IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Reportable
CASE NO. D 534/09

In the matter between:

NUMSA	First Applicant
P MAZWANA & 26 OTHERS	Second and Further Applicants
and	
ADECCO RECRUITMENT SERVICES LTD	Respondent

Date of Hearing: 25 August 2011

Date of Judgment: 30 September 2011

JUDGMENT

REDDY AJ

Introduction

[1] These are interlocutory applications by the applicants:

i. for condonation for the late delivery of their statement of case and;

ii. to amend their statement of case.

The applications are opposed by the respondent.

Factual Background

[2] The individual applicants (whom I shall refer to as "the employees") were retrenched on 25 January 2009.

[3] Their dispute was referred to conciliation and a certificate of non-resolution dated 6 April 2009 was issued.

[4] The employees were employed by the respondent - a labour broker - and performed their services at Man Truck SA (Pty) Ltd - a client of the respondent. For ease of reference I shall hereafter refer to the respondent as the "labour broker" and to Man Truck SA (Pty) Ltd as the "client".

[5] It is alleged by the applicants that the retrenchment occurred without consultation with the employees or their union. Severance pay was not paid. Objective selection criteria were not applied. New employees were employed in the employees' stead after their retrenchment. The labour broker denies that it is liable in any way as the employees were employed in terms of limited duration contracts and their contracts had come to an end by operation of law.

[6] The dispute initially recorded both the labour broker and the client as respondents. In August 2009, the client excepted to the statement of case because the employees were not employed by it but by the labour broker. It submitted that there was no cause of action between the applicants and the client.

[7] The labour broker delivered its reply to the statement of case around August 2009, after the exception by the client was filed.

[8] At this point in time, the applicants were represented by an attorney. During the course of the relationship between it and the attorney, the applicant union (whom I shall refer to as the "union") discovered serious problems with his work and proceeded to terminate his mandate around September 2010.

[9] Upon inspection of the file in this matter, the union's legal officer discovered around October 2010 that the statement of case did not contain certain relevant allegations and that an exception had been taken to the statement of case.

[10] In October 2010, the union filed a notice to amend its statement of case. In November 2010, the labour broker delivered an objection to the intended amendments. In November 2010, the union withdrew the action against the client, leaving only the labour broker as the respondent.

[11] In February and March 2011, the applicants delivered an application to amend their statement of case and an application for condonation for the late filing of the statement of case respectively. These applications are the subject of this judgment.

Condonation

The delay

[12] It is common cause that the statement of case was due on or before 5 July 2009. The statement of case was served on 14 July 2009 (10 days after it was due) and filed on 4 August 2009 (one month after it was due). The delays are to my mind not excessive.

[13] The application for condonation was only delivered on 4 March 2011 – 19 months after the delivery of the statement of case. The delay here is substantial. The labour broker in its response to the statement of case recorded that an application for condonation for the 10 day delay was required.

Explanation for the delays

[14] As stated earlier, the applicants were initially represented by an attorney who referred the matter to this Court. There were certain problems with his services and his mandate was terminated around September 2010.

[15] The attorney incorrectly referred the matter to arbitration to the motor industries bargaining council after the conciliation proceedings were completed. On 9 July 2009, the bargaining council informed the attorney that it did not have jurisdiction to hear the dispute as it had to be referred to this Court. The statement of case was drafted and served and filed on the dates referred to above.

[16] The union was at all times during the existence of the attorney's mandate informed by him that this matter was being properly prosecuted. It had no reason to believe otherwise. It was only on the termination of the mandate in September 2010 and on inspection of the file in October 2010 that the union discovered that certain omissions existed.

[17] A notice to amend the statement of case to cure the lack of relevant allegations and a withdrawal of the dispute against the client followed in October and November 2010 respectively. These steps were taken within a reasonable time of the union becoming aware of the necessity to take these steps and the applicants cannot be said to be in wilful default.

[18] The application for condonation was only delivered in March 2011, 19 months after it should have been delivered. Although a separate application for condonation for the late filing of the condonation application was not delivered to this Court, the labour broker's representative raised this issue and it was dealt with so that the matter need not be adjourned for a separate application for condonation to be filed. Both parties addressed the Court on this issue. I have also had regard to the pleadings in respect of the late filing of the statement of case and the Court file. The pleadings and the Court file were of assistance to the Court when deciding the further application for condonation.

[19] Apart from accepting that its attorney was properly representing it, the union did

not have any further explanation for the delay. I accept as reasonable that the union believed that the matter was being properly prosecuted until it went through the file itself. This covers the period from the dates the statement of case was served and filed (July and August 2009) to the date of discovery of the omissions in October 2010.

[20] For the period thereafter (from October 2010) until the application for condonation was delivered (in March 2011) there is no explanation on affidavit that is before this Court. This period is slightly longer than four months. Does the lack of an explanation evidence an abandonment of the matter by the applicants?

[21] A perusal of the Court file reveals the following:

1. On 15 April 2010, a Court order was issued postponing the matter *sine die* and directing the applicants to file an amended statement of case within 14 days. The applicants were further directed to pay the wasted costs occasioned by the adjournment.
2. On 6 October 2010, a directive was issued to the parties recording that the Court order dated 15 April 2010 had not been complied with and that the parties were to appear in Court on 5 November 2010 to explain why the matter should not be dismissed.
3. On 5 November 2010, the parties consented to an Order that defined the further litigation in respect of the intended amendments to the statement of case. The order further directed the parties to file a pre-trial minute by 10 December 2010.

4. A letter dated 14 February 2011 from the labour broker's attorneys addressed to the Registrar of this Court, explains that the parties had held a preliminary pre-trial conference but that in light of the intended amendments to the statement of case being opposed, it was prudent not to finalise the pre-trial minute until such time as the application for the amendment to the statement of case had been decided.
5. The Registrar was directed on 31 March 2011 to set down the applications for amendment and condonation.

[22] The above summary must be read with paragraphs 9 to 19 above. It is clear from these paragraphs that the applicants did not abandon the matter from October 2010 to March 2011. I am persuaded that the further steps taken by the applicants to amend the statement of case, apply for condonation, attend Court on 5 November 2010 and attempt to finalise the pre-trial minute by 10 December 2010 show their interest in pursuing the matter.

Prospects of success

[23] As recorded above, this is a dispute about an unfair retrenchment in circumstances where no consultation occurred, the requirements of section 189 of the Labour Relations Act (LRA)[1] were not complied with, other workers were employed after the termination of the employees' services and severance pay was not paid to the employees. The labour broker opposes the referral on the basis that the employees were bound by limited duration contracts. It alleges that rights in terms of section 189 of

1 66 0f 1995.

the LRA did not accrue to the employees. It further disputes that there are 27 individual employees who are properly before this Court.

[24] The labour broker alleges that dismissals did not take place. Its reply to the statement of case records bare denials to the allegations in support of the unfair dismissal dispute. Its entire defence is a reliance on a *point in limine* that this Court does not have jurisdiction to determine the dispute as the contracts record the following two clauses:

> "3(a) Should the Client terminate the Agreement it has with Adecco;
>
> (b) Should the Client require Adecco to reduce its onsite resources"

[25] The defence as recorded by the labour broker does not expressly state that either of the clauses was used in terminating the employment relationship. It merely records that these two clauses existed. If the labour broker terminated the employment of the employees because one of the clauses applied it would have recorded which of the two clauses applied and the underlying facts that gave rise to the terminations.

[26] The opposing affidavit to the condonation application also fails to present relevant detail as to the termination of employment before this Court.

[27] Labour brokers and their clients are not entitled to regulate their relationship in a manner that enables the labour broker or client to treat employees unfairly. Public policy whilst recognising the freedom of parties to contract also requires such contracts

to be fair and reasonable. [See *Nape v INTCS Corporate Solutions (Pty) Ltd*[2] and the authorities referred to therein].

[28] There is therefore an overwhelming presumption in favour of the employees that the dismissals were indeed unfair. In addition, the following further considerations warrant recording.

[29] The 27 employees were employed on various dates between 2005 and 2008. Had objective selection criteria such as LIFO been applied, it is probable that some of the retrenched employees would not have been retrenched as other workers with shorter years of service may have been retrenched.

[30] The defence that the employees were employed on limited duration contracts is not supported by the years of service referred to in paragraph 29. It is doubtful that the employees would have been employed on limited duration contracts from 2005 to the date of retrenchment in January 2009.

[31] Even if the limited duration contracts are upheld as valid, it is not a foregone conclusion that the provisions of section 189 of the LRA did not apply to them. There is no provision in the LRA that specifically excludes employees from the protections of section 189 of the LRA if they are employed for a limited duration. See Nape *supra.*

[32] In addition to the above, it is also alleged by the employees that after a period of

2 [2010] 8 BLLR 852 (LC).

four years, the employees would have become permanent employees of the client. This is denied by the labour broker. The trial court would have to determine whether the version alleged by the employees is more probable and if so whether some employees had become permanent employees of the client despite the existence of limited duration contracts and despite the exception by the client that it was not the employer.

[33] It is necessary for the trial court to have regard to the terms of the limited duration contracts to verify whether the employees were indeed employed for a limited duration and if so whether they agreed to the exclusion of the LRA provisions or whether the labour broker intended to avoid its obligations in terms of the LRA by creating an impression that the employees were employed for a limited duration only.

[34] Also of fundamental importance to the operational requirements dismissal is the labour broker's explanation for employing workers in the employees' stead after they were retrenched. *Prima facie*, on this basis alone, there appears to be no reason to have retrenched the employees.

[35] On the face of it, the applicants appear to have sound prospects of success in the main dispute.

Prejudice

[36] I am satisfied that the employees and the union will suffer immense prejudice should they not be allowed to have their matter heard. It is not apparent from the

pleadings that the labour broker will suffer any prejudice should the matter be heard despite the late referral and the late application for condonation. The Court was also not addressed on this issue by the labour broker's representative.

Importance of the matter

[37] The interests of justice require that this matter be heard. Too often labour brokers have sought to avoid the protections afforded to employees by the LRA in relying on terminations by "operation of law". Limited duration contracts are one such example. This Court has previously and consistently upheld the letter of the law when the LRA faced such challenge.

[38] Despite the delay in applying for condonation, I am persuaded on an evaluation of all the relevant principles that the interests of justice require this matter to be heard [See *Melane v Santam Insurance Co Ltd*[3]].

Application to amend the statement of case

[39] It is not necessary to record all the intended amendments to the statement of case. The amendments can be summarised as follows:

i. recording the new address at which service of process will be accepted post the termination of the applicants' attorney's services;

ii. referring to the labour broker only as the respondent;

iii. setting out in greater clarity the factual allegations that led to the

3 1962 (4) SA 531 (AD).

dismissals.

[40] The legal issues that arise from the facts are largely the same in the intended amended statement of case. The only difference is the removal of the following issues as per the numbering in the original statement of case:

> "6.1.7.1 the reason for the proposed dismissal;
>
> 6.1.7.3 The number of employees likely to be affected and the job categories in which they were employed
>
> 6.1.7.5 The time when, or the period during which, the dismissals are likely to take effect.
>
> 6.1.7.9 the number of employees employed by the employer and
>
> 6.1.7.10 The number of employees that the employer has dismissed for reasons based on its operational requirement [sic] in the preceding 12 months"

[41] The relief sought by the applicants is the same save for the addition of the claim for compensation in addition to reinstatement.

[42] The labour broker opposes the application to amend on the basis that the applicants seek to introduce a new cause of action in that it originally recorded that the client dismissed the employees and now records that the labour broker dismissed the employees.

[43] The labour broker's attack on the intended amendments is not placed in context. The intended amendments refer to a meeting of the workers called on 29 January 2010, addressed by the client and attended by the labour broker. At this meeting, the client informed the employees that the labour broker would be informing them if their services were to be terminated due to a reduction on the number of vehicles to be built. It further records that the labour broker handed out letters of termination to the employees on the same day.

[44] It would be appropriate to assume, given the labour broker's defence, that both the client and labour broker, would have each in some way determined the termination of the employees' services and that, at least, one of them participated in the dismissals. The intended amendments clarify that both the labour broker and the client were involved in the dismissals.

[45] There is also an objection to the intended amendments as it is alleged that new evidence has been placed before this Court. The intended amendments provide greater clarity on the facts that led to the dismissal (as summarised above in paragraph 43). Courts will generally allow new evidence to be placed before it where such evidence assists with the ventilation of the true dispute between the parties.

[46] I do not find that a new cause of action has been introduced. Even if I am incorrect in this approach, I am guided by the fact that in allowing the amendment a

proper ventilation of the dispute between the parties will be facilitated. The trial court will be in a position to determine the real issues and justice will be done. [See *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meat (Exports) Ltd*[4]]

[47] Apart from the amended prayer which includes a claim for compensation and reinstatement, I am inclined to grant the application to amend the statement of case. The reason for the dismissal remains the same and the dispute remains the same [See *NUMSA & Others v Driveline Technologies (Pty) Ltd and Another*[5]].

[48] I am satisfied that the applicants are not *mala fide* in their application to amend and that the labour broker suffers no prejudice or injustice as a result of the intended amendments. [See *Rosner v Lydia Swanepoel Trust*[6]]. The labour broker has sufficient time to file a response to the amended statement of case and to have a full and proper hearing of its version.

[49] Further, the intended removal of those issues listed in paragraph 40 above limits the ambit of the dispute between the parties.

[50] Insofar as the claims for reinstatement and compensation are concerned, this Court does not have the power to grant both reinstatement and compensation. The applicants can either claim reinstatement with retrospective effect or compensation or reinstatement with retrospective effect and in the alternative compensation. This

4 [2004] 1 All SA 129 (SCA) at 133H-I.
5 (2000) 21 ILJ 142 (LAC).
6 1998 (2) SA 123 (W) at 127 D-G.

amendment is not opposed however the trial court would have in any event been mindful of its powers in determining the appropriate relief.

Costs

[51] The LRA promotes the speedy and effective resolution of disputes. This Court has discouraged an overtly technical approach to dispute resolution. I am not persuaded that the labour broker's approach in this matter was of any assistance to the Court or that it was justified in opposing the applications for condonation and to amend the statement of case. Its opposition to both applications are frivolous and vexatious. It has also delayed the resolution of the main dispute. There is an overwhelming sense that the labour broker intended opposing the main issue on technical legal points, which has subsisted in its approach to these two applications.

[52] The opposition to the applications for condonation does not in any way assist the Court. The response to the factual issues in the main dispute is not dealt with by the labour broker in any substantive manner. If its reliance on a termination by operation of law is *bona fide*, it would have taken the Court into its confidence by explaining the circumstances that led to the termination of the employees' services. It did not do so.

[53] In respect of the application to amend, there is no reason why the labour broker objected to the amendments. It has an opportunity to oppose the amended statement of case. It would have suffered no prejudice or injustice had it not opposed the intended amendments and filed an amended response to the amended statement of case. Its

opposition not only delayed the finalisation of the main dispute, it added to an already overly burdened court roll. For these reasons it would have been appropriate that the labour broker pay the costs of these applications, however the applicants have not requested a costs order in their favour.

[54] In the circumstances, the following order is made:

1. The application for condonation for the late filing of the statement of case is granted;
2. The late filing of the application for condonation is condoned;
3. The application to amend the statement of case is granted subject to the following amendments to paragraphs 6.2 and 6.3 of the amended statement of case:

   "6.2 Directing the respondent to retrospectively reinstate the second and further applicants from 29 January 2009 without loss of earnings or benefits; alternatively

   6.3 Directing the respondent to pay the second and further applicants just and equitable compensation"
4. Each party is to pay its own costs.

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Reddy AJ

Appearances:

1. For the applicants: Mr S Montshiona of NUMSA
2. For the respondent: Mr G Kirby-Hirst of MacGregor Erasmus Attorneys