REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JS 987/17

In the matter between:

LIQUID TELECOMMUNICATION (PTY) LTD Excipient

and

VALERIE CARMICHAEL-BROWN Respondent

Application heard: 16 March 2018

Judgment delivered: 27 March 2018

JUDGMENT

VAN NIEKERK J

[1] On 7 December 2017, the respondent filed a statement of claim in which she claimed payment of the amount of R15 151 688.00, being damages that she contends were suffered in consequence of a premature termination by the excipient of a fixed-term employment contract.

[2] The relevant portion of the statement of claim reads as follows:

> 5. On 15 August 2017 and at Midrand, the applicant acting personally and the respondent acting through its CEO (Kyle Whitehill) concluded an oral agreement with the following material terms:
>
> 5.1 the applicant was appointed in an executive position;
>
> 5.2 the applicant would serve in the aforesaid position for a term of five years;
>
> 5.3 the applicant would commence service in the aforesaid position with effect from 15 August 2017;
>
> 5.4 the applicant would earn a salary of R3 030 337.60 per annum.
>
> 6. On 29 August 2017 the respondent repudiated the aforesaid contract by purporting to terminate it with effect from 30 August 2017 on the grounds that the applicant's position had become redundant.
>
> 7. The applicant accepted the repudiation on 30 August 2017, alternatively accepts it herewith, with the result that the contract came to an end.
>
> 8. As a result of the aforesaid breach by the respondent in the termination of the agreement, the applicant suffered damages equal to the salary she would have earned for the remainder of the contract.

[3] On 14 December 2017, the excipient filed what is termed a 'Notice in terms of Rule 23 (1) of the Uniform Rules of Court'. In that notice, the excipient gave notice of its intention to except to the statement of case on the basis that it was vague and embarrassing, alternatively, that it lacked the averments necessary to sustain the respondent's claim. The notice proceeded to set out six grounds of complaint. These can be summarized as follows. The first ground of complaint is

one based on Rule 18 (6) of the Uniform Rules of Court ('the Uniform Rules') which requires a party relying on a contract to state in his or her pleading whether the contract is written or oral and when, where and by whom it was concluded, and that if the contract is written, a true copy of the contract or the relevant part of it is required to be annexed to the pleading. The excipient contends that the respondent has failed to comply with this Rule insofar as she fails to allege where the contract was concluded, when it was concluded, which position the respondent would undertake for the term of the contract, the terms and conditions of the contract, the date on which the contract would commence, the date on which it would terminate, the basis of the five-year fixed term period, the position the applicant would undertake from the inception of the contract, the annual salary that the applicant contends she would earn, how the applicant would be paid and what payments would be deducted from her salary.

[4] The second ground for complaint is that the respondent failed to state who from the excipient repudiated the contract, what position became redundant, what discussions took place between the excipient and the respondent, who from the excipient had these discussions with the respondent, if any. The excipient also notes, in a rare reference to the Rules of this Court (as opposed to the Uniform Rules), that the statement of case does not contain a clear and concise statement of material facts and the legal issues that arise from those facts, with the consequence that the excipient is unable to respond properly to the averments in the statement of case.

[5] The third ground for complaint is based on Rule 18(1) of the Uniform Rules. It suggests that the respondent has failed to comply with this Rule in that she fails to allege in what manner she is entitled to the damages claimed, who from the excipient terminated the agreement, on what date the contract was terminated and how the damages claimed were computed.

[6] The fourth ground of complaint is one related to the third, and suggests that the respondent does not allow the excipient 'to reasonable access the quantum claimed…(sic)'.

[7] The fifth ground of complaint is one rooted in Rule 6 of the Rules of this court and is to the effect that the statement of claim was not accompanied by a schedule of documents as required by Rule 6 (1)(e).

[8] Finally, the excipient complains that the respondent has failed to state on what basis this court has the power to entertain a claim for damages.

[9] The respondent furnished an answer to the notice of exception. In the answer, it is recorded that in paragraph 5 of the statement of case, it is pleaded that the contract was concluded at Midrand on 15 August 2017 and that in terms of the contract, the respondent was appointed in an executive position. Further, the respondent noted that the relevant terms of the contract were pleaded in that she was appointed to an executive position, for a five-year period, at a salary of R 3 030 337,60 per annum. The respondent contends that any further information constitutes evidence which will be presented at trial and is not required for the purpose of pleading. Insofar as the fourth ground of complaint is concerned, the respondent avers that she is not required to make any allegation to allow the respondent to 'access' the damages. The respondent has pleaded that she claims damages being her remuneration for the unexpired period of the five-year contract, to which she is entitled in terms of general contractual principles. Insofar as the Rule 6 schedule is concerned, the respondent avers that since the conclusion and the termination of the contract were oral, there are no documents relevant for the purposes of pleading, and that documents which may become relevant for the purposes of trial will be discovered in the ordinary course. Insofar as jurisdiction is concerned, the respondent avers that it is not necessary in this court to allege that the court has jurisdiction to entertain the matter but be that as it may, the court has jurisdiction in terms of s 77(3) of the Basic Conditions of Employment Act, 75 of 1997.

[10] For good measure, the respondent thereafter filed a Notice in terms of Rule 30 in which she asserted that the excipient had taken an irregular step in that the notice of exception was not signed by an advocate as required by Rule 18 of the Uniform Rules.

[11] Both parties have conducted this litigation as if the Rules of this court did not exist. This court has its own Rules Board, and the Board has issued Rules which apply to this court and to the Labour Appeal Court. There is a good reason for this -= one of the primary purposes of the LRA is to establish a system of dispute resolution that is less formal, efficient, expeditious and inexpensive. The Rules are an integral element in achieving this purpose.

[12] As a starting point, the Uniform Rules are not applicable to proceedings in this court. Rule 11 of the Rules of this Court provides, amongst other things, that if a situation arises for which the Rules do not provide the court may adopt any procedure that it deems appropriate (own emphasis) in the circumstances (see Rule 11 (3)).

[13] Rule 11 (3) has often been cited as a basis for applying the Uniform Rules into this court's practice and procedure. This court has recognised that in the absence of any Rule concerned specifically with exceptions, parties may, under Rule 11, have recourse to Rule 23 of the Uniform Rules (see, for example, *Volscenck v Pragma Africa (Pty) Ltd* (2015) 36 *ILJ* 494 (LC)). But this court has never gone so far as to suggest that parties are obliged or entitled to conduct litigation in this court on the basis of the Uniform Rules. It is clear from the formulation of Labour Court Rule 11 (3) that the Uniform Rules are not a form of default procedure in this court, nor is it open to litigants and their representatives to rely selectively on the Uniform Rules in the conduct of litigation in this court. Rule 11 (3) is permissive, and provides that the court (not the parties and their representatives) may sanction the use of a procedure not contemplated by the Rules when this is appropriate. In other words, Rule 11 (3) establishes a procedural mechanism for the convenience of the court. It is not an invitation to practitioners to invoke the Uniform Rules and conduct litigation in this court on the basis that the Uniform Rules apply.

[14] This is not to say that there is no procedure applicable in this court when a party contends that a pleading is vague and embarrassing, or discloses no cause of action or defence. Until the Rules of this court are amended so as specifically to

regulate the filing of exceptions, Rule 11, as this court has held, is an appropriate basis on which to file an exception, and that Uniform Rule 23 is an appropriate guide as to when and how an exception should be filed. What I wish to emphasise is that this limited application of Rule 11 is not the gateway to the wholesale importation and application of the Uniform Rules, and thereby the creation of a parallel system of procedure in this court. In the present instance, for example, the thrust of the excipient's complaints is that the respondent has failed to comply with the provisions of Uniform Rule 18, which regulates generally pleadings in the High Court. Whether or not the respondent's statement of claim is excipiable is to be determined by reference to Rule 6 of the Rules of this court, not Rule 18 of the Uniform Rules. Rule 6 requires no more than that a party referring a statement of claim record in a concise manner the relevant facts on which that party relies, and also in concise terms, the legal issues that arise. In the absence of any directive to the contrary, this is all that is required, and the standard against which any pleading is to be measured.

[15] In *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC), Waglay J (as he then was) said the following:

> **5**. Rule 6 of the Rules of this Court deals with referrals of disputes by way of a statement of claim. Rule 6(1) (b) provides that "a document initiating proceedings, known as a 'statement of claim' … must have a substantive part containing the following information:
>
> **(i)** The names, description and addresses of the parties;
>
> **(ii)** A clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;
>
> **(iii)** A clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and
>
> **(iv)** The relief sought".
>
> **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-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.

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-trial conference. The rules therefore 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.

10. When an exception is raised against a statement of claim, this Court must consider, having regard to what I have said above, whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this Court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing of particulars at the

pre-trial conference stage.

[16] This remains the basis on which exceptions raised against statements of claim will be adjudicated.

[17] In order to succeed, the excipient must necessarily persuade the court that on every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed (*First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA)). Care must be taken to distinguish the facts which must be proved in order to disclose a cause of action from the facts necessary to prove them. The determination of the latter, in each particular case, is essentially a matter of substantive law rather than procedure (*Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T)).

[18] In the present instance, the respondent's cause of action is one for contractual damages, consequent on what is alleged to be the premature termination of a fixed-term contract. The respondent claims that she was appointed in an executive position, that she would serve in that position for a five-year term, that she would commence service with effect from 15 August 2017 at a salary of R 3 030 337,60 per annum, that on 29 August 2017, the excipient repudiated the contract by purporting to terminate it with effect from 30 August 2017 on the grounds that the respondent's position had become redundant, that the respondent accepted the repudiation on 30 August 2017, alternatively, accepted it in terms of the statement of case, with the result that the contract came to an end. As a result of the breach claimed by the respondent at the termination of the agreement, the respondent claims to have suffered damages equal to the salary that she would have earned for the balance of the contract.

[19] It is clear from the pleading that the respondent relies on a repudiation of the contract in order to claim damages. All that is required to assert is a repudiation of the fundamental term of the contract (i.e. conduct which exhibits an objectively deliberate and unequivocal intention not to be bound any longer by the contract) an election to terminate the contract and a communication of that election. The

remedies open to an aggrieved party in the circumstances include restitution, damages or specific performance.

[20] With that background, I turn first to the respondent's objection that the notice of exception was not signed by an advocate, or that it was signed by an attorney without indicating whether that attorney had the right of appearance in terms of s 4 of the Right of Appearance in Court Act, 62 of 1985. The simple answer is that Rule 30 of the Uniform Rules does not apply in this court. Further, the Rules of this court do not require an advocate to sign a notice of exception. The respondent's objection thus stands to be dismissed.

[21] In so far as the merits of the exception are concerned, despite the lengthy answer provided by the respondent in response to the notice of exception, the excipient persists with the exception, seeking the production of the same answers. The excipient is aware where the alleged contract was concluded, when it was concluded, what position the respondent would assume, the date on which the contract would commence, the date on which the contract would terminate by the effluxion of time, the respondent's position, what position became redundant and how the amount of damages claimed has been quantified. Frankly, the demands that the respondent plead information as to what payments would be deducted from the respondent's salary and the basis for the five-year fixed term contract are irrelevant. Information regarding the identity of the persons who cancelled the contract and what discussions took place between the parties are all matters for evidence. In short, the statement of claim complies with Rule 6 of the Rules of this court and all of the excipient's complaints have been addressed and in my view, the exception stands to be dismissed.

[22] In so far as costs are concerned, s 162 of the LRA confers a discretion on the court to make orders for costs according to the requirements of the law and fairness. Although the filing of the Rule 30 notice by the respondent was nothing less than frivolous, it pales into insignificance in comparison to the terms on which the excipient has sought to except to the statement of claim. The exception

has served to do no more than protract proceedings that are intended to be efficient and expeditious, and has no doubt considerably increased the costs associated with a process of litigation that is intended to be relatively inexpensive.

[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.

I make the following order:

1. The exception is dismissed with costs, such costs to be paid on the scale as between attorney and client.

André van Niekerk
Judge

REPRESENTATION

For the excipient: Ms. S Coetzer, Cliffe Dekker Hofmeyr Attorneys

For the respondent: Adv. J Basson, instructed by Alet Uys Attorney