



**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 39819/2016

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
..... DATE SIGNATURE

In the matter between:

SELLO MAMASEDI

First Applicant

THANYANI SIMANI

Second Applicant

LEBOHANG DAVID MOTLATSI

Third Applicant

BABA ISAAC MOFOKENG

Fourth Applicant

FRANS VUSI LEBERA

Fifth Applicant

LERUNO LUCAS MOTSOAGAE

Sixth Applicant

RAJOALANE MARIA TSOTETSI

Seventh Applicant

and

ANTONIO FERNANDEZ GOMEZ	First Respondent
PENSION FUNDS ADJUDICATOR	Second Respondent
ANNEKE BARNARD N.O.	Third Respondent
KGASHANE CHRISTOPHER MONYELA N.O.	Fourth Respondent
SURAIYA BALLIM	Fifth Respondent
THE METAL INDUSTRIES BENEFIT FUNDS ADMINISTRATORS (MIBFA)	Sixth Respondent
THE MASTER OF THE HIGH COURT	Seventh Respondent

JUDGMENT

TERNENT AJ

1. The plaintiffs have sought leave to amend their declaration in accordance with the notice of amendment dated 1 March 2019 (as per the court stamp). They do so because the first defendant opposes the amendment by way of a notice of objection dated 14 February 2019. I was advised by Mr Gibson, defendant's counsel, at the outset of the hearing that the grounds of objection set out in this notice had been expanded in a further notice of objection which had been delivered to the plaintiffs on 7 April 2021. The plaintiffs' attorney, Mr Lebethe, who represented his clients in this application, confirmed that the plaintiffs had no objection to the further notice of

amendment albeit delivered out of time. As such, I was to consider all the grounds of objection encapsulated in both notices in considering whether or not the plaintiffs' application for leave to amend its declaration was sound.

2. The plaintiffs' declaration is founded in contract and seeks payment of certain pension fund contributions deducted from the plaintiffs' monthly salaries in the course of their employment. They were previously employed by the first defendant's close corporation, Vaal Transformers CC (now in liquidation).

3. The declaration sets out the periods of employment of the first to seventh plaintiffs which variously extend over periods of 5½ to 12 years. The declaration goes on to aver that Vaal Transformers CC failed or neglected to remit the plaintiffs' pension fund contributions to the requisite pension fund. Liability is now being visited on the first defendant, as the sole member of Vaal Transformers CC, as a consequence thereof. The claim sounds in an amount "*in excess of R1 000 000,00 (one million rand)*" for all of the plaintiffs, which amount, as averred in the declaration, will ultimately be determined via actuarial calculations.

4. The first notice of objection is squarely based on Rule 18(10) of the Uniform Rules of Court and provides that:

“10. A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof. ...”¹

5. The declaration sets out that the seven plaintiffs as a group are claiming an estimated amount of R1 million as damages. The formulation of the quantum is unhelpful. Mr Lebethe, in an attempt to explain the calculation directed me to Annexure “A” of the declaration. This document is a declaration by Vaal Transformers CC, and signed by the first defendant, listing the employees in its employ, as required under the Unemployment Insurance Act 63 of 2001. It details *inter alia* the seven plaintiffs’ names, identity numbers, gross monthly salaries, hours worked during the month, and employment duration. The contention is that this document sufficed in explaining the damages claimed. Unfortunately, this document does no such thing. It makes no reference to, and does not disclose, what pension deductions were made from each of the plaintiffs’ salaries, each month over the periods of their employment, and it is impossible to determine how the R1 million claim is arrived at. This information

¹ Erasmus, Superior Court Practice, D1-241

needs to be drawn from the plaintiffs' salary slips so that each plaintiff can accurately reflect what pension contributions were deducted during his employ. Once this exercise has been carried out, this individual information should be incorporated into the particulars of claim in order to give the detail that is reasonably required for the first defendant to assess whether the individual claims of the plaintiffs are reasonable and accurate.

6. To the extent that Mr Lebethe submitted to me that he is unable at this stage to properly quantify the claims and that, as in personal injury matters for loss of future earnings, an actuarial calculation will need to be furnished, it is apparent to me that Mr Lebethe is confusing claims for damages in personal injury matters with this claim which is not for loss of income and is grounded in contract, liquid and easily ascertainable, as also submitted to me by Mr Gibson. As correctly set out in the second notice of objection dated 7 April 2021, without this detail and explanation the quantum, in an estimated R1 million rand, cannot be understood.

7. As set out in Mr Gibson's heads of argument, Cloete J² stated that in a claim for damages, a bald allegation as to the amount of the

² *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) at 472B-D

damages does not comply with Rule 18(10). If the proposed amendment was allowed, it would be non-compliant with Rule 18(10) and would render the declaration excipiable.

8. Furthermore, this declaration falls foul of the same objection raised against the particulars of claim in the matter ***Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Inc en Andere***.³ The Court also upheld an objection, as I intend to do here, on the basis that the particulars of claim there and the amendment here did not comply with Rule 18(10) as the plaintiff there and the plaintiffs here had simply pleaded conclusions of fact without setting out the particularity required as to how the amounts claimed had been calculated and arrived at.
9. The second objection pertains to the amendment sought by the plaintiffs, in the alternative, and which is framed as follows:

“Alternatively, both the 1st Defendant and the now liquidated Vaal Transformers CC colluded in misappropriating the Plaintiffs’ provident fund contribution to the tune of R1 000 000,00 and have so been enriched and unjustifiably at the expense of the Plaintiffs by not paying the Plaintiffs provident fund contributions to the 6th Defendant.”

³ 2001 (2) SA 790 (T) at 803E/F-F/G and 804E/F-805E

10. Once again, correctly so in my view, the notice of objection sets out that these averments alone do not sustain an unjust enrichment claim which has not been pleaded at all. Furthermore, insofar as the declaration sought to rely on a claim based on enrichment, it was necessary for the plaintiffs to aver that the first defendant had received the pension fund deductions, deducted from the plaintiffs' respective salaries, which allegation has not been made and, as a consequence, rendered the proposed amendment also vague and embarrassing.
11. On raising this objection with Mr Lebethe, he immediately conceded that the plaintiff's cause of action was not formulated on an enrichment claim and these allegations were simply superfluous. In so doing, this leg of the plaintiff's notice of amendment is wanting.
12. Mr Lebethe, again, correctly conceded that the quantification of the plaintiffs' claim could certainly be calculated by having regard to their individual salary slips and that appeared to be in his words "*another prudent way, to calculate the quantum*". In my view, it is the only way in which this claim can be calculated. This is not a claim for loss of income and it is not a claim for future loss of income, as encountered in personal injury claims.

13. I reiterate that the plaintiffs claims arise from contracts of employment in terms of which pension fund contributions in fixed amounts were deducted from the plaintiffs' salaries to provide for their retirement after termination of their employ.
14. It is clear then, as Mr Lebethe graciously conceded, that the amendment is ill-founded, and cannot be allowed.
15. All that remains then is to determine the issue of costs. The first defendant had sought that I make an order against the plaintiffs on an attorney and client scale. During the course of argument, I asked Mr Gibson to take instructions as to whether the first defendant was persisting with this scale of costs, given its punitive effect. Mr Gibson took instructions and informed me that, in the event that I were to uphold the objection in favour of the first defendant, the first defendant would seek costs on the party-party scale. Mr Lebethe, in the face of his concessions, agreed that in the event that the application for amendment was unsuccessful costs should be borne by the plaintiffs on the party party scale.
16. In the circumstances, an order is made in the following terms:
 - (1) The application for leave to amend the declaration, in

accordance with the notice of amendment dated 1 March 2019, is dismissed.

- (2) The plaintiffs are ordered to pay the first defendant's costs, jointly and severally, the one paying the other to be absolved on the party party scale.

P V TERNENT
ACTING JUDGE OF THE HIGH COURT
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DATE OF HEARING: 12 April 2021

DATE OF JUDGMENT: 28 April 2021 (handed down electronically, uploaded to Caselines and emailed to the parties)

APPEARANCES

Applicants' Counsel: Mr D Lebethe
Attorney with right of appearance in terms of section 4(2) of the Right of Appearance in Courts Act 62 of 1995

Instructed by: Ditheko Lebethe Attorneys
Mr D Lebethe

Respondents' Counsel: Advocate C Gibson

Instructed by: Meise Nkaiseng Inc.

Mr M Samons