

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12805/2011

In the matter between:

M K Murugan

Applicant

and

The Minister of Labour

First Respondent

Director-General: Department of Labour

Second Respondent

Compensation Commissioner

Third Respondent

Judgment

Lopes, J

[1] The applicant is M K Murugan, who seeks leave to amend his Notice of Motion dated the 16th of November 2011. The respondents oppose the application to amend on the basis that the main application was withdrawn by the applicant on the 27th of March 2013. The respondents contended that as the application has been withdrawn, the applicant has no right to seek to amend the Notice of Motion, and the application for an amendment should be dismissed with costs.

[2] The background to the application is relevant and may be viewed as follows:

- (a) From 1995 the applicant was employed at Shell and BP South Africa Refineries (Pty) Ltd ('SAPREF').
- (b) During July or August of 1996 the applicant was diagnosed with toxic hepatitis. It was believed that he had contracted the toxic hepatitis as a

result of his contact with certain chemicals he encountered during his employment at SAPREF.

- (c) During 1996 he lodged a claim with the third respondent, the Compensation Commissioner (now referred to as the Director-General) appointed in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 ("the Act").
- (d) That claim was dismissed by the third respondent on the 27th of October 2000.
- (e) The applicant appealed against that decision in terms of s 91 of the Act on the 6th of November 2000. His appeal was dismissed on the 13th of August 2002 on the basis that his toxic hepatitis was not caused by his exposure to toxic chemicals during his employment at SAPREF.
- (f) In January 2004 the applicant returned to work. After a period he again became ill.
- (g) In June 2004 the applicant launched his second claim for compensation, based on new facts and new medical opinions.
- (h) The applicant's second claim for compensation was rejected on the 27th of January 2011.
- (i) The applicant then again appealed in terms of s 91 of the Act against the rejection of his second claim. This appeal was successful and on the 4th of March 2011, the third respondent advised him in the following terms:
'Subsequent to your objection launched against the Compensation Commissioner's decision dated 27th of October 2000, we hereby wish to advise you that after consideration all your medical reports and reviewing the claim in terms of section 90 of the Act, we hereby advise you that we offer you hundred

percent (100 %) permanent disablement and all medical expenses incurred thereof will be settled by the Compensation Commissioner.

In the light of the above the Compensation Commissioner shall regard your objection as tacitly withdrawn. If you do not respond to this letter within thirty [30] days from the date hereof. (sic)'

- (j) On the 8th of July 2011 the applicant was notified by the third respondent that the offer to accept liability, pursuant to the applicant's appeal of the rejection of his second claim, was made erroneously. This was, according to the third respondent, because the claim had already been considered on the 4th of March 2002, and dismissed by the third respondent. The second claim lodged by the applicant was regarded as a duplicate by the third respondent. The third respondent had therefore reviewed his decision to accept liability in terms of s 90 (2) of the Act. He decided not to award compensation in line with the decision which had already been made by the third respondent pursuant to s 91 of the Act during 2002. The applicant was then invited to support his contention, supported by documentary evidence, that the offer made by the third respondent on the 4th of March 2011 should stand, and that those representations should reach the third respondent's office within 30 days' of receipt of the letter.
- (k) The applicant's attorney then addressed the third respondent on the 19th of July 2011 pointing out that the second claim lodged by the applicant during 2004 was a claim *de novo*, which was supported by new medical records. The applicant's attorney disputed any suggestion that the claim was opened in error as it was not a duplicate of the first claim. Those representations were rejected by the third respondent.
- (l) As opposed to lodging yet another s 91 appeal against this latest rejection of his application, the applicant then instituted review proceedings in this court on the 17th of November 2011. The application

was initially set down for hearing on the opposed roll for the 2nd of April, 2013. The inordinate delays which took place were principally as a result of the failure by the respondents timeously to deliver opposing affidavits.

(m) Shortly prior to the opposed hearing, the applicant was advised by his attorney and counsel that his case was weak. They suggested that the application should be removed from the roll, and the applicant's attorney would attempt to secure the position where the applicant would not be liable for the respondents' costs, which were anticipated to be considerable.

(n) On the 22nd of March 2013 the applicant's attorney addressed the respondents' attorney indicating that the applicant was prepared to withdraw his application which was set down on the opposed roll on the 2nd of April 2013, subject to each party paying its own costs. That proposal was accepted and on the 27th of March 2013, the applicants attorney delivered a Notice of Withdrawal in the following terms:

'KINDLY TAKE NOTICE that pursuant to the Parties reaching a settlement agreement the Applicant herein hereby withdraws his Application against the Respondents set down for hearing on the Opposed Roll for 02 APRIL 2013.

KINDLY TAKE NOTICE FURTHER that it has been agreed that each Party is to pay its own costs.'

(o) As the applicant was dissatisfied with the fact that his application was not argued, he consulted with his present attorney during May of 2013. His file was received by his present attorney from his erstwhile attorney, in September of 2013. It was at this stage that the letter of the 22nd of March 2013 and the Notice of Withdrawal came to light.

(p) The applicant maintains that he believed that the matter was simply being withdrawn from the roll for hearing on the 2nd of April 2013, and he did not give his attorney an instruction that the application itself should be withdrawn.

[3] The applicant now seeks to amend the original prayers in his initial Notice of Motion. The amendments to the Notice of Motion are not extensive, and seek only to clarify the relief which the third respondent awarded to him after his s 91 appeal on the second claim. The amendments seek an order that the second respondent award compensation to the applicant in respect of the permanent disability sustained by him in consequence of having contracted an occupational disease. The compensation to be awarded to the applicant is to be determined on the basis that he suffered a one hundred percent permanent disablement as contemplated in s 49, read with schedule 4 of the Act, and that the date of commencement of the occupational disease was the 14th of September 2004. In addition the applicant seeks interest on the arrear compensation amounts at the prescribed legal rate from the 14th of September 2004 to date of payment.

[4] In my view there is nothing per se objectionable in the amendments sought to the Notice of Motion. The defence, which was vigorously pursued at the hearing by Mr *Naidu*, who appeared for the respondents, was that the amendment could not be granted because the matter had been settled and withdrawn. No *lis* existed between the parties.

[5] Mr *Spoor*, who appeared for the applicant, submitted that the third respondent had, in terms of s 90(2) of the Act, reviewed his s 91 decision to award compensation to the applicant because he regarded the matter as having previously been decided by him. The applicant's second claim, however, was based on new medical evidence, and new facts, inasmuch as he had returned to work in January of 2004, before again becoming ill. Mr *Spoor* submitted that as the applicant's attorney had not been given authority to withdraw the application, but merely to withdraw the matter from the opposed roll, his attorney had had no authority to make the offer which he did, or issue the Notice of Withdrawal. As no such mandate was given to the attorney by the applicant, his act of withdrawal is a nullity. In those circumstances there is no reason why the applicant cannot persist with the original Notice of Motion, but as amended in the manner proposed in this application.

[6] Mr *Naidu* pointed to the complete lack of any explanation from the applicant's erstwhile attorney as to how the offer came to be made and the Notice of Withdrawal came to be delivered. He submitted that the applicant was obliged to content himself with recourse against his erstwhile attorney by way of an action for damages. The respondents' legal representatives had clearly accepted that the withdrawal of the application from the opposed roll was in fact a withdrawal of the main application. From the time the Notice of Withdrawal was lodged, and the matter removed from the roll on the 2nd of April, 2013, there was no *lis* between the parties. No court order was made on the day in question, because the matter was withdrawn from the roll. However, in this regard, I note that the cover of the court file reflects that on the 2nd of April 2013 an order was made as follows:

'Notice of withdrawal, matter removed.'

[7] It is in my view, readily conceivable that the applicant, as a layman, may easily have misunderstood what his attorney and counsel intended when they recommended that the matter not be proceeded with on the 2nd of April 2013, in order to protect the applicant from having to pay a considerable amount in costs. If the applicant's understanding was that the matter was only being withdrawn from the roll, and that the main application was not being withdrawn, then that confusion would have resulted in the fact that there was no agreement between himself and his attorney, and accordingly he gave no mandate to his attorney to withdraw the entire application. There could have been no agreement between the applicant and his attorney to withdraw the entire application if they were not of one mind as to what should happen to it. The probabilities favour this conclusion because the applicant approached his current attorney for assistance approximately one month after the 2nd of April 2013. Had he understood that the main application had been withdrawn, he is unlikely to have done so.

[8] In addition to the foregoing, Mr *Spoor* drew my attention to the provisions of s 33 of the Act which is as follows:

‘33. Cession or relinquishment of benefits void. – Any provision of an agreement existing at the commencement of this Act or concluded thereafter in terms of which an employee cedes or purports to cede or relinquishes or purports to relinquish any right to benefits in terms of this Act, shall be void.’

Mr *Spoor* submitted that the provisions of s 33 prevented the applicant from relinquishing his rights to benefit in terms of the Act. The Act is an instrument of social legislation which confers fundamental rights to compensation upon the applicant. Any interpretation of the provisions of the Act should be in a manner designed to promote the purposes of the Act and s 27 of the Constitution (the right to social security). I agree with these submissions.

[9] I accordingly find that the applicant could not have concluded an agreement to withdraw the application, in circumstances where that would have compromised his right to social security in the form of compensation in terms of the Act. In addition, there appears to be no reason why the withdrawal of the application cannot, in itself, be withdrawn, which is the very purpose of setting down the original Notice of Motion and seeking its amendment as is being done in this application. (See: *Roupell v Metal Art (Pty) Ltd & Another* 1972 (4) SA 300 (W)).

[10] The effect of a withdrawal of proceedings is akin to an order of absolution from the instance. It is not determinative of the *lis* which existed between the parties, even though costs may have to be paid of the proceedings up to the date of the withdrawal. It would be a most expensive and unnecessary exercise were the applicant to have to begin the claim process anew. That could notionally be done the day after this judgment, but would entail an enormous waste of resources and money on both sides. The practical course is simply to allow the amendment of the Notice of Motion, with the review to continue.

[11] Had this application been unopposed, the applicant would have had to bear the costs thereof. However, as the application has been unsuccessfully opposed, costs should follow the result.

[12] In all the circumstances I make the following order:

- 1) The applicant is granted leave to amend his Notice of Motion dated the 16th of November 2011 as set out in the amended Notice of Motion which is annexure "A" to the applicant's founding affidavit in this application.
- 2) The respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the applicant's costs of the application.

Graham Lopes J

Dates of hearing: 16th April 2018

Date of Judgment: 26th April 2018.

Counsel for the Plaintiff: Mr R *Spoor* of Richard Spoor Incorporated, Attorneys.

Counsel for the Defendant: Mr R *Naidu* (instructed by The State Attorney).