THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 256/15

In the matter between:

GAUTENG PROVINCIAL GOVERNMENT **First Applicant**

THE PREMIER, GAUTENG PROVINCIAL GOVERNMENT **Second Applicant**

THE OFFICE OF THE PREMIER GAUTENG PROVINCIAL GOVERNMENT **Third Applicant**

and

NGCOBO THEMBEKILE THELMA **Respondent**

Heard: **23 August 2019**

Delivered: **28 August 2019**

Summary: An amendment of a statement of response. The amendment seeks to introduce a *lis* which could be defeated by the undue delay rule. Allowing such an amendment will cause an injustice. Held: (1) Leave to amend is refused; (2) The applicants to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The applicant herein sought an amendment to introduce a counterclaim in this matter. The respondent objected to the proposed amendment, therefore, the applicants brought this application seeking to be granted leave to amend – by introducing the counterclaim, which is to be heard together with the applicant's (the respondent in this matter) claim for payment of money contractually owed brought in terms of section 77 (3) of the Basic Conditions of Employment Act[1] (BCEA). This application is opposed by the respondent.

Background facts

[2] For the purposes of this judgment, it is unnecessary to traverse all the facts of this case. Suffice to mention that on or about 04 May 2015, the Respondent, Ngcobo referred a claim to be adjudicated by this Court in terms of the provisions of section 77(3) of the BCEA. On or about 17 June 2015, the applicants, the Gauteng Premier and his office, filed a statement of response to the claim of Ngcobo. In the response, they raised a special plea, which prompted Ngcobo to seek condonation. On or about 11 September 2015, Acting Justice Baloyi granted the necessary condonation.

[3] On or about 04 August 2017, the applicants sought an amendment in order to insert a counterclaim. Effectively, the counterclaim aims at declaring the contract extensions to be unlawful and null and void *ab initio*. The respondent objected to the proposed amendment. Owing to the objection, the applicants approach this Court for leave.

Evaluation

[1] Act 75 of 1997.

[4] In terms of the rules of this court, an action or process is instituted by a statement of case and defended by a statement of response. Other than those documents, the Rules of this Court does not make provision for any other document *en route* to adjudication.

[5] Rule 11(3)[2] of the Rules of this Court provides that if a situation for which the rules do not provide arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances. I must point out, the rule does not specifically provide that the procedure to be adopted is one provided in the Rules of another Court, for instance the Uniform Rules. It leaves the court with discretion to adopt any procedure that is appropriate in the circumstances. I may add, litigants in this Court seem to abuse this Rule. Whenever they have the urge to invoke rules of other Courts they do so by invoking this Rule. In my view, it is wrong to do so. The Rule permits the Court to adopt any procedure not litigants to invoke a rule in another Court. It could be argued that section 77(3) claims are effectively civil claims and as such must be treated the same way as how the other civil Courts treat them. However, if a party approaches the Labour Court and not any other civil Court, that party must play the game in accordance with the Rules of the Labour Court

[6] The notion of a counterclaim is foreign to the Rules of this Court. The Uniform Rules of the High Court has in place a procedure for what it terms a claim in reconvention. Rule 24[3] of the Uniform Rules sets out a

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[2] **11. Interlocutory applications and procedures not specifically provided for in other rules –**

(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

[3] **24 Claim in Reconvention**

(1) A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.

(2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the

procedure for counterclaim. The question this Court must ask itself is whether it is appropriate to adopt the procedure in Rule 24? In my view, it is appropriate to adopt that procedure. In terms of that procedure, a counterclaim ought to have been part of the statement of response and it was not. Therefore, what was then required, was for the applicants to seek an agreement from Ngcobo to introduce the counterclaim. It is common cause in this matter that the agreement of Ngcobo was not sought. That being the case, what was available to the applicants was to approach this Court for leave to bring a counterclaim. It is also common cause that the applicants did not do so.

[7] Instead, for reasons best known to themselves, they invoked a procedure contemplated in Rule 28[4] of the Uniform Rules[5]. This was wrong, as this rule was not available to the applicants as it exists to amend existing pleadings and documents. Therefore, introduction of a counterclaim is not an amendment. The counterclaim did not exist together with the statement of response. Strictly speaking, this matter was not supposed to serve before this Court. Rule 24 (5) provides that if the defending party fails to obtain consent and/or leave before delivering a counterclaim, the delivery thereof (which has not yet happened in this matter) amounts to an irregular step, which ought to be dealt with in terms of Rule 30[6] of the

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court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.

(3) A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to subrule (2) of rule 18.

(4) A defendant may counterclaim conditionally upon the claim or defence in convention failing.

(5) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.

[4] **28 Amendment of Pleadings and Documents**

[5] Counsel for the applicant conceded correctly in my view that foreign rules are to be adopted by this Court and not be invoked by parties. Contrary to this submission, the applicants invoked a rule 28 procedure.

[6] **30 Irregular Proceedings**

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

Uniform Rules. As pointed out above, instead of delivering the counterclaim, the applicants sought to adopt the Rule 28 procedure. Thus, Ngcobo could not adopt the procedure in Rule 30[7] within the contemplation of Rule 24 (5).

[8] What Ngcobo should have done was to seek refuge from the Rule 30 procedure once the applicants invoked the Rule 28 procedure. Ngcobo did not, but she is not to blame for that. Therefore, before me is an interlocutory application commenced by the applicants purportedly brought in terms of Rule 28(4). As I have pointed out above, Rule 28 was never available for the applicants from the get go. What this means is that the application is defective and improperly before me. This of course would affect the question of costs at the end. Given my views above, the applicants are bound to fail.

[9] However, even if I were to adopt the procedure unavailable to the applicants and consider this application as a Rule 28 (4) application, I have fundamental difficulties with the counterclaim. If allowed, it shall lead to an injustice.

[10] In *Affordable Medicines Trust & others v Minister of Health and another*[8], 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

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(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

[7] See: *Shell SA Marketing (Edms) Bpk v Wasserman h/a Wasserman Transport* 2009 (5) SA 212 (O).

[8] 2006 (3) SA 247 (CC) at para 9.

> 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 allowed 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".

[11] The injustice manifests itself in the following manner. Properly interpreted, in the counterclaim, the applicants are effectively seeking to review and set aside own decision. I fully agree with Mr Kela for the respondent that what the applicants are seeking to do is not necessarily to invalidate the contract upon which the respondent sues, but to review its own decision to extend the appointment on the principle of legality. In terms of section 158 (1) (h) of the Labour Relations Act[9] (LRA), this Court has jurisdiction to review any decision taken by the State in its capacity as an employer. The decision, which the applicants allege was unlawful was taken around March 2012 or 2013. Under section 158(1) (h) an illegal and/or unlawful decision is capable of being reviewed and set aside[10].

[12] The section does not provide a time period within which the review could be launched. What then applies is the undue delay rule. It takes the court of review to decide whether the delay may be overlooked or not. I doubt whether a court of review would overlook a delay of 7 years or so. Therefore, if the amendment is allowed, this Court would be allowing the applicants to seek a review but not in terms of the section available for such reviews. The net effect of that would be to deny the respondent, Ngcobo to raise, as an available defence, a defence of undue delay to

[9] Act 66 of 1995, as amended.

[10] See *Khumalo and another v MEC for Education: Kwazulu-Natal Case CCT 10[13 [2013] ZACC 49 (CC).* this case dealt with a promotion allegedly no complaint with the Public Services Act. The MEC sought to have the promotion set aside and approached this Court under section 158(1) (h), something the applicant could still do, if so advised.

review and setting aside of an administrative decision, as correctly submitted by Mr Kela.

[13] I disagree with a submission from Malindi SC appearing for the applicants to the effect that the decision to extend an appointment is not an administrative action. It is, the official who motivated for the extension was seeking the Premier to exercise a statutory power and not a contractual power. Should the applicants choose to invoke the provisions of Promotion of Administrative Justice Act (PAJA), they would have to contend with the 180 days prescribed period. Should they choose the section 158(1) (h) process, they would have to contend with the undue delay rule. Allowing them to bypass all the above hurdles would be nothing but an injustice.

[14] This being a civil claim under section 77(3), Prescription Act, may not be available to the respondent. Equally, the undue delay rule may not be available to the respondent. Therefore, an injustice would be allowed if the amendment is granted. For all the above reasons, this application is bound to fail.

The issue of costs

[15] What remains is the issue of costs. I take a view that regard being had to the conduct of the applicants in invoking the wrong procedures and most of all attempting to by-pass the available remedy in section 158(1)(h), the dictates of the law and fairness commands that an order as to costs must be made. It is unfair to expect Ngcobo to be mulcted with costs in an instance where the applicants, who were properly represented from the word go, invoked wrong procedures and attempted to by-pass the available remedies in the LRA. This is a conduct this Court must frown upon and as mark of displeasure make an order as to costs.

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

Order

1. The application for leave to amend is dismissed.
2. The applicants are ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	: Advocate G Malindi SC with him Molokomme
Instructed by	: State Attorney, Johannesburg.
For the Respondent	: Advocate D Kela.
Instructed by	: Ndumiso Voyi Inc