IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 508/06

In the matter between:

SOUTH AFRICA TRANSPORT AND ALLIED

WORKERS UNION 1ST APPLICANT

NOMAHLUBI MABIJA 2ND APPLICANT

AND

SOUTH AFRICAN AIRWAYS (PTY) LTD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an interlocutory application in terms of which the applicants seek leave to amend their statement of claim. The second respondent the South African Aviation Authority has now been joined as a party to these proceedings.

[2] The applicants seek an amendment to their statement of case on the following terms:

> *"4 By the addition of the following paragraphs following the existing paragraph 23 thereof (now paragraph 25 thereof):*

"26. By the end of June 2005, the applicant's blood platelet count had returned to normal levels and she had not been taking the steroid prednisone for approximately four months. For all practical purposes therefore, the applicant's ITP condition was cured and/or in remission and ought not to have presented any further barrier to the award of her class 2 medical certificate issued in terms of the Regulations promulgated in terms of section 22 of the Aviation Act, no. 74 of 1962, ("the Aviation Regulations").

"27 Although the applicant's CD4 count was found to be relatively low and her viral load count high during May 2005, both these conditions are treatable with anti-retroviral therapy. Once the applicant's condition had stabilized following such treatment, this ought not to have presented any medical barrier to the award of a class 2 medical certificate in terms of the Aviation Regulations to her.

"28. At all material times hereto, including up and until the applicant's dismissal by the first respondent, the Institute for Aviation Medicine had merely found the applicant to be temporarily unfit to be issued with a class 2 medical certificate and recommended that she be re-assessed after appropriate treatment for her condition."

5. .

6. By the addition of the following paragraphs before the existing paragraph 30.1 thereof (now 35.4 thereof):

"35.1 The first respondent failed to realise and/or demonstrate that it realised, that the second applicant's medical condition at the time it dismissed her, described in paragraphs 26 and 27 above, is temporary and treatable and not a complete or permanent barrier to the award of a class 2 medical certificate in terms of the Aviation Regulations.

"35.2 The first respondent failed to follow its own policies and protocols dealing with HIV, and in particular the revised protocol dealing with HIV positive applicants, by not providing the applicant with the necessary medical treatment and/or support and/or assistance and/or a fair and reasonable opportunity to demonstrate that her CD4 and viral load counts could be brought within acceptable limits required for class 2 medical certification in terms of the Aviation Regulations.

"35.3 The first respondent failed to, have any or any proper regard for the medical reports issued by the Institute

for Aviation Medicine, which up and until the applicant's dismissal by the first respondent, had merely found the applicant to be temporarily unfit for the issue of a class 2 medical licence and recommended that she be re-assessed after appropriate treatment for her condition, described above."

7 By re-numbering the subsequent paragraphs of the applicants' statement of case accordingly.

8 By the insertion of the word "Consequently" at the commencement of the existing paragraph 30.1 thereof (now 35.4 thereof).

9. By the addition of the following words at the end of the existing paragraph 30.1 thereof (now 35.4 thereof):

11 and section 6(1) of the Employment Equity Act, No 55 of 1998."

Background facts

[3] It is common cause as recorded in the pre-trial minutes that the applicant applied for the post of a cabin crew as was advertised in the Sowetan newspaper by the first respondent. The position she specifically applied for was that of a flight attendant, class II and that was during July 2004. At the time the second applicant applied for this position she was employed by Club Travel.

[4] During September 2004, the second applicant underwent pre-employment medical screening by the first respondent's medical staff and consultants. She was then referred to the Johannesburg Provincial Hospital for further medical tests.

[5] After apparently undergoing a medical test she was informed that she had a low platelet count in her blood. The second applicant was thereafter and during February 2005, informed that she had been accepted into its training programme and also signed a contract of employment with the first respondent. The position of the second applicant is defined in the contract as a "*Contract Cabin Crew Member."* As concerning its termination the contract at paragraph 9(iii) provides as follows:

> *"[The] employer in its sole discretion may terminate this Agreement... if the Contractor does not possess the qualifications, as set out in or required by or inherent to this agreement or as reasonably required for the appointment, or fails to disclose a material fact which would have influenced the Employer whether to employ or retain the Contractor."*

[6] Soon after commencing her employment relationship with the first respondent the second applicant was referred to the Institute for Aviation Medicine (the IAM) for medical check up. She was then informed by the first respondent that the IAM panel had found her medically unfit. The second applicant went through another medical test, the outcome of which, she was informed by the medical department of the first respondent that she had tested HIV positive. Thereafter, the second applicant was informed that the IAM panel had convened on 12 April 2005 and again found her to

be temporarily medically unfit. At that stage the second applicant had successfully passed all the theoretical and practical examinations for the position she was appointed to.

[7] After all the above the second applicant was invited to a meeting with her union representative where they were invited to make submissions as to why she should not be dismissed because of her medical condition which made her unfit to perform her duties.

[8] On the 5th July 2005, the first respondent issued the second applicant with a letter of dismissal. The applicants being unhappy with the dismissal referred a dispute concerning the alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. The parties having failed to reach a settlement during the conciliation process, the applicants instituted the present proceedings and that was after the CCMA had declined to arbitrate the matter because it lacked jurisdiction.

[9] The applicants' claim is based on discrimination and on the alleged arbitrary ground, in contravention of section 187 (1) (f) of the Labour Relations Act, No. 66 of 1995 ("the LRA"), alternatively on the ground unfair dismissal in contravention of the requirements of section 189 of the LRA.

[10] The case of the first respondent on the other hand is that *" it is legally prohibited from employing the second applicant by virtue of the regulations."* The regulation

relied upon are those promulgated by the Minister of Transport under the Aviation Act No 74 of 1962 and are administered by a panel appointed by the Civil Aviation Authority (CAA), in terms of section 4 (2) of the SA Civil Aviation Act.

The first respondent's objection

[11]The first respondent has raised several objections to the applicant's application to amend their statement of case. The first objection to the amendment is based in the contention that the applicants have previously admitted that the decision of the CAA in May and June 2006, was final and not temporary and the applicants are not entitled to withdraw that admission.

[12]The applicants argued that the objection had no merit in that they had never sought to withdraw the alleged admission and that such admission was never made. In the alternative the applicants argued that if the admission was made and that they were seeking to withdraw it, there is no rule against the withdrawal of an admission.

[13]The third basis for the objection is that the applicants are attempting to alter or modify their cause of action very close to the trial and this will prejudice first respondent in its trial preparation.

[14]The fourth objection to the proposed amendment is that the amendment is based in law on the decision of the CAA which is an administrative decision which has not been set aside.

The legal principles governing an amendment

[15]The legal principle governing application to amend pleadings is that the Court has discretion to exercise in considering whether or not to grant an amendment sought by the applicant. An amendment of pleadings will generally be granted where such an amendment will not prejudice the other party. See *Papier & others v Minister of Safety & Security & others [2003] 12 BLLR 1268 (LC), NASUWU & Others v Pear wood Investments (Pty) Ltd t/a Wolf Security & Another (2009) 30 ILJ 1852 (LC).*

[16]The approach to be adopted when considering whether or not to grant an amend of pleadings was set out in *Moolman v Estate Moolman & another* 1927 CPD 27 at 29 where the Court held that:

> *"The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed."*

[17]And the approach to adopt when dealing with the late application for an amendment received attention in in *MacDuff & Co v Johannesburg Consolidated Investments Co Ltd 1923 TPD 309,* where the Court held that:

"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

[18] In dealing with the issue of an amendment involving the withdrawal of an admission the Court in *Papier & others supra,* held that the party seeking the indulgence must provide a full explanation of the circumstances in which the admission was made and the reason for seeking its withdrawal. An amendment involving a withdrawal will not be grant if it will result in prejudice or injustice to the other party unless it has been shown that such prejudice can be compensated by an order as to costs. The same approach was adopted in *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (O), where it was held that an application involving a withdrawal of an admission is no different to any other amendment. See also *Bellairs v Hodnett & another* 1978 (1) SA 1109 (A) at 1150G.

[19] The most important principle in dealing with an application for an amendment is that the Court will in general lean towards granting an amendment to ensure a full and proper ventilation of the dispute between the parties. The ultimate consideration in this respect is to ensure that justice is done to both parties. See *Cross v Ferreira 1950 (3) SA 443 at 447, Trans- African Insurance Co Ltd v Maluleka 1956 (2) SA 273(A) at 279Cand Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at 261C.*

[20]In the present instance it is important in considering the opposition to the granting of the amendment to note that in general the first respondent makes no allegation in its answering affidavit regarding the prejudice that may arise if the amendment was to be granted. The real challenge of the first respondent to the granting of the amendment is that it should not be granted because the amendment sought does not disclose the cause of action. This contention is based on the argument that the decision which found the second applicant to be unfit to perform her duties was made by the medical panel and not the first respondent. This argument has no merit because the applicants have indicated very clearly that their case is not based challenging the decision of the CAA but on the unfairness of terminating the employment of the second applicant on the prohibited ground of discrimination.

[21]It seems to me that the contention of the first respondent would probably have been sustainable had the case of the applicant been based on challenging non appointment to the post. The contention would have been sustainable probably because the applicant would have failed the criteria for the appointment to the position. In the present instance, the case that the applicants seek to present before the Court is the fairness of the dismissal based on the allegations contained in the statement of case. The issue in relation to the decision of the CAA is not, as I understand the case of the applicant, whether or not the decision was correct but whether it was fair for the first respondent to terminate the employment of the second applicant based on that decision. In other words the applicants do not question the validity or correctness of the decision of the CAA but questions the fairness of the dismissal based on that

decision in particular with regard to the contentious question of the interpretation of whether or not the decision said the health condition of the applicant was of a temporary nature. This in my view is an issue to be canvassed and ventilated during the trial of all other issues in these proceedings.

[22]It is further my view that there is no merit in the contention of the first respondent that the amendment does not show a cause of action. It seems to me that the cause of action, being automatically unfair dismissal has already been set out in the pleadings as they stand. The amendment, in my view seeks to amplify the statement of case.

[23]The contention by the first respondent that the applicants are bound by an admission they had made regarding the binding effect of the CAA's decision makes no sense to me. Reading through the pleadings as they stand currently, I have not been able to find in what way is it alleged that the admission was made. However, even assuming that the admission was made or such can be inferred from the pleadings, I see no prejudice which the respondents were to suffer if such admission was to be withdrawn. The applicants have provided satisfactory reasons in their alternative averment why the admission if made at all should be withdrawn.

[24]As indicated above the other basis upon which the third respondent sought to oppose the amendment is that the applicants are attempting to alter or modify their cause of action very close to the trial and this will prejudice first respondent in its trial preparation. The essence of this contention is that the applicants brought their

amendment late. The applicants have provided a satisfactory explanation as to why the amendment was only brought after the pre-trial conference.

[25]The key issue for determination when this matter is considered in trial will be the fairness of the dismissal of the second applicant in terms of sections 187(1) (f) and 188 (1) of the LRA. Thus the issue of jurisdiction as raised by the first respondent in their heads of argument has not merit.

[26]In the light of the above I see no reason why the applicants' statement of case cannot be amended as prayed for in their application. In the circumstances of this case I do not belief that costs should follow the results.

[27]In the premises the following order is made:

1. The applicants' statement of case is amended in terms of the notice of the to amend the statement of claim.

2. There is no order as to costs.

Molahlehi J

Date of the hearing: 17th August 2009

Date of Judgment 22ND January 2010

Representation:

For the applicant:	Adv Euijen
Instructed by:	Cheadle Thomson & Haysom
For the respondent:	Adv Cassim SC with Adv Boda
Instructed by;	Cliff Dekker Hofmeyer Inc