



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JS 988/2011

**In the matter between –
JABULANE KHUMALO**

Applicant

And

MSCP TRANSPORT CC

Respondent

Heard: 21 May 2013

Delivered: 14 June 2013

Summary: Application to amend pleadings. Principles governing waiver by conduct.

JUDGMENT

MOLAHLEHI .J

- [1] This is an opposed application to amend the statement of case. The application was filed after the parties had filed their pre-trial minute and the

matter was ready for trial. The application is brought in the context where there have been protracted delays in bringing the matter to finality.

- [2] The specific details of the proposed amendment are set out in the application. In essence the applicant seeks to amend his statement of claim to include therein the allegation that his dismissal was automatically unfair because the disciplinary proceedings instituted against him was consequent to him indicating the intention to report to the authorities the respondent's failure to comply with the labour laws including alleged failure to comply with tax and other laws of South Africa.
- [3] The respondent opposes the application on a number of grounds which are largely informed by the history of the matter. The history of the matter dates back to 28 July 2011 when a default arbitration award was made by the National Bargaining Council Road Freight and Logistic Industry (the bargaining council). The default arbitration award which was made in favour of the applicant was subsequently rescinded at the instance of the respondent. It is apparent from the reading of the arbitration award which is attached to the pleadings that the issue which the arbitrator had to determine was the alleged substantive and procedural unfairness of the dismissal. In other words the issue of automatically unfair dismissal was not raised.
- [4] Subsequent to the rescission of the default arbitration award, the arbitration hearing was rescheduled for 27 October 2011. At that hearing the applicant apparently raised the issue of automatically unfair dismissal and it was for that reason that the arbitrator ruled that the Bargaining Council did not have jurisdiction and it was then that the matter was referred to this Court.

- [5] Once the matter was referred for adjudication the parties agreed to hold a pre-trial conference and that was held on 25 January 2012. At the pre-trial conference the respondent's attorney pointed out to the applicant that his statement of case was defective. The applicant having insisted in proceeding with the process, the matter was then placed before Cele J for a pre-trial conference. At the hearing the Honourable Judge directed that the applicant be assisted by *pro bono* attorneys.
- [6] On 28 February 2012 the applicant filed an amended statement of case following consultation with the *pro bono* office but did not in the statement of case claim that his dismissal was automatically unfair.
- [7] Another pre-trial conference was convened on 27 March 2012. During the pre-trial conference the attorney for the respondent pointed out to the applicant that his amended statement of case did not disclose the cause of action over which the Labour Court would have jurisdiction. This point was raised in the context where the respondent contended that the Labour Court did not have jurisdiction to entertain unfair dismissal claims.
- [8] The applicant filed the statement of case and therein again did not claim that his dismissal was automatically unfair.
- [9] During April 2012 the applicant was assisted by Maserumule Attorneys. In a pre-trial minute which the respondent's attorneys forwarded to the applicant's attorneys the point about lack of jurisdiction on the part of the Court was raised.
- [10] Although, there was no formal withdrawal by Maserumule attorneys, the Legal Aid South Africa, filed a notice of appointment as attorneys of record during June 2012. Thereafter in correspondence between the parties, the attorneys

for the applicant requested an amendment that needed to be made to the pre-trial minutes. It would appear that because of failure to agree on what was to go into the pre-trial minute the matter was set down during November 2012 for a pre-trial conference before a judge. The pre-trial minutes were signed by both parties on the 14 November 2012. In those pre-trial minutes the applicant persisted with his view that the dismissal was unfair and made no averment with regard to the dismissal being automatically unfair. It would appear that the applicant's view that the Labour Court had jurisdiction was based on the fact that the Bargaining Council had ruled that, that was the case.

[11] In opposing the amendment the respondent contended that the applicant could not amend his statement of case subsequent to signing the pre-trial minute as those minutes constitute a binding agreement between the parties and can only be resiled from by agreement between the parties. This issue is dealt with in details later in this judgment.

[12] The respondent further opposed the amendment on the grounds that by his conduct the applicant had elected to abandon and or wave the right to claim that the dismissal was automatically unfair.

The legal principles governing an amendment

[13] The principle governing an application for an amendment of pleadings received attention by this Court in *South African Transport and Allied Workers Union and Another v South African Airways (Pty) Ltd*¹, where it was held that :

‘The basic principle is that the Court has discretion to exercise in considering whether or not to grant an amendment sought by the applicant. It is also the

¹ 2010 31 ILJ 1938 page 1942

general principle of our law that amendment of pleadings will generally be granted where such an amendment will not prejudice the other party²,

- [14] The leading case in dealing with an application for amendment in pleadings is *Moolman v Estate Moolman & another*³ where the Court 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 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.”

- [15] In *MacDuff & Co v Johannesburg Consolidated Investments Co Ltd*⁴, 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.”

- [16] In considering an application to amend pleadings the Court is enjoined to make sure that the interests of justice prevails, between both parties. In balancing the interest of both parties the Courts in general lean towards granting an amendment, in consideration of ensuring full and proper ventilation of the dispute between the parties.

²See *Papier & others v Minister of Safety & Security & others* [2003] 12 BLLR 1268², *NASUWU & Others v Pear wood Investments (Pty) Ltd t/a Wolf Security & Another* (2009) 30 ILJ 1852 (LC).

³ 1927 CPD 27 at 29

⁴ 1923 TPD 309

Binding effect of pre-trial minutes

[17] It is trite that a pre-trial minute constitutes a binding agreement between the parties. It follows that one party cannot resile from that agreement without the consent of the other. In *Filta-Matrix (Pty) Ltd v Feudenberg and Others*,⁵ the Court held:

“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).

[18] In the present instance the amendment which the applicant seeks to introduce does not form part of the terms agreed upon by the parties in the pre-trial minute. There are two points which the parties in the present matter may not be able to resile from without the consent of the other party and those are set out at paragraph 2 of the pre-trial minutes and reads as follows:

“2.1 The applicant was employed by the respondent as a commercial driver to do cross border deliveries.

2.2 The applicant was dismissed by the respondent on 25 May 2011 for reasons related to alleged misconduct pursuant to a disciplinary hearing held on 19 May 2011”.

[19] The issues which the applicant seeks to introduce are not part of the agreement reached in the pre-trial minute. There is no provision in the pre-trial minutes that takes the right of the applicant to raise the issue relating to automatically unfairness of the dismissal. I do agree with the respondent

⁵ 1998 (1) SA 606 (SCA) at 614.

however that in the circumstances of this case the amendment to the pre-trial minute should properly be effected if and once the amendment is granted.

Waiver

[20] It is trite that where waiver of a right is claimed the onus is on the party making the claim.⁶ It is for the party raising waiver to show that the other party with full knowledge of his or her right, decided to abandon be it, expressly or by conduct. The question of whether a party has waived his or her right is a question of fact. In *McGenis v RAF*,⁷ the Court held that waiver of a right is not to be presumed but clear proof thereof is required. It was further held in that case that it must be shown that the person who is said to have waived his or her right had full knowledge of his rights and that his conduct was irreconcilable with continued existence of such rights or with the intention of enforcing them.

[21] In *Road Accident Fund v Mothupi*,⁸ the Court in dealing with the issue of waiver held that:

"The test to determine intention to waive has been said to be objective. That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations; secondly, that mental reservations, not communicated, are of no legal consequence; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes."

⁶ See *FirstRand Bank Ltd v Soni* 2008 (4) SA 71 (N).

⁷ 2009 JOL 24231 (KZD)

⁸ 2000 (4) SA 38 (SCA).

[22] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*,⁹ the Constitutional Court in dealing with whether the applicant who had agreed to have his dispute referred to private arbitration had waived his right under section 34 of the constitution¹⁰ held that:

‘[81] The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights.

Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish’.

⁹ 2009 (6) BCLR 527 (CC).

¹⁰ Section 34 of the constitution reads as follows: *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.*

[23] In the present instance there is insufficient evidence to show that the applicant had full knowledge and appreciation that, the consequences of his conduct could be interpreted to be abandoning his right. Accordingly the contention that the applicant has waived his right to raise the automatically unfairness dismissal stands to fail.

[24] I now turn to deal with the substance of the application. In this respect I am enjoined to exercise a judicial discretion and take into account factors such as; (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. I have indicated that in exercising that discretion as I do in this judgment I am guided by the decision in *Moolman v Estate Moolman & another*,¹¹ where the court 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.'

[25] The applicant in this case seeks to amend his statement of case to include therein the allegation that his dismissal was automatically unfair. The issue relating to the alleged automatically unfair dismissal is important to both

¹¹ 1927 CPD 27 at 29. See *Transport & Allied Workers Union & another v SA Airways (Pty) Ltd* (2010) 31 ILJ 1938 (LC).

parties and the dictates of justice would require that it be ventilated through the adjudication process. It is an issue that warrants attention of the Court and is on the face value a triable issue.¹²

[26] In light of the above reasons, I am of the view that, the applicant's application stands to succeed.

[27] I do accept that, if regard is had to the facts and the circumstances of this case the respondent has been inconvenienced by the delay in applying for the amendment. However, the applicant is a lay person who drafted the initial statement of case himself. He was of course assisted at some stage by attorneys, but the reason why an application was not filed by them is not clear. Those attorneys never formally withdrew from the record. Ordinarily taking into account the facts and the circumstances of this case, I would have granted costs against the applicant even though he was successful, but taking into account that he is an individual assisted by the Legal Aid of SA, I hold a different view. In my view, it would be unfair to make a costs order against the applicant.

Order

[28] In the premises the following order is made:

1. The applicant is granted leave to amend the statement of case with no order as to costs.

¹² See *Twani and Others v Premier of the Eastern Cape* (2008) ZAEHC 169.

2. The trial which was supposed to have commenced on 13 May 2013 is postponed *sine die*.

E Molahlehi
Judge of the Labour Court of
South Africa

Appearances:

For the Applicant: Mr Makinta of E.S. Makinta Attorneys

For the Respondent: Ruben Orton of Snyman Attorneys