

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/15903

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

**SUN INTERNATIONAL (SOUTH AFRICA) LTD**

Applicant

And

**PERCY GOLEKANYE BOSILONG**

Respondent

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**J U D G M E N T**

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**MASHILE, J:**

[1] The Applicant launched this application in terms of Uniform Rule of Court 30(1) asserting that the founding papers of the Respondent, the particulars of claim, are irregular and therefore vulnerable to be set aside.

Initially, the Applicant furnished three reasons upon which it premised its complaint. However, it has since abandoned two of the reasons.

[2] The abandonment of the two reasons that gave rise to the complaint came about as a result of the Respondent amending its particulars of claim. While the Respondent did not amend its particulars of claim in respect of the second reason, it made allegations in its answering affidavit, which the Applicant found them adequate to persuade it not to pursue the point anymore.

[3] In view of the Applicant's desertion of the other two reasons that gave rise to the complaint, it is not necessary to mention let alone discuss them. For the purposes of this judgment, it should suffice to state that the Applicant argues that the sole reason for its complaint against the Respondent's particulars of claim concerns the infringement of the provisions of Uniform Rule 10(3) of this court.

[4] Uniform Rule 10(3) stipulates that several Defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the Plaintiff or any of the Plaintiffs depends upon the determination of substantially the same question of law or fact which, if such Defendants were sued separately, would arise in each separate action.

[5] The Respondent's claim is fundamentally for contractual damages

flowing from the position he would have been in had the Applicant not contravened and repudiated an employment contract upon which he now sues. According to the employment contract, his total effectual remuneration included a pension.

[6] The Applicant repudiated the agreement and the Respondent accepted the repudiation and elected to terminate the agreement. The repudiation is alleged to have occurred between the period of December 2012 to December 2013 and the acceptance of the repudiation and termination of the agreement happened on 10 December 2010.

[7] Had the Applicant not repudiated the employment contract, the agreement would lapse on 22 August 2018, a date on which the Respondent will attain his retirement age of 60 years. The Respondent alleges that he suffered damages which included the pension benefit that would have accrued to him during the balance of the agreement on account of the Applicant's repudiation of the employment contract.

[8] In claiming what he refers to as the equivalent of the pension benefit that he would have received for the remainder of his employment contract had it not been repudiated by the Applicant, the respondent failed to specify the amount that constitutes the equivalent of the pension benefit of the Applicant. In view of the lack of specificity of the amount for the benefit of the pension, the Applicant argues that it is not possible for it nor this court to establish the precise pension proceeds due to the Respondent, if any, without the benefit of

the evidence or without having cited the relevant Fund.

[9] The Applicant believes that its argument is underpinned by the provisions of sections 13A (3) (aj) and (bj) of the Pension Fund Act No. 24 of 1956 ("PFA"), which stipulates as follows:

*"(3)(a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a members' behalf-*

*(i) shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act No 94 of 1990) ...*

*(ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution ...*

*(Hi) ...*

*(b) Any contribution forwarded to and received by a fund in the circumstances contemplated in paragraph (a) (ii), shall be deposited in the fund's bank account ..."*

[10] The Applicant asserts that in view of the provisions of the above section of the PFA, it is unmistakable that it is not the ultimate custodian of the Respondent's pension contributions. For that reason, it contends that it is incapable to assist the Respondent and this court with regard to the Respondent's estimate or actual pension contributions allegedly due to the Respondent.

[11] From the above, the Applicant concludes that the Respondent's shortcoming to cite the relevant pension fund, which would assist all the

parties to assess the value of the pension benefit is an irregularity as envisaged in Uniform Rules 10(3) of this court read with Uniform Rule 30 and Section 13 A (3 )(a) and (b) of the PFA.

[12] The final submission of the Applicant in this regard is that it will be greatly prejudiced to defend the matter in circumstances where the Respondent seeks payment of his pension contributions against the Applicant and not against the relevant Fund in terms of the PFA.

[13] The issues to be determined by this court are therefore:

13.1 Is the irregular step procedure in terms of Uniform Rule 30 adopted by the Applicant correct in the circumstances of this matter?

13.2 What is the effect of the Respondent's lack of specificity of the amount of pension benefit that it is claiming from the Applicant?

[14] The question raised in the first instance above is whether or not Uniform Rule of Court 30 is a mechanism that can be utilized to challenge a miss or non-joinder. In Erasmus: Superior Court Practice, Page B1-191 the following is stated:

*"An objection of non-joinder or misjoinder may be raised under this rule but the more usual practice is to raise it by way of special plea."*

[15] In the case of *Skyline Hotel v Nickloes* 1973 (4) SA 170 (W) it was held that when a Defendant alleges that the proceedings against him are irregular in that certain interested parties have not been joined in the action, although it is the practice to raise this sort of objection by way of a special plea, it would appear as if the procedure of Rule of Court 30 can also be used for this purpose.

[16] With reference to the second issue, in the case of *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W), to which Counsel for the Applicant referred me and which is also mentioned by Erasmus *supra*, Cloete J of this court stated that he had no doubt that if a pleading both fails to comply with Rule 18 and is vague and embarrassing, the defendant has a choice of remedies. Those remedies to which Cloete J referred are of course the irregular step proceeding which a party may take by way of Rule 30 and Rule 23(1).

[17] Insofar as the non-joinder is concerned, the Applicant argues that the Respondent's failure to join the pension fund, which is the ultimate custodian of the Respondent's pension contributions, should have fatal consequences. The Respondent maintains that such approach by the Applicant is completely misguided.

[18] The Respondent contends that the nature of his claim is the equivalent of the pension benefit that would have accrued to him during the balance of the agreement. His claim is one for damages, which were occasioned by the

Applicant's repudiation of the employment contract. Those damages cannot be claimed from any other party other than the party that caused him to suffer such damages.

[19] Understood in that manner, the pension fund, which the Applicant requires the Respondent to join to these proceedings did not cause the Respondent to suffer damages. Accordingly, the Respondent does not and cannot have a damages claim against the pension fund. For that reason, he is not seeking any pension benefit to be paid from the pension fund.

[20] While I agree with the approach of the Respondent that he does not have a damages claim against the pension fund, the Applicant cannot be blamed for having chosen a path that is less travelled, Uniform Rule of Court 30, to challenge the non-joinder of the pension fund. Whether or not he is right or wrong that the pension fund should have been joined is beside the point.

[21] The Applicant's contention is that the joinder of the pension fund would have made the work of everyone involved in this matter easier in that the pension fund would be well disposed to calculate the amount due to the Respondent. The party making the allegation must prove it. In this instance, the Respondent claims that he suffered damages being the equivalent of the pension benefit that would have accrued to him for the remainder of his employment period up to 30 August 2018. The Respondent should in the circumstances have put forward a figure of the

amount that he believes is due to him.

[22] I therefore disagree with the Applicant that it was necessary to join the pension fund at all in order to arrive at the precise figure due because that is an allegation that should be made and proved by the Respondent. The Applicant is, however, correct that lack of reference to a specific quantified amount of the pension benefit due to the Respondent renders the claim of the Respondent defective. In this regard Uniform Rule of Court 18(10) provides as follows:

*“A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof ...”*

[23] Even in the above instance, the Applicant still has a choice whether to utilize Uniform Rules of Court 30 or 23(1). Uniform Rule of Court 18(12) provides that where there is non-compliance with any of the provisions of Rule 18, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with Rule 30. The Applicant has elected to use Rule 30 procedure to challenge the irregularity and the procedure is countenanced by the rules.

[24] I am at loss why Counsel for the Respondent avers that Counsel for the Applicant misconceives the nature of the Respondent's claim, which is clearly the equivalent of the pension benefit *“that would have accrued to him during the balance of the agreement”*. The particulars of claim of the Respondent provides as follows in respect of the claim for pension benefit:



*“20. In the result, the Plaintiff has, as result of the repudiation, suffered damages as follows:*

*20.1 in the amount of R1 601 936.00 excluding the deductions, calculated as follows:*

*20.1.1 R28 606.08 x 56 months (i.e. from 1 January 2014 to 30 August 2018)*

*20.2 The bonuses that he would have earned during the balance of the agreement;*

*20.3 The remuneration that he would have earned from the Kersaf Share Option Scheme during the balance of the agreement; and*

*20.4 The pension benefit that would have accrued to him during the balance of the agreement.”*

[25] The particulars of claim mention a claim for a pension benefit but there is no specific prayer for payment of the equivalent of the pension benefit to which the Respondent would become entitled on his retirement age, sixty.

[26] The court was left to speculate on whether the pension benefit is a separate claim falling under the prayer that requires the Applicant to be directed to pay any and/or statutory deductions associated with the Respondent's earnings until 30 August 2018, such as tax as well as any other deductions that may be applicable to the relevant authority and/or organization in the Republic of South Africa or that the amount for the pension benefit is part of the R1 716 364.80.

[27] From the paragraph of the particulars of claim quoted in paragraph 24 above, it is plain that the Respondent is claiming an amount for pension

benefit over and above the R1 716 364.80. If it were not a separate claim the formulation of the sentence would have been different from what it is now.

[28] That must be so because it is evident that the amount of R1 716 364.80 was computed by multiplying 60 months being the balance of the Respondent's employment contract by R28 606.08. It is also unmistakable that that figure does not include what the Respondent refers to as pension benefit.

[29] The pension benefit must therefore be a separate amount, which the Respondent has failed to disclose. It is understandable that the Applicant would in the circumstances be prejudiced to plead in that it is impossible for it to plead to an undisclosed amount.

[30] In the circumstances the summons and particulars of claim do constitute an irregularity. The irregularity, however, is not of such a nature that it requires the whole action to be set aside. In terms of Rule 30(3) the court will make the appropriate order that will enable the Respondent to amend its papers. That leaves this court to deal with the question of costs.

[31] Insofar as costs are concerned, the attitude that this court adopts is that the Respondent could have articulated his claim more coherently and lucidly such that the Applicant would not have had a reason to doubt what his claim is.

[32] It was as a direct consequence of the Respondent's lack of intelligibility in his pleadings that the Applicant had to come to court to seek clarity. The Respondent should therefore bear the costs and in any event the costs should follow the results. In this case I regard the Applicant as having been successful.

[33] Against that background, I make the following order:

1. To the extent that the Respondent failed to state the amount of the pension benefit, the summons and particulars constitute an irregularity and are set aside;
2. The Respondent is granted 10 days from the date of this order within which to amend his summons and particulars of claim by stating the amount of the pension benefit or deleting that part of the particulars of claim that refers to a claim for pension benefit;
3. The Respondent is to pay the costs of the Applicant.

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**B A MASHILE**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of Hearing: 30 October 2014

Date of Judgment:

Counsel For the Applicant: Adv. E Moku

Instructed by: Salijee Du Plessis Van Der Merwe Attorneys

Counsel For the Respondent: Adv. HP Van Nieuwenhuizen

Instructed by: Tshabalala Attorneys