



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable
Case no: PS35/17

In the matter between:

EAST CAPE MIDLANDS COLLEGE

Applicant

and

MOEGAMAT RIDWAAN ABDULLAH

Respondent

Heard: 02 May 2018

Delivered: 04 May 2018

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

JUDGMENT

MOSHOANA, JIntroduction

- [1] This is an application for leave to amend a statement of response. The applicant, the respondent in the main referral sought to amend certain paragraphs in its statement of response. The respondent, the applicant in the main referral 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 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 section 77(3) of the Basic Conditions of Employment Act.¹ The applicant opposed the referral. At a particular point, the applicant sought to amend certain paragraphs in the statement of response. It is apparent that at first the applicant amended without affording the respondent an opportunity to object to the proposed amendments. The respondent objected to this step. Consequent thereto, the applicant filed a notice of intention to amend. The respondent objected to the proposed amendment. The respondent raised two grounds for objection, namely, no delegation attached and that the purported delegation is illegal.
- [3] The objection prompted the applicant to file a notice of motion on 9 October 2017 seeking leave to amend and costs. The respondent opposed. The matter came before me as an opposed motion.

¹ Act 75 of 1997

The proposed amendment

[4] The main paragraph objected to reads thus:

The Respondent denies that the decision [its council did not resolve] to terminate the Applicant's services was unlawful for the reason provided by the Applicant, or for any other reason. On the contrary, the decision was taken [at a duly constituted meeting of the council by a proper and valid resolution] by the Executive Committee of the Council [Exco], to which the council had delegated the authority to take the decision by proper and valid resolution, a copy of which is annexed hereto marked "C".

The objection

[5] The respondent raised two principal objections. The first objection is directed to the non-attachment of the delegation. The respondent contended that annexure "C" did not contain a delegation to the effect that the Council authorized EXCO to terminate the respondent's contract of employment. Further, the respondent contended that annexure C is vague and meaningless and renders the proposed amendment vague and embarrassing. In addition, the delegation does not contain sufficient allegations to sustain a defence.

[6] The second objection is directed to the legality of the delegation. Effectively the respondent contended that the delegation offends the provisions of sections 12 (1) (a) and 12 (3) of Continuing Education and Training Act².

Argument

[7] Kroon SC appeared for the respondent. He prepared detailed heads of argument in support of the opposition. Strange enough, it was submitted

² Act 16 of 2006. Suffice to mention that section 12 deals with committees of council to assist council in the performance of its functions and that the council is not divested of the delegated responsibilities.

that the application must fail because the applicant has failed to explain the reason why it wishes to change its case. This is different from the first ground for the objection to the proposed amendment.

[8] The second ground, upon which it was submitted that the application must fail, was that the amendment would render the pleading excipiable. This again is different from the second objection of the illegality of the delegation. The third ground was that there is no factual basis to support the proposed amendment. The submission being that in terms of clause 9 of the Constitution of the applicant a notice of motion is required before any matter may be placed before council for consideration. Since the applicant is unable to provide a copy of the aforesaid notice of motion, the proposed amendment is not supported by facts, so the argument went.

[9] On the other hand, Grogan appearing for the applicant contended that the principles governing amendments as succinctly spelled out in *Commercial Union Assurances Co Ltd v Waymark N.O*³ have been met.

Evaluation

[10] 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 particular⁴. The case made by the respondent in the main referral is that he was terminated without the requisite authority from the council of the applicant. That being the case, in order to defend such a case, the applicant is behoved to present material facts which demonstrates that the termination was with the requisite authority.

[11] Alleging that the council delegated its powers to its committee and that its committee exercised those powers is an appropriate statement to

³ 1985 (2) SA 73 (TK)

⁴ Rule 6 (1) (b) read with sub (3) (b)

make. The initial statement that the decision was taken at a duly constituted meeting of council by a proper and valid resolution lacked sufficient particularity. By seeking to amend, the applicant is complying with the requirement of sufficient particularity. Whether the applicant would be able to demonstrate this defence at the trial of the matter is an issue that does not arise at this stage. Questions like whether the delegation is lawful and effective, are questions to be decided by the trial court after receiving evidence. The issue of a notice of motion, may not be a relevant issue even at the trial stage. To that extent, this court fails to understand why such a notice of motion should be exhibited at this stage in order to make a sustainable averment as required by the Rule.

[12] The SCA in *Foxlake Investments v Ultimate Raft Foundation Design*⁵, 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 disputes⁶ 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 allowed⁷ unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot*

⁵ (144/15) [2016] ZASCA 54 (01 April 2016).

⁶ My own underlining and emphasis,

⁷ My own underlining.

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".

- [13] The proposed amendment shall facilitate a proper ventilation⁸ of the dispute-was the termination authorised. 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 the legality of the delegation. Alleging that there was a delegation is appropriate for the proper ventilation of the dispute. I see no reason why the amendment should not be allowed.

The issue of costs

- [14] What remains is the issue of costs. Since the judgment of *Zungu*⁹ there seem to be a growing view that this court has been stripped of its discretion to award costs against employee parties. This view is incorrect. What the Constitutional Court did was to remind this court of what was said in *Dorkin*¹⁰. The discretion to award costs remains intact.

- [15] As a reminder, the LAC in *Dorkin* 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

⁸ See *Whittaker v Roos and Another* 1911 TPD 1092 at 1102.

⁹ *Ibid* 2

¹⁰ *Ibid* 3

the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and 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.

[16] 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 frivolous cases does not only affect the opposing 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 Constitution¹¹ will be severely compromised.

[17] The applicant was represented by a Senior 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

¹¹ Constitution of the Republic of South Africa, 1996

frivolous. The respondent should not have opposed this application prompted by him. It is indeed so that a party seeking an amendment is effectively seeking an indulgence and such a party must bear the wasted costs. However in instances where the objection and opposition is vexatious, frivolous and unreasonable¹², the other party should bear the costs.

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

Order

1. The applicant is granted leave to amend its statement of response in accordance with its notice of intention to amend dated 7 September 2017.
2. The applicant (Moegamat Ridwaan Abdullah) is to pay the costs of this application.



GN Moshwana,
Judge of the Labour Court of South Africa

¹² Embling v Two Oceans Aquarium CC 2000 (3) SA 691 (C)

Appearances:

For the Applicant : Advocate J G Grogan

Instructed by : Joubert Galpin & Searle Attorneys, Port Elizabeth

For the Respondent : Advocate P N Kroon SC

Instructed by : McWilliams & Elliott Inc, Port Elizabeth.