



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 374/2014

NICOLEEN YOLANDIE KEULDER

Applicant

and

CW VAN HEERDEN t/a DE WET REITZ ATTORNEYS

Respondent

Delivered: 15 July 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] There are essentially three applications before the Court. The first pertains to condonation in respect of the late filing of the applicant's statement of claim. The second relates to leave to amend that statement of claim, and the third relates to the striking out of certain portions of the respondent's answering affidavit. The respondent only filed an answering affidavit to the application for leave to amend and opposes the other two applications.
- [2] At the hearing of these applications, the respondent's contention was that the application for condonation should be postponed and dealt with when the

merits of the main claim are heard. The applicant however seeks that all the applications be disposed of.

Background:

- [3] The applicant was employed as a candidate attorney with effect from 21 July 2011. She was dismissed on 31 July 2013 and referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 21 August 2013. She was informed by the CCMA on 23 August 2013 that her referral was defective on account of proof of service of the referral not having been attached to the referral.
- [4] The applicant remedied the defect and applied for condonation on 21 November 2013. A condonation application was considered and granted by the CCMA on 10 January 2014. A certificate of outcome was also issued and in the condonation ruling, the applicant was advised to refer the dispute for adjudication by this Court within 90 days from the date of the ruling.
- [5] The applicant filed a handwritten statement of claim on or about 10 April 2014 by way of Form 2 in terms of Rule 6 of the Rules of this Court. Her claim related to a retrenchment which she deemed to be procedurally and substantively unfair; and whether she “was ultimately” dismissed. She sought compensation for “above unfair practices”.
- [6] On 29 April 2014 the respondent’s attorneys of record informed the applicant’s attorneys that even though the statement of case was received, a statement of defence could not be filed in the absence of a case number having been allocated.
- [7] A case number was ultimately obtained on 11 May 2014, and the statement of claim was re-served the following day with a case number. In response to the statement of claim, the respondent contended that the statement of case was only filed on 12 May 2014, which was more than 90 days after the condonation ruling was issued. It was pointed out that the applicant had not sought condonation, and that her claim should be dismissed.

- [8] On 10 June 2014, the applicant filed an application for condonation wherein she had explained that on 10 April 2014 when the original statement of case was filed, a request for a case number was simultaneously made. Despite follow ups with the office of the registrar to obtain a case number, this was not issued. Her main contention was that the respondent had received the initial statement of case on time *albeit* without a case number, and that it was afforded an opportunity to file a statement of defence which it had done.

Condonation:

- [9] As already indicated, the respondent had not filed an answering affidavit to the application for condonation. At the hearing of this application the respondent had sought a postponement of the hearing of the application for condonation to the trial date. It is my view that the application to postpone the hearing of the application for condonation from the bar was clearly without merit, especially in circumstances where the application was filed on 22 July 2014, and when the respondent had an opportunity to oppose it. No justifiable basis was laid for this application not to be considered as it was properly before the court.
- [10] I did not understand the respondent's case to be that the application for condonation was not received hence the contention that its hearing should be postponed. The respondent's main contention was that its attorneys of record only got to know of the set down of this matter by chance when its Mr. De Wet went to inspect the court's file due to inactivity. All of these issues were raised within the respondent's heads of argument. This was notwithstanding the respondent's contention that on 7 November 2014, after it got to know of the set-down, it had through its attorneys of record, questioned whether the applicant had any hand in the set-down without notice to the other side.
- [11] The factors to be addressed when seeking condonation are as set out in *Melane v Sandtam Insurance Co Ltd*¹. In considering such applications, the Court will exercise its discretion, having taken into account the degree of lateness, the explanation therefor, the prospects of success and the

¹ 1962 (4) SA 531 (A)

importance of the case. These factors are interrelated and they are not individually decisive².

[12] I have had regard to the degree of lateness and explanation thereof. The delay was clearly as a result of a case number not having been allocated to the matter by the Registrar of this Court. It is accepted that Rule 3 (1) of the Rules of this Court requires parties initiating proceedings to first apply for a case number and then to file their papers. Where however a party first files a statement of case timeously and then requests a case number thereafter, and where a case number is allocated at a later stage, it would not be in the interests of justice in such circumstances to refuse condonation.

[13] It is apparent that the applicant always had intentions to lodge the claim on time and had done so. Even if the applicant had not acted in accordance with the provisions of Rule 3 (1) of the Rules of this Court, it is my view this irregular step is not as material as to call for a refusal to grant condonation. In these circumstances, it would thus not be necessary to deal with other considerations pertaining to the application.

The application to amend the statement of case:

[14] Following the filing of the original statement of case by the applicant on 10 April 2014, and an answer to that statement, the applicant served a notice to amend on 10 June 2014. On 20 June 2014, the respondent objected to the amendment.

[15] With the application to amend, the applicant essentially seeks to delete the original statement of case in its entirety and to replace same with another. The amended statement of case essentially raises the same legal issues as in the initial statement of case, *albeit* in a more concise and coherent manner. The issues that the Court is required to determine from the factual matrix contained in the amended statement pertains to whether the retrenchment of the applicant was procedurally and substantively fair.

[16] The grounds upon which the respondent had opposed the application were that;

² At 532B-E

- a) The referral to the CCMA was out of time.
- b) The applicant was the only employee retrenched as others reached settlement, and the CCMA should have arbitrated the dispute.
- c) The referral to the Court was out of time.
- d) The applicant had still not produced a copy of her statement of case with a stamp from the Registrar of the Court.
- e) The applicant does not seek to amend the statement of case but wants to delete it completely and rearrange its paragraphs.

[17] The first four grounds are clearly without merit in the light of the background set out in this judgment. The CCMA had considered and granted condonation in respect of the late referral of the dispute and had determined that the matter should be adjudicated by this Court. The issue of the late referral of the dispute to this Court has been dispensed with, and the Court is in possession of statement of case with the Registrar's stamp on it. Ground (e) of the objections is unclear as to whether the objection pertains to the initial statement of case being deleted completely or the fact that its paragraphs were being 'rearranged'.

[18] The principles applicable to applications to amend pleadings were elucidated in *South African Transport and Allied Workers Union and Another v South African Airways (Pty) Ltd*³ where this Court 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 general principle of our law that amendment of pleadings will generally be granted where such an amendment will not prejudice the other party"

[19] In *Moolman v Estate Moolman & another*⁴ where the Court held that:

³ (2010) 31 ILJ 1938 at page 1942. See also In *MacDuff & Co v Johannesburg Consolidated Investments Co Ltd* (1923 TPD 30, where 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."

⁴ 1927 CPD 27 at 29

“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.”

- [20] It is further trite that in exercising its discretion to allow the amendment, the Court will further take into account the interests of justice as between both parties, and the need to ensure a full and proper ventilation of the dispute between the parties. The Court is enjoined to further consider whether the application to amend is *mala fide*⁵. The Labour Appeal Court in *Sondorp v Ekrhuleni Metropolitan Municipality*⁶ in considering whether the Labour Court should have granted the application to amend a statement of case further held that:

“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.”

- [21] Further principles affirmed in *Sondorp*, by the Labour Appeal Court are that the Court will allow the amendment of a pleading or prayer where the main issue between the parties remains the same⁷. Whilst the Court will not readily grant an amendment where the granting thereof would introduce a new cause of action, the courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in original proceedings provided that an amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned thereby⁸. There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, where that is necessary to determine the real issue between the parties⁹. There should be a distinction

⁵ *Transport & Allied Workers Union & another v SA Airways* (*supra*)

⁶ [2013] 9 BLLR 866 (LAC) at para [34]

⁷ At para [48]

⁸ At para [45]

⁹ At para [50]

made between an amendment introducing a new cause of action (i.e. the right of action) and one which merely introduces fresh and alternative facts supporting the original right of action¹⁰.

- [22] The amendment as already stated, restates the applicant's claim as pertaining to the substantive and procedural fairness of her retrenchment. Thus no new cause of action arises from the amendments, and the only difference between the initial and amended statement of case is that the latter addresses the applicant's claim in more precise and coherent terms.
- [23] As correctly pointed out on behalf of the applicant, the respondent's answering affidavit does not raise any prejudice it may suffer as a consequence of the amendments, and I fail to appreciate what the respondent implies when it states that the 'rearrangement' of the statement of case 'takes the parties back to square one'.
- [24] The respondent's further objection was based on its view that the amendment was not *bona fide*. In this regard, the respondent made reference to the fact that it could not cede the applicant's articles as she was employed at ABSA Trust, and that despite intense negotiations, the applicant seeks to '*stretch out litigation to hold out for more money*'. This contention cannot in my view form a basis for a conclusion to be made that the application is *mala fide*, and bears little bearing to the applicant's main claim. To this end, the Court should exercise its discretion in favour of the amendment as sought.

The application to strike out:

- [25] The applicant seeks the striking out of paragraphs 9.2, 9.3, 9.6, 16.1 and 16.2 of the respondent's answering affidavits as well as annexures "OBJ12" to "OBJ13"; "OBJ14 to OBJ15" and "OBJ31" to "OBJ34" as inadmissible evidence in that it contains privileged matters. She also seeks the striking out of paragraphs 9.4 and 16.3 to the respondent's answering affidavit as well as annexure "OBJ23" to "OBJ24" as irrelevant.
- [26] There is no provision in the Labour Court Rules for the striking out of matters from affidavits. However, it is trite that where the Labour Court Rules are

¹⁰ At para 51

silent on a particular issue, the Uniform Rules of the High Court may be applied¹¹. In this regard, Rule 6(15) of the Uniform Rules of Court provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including cost as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.”

- [27] The Labour Appeal Court in *PSA v Minister Department of Home Affairs* further held that an application to strike out can be based on any one or all three grounds mentioned above, or on other grounds not mentioned in Rule 6(15).¹² Thus the grounds mentioned in Rule 6 (15) are not exhaustive, and may include objections based on evidence that is privileged.
- [28] An application to strike out matters is an interlocutory application or an application incidental to pending proceedings, and should thus in terms of Rule 11 of the Labour Court Rules, be brought on notice supported by affidavit¹³.
- [29] The respondent pointed out that only the Notice of Motion in respect of the application to strike out was filed. The applicant did not file an affidavit in this regard. As it was pointed out in *PSA v Minister Department of Home Affairs*¹⁴, the facts and circumstances of the case will dictate whether it is necessary for the notice to be supported by an affidavit. In this case, the basis of seeking to strike out the relevant paragraphs and annexures was laid out in clear terms in the applicant’s replying affidavit. It is therefore my view that in such circumstances, it would not have been necessary to repeat the same assertions in a separate supporting affidavit.
- [30] In respect of the above, paragraphs 9.2, 9.3, 9.4, 9.6, 16.1, 16.2 and 16.4 were contended to be in reference to discussions held between the parties’ legal representatives and that annexures “OBJ12” to “OBJ15” and “OBJ31” to

¹¹ *PSA v Minister of Department of Home Affairs & Others* Case no: JA 90/11 at para [7]

¹² At para [12]

¹³ *PSA v Minister of the Department of Home Affairs & Others* at para [10]

¹⁴ At para [14]

“OBJ34”, were letters exchanged between the representatives subsequent to the dismissal in an attempt to resolve the matter. It was further contended that these annexures were accordingly marked ‘without prejudice’, and were thus privileged.

[32] It was conceded on behalf of the respondent that at best, the applicant could only argue that the contents of the said paragraphs and annexures were not relevant. In the light of this concession, I fail to appreciate the persistence with the opposition to strike these out. It is indeed correct that the issues raised in these paragraphs and annexures are not pertinent to the resolution of the main dispute and were also matters that are privileged between the parties. I am in agreement with the applicant’s contentions that they should be struck out from the answering affidavit on account of not being relevant or on the basis of being privileged. I have further considered the issue of costs, and I am of the view that considerations of law and fairness militate against such an order being made.

Order:

- i. The late filing of the applicant’s statement of case is condoned.
- ii. The application to amend the statement is granted.
- iii. Paragraphs 9.2, 9.3, 9.4, 9.6, 16.1, 16.2 and 16.4 of the respondent’s answering affidavit, together with its annexures “OBJ12” to “OBJ15” and “OBJ31” to “OBJ34” are struck out.
- iv. There is no order as to costs.



Tlhotlhallemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv. H Viljoen
Instructed by: Metclafe Attorneys

On behalf of the Respondent: Adv C Roodt
Instructed by: De Wet Reitz Attorneys

LABOUR COURT