IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 2131/08

J 2132/08

J 2133/08

In the matter between:

DICKS CHRISTOPHER JOHANNES **Applicant**

and

SOUTH EAST NODE (PTY) LTD **Respondent**

JUDGMENT

LAGRANGE, J

1. The applicant in the main matters has launched two separate applications in October 2008 for different relief under the Basic Conditions of Employment Act 75 of 1997.

2. The first application is to obtain a certificate of service in terms of section 42 of the BCEA. For reasons which remain unclear this application was filed twice under different case numbers, namely J 2133/08 and J 2131/08

3. Regarding the first claim, the respondents supplied the applicant's attorneys with a copy of the applicant's certificate of service for the period of his employment with the respondent. The respondent queried why the applicants had not used the enforcement mechanisms provided in the BCEA, which enables him to obtain such a document by using the offices of the Department of Labour and its inspectors. The respondents also pointed out that the applicant was employed by an associated

company and not by itself at the time the applicant claims the duty to provide the particulars of employment arose.

4. The second application is for the payment of the overtime pay. The applicant claimed that the respondents had not complied with its obligations in terms of section 20 and section 10 of the BCEA governing the payment of leave pay and overtime respectively. The respondent has opposed both applications.

5. In both cases, the applicant sought a cost order on an attorney and client scale.

6. In June 2010, the applicant filed a supplementary affidavit in which he now essentially relies as his cause of action on a contractual entitlement based on the provisions of sections 4 and 77(3) of the BCEA. The former provides that a basic condition constitutes a term of a contract of employment, subject to certain limitations which do not seem to be relevant here. The latter provision gives this court concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment whether or not a basic condition of employment constitutes a term of the contract.

7. No explanation is provided for the filing of the supplementary affidavit, nor has the applicant sought leave for its introduction into the proceedings.

8. The application before me is an interlocutory one brought by the respondent in the main matter. It seeks to have the supplementary affidavit struck out. The respondent also seeks the setting aside of a document styled by the applicant as a "Tender in Terms of Rule 22A" and served directly on the respondent instead of its attorneys of record, as an irregular proceeding. It further seeks relief in the form of a referral to the Law Society of the applicant attorneys conduct for communicating directly with the respondent and for allegedly creating the impression it acted for the respondent.

9. Only the last part of the relief relating to the punitive cost award is opposed.

10. Rule 7 of the Labour Court Rules makes no provision for the filing of a supplementary affidavit in motion proceedings. The effect of the applicant's supplementary affidavit is to amend its cause of action from one reliant solely on the direct application of sections the BCEA to one based on sections 10,20 and 42 of the BCEA to one reliant on the contractual qualities of basic conditions of employment. As mentioned, no explanation is made for this change of tack on the applicant's part, nor is leave sought from the court for introducing the supplementary affidavit which in effect is akin to an application to amend pleadings and amounts to the introduction of a new cause of action.

Whatever the circumstances are in which this court may admit supplementary affidavits[1], the content of the affidavit is such that the applicant ought to have made a formal application for its admission.

11. In these circumstances, no proper application for the introduction of the supplementary affidavit has been made, nor does the affidavit explain why the applicant is changing his cause of action. The admission of the affidavit in the circumstances has not been justified and is not admitted as part of the record.

12. The applicant's representative sought to argue that in seeking an attorney own client cost order against the applicant's attorneys, the respondent ought to have separately joined the firm as a party to the matter, notwithstanding the provisions of section 162(3) of the Labour Relations Act 66 of 1995 ('the LRA'). Mr Scholtz, who appeared for the applicant, could not explain why the firm would not have had notice of the respondent's intentions in this regard, by virtue of being the applicant's attorneys in the matter on whom the respondent's interlocutory application was served. Mr Beaton, for the respondent, referred to the case of ***Darries v Sheriff, Magistrates Court, Wynberg & Another*** **1998 (3) 34 SCA** in which the Supreme Court of Appeal held an attorney liable for the costs of an application for condonation, without any joinder application having been brought. In any event, Mr Scholtz could not cite any authority for the proposition that his firm ought to have been joined before such an order can be made. In circumstances where the applicant's attorneys of record must have been aware of the order that was sought, I see no reason why they had to be joined as parties to the main litigation.

13. Mr Scholtz also argued that the respondent had filed its opposing affidavit three days late and in the absence of obtaining condonatéon for the late referral it could not oppose itS applications. This is a matter of disput%, as phe respondent dEnies receiving the applica`Ion on the date in question But$cìaims to heöe recåiVud it only three dayr lat r/ It $oes not appg!r to$me in the`circumstances that it w`s necessary for the respondunt t/ apply for condonation.

14. RegarDing the tender document sent to the respondent directly, there is no excuse for conduct of The applicant s attorneys in this regard. Tha rerpondent's attm2ney{ were on record, and the document itself may well have created confusion in the mind of the respondent that its attorneys had tendered an offer to settle the matter. Whether there was professional misconduct by the applicant's attorneys is a matter for the Law Society to consider and it will be referred to it, though it does not form part of the order of this court. However, whether or not it constitutes unethical conduct, such

[1] In parenthesis, it should be noted that the general practice followed in this court is that a supplementary affidavit cannot be introduced without the leave of the court and such leave is normally sought by way of an interlocutory application. For example see ***NASUWU & Others v Pearwood Investments (Pty) Ltd t/a Wolf Security & Another*** **(2009) 30 ILJ 1852 (LC)** at 1859, [32]

correspondence ought to have been served on the respondent's attorneys of record and such conduct should be discouraged. However, it was not a step in the proceedings as such and it is not necessary to declare it an irregular step in the sense that term is usually meant. Even though the applicant does not oppose the relief sought in this regard, it is not necessary for the court to make the ruling sought, even though the conduct was improper in relation to the rules pertaining to service.

Order

15. Accordingly, an order is made in the following terms:
    15.1. The applicant's supplementary affidavit filed on 21 June 2010 is struck out.
    15.2. The applicant's attorneys, Jansen Incorporated, must pay the costs of this application on an attorney own client scale.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 01 February 2011

Date of judgment: 02 February 2011

Appearances:

For the Respondent: Mr R G Beaton instructed by Messrs Wandrag & Marais Inc

For the Applicant: Mr W G Scholtz of Jansens Inc.