

SOUTH AFRICA / JUDGMENT

NUM obo Mbengwa v Dwarsrivier Chrome Mine (Pty) Ltd (JS171/23) [2025] ZALCJHB 342 (8 August 2025) [2025] ZALCJHB 342

COURT

Labour Court Johannesburg

BEFORE

R Itzkin

CASE / FILE NUMBER

JS171/23

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable
case

No: JS171/23

In

the matter between:

NUM obo TSHENGEDZENI
REMEMBER MBENGWA
Applicant
and
DWARSRIVIER
CHROME MINE (PTY) LTD
Respondent

Heard:

25 JULY 2025

Delivered:

08 AUGUST 2025

(This
judgment was handed down electronically by emailing a copy to the
parties. The 08th of August 2025 is deemed to be the date
of delivery of this judgment).

JUDGMENT

ITZKIN, AJ

Introduction

- [1] NUM (acting on behalf its member, Mr Mbengwa) seeks leave to amend its statement of claim. The application was prompted by an objection delivered by the respondent (the company) in response to a notice of intention to amend delivered by NUM. The company opposes the application for leave to amend.
- [2] The main claim is brought under section 77(3) of the Basic Conditions of Employment Act[1] for remuneration allegedly due to Mr Mbengwa pursuant to a retrospective reinstatement order contained in an arbitration award.
- [3] According to the statement of claim, the company pursued a review application pertaining to that award, the outcome of which was an order upholding the review application on a limited basis. In particular, the court made an addition to the award in terms of which Mr Mbengwa's retrospective reinstatement was to be accompanied by a final written warning valid for 12 months.
- [4] NUM pleads that the company unsuccessfully petitioned the Labour Appeal Court (LAC) for leave to appeal, after which Mr Mbengwa was reinstated and paid an amount equivalent to 10 months' back-pay (which pertained to the period from the date of dismissal to the date of the award).
- [5] NUM pleads that Mr Mbengwa was, in addition, entitled to payment of arrear wages in the amount of R7 428 617.46 in relation to the period from 1 August 2018 to 17 November 2021 (the latter being the date of the implementation of his reinstatement).
- [6] NUM seeks, by way of the proposed amendments, to add a series of new allegations to the statement of claim which are to the following effect:

6.1 Whilst the statement of claim alleges that Mr Mbengwa tendered his services on 17 November 2021, NUM seeks to add several allegations of prior tenders (or attempted tenders) of services, which are as follows:

6.1.1 Prior to 17 November 2021, he attempted to tender his services and was informed by the company not to do so.

6.1.2 Shortly after the arbitration award was issued, in late May 2018, Mr Mthobisi (an Employment Relations Specialist at the company) informed NUM's paralegal officer that the company intended to challenge the award on review, and on 31 March 2018, the paralegal officer e-mailed Mr Mthobisi to inquire if Mr Mbengwa could report for duty on 1 June 2018, and he was informed on the same day that he should not report for duty.

6.1.3 After the Labour Court judgment was handed down, in June or July 2021, Mr Mbengwa's erstwhile attorney contacted the company's attorneys to inquire if Mr Mbengwa could report for duty, and was informed that an application for leave to appeal to the LAC had been delivered and that he should not report for duty.

6.1.4 After the dismissal of the application for leave to appeal, on 4 August 2021, Mr Mbengwa reported to the company's offices and his tender of services was not accepted, with it being communicated to him that the company intended to petition the LAC.

6.2 Mr Mbengwa completed his LLB degree in 2018, and he has been unemployed ever since, having unsuccessfully applied for several positions.

6.3 Mr Mbengwa attended certain courses to facilitate his admission as an attorney and enhance his prospects of securing employment.

6.4 Mr Mbengwa secured articles of clerkship with Mvundlela & Associates, and served articles of clerkship from 12 January 2021 to 30 April 2022, during which period he received a stipend totalling R66 000.00.

[7] The company has objected to the intended amendments on two grounds:

7.1 They seek to withdraw the pleaded admission that he tendered his services on 17 November 2021.

7.2 They are contrary to paragraph 3.15 of the signed pre-trial conference minutes which record, as a common cause fact, that Mr Mbengwa tendered his services on 17 November 2021.

Evaluation

[8] In the supporting affidavit in the application for leave to amend, it is explained that the pleadings and the pre-trial conference minute were prepared by NUM's previous attorneys who were succeeded by its current attorneys.

[9] The supporting affidavit further states that in the run-up to the trial which was set down on 17 February 2025, NUM's current

attorneys consulted with Mr Mbengwa and received further information to the effect that although it is correct that he tendered his services on 17 November 2021 (as pleaded, and as recorded in the pre-trial conference minute) there were other tenders (or attempted tenders) too. He was therefore advised by his current attorneys to amend his statement of claim.

[10] It is also alleged that the amendment does not have the effect of withdrawing an admission in that Mr Mbengwa maintains that he tendered his services on 17 November 2021, but he seeks to add allegations regarding other instances in which he tendered (or attempted to tender) his services. NUM further states that his cause of action remains the same and that he is not mala fide in seeking to amend.

[11] The principles relating to amendments are well-established. In *Affordable Medicines Trust and Others v Minister of Health and Another*[2], the Constitutional Court captured the position espoused in previous judgments, in these terms:

‘[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.’ (Emphasis added)

[12] A key question for present purposes is whether the intended amendments amount to the withdrawal of an admission; and if so, the consequences thereof for the principles applicable to this application.

[13] NUM alleges that the intended amendments do not amount to the withdrawal of an admission, as it is indeed the case that Mr Mbengwa tendered his services on 17 November 2021 (which remains common cause), and the amendments seek to supplement the pleaded case with references to other instances in which he tendered his services.

[14] In argument, NUM’s representative argued that an admission must be contained in a statement of response (or plea) wherein it is responding to a pleading and admitting the contents thereof, and that the contents of a pleading initiating proceedings (such as a statement of claim) cannot be construed to contain admissions; thus an amendment would not in this instance amount to the withdrawal of an admission.

[15] There appears to be merit in this argument. In action proceedings in the Labour Court, a defendant must admit, deny or confess and avoid the allegations in a statement of claim, and the plaintiff does not plead in response to any allegations in the statement of claim. In *Wild Sea Construction (Pty) Ltd v Van Vuuren*[3], it was held that an admission is an unequivocal agreement by one party with a statement of fact by the other.

[16] That being said, I appreciate that a party may make concessions in a statement of claim which may be akin (in effect) to admissions in the sense that they exclude controversy on the issue, although unprompted by a previously pleaded allegation that is being responded to. There does not appear to be a basis on which such concessions should be treated differently from admissions in the amendment context.

[17] The next line of inquiry for consideration is whether, properly interpreted, paragraph 16 of the statement of claim contains such a concession.

- [18] It is evident that the pleaded contention that Mr Mbengwa tendered his services on 17 November 2021 is indeed a concession (in the sense of limiting his case to a tender having been made on that date and not on other dates). This is so principally because in a contractual claim of this nature, the existence and timing of a tender of services are important consideration, and in the statement of claim, the pleaded allegation regarding a tender was confined to one instance (i.e. 17 November 2021).
- [19] However, that does not (in and of itself) necessarily mean that leave to amend stands to be refused, as there is scope to permit an amendment which withdraws a concession (or even an admission).
- [20] The High Court recently had occasion to consider the issue in *Mamokuthu Development CC v Cas Dry Attorneys Inc and Others*[4]. It held as follows in the context of an application for leave to amend particulars of claim, where the defendant alleged that the intended amendment amounted to the withdrawal of an admission:
- [15] An admission is an unequivocal agreement by one party with a statement of fact by the other. The effect of an admission is to render it unnecessary for the plaintiff to prove the admitted fact. As Shepostone AJ noted in *Thompson Kusela* judgment, this does not imply that a party who has made an inaccurate or mistaken admission is left without recourse. Such a party may deliver a notice of its intention to withdrawal the admission. There is clearly no “unequivocal agreement between by one party with a statement of fact by the other” that can be read into paragraph 8,2 of the particulars of claim as they stand. What appears from the plea is a clear dispute between them.
- [16] Under paragraph 8.9, the Applicant had averred that “the Plaintiff concedes that the First Defendant is entitled to deduct from the purchase price commission of 3% plus VAT on the amount of R8 000 000.00 as well as the First Defendant's costs in terms of clause 2.10, to the maximum amount of R200 000.00 (two hundred thousand rand).” In the notice to amend, this paragraph would now be replaced with, “in the premises, following the Plaintiff's performance, occupation and registration of the immovable property in favour of the Third Defendant, the Plaintiff is entitled to receive the balance of the purchase price less the deductions which are permitted in terms of the sale and development agreement.”
- [17] My understanding of the proposed new paragraph is that it does not withdraw anything, but it expands from what it had provided, which was limited to deductions of commissions and VAT. In its proposed format, VAT and commissions could just be some of the deductions that are provided for in the contract, but there could be more.
- [18] To the extent that the proposed paragraph could be a withdrawal of a concession made in the particulars of claim, the Applicant remains covered and protected by Rule 28 in that one can amend an admission erroneously made in the particulars of claim. This is the whole purpose of introducing this rule. The Applicant's case needs not be mistaken for a case where in a claim, a party admits the merits of the claimant's case. Thus, a court will not allow an amendment introducing a defence on the merits where the parties have agreed that

the merits and the quantum are to be separately following a concession on the merits by the defendant, that has been accepted by the plaintiff. By compromising the merits, the defendant precludes himself from being able to revisit the merits just the same as judgment had been given thereon.

- [19] If a party makes a mistake in the pleadings by, for example, demanding too little when more is owing, or by admitting that the defendant has paid portion when in fact he has not, he gives his opponent an advantage which justice and fair dealing would not condone. If the opponent is then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleading sought to amend was filed. The opposing party suffers no injustice and is not prejudiced, for he is in no worse position than he would have been if the pleading in its amended form had been filed in the first instance.' (Emphasis added; references omitted.)
- [21] It has been held that the court's discretion is not fettered by the necessity to find that there has been an error before it can allow such an amendment,[5] and it has been stressed that an amendment involving the withdrawal of an admission is not put on a different basis from other amendments (albeit that the explanation and the issue of prejudice require closer scrutiny than in the case of other amendments). In *President Versekeringsmaatskappy Bpk v Moodley*[6] the Court found that:
- 'The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires a full explanation to convince the court of the bona fides thereof and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence.'
- [22] Presently, it is evident that a full explanation has been provided; namely, that following a change of attorneys additional information came to light during trial preparation (as often happens), and NUM's current attorneys advised that it be incorporated into the pleading. In the context of the explanation, there also does not appear to be a basis for finding that the intended amendments are mala fide.
- [23] With reference to the notion of prejudice, what does it entail for present purposes?
- [24] It is well-established that the fact that an amendment may cause the other party to lose its case against the party seeking an amendment is not, in and of itself, prejudice of the sort that will preclude an amendment.
- [25] The timing of the introduction of an amendment, and the ability of the other party to deal with the implications thereof at trial, is an important factor relevant to prejudice.
- [26] Presently, the trial has not yet commenced, and there does not appear to be a basis for concluding that the amendment would result in incurable prejudice.

[27] Moreover, it would be in the interests of justice to allow for the statement of claim to encapsulate the totality of the case that Mr Mbengwa seeks to pursue so that the dispute can be fully ventilated at trial. The company will, at the trial, have the opportunity to contest the additional factual allegations if it so wishes. This is subject, however, to whether NUM is able to broaden the case with reference to the pre-trial conference minute, which is dealt with below.

[28] There is a further leg to the inquiry. What remains to be considered is whether the fact that the tender date is embodied in a signed pre-trial conference minute, precludes the amendment of the statement of claim where there is no application to amend / resile from the minute.

[29] There are three key judgments that are of relevance.

[30] The first judgment is *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v CTP Ltd and Another*[7] (CTP), wherein this court (per Myburgh AJ) dealt (amongst other things) with when a party can withdraw an admission in a pre-trial minute, holding (with reference to earlier authority) that:

“where a party in a pre-trial minute abandons a point, or agrees (expressly or by necessary implication) not to pursue / rely on the point, or otherwise informs the opposing party that the point will not be relied upon, then he will not be allowed to do so at a later stage, unless he is able to resile from the agreement on a basis upon which he would in law be able to resile from a contract”.[8]

[31] The second judgment is *South African Breweries (Pty) Ltd v Louw*[9] (SAB), wherein the LAC held as follows:

[8] The relationship between the pleadings and the pre-trial conference minute has been the subject of several judicial pronouncements. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pre-trial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pre-trial conference need to be carefully thought through, seriously

made, and scrupulously adhered to. It is not open to a court to undo the laces of the strait-jacket into which the litigants have confined themselves.’

- [32] The third judgment is the unreported judgment of this court (per Sass AJ) in *AMCU obo Wayise and Others v Rand Uranium (Pty) Ltd*[10] (AMCU). In that matter, the court was concerned with an application to amend a statement of claim where portions thereof had been encapsulated in a pre-trial conference minute. It held that an application to amend a statement of claim does not automatically result in an amendment to a pre-trial minute, and that such relief must be sought specifically.[11] It also observed that the test for determining whether a pleading may be amended is different from the test for determining whether a pre-trial minute may be amended or resiled from.[12] The court ultimately permitted the amendment to the statement of claim, but made it clear that the pre-trial conference minute would have to be dealt with separately by bringing an appropriate application or seeking the opposing party’s consent to amend the minute.[13]
- [33] Returning to the present matter, Mr Van As (representing the company) argued that the application for leave to amend the statement of claim is fatally defective in that the statement of claim cannot be amended without also amending the pre-trial minute. He also argued that no purpose would be served by amending the statement of claim if NUM remains bound by the case (as narrowed down by the pre-trial minute).
- [34] Whilst it is so that an amendment to the statement of claim will not resolve the difficulty arising from the pre-trial conference minute, the fact that the pre-trial minute may require an amendment (in order for NUM to run a case based on the new allegations introduced into the statement of claim), does not in itself preclude an amendment to the statement of claim.
- [35] It would have been preferable for NUM to bring a composite application to address both issues simultaneously, which is an aspect that has a bearing on costs (as dealt with further below).
- [36] I have therefore concluded that the amendment to the statement of claim should be permitted; albeit that this does not, in itself, result in a broadening of the case in the pre-trial minute, and a different test will be applicable in relation to whether or not to permit NUM to resile from the minute in any proceedings where it seeks to be permitted to do so.
- [37] With reference to the issue of costs, it would accord with the requirements of law and fairness for NUM to be ordered to pay the costs of this application and of any consequential amendments that the company may make pursuant to the statement of claim being amended. This is so because as previously remarked, it is unfortunate that a composite application was not brought to address the issue in relation to the statement of claim as well as the pre-trial conference minute, and the approach of addressing the issue on a piecemeal basis has resulted in costs being incurred which could have been minimised if a composite application had been brought. In addition, if a later application to address the pre-trial conference minute is unsuccessful and NUM remains confined to the case as presently encapsulated in the pre-trial conference minute, the outcome of the present application

may be ineffectual in relation to the trial of the matter in due course.

[38] In the premises, the following order is made:

Order

1. The applicant is granted leave to amend its statement of claim in accordance with its notice of intention to amend dated 5 March 2025.
2. The applicant is ordered to pay the costs of this application and of any consequential amendments made by the respondent.

R. Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: I Savant of Cheadle, Thompson & Haysom Inc.

For the Respondent: MJ Van As

Instructed by: Cliffe Dekker Hofmeyr Inc.

[1] Act 75 of 1997.

[2]

[2005] ZACC 3; 2006 (3) SA 247 (CC).

[3] 1983 (2) SA 450 (C) at 452F.

[4] (919/2020) [2025] ZAMPMBHC 34 (8 May 2025).

[5] Amod v SA Mutual Fire and General Insurance Co Ltd 1971 (2) SA 611 (N) at 614F-G.

[6] 1964

(4) SA 109 (T) at 110H-111A.

[7]

[2013] 4 BLLR 378 (LC).

[8] CTP ibid at para 108.

[9]

[2018] 1 BLLR 26 (LAC) at para 8.

[10] (JS658/17) [2022] ZALCJHB 346 (8 December 2022)

[11] AMCU ibid at para 23.

[12] AMCU ibid at paras 24 to 26.

[13] Court's order at para 3.

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