



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS597/17

In the matter between:

ANTONIO DI NARDO

Applicant

and

GIURICICH BROS CONSTRUCTION (PTY) LTD

Respondent

Heard: 24 August 2018

Delivered: 31 August 2018

Summary: An amendment of a statement of case – no prejudice shown. Where an objection and opposition for seeking leave to amend is frivolous cost order to be made. Held: (1) Leave to amend granted (2) The respondent to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application for leave to amend a statement of case. The applicant sought to amend certain paragraphs in his statement of case. The respondent objected to the proposed amendment. Following the objection, the applicant launched the present application for leave to amend. Over and above the objection, which prompted the present application, the respondent opposed the present application.

Background facts

- [2] Essentially, the facts relevant to this application are that, following his dismissal, the respondent referred a dispute to this Court in terms of rule 6 of the Rules of this Court. The applicant opposed the referral. At various points, the applicant sought to amend certain paragraphs in the statement of case. Ultimately, on 13 December 2017, the applicant sought an amendment. It is this amendment that ignited this application after having being objected to on 18 December 2017.
- [3] The objection prompted the applicant to file a notice of motion on 26 January 2018 seeking leave to amend and costs on an attorney and client scale. The respondent opposed the application. The matter came before me as an opposed motion.

The proposed amendment.

- [4] It is not necessary for the purposes of this judgment to set out fully the proposed amendment. Suffice to mention that the applicant sought to delete and insert certain paragraphs in the original statement of case.

The objection

- [5] The respondent raised an objection that the applicant had failed to withdraw the previous attempted amendments. Such failure to amend

creates ambiguity and confusion, which renders the statement of claim to be vague and embarrassing, thus excipiable. The vagueness would make it impossible for the respondent to present a response. With reference to some paragraphs in the statement of case sought to be amended it was suggested that it is not clear whether the applicant is relying on section 189A or 189 of the Labour Relations Act¹.

Argument

- [6] Advocate Roode appearing for the respondent prepared detailed heads of argument in support of the opposition. He persisted with an argument that the applicant was obliged to formally withdraw the previous proposed amendments. He could not provide the court with an authority to this submission. He maintained that the statement of case would be excipiable and the respondent would suffer prejudice, which is not remediable with an order as to costs. He however conceded that once the amendment is allowed, the right of the respondent to raise an exception does not dissipate.
- [7] On the other hand, Advocate Cook appearing for the applicant contended that the principles governing amendments have been met.

Evaluation

- [8] Strictly speaking statement of case and of response are not pleadings. What is required is a clear and concise statement of the material facts, in a chronological order, on which a party relies, which statement must be sufficiently particular². By seeking to amend, the applicant is complying with the requirement of sufficient particularity. Whether the applicant would be able to demonstrate this case at the trial of the matter is an issue that does not arise at this stage. Questions like whether section

¹ 66 of 1995, as amended.

² Rule 6 (1) (b) read with sub (3)(b).

189A or 189 apply or not, are questions to be decided by the trial court after receiving evidence.

- [9] The Supreme Court of Appeal in *Foxlake Investments v Ultimate Raft Foundation Design*³, had the following to say:

“[11] In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) para 12 Heher JA said:

‘Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes⁴ and are granted according to a body of rules developed in that context’

In *Affordable Medicines Trust & others v Minister of Health & another* 2006 (3) SA 247 (CC) para 9 Ngcobo J said:

*‘The principles governing the granting or a refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark* [1995 (2) SA 73 (Tk) at 76D-I]. The practical rule that emerges from these cases is that amendments will always be allowed⁵ unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed”.’*

- [10] The proposed amendment shall facilitate a proper ventilation⁶ of the dispute – i.e. was the dismissal fair or not. It has not been demonstrated that the amendment is made in *bad faith* or that the amendment would cause an injustice. At the trial of the dispute, there is nothing that would prevent the respondent to probe and also argue that section 189A does

³ (144/15) [2016] ZASCA 54 (01 April 2016).

⁴ My own underlining and emphasis.

⁵ My own underlining.

⁶ See *Whittaker v Roos and another* 1911 TPD 1092 at 1102.

or does not apply. With regard to the withdrawal of the previous amendments, I venture to say that a proper reading of rule 28 (7) of the Uniform Rules of Court suggests that if an amendment is not effected by delivering the amended pages, such a proposed amendment does not exist anymore⁷. I see no reason why the proposed amendment should not be allowed.

The issue of costs

[11] What remains is the issue of costs. Since the judgment of *Zungu v Premier of the province of Kwa Zulu Natal and Others*⁸ there seem to be a growing view that this court has been stripped of its discretion to award costs against parties in the Labour Court. This view is incorrect. What the Constitutional Court did was to remind this court of what was said in *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin No and Another*⁹. The discretion to award costs remains intact.

[12] As a reminder, the Labour Appeal Court (LAC) in *Dorkin* (supra) had the following to say:

“[19] With regard to costs I have been tempted to award costs against the second respondent because the second appellant has had to come to court to seek to alter the sanction imposed upon the second respondent but, I think that, having obtained a sanction of final written warning which was not his decision but that of the first respondent- he was entitled to come to Court and seek to defend it. Indeed, he was successful in the Court below. The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and

⁷ See in this regard *Becker v MEC for the Department of Economic Development & Environmental Affairs and others* (3366/2013) [2014] ZAECPHC 43 (24 June 2014) at paragraph [17] ...The effect of those judgments is that absent the delivery of amended pages pursuant to rule 28(5) read with sub rule (7) there is in fact no amendment.

⁸ [2018] 4 BLLR 323 (CC).

⁹ (2008) 29 ILJ 1707 (LAC).

fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes. In that way these Courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or Courts for adjudication."

[13] The LAC was acutely aware that what is required is not a blanket approach but a striking of a balance, a process that is not easy. To my mind if the evidence is overwhelming that the case is frivolous the scale must tip in favour of making an order as to costs. Allowing parties to bring or oppose cases frivolously does not only affects the one party but it also affects the administration of justice, the business of the court and judges. The resources of this court, judges that is, are thinly spread country wide. If this court were to allow those thinly spread resources to be abused, then the provisions of section 34 of the Constitution¹⁰ will be severely compromised.

[14] The applicant was represented by Counsel, who is fully aware of the generous approach adopted by courts when it comes to amendments. Had the respondent not objected to this perfectly appropriate amendment, this substantive application would have been obviated. The applicant was compelled to bring this application when it should not have been brought. The opposition by the respondent was frivolous. The respondent should not have opposed this application prompted by its objection. It is indeed so that a party seeking an amendment is effectively

¹⁰ Constitution of the Republic of South Africa, 1996

seeking an indulgence and such a party must bear the wasted costs. However in instances where the objection and opposition is vexatious, frivolous and unreasonable¹¹, the other party should bear the costs. I am not persuaded that a case for a punitive costs order has been made.

[15] In the results, I make the following order:

Order

1. The applicant is granted leave to amend its statement of case in accordance with its notice of intention to amend dated 13 December 2017;
2. The respondent to pay the costs of this application.

GN Moshwana
Judge of the Labour Court of South Africa

Appearances:

¹¹ Embling v Two Oceans Aquarium CC 2000 (3) SA 691 (C).

For the Applicant : Advocate A L Cook
Instructed by : Allardyce & Partners, Midrand

For the Respondent : Advocate B L Roode
Instructed by : Nicole Ross Attorneys, Woodmead.

LABOUR COURT