



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: J 674/14

In the matter between:

**UNITED NATIONAL TRANSPORT
UNION ("UNTU")**

Applicant

And

**OPERATING COMPANY (PTY) LTD
(" BOMBELA")**

Respondent

Heard: 10 February 2017

Delivered: 14 February 2017

Summary: (application to amend the statement of claim-opposed-whether amended statement would be excipiable – tacit agreement not relied on by applicant – leave to amend granted)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant in this matter ('UNTU') has brought an application to amend its statement of claim dated 17 October 2016. The application is opposed by the respondent ('Bombela') on the basis that if the amendment was permitted, the statement of claim would still be vague and embarrassing and would not disclose a cause of action. Prior to the notice of intention to amend of 17 October 2016, the applicant's statement of claim has been through numerous revisions.
- [2] To contextualise history of the matter, it is sufficient for present purposes just to state that the applicant filed its original statement of claim on 20 March 2014. It then filed a first amendment of its statement of claim on 29 July 2016. Following the filing of answering statements and the applicant's replication, the applicant filed a further notice of intention to amend his statement of claim on 26 September 2016. The respondent filed a notice of intention to accept to that proposed amendment, calling upon the applicant to remove the causes of complaint. On 17 October 2016 the applicant filed a notice of intention to amend paragraph 8 of the statement of claim and the respondent gave notice of its intention to object thereto.
- [3] I mention the above because, it simply illustrates that the applicant's statement of case has evolved through a number of iterations, which might have been avoided by obtaining better instructions at an earlier stage. Be that as it may, all that the court needs to determine is whether the latest proposed amendments, if permitted, would result in a statement of claim that is vague and embarrassing and does not disclose a cause of action.
- [4] The claim the applicant is pursuing is a claim for overtime payment. In essence, it claims that the train drivers which it represents work an ordinary working week of 40 hours, but since May 2013, they only received overtime rates of pay once they had worked more than 48 hours a week. Initially, the claim was based on their interpretation of the terms of their contracts of employment and the operating procedures of the respondent. Subsequently, they amended their claim to take account of an email which they allege amended the operating procedures.
- [5] The clause which they seek to insert by way of amendment reads:

“8. By custom/and/or practice and/or conduct and/or in accordance with the Policy, train drivers were and/or are required to work by Bombela, in the following way-

8.1 Since they started working at Bombela, or since Bombela and UNTU concluded a recognition agreement on 9 October 2011, train drivers scheduled by rostered shifts to work in periods of 6 x 9 -hour shifts (of which 1 hour is an unpaid lunch hour) totalling 54 hours, with a two day break between each period;

8.2 The number of hours that train drivers work in such periods depends on the number of shifts that are allocated by shift rosters, so that some employees work up to 54 hours in a week and others were less than 54 hours in a week,

8.3 The rosters are compiled taking account of the operational needs of Bombela and the availability of train drivers;

8.4 The number of hours worked in any period of rostered shifts that is in excess of hours constituting the ordinary hours of a working week, is overtime.”

(emphasis added)

[6] UNTU objected vehemently to the respondent’s opposition to its application to amend the statement of case. UNTU had called on Bombela to withdraw its notice of intention to except on the basis that the crux of the exception was that, it claimed UNTU had to plead evidence in its statement of case which was plainly bad in law. Other criticisms related to Bombela’s claim that UNTU had failed to identify the parties to the contract and on whose behalf it was acting, but these issues appear to have been resolved so I will not deal with them.

[7] At paragraph 46.3 of its replication to Bombela’s opposition, UNTU stated:

“UNTU’s cause of action is that by custom and/or practice and/or conduct and/or in accordance with Bombela’s Working Hours Policy, its members are entitled to be paid overtime for work in excess of 400 per week. The facts pleaded in paragraph 8 of the intended amendment, if true, establish that case.”

(emphasis added)

[8] The respondent raised a number of objections to the proposed paragraph 8 on the basis that it implied that the applicants are relying on a tacit agreement which has not been properly pleaded. In the result, the respondent contends the amendment is deficient because it does not disclose a cause of action based on a tacit agreement. The respondent refers to a number of requirements to be met if a party wishes to rely on the existence of a tacit agreement, including:

8.1 it must be specifically alleged that the contract relied on is a tacit one,¹ and

8.2 the facts and circumstances from which the tacit contract can be inferred must be set out;²

[9] The central question then is whether the applicant has indeed pleaded a tacit agreement as an alternative cause of action to its main cause of action, and if so whether it pleaded it with sufficient particularity to disclose the basis for a cause of action based on a tacit agreement, which would also enable the respondent to plead to the facts and circumstances it intended to prove to establish the existence of a tacit agreement.

[10] Before dealing with that, it is necessary to emphasise that if one has regard to the other portions of the applicant's statement of claim dealing with the individual train drivers' contracts of employment, it is clear from paragraph 3 of the statement of claim that the applicant's claim that the employment contracts are incorporated in written letters of appointment concluded at various times from 2010 onwards which have similar or the same provisions and amongst other things state that the appointments are subject to Bombela's conditions of service. The claim further elaborates in paragraph 6 that the working conditions of service relating to hours of work contained in the Working Hours Policy of the respondent as amended in terms of an email which reflected changes to the terms and conditions of employment.

¹ *E C Chenia And Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) at 578F

² *Roberts Construction Co Ltd v Dominion Earth-Works (Pty) Ltd and Another* 1968 (3) SA 255 (A) at 261F-262A.

- [11] In the proposed amendment to paragraph 8, the essential change proposed is in the preamble of that paragraph which previously simply read:

“8. By custom and practice and in accordance with the policy-

8.1”

- [12] It is very clear from the proposed amendment that nowhere in the statement of claim does the applicant expressly state that it is relying on a tacit agreement as an alternative contractual basis of the claim set out in the statement of claim preceding paragraph 8, which is based on driver's letters of appointment and that the working conditions relating to hours of work are contained in the Working Hours Policy as amended by the email. A careful reading of the proposed amendment to paragraph 8 shows that, that paragraph does not set out a basis for contending that the ordinary hours of work ought to be 40 as part of the drivers' conditions of service. All it states is that hours in excess of ordinary hours are considered overtime which appears to be a somewhat trite proposition. For the rest, paragraph 8 records what the UNTU claims was the established practice for rostering of drivers.

- [13] Thus, it would be completely disingenuous of the UNTU to argue subsequently that it had indeed pleaded an alternative contractual basis for its members' claims based on the existence of a tacit contract, when this was never made explicit despite the numerous revisions of their statement of claim. In the absence of making such a claim, I do not see how their amendment can be criticised as being deficient in establishing the basis for a tacit agreement. For that reason, I do not believe it is excipiable as vague and embarrassing or as not disclosing a cause of action. Nonetheless, it seems to be true from the claim made in paragraph 46.3 of the replication that UNTU believed that the proposed amendment somehow disclosed the essential requirements of its members' cause of action. In the circumstances, it is understandable that the respondent would have felt justified in opposing it on the basis that it concealed a badly pleaded alternative cause of action.

[14] In his replying argument however, *Mr Bruinders SC* who appeared for UNTU assisted by *Ms Millard* also expressly disavowed any contention that paragraph 8 sought to set out a cause of action different from the contractual cause of action based on written letters of appointment and documents governing conditions of service set out in the preceding paragraphs of the statement of claim. On a careful reading of paragraph 8, I think the text supports this view.

[15] Having regard to the above, I believe the amendment should be permitted but I am disinclined to award the applicant any costs because of its somewhat misleading suggestion in paragraph 46.3 of its replication that the amended provision did set out a cause of action.

Order

[16] The applicant is granted leave to amend its statement of claim in accordance with its notice of intention to amend dated 17 October 2016.

[17] No order is made as to costs.

[18] The parties are further directed to hold a pre-trial meeting and file a pre-trial minute by 14 March 2017.



Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

T Bruinders SC assisted by
K Millard instructed by
Fluxmans Inc.

RESPONDENT:

P Buirski assisted by S
Khumalo instructed by
Bowmans

LABOUR COURT