THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JS154/18

Of interest to other judges

In the matter between:

NTOKOZO PATRICK ZULU **Applicant**

(Respondent in the exception)

and

ESKOM ROTEK INDUSTRIES (SOC) LTD **Respondent**

(Excipient)

Heard: 6 December 2018

Delivered: 10 December 2018

Summary: (Exception and condonation – claim for damages – lack of clarity in terms of employment contract relied on – existence of tacit term must be expressly pleaded – intended amendment capable of being read to set out a cause of action – uncertainty created about the terms of the employment contract nonetheless rendering statement of claim vague and embarrassing)

JUDGMENT

LAGRANGE J Background

[1] The court must determine an application for condonation for the late filing of an exception and if granted the exception itself.

[2] In December 2018 various exceptions were taken to the applicant's statement of case. Only one exception was upheld partially. The applicant was required to file an amended statement of case, which he did on 7 March 2019. Accordingly, any answering statement should have been filed by 22 March 2019, but instead of filing an answering statement, the respondent filed an exception on 23 April 2019.

[3] The respondent had obtained the consent of the applicant to file a statement of response by that date. The applicant did not regard its indulgence for the late filing of a statement of response to include another notice of exception.

[4] The respondent contends that since the filing of the exception was covered by the indulgence, on that basis, the only period of delay is the period between 22 March 2019 and the dates the indulgence was granted for in April.

[5] The applicant counters that the indulgence did not extend to filing an exception and accordingly the period of delay is not merely 10 days but just over one month.

[6] It is true that in terms of the normal applicable time periods a party may file an exception instead of an answering statement within the period for filing the letter. However, when an indulgence is sought specifically to file an answering statement, it does not follow in my view that the party granting the indulgence tacitly agreed that the respondent could also file a notice of exception instead, or that the party seeking the indulgence could assume that the other party necessarily contemplated any other form of response that could be filed within the time permitted for filing an answering statement in terms of the rules of court.

[7] Why it took the respondent so long to come up with the exception is not adequately explained. Nonetheless, there was no demonstrable prejudice suffered by the applicant and he was willing to accept some further delay

in the matter, even if not to receive a notice of exception. Moreover, the merits are such that it is better the defect in the notice of amendment be addressed now than much later at trial.

[8] The applicant has brought a claim concerning his contract of employment with the respondent, which he entered into on 1 November 2010. He was appointed as the Head of Statutory Equipment Section in the Power Generation Service Business Unit of the respondent. Later he claims he was appointed as an Asset Manager. In April 2015 he was dismissed on two charges of misconduct. His subsequent appeal was also dismissed.

[9] In the statement of claim he sets out his various contractual entitlements including his entitlement to four weeks' notice in the event of the termination of his contract. He also notes that he would have been due to retire on 31 December 2040 and would have received an increased pension payment on reaching retirement age as well as postretirement benefits.

[10] He claims that, in dismissing him, the respondent had breached various provisions of the disciplinary code and grievance procedure as well as dismissing him in consequence of the hearing and failing to pay his notice pay. After setting out these averments in his original statement of claim paragraph 17 read:

> "Had the respondent not breached the contract of employment as stated, the applicant would have remained in the respondent's employment till retirement age."

[11] The remainder of the statement quantifies the damages he claims he has suffered amounting to R27 990 401,60.

[12] In his notice to amend paragraph 17, he elaborates and rephrases the original paragraph cited below and then expands upon it to try and explain why he would have continued working for the respondent until retirement. The paragraph above was amended to read:

> "Had the respondent not breached the contract of employment as stated, the applicant would have remained in the respondent's employment till retirement age, which is 65 years of age i.e. December 2040, alternatively beyond any notice period in terms of the contract of employment."

[13] In the subsequent sub-paragraphs of paragraph 17 he sets out the basis on which he believes his future long-term employment was assured. These relate to issues such having been sent on various courses funded by the employer, the fact that he was engaged in a plant maintenance department and the "*…intention was that the applicant's employment in the plant maintenance department of the respondent should be akin to a fixed term of employment linked to the period required for the completion of the said Data Maintenance and Service and Maintenance of Assets under the control of the Plant Maintenance Department and it was understood as such by all concerned*" [emphasis added).

[14] He further maintains that it was the intention of the respondent to employ him on a long-term basis and that its conduct created a reasonable expectation thereof.

[15] Lastly, he concludes that the breach of his contract was unlawful and his dismissal invalid and he was entitled to declaratory relief invalidating his termination. Alternatively, in paragraph 18 of his statement of claim, he claims damages based on projected earnings and other benefits he would have earned had he worked until retirement. He states that these damages "*…flow naturally from the respondent's breach of the contract of employment and are damages that are normally to be anticipated, and are in law to be regarded as within the contemplation of the parties as probable consequences of a breach of a contract of employment. Alternatively, it was at the time of concluding the contract of employment within the contemplation of the parties or ought reasonably to have been within contemplation of the parties, that all the damages as aforesaid, alternatively or the type of damages as aforesaid, probably would flow from a breach of the contract of employment. It was at the time of concluding of the contract of employment so within the actual contemplation of the parties that the contract of employment was in truth concluded on that basis*."

[16] The exception the respondent takes to the amended paragraph 17 is that he has not set out a contractual basis for his claim that he would have remained employed until the age of retirement, or for the extensive

damages he claims. On the applicant's own version, he was employed on an indefinite basis and his contract was terminable on one months' notice. The respondent argues that the applicant cannot claim "…contractual damages for a fixed or determined period when there is no pleaded contractual provision to establish a right to be employed until his retirement age". It contends that the reasons he cites in the subparagraphs of paragraph 17 do not establish the existence of a contract of employment persisting until his due date of retirement. Alternatively, it pleads that the statement of claim is vague and embarrassing making it impossible for the respondent to plead to it.

[17] It must be mentioned that the test for succeeding with an exception sets a relatively high bar for the excipient. As explained in *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A):

> "Since these are proceedings on exception, it must be borne in mind that the appellant has the duty as excipient to persuade the Court that upon every interpretation which the particulars of claim, including annexure 'D', can reasonably bear, no cause of action is disclosed."[1]

(emphasis added)

[18] I agree that there is a tension in the applicant's statement of claim, taking into account the intended amendment of paragraph 17. On the one hand, he pleads an ordinary indefinite contract terminable on one months' notice, which I presume is in writing, but was not attached to the statement of claim as it ought to have been. On the other, assuming the most generous interpretation of the reformulated paragraph 17, he is contending for a tacit agreement that his term of employment was dependent on the completion of work relating to data maintenance in the Plant Maintenance Department. Accordingly, he ought to have expressly pleaded the existence of a tacit term and whether or not it varied the original written contract of employment.

[1] At 817F-G

[19] It also appears to me that his claim for an extraordinary sum of damages is expressed more in terms of the language that is used for a claim of special contractual damages. The distinction between general and special contractual damages has been expressed thus:

> 'To ensure that undue hardship is not imposed on the defaulting party . . . the defaulting party's liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (Shatz Investments (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (A) at p 550). The two limbs, (a) and (b) of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of Hadley v Baxendale (1854) 150 ER 145, which read as follows (at p 151):
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> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[2]

[20] Taking the above into account, it appears to me that there is one possible interpretation of the averments in paragraph 17, namely that the applicant is postulating a tacit term regarding the longevity of the contract of employment and secondly that his claim for damages estimated against his expected earnings until retirement can only be a claim for special damages, which were within the contemplation of the parties when the contract was entered into.

[2] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687.

[21] Consequently, I cannot say in applying the test for upholding an exception that a claim fails to disclose a cause of action, that no possible cause of action can be discerned in the proposed amendments to paragraph 17 of the statement of case. However, that does not mean the statement of claim is not vague and embarrassing on account of the murky way in which the applicant has drafted paragraph 17. The respondent cannot be sure whether the applicant is relying on a tacit term about the length of his employment, or whether such a term existed at the time the contract was concluded or later in the form of a tacit amendment of the original contract. In so far as the applicant speaks of an expectation about the life of the contract, he owes it to the respondent to clarify whether he is specifically claiming to have acquired a contractual right based on a reasonable expectation. All of these things are necessary for the respondent to be able to know the true nature of all the contractual claims that might be lurking in the opaque wording of paragraph 17.

[22] In conclusion I am satisfied that the exception that the notice of amendment to the applicant statement of claim does not disclose a cause of action cannot be upheld, but the alternative claim that the amendment would render the statement of claim vague and embarrassing should be upheld.

[23] On the question of costs, a party defending itself against an action brought by another should not have to struggle to obtain clarity about the claims initiated by the other party. The amended paragraph 17 seems almost designed to raise ambiguity and uncertainty rather than provide clarity. Such an evasive form of pleading must be discouraged. Accordingly, I am satisfied that it is appropriate to award costs against the applicant.

Order

[1] The late filing of the respondent's exception is condoned.

[2] The respondent's exception to the applicants notice of amendment filed on 26 November 2018 on the basis that it does not disclose a cause of action is dismissed.

[3] The respondent's exception in the alternative to the said notice of amendment on the basis that it is vague and embarrassing is upheld.

[4] The applicant must pay the respondent's costs.

[5] The applicant must file a further notice of amendment remedying the defects in the notice of amendment filed on 26 November 2018, within 10 court days of this judgment.

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Robert G Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	H Gerber instructed by Welman & Bloem Inc.
RESPONDENT:	T Manchu instructed by Madhlopha & Thenga Inc.