



IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

CASE NO. 15/2010

In the matter between:-

NORBERT LE CORDIER

APPLICANT

AND

SPINTEX SWAZILAND (PTY) LTD

RESPONDENT

Neutral citation : Norbert Le Cordier v Spintex Swaziland (Pty) Ltd
(15/2010) [2012] SZIC 34 (13 November 2012)

CORAM : **DLAMINI AJ,**
(Sitting with D. Nhlengetfwa & P. Mamba Nominated
Members of the Court)

Heard : **16 OCTOBER 2012**

Delivered : **04 DECEMBER 2012**

Summary: ***Procedure - Amendment of pleadings - General policy is that the grant or refusal of application for amendment is exclusively within discretion of Courts having taken into account circumstances of each case.***

1. Norbert Le Cordier, the Applicant in this matter, has applied to this Court for determination of an unresolved dispute he has with his former employer, Spintex Swaziland (Pty) Ltd - the Respondent in this matter. In his application he alleges that he has been unfairly dismissed.
2. The basis for his claim that he has been unfairly dismissed is that: at the beginning of October 2007 he was employed by the Respondent as a Factory Manager, on a one year contract which was to expire at the end of September 2008. Apparently two weeks before that contract expired, he was again made to sign another one year contract until the end of September 2009. When he initially launched the present application his contention was that by virtue of the fact that the contract of employment was renewed before the expiry of the initial contract then his employment status was rendered permanent in terms of section 124 of the Employment Act 1980, as there was continuity of employment.
3. The Respondent opposes the present application. In its reply it pleaded that the Applicant was not dismissed but rather that his employment terminated with the effluxion of time. It denies that there was continuity of employment as envisaged by section 124 of the Employment Act.
4. The trial commenced with the Applicant delivering his testimony in support of his case. At the end of the Applicant's testimony in-chief, his counsel applied to file a notice to amend the Applicant's statement of claim at paragraph 7 as follows;

"The Applicant had a legitimate expectation that his contract of employment would be renewed as a result of

the long history between the parties and engagements on same”

5. The application to amend the particulars of claim is opposed. The parties agreed that the Court hears arguments on this issue, before the matter proceeds on its merits hence now this ruling on the issue.
6. Attorney Mr. Jele, on behalf of the Applicant, in support of the application to amend the particulars of claim referred the Court to a letter by the Applicant addressed to a certain Mr. M. Naicker dated 06 July 2009. In the said letter at paragraph 4 the Applicant states as follows: *‘...I had both a legitimate and real expectation that my contract of employment would be renewed given recent developments and the engagements that we had.’*
7. The statement above, according to Jele, goes to prove that the issue of the legitimate expectation was not being raised for the first time, at this stage of the trial by the Applicant. To further support the contention that the sought amendment was not something new, Jele also referred the Court to paragraph 5.3 of the Applicant’s replication where he, in the alternative, pleads that he had a reasonable expectation that his contract of employment would be renewed.
8. Mr. Jele submitted that the Respondent would not suffer any prejudice should the amendment be allowed because:
 - 8.1 *this was not the first time the claim of legitimate expectation was being raised by the Applicant;*
 - 8.2 *the Respondent has not yet cross examined the Applicant;*

8.3 *the Respondent can still amend its pleadings to address the proposed amendment and even call witnesses to contest the claim.*

9. As pointed out afore, the application to amend the pleadings is opposed by the Respondent. Attorney Mr. Sibandze, the Respondent's counsel, in his submissions and arguments *contra* contends that the main reason for the opposition is that amendment seeks to introduce a new cause of action. According to Mr. Sibandze, the dispute reported by the Applicant at the Conciliation Mediation and Arbitration Commission was that his employment status had been rendered permanent in terms of section 124 of the Employment Act. This new cause of action which is now sought to be introduced, Sibandze submitted, has in fact prescribed in terms of section 76(2) of the Industrial Relations Act, 2000, as amended. And that should the Court grant the amendment, the Respondent would be prejudiced because it would now be facing a new cause of action altogether. In support of this line of argument the Court was referred to the case of ***Jameson Thwala V Neopac (Swaziland) Limited Case 18/1998.***
10. It was further argued and submitted that the amendment sought is not bona fide in that it is sought to tailor the Applicant's case to his evidence which is in contrast to his pleadings and is a new revelation.
11. Attorney Sibandze, quoting *Watermeyer J* in ***Moolman V Estate Moolman 1927 CPD 27 at page 29***, further pointed out that the general rule with regard to amendments is that *'they will*

always be allowed unless such application is made mala fide or unless the such amendment would cause injustice to the other side which cannot be compensated by costs or unless the parties cannot be put back for purposes of justice in the same position as they were when the pleading sought to be amended was filed'. But in casu the amendment is meant to align the Applicant's particulars of claim in with a mala fide intent, so the argument continued.

12. Further compounding issues for the Applicant, according to Sibandze, is that the application has been brought two years after the institution of the proceeding and when the trial has commenced, with no explanation for the delay.
13. Another argument raised by Attorney Sibandze was to the effect that one of the grounds upon which a proposed amendment can be successfully opposed is that it would in effect resuscitate a prescribed claim or defeat a statutory limitation as to time. Further to this, the proposed amendment is not one which could be compensated by an award for costs and would be prejudicial to the Applicant because: it would require not only a postponement but also that the calling of two witnesses who have long left the employ of the Respondent.
14. In his replying submissions, Attorney Jele pointed out that a dispute under the Act is different from a cause of action. He went on to submit that the dispute between the Applicant and his former employer in this matter is one of unfair dismissal. Jele further argued that since the Applicant had a legitimate expectation that his contract would be renewed, the non-renewal thereof is the reason he contends he has been unfairly dismissed. He further submitted that in proving the unfair

dismissal the Applicant relies on the legitimate expectation of his contract – which he argues is the cause of action.

15. The principles that apply to applications for amendment of pleadings, such as the present, are well known in this jurisdiction. Since the Rules of this Court do not make provision for the procedure to follow in amendment of pleadings, the High Court Rules accordingly apply – with such qualifications, modifications and adaptations as may be necessary.
16. Rule 28 of the High Court Rules regulates the procedure to be followed when a party seeks to amend a pleading. The practical application of the rule involves the exercise of discretion by the Court to which the application has been made. Not only that, but also that such discretion be exercised judiciously. Watermeyer J, in ***Moolman v Estate Moolman and another 1927 CPD 27, at page 29*** 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 side which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed’.
17. In an earlier decision, ***Whittaker v Roos and another; Morant v Roos 1911 TPD 1092 at 1102***, Wessels J crisply stated the correct approach as follows;

“This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties.

It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts....But we all know, at the same time, that mistakes are made in pleadings, and it would be a grave injustice, if for the slip of a pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see the real position between the parties”.

18. The plethora of authorities on the subject of amendment of pleadings indeed have the same approach when it comes to dealing with the issue – that, although the granting of an amendment amounts to the granting of an indulgence, the modern tendency of the Courts lies in favour of an amendment whenever such amendment facilitates the proper ventilation of the dispute between the parties.
19. After undertaking a comprehensive review of the case law on amending pleadings in ***Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another 1967 (3) SA 632 (D) at 640H-641B***, Caney J held:

“...the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on the record is not to stand in the way of this; his

punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is bona fide and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has some deserving consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable... or deliberately refrain until a late stage from bringing forward his amendment with a purpose of catching his opponent unawares... or of obtaining a tactical advantage or of avoiding a special order as to costs..."

20. In the present matter before Court, for determination is the alleged unfair termination of the Applicant's employment. That is the dispute between the parties. It is not the first time that the allegation that the Applicant had both a legitimate and real expectation that his contract of employment would be renewed is raised before this Court. Indeed it is common cause that he raised it in his letter of 06 July 2009 addressed to the Managing

Director of the Respondent. The Applicant also raised this issue of his legitimate expectation in his replication to the Respondent's replies where he stated, in the alternative, at paragraph 5.3, that *'he had a reasonable expectation that his contract of employment will be renewed.'*

21. It is therefore without doubt that the Respondent had been aware that the Applicant would be raising the claim of legitimate expectation as one of the grounds upon which he expected his contract of employment to be renewed. We are not aware as to what was going on in the mind of the Applicant's Counsel when he initially prepared the statement of claim on behalf of his client. What we are aware of though, is that mistakes do happen in the drafting and preparation of pleadings. However, before the pleadings were closed in this matter, the claim of legitimate expectation was then introduced in replication, albeit in the alternative.

22. Perhaps one needs to borrow from the wise words of Innes CJ, as he then was, in ***Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198*** when he stated:

'The object of pleading is to define issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent a full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings.'

23. The effect of the present amendment by the Applicant is that he (Applicant) now wants to rely solely on this claim of legitimate expectation and do away with the section 124 claim of continuity

of employment. The fact that this is not the first time the claim of legitimate expectation is brought up coupled with the fact that the Applicant has not yet been cross questioned should, in our view, count in favour of granting the leave sought. We do not find any mala fides on the Applicant's conduct in the manner things have turned out. The general rule is that an amendment should be allowed if it can be made without injustice to the other side - which *in casu* we did not find.

24. Taking into account all circumstances of this case, we come to the conclusion that in the interests of doing justice between the present disputants, and in the exercise of this Court's discretionary powers, the amendment in question is of sufficient importance for a full and proper inquiry into all the issues involved in this matter. The Court accordingly makes the following order;

A) The amendment is allowed.

B) The Applicant is to file and deliver the amended particulars of claim within 5 days.

C) The Respondent is to file its replies, if any, within 14 days after delivery of the amended particulars.

D) The Applicant is to pay the costs occasioned by such amendment.

The members agree.

**T. A. DLAMINI
ACTING JUDGE - INDUSTRIAL COURT**

**DELIVERED IN OPEN COURT ON THIS 4TH DAY OF DECEMBER
2012.**

For the Applicants : *N.D. Jele (Robinson Bertram Attorneys).*

For the Respondent : *M.S. Sibandze (Musa M. Sibandze Attorneys).*