



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2206/2015

In the matter between:

ELLIOT MODISE

Applicant/Defendant

and

RAFAEL HELENARD SWARTZ

Respondent/Plaintiff

CORAM: VAN RHYN, J

HEARD ON: 1 JUNE 2023

DELIVERED ON: 22 JUNE 2023

- [1] The applicant, Elliot Modise, an electrician in the employment of Eskom Holding Limited ("Eskom") at Welkom, seeks the reinstatement of a special plea in the main action and to set-aside a notice of removal in terms whereof the special plea was abandoned. The application is opposed by the respondent, Mr Rafael Helenard Swartz, previously also employed as an electrician and Chief Technical Officer at Eskom.
- [2] The background facts relevant to this application can briefly be summarised as follows: On 31 January 2013 the respondent suffered an electric shock during the course and scope of his employment with Eskom while rendering electrical

repair work to a mini substation ("the incident"). In order to render the repair work, the applicant was instructed to disconnect the mini-substation from the electrical network, but failed to do so. The respondent suffered serious injuries as a result of the incident. Pursuant to the incident, the applicant was subjected to a disciplinary hearing conducted by Eskom. The applicant pleaded guilty and was suspended for a period of 14 days.

- [3] On 12 May, 2015 the respondent, as plaintiff in the main action, had a summons issued claiming compensation from the applicant (defendant in the main action) for damages as a result of the incident. The applicant defended the action and filed a special plea based upon the provisions of the Compensation for Occupational Injuries and Diseases Act¹ ("COIDA"). In terms of the special plea, the applicant alleged he was a person as described in section 56 of COIDA at the time of the incident. Therefore, the respondent was duty bound to submit a claim with the Compensation Commissioner and not against him.
- [4] During a pre-trial conference held on 15 January 2019, the parties' respective legal representatives agreed that, initially, only the special plea would be adjudicated upon at the trial. The matter was certified trial ready in respect of the special plea on 4 March 2019. The special plea was enrolled to be heard on 3 and 4 December 2019. On 27 September 2019, the applicant's then correspondent attorney of record, Kramer Weihmann & Joubert Inc., in a letter abandoned the special plea and tendered to pay the costs in respect of the special plea.
- [5] The respondent (as the plaintiff) filed a notice of removal and recorded in such notice that the defendant has abandoned his special plea and tendered to pay the wasted costs. Thereafter a memorandum of fees and disbursements were drafted by the respondent's attorney and submitted for payment to the applicant. On 5 December 2019 the parties' respective legal representatives agreed that the applicant would pay the amount of R23 000.00 in respect of the wasted costs.

¹ Act 130 of 1993.

- [6] In the meantime the applicant's former attorney of record withdrew. During a pre-trial conference held on 14 September 2021, the applicant's newly appointed legal representatives did not mention that the applicant intended to proceed with the special plea. The matter was again enrolled for trial to be heard on 30 August 2022 and 31 August 2022. The notice of set down was served personally on the applicant. On 30 August 2022 the matter was removed from the roll and the applicant was ordered to pay the wasted costs brought about by the postponement sought by him.
- [7] During yet a further pre-trial conference held on 10 October 2022, the applicant's current legal representatives raised the issue regarding the special plea. It appears as if applicant's current legal representatives only learned that the special plea had been abandoned during September 2019 at the pre-trial conference held on 10 October 2022. The respondent restated as much in a letter dated 31 October 2022 addressed to the attorneys acting on behalf of the applicant. The matter was enrolled for the trial to proceed on 14, 15 and 17 March 2023. On 23 January 2023 the applicant served a notice of intention to amend his plea in order to introduce three (3) special pleas. The respondent opposed the intended amendment and on 15 February 2023 the applicant filed an amended plea without having applied for leave to do so.
- [8] Respondent filed a Rule30(2)(b) notice requesting the applicant to remove the aforementioned irregular step. Applicant replied on 24 February 2023 and stated that the amended plea will be withdrawn but that the applicant will persist with the special plea as originally pleaded. The attorney acting on behalf of the applicant was reminded in writing, that the special plea was abandoned by the applicant. No reply was received. However, on the day of the trial, 14 March 2023, the applicant insisted on relying on the abandoned special plea on the basis that same was, apparently, abandoned without his instructions.
- [9] Mr Mathevula, counsel on behalf of the applicant, argued that opposition of the application for reinstatement of the special plea is without merit in that the application is clear and straight to the point. The applicant furthermore contend that the abandonment of a special plea can only be done in terms of the provisions of Rule 41 of the Uniform Rules of Court and for such abandonment

to have the effect, it must have been made by the applicant being the defendant in the main action. Therefore, due to the abandonment of the special plea by the applicant, it is an irregular step and such removal should be set aside and declared null and void.

- [10] Apart from relying on the provisions of Rule 41, Mr Mathevula furthermore relied on the judgment in **Roupell v Metal Art (Pty) Ltd**² for his contention that the applicant should be allowed to re-instate his special plea. The facts in the **Roupell** matter, as per the heading, are as follows:

“After the plaintiff’s claim for damages for wrongful dismissal had been set down, the matter was settled and the plaintiff filed a notice of withdrawal. The defendants however sought to deduct an amount as P.A.Y.E. from the amount agreed upon which contention plaintiff rejected. He now applied for an order authorising him to withdraw his notice of withdrawal and directing the action to be enrolled. The defendants were informed by the Receiver of Revenue that tax was not deductible as the plaintiff was a provisional taxpayer.”

The court held that the plaintiff was entitled to the order sought and that the defendants should be ordered to pay the costs incurred.³

- [11] The facts in the **Roupell** matter are distinguishable from the facts of the matter at hand. In **Roupell** the issue was whether the settlement was unconditional as contended by the plaintiff or whether the settlement was subject to the term or condition proposed by the defendants regarding the deduction of an amount in respect of tax.⁴ To my mind the **Roupell** matter does not provide an answer to the dispute in respect of the abandonment of the applicant’s special plea. Mr Mathevula argued that it is furthermore the applicant’s case that he did not provide instructions to his former attorneys to abandon the special plea and it will be in the interest of justice to grant the relief sought by the applicant.
- [12] Mr Coetzer, counsel on behalf of the respondent, argued that the provisions of Rule 41 are not applicable to the issue at hand. I agree. The effect of the abandonment of the special plea is that it no longer existed as a pleading. The

² 1972 (4) SA 300 (W).

³ **Roupell** (supra) at p 300B-C.

⁴ **Roupell** (supra) at p 304.

special plea was abandoned in a letter by the applicant's former attorneys where after the respondent's attorneys, in compliance with the provisions of Rule 41(3) merely removed the matter from the roll. Rule 41(3) specifically states that "... in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant to immediately inform the registrar accordingly."

- [13] Mr Coetzer further argued that the contention on behalf of the applicant that no claim, counterclaim or defences, including special pleas, may be abandoned during a pre-trial conference held in terms of the provisions of Rule 37, Rule 37(8) proceedings or from the bar during the trial or during argument, is misplaced and wrong. I agree.
- [14] The applicant made several defamatory statements that the respondent's attorney is guilty of collusion without providing a factual basis or any evidence to justify the uncalled for remarks. In order to determine whether the applicant's former attorney could have concluded a compromise agreement on behalf of his client, it is necessary to determine whether the attorney had an actual mandate. In **Ras v Liquor Licensing Board Area No 11, Kimberley**⁵ it was held that a client will not be bound by the actions of his or her legal representative where the latter exceeded his or her mandate and/or achieved an object not intended by the client.
- [15] With reference to **MEC for Economic affairs, Environment and Tourism: Eastern Cape v Kruizenga and Another**⁶, application of the principle of ostensible authority as explained in **Minister of Police v Kunene and Others**⁷ and the legal position applicable to actual authority and ostensible authority explained in **Minister of Police v Van der Watt and Another**⁸, Mr Coetzer argued that the applicant has failed to establish that he did not provide instructions to his former attorney to abandon the special plea.
- [16] There is not a single averment in any of the applicant's affidavits stating that his current attorney or his previous attorney, for that matter, had perused the office

⁵ 1966 (2) SA 232 (C) at 237E-238F.

⁶ 2010 (4) SA 122 (SCA).

⁷ [2020] 1 All SA 451 (GJ).

⁸ (A265/2018) [2021] ZAGPPHC 53 (20 January 2021) at paragraphs 37 – 50.

file in an effort to prove that no letter, consultation note or telephone note could be traced to provide proof for the contention that applicant did not provide such instructions. The applicant failed to explain why he paid the costs as tendered, associated with the removal of the matter from the roll during December 2019. The applicant failed to explain why, in the event of him being determined to proceed with the special plea at the trial, he did not sooner raise the alarm regarding his former attorney's action to abandon his special plea. The applicant furthermore failed to provide any logical and reasonable explanation why, after causing the matter to be removed from the roll during December 2019, during August 2022 and on 14 March 2023, he only in January 2023 realised that the special plea had been abandoned years ago and now endeavours to re-instate the same.

- [17] This being application proceedings, the applicant must make out his or her case in the Founding Affidavit, which the applicant failed to do. It is trite that an applicant who seeks relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

- [18] Furthermore the applicant has, except for his mere say-so, failed to present any argument or case law to confirm that the respondent's claim against the applicant forms part of COIDA. The applicant has not made out a case that the respondent's claim against him is therefore barred or expunged, nor has the applicant made out a case that he has good chances of success in succeeding with the special plea. Section 35(1) of COIDA provides that no action shall lie by an employee for the recovery of damages in the respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer and no liability for compensation on the part of such employer shall arise, save under the provisions of COIDA in terms of such disablement or death.

- [19] The applicant and the respondent were co-employees at Eskom. From the mere reading of section 35(1) of COIDA it is clear that co-employees are not excluded

from the said section. The effect of section 35(1) of COIDA is to deprive an employee of his common-law right of action to claim damages from his employer in respect of an occupational injury. Mr Coetzer, in his heads of argument, furthermore referred to the provisions of section 35(2) and section 36(1)(a) and convincingly argued that the applicant's reliance upon his special plea is misplaced.

[20] To allow the applicant to, again, rely upon his special plea, which is not valid in law, will cause further delay in the finalisation of the respondent's claim, which has been seriously delayed by the applicant since 2019 and will increase the costs. I am of the view that the applicant's application should be dismissed. There is no reason why costs should not follow the event.

[21] Even though being informed months in advance that the special plea was abandoned, the applicant caused the trial set down for hearing during March 2023, to be postponed yet again. The applicant should therefore be ordered to pay the costs of the postponement of the trial. No arguments in this regard were presented by the applicant notwithstanding the order granted by Mahlangu AJ on 14 March 2023 that the costs occasioned by the postponement of 14 March 2023 are to be argued on 1 June 2023.

ORDER:

[22] In the result the following order is made:

1. The application is dismissed with costs.
2. The applicant (defendant in the main action) shall pay the wasted costs occasioned by the postponement of the trial on 14 March 2023, which costs shall include the reservation fees of the expert witness.



VAN RHYN. J

On behalf of the Applicant:

ADV. R C MATHEVULA

Instructed by:

WEBBERS ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondent:

ADV. C COETZER

Instructed by:

HONEY ATTORNEYS
BLOEMFONTEIN