REPUBLIC OF SOUTH AFRICA

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

Case No: 21/48263

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED NO

26 September 2023

....
SIGNATURE **DATE**

MAHARAJ, ASHNEE Plaintiff / Respondent

and

STRATE (PTY) LTD First Defendant / First Excipient

NORTJE, ANDRE Second Defendant / Second Excipient

PAYNE, NIGEL GEORGE Third Defendant / Third Excipient

JUDGMENT

Heard: 16 January 2023

Delivered: 26 September 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email and uploaded to *CaseLines*. The date and time for hand-down is deemed to be 10:00 on 26 September 2023.

Summary:

- *Exception to particulars of claim* **–** No cause of action - Excipient restricted to the grounds recorded in exception notice
- *Protected Disclosures Act* – adequacy of pleading to establish cause of action under Act.
- *Delict* – no separate delictual claim for repudiation of contract.
- *Companies Act* - Section 76(2) and section 218(2) on Companies Act do not provide a basis for an employee to claim damages against a director.

TURNER AJ

[1] This is an exception brought by the defendants against the particulars of claim delivered by the plaintiff. The plaintiff pleads four different claims in which she claims the same damages:

1.1 Claim A is a claim for contractual damages;

1.2 Claim B seeks compensation in terms of the Protected Disclosures Act, 26 of 2000 ("the PDA");

1.3 Claim C, in the alternative to A, is made in delict.

1.4 Claim D is made against the second and third defendants under the Companies Act, relying on alleged breaches of their obligations in terms of section 76(2)(a) of the Companies Act.

[2] The defendants have taken exception to each of the four claims on the basis that they lack averments which are necessary to sustain an action. The defendants' exception does not assert that the pleading is vague and embarrassing.

[3] The principles applicable to deciding exceptions are well established. The principles relevant to the current matter include –

3.1 An excipient is obliged to confine his complaint to the stated grounds of his exception.[1]

[1] *Feldman v EMI Music* [2009] ZASCA 75 at para 7.

3.2 Exceptions provide a useful procedural tool to weed out bad claims at an early stage but they must be dealt with sensibly. An over-technical approach destroys their utility and must be avoided.[2]

3.3 In deciding an exception the Court will accept all allegations of fact made in the particulars of claim as true and will uphold the exception to the pleading only when the excipient has satisfied the Court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.[3]

[4] Additional principles apply when dealing with pleadings that are vague and embarrassing but, as noted above, the defendants have not raised this as a ground of exception and consequently, they must either succeed or fail on the "no cause of action" grounds.

The claim

[5] The following facts appear from the particulars of claim, giving the document an interpretation favourable the plaintiff, as required.

[6] The plaintiff was employed by the first defendant as its Chief Financial Officer from April 2016 to November 2018. The terms of her employment contract included her entitlement to remuneration (total cost to company package) of R2,000,000 per annum; the provisions of the agreement included a code of conduct policy, a disciplinary procedure policy, a long-term incentive scheme rules policy. The plaintiff was nominated to participate in the long-term incentive scheme rules policy and to receive the financial benefits as a result of her participation.

[7] In November 2018, disciplinary proceedings were brought against the plaintiff by the first defendant. The plaintiff was charged with dishonesty and on 14 November 2018, she was found guilty of those charges and was ultimately dismissed. The charges for dishonesty arose from allegations that the plaintiff had "doctored an email" alternatively relied on an email which she knew had been manipulated to gain a benefit for herself.

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2 *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H.

3 *Pretorius and Another v Transport Pension Fund and Others* 2018 ZACC 10 para 15.

[8] It appears from paragraphs 16 and 17 of the particulars of claim that the plaintiff acknowledges that there was a "doctored email" but she asserts that the email was "doctored" by someone else "without the plaintiff's knowledge and/or consent and/or coercion".

[9] In Claim A, the plaintiff relies on the above facts to assert that, in bringing the disciplinary proceedings and in dismissing her, the first defendant breached the employment contract, alternatively "intimated by conduct and without lawful excuse, that all or some of the obligations arising from the agreement ... will not be performed".

[10] At the time of her dismissal, she was 41 years old and the plaintiff pleads that her employment contract would have continued to apply until she reached the age of 65. She quantifies her claim at R109,029.897.00, being "Losses relating to performance" calculated from December 2018 to the date of her reaching her 65th birthday, including inflationary increases. In addition, the plaintiff claims R300,000 which she alleges are "Consequential losses caused by the first defendant's breach" arising from her liquidating an investment property and liquidating her money market investments.

[11] In Claim B, the plaintiff alleges that she made certain disclosures to the first defendant (her employer) which qualify as "protected disclosures" in terms of the PDA. She says that:

11.1 During November 2017, she disclosed information to the first defendant's Chief Executive Officer and/or audit & risk committee (including the third defendant) that the first defendant was non-compliant with section 27 of the Employment Equity Act, 45 of 1998 and that the first defendant was remunerating employees based on, alternatively partly based on, race and/or sex.

11.2 During March 2017, she disclosed to the Chief Executive Officer and/or Audit & Risk Committee that the first defendant was non-compliant with section 28 of the Value Added Tax Act.

11.3 During July 2018, she disclosed to the first defendant, particularly to the Chairman of the "Chief Executive Officer Appointment Committee" at the first defendant, information relating to the second defendant. At the time,

> the second defendant was a candidate for appointment as Chief Executive of the first defendant and the information disclosed was that the second defendant had received negative references from his previous employer which would make him unsuitable for the position of Chief Executive Officer at the first defendant.

[12] The plaintiff contends that the information she disclosed was information "of an exceptionally serious nature" and that the disclosures were reasonably made.

[13] The second defendant was subsequently appointed as Chief Executive Officer at the first defendant from 1 August 2018. The plaintiff alleges that as a result of having made the protected disclosures, after his appointment she was subjected to the disciplinary action and subsequent dismissal in November 2018.

[14] The plaintiff claims the same quantum of damages (as in Claim A) arising from the alleged breaches in Claim B.

[15] Claim C is premised on an allegation that the first defendant intentionally repudiated the employment agreement, alternatively intentionally or negligently subjected the plaintiff to "occupational detriment" (as contemplated in the PDA). She alleges that the first defendant had a legal duty not to do so and, as a result of its conduct, it "wrongfully caused the plaintiff damages". In its formulation, and as acknowledged in the heads of argument, Claim C is formulated as a delictual claim flowing from an alleged repudiation or breach of the employment agreement.

[16] Claim D is directed against the second and third defendants who are both directors of the first defendant. The plaintiff claims the same quantum of damages from the second and third defendants which she says flow from their respective breaches of section 76(2)(a) of the Companies Act 71 of 2008.

[17] The inference from the allegations made in Claim D is that the second defendant, reacting to the plaintiff's disclosure of the negative references from his previous employer, used his position as Chief Executive Officer (from August 2018) to dismiss the plaintiff . The plaintiff characterises this as conduct in which the second defendant used his position as a director to gain an advantage for himself, which advantage

included "*less resistance [from the plaintiff] to decisions which would be beneficial to the second defendant*."

[18] The plaintiff makes a similar allegation against the third defendant. She alleges that her disclosure of the first defendant's non-compliance with the Value Added Tax Act was a matter to which the third defendant reacted, using his position as Chairman of the first defendant's board to dismiss the plaintiff *"in order to gain an advantage for himself which advantages included inter alia less resistance to decisions which would be beneficial to the third defendant."*

The exception

[19] Two grounds of exception are directed at Claim A.

[20] The first alleges that there is no cause of action for the damages claimed. The exception is directed at the formulation of the damages claimed and not at the elements of the breach relied on. The first defendant contends that the *"limited damages rule"* which derives from common law principles of contract precludes the plaintiff from recovering the quantum she claims – calculated as her losses until retirement age. The first defendant asserts that the particulars of claim do not contain averments to sustain the "*legal conclusion pleaded by the plaintiff that she would have been able to remain in the employ of the first defendant until retirement age*".

[21] The problem with this ground of exception is that it does not strike at the heart of the cause of action in Claim A. Claim A identifies the contract relied upon, it specifies the alleged breaches and it sets out the damages which are alleged to have flowed from the breaches. Whether those damages are sustainable or not, is a matter for evidence. To the extent that the pleading of the damages lacks particularity that may cause the defendant embarrassment, such ground of objection is not recorded in the notice of exception and consequently, it is not open for the defendant to rely on such embarrassment in these proceedings.

[22] To the extent that the first defendant requires further particularity as to the basis on which the plaintiff contends she would have been entitled to remain employed until the age of 65, the provisions of Uniform Rule 21 provide the defendant with the opportunity to request particulars. If the defendant is correct in its interpretation of the

employment contract and that the "*limited damages rule*" applies as it contends, then the plaintiff will not succeed at trial in recovering the full extent of her claimed quantum, but it cannot strike out the claim on the basis that it does not disclose a cause of action.

[23] In the circumstances, the first ground of exception is dismissed.

[24] The second ground of exception, directed at Claim A, asserts that the R300,000 claimed as "consequential losses" constitute special damages and the particulars of claim do not establish a basis to recover such special damages.

[25] I have found above that the Claim A does disclose a cause of action. The second ground of exception is merely directed at the manner in which the plaintiff seeks to quantify the second part of her damages. While the pleading may lack particularity of the special circumstances that would entitle the plaintiff to recover these special damages, this again is merely a defect in the particularity pleaded and does not go to the existence of the cause of action. While the pleading is not a picture of clarity, the bones of the cause of action are present and consequently the second ground also falls to be dismissed.

[26] The third, fourth and fifth grounds of exception are directed at Claim B.

[27] While I sympathise with the defendant in that the pleading is difficult to follow, at exception stage, it is necessary for me to read the pleading in a manner most advantageous for the plaintiff in order to see whether, on such a benevolent reading, a cause of action may exist. Again, I am not asked to establish whether the pleading is vague and embarrassing.

[28] The plaintiff relies on three disclosures. Two of these disclosures allege a failure by the first defendant to have complied with legal obligations in terms of legislation – the Employment Equity Act and the Value Added Tax Act. *Prima facie*, these disclosures would fall under sub-paragraph (b) of the Protected Disclosures Act. Although the pleading does not disclose the actual information that is alleged to have been uncovered and disclosed and as a consequence, the defendant may be embarrassed thereby, the absence of such particularity does not mean that the claim fails to disclose a cause of action.

[29] The plaintiff alleges that the non-disclosure of the second defendant's employment references may have caused a "miscarriage of justice to occur". Whilst this seems unlikely, given that the second defendant was appointed notwithstanding the disclosure of these references, it is not necessary for me to decide the matter at this stage. Once the relevant particularity and/or evidence has been presented, a determination of this issue can be made by the trial Court. As I have found that the alleged legislative breaches could qualify as protected disclosures and the loss-causing event (the dismissal) is alleged to have flowed from a combination of the three pleaded disclosures, the exception to that claim falls to be dismissed. It is, therefore, not necessary for me to decide whether the disclosure relating to the second defendant's employment references also falls to be classified as a "protected disclosure" under the PDA. This can be dealt with by the trial Court.

[30] The fourth ground of exception asserts that liability in terms of the PDA is not strict liability and that in the absence of allegations of intention or culpa, Claim B fails to disclose a cause of action. The relevant provisions in the PDA are recorded in sections 3 and 4 as follows:

> "3 **Employee or worker making protected disclosure not to be subjected to occupational detriment**
>
> No *employee* or *worker* may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made *a protected disclosure*.
>
> **4 Remedies**
>
> (1) Any *employee* who has been subjected, is subjected or may be subjected, to an *occupational detriment* in breach of s 3, or anyone acting on behalf of an employee who is not able to act in his or her own name, may -
>
> (a) approach any court having jurisdiction ... for appropriate relief; or
>
> (b) pursue any other process allowed or prescribed by any law.
>
> (1B) If the court or tribunal ... is satisfied that an *employee or worker* has been subjected to or will be subjected to an *occupational detriment* on account of a protected disclosure, it may make an order that is just and equitable in the circumstances, including –

> (a) payment of compensation by the employer or client, as the case may be, to that *employee or worker*;
>
> (b) payment by the *employer* or client, as the case may be, of actual damages suffered by the *employee or worker*; or
>
> (c) an order directing the *employer* or client, as the case may be, to take steps to remedy the occupational detriment."

[31] The term "*occupational detriment*" is defined in the PDA in relation to an employee and includes:

> "... (a) being subjected to any disciplinary action;
>
> (b) being dismissed, suspended, demoted, harassed or intimidated ..."

[32] As appears from these statutory provisions, there is no express requirement for a complainant to allege intention or fault. However, in my view, the debate is an unnecessary one. Where an employer has subjected an employee to disciplinary action or has dismissed the employee, such conduct is necessarily intentional conduct - the employer intended to dismiss the employee and did so. Consequently, if the plaintiff can prove that the disciplinary action and/or dismissal took place and it was the consequence of her having made a protected disclosure (as contemplated in sections 3 and 4 of the PDA), then she is entitled to the remedies in section 4.

[33] Those remedies include "just and equitable" compensation or damages and will be quantified by the court after hearing the relevant evidence (if a breach is established).

[34] In his heads of argument, the defendants counsel contended that the particulars of claim are defective because the plaintiff was not permitted to plead a "legal conclusion without alleging the material facts which, if proven, would warrant that conclusion".[4] In my view, while the plaintiff has not provided much particularity, she has met the low threshold required to plead a cause of action. Her ability to recover at trial will depend on the particulars of her claim and the evidence she is able to present. In argument, I was pointed to an example of where these provisions have been successfully invoked, In the decision in *Chowan*[5], this Court upheld the plaintiff's claim and awarded damages flowing from a breach of the PDA.

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[4] Reliance was placed on *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 172D.

[5] *Chowan v Associated Motor Holdings (Pty) Ltd and others* 2018 (4) SA 145 (GJ)

[35] In the circumstances, the fourth and fifth grounds of exception are dismissed.

[36] Claim C relies squarely on the first defendant's conduct in allegedly repudiating the employment contract and/or subjecting the plaintiff to an occupational detriment. This claim is made separately from Claims A and B and pleaded on the basis that there exists a delictual "legal duty" separate from the contractual obligation relied upon in Claim A and the statutory obligation relied upon in Claim B. The claim is for pure economic loss allegedly arising from a breach of this unarticulated duty.

[37] I agree with the defendants' submission that Claim C does not disclose a cause of action. If the plaintiff is not successful in her contractual Claim A, she would have failed to have proved the alleged repudiation or breach which is alleged to arise from the disciplinary proceedings instituted against her.

[38] *Lillicrap*[6] decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract.

> "In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.
>
> .....
>
> The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability. "

[39] The Court found that such conduct was not wrongful for purposes of Aquilian liability.

[40] The plaintiff in the current matter does not plead allegations to establish a separate legal duty, actionable in delict, that exists independently of the contractual and statutory

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[6] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 499A - F; see too *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at [6]

obligations pleaded in Claims A and B. Consequently, I uphold the sixth ground of exception and find that Claim C does not disclose a cause of action.

[41] Claim D relies on section 76(2)(a) read together with section 218(2) of the Companies Act. Section 76(2)(a) provides (in relevant part):

> "76 (2) A director of a company must –
>
> (a) not use the position of director or any information obtained while acting in a capacity of a director -
>
> (i) to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or
>
> (ii) to knowingly cause harm to the company or a subsidiary of a company."

Section 218(2) provides:

> "218(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

[42] In *Hlumisa,*[7] the SCA addressed the proper interpretation and application of section 218(2) in the context of an alleged breach by a director of section 76(3) of the Companies Act. The Court confirmed that:

> "the provision [s 218] thus provides a statutory remedy to 'any person' who can bring themselves within its ambit... It is not necessary in this case to make any findings in relation to the precise contours of this remedy and we deliberately eschew doing so."

[43] In *Hlumisa*, the claimants were shareholders in the relevant company who alleged that their shares in the company had lost their value as a result of breaches by the directors of section 76(3). The SCA confirmed that section 218 does not establish a right in the hands of shareholders to recover a reflective loss where the direct loss was suffered by the company. In the current case, the plaintiff claims in respect of losses which she alleges were sustained directly by her and not as a result of reflective losses as a shareholder. Theoretically, the plaintiff could be "a person" if she can show that the provisions of the Companies Act on which she relies are actionable by her.

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[7] *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and others* 2020 (5) SA 419 (SCA) at 45 – 52.

[44] However, the SCA In *Hlumisa* confirmed the findings of the High Court, that section 76 had to be read together with 77(2)[8], as:

> "These provisions of the Companies Act make it clear that the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss. It is also clear that the legislature was astute to preserve certain common-law principles. It makes for a harmonious blend."

[45] The SCA confirmed that liability for a breach of s 76(3) is limited by section 77(2) to be only 'in accordance with the principles of the common law'. In my view, the provisions of section 76(2) of the Companies Act must be read in the same way - namely, in the context of and subject to the limitations in section 77(2) which provides for the "Liability of directors" under the Act as follows:

> "77 (2) A director of a company may be held liable –
>
> (a) in accordance with the principles of the common law relating to breach of a fiduciary duty <u>for any loss</u>, damages or costs <u>sustained by the company</u> as a consequence of any breach by the director of a duty contemplated in s 75, 76(2) or 76(3)(a) or (b) ..." (emphasis added)

[46] The limitation of the directors' liability to the company itself accords with the provisions of section 76(2)(a) which are directed at ensuring that the director does not use his position to obtain benefits in preference to or to the detriment of the company. If he breaches these obligations, the company suffers the loss and only the company (or someone on its behalf) can be the proper plaintiff to enforce a claim against the director for a breach of section 76(2). Section 76(2) confirms and reinforces the common law fiduciary obligations on a director in company law and section 77(2) confirms that liability is determined in accordance with the common law. There is no indication that the legislature intended to extend the scope of the director's obligations to cover the interests of third parties, including employees or other directors, and to create a new right of action for them personally.

[47] This SCA authority confirms, in my view, that section 218(2) does not provide a right of action under section 76(2) to a person in the position of the plaintiff, whether as an employee or co-director, who claims damages (for herself) because another director

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[8] *Hlumisa* (supra) at [12] to [14] and [50]

used his position to gain a potential advantage for himself. Not only is this interpretation supported by the text and the purpose of these provisions, but it is also the sensible interpretation. If the contrary were true, the scope for unwanted litigation by disgruntled competing directors or employees would be endless and directors would be unable to identify the limits of their duties under the Act. I have no doubt that the legislature did not intend to create such a new right of action or remedy.

[48] In the circumstances, the defendants' exception against Claim D is upheld on the basis that Claim D does not disclose a cause of action against either the second defendant or the third defendant.

[49] The plaintiff and the defendants have both been partially successful in this exception. In my view, the correct result is to make no order as to costs, so that each party bears their own costs in the exception.

[50] In the result I make the following order:

50.1 The defendants' exceptions to Claim A and Claim B are dismissed.

50.2 The defendants' exceptions against Claim C and Claim D are upheld on the basis that neither Claim C nor Claim D discloses a cause of action.

50.3 The plaintiff is afforded a period of 15 court days to amend her particulars of claim, if so advised.

50.4 There is no order as to costs.

TURNER AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Plaintiff/Respondent - Plaintiff in person
Instructed by:

Counsel for the Defendants/Excipients – Adv HM Viljoen
Instructed by: Cowan Harper Madikizela Attorneys

Date of hearing: 16 January 2023

Date of Judgment: 26 September 2023