In the Labour Court of South Africa

(Held at Durban)

In the matter between:	Case number D364/05
Nasuwu	First Applicant
Individual employees as set out in Annexure X	Second to Further Applicants
and	
Pearwood Investments (Pty) Ltd t/a Wolf security	First Respondent
Enforce Security Services (Pty) Ltd	Second Respondent

Judgement

Bhoola AJ

Introduction

[1] There are two matters before the court. The first is an application by the applicants for leave to amend their Statement of Claim. The respondents oppose the application. The second is an application by the second respondent for an order setting aside the applicants' Statement of Claim. A third matter that arises is whether the Supplementary Affidavit of the applicants' attorney representative should be admitted in the absence of a formal application for leave.

Background facts

[2] The second to further applicants ("the individual Applicants"), were employed by the respondent as security guards prior to the termination of their employment on 31 October 2004.

[3] The first applicant referred a dispute concerning the alleged unfair dismissal of the individual Applicants to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 23 November 2004. The case reference allocated by the CCMA was KNDB8457-04 ("the first referral").

[4] The CCMA responded with a notice dated 7 December 2004 advising that the referral was fatally defective on the grounds, *inter alia*, that proof of service on the first respondent was unclear, the application had not been signed and the citation of the referring party was incorrect.

[5] On 23 December 2004 applicants filed a subsequent referral ("the second referral") accompanied by an application for condonation of its late filing. The referral was duly

served on the first respondent and included an Annexure (referred to interchangeably as either A or X) identifying the individual applicants.

[6] The CCMA issued a notice advising the parties that the second referral was set down for a joint conciliation – arbitration ("con-arb") on 7 March 2005. The second respondent objected to the con-arb and the matter was conciliated but was not resolved. The CCMA granted the application for condonation and duly issued a certificate of outcome. The CCMA ruling refers to the case number as KNDB10195/04.

[7] The CMMA then issued a further notice setting the first referral down for con-arb on 14 March 2005. The matter was dismissed.

[8] The second respondent acquired the guarding division of first respondent as a going concern on 1 April 2005.

[9] The applicants filed their Statement of Claim on 31 May 2005. Mr W Hardie, the Human Resources Manager of second respondent confirmed that he received the Statement of Claim on 13 June 2005.

[10] On 24 June 2005 the second respondent launched an application for an order setting aside the Statement of Claim on the grounds, *inter alia*, that:

(a) There was no compliance with Rule 6(1) of the Rules of the Labour Court;
(b) The Annexure purporting to identify the second to further applicants was not attached;
(c)The Labour Court had no jurisdiction to adjudicate the claim in terms of section 191, 191(5) (b), and 191 (11) (a) in that the application was out of time;
(d)The Statement of Claim had not been signed; and
(e)A Schedule of material and relevant documents was not attached as required by Rule 6(1) (e).

[11] This application was not enrolled for hearing.

[12] On 21 November 2006, more than a year later, the applicants filed a notice of intention to amend their Statement of Claim as follows:

"1. By the delivery herewith of Annexure "A" identifying the individual applicants.

2. By the addition of the word "First" in paragraph 3.4 before Respondent.

3. By the addition of paragraph 3.5:

"The Second Respondent is Enforce Security Services (Pty) Ltd, a company duly registered with limited liability according to the Company laws of the Republic of South Africa and which has its principal place of business at 43 Sea Cow Lake Road, Springfield Park, Durban".

4. *By the addition of the following paragraphs:*

"4.5 The said transfer occurred during August 2002. The individual Applicants were, after the said transfer, deployed to various sites guarding property belonging to the Durban Metro.

4.6 The Respondent alleged that the Durban Metro had failed to renew its contract with the Respondent.

4.7 A process of consultation was embarked upon between the Respondent and the First Applicant.

4.8 During the said process of consultation, following various requests for further information by the First Respondent, the contracts of services of the individual Applicants were terminated.

4.9 At the time of the aforesaid transfer, all of the individual Applicants were permanent employees.

4.10 When they were deployed to the Durban Metro sites, the Respondent placed the individual Applicants in the same position as other persons employed on limited duration contracts.

4.11 The Respondent could and should have accommodated the individual Applicants by virtue of their length of service and should have distinguished between employees employed on limited duration contracts as opposed to the applicants who were at all times permanent employees.

4.12 The Respondent failed to consult with the First or Further Applicants in accordance with the requirements of s189 of the Act read with the Code of Good Practice pertaining to Operational Dismissals.

4.13 The business of the Respondent has been transferred to Enforce Security Services (Pty) Ltd, a company duly registered with limited liability according to the Company laws of the Republic of South Africa and which has its principal place of business at 43 Sea Cow Lake Road, Springfield Park, Durban".

[13] The respondent objected to the notice of intention to amend on 29 November 2006.

[14] Thereafter the applicants launched this application for leave to amend. The respondents oppose the application and this opposition was heard together with the application to set aside.

[15] I deal firstly with the application to set aside.

No condonation and certificate of outcome

[16] The second respondent's contention is that :

1. The first referral is the dispute pending before this court.

2. No condonation was sought or granted in respect of that referral. It was not subject to conciliation and no certificate of outcome was issued.

3. Condonation was only granted and a certificate of outcome issued in respect of the second referral.

4. The referral to this court is accordingly out of time in terms of section 191(1) (b) (i).

[17] It was submitted by Ms Harries, the attorney for the applicants, that there was an obvious error on the part of the CCMA, and that both referrals are in respect of the same matter between the same parties, the first being defective and having been replaced by the second. The second respondent had at all material times been party to the second referral. Its objection to the con arb was in respect of the second referral.

[18] Ms Harries investigated the matter with the CCMA and made certain conclusions regarding the first and second referrals being in respect of the same issue and between the same parties. Her evidence was presented to the court in the form of a supplementary affidavit, which the respondents' Counsel, Adv G Van Niekerk SC submitted was *pro non scripto* in that, *inter alia,* application for leave to admit it had not been sought. I will deal with this below. Even if regard is not had to the supplementary affidavit, in my view the error committed by the CCMA is obvious. The first referral should never have been set down for con-arb. It had been returned to applicants as being "fatally defective". The condonation granted and certificate of outcome issued was in respect of the second referral. Furthermore, the Respondents had a remedy at the time and chose not to exercise it. They could have objected *in limine* at the conciliation and failing that, sought to review the certificate of outcome. They did none of this. It cannot behove them now to seek to set aside a process in which they willingly participated, on a mere technicality.

[19] In my view, the second referral is properly before this court.

Non-joinder

[20] The Respondent's case is that the purported joinder of second respondent is defective in that Rule 22(6) of the Rules of the Labour Court were not complied with. Rule 22(6) requires copies of all previously delivered documents to be served on the party to be joined. This is a technical and frivolous point. The applicants' attorney submitted that all process was duly filed on the respondents' attorneys of record, and the same firm represents both respondents. Furthermore, she submitted that it was common cause that the second respondent acquired the business of the first

respondent in April 2005. The second respondent has not adduced any evidence of prejudice suffered as a result of the non-compliance with Rule 22(6), and moreover the second respondent was in possession of the relevant documents and this enabled it to launch the application to set aside.

Claims compromised

[21] The respondents contend that the claim in respect of the unfair dismissal brought by the applicants has been compromised in that certain of the individual applicants were awarded severance pay. Furthermore, they contend that the applicants are seeking to bring multiple actions.

[22] I do not agree. Acceptance of and claims for severance pay cannot constitute a waiver of the rights of the individual applicants to pursue their claim in respect of their unfair termination based on operational requirements.

[23] Furthermore, as was submitted by Ms Harries, the applicants have a constitutionally guaranteed right to fair labour practices, and are entitled to seek to have the merits of their claim in respect of the alleged unfair dismissal adjudicated.

Exception

[24] Counsel for the respondents submitted that the amendment sought through the introduction of background facts in paragraphs 4.5 to 4.13 ("the background facts") is excipiable in that, *inter alia*, it is nonsensical, incongruous, vague and embarrassing and exacerbates uncertainty. He cited the following authorities in support of the proposition that amendments which would render pleadings excipiable should be disallowed : *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd & Another* 1967(3) SA 632 (D) at 641 A, *Benjamin v SOBAC South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958 D and *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en ń Andere* 2002(2) SA 447 (SCA) at paragraphs [34], [36], [42] and [43] . These authorities become relevant should I find that the amendment is indeed excipiable. I do not understand the respondents to be arguing that the original Statement of Claim is excipiable, but the background facts are excipiable and would, if allowed, result in the pleadings becoming excipiable. The grounds relied on are, *inter alia*, that there is no previous reference to an alleged "transfer" and yet the background facts make reference to this; the dates are wrong and the amendment is accordingly illogical and nonsensical.

[25] The Rules of the Labour Court are silent on exceptions. However, the Labour Court can have regard to the principles espoused by the High Court, as was held in *Eagleton & Others v You asked for Services (Pty) Ltd* [2008] 10 BLLR 1040 (LC). The court, *per* Basson J, reiterated the ultimate test as being whether the excipient is prejudiced by the amendment (at 1045 B). Furthermore, citing Erasmus, *Superior Court Practice,* Basson J accepts that the onus is on the excipient to show both "*vagueness*

amounting to embarrassment and embarrassment amounting to prejudice" (at 1045 A).

[26] Rule 6 (1) of the Labour Court rules requires that statements of claim should contain, *inter alia:*

> *"a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;…a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document"*

[27] Waglay J in *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) articulates the test as follows in instances where an exception is raised to the statement of claim :

" the court must consider…whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing particulars at the pre-trial conference stage".

(At paragraphs 6, 7 and 10).

[28] In my view, the amendment will result in "*real embarrassment*", in that it is riddled with errors. It is not clear that it actually pertains to this matter at all as the facts referred to and the dates appear to relate to another matter. Even though it may be possible for the respondents to file what the Court in *Levitan v Newhaven Holiday Enterprises CC* [1991] 4 All SA 226 (C) at 298H-299C referred to as *"an unobjectionable plea to an objectionable declaration"* this is unlikely to assist in expediting the ultimate resolution of the main claim, which was the test the Court had regard to. The amendment sought is likely to prejudice the respondents in the formulation of a defence, and is accordingly not allowed.

Delay

[29] The respondents' relied on *Nzimande v Zenex* (2001) BLLR 419 (LAC) in support of the submission that the inordinate delay (of more than a year in this instance), in bringing the application to amend on its own justifies the dismissal of the application. I do not agree. The delay may well have been unacceptable but the Respondent has not shown that it has been prejudiced thereby. *Nzimande* is authority for the *dictum* that both are relevant considerations, and that, despite delay, the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order of costs. Of course, in the labour relations context these *dicta* have to be viewed in regard to whether the interests of expedition and efficacy are undermined. In my view, this matter is distinguishable in that *Nzimande* dealt with a substantive amendment replacing the original Statement of Claim in its entirety; the original Statement of Claim had laid no factual basis for allegations of discrimination and

arbitrariness, and furthermore there was a continuing permanent relationship between the parties. This is not a matter akin to *Nzimande* where the background is *"extremely difficult to describe coherently as a result of the unsatisfactory manner in which the Statement of Claim both in its initial and amended versions has been drafted"* (at 420 A). I accordingly find no reason to depart from the principle that leave to amend will generally be granted unless there is a likelihood of prejudice that cannot be cured by an appropriate costs order, even though the unexplained delay of more than a year in proceeding with the application to amend may be unreasonable. The respondents have not shown any prejudice if the applicants are permitted to exercise their rights to have their dispute adjudicated to finality.

Hearsay

[30] I turn now deal with the supplementary affidavit of the applicants' attorney. This is the affidavit that is the subject of the Respondents' contention that it is not properly before the court in that no leave was sought for its admission, which would have required the exercise of judicial discretion in regard to its relevance and other matters. Counsel submitted furthermore that the supplementary affidavit was entirely hearsay and speculative and that no confirmation or explanation was forthcoming from the CCMA. Accordingly, it was submitted that the supplementary affidavit was *pro non scripto.*

[31] Ms Harries contended the supplementary affidavit was relevant and of assistance to the court, and that no prejudice will be occasioned to respondents by its admission. She explained that the applicants had not noticed the two case numbers in the referrals as this had not been pleaded by the respondents nor had it been raised during the con arb. When it came to light, she undertook an investigation and accordingly submitted the affidavit in order to assist the court. Ms Harries submitted that the court can exercise its judicial discretion in this regard and admit the supplementary affidavit.

[32] I am in agreement with the respondents' counsel that it is not acceptable to file supplementary pleadings without a formal application for leave. Its probative value is furthermore limited. I have not had regard to it in deciding this matter.

[33] I now deal with the application to amend.

[34] The applicants seek to amend their Statement of Claim by the inclusion of the Annexure describing the individual applicants; by joining the second respondent as party to the unfair dismissal claim, and by the inclusion of the background facts. The applicants contend that these amendments cure the defects complained about by the Respondents as adhering to the Statement of Claim.

[35] The applicants contend furthermore that the objection to the amendment and application to set aside are based on technical grounds and are frivolous. The application to set aside is based on a distinction the respondents seek to draw between the situation in this instance where, it is submitted the first applicant elected to cite but

failed to identify its members as co-applicants. This, respondent's Counsel argued, was not the situation envisaged in *Hernic v Hernic Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC) where a trade union was held to be entitled to act in its representative capacity and bring a claim in its own name. The applicants' legal representative argued that in addition to the dictum in *Hernic* being applicable, the first respondent knew who the individual applicants were, it had employed them prior to their dismissals, and could hardly claim to have been prejudiced by the failure to identify them. Moreover, the second respondent became aware of the individual applicants when it was served with the second referral and condonation application. The respondents' Counsel relied on an election made by the union to join the individuals as taking it out of the parameters of *Hernic.* I fail to see the merits of this submission. The point is that the annexure was an omission which has subsequently been remedied. It did not, in my view, render the Statement of Claim defective in the first place. However, I am of the view that, even in the absence of this cure, the first applicant would have been entitled to proceed in its representative capacity. The failure to describe individual trade union members, irrespective of whether they are cited as co-applicants or not, cannot possibly deprive them of their rights to institute proceedings in respect of an unfair termination. The First Respondent did not dispute having received the second referral and the condonation application, of which the annexure formed part, and it cannot be said to have been prejudiced by the belated identification of the individual applicants.

[36] The applicants' attorney submitted that the respondents have suffered no prejudice other than compensation that may become payable should the main claim succeed. The applicable test, submitted by Ms Harries, relying on *NUM v Namakwa Sands –A division of Anglo Operations Ltd* [2008] 7 BLLR 675 (LC), is whether the Respondents are prejudiced by the amendment.

[37] The applicants submitted that the notice of objection refers only to the inclusion of the Annexure but the respondents then seek, in their pleadings opposing the application to amend, to raise issues not contained in the notice of objection. This does not comply with High Court Rule 28, which applies *mutatis mutandis* given that the Labour Court Rules are silent in regard to applications to amend, in that Rule 28 provides that an objection to a proposed amendment shall clearly and concisely state the grounds on which the objection is founded. Accordingly, the further issues the respondents seek to raise should be dealt with as points *in limine* in the main claim. I am satisfied with the explanation from respondent's Counsel that they are not bound by the four corners of their objection and accordingly heard submissions in regard to the further objections.

[38] In my view, for the aforegoing reasons the application to amend should succeed other than in respect of the paragraphs I consider to be excipiable. The background facts are excipiable and will render the entire pleading excipiable in that they are vague and embarrassing, contain incongruous dates and are nonsensical. They furthermore cause

the respondents to be prejudiced in the formulation of a defence, which prejudice may not be sufficiently remedied by way of an appropriate costs order.

[39] In the premises, the court accordingly grants the following order

1. The application for leave to amend is granted in respect of amendments 1, 2 and 3 of the applicants' notice of intention to amend.

2. The amendment in respect of paragraph 4 introducing the background facts is not granted.

3. The application brought by the second respondent to set aside the Statement of Claim issued by the applicants is dismissed.

4. The Supplementary Affidavit is not admitted.

5. No order as to costs.

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U Bhoola

Acting Judge of the Labour Court

Date of hearing : 20 November 2008

Date of judgement : 04 December 2008

For the Applicants: Ms J P Harries

For the Respondents: Adv G Van Niekerk SC instructed by Millar & Reardon