

SOUTH AFRICA / JUDGMENT

SA Solidarity obo Booï and Others v Technistrut (Pty) Ltd t/a Selati Roofs (JS381/12) [2015] ZALCJHB 212 (15 July 2015) [2015] ZALCJHB 212

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

JS381/12

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS381/12

SA SOLIDARITY obo MT BOOI & 22 OTHERS Applicants and TECHNISTRUT (PTY) LTD t/a SELATI ROOFS Respondent

Delivered: 15 July 2015

JUDGMENT- APPLICATION TO AMEND PRE-TRIAL MINUTE

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an interlocutory application brought in terms of Rule 11 of the Rules of this Court in which the applicants seek leave to amend the signed pre-trial minute. This application was launched mid-stream the trial with the leave of the Court.
- [2] The applicants essentially seek to strike out paragraphs 3.23 and 3.24 of that minute, or in the alternative, they seek an order amending the aforesaid paragraphs to become issues in dispute under section 4 of the minute, or alternatively, an order that a further pre-trial conference to be convened to be presided over by the Judge. The respondent opposes the application.

Background:

[3] The sixteen individual applicants were dismissed by the respondent on or about 6 May 2011. They subsequently referred a dispute to the CCMA with the assistance of SA Solidarity, and a certificate of outcome was issued when the dispute could not be resolved. They had then approached Wits Law Clinic for assistance and a statement of case was then filed on 22 May 2012.

[4] The dismissal of the individual applicants followed upon the following events;

4.1 They were members of SA Solidarity Union which had referred a matter of mutual interest dispute regarding wages to the CCMA on 13 January 2011. The dispute could not be resolved and a certificate of outcome was issued on 11 February 2011.

4.2 A protected strike commenced on 14 February 2011. The strike action turned violent to such an extent that an interdict was obtained from this Court under case number J273/11.

4.3 On 24 March 2011, the parties agreed to resolve the wage dispute resulting in an agreement signed on the same date. All the striking

employees undertook to resume their duties at 07h00 on 28 March 2011, and the respondent reserved its rights to institute formal

disciplinary action against the employees who had allegedly committed acts of misconduct during the strike.

4.4 On 12 April 2011 after an internal investigation, the respondent identified 16 employees whom it sought to institute disciplinary

proceedings against for alleged serious acts of misconduct during the strike. Some of the cases that had resulted in a dismissal have since been finalised at the CCMA.

4.5 On 12 April 2011, the respondent's management met with SA Solidarity's Messrs Jack Chuma, Tshabalala and shop stewards in order to discuss the anticipated disciplinary action against the identified employees who had then been placed on suspension.

Disciplinary hearings were scheduled to take place on 14 and 20 April 2011 respectively.

4.6 About 31 employees including the individual applicants embarked on an unprotected strike on 13 April 2011 in sympathy with the 16 employees who were on suspension. An ultimatum was issued on 13 April 2011 advising the union and the applicants to go back to work by 13h30 failing which they would face disciplinary action and possible dismissal. Despite the respondent's Frans Labuschagne's

attempts to persuade the striking employees to return to work, they made it clear that they would not until the suspensions of the 16 others were uplifted.

4.7 A second ultimatum was issued on 13 April 2011 at 14h50 advising the employees to go back to work by 15h00, and this yielded no results. A final ultimatum was issued on the same day at about 15h00 whereby the employees were instructed to resume work at 07h00 on 14 April 2011 and warned that failure to heed the ultimatum would result in disciplinary action.

4.8 According to the respondent, the unprotected strike continued on 14 April 2011, Chuma had addressed the employees and failed to honour a meeting arranged with management for 12h00 on that day. A meeting with him was eventually held on 15 April 2011 and thereafter, he (Chuma) sought to but failed to persuade the employees to go back to work.

4.9 According to the respondent's version, eight employees abandoned the strike action and on 19 April 2011, Mr. Mampuru, from the union attended a meeting arranged with management where an offer was made by management for the employees to return to work with warnings. Mampuru's stance was also that the employees would only go back to work once the suspension of others were uplifted.

4.10 Management once again extended an invitation to the union that if the striking employees went back to work by 12h00 on 19 April 2011 they would only be issued with final written warnings. Again, this did not yield any positive results.

4.11 The striking employees including the individual applicants were then placed on suspension on 20 April 2011, with disciplinary hearings

scheduled for 3 May 2011. The individual applicants were ultimately dismissed on 6 May 2011

[5] The events of 19 and 20 April 2011 according to the applicants are in contention, hence the application to amend the paragraphs in the pre-trial minute which are;

Paragraph 3.23, which states that;

"On the 19th of April 2011, Mr. Kgoroba Mampuru (hereinafter referred to as Mampuru), an National Representative of SA Solidarity Union, arrived

for a meeting scheduled with the Respondent"

And paragraph 3.24, which states that;

"On the 20th of April 2011, 23 (twenty three) employees faced the following charges:-

Gross misconduct alternatively, misconduct in that you participated in an unprotected strike which commenced on Wednesday 13 and ended on Tuesday 19 April 2011; and/or

Gross insubordination alternatively insubordination in that despite having received no less than three

(3) written ultimatums to return to work as normal on Wednesday 13 April 2011 and a further final ultimatum to return to work by no later than 12h00 on Tuesday 19 April 2011 you elected, for reasons best known to you personally, to continue with your participation in the unprotected strike.”

[6] In seeking an amendment, Mr. Dakalo Singo, the applicants’ attorney of record from the Wits Law Clinic, averred the following in his founding affidavit;

6.1 The applicants had approached the Clinic and were assisted by another attorney who has since left the employ of the Clinic. Singo became the attorney in this matter in July 2012 at a stage when a pre-trial conference was to be convened. Singo had attended a pre-trial conference at the offices of the respondent’s attorneys on 13 March 2013 in the absence of counsel.

6.2 Following the conference, he and the respondent’s attorney of record, Ms Diepenaar undertook to make certain reversions after having consulted with their respective clients, more in particular in regards to the contents of the paragraphs in contention.

6.3 Between 13 March 2013 and 12 April 2013 when the minute was eventually finalised and filed with the Court, Singo had met and consulted with Mr Themba Matunjwa, one of the individual applicants, and exchanged various correspondence with Ms. Diepenaar regarding the contents of the minute.

6.4 The trial was initially set-down for 17 October 2013 but could not proceed on account of the unavailability of the applicants’

initial counsel. The new counsel, Ms Magano attended to the matter on 17 October 2013 when it was postponed. When the matter again

commenced on 17 February 2014, and during the course of preparation for the trial, the individual applicants brought it to the attention of Ms Magano that the pre-trial minute contained incorrect dates as recorded in paragraphs 3.23 and 3.24 of the minute.

6.5 Engagements with Mr Du Randt of the respondent to consent to the said paragraphs being struck out altogether or to be placed under issues in disputes yielded no results, with Mr Du Randt indicating that he would oppose such steps.

6.6 The applicants’ case is that the dates in the paragraphs of the minute were incorrect and did not amount to an accurate version of their case. These dates have accordingly always been issues in dispute, and it was Singo’s contention that their recordal as it currently stood was either intentionally or erroneously recorded by Ms Diepenaar who had filed a copy with the Court, or was as a result of oversight by himself.

6.7 He contended that it was never his intention to record the paragraphs as being common cause facts, and that the applicants’ statement of case reflected the applicants’ true version of their case in accordance with their instructions.

6.8 Singo further submitted that the contentious paragraphs clearly contradicted the case of the applicants' as appears from paragraphs 5.18 to 5.23 their statement of case. He further submitted that the minute on the other hand disposes of the applicants'

case, and that the crux of the dispute will turn around inter alia, the issue of dates, when the strike action commenced and ended, and the reasonableness of the ultimatum of the day preceding the date the final ultimatum was issued.

6.9 Those issues were accordingly in dispute and the parties had not reached agreement on them. It was also contended that the amendments do not prejudice the respondent's case in any manner.

[7] In opposition to the application, Mr. Du Randt on behalf of the respondent in his answering affidavit submitted that:

7.1 The applicants have been represented by the same attorneys of record since the inception of the matter, and Singo has dealt with this matter at all material times in relation to this application including the time that the pre-trial meeting was concluded between

the parties on 13 March 2013, and when the pre-trial minute and subsequent addendum thereto was concluded between the parties on 11 April 2013;

7.2 It was unscrupulous of the attorneys of the applicants to launch the application given its timing, and further that the attorneys had been silent about the concessions made in the pre-trial until the commencement of the trial.

7.3 The application was brought in the light of the realisation that the applicant's version as conceded was detrimental to their case and the result thereof would be that their case was frivolous. The concessions could not have been as a result of a bona fide mistake and the applicants were opportunistic in their attempt to change their version of events at a time when they came to realise

that their defence would not stick.

7.4 The signed pre-trial minute followed a long process including exchange of correspondences between the legal representatives of the parties and after each party had an opportunity to properly consider their respective positions. If the applicants' attorneys/representatives had discovered that there were contentious paragraphs in the pre-trial minute, they had an opportunity to raise these concerns prior to the initial trial date in October 2013 and again prior to the scheduled trial date in February 2014.

7.5 By raising these concerns during the second day of the trial, the respondent has been severely prejudiced especially since its case was prepared in line with the concessions made in the pre-trial minute.

Evaluation:

- [8] This application was brought at a time when the respondent's first witness, Mr Pierre Anton Govea was under cross-examination. It was precipitated by a version being put to this witness that the applicants would dispute the contents of paragraphs in question, and that in particular, a meeting was held with the union's Mampuru on 19 April 2011, who had thereafter given feedback to the striking employees on that date. This issue was also related to whether a further ultimatum was issued on 19 April 2011, which was communicated to the employees, and who had in turn refused to heed to it. Furthermore, it related to whether the individual applicants had not been provided with protective gear as they had alleged, hence they had not reported for duty on that day.
- [9] The issue of amendment to the signed pre-trial minute is significant in that if allowed it may have implications regarding the issue of ultimatums issued to the applicants.
- [10] What is disconcerting with this application however is that it was brought at a point when Ms. Magano could not get a concession out of Govea with regards to these dates, and the question to be posed is whether such an amendment can be allowed at this stage of the proceedings, especially if it is contended that there are material disputes of fact surrounding these dates.
- [11] The principles applicable to the withdrawal of an admission made at a pre-trial conference were comprehensively considered by Myburgh AJ in *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v CTP Ltd and Another*[1], and from which I take the liberty to summarise as follows:

11.1 Rule 6 (4) of the Rules of this Court as with Rule 37 of the High Court Rules was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a pre-trial conference constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative[2].

11.2 A pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties.[3]

11.3 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.[4] However, in the absence of special circumstances, a party cannot resile from the agreement[5].

11.4 In order for this application to succeed, the applicants must show that special circumstances exist for the court to exercise its discretion in their favour. Three requirements must be met: firstly, the applicant must furnish an explanation sufficiently full of the circumstances under which the concession was made and why it is sought to be withdrawn; secondly, he should satisfy the court as to his bona fides; and thirdly, show that in all the circumstances justice and fairness would justify the restoration of the status quo ante[6]

[12] It is accepted that once pleadings have been closed, and the parties have concluded a pre-trial conference and filed signed minutes, the parties strategise and formulate their respective cases in accordance with their pleaded cases, facts that are common cause, and those that are in dispute as recorded in a signed pre-trial minute. It follows that any attempt at either amending pleadings or the pre-trial minutes have a detrimental and prejudicial effect against the party that had relied on those pleadings or minutes in preparing and presenting its case.

[13] The first question therefore is whether Singo in his founding affidavit has furnished an explanation sufficiently full of the

circumstances under which the concession was made and why it is sought to be withdrawn. Central to Singo's submission is that in the light of the applicant's case as captured in paragraphs 5.22 to 5.23, it could never have been his intention to make the concessions captured under the contested paragraphs of the minute. In paragraph 5.22 of the statement of case, the applicants state that;

"On or about 19 April 2011 all the applicants and the other employees reported for work. On this day, not one of the applicants was able to sign in on the system. They remained outside the respondent's premises until they were advised by the respondent that they were suspended"

And at paragraph 5.23, the applicants state that;

"A meeting was held between the respondent and the trade union, on or about 20 April 2011. At about 11h30, a trade union representative returned to inform all the applicants that the respondent had given an ultimatum to the applicants to return to work by 12:00 pm"

[14] In response to the above, the respondent had at paragraph 64 stated that;

"64 AD PARAGRAPH 5.22

"64.1. The contents of this paragraph are denied as if specifically traversed and the Applicants are put to the proof thereof.

64.2 On the 19th of April 2011 the Respondent met with Mr. Mampuru, a senior official from SA Solidarity Union who was himself unable to convince the Applicants to return to work and to resume their duties as normal"

65. AD PARAGRAPH 5.23

65.1 The contents of this paragraph are disputed.

65.2 The meeting had indeed taken place at 09h30 on the 19th of April 2011. Mampuru informed the management representatives of the Respondent that the Applicants had decided not to resume their duties and that the Respondent “must do what it had to do”.

[15] Paragraphs 4.31 to 4.41 of the pre-trial minute under the rubric of “FACTS IN DISPUTE” sets out a number of disputed facts including whether it was agreed that a meeting would take place at the respondent’s premises at 08h30 on 19 April 2011 where the higher structures of SA Solidarity union could address the striking employees including the applicants; whether Mampuru arrived one hour late for the meeting scheduled for 19 April 2011; whether the respondent once again made an offer that the striking employees including the applicants could return to work as normal and be issued with written warnings during the meeting on 19 April 2011; whether at the meeting of 19 April 2011 Mampuru made it clear that the striking employees including the individual applicants could only return to work if the 16 suspended employees’ suspensions were uplifted by the respondent; whether Mampuru was informed at the meeting on 19 April 2011 that the disciplinary hearings against the 16 suspended employees would proceed as scheduled; whether Mampuru and the striking employees including the individual applicants conveyed to the respondent on 19 April 2011 that the striking employees would not return to work and that the respondent ‘must do what it has to do’; whether Mampuru at the meeting of 19 April 2011 indicated that he did not agree with the striking employees’ viewpoint and stance; whether the respondent had extended its invitation to the union on 19 April 2011 that in the event that the striking employees decided to return to work at 12h00 on that date those employees who did so would only be issued with a final written warning; whether the striking employees were suspended on 20 April 2011; and whether the applicants had to comply with ultimatums to return to work and were made aware of the repercussions of their actions, as well as given an opportunity to rectify their behaviour in return for a lighter sanction, on the 13th, 15th, and 19th of April 2011.

[16] Significant throughout the facts in disputes as summarised above is that it is not the date of 19 April 2011 that appears to be in dispute, but the events that took place on that date. Throughout the factual disputes raised, the 20th of April 2011 came up once, and in relation to whether the suspensions took place on that date or not.

[17] According to Singo, the applicants’ counsel, Ms. Magano took over the matter in October 2013 when it was postponed. It is therefore inconceivable in the light of the disputed facts as opposed to those that are common cause that Ms. Magano throughout her consultations, would have missed that there was an error in the paragraphs sought to be amended. Even more significant is that it is not known when the applicants had raised the matter with Singo or counsel. Furthermore, the objection came about during cross-examination of a witness, and surely if there was such an obvious and material error in the pre-trial minutes, Ms Magano would have raised it prior to the commencement of the proceedings, and not at the stage when she could not get a concession from a witness under cross-examination. In these

circumstances, I am not satisfied that Singo has furnished an explanation sufficiently full of the circumstances under which the concessions were made and why it is sought to be withdrawn at this stage of the proceedings.

[18] Further in the light of the history of this matter, the disputed facts as outlined in the pre-trial minute and the timing of the raising of the objection, it is doubted that the applicants' application is bona fide, especially in the light of it not being disclosed as to when the applicants had become aware of the alleged error.

[19] In the circumstances, given the binding nature of the pre-trial minutes, the prejudice to be suffered by the respondent if the amendment is granted, the disputed facts as outlined in the pre-trial minute, considerations of justice and fairness do not justify the application

being granted. I am further of view that contrary to Singo's contentions, the applicants' case does not necessarily collapse on account of the concessions made in the relevant paragraphs, and that the disputed facts as captured in the pre-trial minute remains to be ventilated. In conclusion, I am not satisfied that the applicants have established special circumstances for the court to exercise its discretion in their favour. Accordingly, the following order is made;

Order:

- i. The application to amend, or strike out paragraphs 3.23 and 3.24 of parties' signed pre-trial minute is dismissed.
- ii. The matter remains part-heard and the Registrar of the Court is to set it down for continuance.
- iii. The costs associated with this application are to be in the cause.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants: Adv. F Magano

Instructed by:

WITS Law Clinic (Pro Bono)

On behalf of the Respondent: J Du Randt of Du Randt Du Toit Pelsers Inc

[1]

[2013] 4 BLLR 378 (LC) at paragraphs [103] to [110]

[2] With reference to MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga and Another 2010

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- (4) SA 122 (SCA)
- [3] With reference to Shoredits Construction (Pty) Ltd v Pienaar NO & others [1995] 4 BLLR 32(LAC) at 34E-F.
- [4] NUMSA v Driveline Technologies (Pty) Ltd and Another [2007] ZALC 66; [2000] 1 BLLR 20 (LAC) at para 16-17
- [5] With reference to Filta-Matrix (Pty) Ltd v Freundenberg
[1997] ZASCA 110; 1998 (1) SA 606(SCA)
- [6] Rademeyer v Minister of Correctional Services [2008] JOL 21787 (W); [2008] ZAGPHC 141.
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