



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS34/21

In the matter between:

**BARLOWORLD EQUIPMENT (A DIVISION OF
BARLOWORLD SOUTH AFRICA (PTY) LTD**

Applicant

and

SOLIDARITY

First Respondent

MJ GEYSER

Second Respondent

J NEL

Third Respondent

S SMIT

Fourth Respondent

Consolidated with:

Not Reportable

Case No: JS1036/20

**BARLOWORLD EQUIPMENT (A DIVISION OF
BARLOWORLD SOUTH AFRICA (PTY) LTD**

Applicant

and

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

First Respondent

**ABEGAIL BOTOLO AND 35 OTHERS LISTED
IN ANNEXURE A**

Second Respondent

Heard: 26 October 2023

Delivered: 05 February 2024

JUDGMENT

ADAMS, AJ

Introduction

- [1] Both applications before me involve applications for leave to amend. The matters have been consolidated. It is for this reason that I address both applications together in this judgment.
- [2] The test for determining whether to grant an amendment is whether the interests of justice permit the granting of such an amendment.¹ This is a broad test.
- [3] In deciding whether to grant or refuse an application for amendment courts lean in favour of granting them in order to ensure that justice is done between the parties by deciding the real issue between them. An application for amendment will always be allowed “*unless it is mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as postponement*”².
- [4] These principles are set out and were applied by this Court in *SATAWU & another v SAA (Pty) Ltd*³. That is one of the many examples where this Court has adopted and applied the Uniform Rules⁴ in situations governed by Rule 11.

¹ *Stainbank v SA Apartheid Museum at Freedom Park and Another* 2011 (10) BCLR 1058 (CC); [2011] ZACC 20 at para 23.

² *Imperial bank Limited v Barnard NO and others* [2013] JOL 30943 (SCA) at para 8.

³ *SATAWU & another v SAA (Pty) Ltd* [2010] JOL 24956 (LC) paras 15 to 19.

⁴ GNR. 48 of 12 January 1965: Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

- [5] It is trite that the primary objective of allowing an amendment is to obtain a proper ventilation of the dispute between the parties and to determine the real issues between them, so that justice may be done.⁵
- [6] One of the prime considerations in the decision of whether to grant an amendment is whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.⁶
- [7] In the matter of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Limited and Another*⁷, the Court stated that an applicant for an amendment must, in his application for the amendment, show *prima facie* that he has something deserving of consideration – a triable issue.
- [8] A triable issue is (1) a dispute which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant, or (2) a dispute which will probably be proved by the evidence so foreshadowed.

The application in terms of case number JS34/21

- [9] The Applicant sought an amendment to its statement of response in terms of a notice to amend (notice) dated 3 February 2023, for the incorporation of a special plea as contained at paragraphs 1.1 to 1.5 of its notice.
- [10] This was objected to by the Respondents in a notice titled 'objection against amendments sought by Respondent' dated 17 February 2023.
- [11] The grounds for objection were, in summary, as follows:
- 11.1. The amendments as sought would not have the effect that there would be a proper ventilation of the dispute between the parties and would not serve to determine the real issues between them (which issues have

⁵ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D); [1967] 4 All SA 105 (D) at 638A.

⁶ *Trans-Drakensberg supra* at 638A-B.

⁷ 2002 (2) SA 447 (SCA).

already crystallised from the statement of claim and statement of response);

- 11.2. The amendments are sought extremely belated and some 24 months after the statement of response was served and filed. The amendment (if allowed) would be prejudicial to the Claimants since the parties have already extensively engaged in a pre-trial process, with the intervention of this Honourable Court;
- 11.3. The issue raised by the Respondent that the contents of the statement of claim seeks to introduce an adjudication of a dispute about the procedural fairness of an operational requirements dismissal is misguided, since it is trite that deficiencies in a procedure may impact on the substantive fairness of an operational requirements dismissal;
- 11.4. The issues in dispute have been properly ventilated in the pleadings and the amendment would only serve to prolong the finalisation of the current matter in circumstances where the matter was already delayed substantially due to an inability to conclude a pre-trial minute;
- 11.5. The Respondent's proper cause of action would have been to make an application to strike out those portions of the statement of claim that they may contend are irrelevant in relation to the relief sought by the Claimants;
- 11.6. The amendments sought are consequently unnecessary since the Claimants do not seek an order holding that their dismissals were procedurally unfair; and
- 11.7. The Respondent's conduct borders on the contemptuous since Honourable Judge Prinsloo ordered the parties to conclude and file a signed pre-trial minute, but instead the Respondent is embarking upon a course that is further delaying the finalisation of this matter instead of concentrating on finalising and signing the pre-trial minute.

[12] Having considered these grounds, I cannot find that the grounds demonstrate that the amendment sought by the Applicant is *mala fide* or prejudicial to the Applicant:

- 12.1. First ground: I do not believe that this constitutes a reasonable ground when one considers that the Applicant is attempting to ventilate the dispute in a manner that is logical and practical and may result in unnecessary costs for both parties should the special plea be granted. Should the special plea be refused, both parties will be in a position to know what the issues are in the proceedings. This ground stands to fail;
- 12.2. Second ground: This is not a reasonable ground to refuse an amendment. There are no time periods provided for in the Rules of Court⁸ or the relevant authorities. An amendment can be brought at any time of the proceedings but before judgment. It can also be granted before and after the close of pleadings, during the hearing of evidence, after the evidence has been given, and even during or after the closing argument, but not after judgment.⁹ This ground stands to fail;
- 12.3. Third ground: This ground concerns arguing the substance of the proposed amendment. This aspect can be raised by the Respondents in their response to the special plea and argued at that stage of the proceedings. Importantly, amendments are not intended or designed to determine factual issues and should not deteriorate into mini-trials.¹⁰ This ground stands to fail;
- 12.4. Fourth ground: I do not agree with this contention. One simply has to consider the averments made by the Applicant in paragraph 13 of their Founding Affidavit to see that the parties have reached a stalemate in regard to finalising the pre-trial minute and that this is premised, according to the Applicant, on those grounds set out at paragraphs 13.1 to 13.6 of its Founding Affidavit. This ground stands to fail;

⁸ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

⁹ *South African Breweries (Pty) Ltd v Louw* [2018] 1 BLLR 26 (LAC); [2016] ZALCJHB 156 (LAC) at para 28.

¹⁰ *Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality and another (Ergo Mining)* [2020] 3 All SA 445 (GJ); [2020] ZAGPJHC 134 (GJ).

- 12.5. Fifth ground: The Applicant's amendment does not seek to strike out irrelevant allegations – it is clearly centred around raising a jurisdictional point and not simply the striking out of allegations based on irrelevance. Rule 6 of the Rules of Court, furthermore does not provide for such a procedure in any event. This ground stands to fail;
- 12.6. Sixth ground: I reiterate my findings in terms of the third ground herein – this is an argument on the substance of the amendment which should and can be raised by the Respondents in response to the special plea. This ground stands to fail;
- 12.7. Seventh ground: I reiterate what I have already found in terms of the fourth ground which would also apply herein. This ground stands to fail.
- [13] For the above reasons, I find that the amendment to the statement of response is neither *mala fide* nor prejudicial to the Respondents and that leave should be granted to allow the Applicants to amend their statement of response.

Application in terms of case number JS1036/20

- [14] The Applicant sought an amendment to its statement of response in terms of a notice to amend (notice) dated 3 February 2023, for the incorporation of a special plea as contained in paragraphs 1.1 to 1.5 of its notice.
- [15] This was objected to by the Respondents in a Notice titled 'objection against amendments sought by Respondent' dated 16 February 2023.
- [16] The grounds for objection were, in summary, as follows:
- 16.1. The Respondent ought to have filed an application to strike out the allegations it contends are irrelevant to the relief sought by the Applicants;
- 16.2. The notice filed by the Respondent is neither a dilatory plea nor is it a plea in abatement (sometimes also referred to as a plea in bar). It is not a special plea at all but is an irregular process and amounts to an abuse of court;

- 16.3. The plea does not relate to the jurisdiction of this Honourable Court given that the Applicants do not seek a determination of procedural fairness of the dismissals;
- 16.4. The plea is prejudicial to the Applicants who allege that the retrenchment could have been avoided through alternatives tabled during the consultation process had they been properly explored;
- 16.5. The plea is *mala fides* and brought to delay the determination of the dispute on the merits and avoid a detailed and thorough examination of alternatives to the retrenchment;
- 16.6. The Respondent is aware that the allegations made in the statement of claim, which may otherwise have supported a case for procedural unfairness, are raised because they illustrate a lack of *bona fides*, are so gross that they impact on substantive unfairness, and they are relevant to the relief sought;
- 16.7. This Court ordered the parties to file pre-trial minutes and the Respondent's conduct is in contempt of court.
- [17] Having considered these grounds, I cannot find that the grounds demonstrate that the amendment sought by the Applicant is *mala fide* or prejudicial to the Applicant:
- 17.1. First ground: The Applicant's amendment does not seek to strike out irrelevant allegations – it is clearly centred around raising a jurisdictional point and not simply the striking out of allegations based on irrelevance. Rule 6 of the Rules of the Court, furthermore, does not provide for such a procedure in any event. This ground stands to fail;
- 17.2. Second ground: I do not agree with this ground. The amendment seeks to introduce a special plea premised on the jurisdiction of this Court. This ground stands to fail;
- 17.3. Third and fourth ground: These grounds concern arguing the substance of the proposed amendment and do not necessarily relate to the amendment itself. These aspects can be raised by the Respondents in their response to the

special plea and argued at that stage of the proceedings. Importantly, amendments are not intended or designed to determine factual issues and should not deteriorate mini-trials.¹¹ These grounds stand to fail;

17.4. Fifth ground: I do not believe that this constitutes a reasonable ground when one considers that the Applicant is attempting to ventilate the dispute in a manner that is logical and practical and may result in unnecessary costs for both parties should the Special Plea be granted. Should the special plea be refused, both parties will be in a position to know what issues are in the proceedings. This ground stands to fail;

17.5. Sixth ground: I reiterate what I have already stated for the third and fourth grounds above. This ground stands to fail;

17.6. Seventh ground: I do not agree with this objection. One simply has to consider the averments made by the Applicant in paragraph 13 of its founding affidavit to see that the parties have reached a stalemate in regard to finalising the pre-trial minutes for the reasons set out by the Applicant in paragraph 13. The resolution to this stalemate may be in terms of allowing the amendment so that both parties may reach a resolution in terms of the issues in dispute between them. This ground stands to fail.

[18] For the above reasons, I find that the amendment to the statement of response is neither *mala fide* nor prejudicial to the Respondents and that leave should be granted to allow the Applicants to amend their statement of response.

[19] For this reason, I grant the following order:

Order

In terms of the application under case number JS34/21

1. The Applicant is granted leave to amend its statement of response dated 1 February 2021 as per its notice of intention to amend dated 3 February

¹¹*Ergo Mining* [2020] 3 All SA 445 (GJ).

2023, which is annexed to the founding affidavit and marked annexure “BWE7”;

2. The Applicant is authorised to deliver its amended pages within 5 days of the granting of this Order;
3. No order as to costs.

In terms of the application under case number JS1036/20

1. The Applicant is granted leave to amend its statement of response dated 1 February 2021 as per its notice of intention to amend dated 3 February 2023, which is annexed to the founding affidavit and marked annexure “BWE7”;
2. The Applicant is authorised to deliver its amended pages within 5 days of the granting of this Order;
3. No order as to costs.

R Adams

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Andrew Redding SC

Instructed by: Bowman Gilfillan Inc

For the Respondent

(NUMSA): R Daniels

Instructed by: CTH Attorneys

For the Respondent

(Solidarity): Wilhelm P Bekker

Instructed by: Serfontein Viljoen & Swart Attorneys

LABOUR COURT