



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1280/09

In the matter between:

SOUTH AFRICAN TRANSPORT

AND ALLIED WORKERS UNION

Applicant

W MASINA AND 42 OTHERS

Second Applicant

and

COLLETT ARMED SECURITY SERVICES

Respondent

Heard: 30 April 2013

Delivered: 02 May 2013

Summary: Application to amend. Principles governing application to amend- applicant to show no injustice, no mala fide, no prejudice. Whether prejudice can be addressed by cost order. Court has powers to consider matters incidental to its jurisdiction which are labour related. Agreement between the

parties that the Court should sit as arbitrator in terms of section 158 (2) (b) of the LRA of no force and effect.

JUDGMENT

MOLAHLEHI J

- [1] This is an interlocutory application in terms of which the respondent seeks to amend its statement of opposition in which it had admitted that the strike action by the applicants was protected. The respondent also applied to have the matter stand down for the following day 30 April 2013 or be postponed *sine die* as its main witness was not available. The respondent tendered costs.
- [2] The hearing stood down for the following day, 30 April 2013 and the applicants were granted leave to file their answer to the respondent's application to amend its pleadings by 17H00 on 29 April 2013. And the respondent was to file its reply in the morning of 30 April 2013.
- [3] The applicants' attorney, Mr Daniels indicated that the applicants would be ready to proceed if the respondent's application to amend was unsuccessful. He indicated that the applicants would however not be ready to proceed if the application to amend was granted. Mr Vetten, counsel for the respondent indicated that the respondent would consider its position whether or not to proceed once the decision regarding its application to amend was made.
- [4] The main matter in this case relates to a dispute concerning an alleged automatically unfair dismissal arising from the strike action which was

undertaken by the applicants. The applicants in their statement of case contend that the dismissal was automatically unfair because the respondent dismissed them for participating in a protected strike action. The statement of case launching the main action was filed with the Court on 26 November 2009. In relation to the nature of the strike action the applicants had embarked upon the applicants specifically state at paragraph 3.1 of the statement of case that:

“3.1.1 The individual applicants were dismissed by the respondent for engaging in a protected strike action . . .”

- [5] In its response to the above paragraph the respondent states in statement of opposition, which was filed on 11 December 2009, that:

“22.2 Save to admit the dismissal the Respondent state that the Applicants were dismissed for engaging in misconduct.”

- [6] And at paragraph 25 of its statement of opposition the respondent states that:

‘The allegations contained herein are admitted and the Respondents states that it was not required from the Respondents to issue an ultimatum as the Applicants were not dismissed for alleged engagement in a strike, but their misconduct.’

- [7] On 14 November 2012, the parties filed their pre-trial minutes wherein they recorded amongst others the following as common cause facts:

‘2.11 On 19 August 2009, the respondent met with the union . . .

2.12 Later that same day, the union sent a 48 hour strike notice to the respondent, regarding the rotation.

2.13 On 20 August 2009, the union sent a further letter to the respondent notifying it of its members' intention of embarking on a protected strike commencing on 22 August.

2.14 On 22 August 2009, the union's members embarked on protected strike action.'

[8] The pre-trial minutes further states that on 1 September 2009 the respondent succeeded in interdicting misconduct during the strike action.

[9] Concerning the issue to be determined by the Court the pre-trial minutes states the issues to be the following:

'4.1 Whether the dismissals of the individual applicants were for reasons related to misconduct, as alleged by the respondent or for their participating in a protected strike, as alleged by the applicants . . .'

The application to amend

[10] As indicated above the respondent is seeking to amend its statement of opposition to the applicants' statement of case. The respondent specifically seeks to amend its admission that the applicants' strike was protected. The amendment which the respondent wishes to introduce is to the effect that the applicants were dismissed for allegedly participating in an illegal strike.

[11] The deponent to the founding affidavit in this application states that when preparing the response the applicants' statement of case he erroneously

admitted that the strike was protected under the law. In this respect the respondent seeks leave to amend paragraph 18 of its opposition to the applicants' statement of case, (this would include paragraph 2.14 of the pre-trial minutes) for it to read as follows:

'Save to deny that the strike action embarked upon on 22 August 2009 was protected, the allegations contained herein are admitted.'

- [12] In support of its application to amend its papers the respondent contends that it was always its intention to dispute the legality of the strike embarked upon by the applicants.
- [13] It was argued on behalf of the respondent that but for denying that the respondent committed an error, and that the application was *mala fide*, the applicants have not pleaded prejudice in the event the application for the amendment of the statement of opposition was to be granted. It was also argued in this respect that any prejudice that the applicants may suffer can be addressed through a costs order.
- [14] In relation to the concession made about the legality of the strike, it was argued on behalf of the respondent that the error was based on the legal principle.
- [15] The respondent contends that it had from the beginning challenged the legality of the strike. In this respect the respondent contends that the issue that gave rise to the strike was the rotation of the employees, which was resolved in terms of the settlement agreement dated 14 August 2009. The referral which was made on 17 August 2009, by the applicants was therefore

invalid because at that stage the parties had settled the matter by agreeing to a meeting.

[16] The respondent further contended that the strike was unprotected because the dispute upon which the applicants relied on in embarking on the strike relates to refusal to bargaining in terms of section 64 (2) of the Labour Relations Act which requires an advisory award before employees can be entitled to embark on a protected strike.

[17] It was for the above reasons that it was argued on behalf of the respondent that there is a need to ventilate the issues in order to come to a fair and reasonable conclusion as to the application to amend.

The legal principles governing an amendment

[18] It is trite that the Court has a discretion to exercise when considering an application to amend pleadings. The factors which the Court will take into account in considering whether to grant an application to amend pleadings include amongst others: (a) is the application mala fide; (b) will the granting or refusal amount to an injustice (c) will the granting of the amendment prejudice the other party and; (d) can prejudice that may result be cured by a cost order. In a case involving a withdrawal of an admission made in the pleadings, the Court will consider whether a full explanation of the circumstances in which the admission was made and the reason for seeking its withdrawal.¹

¹ See Transport & Allied Workers Union & another v SA Airways (Pty) Ltd (2010) 31 ILJ 1938 (LC). In Moolman v Estate Moolman & another 1927 CPD 27 at 29, where the court

[19] In *Twani and Others v Premier for the Province of the Eastern Cape and Others*,² the Court held that:

“[20] The following principles applicable to the question whether an amendment which is opposed should be granted may be recorded. The Court has the greatest latitude in granting amendments and it is very necessary that that be so. The object of the Court is to do justice between the parties. Court proceedings are not a game in which, if some mistake is made, the forfeit is claimed. Subject to what follows, the general approach of the Court is to grant the amendment in order to promote the proper ventilation of the dispute between the parties and to have the true issues between them the subject of decision. An amendment is, however, not to be had merely for the asking; some explanation therefore must be offered. This is especially so where the proposed amendment involves the withdrawal of an admission and the Court will generally require to have before it a satisfactory explanation of the circumstances

held that: '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 party 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.' And in *MacDuff & Co v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309, the court held that: 'However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.'

² (460/99) [2008] ZAECHC 169.

in which the admission was made and the reasons for seeking to withdraw it. The explanation offered must demonstrate the bona fides of the applicant. The applicant must show that prima facie the amendment sought discloses “something deserving of consideration, a triable issue”. The amendment must not cause prejudice to the other side which cannot be met by a postponement and/or an order for costs.’ (footnotes left out).

Evaluation

[20] The application to amend and withdraw the concession, in the present matter, was made by the respondent in the context of the preparation for the trial and more importantly in the pre-trial minutes. The pre-trial minutes is an outcome of the pre-trial conference conducted by the attorneys of both parties.

[21] In the amendment the respondent seeks to withdraw its admission that the applicants’ strike was protected. The object of the amendment sought is to record that the strike was unprotected. In this regard the application has to be considered within the context of the effect and object of the pre-trial conference. The object of pre-trial minutes is set out in *CEPPWAWU v CTP Ltd and Another*,³ in the following terms:

“[103] In *MEC for Economic Affairs, Environmental & Tourism, Eastern Cape v Kruizenga and Another (Kruizenga)*, the SCA said the following about the role and importance of pre-trial

³ *CEPPWAWU v CTP Ltd and Another* [2013] 4 BLLR 378 (LC)

conferences and the significance of admissions of fact made in the course thereof:

'The rule (ie rule 37) was introduced to shorten the length of trials, to facilitate settlement between the parties, narrow issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning a number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of the pre-trial conference merely signed either by a party or his or her representatives. Rule 37 is thus of critical importance in the litigation process.'

[22] It is trite that the parties are generally bound by the pleadings and the concessions made therein.⁴ The effects and the consequences of a pre-trial conference are set out in *Filta-Matix (Pty) Ltd v Feudenberg and Others*,⁵ as follows:

'To allow a party, without special circumstances, to resile in from an agreement deliberately reached at the pre-trial conference would be to negate the object of rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding.' (footnotes omitted).

⁴ See *Price No v Allied –JBS Building Society* [1980] (30) SA 874 (AD).

⁵ 1998 (1) SA 606 (SCA) at 614 para C-D

- [23] It is clear from the above authorities that the contents of the pre-trial minutes are binding on the parties. A party can escape the binding effect of the pre-trial minutes if the other party consent thereto or if the Court was to exercise its discretion in favour of allowing the amendment of the pre-trial minutes. As indicated earlier the Court will in general grant permission to amend a pre-trial minutes if justice between the parties so dictates.
- [24] In the present instance the key issue for consideration is whether the respondent has provided a satisfactory explanation for the amendment. The duty of the respondent to provide a satisfactory explanation is even heavier when regard is had to the fact that the object of the amendment is to withdraw a crucial admission that the strike in which the applicants participated in was protected.
- [25] In my view, the respondent has failed to make out a case providing a basis for granting the amendment.
- [26] Mr Vetten for the respondent disagreed with Mr Daniels that the error which the respondent says its attorney made was repeated throughout the pleadings. He argued that the error made was perpetual rather than repeated. In other words if one accepts his analysis of the nature of the error it would mean that the error did not occur only in the pre-trial minutes, but also throughout the pleadings in the matter. Accepting this analysis the point is that there is no explanation why the error made is "perpetual."
- [27] It is apparent that at some point in the history of the dispute there was a disagreement between the parties as to the nature of the strike. This is more

so when regard is had to the two urgent interdicts which the respondent lodged before this Court. In one of the applications to interdict the strike which was brought under case number J1873/09, which was heard on the 1 September 2009, the respondent sought to interdict the strike on the basis that it was unprotected. The applicant was unsuccessful in showing that the strike action was unprotected.

[28] The other case where in the respondent sought to interdict the strike on the basis that it was unprotected and that the conduct of the applicants in the furtherance thereof was unlawful, was filed under case number J1808/09. That application was also unsuccessful. It again means that the respondent had failed to show that the strike was unprotected.

[29] It follows from the above that the two applications do not assist nor provide any explanation as to the alleged error which the respondent seeks to rely on in seeking the amendment. All what the two cases show when contrasted with the pleadings is that the stand which the respondent took before the applicants declared an unfair dismissal dispute was that the strike was unprotected. The stand taken by the respondent leading to and during the strike change in the course of the engagement with the applicants in the process of preparing for trial. The same applies to the two letters which the respondent addressed to the applicants on 20 August 2009. In one of the letters the respondent's attorneys advised the applicants that their notice of intention to embark on the strike was defective because it did not comply with the provisions of section 64 (1) of the Labour Relations Act and in the other letter, the applicants were advised that their planned strike action at the time

was unprotected. The same applies to the ultimatum which the respondent issued on 1 September 2009.

[30] The concession that the strike was protected runs throughout the pleadings or to use the words of the respondents counsel is perpetual throughout the pleadings. The concession is more importantly recorded in the pre-trial minutes which serves not only to narrow the issues but also serves as an agreement between the parties which the Court is enjoined to uphold unless there are good reasons not to do so.

[31] In short what the respondent has explained is the stand it took prior to the commencement of the litigation about the alleged unfair dismissal dispute. The facts surrounding the stand which the respondent took prior to the commencement of the litigation does not provide any explanation regarding the alleged error which the respondent claims to have made.

[32] In light of the above reasons, I am of the view that the respondent's application stands to fail. The respondent's application further stands to fail because the respondent has failed to make out a case that the applicant would not suffer prejudice if leave to amend was to be granted. I do not agree with Mr Vetten that it was for the applicant to make out a case of prejudice.

[33] As concerning costs, it was argued on behalf of the applicants that consideration should be given to awarding punitive costs. In my view, whilst I see no reason why costs should not follow the results, I am not persuaded that the facts and the circumstances of this case support the contention for a punitive costs order. It is also my view, taking into account the circumstances

of this case that the costs should include the wasted cost of 29 April 2013. This is the case notwithstanding the fact that the respondents were granted leave to file this answer. The leave to file an answer granted to the respondent was occasioned by the late filing of the application to amend.

[34] The other issue that arose in this matter concerns the agreement recorded in the pre-trial minutes that the Court shall in terms of section 158 (2) (b) sit as an arbitrator. Section 158 (2) (b) of the LRA reads as follows:

- (2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-
 - (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

[35] The agreement is based on dual causes of action arising from the facts in this matter. The legal representatives agreed that the Court was not bound by the agreement and that on the proper reading of section 158 (2) of the LRA, the Court has a discretion whether to sit as an arbitrator. The Court will sit as an arbitrator when it is expedient for it and not at the expediency of the parties to do so.

[36] In my view the fact that certain aspects of the case does not fall within the jurisdiction of the Court does not mean that the Court lacks jurisdiction. The broad principle governing the jurisdiction is that the Labour Court has power to deal with all employment related matters that fall within its jurisdiction and

matters that are incidental thereto. It is therefore my view, that where the Court is dealing with strike related conduct which will in general confer jurisdiction on the Court, and the Court should be able entertain other issue that may arise in that context to avoid piecemeal approach to a dispute resolution. Mlambo J as he then was, put it succinctly and correctly in *NEHAWU v University of Cape Town*⁶ when he said:

'In my view it is unnecessarily restrictive to interpret the Act in a way that excludes matters that are incidental to the relationship between employer and employee from the processes of the LRA'.

[37] It is also my view that it is for the trial Court to determine, once all the facts have been placed before it, whether it would be expedient to deal with matters that would ordinarily fall within the jurisdiction of the CCMA or the Bargaining Council if those matters are incidental to the main cause of action. I need to pause and indicate that different consideration would apply in a case where the main cause of action is based on issues that fall within the jurisdiction of the CCMA or the Bargaining Council⁷. It is in those kind of cases where the provisions of section 158 (2) (b) of the LRA becomes relevant. In other words if it becomes apparent to the Court that the dispute ought to have been referred to arbitration the Court may if it deems expedient to do so, seek the consent of the parties that it continues with the proceedings but convert them

⁶ (2000) 7 BLLR 819 (LC) at para H-I

⁷ Section 191 of the Labour Relations Act of 1995 provides as follows: **Disputes about unfair**

dismissals and unfair labour practices - If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to- 1. a council, if the parties to the dispute fall within the registered scope of that council; or- 2. the Commission, if no council has jurisdiction.

into arbitration proceedings. The process of initiating the “conversion” from adjudication to arbitration vests with the Court and not the parties.

[38] In my view it is not for the parties to agree that the Court should sit as an arbitrator but it is for the Court once it finds that it is expedient to do so, and the matter must have already been referred to the Court.

Order

[35] In the premises, the following order is made:

1. The agreement between the parties that the Court should sit as an arbitrator is declared to be of no force and effect.
2. The respondent's application to amend its statement of defence is dismissed with costs including the costs of matter standing down on 29 April 2013.
3. The main action is postponed to 2 September 2013, with costs on attorney and client scale, to be paid by the respondent.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr R Daniels of Cheadle Thompson & Haysom

For the Respondent: Adv Vetten instructed by Makhafola & Verster Attorneys

LABOUR COURT