



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P342/12

In the matter between:

PIETER WOUTER DU TOIT

Applicant

and

MTO FORESTRY (PTY) LTD

Respondent

Heard: 22 November 2013

Delivered: 27 May 2014

Summary: An application for leave to amend the statement of claim will be granted if the applicant is not mala fide in bringing the application and the amendment will not cause injustice to the respondent.

JUDGMENT

LALLIE J

- [1] This is an application for leave to amend the statement of claim. The factual background of this application is that the respondent terminated the services of the applicant for operational requirements on 31 January 2012. The

applicant filed his statement of claim on 1 August 2012. On 17 August 2012, the respondent filed the response to the statement of claim and on 29 April 2013 the parties filed their pre-trial minute. On 4 November 2013, the applicant launched the present application. It is opposed by the respondent.

- [2] In the amendment the applicant seeks to add paragraph 57A in which he alleges that his dismissal was unlawful as it was effected in breach of Section 189A of the Labour Relations Act 66 of 1995 (the “LRA”). He further seeks to add paragraph 63A in which he alleges that the omission to refer a dispute regarding his intended dismissal to the CCMA rendered his dismissal premature, impermissible in law and unlawful. The applicant further seeks to add paragraph 66A which will have the effect of expanding the relief he initially sought by declaring his dismissal premature, unlawful and of no force and effect. He also seeks to add to the relief he is seeking, his reinstatement retrospectively until his contract is terminated lawfully.
- [3] The respondent sought to rely on a number of grounds in opposing this application. It submitted that the applicant sought to raise, late in the day, a new cause of action that his dismissal was governed by section 189A of the LRA. The submission is misplaced as a facilitator had been appointed. The applicant waived his right to the protection of section 189A. Alternatively, the applicant is estopped from invoking the provisions of section 189A as he created to the respondent, the impression that he had no intention of doing so. The parties settled their differences and agreed on a termination date, the provisions of section 189A are therefore inapplicable. The amendment sought offends the respondent’s constitutional right to fair labour practices as it is sought just before trial in an effort to have the entire retrenchment process invalidated. And the last ground the respondent seeks to rely on is that the amendment will render the statement of claim excipiable.
- [4] The leading authority in matters regarding amendment of pleadings is *Moolman v Estate Moolman and Another*¹ where the court held as follows:

‘the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such

¹ 1927 CPD 27 at 29

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’.

The above dictum has been referred to with approval by different Courts including the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*².

- [5] The respondent argued that the amendment was sought very late, on 6 November 2013 when the matter had been enrolled for trial on 26 November 2013. It sought to rely on *Nzimande and Others v Zenex Oil (Pty) Ltd and others*³, where the applicant sought to amend its statement of claim to base its claim on a new cause of action. The amendment was refused on the basis that where there is a permanent relationship between the parties, a lengthy delay before a dispute can be resolved may harm the relationship and cause considerable prejudice to one or both parties. The Court added that an unexplained delay of eighteen months can justify the refusal to amend a statement of claim.
- [6] *Nzimande (supra)* is distinguishable from the matter at hand as the applicant does not seek to base his entire claim on a new cause of action but seeks to expand on the relief he originally sought. The respondent did not plead the existence of an unexplained delay. Our Courts, in balancing the expediency in which disputes have to be resolved as envisaged in the letter and spirit of the LRA and ensuring that justice is done in the resolution of labour disputes, have made justice the overriding principle. In *Sondorp and Another v Ekurhuleni Metropolitan Municipality*⁴ an appeal against a judgment refusing an application for amendment of pleadings which was brought more than seven years into the matter, the respondent had closed its case and the applicant had finished leading its first witness. The Court held as follows:

² 2006 (3) SA 247 (CC)

³ [2001] 4 BLLR 419 (LAC)

⁴ [2013] 9 BLLR 866 (LAC)

‘...In exercising its discretion in this regard. The lower court should always reflect, in its assessment of the application, a degree of generosity and strive to ensure, as its objective, a proper ventilation of the real dispute between the parties’.

- [7] It is not the respondent’s case that this application is *mala fide*. Further, the respondent proved no *mala fides* on the part of the applicant in bringing this application. I am not convinced that the time at which this application was brought justifies its dismissal. While pleadings have been closed and the pre-trial minute filed, no evidence has been led. The importance of having the dispute resolved expeditiously is eclipsed by the need to have all the aspects of this matter ventilated properly. In a number of decisions when dealing with delays, the Constitutional Court has expressed the view that the interest of justice is the overriding principle. See *F v Minister of Safety and Security and Another (Institute for Security Studies, Institute for Accountability in Southern African Trust and Trustees of the Women’s Legal Centre as Amici Curiae)*⁵. The prejudice the applicant stands to suffer in the event of this application being refused out weighs by far any prejudice the respondent may suffer should an order to the contrary be granted. In addition, the respondent’s prejudice may be compensated by an appropriate costs order.
- [8] The argument that the amendment will be unfair towards the respondent does not assist the respondent’s case. The unfairness is an issue which is inextricable linked to the merits and cannot be determined at this stage in the absence of evidence. The same applies to the remaining grounds the respondent sought to rely on. As the application to amend the statement of claim is not *mala fide* and the amendment will not cause injustice to the respondent, this application must succeed. Considerations of the law and fairness require that the applicant pay the respondent’s costs.

- [9] In the premises, the following order is made:

9.1 The application to amend the applicant’s statement of claim is granted.

⁵ (2012) 33 ILJ 93 (CC)

9.2 The applicant is directed to pay the respondent's costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Unwin of Chris Unwin Attorneys

For the Respondent: Advocate Costhuizen

Instructed by: Werksmans Attorneys

LABOUR COURT