

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO. DA 13/2000

In the matter between

ISAAC NZIMANDE

1st Appellant

BEVERLEY BRODIE

2nd Appellant

**A FURTHER 72 APPLICANTS (AS PER
ANNEXURE “X” TO THE APPLICANTS’**

STATEMENT OF CLAIM)

3rd to 74th

Appellants

and

ZENEX OIL (PTY) LTD

1st Respondent

WIMMERA INVESTMENTS (PTY) LTD

2nd

Respondent

WALDECK INVESTMENTS (PTY) LTD

3rd

Respondent

VALAIS INVESTMENTS (PTY) LTD

4th

Respondent

WORLDWIDE AFRICAN INVESTMENTS (PTY)

5th Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD

t/a STANDARD CORPORATE AND MERCHANT BANK

6th Respondent

JUDGMENT

DAVIS AJA

[1] This is an appeal against a ruling by **Pillay AJ** (as she then was) in terms of

which appellants were refused leave to amend their statement of claim. The background to the dispute between the parties which was referred to the Commission for Conciliation Mediation, and Arbitration (the ‘CCMA’) which certified the dispute to be unresolved on 11 March 1998 is extremely difficult to describe coherently as a result of the unsatisfactory manner in which the statement of claim both in its initial and amended versions have been drafted.

[2] To the extent that there is no material difference between the two versions of the statement of claim, it is possible to summarise the essential facts which gave rise to the dispute thus: In 1986 Esso Africa Inc, the owner of shares in Esso (Pty) Ltd (“Esso”) disinvested from South Africa hereby relinquishing its shareholding and control of the business to an offshore entity, the managing trustee of which was Radite Ltd, a company incorporated on the Isle of Mann. It appears to have been a term of the sale of the business by Esso Africa Inc. to the trust that employees of Esso were to benefit annually from a distribution of 2½ % of the company’s pre-tax profits amongst all of the employees of that company.

[3] As with much of the statement of case, there is no clarity as to how Esso transmogrified into Zenex Oil (Pty) Ltd. However in April 1997 the business of Zenex Oil (Pty) Ltd (“the Old Zenex”) was sold as a going concern to fourth respondent which changed its name to Zenex Oil (Pty) Ltd (“the New Zenex”).

[4] Applicants allege that in February 1997 pursuant to the announcement of the April sale, employees including applicants of the Old Zenex were promised shares in the New Zenex by the Chief Executive Officer and three other directors of the Old Zenex. Thereafter the sale took place and the New Zenex was born. The shareholding in the New Zenex was held in the amount of 49% by the Standard Bank of South Africa Ltd (which is the sixth respondent) constituting 490 preference shares and 51% by Wimmeria Investments (Pty) Ltd (which is the second respondent and to which I shall refer to as “Wimmeria”) being 510 ordinary shares, these constituting the entire issue of ordinary shares in the company. In turn the shareholding in Wimmeria was held as to 49% by Waldeck Investments (Pty) Ltd (which is the third respondent and to which I shall refer to as “Waldeck”) and 51% by Worldwide African Investment Holdings (Pty) Ltd (“Worldwide”) which is described as a black empowerment company.

[5] In terms of the Waldeck shareholder agreement, applicants allege that the shares thereof were held by the four directors of the Old Zenex together with a number of key employees.

[6] Applicants contended that they were not allotted any shares in Waldeck and they were thereby excluded from participating in the benefit of any of the issued ordinary shares of the company and the sale thereof. They contended further that the various agreements produced the result that certain employees of the New Zenex were allocated shares on a selective basis which amounted to direct discrimination on an arbitrary ground. They contended further that the New Zenex was a party to an agreement that expressly contemplated, and endorsed both the control of its shares being exercised selectively and arbitrarily by certain employees through Waldeck and that Waldeck, Wimmeria and the New Zenex were a single entity in mind and management. Furthermore as none of the African employees of the New Zenex had been allocated shares in Waldeck such employees had been differentially treated on the grounds of race.

[7] For these reasons applicants declared a dispute with first respondent claiming that first respondent's conduct constituted an unfair labour practice relating to discrimination and hence was in contravention of item 2(1)(a) of part B of Schedule 7 of the Labour Relations Act 66 of 1995 ('the LRA').

[8] The initial statement of claim was filed on 30 June 1988. Respondents' reply to the statement of case was amended by substituting the entire document on 30 November 1998. The matter was then enrolled for trial between 22 –26 May 2000. At the commencement of the trial on 22 May 2000 appellants brought an application for the amendment of their statement of claim which application was opposed. The application sought to replace the original statement in its entirety.

[9] It was common cause that at least one aspect of this amendment, paragraph 14 of the statement of claim was substantial and did not merely constitute a formal amendment. In paragraph 13 of its original statement of claim, applicants alleged that the promise of shares had been made by David Knowles, a director of Zenex Oil (Pty) Ltd which appears to be the Old Zenex. In paragraph 14 of the proposed statement of claim, applicants expanded on this allegation and contended that the promise of shares had been made by Mr Knowles together with three of his colleagues namely, Paul Richards, the Chief Executive Officer of the Old Zenex, Terry Billing and Harry Govind, both of whom were directors of the company.

[10] In refusing the application for the amendment of the statement of claim, **Pillay AJ** said, "An application for an amendment should not be refused purely because of the delay in bringing the application. However, the delay in this matter amounts

to dilatoriness on the part of the applicant, particularly as they were alive to the need for the amendment more than a year and four months before the trial. Furthermore, they were reminded periodically about the amendment. The applicants have no one but themselves to blame for this application being refused.

The applicants were also alive to the prejudice caused to the respondent as a result of the delay in securing a trial date. I refer here to respondents' offers to refer the matter to private arbitration at the cost of the respondents and with the right of appeal. The prejudice to the respondent which was conceded, cannot be cured by an adjournment and an appropriate order for costs. The next available trial date is six months away. Allegations of discrimination, particularly, racial discrimination, are serious and will impact on the business of the respondent."

[11] Mr van Niekerk, who appeared on behalf of the applicants, submitted that the late bringing of an amendment was in itself, in the absence of prejudice, no ground for refusing such amendment. In support for this submission he relied, *inter alia*, on **Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd** 1967 (3) SA 632 (D) at 642 C-D and **Mabaso v Minister of Police** 1980(4) SA 319 (W) at 323 D.

[12] The background to **Mabaso's** case illustrates the context of the principle laid down in these two cases. In **Mabaso's** case, plaintiff issued summons in December 1972 claiming damages from defendants arising from a shooting

incident in July 1972 and based on the allegation of assault. Defendants pleaded in September 1973. The notice of enrolment was filed in November 1973 and by notices issued in March 1977, May 1977 and February 1980 plaintiff's particulars of claim were amended without objection by defendants. The action was set down for hearing on 8 March 1979 but by consent was removed from the roll. It was again set down for hearing on 16 May 1980. On 5 May 1980 plaintiffs gave notice of further amendments to the particulars of claim which sought to base the claim on an allegation of injury caused by second defendant's recklessness or negligence and only in the alternative on the basis of an intentional act. This amendment also sought to increase the second plaintiff's claim for damages because it appeared that he had become a paraplegic as a result of the shooting. Defendants objected to the proposed amendments on the grounds, **inter alia**, of unexplained lateness thereof. Insofar as this objection was concerned **Goldstone AJ** (as he then was) said "In my opinion, even in a gross case such as the present, the Court should grant amendments such as those now sought, unless there is a likelihood of prejudice to the defendants which cannot be cured by a suitable order for costs" (at 323 D).

- [13] Mr Van Niekerk pressed the point that this *dictum* in **Mabaso's** case was equally applicable to the present case in that respondents' right to finality should be trumped by appellants' interest in a proper ventilation of the dispute between the parties, particularly when a breach of the former's right could easily be cured by an appropriate order as to costs. He further submitted that the "sparse" reasoning

of **Pillay AJ** , as he described it, was incorrect in law in that the learned judge justified the dismissal of the application in terms of the principle of delay without an appropriate examination of the question of prejudice.

[14] Mr Gauntlett, who appeared together with Mr La Grange on behalf of respondents, submitted that in interlocutory matters of this kind in which the trial court is visited with a discretion, appellate tribunals should adopt the principle of a margin of appreciation which should be granted to trial courts to make such rulings provided that the discretion was exercised judicially.

[15] Although **Pillay AJ's** ruling might have been somewhat cryptically phrased, the basis thereof is clear, namely that there was an unacceptable delay coupled with clear prejudice to respondents. This is evident from a careful analysis of the ruling. The need to amend the statement of claim was first anticipated at the pre-trial conference held in December 1998. A delay in the amendment of the statement of claim was caused primarily by applicants' need to procure an appropriate opinion by counsel on their prospects of success. It took some fifteen months to obtain this opinion. Notwithstanding that counsel's opinion became available in April 2000, the amendment was only faxed to respondents' attorneys on 19 May 2000, that is two days before the trial was due to commence. Accordingly, **Pillay AJ** found that the delay amounted to dilatoriness on the part of the applicant. Furthermore the learned judge found that the prejudice in this case could not be cured by an appropriate order for costs, for allegations of discrimination, particularly racial discrimination, are so serious that they would impact on the business of respondents which consequently had an understandable desire to expedite the resolution of the dispute.

[16] Although Mr Van Niekerk contended that there was no mention of prejudice in respondents' replying papers, the record containing the addresses of counsel to the *court a quo* reveals clearly that counsel for respondent directed the *court a quo's* attention to the allegations of racial discrimination and then submitted "To say about someone, you discriminated on the grounds of race, you've discriminated on some other ground, we're not sure what it is yet, but you have behaved arbitrarily you've discriminated. Those are very serious allegations and the respondents have every interest in putting that allegation to rest and having finality".

[17] In my view, there is no justification for a conclusion that **Pillay AJ** did not exercise a judicial discretion based on considerations both of delay and prejudice to the respondent.

[18] However, Mr Van Niekerk sought to persuade us that delay alone is an insufficient ground to reject such an application . He contended that in the present case there was an insufficient evidential basis to show the necessary prejudice. Even if this approach were correct , it would not necessarily justify the setting aside of the ruling of the *court a quo*. Although **Trans-Drakensberg Bank Ltd**, *supra* and **Mabaso**, *supra* are authority for the proposition that, despite delay, the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order of costs, the question arises

as to whether these *dicta* are equally applicable within the context of the LRA.

[19] Section 1 of the LRA sets out the purpose of the Act which includes the promotion of the effective resolution of labour disputes. Within the context of labour relations, efficacy must be coupled with expedition. Where a permanent relationship between the parties exists as in this case, a lengthy delay before a dispute can be resolved may harm this relationship and hence cause considerable prejudice to one or both of the parties. For this reason the unexplained delay of eighteen months can, of itself, justify the refusal of an application to amend a statement of claim.

[20] In terms of principles which have been accepted by the courts, no amendment will be allowed, save perhaps in exceptional circumstances, where the pleading as a result thereof would become excipiable . See **Trans-Drakensberg Bank Ltd**, *supra* at 641A-B; **Caxton & Others v Reeva Forman (Pty) Ltd and Another** 1990(3) SA 547(A) at 565 G-I.

[21] There are considerable difficulties in establishing whether applicants have a cause of action in their proposed statement of claim. The allegation of a promise of shares was that appellant would receive such shares in the New Zenex. However in paragraph 18 the identity of the shares complained of changes and appellants allege that they were never allotted shares in Waldeck. It should be noted that Waldeck is allegedly a minority shareholder in Wimmeria which holds all the ordinary shares in the New Zenex. Save for alleging that the only employees who received shares in Waldeck were senior executives and key employees, no basis was laid in the statement of case as to the existence or nature of arbitrary or racially discriminatory conduct on the part of respondents.

[22] It would appear that appellants have sought to deal with the discrepancy between the promise of shares in the New Zenex and the further allegation that shares were not received in Waldeck by alleging that Wimmeria, Waldeck and the New Zenex were a single entity in mind and management. However in paragraph 15.2 of the amended statement of case, it is alleged that the majority shareholding in Wimmeria which controls the New Zenex is held by Worldwide, which would appear to be an entity independent from the New Zenex, Waldeck or Wimmeria. For these reasons alone the statement of case is so riddled with contradiction and vague and unsubstantiated allegations that a conclusion that no triable cause of action was disclosed in appellants' amended statement of case can be justified.

[23] In canvassing the detailed arguments of both counsel in the present dispute, I am cognizant of the further difficulty as to whether the ruling of the nature of that given by the *court a quo* is appealable. See for example **Zweni v Minister of Law and Order** 1993(1) SA 523(A) 536 B and **Liberty life Association of Africa Ltd v Niselow** (1996) 17 ILJ 673 (LAC) at 676- 680 where **Nugent J** collects the key authorities in this connection. However, given the conclusion to which I have come, it is unnecessary to decide this particular question.

[24] The appeal is dismissed together with costs including those of two counsel.

DAVIS AJA

I agree.

ZONDO JP

I agree.

GOLDSTEIN AJA

For the Appellants:

Gardner Van Niekerk SC

Instructed by J Leslie Smith & Co Inc.

For the Respondents: JJ Gauntlett SC

WG La Grange

Date of Hearing: 21 November 2000

Date of Judgment: 14 December 2000.