

SOUTH AFRICA / JUDGMENT

Mosiane and Others v Murray And Roberts Cementation (Pty) Ltd (JS 437/10) [2014] ZALCJHB 518 (12 December 2014) [2014] ZALCJHB 518

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

JS 437/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 437/10

DATE: 12 DECEMBER 2014

Not Reportable

DENNIS MOSIANE & 750 OTHERS.....Applicant

And

MURRAY & ROBERTS CEMENTATION (PTY) LTD.....Respondent

Heard: 1 December 2014

Delivered: 12 December 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This matter came before this court on a limited issue being whether or not to permit the applicants to file a further or additional statement of claim. The initial referral to this court has already been amended twice. With the present application, the applicants do not seek a further amendment, but merely for the court to allow the statement of claim to exist simultaneously with the amended initial one.

- [2] The current statement of case effectively seeks to allow the matter to proceed based on averments found in the pleadings prior to the second amendment which was referred to as the “David Cartwright Attorneys amended statement of claim”. This relief is vehemently opposed by the respondent who contend inter alia that the filing of the present statement of claim constitutes an irregular step and also because the present statement of claim cannot exist simultaneously with the initial amended statement of case.

Background:

- [3] The applicants were employed as “category B” employees and were based at the Kroondal and Marikana Platinum Mine Operations. They were part of a group of 3 921 employees who were summarily dismissed by the respondent on 26 August 2009 on the grounds of engaging in an unprotected strike. Of these dismissed employees a group of approximately 936 employees were reinstated as their dismissal had been effected in error. A further group of 1 207 were re-employed, however many of these employees allegedly failed to report to work subsequent to their re-employment. Further dismissals of about 1 133 employees were effected on 2 September 2009.
- [4] The applicants as well as other employees who were employed by the respondent were members of the National Union of Mineworkers (NUM). Negotiations over wages and other conditions of employment occurred in July 2009 and had resulted in a deadlock. NUM referred a dispute to the CCMA and subsequent to conciliation attempts having failed on 19 August 2009, a certificate of non-resolution was issued. NUM issued a strike notice on the same day that the certificate was issued. Negotiations nevertheless continued in an attempt to avert the strike and resolve the dispute.
- [5] A mass meeting occurred on 23 August 2009 prior to the commencement of a strike, and it appears that no clear message was conveyed to the employees that the strike was suspended. Thereafter a strike commenced from the shift commencing at 10h00 on 23 August 2009. Subsequent to the employees embarking on strike action, four ultimatums were issued, imploring them to return to work. They were further warned that failure to heed the ultimatums would result in dismissals, which would “be effected collectively commencing at 22:30 on 24 August 2009 without any enquiry being held”. The ultimatums also advised the employees that the strike action was illegal and unprotected.
- [6] The applicants deny that all of them or other employees received the ultimatums. They further alleged that they had attempted to return to work on 26 August 2009, but were however unable to do so because the gates to the premises were locked, and/or that security officers at the gates would not permit them to enter the premises. A circular was issued by the respondent on 26 August 2009 which advised the applicants of their summary dismissals.

- [7] The Respondent's contention is that between 30 August and 2 September 2009, it had re-employed about 1207 employees, and a further 936 whom it considered to have dismissed in error. A majority of those re-employed had allegedly failed to report for duty and about 1133 employees were dismissed on 2 September 2009.
- [8] The application before the court has its genesis from disputes referred to both the CCMA and this Court on behalf of the applicants by a variety of role players. The first referral was lodged by NUM on 7 September 2009 in respect of the dismissals of 26 August and 2 September 2009. A certificate of outcome which captured the dispute as pertaining to "Dismissal related to participation/support of protected strike" indicating that the dispute can be referred to the Labour Court was issued on 3 February 2010. On 7 May 2010, NUM delivered a statement of case under case number JS437/10.
- [9] Prior to the filing of the NUM statement of case, a group of its disgruntled former members defected to MEWUSA which had on 26 March 2010, referred a dispute and filed a statement of case under case number JS 253/10 in the name of Mashaba & others. This group's claim was based on an automatically unfair dismissal in terms of section 187(1)(a) of the Labour Relations Act (LRA). This referral was amended by MEWUSA on 14 May 2010, which amendment essentially took the form of a new statement of case.
- [10] Ultimately the NUM and MEWUSA disputes were consolidated under the present case number on 27 October 2010. The NUM dispute was settled on 1 February 2012 after NUM conceded during a pre-trial conference that the strike that commenced on 23 August 2009 was unprotected. NUM then abandoned and withdrew the dispute in respect of all disputes arising from the 2009 strike dismissals on behalf of its members as they had appeared on its list accompanying the statement of case.
- [11] The Mashaba & others matter under MEWUSA however took different turns. MEWUSA had appointed MM Baloyi as its attorneys of record. The matter was set-down for trial on 13 February 2012 and another union, COSAWU brought a joinder application to become involved in the matter. The application for a joinder was granted. Having entered the fray, COSAWU was deregistered on 17 February 2012. MM Baloyi withdrew as MEWUSA's attorneys of record on 24 February 2012, and MEWUSA also withdrew from the matter entirely at about the same time.
- [12] On 6 March 2012, the matter was again set down for the hearing of a series of points in limine. Another union, GIWUSA became involved in the matter as a result of an intended merger with COSAWU. Ultimately the merger did not occur, and COSAWU eventually merged with a different union, UCIMESHAWU, which appeared to have taken over the applicant's matter.
- [13] Amidst the problems associated with the Mashaba & others matter now represented by UCIMESHAWU, a splinter group of applicants referred yet another dispute in respect of a selective re-employment dispute to the CCMA under case number NWRB 2085/12 on 15 May

2012. An application for condonation was sought for the late referral of the dispute. A ruling was issued by the CCMA wherein it was stated that the CCMA lacked jurisdiction and that UCIMESHAWU is not entitled to represent the applicants therein until it proved their membership to the union. UCIMESHAWU thereafter withdrew as the applicants' representative.
- [14] David Cartwright Attorneys (Cartwright) was thereafter appointed as the applicants' attorney of record on 9 November 2012. Following a further postponement of the hearing of points in limine raised by the respondent, Cartwright had met with the respondent's attorneys of record for the purposes of convening and finalising a pre-trial minute on 12 April 2013. During the pre-trial conference there were a number of concessions made by Cartwright, being the concessions which the applicants now seek to avoid by filing this application.
- [15] Critically, Cartwright made the following concessions on behalf of the 751 applicants;
- 15.1 The 751 applicants would no longer be challenging the fairness of the dismissal which took place on 26 August 2009;
- 15.2 The Applicants would abandon their automatically unfair dismissal claim;
- 15.3 150 of the applicants would pursue their dismissal claim on the basis that they were not permitted to tender their services;
- 15.4 A wage agreement concluded between NUM and the respondent was binding on the parties at the time of the strike and that accordingly, the strike was unprotected and that the subsequent dismissals were fair.
- [16] Cartwright further advised the respondent of an intended change in legal strategy in terms of which a group of his clients would refer a selective re-employment dispute to the CCMA and the remainder would challenge the dismissal of those whom it was claimed to have signed new employment contracts with the respondent.
- [17] Cartwright thereafter on 29 April 2013 effected an amendment to the statement of claim on behalf of the 751 applicants in accordance with the concessions made. Cartwright withdrew as the representative for 696 of the applicants and remained on record for only 55 of the applicants in respect of the Labour Court dispute.
- [18] A selective re-employment dispute was thereafter referred to the CCMA by Cartwright on behalf of those of the applicants he remained representative of, accompanied by an application for condonation. The CCMA declined to grant the application on 17 November 2013. The ruling in that regard was subsequently challenged on review in this Court under case number JR 2409/13. The judgment of the Honourable Van Niekerk J in the review application was handed down on 2 December 2014 in terms of which the review application was dismissed. In the meanwhile, Cartwright had withdrawn as the applicant's attorney of record on 14 April 2014.

The identity of the Applicants:

[19] At the end of the hearing of this application, the parties were directed to agree on and submit a list of the affected applicants in view of a variety of factors having affected that list, and further in view of the fact that it was the respondent's contention that some of the individual applicants were not properly before the court. In the respondent's view, and based on an analysis of the 642 individuals listed for the purposes of this application, only 362 of them fell within the 751 individuals initially listed, and these were properly before the court in terms of an agreement entered into with Cartwright. 76 of the individuals according to the respondent were part of the review application determined on 2 December 2014 under case number JR2409/13, whilst 92 formed part of the NUM settlement agreement concluded on 1 February 2012. In accordance with the court's directive, the parties have since submitted a list agreed upon of the individuals who are properly before the court[1].

The application:

[20] This application was lodged by Ms Isa Vorster of Stegmanns Inc Attorneys. She was called upon by the Court on 08 October 2014 whilst doing duty in the SASLAW Pro Bono office to assist the Applicants. The Court is indebted to her and Adv. Navsa for taking over the matter under difficult circumstances.

[21] The intention of this application according to Ms Vorster is not to amend a prior statement as that will do away with the case set out by Cartwright. She contended that the averments in the Statement of Claim are not new, as the respondent has been made aware of them since the referral of the MEWUSA matter and would thus not suffer any prejudice as a result of the 'reviving'

of this particular cause of action. It was contended that if the statement of claim was not permitted, the Applicants would suffer

prejudice as there would be nothing for the court to entertain on behalf of the Applicants. Adv Navsa had further submitted that the respondent had in any event responded to that particular cause of action, and had prepared its defence along those lines.

[22] The further intention of the statement is for it to co-exist alongside the Cartwright statement of case, and to place before the court, the correct version of the applicants, which is that the Respondent dismissed them for taking part in, or supporting, or indicating their intention to participate in a or support a protected strike, which dismissal was thus automatically unfair as contemplated in section 187 (1) (a) of the LRA. Adv Navsa had pointed out that if the statement of claim was not allowed, the applicants as per the agreed list would be denied a fair trial.

[23] Chief amongst the reasons for seeking permission that the statement of case be permitted is that Cartwright was not mandated by the applicants to make any concessions at the pre-trial conference convened with the respondent on 12 April 2013. It was contended that Cartwright was not mandated to concede that the strike leading to the dismissals was

unprotected or that the applicants' dismissal was procedurally and substantively fair. It was further contended that Cartwright was not mandated to file the 2013 amended statement of case compromising all but 55 of the applicants' claims and to limit the ambit of the case to selective re-employment on behalf of only these 55 applicants. These contentions then raise the issue of mandate and the circumstances under which a party may resile from pre-trial agreement.

The effect of pre-trial conference agreements:

[24] The purpose of a pre-trial conference is set out in Rule 6 (4) of the Rules of this Court.

Because of the importance of a pre-trial

conference and the purpose for which it is intended to achieve, i.e. to redefine and confine issues which emerge from the pleadings, and which ultimately the court is called upon to determine, once the parties have committed themselves to those issues, they remain bound to that commitment. Thus a party may not unilaterally repudiate that commitment[2]. The binding nature of a pre-trial agreement was emphasised in NUMSA & Others v Driveline Technologies (Pty) Ltd & another[3] where the Labour Appeal Court held that:

"It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (Shoredits Construction (Pty) Ltd v Pienaar NO & others [1995] 4 BLLR 32 (LAC) at 34C-F)"

[25] As it was correctly pointed out on behalf of the Respondent in reference to two seminal Supreme Court of Appeal judgments[4], in the absence of special circumstances, a party cannot resile from the pre-trial agreement. The reasoning behind this approach is that to allow parties to willy-nilly resile from such agreements will negate the purpose of Rule 6 (4), and ultimately hamper the smooth progress of trials. Effectively, a party cannot be allowed to chop and change its cause of action or the nature of its claim as a matter progresses.

[26] Even more important in such matters is the decision of the High Court in Rademeyer v Minister of Correctional Services[5], which spelt out three requirements in establishing 'special circumstances' In this regard, the party that wished to resile from the agreement must furnish an explanation of the circumstances under which the concessions made in the pre-trial conference were made and why it is sought to be withdrawn. Secondly, the court must be satisfied as to that party's bona fides; and thirdly, it must be shown that in all the circumstances, justice and fairness would justify the restoration of the status quo ante[6].

[27] Other than placing reliance on the Rademeyer test as above, the Respondent had also relied on the more stringent test set out in CEPPWAWU and others v CTP Ltd and another[7] where it was held that the Rademeyer test was too lenient as it did not take into account the fact that a pre-trial agreement equated to a contract between the parties, and that 'special circumstances' should mean that in order to resile from the agreement or part thereof, the

applicant must establish a basis for doing so in law of contract. In my view, the two tests are not at odds with each other.

The question of mandate:

[28] In considering whether the applicants have established special circumstances to exonerate them from the Cartwright concessions, it therefore follows that the primary issue is whether indeed Cartwright lacked the necessary mandate as alleged by the applicants. It was not in dispute that Cartwright was properly on record as the applicant's attorneys at the time that the concessions were made on 12 April 2013. The respondent had further made reference to an affidavit deposed to in respect of an application for condonation before the CCMA in respect of the selective re-employment dispute. In that affidavit, the deponent, Mpopo, averred that Cartwright had held meetings with the committee appointed by the applicants and agreed on a new legal strategy with them. Secondly, the agreement between Cartwright and the Committee in respect of the new strategy was that the dispute surrounding the

automatically unfair dismissal dispute was no longer to be pursued. Several meetings were held with Cartwright leading to the pre-trial conference of 12 April 2013, and it was as a result of these meetings and agreement on a new legal strategy that Cartwright had made the concessions and effected the amendments in line with the new legal strategy.

[29] It is generally accepted in our law that counsel or an attorney has the authority to compromise a client's claim unless the client has instructed otherwise[8]. It is also accepted that in the absence an instruction to the contrary by a client, counsel or an attorney has implied authority as between himself or herself and the client to compromise the client's claim, and that counsel or attorney of a client has ostensible authority as between himself or herself and the other party to settle or compromise a client's claim without the need of actual proof of the existence of such authority[9].

[30] Inasmuch as the Applicants contend that Cartwright did not have a mandate to make the concessions or amend their statement in accordance with those concessions made at the pre-trial conference, the applicants have nevertheless not substantiated their contentions, other than through a mere submission of barely helpful confirmatory affidavits to this application. Where a party denies that its representative lacked the necessary mandate to perform certain functions, the onus is on that party to elaborate the basis on which it is alleged that such a mandate was not given or at most overstepped. A bare denial as in this case is hardly of any assistance to the applicants' case.

[31] As already indicated elsewhere in this judgment, Cartwright withdrew from the matter on 14 April 2014 under circumstances which had clearly rendered his position unenviable. Having made concessions in the pre-trial conference, and further having pursued the new legal strategy agreed upon with the applicants, he had found himself in a position where he was now forced to recant from the applicants' adopted and agreed position on the course to follow in respect of their claim. An affidavit was not obtained from Cartwright to explain the circumstances under which he had made those concessions and why it is essential that they

should be withdrawn. Even if Cartwright were to file any affidavit to explain his conduct, it is doubted that this would have carried any weight or advanced the applicants' cause in the light of his correspondence of 14 April 2014 to the respondent's attorneys of record, where he had explained the circumstances leading to his withdrawal as the Applicants' attorneys of record.

- [32] The bona fides of the Applicants (without reference those of Ms. Vorster and Adv. Navsa) are however doubted insofar as it is their intention to pursue with the 'new' statement of claim. In the absence of any other contention, they have not made any effort to dispute that indeed Cartwright had the necessary mandate leading to the events of 12 April 2013 and the subsequent filing of the amended statement of claim.
- [33] Since the dismissals, the applicants' claim has morphed from one to the other, forcing the Respondent to adjust and adapt its defence as and when various claims were lodged with different role players who came and went. Not much effort was made in attacking the basis on which NUM had as early as February 2012 made the concessions it had made in settling the dispute it had referred to this Court. The Applicants at the time that the events that led to the strike were members of NUM and surely there is sound reasoning for the concessions made by it when settling its dispute. Over the years since the dismissals, various unions had entered the fray and disappeared without taking the Applicants any further. In the meanwhile, the prejudice that the Respondent continued to suffer

in having to keep up with the dynamics of the Applicants' case is indeed immense.

- [34] In the light of the above, it is my view that the interests of justice and fairness cannot be in favour of the Applicants, where it is apparent that they have over the years, not made up their mind as to how they seek to approach their case and find finality. Even if it might be argued that with this application there is an endeavour towards establishing certainty surrounding the Applicants' case, their bona fides as already pointed out above are doubted. It might be correct that in the light of Van Niekerk J's judgment under case number JR2409/13 and with the dismissal of this application the applicants might find themselves with no cause of action. However, those are the consequences of the path they chose for themselves through their various representatives. In the end, there is no basis for any conclusion to be reached that the Applicants have demonstrated any special circumstances that would permit their additional statement to be allowed.

Order:

- i. The application for leave to file a further or additional statement of claim is dismissed.
- ii. There is no order as to costs.

Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv. Navsa

Instructed by: Stegmanns Inc Attorneys

On behalf of the Respondent: A Myburgh SC with Adv. T Ngcukaitobi

Instructed by: Werkmans Attorneys

[1] The list is indexed as “Agreed amended list’ in the common bundle

[2] Filta-Matrix (Pty) Ltd v Freudenberg and Others 1998

(1) SA 606 (SCA) at 614 B- D.)

[3]

[2007] ZALC 66; [2000] 1 BLLR 20 (LAC) at para 16

[4] Filta-Matix (Pty) Ltd v Freudenburg and others

[1997] ZASCA 110; 1998 (1) SA 606 (SCA) and MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA)

[5] [2008] ZAGPHC 141

[6] At para 6

[7] [2013] 4 BLLR 378 (LC)

[8] See Hlobo v Multilateral Motor Vehicle Accident Fund 2001 (2) SA 59 (SCA)

[9] See Ivoral Properties (Pty) Ltd v Sheriff, Cape Town and Others 2005 (6) SA 96 (C) and also Dlamini v Minister of Law and Order 1986 (4) SA 342 (D) at 346 I to 347A

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