



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS773/2022

In the matter between:

THOMAS FRANCOIS BRINK

Applicant

and

SUPER GROUP TRADING (PTY) LTD

Respondent

Heard: 16 May 2025

Delivered: 2 October 2025

Summary: Application for leave to amend - objections lack any merit – objections frustrating the expeditious resolution of the dispute - amendment allowed, with respondent to pay the costs of the application.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant instituted a claim in this court on 10 November 2022¹ alleging *inter alia* that his dismissal by the respondent was automatically unfair. This prompted a notice of exception from the respondent delivered on or about 23 November 2022.
- [2] The applicant filed a notice of intention to amend his statement of claim during 2022. The respondent filed an exception, and the applicant filed an application to amend his statement of claim. The exception and the application to amend were heard by the learned acting judge Itzkin AJ and resolved through his judgment, handed down on 26 April 2024 (the “earlier judgment”).
- [3] The applicant filed a further notice of amendment, on 11 July 2024 (the “second amendment”). After the respondent filed a notice of objection, the applicant brought an application to amend, which is opposed.
- [4] This judgment relates to the application to allow the second amendment.

Material facts

- [5] The background to the dispute is well illustrated by the earlier judgment. However, insofar as any facts are disputed on the pleadings, these must still be resolved by the trial court.

¹ See service affidavit of the applicant and par 4 of the respondent’s heads of argument.

[6] The material facts may be summarized as follows:

- 6.1 The applicant was employed by the respondent until his dismissal on 15 June 2022. The applicant alleges that, at the time of his dismissal, he held the position of Master Diagnosis Technician.²
- 6.2 The applicant suffered an injury on duty on 14 January 2020, which affected his ability to use right arm.
- 6.3 After this, the applicant used his left arm at work, but this resulted in him developing a 'trigger finger' on his left hand. He underwent surgery, for which he was granted sick leave. When the applicant returned to work, he was expected or required to perform the duties of a mechanic, which required that he lift heavy objects. Thereafter, the applicant underwent surgery to his right elbow for which he was booked off again. The applicant underwent a nerve conduction study which revealed that the right posterior interosseus nerve neuropathy and right median nerve compression at the carpal tunnel (albeit that no definitive diagnosis was made).
- 6.4 The insurer, Rand Mutual Assurance ("RMA") declined to provide further treatment to the applicant and determined that he was permanently disabled, awarding him a lump sum amount. The respondent failed to apply to RMA for further benefits on the applicant's behalf.
- 6.5 On 24 February 2022, an orthopaedic surgeon and an occupational therapist recommended that the respondent accommodate the applicant in alternative position and further recommended that a full

² The respondent disputes this and states that, at the time of his dismissal, the applicant was a "technician (mechanic)".

functional capacity evaluation be conducted to assess which duties, if any, the applicant could do. The respondent declined the recommendations and instituted an incapacity process. Following an incapacity hearing, the respondent dismissed the applicant on 15 June 2022.

6.6 On 11 July 2022, the applicant referred an unfair dismissal dispute to the Motor Industry Bargaining Council (“MIBCO”) for conciliation. In the referral, the applicant alleged that his dismissal was procedurally and substantively unfair; and gave no allegation that he believed the dismissal was ‘automatically unfair’. With the failure of conciliation, the MIBCO Dispute Resolution Centre issued a certificate of outcome of conciliation on 15 August 2022.

6.7 Having received advice that the respondent’s conduct was unfairly discriminatory, applicant referred a second dispute to conciliation regarding the alleged unfair discrimination against him.

6.8 On 13 December 2022, the applicant referred a dispute to this court. In his statement of claim, the applicant alleged *inter alia* that:

6.8.1 The reason for his dismissal was based on his disability, and his dismissal was automatically unfair, as contemplated in section 187(1)(f) of the Labour Relations Act No. 66 of 1995 as amended (the “LRA”),

6.8.2 If the dismissal was not automatically unfair, the dismissal was nevertheless procedurally and substantively unfair,

6.8.3 The respondent unfairly discriminated against him and acted in violation of sections 2, 5, and 6(1) of the Employment of Equity Act No. 55 of 1998 (the “EEA”), and

6.8.4 The respondent is obliged to pay the applicant severance pay because his dismissal was a “no-fault dismissal” and akin to a dismissal for operational reasons.

6.9 In the earlier judgment, the court upheld the exception in relation to the EEA claim, and the severance pay claim. The court dismissed the exception in relation to the claim that the dismissal was automatically unfair and permitted applicant to amend his statement of claim. However, the court noted, in paragraphs [57] and [58] of the judgment, that the applicant was required, if he intended to rely on section 158(2)³ of the LRA, this must be pleaded.

6.10 The applicant filed a notice of amendment on 11 July 2024 in which the applicant seeks to introduce two new paragraphs numbered as [67] and [68]. In paragraph [67] the applicant seeks that, if the court finds that the dismissal was not automatically unfair, the court ought to continue with the matter as contemplated by section 158(2)(b). In paragraph [68], the applicant identifies the grounds upon which he alleges it is expedient for the court to continue with the matter in accordance with section 158(2)(b).

³ Following an amendment to the LRA during 2015, section 158(2) reads as follows: “If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –

(a) stay the proceedings and refer the dispute to arbitration; or

(b) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable.

Legal principles

[7] The general principles may be summarized as follows:

- 7.1 An application for an amendment should always allowed unless it is made *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement.⁴
- 7.2 Amendments should generally be permitted to allow for a proper and full ventilation of the dispute between the parties - so that the real issues are adjudicated and justice is done.⁵
- 7.3 The court exercises a discretion in determining whether to allow an amendment. The discretion must be exercised judicially and “*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*”.⁶
- 7.4 An amendment should not be allowed if the pleading will, as a result, lack the necessary averments to sustain a valid cause of action.⁷

⁴ *Imperial Bank Ltd v Barnard and others* NNO 2013 (5) SA 612 (SCA) at para [8]

⁵ *Trans-Draakensberg v Combined Engineering* 1967(3) SA 632 (D) at 638

⁶ *Sondorp & another v Ekurhuleni Metropolitan Municipality* (2013) 34 ILJ 3131 (LAC) at para 34

⁷ *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC and others* 2003 (6) SA 289 (W), *De Klerk and another v Du Plessis and others* 1995 (2) SA 40 (T) at 43I – 44A, *Kritschke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B, *Cross v Ferreira* 1950 (3) SA 443 (C) at 449H

Analysis of the objections to the amendment

- [8] The respondent's objection can be distilled into four distinct submissions. I deal with each in turn.

The first submission

- [9] The respondent contends that section 158(2)(b) does not confer jurisdiction on this court because this would conflict with section 157(5) which ousts the court's jurisdiction where a dispute must be determined through arbitration in terms of the LRA. The respondent relies on *Mkokeli v Bloomberg LP*⁸ where the court held that section 158(2)(b) does not operate to confer jurisdiction on the court. The court held that its jurisdiction, ousted by section 157(5), cannot be clawed back through section 158(2)(b). In my view, the comment in *Mkokeli* that section 158(2)(b) does not confer jurisdiction on the court is clearly wrong.

- [10] Section 157(5) cannot and should not be read in isolation. The provisions in the LRA must be interpreted purposively, and in their full context. The purpose of section 158(2)(b) is to limit the scope and operation of section 157(5). This is apparent from section 157(5) itself which provides as follows: "*Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration.*" Furthermore, section 157 is not the sole source of jurisdiction for the Labour Court, as explained in *Merafong City Local Municipality v SAMWU & another*⁹ where the LAC held: "*A proper reading of s157 makes it clear that other provisions of the LRA are sources of jurisdiction of the Labour Court and s158 is not excluded as a possible source.*"

⁸ (2021) 42 ILJ 1224 (LC)

⁹ (2016) 37 ILJ 1857 (LAC) at para 35

- [11] Accordingly, section 158(2)(b) confers jurisdiction on this court provided the jurisdictional prerequisites in that subsection are satisfied. It is only if, or when, this court finds that the dismissal was not automatically unfair, that it will become apparent that the dismissal dispute ought to have been referred to arbitration.

The second submission

- [12] The respondent contends that the applicant referred an 'ordinary unfair dismissal' to conciliation but not an 'automatically unfair dismissal'. This submission is without merit. It is clear the dispute, referred to conciliation on 11 July 2022, related to the alleged unfairness of the dismissal. The referral covered all the potential reasons for the unfairness of the dismissal. A similar argument to that made by the respondent was rejected by the Labour Appeal Court ("LAC") in *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another* ("*Driveline*").¹⁰ In that matter, the union referred a dispute to conciliation and then to this court alleging that the retrenchment of its members by the employer was unfair. Subsequently, the union attempted to amend its statement of claim to provide that the dismissal was automatically unfair in terms of s 187(1)(c). The employer objected to the amendment *inter alia* on the basis that no dispute relating to the automatic unfairness of the dismissal had been referred to conciliation. Zondo JP (as he then was) writing for the majority held at para [48]:

"... I would say that a dispute about the fairness of a dismissal remains the same dispute whether or not the reason alleged as the reason for dismissal is changed, withdrawn or added to. The mere allegation of another or an additional reason for dismissal or the mere allegation of another ground of alleged unfairness does not change one dismissal dispute into as many dismissal disputes as there are alleged reasons for the dismissal or into as many disputes as there are grounds of alleged

¹⁰ 2000 (4) SA 645 (LAC); (2000) 21 ILJ 142 (LAC)

unfairness. If this was not the case, an employer could frustrate the entire processing of such a dispute by the mere device of keeping on changing the alleged reasons for dismissal.”

- [13] The Constitutional Court has endorsed the reasoning of the majority in *Driveline. In Association of Mineworkers & Construction Union & others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) & others*¹¹ the apex court held as follows:

“The flaw in the Labour Court’s reasoning stems from its characterisation of an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute that was referred to conciliation. That court overlooked the fundamental issue which is that what was referred to conciliation was the unfairness of the dismissal, regardless of whether the unfairness concerned was automatic or otherwise. And that it is not reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal.”

(own emphasis)

The third submission

- [14] The respondent contends that the applicant cannot rely on the referral to conciliation, relating to the alleged unfair dismissal, because it abandoned that referral by electing to make a second referral relating to unfair discrimination. The applicant denies that it made any such election and denies that it abandoned the dispute concerning the fairness of the dismissal. In *National Union of Metalworkers of SA v Intervolve (Pty) Ltd & others*¹² Cameron J held as follows:

¹¹ (2020) 41 ILJ 1837 (CC) at para [21]

¹² (2015) 36 ILJ 363 (CC) at paras [60] and [61]

[60] ... Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.

[61] So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. It may be inferred from the outward manifestations of the right-holder's intention: 'The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to speak exists.'

(own emphasis)

[15] The respondent submits that the second referral is inconsistent with the referral of the dismissal dispute, and, from this, one can infer that the applicant waived his right to claim that his dismissal was automatically unfair. I disagree. Unfair discrimination claims contemplated in section 6(1) of the EEA excludes claims relating to unfair dismissal.¹³ The first referral and the second referral relate to different claims and are not inconsistent with each other. Waiver is not easily inferred or established. In the circumstances, there is no action or conduct to suggest that the applicant intended to waive his right to claim that he was unfairly dismissed for reasons related to his disability.

The fourth submission

[16] The respondent contends that the referral of the unfair dismissal dispute to this court was made late and condonation is necessary. The dismissal dispute was referred to conciliation, and a certificate of outcome of conciliation was issued on 15 August 2022. The dispute was referred to

¹³ See section 10(1) of the EEA

this court within 90 days of the issue of the certificate, on 10 November 2022. The respondent did not object to the form of service of the statement of claim and instead filed a notice of exception.

[17] At the time that this matter was instituted, the old rules were in effect.¹⁴ If the respondent wished to object to service, it ought to have done so by filing an application in terms of Rule 11.¹⁵ In any event, if service was not made according to the letter of the rule, but service was effective because the respondent actually received the document, then service is good.¹⁶ There should not be a rigorous or formalistic approach to the rules. The court should consider the purpose the rules – to ensure fairness in the procedure, and the realities of the situation. Furthermore, by filing an exception, the respondent waived any right to contest the form and manner of service.

[18] In the circumstances, the applicant referred its dispute to this court in accordance with the time periods contemplated in section 191(11) of the LRA and condonation is not required.

Costs

[19] Both parties sought costs. The applicant sought costs on the basis that the respondent's opposition to the amendment was meritless.

[20] The principles governing costs orders in this court are set out in section 162 of the LRA (costs may be ordered according to the requirements of law and fairness) and thereafter distilled in *MEC for Finance, KZN &*

¹⁴ Published in GN 1665 of 14 October 1996, as amended thereafter.

¹⁵ Practice in the Labour Courts by Landman and Van Niekerk (Juta & Co) 1998 (Revision Service 7) at D-12

¹⁶ *Investec Property Fund Ltd v Viker X (Pty) Ltd* (2016/07492) [2016] ZAGPJHC 108 (10 May 2016) (Unreported) at paras [7] – [19]

another v Dorkin NO & another (“Dorkin”),¹⁷ *Biowatch Trust v Registrar, Genetic Resources & others* (“Biowatch”),¹⁸ and *Zungu v Premier of the Province of KwaZulu-Natal & others* (“Zungu”).¹⁹

[21] In *Zungu*, the LAC held that: “*The rule of practice that costs follow the result does not govern the making of orders of costs in this court. ... 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' organizations 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.*” In *Biowatch*, at para 24, the Constitutional Court held that: “*If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.*” In *Zungu*, the Constitutional Court endorsed *Dorkin* and noted that where costs are ordered it is necessary for the court to give its reasons for doing so.

[22] It is clear from the above that this court is not prohibited from making cost orders where appropriate. The court must consider the requirements of law and fairness and consider the chilling effect that costs orders may have on the use of litigation to resolve disputes. That said, our courts have consistently held that costs may be appropriate and fair where the litigation is meritless. This court has held that an appropriate award of costs is a method of ensuring that earnest thought and consideration go into decisions to litigate in the Labour Court²⁰ and fairness may dictate that a party bears the costs of meritless litigation.

¹⁷ (2008) 29 ILJ 1707 (LAC)

¹⁸ 2009 (6) SA 232 (CC)

¹⁹ (2018) 39 ILJ 523 (CC)

²⁰ *National Union of Metalworkers of SA v Tshwane University of Technology* (2020) 41 ILJ 2686 (LC) at paras [44] – [49]

[23] In my view, as illustrated above, all the grounds of objection are so without merit that they strongly suggest ulterior motives to the opposition to the amendment. As a result of the unnecessary and unmerited objection to the amendment, the finalisation of this dispute has been delayed for more than a year. This conduct was unprofessional, frustrated the expeditious resolution of the dispute, and therefore warrants sanction.

Conclusion

[24] In the circumstances, for the reasons set out above, I make an order in the following terms:

24.1 The application for leave to amend is granted,

24.2 The notice of amendment filed in this court by the applicant on 11 July 2024 is allowed,

24.3 The respondent is ordered to pay the costs of the application.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv Henry Cowly

Martin Hennig Attorneys

For the Respondent

Adv R Grundlingh

William Berry Attorneys