



**REPUBLIC OF SOUTH AFRICA**

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: J 579/11

In the matter between:

**PROFFESSOR SOLEY J.T**

**First Applicant**

**DR VAN STADEN S.L**

**Second Applicant**

**PROFFESSOR BOOTH K**

**Third Applicant**

and

**UNIVERSITY OF PRETORIA**

**First Respondent**

**PROFESSOR MADEKUROZWA**

**Second Respondent**

**Heard: 05 December 2012**

**Delivered: 24 December 2012**

**Summary: Interlocutory applications: Application to stay; Application for leave to amend the response to the statement of claim and application for an order to enrol matter for hearing in terms of Rule 6(5)(a) of the Rules of the Labour Court.**

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**JUDGMENT**

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AC BASSON J

## Introduction

- [1] In these (interlocutory) proceedings, the first respondent (hereinafter referred to as “the university”) has instituted an application for leave to amend its statement of defence to the statement of claim that was filed on 8 April 2011 and for an order staying the proceedings in this Court (the Labour Court) under case number J579/2011 pending the final determination of subsequent proceedings instituted by the second respondent (Prof Madekurozwa – hereinafter referred to as “Madekurozwa”) against the university in the North Gauteng High Court.
- [2] In a counter-application, the applicants (Prof Soley, Dr Van Staden and Prof Booth) are seeking an order directing that the matter be enrolled in this Court for hearing in terms of Rule 6(5)(a) of the Rules of the Labour Court. (For convenience, I will continue to refer to the three individual applicants collectively as “the applicants” with the understanding that they are the applicants in the main application pending before this Court.) The applicants argue that true justice will not be served if their case is not enrolled because of further delays resulting from a stay of their matter which is pending before this Court.
- [3] This Court is only called upon to decide on the three interlocutory applications before it. The Court is not called upon to decide the merits of the main application nor is this Court called upon to speculate on what the outcome of the pending High Court application would be. (See hereunder.) I have, however, taken the liberty of making some observations in respect of the prospects of success in the High Court action but have done so strictly in arriving at a decision whether this Court should stay the pending proceedings in the Labour Court pending the outcome of the High Court action instituted by Madekurozwa. These observations remain what they are and this Court is aware of the fact that evidence will be led in the High Court to determine the merits of the action referred to it.

## Background: Labour Court Proceedings

- [4] The three applicants and the second respondent (Mdekurozwa) are employed by the university in its Faculty of Veterinary Science. They are currently lodged in a dispute which essentially centres on certain allegations made by Mdekurozwa claiming (or at the very least insinuating) that the applicants are racists. In terms of proceeding pending before this Court, the applicants in turn lodged a dispute against the university in which they, *inter alia*, allege that the university is discriminating against them on the basis of race. (I will return to their claim in more detail herein below.)
- [5] At the outset, it should be made clear that this Court is not called upon to pronounce on the veracity of the claims of racism made by Mdekurozwa against the applicants nor on the *bona fides* of Mdekurozwa in making these claims in so far as it is necessary to determine whether Mdekurozwa has made a protected disclosure to the university. As already pointed out, this dispute on the merits is still pending before the High Court.
- [6] Very briefly, the facts on which the applicants rely in their statement of claim are as follows: In a letter dated 28 August 2009, Mdekurozwa alleged that Van Staden and other White colleagues have a lack of trust and respect for Black lecturers. She further alleged that Black lecturers were not supported and were patronized by Van Staden and other academic staff of a lesser rank and academic qualifications. She further alleged that Van Staden is a racist because of an incident that took place on 27 August 2009 relating to the loading of Van Staden's power point presentation which Mdekurozwa allegedly did not arrange 10 minutes before the lecture. On 31 August 2009, Van Staden wrote a letter to the Dean of the Faculty of Veterinary Science and gave her account of the events in response to the allegations made by Mdekurozwa. On 11 September 2009, Mdekurozwa in a letter, made further allegations against the three applicants. Mdekurozwa sent this letter to the Transformation Committee, Faculty of Veterinary Science and the Black Veterinary Forum. Mdekurozwa again accused the applicants of being racists. The problem culminated in the filing of grievances, investigations and offers for mediation. On 26 November 2010, the applicants, after exhausting the internal grievance procedures, referred a dispute to conciliation in terms of

the Employment Equity Act<sup>1</sup> ("the EEA"). On 2 December 2010, the university summonsed the applicants to a preliminary investigation into their alleged misconduct and threatened to discipline them. On 8 December 2010, the applicants referred a further dispute because of this threat to discipline them. It is common cause that no disciplinary action was ever instituted against them.

- [7] As already pointed out, on 8 April 2011, the applicants filed a statement of case under the EEA. The applicants state in their statement of claim that the allegations levelled against them by Madekurozwa were untrue and that the allegations constituted racist accusations towards them and towards White academic staff in general. The applicants further claim that the university had unfairly discriminated against them by failing to deal properly- or at all - with their grievance against Madekurozwa. The applicants also seek an order from the Labour Court that the failure by the university to take timeous disciplinary action against Madekurozwa amounts to unfair discrimination against them on the ground of race which is prohibited by the EEA and that such conduct also violates their contracts of employment. The applicants further seek an order compelling the university to pay compensation and/or damages to them in the sum of R 300 000.00 each or the maximum allowable by law under section 50(1)(d) or (e) of the EEA.<sup>2</sup>
- [8] It is common cause that the university only decided to act and institute disciplinary proceedings against Madekurozwa after the statement of claim was served on the university. Such disciplinary proceedings were only instituted on 21 April 2011. By this time a long delay had already occurred and the applicants had to live with the stigma of being branded racists by a colleague.
- [9] On 10 June 2011, the university filed its statement of defence in which it recorded that it had at last instituted disciplinary action against Madekurozwa.

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<sup>1</sup> Act 55 of 1997.

<sup>2</sup> In essence the applicants are seeking an order that Madekurozwa's allegations against the applicants 'are attributable to the First Respondent [the university] and are racist and discriminate against the Applicants on the grounds of race'.

The disciplinary process that has been instituted against Madekurozwa will consider, *inter alia*, whether Madekurozwa has committed misconduct by making false allegations of racism against the applicants. The university further pleads that it has no knowledge as to the truth of Madekurozwa's allegations of racism against the applicants but accepts that to date Madekurozwa has failed to substantiate these allegations or to satisfy the university as to the truth of these allegations of racism. What is of importance is the fact that the university pleads, and also did so in the High Court proceedings (see herein below) that there is, according to the university, no protected disclosure. The university further clearly states that it will proceed with disciplinary action against Madekurozwa in the event the High Court dismisses the action pending before it.

- [10] The disciplinary hearing against Madekurozwa was postponed by the chairperson of the hearing (Adv K Moroka SC) pending the determination of an action to be brought before this Court against the university for protection under the PDA. Madekurozwa (subsequent to the filing of the statement of claim in this Court), however, elected to institute an action for a declaratory order in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>3</sup> (PEPUDA) before the North Gauteng High Court.
- [11] Madekurozwa further did not enter any appearance to defend the Labour Court matter despite the fact that she could have defended the matter by raising the defence of a protected disclosure in this Court. Instead she has elected to approach the North Gauteng for a declaratory order that her disclosure falls within the ambit and scope of the protection afforded by PEPUDA.
- [12] It is further common cause that no order has been granted by this Court interdicting the disciplinary enquiry on the basis that Madekurozwa has made a protected disclosure as contemplated by the Protected Disclosure Act<sup>4</sup>. (I will return to the High Court proceedings herein below.)

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<sup>3</sup> Act 4 of 2000.

<sup>4</sup> Act 26 of 2000.

- [13] The applicants submitted that Madekurozwa is patently participating in dilatory conduct and is engaging in impermissible forum shopping which undermines the dispensing of justice, particularly in this Court. It was further submitted that the university, by seeking an order to stay the proceedings in the Labour Court seeks this Court's stamp of approval for this conduct.
- [14] In August 2011, the applicants submitted a draft pre-trial minute to the university and on 26 August, the applicants' attorneys delivered a notice calling upon the university to attend a pre-trial conference. The notice was ignored and to date the pre-trial minutes remains unsigned. The applicants also submitted that this failure to expeditiously hold a pre-trial conference should weigh heavily against the university in deciding the balance of convenience in the application before this Court as it demonstrates, according to the applicants, that the university is intent on delaying the Labour Court proceedings.
- [15] The present application for leave to amend and to stay the Labour Court proceedings was filed on 14 December 2011.

#### The High Court Application

- [16] On 17 June 2011- after the statement of claim and statement of defence have been served, - Madekurozwa launched an action in the North Gauteng Division of the High Court against the university claiming that the disciplinary proceedings instituted against her constituted an "occupational detriment" in terms of the PDA. She is seeking a declaratory order that the university's institution of disciplinary action against her is unlawful and invalid.<sup>5</sup> She further seeks an order declaring that the allegations contained in the letter, including the allegations of racism against the applicants were made in good faith and in the reasonable believe of their truthfulness. She alleged that the information contained in the letter shows or tends to show unfair discrimination as contemplated by the PEPUDA and consequently the information fall within the ambit and scope of the protection afforded by PEPUDA.

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<sup>5</sup>At paragraph [1] of the High Court's judgment.

- [17] The university defended the High Court action and stated that, should Madekurozwa be unsuccessful, it intends to pursue the disciplinary proceedings against Madekurozwa. Madekurozwa did not cite the applicants as defendants in the action before the High Court.
- [18] The university filed a third party notice and joined the applicants (Prof Soley, Dr van Staden and Prof Booth) as third parties in the High Court action and sought a stay of those proceedings pending finalisation of the Labour Court proceedings, alternatively a direction to transfer the matter to the Labour Court. The third parties (the applicants) filed a plea and raised *inter alia* a special plea of *lis alibi pendens*.
- [19] It was agreed by the parties that the action would be postponed *sine die* with no order as to costs and that only the special plea would be argued before the High Court.
- [20] In support of this plea, it was, *inter alia*, claimed that the facts and allegations that form the subject matter of the matter before the High Court were essentially the same as that which would be raised before the Labour Court.
- [21] On 6 September 2012, the High Court delivered its judgment and declined to grant either order ruling that the matter was *not lis pendens*:
- (i) Firstly, with reference to the requisites of the plea of *lis alibi pendens*, the High Court pointed out that the plaintiff, Madekurozwa, did not cite the third parties (the three applicants in the pending proceedings in the Labour Court) in the action in the High Court and that in the premises no *lis* existed between the plaintiff (Madekurozwa) and the third parties (the three applicants).
  - (ii) Secondly, and in the alternative, the Court held that the litigation in the Labour Court and the High Court is not based on the same cause of action. Moreover, in the Labour Court, the applicants seek no relief against Madekurozwa: She is merely cited as a result of her direct and substantial interest and in consequence of the fact that the orders sought may affect her rights. The letter written by Madekurozwa is only

referred to in the pending Labour Court matter in order to sustain a cause of action against the university.

- [22] The High Court accordingly dismissed the special plea of *lis alibi pendens*. The result of this order is that the action brought in the High Court by Madekurozwa will proceed on the merits at a time yet to be allocated.
- [23] The High Court further accepted the arguments on behalf of both the university and Madekurozwa aimed at resisting the applicants' prayers for a stay of the High Court proceedings or their transfer to the Labour Court.

#### Interlocutory applications before this Court

- [24] The university argued that it is only logically that the application for leave to amend should be heard first as it contains the application to stay and the application to amend its statement of response. As already pointed out, the university is seeking an order to stay the Labour Court proceedings pending the final determination of Madekurozwa's High Court action and secondly an order granting it leave to amend its response to the applicants' statement of claim in accordance with its notice of intention to amend dated 26 October 2011. As will appear more fully herein below, I have decided to dismiss the application for leave to amend. Consequently, the application for leave to stay should also be dismissed. I have, however, nonetheless decided to deal with the application to stay separately although I have dismissed the application for leave to amend.
- [25] At the outset, I should point out that Mr Freund on behalf of the university did not aggressively pursue the point that the Labour Court proceedings should be stayed. He was, however, adamant that this Court should allow it to amend its pleadings. I will now proceed to deal with the application to stay first.

#### Application to stay the Labour Court proceedings

- [26] At the outset, it is accepted that the applicants have a statutory right to come before this Court and have their day in Court. It is also accepted that an integral part of this right is the principle that the statutory dispute resolution

structure provided for in the Labour Relations Act 66 of 1995 is aimed at resolving labour dispute expeditiously and without undue delay. The dispute that is before this Court falls within the exclusive jurisdiction of this Court. Almost 21 months have now passed and the applicants are nowhere near exercising their statutory right to have their dispute placed before this Court without unnecessary and unreasonable delays.

- [27] I am of the view that the order that the university is seeking will only result in a further delay in the proceedings pending before this Court: The university is seeking an order to stay the Labour Court proceedings “pending the final determination” of the High Court proceedings. Needless to say that the present legal dispensation allows for appeals to at least three possible forums once the High Court has heard the matter. A stay may therefore potentially result in an indefinite postponement of the applicants’ case pending before this Court. In order to avoid further delays, the applicants are seeking an order directing that the matter be enrolled for hearing in terms of Rule 6(5)(a) of the Rules of the Labour Court (the third interlocutory application. I will deal with that application herein below).
- [28] It was submitted on behalf of the university that the High Court’s judgment may dispose of a number of issues pending before the Labour Court. It was further submitted that there will be a material overlap between the issues in the High Court proceedings and the issues in the Labour Court proceedings. The main issue, so it was submitted, will be whether Madekurozwa’s allegations of racism against the applicants were true or were at least made in good faith and, if so, whether the PDA prohibited the university from taking disciplinary steps against her. It was therefore submitted that this will lead to a duplication in processes which is not in the interest of justice. More in particular, it was submitted that the same evidence will be led before the High Court and the Labour Court in respect of whether a protected disclosure was made. Lastly it was submitted that a finding by the High Court that Madekurozwa made a protected disclosure and consequently that the failure of the university to hold a disciplinary enquiry will be unlawful, will materially impact on the proceedings in this Court.

[29] I do not agree with these submissions for the following reasons:

- (i) It is common cause on the facts before the Labour Court that Madekurozwa did not make a protected disclosure. Madekurozwa has, by not entering opposition to the Labour Court matter, therefore effectively waived her right to defend the pending proceedings before the Labour Court. There exists therefore no reason to wait for a determination by the High Court about whether a protected disclosure has been made in light of the fact that on the pleadings before this Court, it is common cause that no protected disclosure has been made.
- (ii) The issues pending in the High Court and those pending in the Labour Court are not the same.<sup>6</sup> The causes of actions are further based on two different actions. The plea of *lis pendens* failed for that reason in the High Court. I am in agreement that it must logically follow that this application must fail for the same reason.<sup>7</sup> Furthermore, there is no *lis*

<sup>6</sup> The Court in *Nestlé (SA) (Pty) Ltd v Mars Incorporated* [2001] 4 All SA 315 (A) accepted that a duplication of proceedings is undesirable: '[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case), the one operating consensually and the other by force of statute, each having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be inquiring into and ruling upon different matters, and neither will be capable of ruling authoritatively on the issue that falls within the competence of the other.'

<sup>7</sup> See in this regard: *Fidelity Guards Holdings (Pty) Ltd v PTWU and Others* [1998] 10 BLLR 995 (LAC): '[6] Basson J thus found that the three requirements of *res judicata* were met in so far as the second and third collective agreements were concerned. In regard to the first collective agreement, which had not been relied upon by the appellant in the application before Revelas J, Basson J held that that agreement "... is 'new' in the sense that it did not form a cause of action in the prior proceedings referred to above. In the event, the third requirement for the *res judicata* defence to succeed is not met and the applicant may bring an application based on this 'collective agreement' ". The question in this appeal is whether that finding is correct.

[7] The most oft-quoted authority for the requirements of the defence of *res judicata* is Voet *Commentarius ad Pandectas* 44.2.3:

"Under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of those requisites is wanting, the exception fails" (*Bertram v Wood* (1883) 10 SC 177 at 181).

It is the requirement of "the same cause of action" which requires further consideration. The cause of action is the same whenever the same matter is in issue: *Wolfaardt v Colonial Government* (1899) 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment and is relevant to the relief sought: *Horowitz v Brock and others* 1988 (2) SA 160 (A) at 179F–H. The rule was explained in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562D–E as follows:

in the Labour Court proceedings between the applicants and Madekurozwa and no relief is sought against her. Consequently, it follows that a finding by either court will not render that in the other *res judicata*. There is therefore no basis for a stay of the present proceedings pending the High Court's ruling on Madekurozwa's claim. Furthermore, the applicants have appealed the costs order alone and in the absence of abandonment thereof the university is bound by that judgment. It is not for this Court to revisit the issue as that is now *res judicata*.

- (iii) The claim against the university instituted by the applicants in this matter is based on the EEA and the contract of employment. The Labour Court has exclusive jurisdiction over a dispute arising from the EEA. Furthermore, the High Court does not have equitable jurisdiction as the Labour Court has.<sup>8</sup> More in particular, one of the causes of action is the contention that the university is vicariously liable and responsible in terms of section 60(3) of the EEA for the racist comments made by Madekurozwa in terms of the complaints raised by

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"Where, for instance, the *causa or quaestio* is ownership, the claimant, if his case is that he has the ownership through inheritance, would not, according to *Dig* 44.2.11 para 5, be instituting a new claim by alleging a donation, for no matter in what he may have acquired the ownership, his right to it would be finally disposed of in the first action. According to *Dig* 44.2.27, regard must be had to the immediate cause of action, and the reason why a claimant may think it is good cause, is of no consequence."

The reason for the rule is to prevent difficulties arising from discordant or mutually contradictory decisions due to the same action being aired more than once in different judicial proceedings: Voet 44.2.1. The object of the rule is that of public policy which requires that there should be an end to litigation and that a litigant should not be harassed twice upon the same cause: *Boshoff v Union Government* 1932 TPD 345 at 350; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A–E. The ratio underlying the rule is that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause: *Custom Credit Corporation (Pty) Ltd v Shembe* at 472A; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F–G. The strict common-law requirements for the defence of *res judicata* should not be taken literally and in all cases applied as inflexible rules. There is room for the adaptation and extension of the rule. Every case has to be decided on its own facts: *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 669F–I."

<sup>8</sup> See *Transman v SAPO* [2005] 8 BLLR 834 (LC): "[15] The third objection raised was a defence of *lis pendens* based on the application pending in the High Court. The relief claimed in the High Court and in this application are different even though similar issues would be traversed. But the Labour Court exercises in addition an equity jurisdiction. The considerations that apply in the Labour Court are different from those taken into account by the High Court. Relevance and confidentiality may be headings under which both courts may consider an application for disclosure of information. However, its relevance to protecting socio-economic rights, such as fair labour practices, may differ from the relevance of information in a purely commercial, contractual dispute. In my view, therefore the defence of *lis pendens* must fail'.

her on 26 August 2009 and 11 September 2009. Madekurozwa has not sought to declare that a protected disclosure has been made. Moreover, it makes no sense to stay an action in the Labour Court on an issue over which the High Court has no jurisdiction.

- (iv) The applicants also contended that the pending *lis* before this Court came first. This is borne out by the facts.
- (v) One of the fundamental complaints in the applicants' statement of claim is that the university's delay in dealing with the complaints against Madekurozwa only served to perpetuate their suffering as a result of the stigma attached to them being branded racists. I am in agreement that delaying the pending matter before the Labour Court will further undermine the very purpose of the dispute pending before this Court and which forms the basis of the dispute before this Court.

[31] There is, in my view, no reason to stay these proceedings in light of these facts.

### Legal Principles

[32] The Labour Court has inherent jurisdiction to prevent abuse of their processes by staying proceedings in certain circumstances. The power to do so will be exercised sparingly and only in exceptional circumstances.<sup>9</sup> In this regard, the Court has the same inherent powers that a High Court has.<sup>10</sup> The authors Herbstein and Van Winsen<sup>11</sup> point out that '[s]trong grounds must be shown to justify a court in staying an action, for "the courts of law are open to all, and it

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<sup>9</sup> See in this regard: Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5ed vol 1 (2009) chapter 10 page 306: 'South African High Courts possess inherent jurisdiction to prevent abuse of their process by staying proceedings in certain circumstances, but the power to do so will be exercised sparingly and only in exceptional cases. This should be done with very great caution, and only in clear cases. Proceedings will be stayed when they are vexatious or frivolous or when their continuance, in all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties, as, for example, when a person brings proceedings without having paid costs that have been incurred in former proceedings in which the same subject-matter was in dispute.' [footnote omitted]

<sup>10</sup> Section 151(2) of the LRA.

<sup>11</sup> See in this regard: Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* chapter 10 page 306. [footnote omitted]

is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action”.

- [33] Some of these grounds include where the action is frivolous or vexatious, the action is *lis pendens*; the process is an abuse of court; the action is hopeless or impossible; the dispute is subject to arbitration, criminal proceedings are pending, and where previous costs are unpaid.<sup>12</sup> None of these circumstances apply in this matter. The application to stay is therefore dismissed.

#### Application to amend

- [34] The university gave notice of an intention to introduce a plea *in limine* to the effect that the Labour Court proceedings should be stayed until after the final determination of the High Court proceedings and to introduce a new paragraph 102A into the university's reply which will result in the introduction of a new paragraph 1A.4. The proposed amendment seeks to introduce as an alternative plea the contention that the applicants' Labour Court claim falls to be dismissed because, on the basis alleged by Madekurozwa in the High Court proceedings, the university is precluded by the PDA from taking disciplinary action against her. The proposed amendment reads as follows:

'In the alternative to what has been pleaded by the First Respondent in the High Court proceedings, in the alternative to all its other defences in the present proceedings, and without prejudice to its right to pursue the disciplinary proceedings which it has initiated against the Second Respondent should it finally be determined by a competent court that it is legally entitled to do so, the First Respondent pleads that the Applicants' claim in the present proceedings falls to be dismissed because, on the basis alleged by the Second Respondent is precluded by the PDA from taking disciplinary steps against her.'

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<sup>12</sup>The full bench of the Western Cape High Court in *Belmont House (Pty) Ltd v Gore and Another* NNO 2011 (6) SA 173 (WCC) likewise held that although the Courts lack a general equity-based discretion to stay Court proceedings they do have the discretion to grant a stay where the proceedings in question are either vexatious or amount to an abuse of the process of the court. In particular, a Court will not, in the absence of a viable defence of *lis alibi pendens*, on equitable grounds suspend an eviction order pending the finalisation of related matters.

[35] The applicants opposed the proposed amendment and essentially base their objection on the following:

- (i) The proposed amendment “seeks to withdraw significant admissions made on the pleadings before this Honourable Court” and
- (ii) The application for leave to amend “is not *bona fide*”.

[36] The university argues that these two submissions have no substance and that leave to amend should be granted. In this regard, the Court was referred to the fact that it is a tendency of our courts to allow amendments where this can be done without prejudice to the other party. (See in this regard *in Moolman v Estate Moolman and Another*.<sup>13</sup>)

[37] The same principle applies where the amendment seeks to withdraw an admission previously made, but with the proviso that a full explanation must be tendered to show *bona fides*. (See in this regard: *President-Versekeringsmaatskappy Bpk v Moodley*.<sup>14</sup>)

[38] The university argued that a reasonable explanation has been given in the Founding Affidavit as to the circumstances giving rise to the application to amend. It was further argued that the applicants will not suffer irreparable

<sup>13</sup> 1927 CPD 27 at 29: ‘...the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed.’

<sup>14</sup> 1964 (4) SA 109 (T) at 110F-111A: ‘Generally the Court leans towards the granting of amendments. WESSELS, J., expressed it thus in *Whittaker v Roos and Another*, 1911 T.P.D. 1092 at pp. 1102 - 3: “This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. We are not going to give a decision upon what we know to be wrong facts.”

There are two guiding rules to be distilled from the various authorities:

1. There must have been a *bona fide* mistake on the part of the party seeking to amend;
2. the amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs.

It has been suggested, especially in view of the decision in *Rishton v Rishton*, 1912 T.P.D. 718, that an amendment involving a withdrawal of an admission is to be put on a different basis. This is not so. The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the Court of the *bona fides* thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence.

I shall apply the tests of *bona fides* and absence of prejudice to the present facts. The applicant must first convince the Court of his *bona fides*, and when he has done so, the respondent can still stave off the amendment by showing prejudice which cannot be cured by an order as to costs.’

harm – particularly not the harm that it is alleged they will suffer. It therefore argued that there exists no proper basis on which the university should be precluded from including this point as a point *in limine*.

- [39] The applicants argued that the application for leave to amend is not *bona fide* because if it was, Bakker (the attorney of record) would have signed the pre-trial minute timeously. It is further submitted that the application for leave to amend is simply designed to further frustrate the applicants having their day in court and to delay the proceedings.
- [40] In respect of *bona fides*, the university submitted that the application to stay the proceedings pending the outcome of the High Court's application is not motivated to prolong litigation, but motivated by its view that it would be inappropriate for the two different courts to adjudicate the same question with the attendant risk of contradictory findings. Furthermore, Bakker's reasons for not having signed the pre-trial minutes are set out in the replying affidavit. The university, so it is submitted, is *bona fide* and that the amendment is not aimed at withdrawing admissions.
- [40] From the pleadings before this Court, it is common cause that Madekurozwa did not make a protected disclosure. I am in agreement that no purpose would be served to allow the university to raise a defence at this stage which has no merit in law. As already pointed out, Madekurozwa has made a deliberate choice not to defend the proceedings pending before the Labour Court and to raise the issue of a protected disclosure. I am in agreement with the submission that to permit the amendment would allow the university to introduce a defence which is contrary to the admitted facts and, in my view, in any event premature. In the event the application to amend is dismissed

#### Counter-application

- [41] In their counter-application, the applicants seeks an order directing that the matter be enrolled for hearing in terms of Rule 6(5)(a) of the Rules of the Labour Court. I am in agreement that justice demands that the applicants'

claim should not be further delayed.<sup>15</sup> This matter has been dragging on for years and it is in the interests of justice that finality should be reached. The counter-application is therefore granted.

[42] In order to expedite the pending Labour Court's matter, the parties are ordered to serve and file their signed pre-trial minutes on or before Friday 11 February 2013.

### Costs

[43] In respect of costs, I am of the view that costs should follow the result.

### Order

[44] In the event, the following order is made.

44.1 The Application to Stay the proceedings in the Labour Court pending the outcome of the action pending in the High Court is dismissed.

44.2 The application for Leave to Amend first respondent's Statement of Response is dismissed.

44.3 The first respondent to pay the applicants' costs in respect of the Application to Stay and the Application for Leave to Amend which costs include the costs of Senior Counsel.

44.4 The applicants' counter application is granted with costs.

44.5 The parties are ordered to serve and file their signed pre-trial minute on or before Friday 11 February 2013.

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<sup>15</sup> See in this regard *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) where the Court emphasised the principle that labour disputes must be resolved without unreasonable delay: '[44] The only tension in relation to reconciling s 145 of the LRA with the provisions of PAJA, so the Supreme Court of Appeal reasoned, was in relation to time-limits. Section 145 of the LRA provides that a party may apply to set aside an arbitration award within six weeks of the date that the award was served on him or her. PAJA, on the other hand, requires that proceedings for judicial review be instituted without unreasonable delay and in any event not later than 180 days after exhaustion of internal remedies or after the person concerned became aware of the action involved and the reasons for it. The Supreme Court of Appeal relying on its decision and those of this court emphasized that labour disputes require speedy resolution and the legislature, in prescribing the time period of six weeks in s 145(1) of the LRA, gave clear effect to this imperative. Thus, according to the court, it may be expected that the legislature would legislate different time periods in different fields and that did not militate against its earlier conclusions

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AC BASSON, J

Judge of the Labour Court

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

Advocate J G Grogan SC

Instructed by Du Toit Attorneys

FOR THE RESPONDENT:

Advocate A J Fruend SC

Instructed by Anton Bakker Attorneys

LABOUR COURT