IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN) OF INTEREST

CASE NO: C428/00

DATE HEARD: 11-09-2002

DATE DELIVERED: 12-9-2002

In the matter between:

ANDRE MYBURGH First Applicant

PIETER PAUL DANIEL LE ROUX Second Applicant

ARMAND GERHARDUS GELDENHUYS Third Applicant

CHRISTIAAN ERNST GERHARDUS JORDAAN Fourth Applicant

RAYNARD HERMY MARS Fifth Applicant

and

AUTONET (PASSENGER SERVICES) First Respondent

AUTOPAX (PTY) LIMITED Second Respondent

JUDGEMENT

PILLAY, J:

1. This is an application for the amendment of the applicants' statement of claim.

2. The first ground of objection is to the applicants seeking to compel the respondent to abide by the provisions of Rule 28 of the Rules of the High Court without first having obtained leave of this Court. Rule 11(3) and (4) do not confer rights on litigants to utilise the procedure of the High Court without first having obtained leave of this Court, so it was submitted for the respondent.

3. The applicants countered that litigants cannot be expected to apply to the Court each time recourse is had to Rule 11(3) and (4) of the Rules of the Labour Court. Furthermore, the respondent, having given notice of its objection to the amendment, failed to formally set out the grounds thereof as required to by Rule 28(3) of the Rules of the High Court. The respondent has, therefore, lost the right to object to the amendment. So it was submitted for the applicants.

4. Rule 11 of the Rules of the Labour Court provide:

"*(3) If a situation for which these Rules do not provide arises in proceedings or contemplated proceedings, a Court may adopt any procedure that it deems appropriate in the circumstances.*

(4) In the exercise of its powers and in the performance of its functions or in any incidental matter the Court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act."

5. I agree with Mr Rautenbach for the respondent that it is only the Labour Court that can, by having recourse to Rule 11(3) and (4), permit the adoption and adaption of the High Court Rules. However, that does not imply that every time recourse is had to Rule 28 of the High Court Rules, a litigant must first apply to the Labour Court to do so. Applications for amendment of pleadings are heard routinely in the Labour Court. I agree with Mrs Klopper for the applicants that for such applications to be prefaced by an application for leave to use Rule 28 of the Rules of the High Court would be cumbersome and costly and would serve no practical purpose.

6. When an application for amendment is made, the Labour Court

may adopt, adapt or reject the Rule 28 procedure or act in any manner that it considers expedient. I am not aware of any authority, nor was I referred to one, where the Labour Court refused to apply Rule 28 of the High Court Rules when confronted with an application for amendment. In the circumstances, the respondent had no reason to doubt that the Labour Court would refuse to apply Rule 28. It should have complied with Rule 28 fully.

7. However, whether the respondent complied or not is now academic. When the applicants sought to secure confirmation from the Labour Court that the pleadings had already been amended, the Court (per Wagly J) rejected the submission and ordered the applicants on that occasion to launch a substantive application. That is the application now before me as a properly opposed motion.

8. Whether pleadings had closed or not was also raised as a peripheral issue in this application. The applicants wanted discovery to cure the vagueness of their pleadings. The respondent refused to make discovery as pleadings had not closed. For the same reason it also took the view that it was premature to hold a pre-trial conference.

9. Whether the pleadings had closed or not is irrelevant to this application for amendment. Either the applicants have a valid cause of action or they do not have such a cause. They cannot depend on the respondent to create a cause of action for them through disclosure. Besides, if the applicants seriously believed that they were entitled to discovery they should have brought a separate application for that. Furthermore, I agree with the respondent that the pre-trial would be premature if the issues in dispute have not been defined in the pleadings. This application for amendment is, I understand, a step in that direction.

10. The second issue for determination is whether the applicants' late filing of the reply should be condoned. The application for condonation is embodied in paragraphs 7 and 8 of the replying affidavit. No substantive application for condonation was made.

11. The reply was delivered on 28 August 2002, three months late and 13 days before the hearing. The explanation for the delay was that the applicants' representative only became aware that a reply was warranted when the heads of argument were being prepared.

12. The explanation for the delay is wholly inadequate. The applicants had the benefit of two legal minds - that of counsel and their attorney - throughout the matter. They could not reasonably have had any doubt about whether a reply was warranted. I say so against the following backround:

13. The applicant referred a dispute to the CCMA based on an alleged unfair labour practice. The referral form dated 19 October 1999 confirmed that it was in terms of Schedule 7 Item 3(4)(b) of the Labour Relations Act 66 of 1995 (the LRA). They described the nature of the dispute as follows:

"*Die geskil gaan oor die werknemer - is op dieselfde voordele as permanente werkers geregtig, maar die werkgewer versuim om dit aan die werknemer te verskaf.*"

14. The relief sought was:

"*Permanente aanstelling en vergoeding en voordele van permanente werkers vanaf datum van aanstelling, alternatiewe kompensasie.*"

15. They described the special circumstances of the case thus:

"*Die werkgewer weier om die werknemer permanent aan te stel en wysig deur voorwaardes eensydig.*"

16. After conciliation, the commissioner issued a certificate stating that the dispute about the alleged unfair labour practice in terms of Schedule 7 Item 3(1) remained unresolved.

17. On 9 June 2000 the applicants referred a dispute to this Court. Predictably, the respondent in opposing the claim objected *in limine* to the jurisdiction of the Court on two grounds: The claim referred to this Court was based on constructive dismissal which had not been conciliated and which, in any event, should have been referred for arbitration. Furthermore, the alleged unfair labour practice dispute should have been referred to arbitration and not for adjudication by the Labour Court.

18. The applicants conceded in a letter to the Registrar that the Labour Court had not jurisdiction because the issue that was pleaded was not addressed in the preceding referral to the CCMA. They said that they intended to make a fresh referral based on the constructive dismissal, together with an application for condonation to the CCMA. In due course, the CCMA dismissed the application for condonation.

19. Subsequently, it was agreed that the applicants would make an

application to amend their pleadings. The respondent disputes that it ever agreed to the amendment. There is no evidence that the respondent agreed to the amendment. All the evidence points to the contrary. I would be surprised if the respondent consented to an amendment that might deprive it of the tactical advantage that it acquired from its jurisdictional objection.

20. The applicants then delivered their proposed amendment. Their claims were now to be based on an alleged unfair labour practice in terms of Schedule 7, their cause of action being unfair discrimination. The relief they sought was no longer reinstatement but compensation. The cause of action was amplified in argument to be an automatically unfair constructive dismissal based on discrimination and other alleged violations of the applicants' constitutional rights.

21. The respondent's jurisdictional objection raised *in limine* to the original referral therefore remained substantially valid for the referral of the proposed amended statement of claim. The grounds of objection were reaffirmed in a letter to the applicants' representative as early as 12 September 2001, 12 days after receiving the notice of the proposed amendment. It is therefore astounding that the applicants failed to set out fully in their

founding papers their reliance on evidence that would allegedly prove that, in discussions with the commissioner at conciliation, the true nature of their dispute was identified as that of unfair discrimination. These allegations which underscore the amendment, were also not made in the reply for which condonation is now sought. The applicants could not reasonably have been under any misapprehension that the objection *in limine* would not be pursued through the opposition to the amendment since they both related to the cause of action.

22. The primary purpose of the replying affidavit is to introduce new evidence about what transpired at the conciliation. This the applicants may not do, not only as a rule, but in all the circumstances described herein.

23. Furthermore, the respondent was not at conciliation. There is no record or evidence from the conciliating commissioner. All that the Court has is the version of the applicants. Made as it is at such a late stage of the proceedings, after having conceded that the Court had no jurisdiction and after having been unsuccessful in the application for condonation, the Court has serious doubts about the veracity of the applicants' version. These doubts are fortified by the commissioner's description of the dispute in the

certificate as one of an unfair labour practice in terms of Schedule 7 Item 3(1). The applicants have also not attempted to set aside that certificate which appears to be consistent with their referral to conciliation.

24. If the issue of discrimination was alive at the conciliation, as alleged, then the applicants had no reason to abandon their claims for constructive dismissal for want of jurisdiction. Their objective of applying for condonation was, it was submitted, to be able to re-refer a dispute about an automatically unfair constructive dismissal based on discrimination and other infringements of their constitutional rights. It seems to me that having shopped for a forum, the applicants were now shopping for a cause of action.

25. Against this factual background the explanation for the delay is not only unreasonable, but also shows that the applicants have little prospects of succeeding in their application for the amendment. The amendment changes the cause of action substantially. It is also a cause that has not been conciliated. As there has not been compliance with a jurisdictional prerequisite, the amendment cannot be allowed.

26. The application for condonation of the late delivery of the replying affidavit must therefore fail. It follows, therefore, that in the absence of condonation and any prospects of success on the merits, the application for amendment must also be dismissed.

27. In deciding the issue of costs I have taken into account that the applicants were forewarned of the respondent's stance from the outset. They have chosen this course of action and they have therefore put the respondents to expense. In the circumstances they must pay the costs. I order as follows:

1. The application in which relief is sought in terms of paragraphs 1, 2 and 3 of the notice of motion is dismissed.
2. The applicants are to pay the costs.

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PILLAY, J