



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JS 871/11

In the matter between -

ALAN TULWANA

First Applicant

ROBERT WIEBOSCH

Second Applicant

And

CITY OF JOHANNESBURG

Respondent

Date heard: 03 June 2013

Date delivered: 14 June 2013

Summary: Application to amend statement of case.

JUDGMENT

MOLAHLEHI J

- [1] This is an interlocutory application in terms of which the applicants seek to amend their statement of claim. The respondents oppose the application

essentially on the basis that if granted the amendment would render the applicant's claims exceptiable.

- [2] The application to amend includes an amendment to some of the background facts. It is apparent from the reading of the application that the key amendment which forms the basic cause of action is paragraph 63 which reads as follows:

'6.1.3 that the Respondent's failure to renew the Applicant's fixed term contract and /or failure to employ him permanently constituted an automatically unfair dismissal in terms of section 187(1) (h) of the LRA, alternatively

63.2 that the Respondent's failure to renew the Applicant's fixed-term contract and/or failure to employ him permanently upon expiry of his fixed-term contract constituted an unfair dismissal in terms of section 186 (1) (b) of the LRA;

63.3 that the Applicant be reinstated to the position of OPS Revenue Manager with effect from 1 November 2010 . . . '

The background facts

- [3] It is common cause that on 21 February 2006, the Independent Municipal and Allied Trades Union (IMATU) and the South African Municipal Workers Union (SAMWU), entered into a settlement agreement which was subsequently made an arbitration award under the auspices of the South African Local Government Bargaining Council (the bargaining Council).
- [4] The settlement agreement which has now become an arbitration award provided that the fixed term contracts of the non-section 57 (1) of the Municipal Systems Act employees of the municipalities were to run the full life

span. It would appear on the expiry of the fixed term contracts, the respondent was obliged to employ the applicant on a permanent basis.

- [5] Another agreement was concluded between the unions and the respondent during 2012. The 2012 agreement under the heading, "Background" records several points, which includes the fact that the arbitration award referred to above was rescinded. And also that during August 2006, the employers' organisation, the South African Local Government Association (SALGA) instituted proceedings before this court under case number J1232/06 in terms of which it sought to have the 2006 agreement set aside.
- [6] During June 2012 IMATU instituted an urgent application in this Court under case number J1621/12, in terms of which it sought a declarator that the employees employed in the risk and audit service should remain in the employ of the respondent pending the outcome of the case instituted by SALGA.
- [7] The respondent contends that the court does not have jurisdiction to claims falling under the provisions of section 186 (1) (b) of the Labour Relations Act of 1995. The respondent further contends that the Court has no jurisdiction because the issues raised by the applicant are issues that have to do with interpretation and application of the collective agreement in terms of which the dispute resolution procedure is provided for in terms of the dispute resolution procedure.
- [8] The applicant on the other hand argue that, the 2012 agreement does not apply to them because at the time it was concluded they were no longer members of the trade unions and therefore the agreement could not apply to them.

Evaluation

[9] In considering whether to grant or refuse this application, I am enjoined to exercise a judicial discretion. In exercising that discretion I have to do so by taking into account factors such as; (a) the bona fide of the application; (b) the injustice that may arise from the granting or refusal of the amendment (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 exercising that discretion as I do in this judgment I am guided by the decision in *Moolman v Estate Moolman & Another*,¹ 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.' 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.'

[10] In the present instance the applicant seeks to amend the statement of case to insert therein the allegation that his fixed term contract of employment was not renewed for reasons prohibited by the law. The issue relating to the alleged automatically unfair non-renewal of the employment contract is important to

¹ 1927 CPD 27 at 29. See *South African Transport and Allied Workers Union and Another v SA Airways (Pty) Ltd* (2010) 31 ILJ 1938 (LC).

both 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.² The issues relating to the 2006 and 2012 agreements are in my view secondary to the fundamental issue of the allegation that the non-renewal of the contract based on the alleged ground prohibited by the law. In fact I see the issues relating to the contracts as more of background facts than a cause of action. However even if they were central to the dispute, I am of the view that the trial Court will in all probabilities treat them as issues which it has incidental powers to deal with.

[11] In light of the above reasons, I am of the view that, applicant's application stands to succeed. However, in the circumstances of this case I do not believe that the requirements of law and fairness would permit granting costs against any of the parties.

Order

[12] 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.
2. The trial which was supposed to have commenced on 3 June 2013 is postponed *sine die*.

² See *Twani and Others v Premier of the Eastern Cape* (2008) ZAEHC 169.

Molahlehi J
Judge of the Labour Court of
South Africa

Appearances:

For the Applicant: Adv P E Flynn instructed by Cowan Harper Attorneys

For the Respondent: Adv C Prinsloo instructed by Helena Strijdom Attorneys.