utilised by the respondent to 'construct' and justify a dismissal, the nub of the applicant's assertion being that the section 189 process was a sham and the applicant's retrenchment was a *fait accompli*. The respondent relies heavily on the applicant's choice of word 'construct' to convey these sentiments. The respondent asserts that the applicant fails to plead the basis of his contention that his dismissal was 'constructed' in the absence of a ground of unfair discrimination as the reason for his dismissal, thereby rendering such averments so vague and embarrassing that the respondent is precluded from reasonably pleading thereto.

- [14] In the fourth complaint, the respondent takes issue with the applicant's averment that the selection criteria applied in his retrenchment were arbitrary and subjective. The selection criteria that the applicant contends were applied, and which the respondent asserts in its exception, are recognised as generally fair, were based on "*skills, past performance, length of service and qualifications*". The respondent complains that in the absence of the applicant pleading the basis for his assertion that these selection criteria were arbitrary and subjective, the averment is vague and embarrassing, thereby rendering the respondent unable to plead thereto.
- [15] The respondent afforded the applicant fifteen days to remove the causes of complaint, failing which the respondent advised that it would set its exception down for hearing.
- [16] In response to the Notice of Exception, on 31 July 2024, the applicant delivered a notice of intention to amend his statement of claim (the First Notice of Amendment). It is apparent from that notice that the applicant sought to meet several of the complaints raised. By way of example, he proposed to:
- 16.1. Withdraw the automatically unfair dismissal claim in its entirety by deleting references to an automatically unfair dismissal throughout the statement of claim;
 - 16.2. Recast the retrenchment narrative by substituting the term 'constructed' with 'manufactured' and clarifying that the complaint concerns a sham section 189 process and a predetermined outcome;
 - 16.3. Introduce allegations that, post-retrenchment, the respondent created and filled positions for which the applicant was suited but in respect of which he was not considered;
 - 16.4. Insert a new paragraph alleging that the respondent had failed to disclose in writing all relevant information in terms of section 189(3) of the LRA;

16.5. Insert paragraphs alleging that the respondent failed to engage in a meaningful joint consensus-seeking process; that no consensus was reached on the method for selecting employees for dismissal; that the respondent instead unilaterally chose the selection criteria without proper consultation; and that the respondent (i) failed to apply its own criteria and/or (ii) failed to inform the applicant how the criteria were applied or to explain the outcome.

[17] The respondent had 10 days to object to the proposed amendment. It thus had until 14 August 2024 to do so.

[18] On 13 August 2024, the respondent:

18.1. Delivered its exception to the statement of claim, maintaining the two main grounds and four complaints foreshadowed in the Notice of Exception, and contending that the First Notice of Amendment did not cure them;

18.2. Served a notice of enrolment for the hearing of its exception;

18.3. Delivered a notice of objection (the First Notice of Objection) to the First Notice of Amendment.

[19] In the First Notice of Objection, the respondent objected to the applicant's proposed amendments on the following bases:

19.1. The respondent contended that the First Notice of Amendment does not cure the defects identified in the Notice of Exception. Even if the amendment is effected, the statement of claim would remain vague and embarrassing and would still lack averments to disclose a cause of action;

19.2. Certain of the proposed new paragraphs, according to the respondent, would themselves be excipiable for vagueness;

19.3. The respondent contended that the applicant failed to comply with Rule 20(8) of the Rules of this Court, which provides that a party giving notice of

amendment is, unless the court otherwise directs, liable for the costs occasioned to any other party.

- [20] The respondent acknowledges in the First Objection that *“on a wholistic reading of the proposed amendment it is apparent that the applicant seeks to remove/abandon his claim of an automatically unfair dismissal”* and that a complete abandonment and removal of all reference to the applicant’s alleged automatically unfair dismissal claim would adequately address the respondent’s first ground of exception (namely that the applicant had failed to make necessary averments to sustain an automatically unfair dismissal claim). However, the respondent highlighted that whilst the First Notice of Amendment appeared largely to achieve this objective, in one stray instance the reference to ‘automatically’ remains, namely in paragraph 6.5.
- [21] The respondent expressed the view that the second, third and fourth complaints remained valid, in that they were not suitably addressed by the First Notice of Amendment.
- [22] Insofar as the applicant sought to introduce new paragraphs complaining that the respondent had made various new appointments after the applicant’s retrenchment, but the applicant had not been considered for any of those appointments, the respondent complains that the applicant fails to identify such appointments or positions. On this basis, the respondent submits that the proposed paragraphs are themselves vague and embarrassing (and thus excipiable) and that leave to amend should be refused.
- [23] In response to the respondent’s steps on 13 August 2024, the applicant withdrew the First Notice of Amendment and, on 26 August 2024, delivered a fresh notice of intention to amend (the Second Notice of Amendment). The second notice was aimed at addressing, to the extent necessary or prudent, the objections raised.
- [24] In the Second Notice of Amendment, the applicant removed all references to his claim of automatically unfair dismissal, including that in paragraph 6.5 which had

been inadvertently omitted by the First Notice of Amendment, due to an oversight. The applicant went further and, presumably as a belt-and-braces measure, included an overriding provision expressly “*abandoning and removing all references to the Applicant’s automatically unfair dismissal claim*”. What followed after this broad statement was a clear indication of where, in each portion of the statement of claim, the removal of such references would be made, and how this would be achieved.

- [25] This second notice also identified the new appointments made by the respondent after the applicant’s retrenchment and their positions. The applicant also expressly tendered the wasted costs occasioned by the proposed amendment, although the applicant pointed out that this was not strictly necessary as it is implicit in the Rules of this Court.
- [26] Exactly ten days later, the respondent filed an objection (the Second Objection) to these proposed amendments.
- [27] In the Second Objection, the respondent persisted in its challenge insofar as the automatically unfair dismissal claim is concerned. While again conceding that, viewed wholistically, the applicant seeks to abandon and remove that claim, the respondent took issue with the applicant’s ‘belt-and-braces’ overarching clause purporting to delete “*all references*” to it. The respondent contends that this broad formulation offends Rule 20(1) because, standing alone, it does not furnish sufficiently specific particulars of the amendments sought, thereby impeding a considered objection. The respondent also persisted with complaints two, three and four, and maintained that, even if the Second Notice of Amendment were effected, the statement of claim would remain vague and embarrassing and thus excipiable.
- [28] Before launching this application, the applicant’s attorneys wrote to the respondent’s attorneys contending that the objections were without merit and calculated to delay and frustrate the proceedings, thereby increasing costs in a manner intended to ‘out-litigate’ the applicant. The letter foreshadowed the present

application and indicated that punitive costs would be sought at the hearing on the basis that the objections were baseless and occasioned unnecessary interlocutory skirmishing.

[29] The application for leave to amend was subsequently launched. In the notice of motion, the applicant did not seek costs of the application, save in the event of opposition thereto by the respondent, in which event the respondent is ordered to pay the costs of the application.

[30] The respondent opposed the application.

Applicable legal framework

[31] Two interlocutory matters are before me, namely an application for leave to amend and an exception to the existing pleading. I agree with the respondent that the logical and efficient course is to address the amendment application first. If leave to amend is granted and the amendments cure the impugned defects, the exception, directed at a superseded pleading, becomes academic. In this regard, it will be observed from what is set out above that the respondent's objections to the proposed amendments in any event largely mirror the exception grounds.

[32] Against that backdrop, I begin with the governing legal principles on amendments to pleading, and the proper treatment of objections, before applying those principles to the proposed amendments *in casu*. In doing so I do not intend setting out a comprehensive analysis of the legal principles governing pleadings, amendments and objections, but instead confine myself to those that are particularly apposite to the issues in this matter.

[33] It is useful to commence this evaluation by first clarifying the purpose and scope of a statement of claim. The purpose of a statement of claim in this Court is to bring a respondent before the Court, and to define the dispute. The statement of claim must, with sufficient particularity to enable a response, set out (i) a clear and concise statement of the material facts on which the claim rests (in chronological sequence) and (ii) a clear and concise statement of the legal issues arising from

those facts. That was the position under the former Rule 6, and it remains so under the current Rules (Rule 11).

[34] This Court in *Harmse v City of Cape Town*² helpfully explained the purpose and scope of a statement of claim, thus:

- '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 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-trail (sic) 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.
9. Accordingly the rules of this Court anticipate that the relief claimed might not have been precisely pleaded in the Statement of Claim filed. The Rules of this Court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trail conference. The rules therefore

² [2003] ZALC 53; (2003) 24 ILJ 1130 (LC).

anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadows this activity but is not a substitute for it. It is for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the Court is required to decide.'

- [35] Where a respondent contends that a statement of claim is defective, either because, on its own averments, it fails to disclose a cause of action, or because the averments are so imprecisely pleaded as to cause embarrassment in pleading, a respondent may proceed by exception. In this Court, exceptions are taken by applying the Labour Court's Rules and, where appropriate, adopting the procedure in Uniform Rule 23 through the Court's discretionary power (formerly Rule 11(3), now Rule 41(3)). Rule 41(3) provides that *"[i]n the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act"*.
- [36] Two pathways on exceptions follow. First, if the complaint is vagueness/embarrassment, the respondent should serve a notice to remove the cause of complaint within the stipulated period; if the defect is not removed, an exception may then be delivered and set down for hearing. Secondly, if the complaint is a failure to plead averments necessary to sustain a cause of action, the respondent may deliver an exception directly (without prior notice calling for a cure to the defect). The applicant contended that an excipient must elect a single ground and may not pursue both 'no cause of action' and 'vague and embarrassing'. I do not agree. The grounds are conceptually distinct and may be advanced in the alternative or in parallel, depending on the facts of the case and particularly where different paragraphs and/or different causes of actions are impugned on different bases.
- [37] Where an applicant, of its own volition or in response to an exception, seeks to amend a statement of claim, the procedure is by notice of intention to amend in

terms of Rule 20. If no objection is delivered within the stipulated period, the amendment may be effected, and the amending party is, unless the Court otherwise directs, liable for the costs thereby occasioned (Rule 20(8)).

[38] If an objection is delivered, the amendment does not take effect unless and until the Court grants leave for the amendments to be effected.

[39] Mr Bishop submitted that the discussion in *Erasmus: Superior Court Practice*³ and the authorities therein mentioned on Uniform Rule 28 are apposite to this Court's approach to amendments and to applications for leave to amend, given that Uniform Rule 28 is, in substance, framed in terms that mirror Rule 20. I concur. While Uniform Rule 28 does not apply of its own force in this forum, its principles are routinely adopted through Rule 41(3) and are persuasive.

[40] As noted by Erasmus, in determining applications for leave to amend, the starting point is that the Court has a discretion to grant or refuse an amendment. This discretion must be exercised judicially. The default inclination is to permit amendments brought in good faith. To earn that indulgence, the applicant should explain the change and satisfy the Court of *bona fides*. Differently put, as a general rule, amendments are to be allowed unless they are sought *mala fide* or they would visit non-compensable prejudice on the other side. The *locus classicus* remains *Moolman v Estate Moolman and Another*⁴, where the Court stated:

'The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words 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.'

[41] A central rationale for permitting amendments is to secure the proper ventilation of the real dispute. As long ago recognised in *Trans-Drakensberg Bank Ltd (Under*

³ Erasmus Superior Court Practice: RS 23, 2024, D1- Rule 28-5 *et seq.*

⁴ 1927 CPD 27 at 29.

*Judicial Management) v Combined Engineering (Pty) Ltd and Another*⁵, amendments are a means to get the true issues into sharp focus so that the case can be determined on its merits rather than on pleading niceties.

[42] Allied to that is a broader point. Court rules and pleadings are not ends in themselves. They exist to promote the good order and administration of justice.⁶ In this Court, that orientation dovetails with the LRA's objectives of expeditious, effective dispute resolution. The discretion on amendments must therefore be exercised to advance substance over technical skirmishing, while preserving fairness to both sides.

[43] There is, however, a limiting principle. An amendment will not be allowed if its effect would be to render the pleading excipiable, or if it fails to cure an excipiable defect. In other words, the Court will not sanction a change that leaves the pleading bad in law or so lacking in particularity that it causes real prejudice. But where the complaint goes to curable embarrassment or arguable particularity (matters that can be addressed by, for example, targeted particulars provided through the pre-trial procedure, or if truly necessary a focused exception), the better course is ordinarily to grant leave and manage any lingering issues through those tools, with costs adjusted as fairness requires.

[44] In *Horwarth v Fargoworx Investments (Pty) Ltd and Another*⁷ the High Court put it thus:

[14] If an amendment will result in a pleading being excipiable, such an amendment shall not be allowed. However, in exercising its discretion the court must adopt an approach that is not over-technical. It has always been said that an exception may only be allowed if it strikes at the root of the cause of action. In *Telemetric v Advertising Standards Authority South Africa* it was held:

⁵ 1967 (3) SA 632 (D); [1967] 4 All SA 105 (D) at 638A.

⁶ See *Bankorp Ltd v Anderson-Morsehead* 1997 (1) SA 251 (W) at 253D–G.

⁷ [2018] ZAECHGHC 144.

“Exceptions should be dealt with sensibly. They provide a useful mechanism, to weed out cases without legal merit. An over-technical approach destroys their utility.”

[15] The issue is whether the present case is without any merit but for the amendment. Ms Beard has argued that the paragraphs sought to be amended are substantially identical with the amending paragraphs. Whilst contending that the amendment will result in the summons being excipiable, Mr Williams did not advance any credible counter argument to outsmart the submission so made. The defendants’ objection to the proposed amendment is that it will render the summons excipiable on the ground that it will be vague and embarrassing.

[16] An exception raised on the ground of material vagueness is always a curable defect. It may be cured by simply amending the same summons to which an exception is raised...

[45] Thus, where an objection says the proposed amendment would render the pleading excipiable, the Court may (and often does) treat the objection as if it were an exception for the limited purpose of deciding whether the proposed pleading (pursuant to the amendment) would be bad in law or so lacking in particularity as to cause real prejudice.

[46] In this regard, in *De Klerk and Another v Du Plessis and Others*⁸, the High Court held with regard to objections to proposed amendments to pleadings, that *“the grounds of objection are appropriate to an exception and accordingly the Application will be dealt with as if it is an exception. This is preferable to allowing the amendment in the sure knowledge that the Defendant would immediately note an exception”*.

⁸ 1994 (6) BCLR 124 (T), cited in *Kganyago v Tsogo Sun Casino Management Company and Another* [2024] ZALCJHB 41 at para 22.

- [47] Similarly, as Adams AJ recently observed in *Kganyago v Tsogo Sun Casino Management Company and Another*,⁹ treating an objection as if taken by way of exception avoids a two-step skirmish and promotes procedural economy.
- [48] In assessing whether to grant leave for the amendment of the statement of claim, I therefore consider the respondent's objections through the exception lens.
- [49] The legal principles on evaluating exceptions on the ground that they fail to disclose a cause of action are trite. For an exception that a pleading fails to disclose a cause of action, the Court (i) takes the pleaded facts as true; (ii) reads the pleading as a whole and with common sense; and (iii) will uphold the exception only if, on every reasonable interpretation, the pleading lacks the material averments necessary to sustain the claim. If any reasonable reading discloses a cause of action, the exception must fail.¹⁰
- [50] The legal principles on evaluating exceptions on the ground that the pleading is vague and embarrassing are likewise well known, and for purposes of this judgment, the following summary provided by Erasmus¹¹, supported by the authorities therein mentioned, suffices:
- 50.1. The first enquiry is whether the pleading does lack particularity to the point of vagueness. A statement is vague if it is meaningless, internally inconsistent, or reasonably capable of more than one meaning, such that the reader cannot distil from it a single, clear meaning.
- 50.2. If such vagueness is found, the Court must then assess, concretely, the degree of 'embarrassment' it causes. The excipient must show that the lack of particularity will 'substantially embarrass' or prejudice it in formulating a plea or conducting its case. Merely technical or speculative prejudice will not suffice.

⁹ [2024] ZALCJHB 41.

¹⁰ *Pretorius and another v Transport Pension Fund and others* [2018] ZACC 10; [2018] 7 BLLR 633 (CC); at para 15.

¹¹ Erasmus: Superior Court Practice RS 23, 2024, D1 Rule 23-13 *et seq.*

50.3. In each case the Court must make a contextual, ad hoc ruling on whether the embarrassment is sufficiently serious to cause prejudice if the excipient is compelled to plead to the impugned paragraph. A point that is critical in one matter (such that its omission creates vagueness and embarrassment) may, in another, be a minor detail. The enquiry is fact-sensitive and turns on materiality, the stage of proceedings, and whether the respondent can reasonably be expected to plead without unfairness.

50.4. The ultimate test is prejudice. Whether an exception should be upheld turns on a factual enquiry and a question of degree, informed by the nature and content of the allegations, the context and character of the claim, the relationship between the parties, and the stage of the proceedings. The excipient must show that the vagueness will materially hinder a proper plea or the conduct of its case.

50.5. The onus rests on the excipient to establish both elements, namely (i) vagueness amounting to embarrassment, and (ii) embarrassment that rises to prejudice.

50.6. The excipient must make out that case *ex facie* the pleading, by reference to the impugned pleading itself, not by importing extraneous facts.

[51] To this list, I would simply add that the pleading must be read as a whole and in context. Paragraphs are not parsed in isolation, and a sensible, rather than a pedantic, approach must be adopted.

[52] Against these principles, I turn to evaluating the application for leave to amend.

Evaluation

[53] As foreshadowed earlier, the Second Notice of Amendment:

53.1. Abandons the automatically unfair dismissal claim and deletes all references to it. A 'belt-and-braces' statement confirming that all references

to an automatically unfair dismissal claim is asserted, coupled with pinpoint deletions and insertions;

53.2. Refines the retrenchment narrative;

53.3. Specifies, by title and timing, the post-retrenchment appointments on which the applicant relies;

53.4. Identifies the statutory disclosure duty invoked and amplifies the information said to have been withheld; and

53.5. Elaborates upon the consultation and selection-criteria allegations.

53.6. The applicant also expressly tenders the wasted costs contemplated by Rule 20(8).

[54] On their face, the proposed amendments are clarificatory and appear *bona fide*, directed at ventilating the real, triable issues. Absent objection, I would have had no hesitation in granting leave. Because the respondent has taken pointed objections (largely tracking exception grounds), I assess them through the exception lens in what follows.

First ground of objection: automatically unfair dismissal claim

[55] The first objection appears directed not at what the Second Notice of Amendment proposes to plead, but at how the applicant proposes to withdraw the automatically unfair dismissal claim. The respondent contends that the applicant's 'belt-and-braces' statement (stating that all references to an automatically unfair dismissal are abandoned and removed) offends Rule 20(1) because, standing alone, it is said to lack sufficient particularity to permit a considered objection.

[56] The premise of the objection is misplaced for two reasons. First, the Second Notice does not rely on this assertion standing alone. It couples that overarching statement with pinpoint deletions and insertions across the pleading (paragraphs 2 to 24 of the notice), each identifying where and how the text is to be amended. I

agree with the applicant's categorisation of this objection as pettifogging. The function of Rule 20(1) is to provide notice of the intention to amend and to furnish particulars of the amendments. That function is fulfilled when a general statement of intention is paired with an itemisation of specific amendments.

[57] Secondly, the amendment narrows the dispute. It abandons an entire cause of action. The objection does not convincingly explain how such a narrowing, effected with itemised deletions, leaves the respondent unable to understand or meet the amended case.

[58] In any event, at the hearing, the respondent accepted that, read wholistically, the applicant seeks to remove and abandon the automatically unfair dismissal claim in its entirety. When asked by the Court, the respondent could not identify a single surviving reference to an automatically unfair dismissal claim that would persist if the amendments were allowed. In those circumstances, the attack on the general statement of intent becomes, to my mind, purely formal and lacking in substance. Rule 20(1) is not a trap for litigants. It is a mechanism to ensure clarity. Here, clarity is achieved.

[59] Viewed through the exception lens, the point goes nowhere. Once the automatically unfair dismissal claim is withdrawn, there is no such claim to assess for failure to disclose a cause of action. A complaint that a non-existent claim lacks averments is conceptually incoherent. The proposed pleading will not be bad in law for want of averments in respect of a cause of action that is no longer pleaded.

[60] Nor is there prejudice of the kind that could justify refusing the amendment. The amendment advances the proper ventilation of the remaining dispute and does so in a way that is transparent and readily traceable in the schedule of deletions.

[61] I therefore reject this objection.

Second ground of objection: failure to remove cause of complaint on vague and embarrassing pleadings in two respects

- [62] Under this rubric the respondent advanced two complaints. The first targeted the 'statutory duty' allegation, contending that the statement of claim did not identify the source, content or scope of the duty to disclose information. That complaint is not borne out. In both the First and Second Notices of Amendment the applicant expressly anchors the duty in section 189(3) of the LRA and amplifies the categories of information said to have been withheld. At pleading stage, that identification suffices. Whether the respondent complied with section 189(3) is a matter for evidence and will be ventilated at trial.
- [63] In argument, Mr Naidoo, wisely in my view, formally withdrew this complaint. It accordingly does not stand as a bar to leave to amend on this point.
- [64] The second complaint under this category relates to the applicant's attempt to replace the word 'construct' (and the phrase linking it to 'discriminate') with 'manufacture a reason to retrench the applicant', and to delete the stray discrimination wording. Read with the abandonment of the automatically unfair dismissal claim, this makes plain that the case is a section 189 unfair retrenchment challenge in which the applicant alleges that the consultation process was a sham and the outcome predetermined (*a fait accompli*).
- [65] The objection that 'construct' imports an automatically unfair dismissal ground falls away once the amendments are effected. Insofar as the respondent contends that the proposed amendment leaves averments that are now irrelevant to an ordinary unfair retrenchment dispute, I agree with Mr Bishop that this is not a basis to refuse leave. If genuinely irrelevant matter remains, the appropriate remedies are available, such as a targeted striking-out application, rather than disallowing a *bona fide*, clarificatory amendment.
- [66] What remains therefore is a complaint that the applicant has not pleaded 'enough' to sustain the allegation of a sham process. The applicant contends that it has,

and points in particular to paragraphs 5.22 to 5.31; and 5.64 to 5.69 of its existing statement of claim.

[67] However, that residual complaint does not justify refusing leave. The allegation that consultation was a sham and the outcome predetermined is intelligible, capable of a single meaning, and squarely traversable. To the extent the respondent wants, in addition to what has already been provided, dates of meetings, who said what, or the precise manner in which criteria were ‘manufactured’ or applied, those are matters of particularity and proof, which are curable by targeted amplification and further particularity at pre-trial stage. They do not render the pleading unintelligible or fatally defective to warrant a refusal of the proposed amendment. No substantial prejudice in pleading a response has been shown. Accordingly, this objection must likewise fail and the applicant should be given leave to effect its proposed amendments.

[68] In the result, leave to amend is granted in accordance with the Second Notice of Amendment dated 26 August 2024.

[69] As that amendment cures the semantic complaint and clarifies that the case proceeds only as an unfair retrenchment claim, the exception, directed at the superseded pleading, is academic. It is struck from the roll, with liberty to the respondent, if so advised, to deliver any focused exception to the amended pleading in due course, in accordance with the Rules.

[70] Finally, and to the extent necessary, something must be said of the applicant’s argument, advanced from the bar, that the notice of exception, dated 10 July 2024, was out of time. That contention was not made on the papers, and the dispute must be determined on the affidavits before this Court. On the papers, the parties recorded a consensual extension ‘to file a response’ to the statement of claim. The applicant himself averred (in paragraph 9 of the founding affidavit) that, after affording the respondent an extension to file its response, the respondent delivered a notice to remove the cause of complain. The applicant nowhere alleges in his affidavits that such notice fell outside the scope of the agreed extension. The

respondent, for its part, admitted the extension in its answering affidavit. I agree with Mr Naidoo that, read sensibly, a 'response' to a statement of claim may take the form of a statement of response or the step of a notice to remove the cause of complaint (as a precursor to exception). It would be artificial to read the agreement as permitting the one but not the other.

[71] That said, a private agreement does not, of its own force, vary court-imposed time limits. Much of the procedural sequence occurred under the former Labour Court Rules (pre-17 July 2024). Under those Rules, whilst a consensual extension would be a weighty factor in the interests-of-justice enquiry, compliance with time periods still had to be regularised by the Court. (By contrast, the current Rules now formalise a notice-of-bar mechanism that accommodates consensual extensions before any bar is set.) Accordingly, to the extent necessary, I condone any non-compliance with the original time-limits for the delivery of the notice to remove the cause of complaint. Condonation is warranted having regard *inter alia* to the parties' agreement, the short delay, the prompt steps taken, and the absence of prejudice.

[72] I turn now to the issue of costs.

Costs

[73] Both parties have argued that costs be awarded in their favour, with the applicant contending that he is entitled to costs on the punitive scale.

[74] Section 162 of the LRA confers a discretion on the Court to make orders for costs according to the requirements of the law and fairness.

[75] In assessing fairness, it is material that once the automatically unfair dismissal claim was abandoned, the exception's core premise largely fell away, yet opposition to the amendment persisted on points either cured or curable. Several complaints were semantic or capable of straightforward correction. The first ground of objection was bad in law, the second was withdrawn at the hearing and the third was meritless. The respondent persisted in its objections notwithstanding the

applicant's tender of wasted costs occasioned by the amendment and despite a letter having been sent to the respondent's attorneys in the terms mentioned above. The objection to the proposed amendments and the interlocutory exchanges added delay and expense without appreciable advancement of the merits.

- [76] In argument, this Court's attention was drawn to the decision of Van Niekerk J (as he then was) in *Liquid Telecommunication (Pty) Ltd v Carmichael-Brown*¹² (*Liquid Telecommunication*), in which the Court has cautioned against technical point-taking that frustrates the LRA's objective of expeditious and inexpensive dispute resolution. At paragraph 23 of the judgment in *Liquid Telecommunication*, the Court put the matter starkly thus:

'[23] The respondent seeks costs on a punitive scale, on the basis that the excipient's persistence with these proceedings is nothing more than an abuse of the court process, and an attempt to frustrate the respondent's case and to increase the costs of litigation. There is merit in these submissions. Technical point-taking has never been encouraged in this court, inimical as it is to the statutory purposes to which I have referred above. Litigating in the manner in which the excipient employer has approached this matter is to be discouraged in the strongest terms. This is particularly so in litigation between dismissed employees and their erstwhile employers, where the promotion of access to justice may be frustrated by the cost of litigation conducted in a manner other than that envisaged by the Rules. At best for the excipient, the terms of the exception evince an overly-technical approach to litigation, one that is not welcome in this court. At worst, it is an attempt consciously to frustrate the statutory purposes to which I have referred. Either way, in my view, a punitive costs order is warranted.'

- [77] Applying those considerations here, two features are material. First, after the Second Notice of Amendment, the respondent's persistence with objections that

¹² [2018] ZALCJHB 153; [2018] 8 BLLR 804 (LC).

were either cured or plainly curable did little to advance the issues. Secondly, the applicant's express costs tender under Rule 20(8), removed any real prejudice.

[78] That said, I am also mindful of the respondent's contentions that the exception and the First Objection had the desired effect, in that they caused the applicant to take steps to amend his statement of claim and, not insignificantly, to withdraw the automatically unfair dismissal claim. Equally so, whilst I have found that the belt-and-braces broad statement did not pose an impediment to the amendment, the applicant's counsel appeared to concede in argument that it was an unfortunate and unnecessary statement, which need not have been included, and in terms of which no amendment is now sought. This had a bearing on the respondent's election to persist in the objection, albeit in my view misguidedly so.

[79] Taking these factors together, law and fairness do not, in my view, justify a punitive order against either party. Each side enjoyed partial success at various stages. The respondent's early steps prompted pruning (notably the abandonment of the automatically unfair dismissal claim), but its persistence after the Second Notice was largely cured/curable point-taking. The applicant, for his part, introduced an unnecessary general intentional statement, later abandoned, albeit paired with a proper costs tender. A targeted costs order will adequately and fairly mark the parties' respective conduct.

[80] In particular, in line with Rule 20(8) and the applicant's tender, the applicant must pay the wasted costs occasioned by the amendment. The respondent must pay the costs of the application for leave to amend (from the Second Notice onwards) including the costs of the hearing of the application. Save in these respects, there is no other order as to costs.

[81] In the premises, the following Order is made.

Order

1. The applicant is granted leave to amend his statement of claim in accordance with paragraphs 2- 24 (inclusive) of the applicant's notice of intention to amend, dated 26 August 2024.
2. The applicant is directed to deliver his amended statement of claim within 10 (ten) court days of this judgment.
3. The exception directed at the superseded pleading is struck from the roll as academic. The respondent is at liberty, if so advised, to deliver any focused exception to the amended statement of claim in accordance with, and within the periods, prescribed by the Rules.
4. To the extent necessary to regularise the record, condonation is granted for any non-compliance with the time-limits for the delivery of the notice to remove the cause of complaint dated 10 July 2024.
5. Costs:
 - 5.1. In line with Rule 20(8) and the applicant's tender, the applicant is to pay the wasted costs occasioned by the amendment.
 - 5.2. The respondent is to pay the costs of the application for leave to amend (from the Second Notice of Amendment onwards), including the costs of the hearing of that application.
 - 5.3. Save as set out above, there is no further order as to costs.

S. Milo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Anthony Bishop

Cowan Harper Madikizela Attorneys

For the Respondent

Mr Sashin Naidoo

Cliffe Dekker Hofmeyr Inc

LABOUR COURT