REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 414/13

In the matter between:

Louis VOLSCHENK **Applicant**

and

PRAGMA AFRICA (PTY) LTD **Respondent**

Heard: **23 May 2014**

Delivered: **27 May 2014**

Summary: Exceptions upheld. BCEA s 77 – contractual claims arising from alleged constructive dismissal.

JUDGMENT

STEENKAMP J

Introduction

[1] The respondent, Pragma Africa (Pty) Ltd, raises five exceptions against a statement of claim delivered by the applicant, Louis Volschenk.

[2] Volschenk resigned from the company on two months' notice, although he was employed on a contract requiring one month's notice. Yet he claims

constructive dismissal. He did not refer a dispute the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s 186(1)(e) of the Labour Relations Act[1], as one might expect. Instead, he referred a contractual claim to this Court, apparently in terms of s 77(3) of the Basic Conditions of Employment Act[2], relying on breach of contract.

[3] Volschenk relies on five contractual damages claims :

3.1 Commission payable;

3.2 Leave pay;

3.3 Future loss of earnings;

3.4 Performance bonus; and

3.5 Shares in an employees' share unit scheme.

[4] Pragma has raised five exceptions. It claims that the applicant's statement of case does not set out a cause of action for his various claims.

Background facts

[5] Volschenk was employed in terms of an indefinite contract of employment providing for termination on one month's notice. He fell out with management. In terms of his statement of claim, around September 2012, he "initiated discussions with the respondent regarding the termination of his employment, due primarily to [its] inconsistent application of the commission policy, and the refusal of the respondent to comply with the terms and conditions of the policy". On 5 October 2012 he sent the company an email "indicating that the employment relationship had broken down". On 12 October he suggested that his services be terminated for operational requirements and that he be paid a severance package of two weeks' remuneration per completed year of service, i.e. double the minimum prescribed by s 41 of the BCEA. The company refused as no valid reason for such a termination existed. According to the statement of

[1] Act 66 of 1995 (the LRA).

[2] Act 75 of 1997 (the BCEA).

claim, the company's Tait later indicated to Volschenk that the employment relationship was beyond repair:

> "Under the circumstances, the applicant regarded the respondent's conduct as a material breach of the contract of employment and the terms and conditions of employment. The applicant accordingly, in light of the material breach, elected to terminate the contract of employment, and issued the respondent with a letter of resignation dated 29 October 2012."

[6] Volschenk left on 31 December 2012.He referred the damages claim based on breach of contract to this Court on 24 June 2013.[3]

This history of the matter before this Court

[7] On 5 July 2013, the company notified the applicant that it intended to raise an exception that his statement of claim is vague and embarrassing and does not disclose a cause of action. It afforded him 15 days to remove the cause of complaint. He did not do so.

[8] On 13 November 2013 the company's attorneys delivered a notice of exception to the applicant's attorneys. It raised five exceptions. The applicant did not respond.

[9] It was only seven months after the company had notified the applicant that it intended to raise an exception, and when the exception was set down for hearing on 20 February 2014, that the applicant – on 12 February 2014 – delivered a notice of intention to amend his statement of claim.[4]

[10] The respondent objected to the intended amendment on 19 February 2014. On 20 February 2014, when the exception was due to be heard before Rabkin-Naicker J, it was removed from the roll "subject to respondent's right to raise and argue all the exceptions in its present application at a later stage to the extent not addressed by the applicant's proposed amendment to its [*sic*] statement of case." He was ordered to pay the company's wasted costs.

[3] It was apparently served on the company on 21 June 2013.

[4] It appears that the applicant served the notice on the respondent's attorneys on 5 February 2014. But 'deliver' is defined in the rules to mean 'serve on other parties and file with the registrar'. It was only filed on 12 February 2014.

[11] At the time when this exception was heard on 23 May 2014, the applicant had not applied for an amendment to his statement of claim.

The law relating to exceptions

[12] As Mr *Rautenbach* for the company pointed out, this Court recently considered the way in which exceptions are to be dealt with in *De Klerk v Cape Union Mart International (Pty) Ltd*:[5]

> "The rules of the Labour Court do not specifically provide for exceptions. However, it is now trite that exceptions may be raised under rule 11 of this Court read with rule 23 of the Uniform Rules of the High Court.[6] In dealing with exceptions to a statement of claim, the Court will have regard to the principles developed in the High Court.[7]
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> An exception is a legal objection intended to address a defect inherent in the other party's pleadings. Two categories of exceptions are generally recognised in this regard, namely:
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> Where the pleading is vague and embarrassing; and
>
> Where the pleading lacks averments which are necessary to sustain an action or defence.
>
> Thus, where a litigant is faced with a pleading that is vague and embarrassing or that lacks averments to sustain an action or defence, the litigant is entitled to take an exception to have the action or defence dismissed even before the merits of the matter are considered in evidence.[8]"

Evaluation

[13] Rule 6(b) requires the applicant to set out in the statement of claim:

[5] (2012) 33 *ILJ* 2887 (LC) paras [18] – [19]. See also *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC) paras [6] – [10].

[6] *Charlton v Parliament of the RSA* [2007] 10 BLLR 943 (LC). (This principle was not overturned on appeal by the subsequent judgments of the LAC and the SCA).

[7] *Eagleton & ors v You Asked Services (Pty) Ltd* [2008] 11 BLLR 1040 (LC) para [15].

[8] *Davidson & ors v Wingprop (Pty) Ltd* [2010] 4 BLLR 396 (LC) para [25].

> "(i) 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;".

[14] This means that the applicant must set out all legally relevant facts to make out a case disclosing a cause of action. It must be sufficiently clear so that the respondent knows what case it has to answer.

[15] The respondent in this case claims that the applicant has not done so, despite the numerous opportunities and long time he has had to do so. I shall consider each of the exceptions raised.

Exception 1: leave pay

[16] The applicant says that he terminated the contract of employment because of an alleged breach by the company. He then simply states that, "as a consequence of the above", he suffered damages. As one of the five legs to the damages claim, he claims outstanding leave pay of R74 981, 00. He does not state whether this alleged to be due under the BCEA, his contract of employment, or some other source. He does not explain how it is calculated. And in any event, if leave pay is due, it would arise from a claim for specific performance and not damage arising from an alleged breach of contract.

[17] Mr *Taylor* blithely states in his heads of argument:

> "It is submitted that nothing turns on the word or label 'damages'. Applicant's leave pay id either owing to him or it isn't. The words damages, losses and compensation are interchangeable."

[18] That submission is simply wrong in law. Section 195 of the LRA makes it clear that a claim for compensation cannot be equated to a damages claim:

> "195. Compensation is in addition to any other amount.—An order or award of compensation made in terms of this Chapter is in addition to, and

> not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment."

[19] This claim does not disclose a cause of action. The exception is upheld.

Exception 2: future loss of earnings

[20] This claim conflates a contractual claim for damages with a claim for compensation arising from an allegedly unfair constructive dismissal. Volschenk claims "future loss of earnings" for 12 months. He does not explain what that period is based on. His contract was an indefinite one with a notice period of one month. It was not a fixed term contract with an unexpired portion of 12 months.

[21] Under this heading, Mr *Taylor* again conflates damages with compensation. He goes further to argue that "the appropriate amount of compensation to be paid to the applicant is a matter for the trial court's discretion subject to the limits enunciated in s 194 of the LRA". That appears to be his source for the claim of 12 months' remuneration. But that is a claim arising from compensation for unfair dismissal under the dispute resolution system of the LRA; it is not a claim for damages under the common law, on which the applicant seeks to rely in this case. Had he wanted to rely on a claim for unfair constructive dismissal and hence compensation under ss 186(1)(e) and 194 of the LRA, he could have done so; but then this Court would not have had jurisdiction. Had he elected to refer such a claim, he had to refer it to conciliation and, if necessary, arbitration at the CCMA.[9] He did not.

[22] What remains, as set out in the applicant's statement of claim, is a contractual claim for damages. That could be no more than his remuneration for one month's notice under the contract of employment.[10]

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[9] Cf *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) paras [21] – [23]; *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) paras [16] – [21].

[10] Cf *Spruyt v De Lange* 1903 TS 277: ""[T]he engagement was an ordinary monthly one. The [employee] was therefore entitled to a month's notice." And as Wessels J held in *Crawford v Tommy* 1906 CPD 843 at 847: "[T]he appellant was entitled to give the respondent notice to quit on the 20th of the month, making himself thereby responsible to the respondent for a month's wages in lieu of earlier notice".

In fact, he served and was paid for two months' notice. He suffered no contractual damages.

[23] The measure of damages where the employer has committed a material breach that entitles the employee to cancel the contract – as opposed to a claim for compensation for unfair dismissal in terms of the LRA – was set out as follows in *Myers v Abrahamson:*[11]

> "The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment".

[24] That decision was quoted with approval by the then Appellate Division in *Stewart Wrightson v Thorpe*[12]:

> "As in other contracts, this [the repudiation of the contract of employment] did not *per se* end the contract, but served only to vest the [employee] with an election either to stand by the contract or to terminate it."

[25] In the case of a periodical contract which is concluded from month to month, as opposed to a fixed term contract, the measure of damages is the remainder of the period of the contract.[13] In this case, the notice period was one month. Volschenk served and was paid for two months. He suffered no damages. This exception must be upheld and the claim dismissed.

[26] As an aside, it is difficult to see how Volschenk would succeed in a claim for constructive dismissal, whether at common law or under s 186 of the LRA, in circumstances where he continued to work for the employer for another two months after he had claimed that the employer had breached his contract of employment or made his continued employment intolerable. Two days before this exception was heard, Simler J handed down judgment in the UK Employment Appeal Tribunal in *Cockram v Air*

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[11] 1952 (3) SA 121 (C) 127.

[12] 1977 (2) SA 943 (A) 952.

[13] *Bulmer v Woollens Ltd (in liquidation)* 1926 CPD 459 at 467;

Products PLC.[14] In that case, the employee claimed constructive dismissal but had given seven months' notice. Simler J referred to the concept of affirmation. She held that, at common law, an employee wishing to resign and successfully claim constructive dismissal would have to resign without notice:[15]

> "To do otherwise would be to affirm that part of the contract covered by the period of notice, whilst disaffirming the rest in the sense of accepting the employer's repudiatory contract as entitling the employee to bring the contract to an immediate end."

Exception 3: Calculation of the claim

[27] Quite apart from the fact that Volschenk has not suffered any damages arising from the alleged breach of contract and based on future loss of earnings, he has in any event not quantified that alleged loss. He does not set out how and why he claims 12 months' remuneration. As discussed above, this damages claim cannot be equated to a claim for compensation under s 194 of the LRA, which is capped at 12 months' remuneration. He makes out no case for these alleged damages. The exception must be upheld and the claim fails on this basis as well.

Exception 4: Performance bonus

[28] Once again, Volschenk does not set out any facts on which he bases his claim for a performance bonus. It is impossible for the company to assess on what basis he claims such a bonus, whether he would have been entitled to it, and how it is calculated. The exception is upheld.

Exception 5: Shares

[29] Volschenk lastly claims dividends under the company's employee share unit scheme. But he sets out no basis why these alleged damages flow from the company's alleged breach of his employment contract. Nor does he explain how it is quantified. This exception is also upheld.

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[14] UKEAT/0038/14/LA, unreported, 21 May 2014.

[15] Para 13.

Conclusion

[30] All five exceptions are upheld. The question remains whether the applicant's claims should be dismissed.

[31] In some cases where exceptions have been upheld, the Court has nevertheless given the applicant a further opportunity to amend his or her statement of claim.[16]

[32] But in this case the applicant has had more than enough time and more than one opportunity to remove the cause of complaint. He did not respond to the initial invitation to do so in July 2013. And even after he eventually delivered a notice of his intention to amend the statement of claim shortly before the exception was first set down for hearing in February 2014, he did not deliver an application to amend. There is no reason why the company should be further prejudiced and be forced to incur further costs in order to grant Volschenk yet another indulgence.

[33] In law and fairness, Volschenk should bear the company's costs. He paid no heed to the company's invitation to him to remove the cause of complaint, and even after his legal representatives appeared in court on 20 February, they took no further steps to deliver an application to amend his defective statement of claim, not even when the exception was heard three months later. Volschenk was legally represented throughout. Both parties were represented by counsel in this hearing. He is not uneducated or indigent. He earned a substantial salary. The company is entitled to its costs.

Order

[34] I therefore order that:

34.1 The excipient's exceptions are upheld.

34.2 The applicant's claims are dismissed.

34.3 The applicant, Volschenk, is ordered to pay the costs of the respondent, Pragma, including the costs of counsel.

[16] Cf *Bomoyi Gaba v National Prosecuting Authority* C 473/2005, 12 November 2012, unreported.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Graham Taylor Instructed by Dixon attorneys.
RESPONDENT (EXCIPIENT):	Frans Rautenbach Instructed by Maserumule Inc.