



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2578/10

In the matter between:

PUTCO LIMITED

Applicant

And

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA

First Respondent

MANGE ZACK

Second Respondent

Heard: 26 November 2014

Delivered: 18 February 2015

Summary: Application to amend statement of defence. Amend statement of defence to withdraw an admission. Principles governing amendment of pleadings.

JUDGMENT

MOLAHLEHI, J

- [1] This is an interlocutory application in terms of which the respondents seek to amend their statement of response which they have filed in opposition to the statement of claim of the applicants. The applicants are claiming damages in the amount of R106 2012.20 in terms of section s158 (1) (a) (V) read with s 68 (1) (b) of the Labour Relations Act of 1995 (the LRA). The application is opposed.

The background facts

- [2] It is common cause that during 2010, the parties to the South African Road Passenger Bargaining Council (the bargaining council) engaged in wage negotiations. The majority of the employer parties in the negotiations were represented by the South African Bus Employers Association (the SABEA) and the union parties were SATAWU, TOWU and TAWUSA.
- [3] The parties having failed to reach a consensus on their own resolved to engage the services of the mediator in terms of the constitution of the bargaining council. Initially, when the process failed to facilitate consensus, the union parties to the bargaining council issued a notice of intention to go on strike on 26 March 2010 and that such a strike would have commenced on 29 March 2010.
- [4] In the meantime, the employer parties revised their offer to a 10% which was communicated to the union parties by the mediator. The revised offer was accepted in writing by TOWU and verbally by SATAWU on 28 March 2010. The two unions then suspended the strike pending signature of the main collective

agreement which was to take place on 29 March 2010. TAWUSA did not agree with the approach of the other unions.

- [5] The acceptance of the offer by TOWU and SATAWU meant that a binding agreement was reached in terms of the constitution of the bargaining council. This also meant that the agreement was binding I, even on the parties that did not sign the agreement such as the first respondent.
- [6] The signing ceremony of the agreement took place on 29 March 2010 and present there was amongst others the representative of the first respondent, Mr Mankge. . He, on that day at about 11h15, sent an email to a number of people including the representatives of the other unions wherein he said:
- “... neither SATAWU nor TOWU have agreed with us on the suspension of the strike. We therefore record we do not agree to the suspension of the strike.”
- [7] SATAWU responded to the email and expressed its surprise at the position that had been taken by the first respondent particularly because its representative was present through the discussions regarding the negotiations. They indicated that they did not agree with the respondent and believed that in the circumstances, the constitution of the bargaining council should apply.
- [8] According to the applicant, Mr. Mr Mankge indicated that the first respondent did not accept the revised offer of 10% wage increase and that the strike on their part would continue.
- [9] The applicant further states in its statement of case that the shop stewards of the first respondent were informed during the afternoon of 29 March 2010, that the collective agreement regarding the wage dispute had been signed by the majority members of the bargaining council and that the agreement was for that reason binding on everyone.

- [10] It is also alleged by the applicant that the members of the first respondent did not return to work after being told to do so and continued with the strike on 30 March 2010. The strike, accordingly, became unprotected. The member of the first respondent ceased their action only after the applicant obtained an interdict from the court against them.
- [11] The applicant's claim for damages in this matter is based on the complaint that it had suffered damages as a result of the unlawful conduct of the first respondent and its members.

The issue for determination

- [12] The issue for determination in this matter is whether the respondents, in their founding affidavit, have made out a case justifying the withdrawal of the concession they made at paragraph 5.13 of their statement of defence. Paragraph 5.13 of the statement of claim of the applicant reads as follows:

"On the afternoon of 29 March 2010, Mr Mankge attended the signing ceremony and indicated that TAWUSA did not accept the across-the-board increase and that the strike on the part of TAWUSA would continue. The 2010 Main Collective Agreement was signed by SABEA, SATAWU and TOWU on the afternoon of 29 March 2010."

- [13] The respondents, at paragraph 4.9 of their statement of response, do not dispute the correctness of the above facts. The respondents' statement of defence at paragraph 4.9 reads as follows:

"AD PARAGRAPH 5.12 and 5.3

The contents of these paragraphs are admitted."

- [14] Mr Mankge the deponent to the founding affidavit does not dispute the correctness of the above concession but states that he would have said that the strike on the part of TAWUSA continues. He states further that he made an error in that the statement does not accord with the instruction given to their

attorney. According to Mr Mankge the reason for bringing this application at the point when the trial should commence is that although the instructions came from him, he never had sight of the contents of the statement of defence. He became aware of the error when the admission was brought to his attention in preparation of this application.

[15]

[16] It should be noted that the admission sought to be withdrawn is confirmed in the pre-trial minutes and no application to withdraw the admission in that regard has been made. In this respect Mr Maimane argued that there was no need to withdraw the admission made in the pre-trial minutes because there is a distinction between an admission made in the pleadings and that which is made in the pre-trial minutes. He argued that the admission of the contents of paragraph 5.13 in the pre-trial is of no legal consequences as it would fall away once the admission made in the statement of defence was withdrawn. His argument is that the admission in the pre-trial minutes is not binding because it did not come as a result of the agreement between the parties but it was rather stated as common cause fact which came as a result of the directive from the Judge President. According to him, the admission made in the pre-trial minutes is a mere compliance and a recordal which the employee could not refuse to make as it is a directive. It does not, according to the submission made, constitute an agreement between the parties.

[17] It was further argued that the pre-trial minutes do not constitute an agreement in terms of the law of contract but rather it is a type of an agreement governed by the law of procedure whose purpose is to assist the Court in knowing what the issues are.

The legal principle in relation to amendment of pleadings

[18] It is trite that the court is generally inclined to granting an application to amend pleadings to ensure a proper ventilation of the dispute between the parties.

However, as stated in *Twani and Others v Premier of the Province of the Eastern Cape and Others*,¹ “an amendment is not there for the taking”.

- [19] In considering an application for an amendment of pleadings, the Court has discretion to exercise. In exercising its discretion, the Court has to consider whether the application is *mala fide* and whether if granted or refused, will it result in an injustice and or prejudice. Another factor to take into account in considering the application to amend is whether prejudice in granting it cannot be cured by a cost order.²
- [20] In order to succeed, the party seeking amendment of pleadings must provide a full explanation to convince the Court of his or her *bona fides* for seeking the amendment. This is even more so where the amendment relates to the withdrawal an admission. In this respect, the applicant has to provide a full and satisfactory explanation of the circumstances in which the admission was made and the reason for seeking its withdrawal.³
- [21] In the present instance, the respondents do not provide a satisfactory explanation as to how the admission was made. The respondents simply state that Mr Mankge did not have sight of the statement of response and that the admission does not accord with the instruction given to their attorney. They do not address the prejudice that the applicant will suffer if the amendment was to be granted.
- [22] The reading of the respondents founding affidavit reveals very little effort on the part of the respondent to persuade this court that there is justification to indulge them and grant the amendment. Mr Mankge states, in the founding affidavit, that his attorney was not aware of the significance of the admission.

¹ (460/99) ZAECHC 169 [2008] ZAECHC 169 (1 October 2008) at para 20.

² *South African Transport and Allied Workers Union and Others v Collett Armed Security Services (JS 1280/09)* [2013] ZALCJHB 111 (2 May 2013) at para 18.

³ See *SMM Papier and Others v The Minister of Safety and Security and Others (C552/2001)* [2003] ZALC 112 (17 October 2003) at para 15.

[23] It is significant in considering this application to note that the respondents have not attached any confirmatory affidavit, particularly from the attorney, confirming the following:

- a. That the admission was not made on the instruction of Mr Mankge;
- b. That Mr Mankge did not until this application have sight of the statement of response;
- c. There is no explanation as to why this application was made after the same admission was made in the pre-trial minutes.

[24] I am in agreement with the applicant that the fact that this application is made after the same admission was made in the pre-trial minutes is an indication of bad faith on the part of the respondents. For these reasons, the respondents' application stands to fail.

[25] Turning to the admission as made in the pre-trial minutes, it has to be noted that the respondents have not filed any application to have the admission withdrawn.

[26] The approach adopted by the courts in dealing with the status of pre-trial minutes in our law is well established. It has been stated in this regard by the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd and Another*,⁴ that:

"It is true, of course that a pre-trial minute is a consensual document which binds the parties thereto and obliges the court (in the same way as parties pleadings do) to decide the issues set out therein."

[27] And as concerning the issue of withdrawal of an admission made in the pre-trial minute, the court in *Filta- Matrix (Pty) Ltd v Freudenberg*,⁵ held that:

"to allow a party, with a special circumstances, to resile from an agreement reached at a pre-trial conference will be to the objects of rule 37 which is to curtail the scope of the litigation."

⁴ [2000] 1 BLLR 20 (LAC) at para 16.

⁵ 1998 (1) SA 606 (LAC) at 614B-D.

[28] In light of the above, I am of the view that the respondents' application stands to fail.

Order

[29] In the circumstances, the respondents' application to amend their statement of defence to effect the withdrawal of the admission made is dismissed with costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K Makapane from Bowman Gilfillan Inc.

For the Second Respondent: Advocate Maimane instructed by Masango Attorneys.