IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO: C552/2001

In the matter between:

SMM PAPIER AND EIGHT OTHERS
Applicants

and

THE MINISTER OF SAFETY AND SECURITY First Respondent

THE NATIONAL COMMISSIONER SOUTH AFRICAN POLICE SERVICES
Second Respondent

PROVINCIAL COMMISSIONER SOUTH AFRICAN POLICE SERVICES (WESTERN CAPE) Third Respondent

---

JUDGMENT

---

FRANCIS J

*Introduction*

1. This is an application by the respondents to amend paragraph 3 of its response to the applicants' statement of claim. The application to amend was opposed by the applicants.

*Background facts*

2. The applicants are all employed by the respondents. Their claim is that during the period 1 May 1993 to 30 June 1996 they were overpaid by the South African Police Services ("the SAPS"). During October 1999 they were informed by the second respondent of the overpayments and that those overpayments would be

recovered from their remuneration in installments. The applicants agree that the overpayments were made wrongfully. They dispute that the SAPS is entitled to recover the overpayments from them on the basis that the claims for overpayments had prescribed in terms of Section 11(d) of the Prescription Act 68 of 1968 ("the Prescription Act"). The last day on which the respondents' and/or the SAPS could have instituted action, civil or otherwise in terms of the Public Service Act 103 of 1994 ("the Public Service Act") or any other legislation for recovery of overpayments was 30 June 1996. They contended further that the respondents and the SAPS only commenced recovering the overpayments after a period of three years and after the claim prescribed in terms of section 11(d) of the Prescription Act. The respondents are not entitled to recover the overpayments.

3. The respondents admitted in its response that the applicants were employed by the SAPS and that during the period 1 May 1993 to 30 June 1996 the individual applicants were overpaid by the amounts further that they were advised during October 1999 by the second respondent of the overpayments referred to and that these would be recovered from their remuneration from them on the dates stated by the applicants.

4. The respondents submitted that the amounts erroneously paid to the applicants are recoverable in terms of the Public Service Act. It submitted furthermore that the

claims for the recovery of money as at the respective dates when it was effected had not prescribed in terms of section 11(d) of the Prescription Act. The respondents only became aware of the erroneous payment in September/October 1999 and soon thereafter informed the applicants that the overpayments would be recovered in terms of the Public Service Act. The respective claims would only prescribe in September/October 2002, as the respondents only became aware of the erroneous payments in September/October 1999. It was admitted that the respondents commenced recovering the overpayments after a period of three years from the date that it was so paid. However, the respondents only became aware if these erroneous payments in September/October 1999. The respective claims had not prescribed in terms of section 111(d) of the Prescription Act.

5. The matter was set down for trial on 17 December 2002. On that day the respondents applied for a postponement of the matter to bring an application for the amendment of its response to the statement of claim. The matter was postponed in order for the respondents to file and serve the said application. The application to amend was served and a notice to oppose the application was duly filed.

*The application to amend*

6. The respondents sought to amend the admissions made as referred to in paragraph 3 above and substitute it with what is contained in its application to amend. I do

not deem it necessary to repeat the contents of the proposed amendment.

7. The notice of an objection is on two basis. The first basis is that the respondents did not make any tender of wasted costs occasioned by its proposed amendment. The second basis is that because the respondents want to amend their pleadings by withdrawing or retracting an admission made it would prejudice the applicants. The respondents had failed to provide an explanation on affidavits, of the circumstances under which the admission was made and the reason that it was seeking to withdraw the admission.

8. The respondents subsequently tendered wasted costs occasioned by the amendment that therefore disposed of the first objection.

9. The explanation given by the respondents is contained in two affidavits made by Johan Adam Nortje ("Nortje") and Gerhardus Jacobus Kemp ("Kemp"). Nortje stated in his affidavit he is responsible for all civil litigation, Labour Court matters, Arbitration and other legal matter. He is based at the Provincial Head Office. The reason for the delay is that one superintendent Marissa van Deventer ("van Deventer") was the instructing legal officer in this matter. She resigned during July 2002 when he was on annual leave. Only van Deventer and himself have got the authority to deal with labour matters. The Provincial file went missing when her office was vacated. He was appointed as Provincial Head

Human Resources in the Province in an acting capacity. As a result of the latter appointment he was in Pretoria on a weekly basis for urgent matters and could not attend to all legal matters as a result of any support structures in the legal office. As a result of this lack of supporting personnel in his legal office some arbitrations, civil matters and labour court matters were neglected. He was recently informed by the National Office that they had received a subpoena from the applicants attorneys for the discovery of certain documentation. He immediately instructed the state attorneys to attend to the matter as a matter of extreme urgency. He instructed the state attorney and counsel Tanya Golden to fly to Pretoria to get hold of all financial documentation that were with the National Office.

10. Kemp explains in his affidavit that he is the Deputy-Director: Personnel Management and Sub-section Head: promotions for the South African Police Services Head Office in Pretoria. The SAPS embarked on seniority training workshops in 1998 for its personnel to calculate seniority dates in respect of qualifying periods for promotion. Prior to this date, when a member applied for promotion, Head Office exclusively restricted personnel who dealt with all these queries. The SAPS is one of the biggest government department in South Africa servicing thousands of police stations, Provincial Offices and thousand of employees. The capacity and infrastructure at Head Office are limited as in his subdepartment, they have only but a few personnel dealing with issues like promotions and calculations of seniority dates. As regard disputes and litigation from their provincial offices, it is often very difficult to co-ordinate communication between the provincial offices to facilitate the resolution of disputes. They deal with an abundance of files that relate to vast amounts of disputes on a monthly basis. If these disputes deal with issues like promotions authorised on national level, it falls squarely within the responsibility of the personnel at Head Office.

11. Kemp further explains that it was only during November 2002 that he became aware that the matter was set down for trial on 17 and 18 December 2002 and that it pertained to erroneous overpayments in relation to the respective applicants. He immediately liaised with their Financial Services Department and obtained all the relevant personnel files and information about this

matter. This information had to be forwarded to the respondents counsel in Cape Town and was required for consultations and preparation for trial. Some documentation was also on the subject of a subpoena *duces tecum.* This exercise was time consuming. Respondents' legal representatives were for the first time given access to these files on 10 December 2002 during a consultation in Pretoria. Because the respondents head office deals with files relating to vast amounts of disputes on a monthly basis, it is often extremely difficult to coordinate and facilitate consultations and the obtaining of further information as expeditiously as possible. A lack of adequate staff and work overload, often results in a lack of communication between the Provincial office and Head Office. He said that there was no intentional negligence involved in seeking this amendment at such a late stage. The amendment is material and absolutely crucial to the successful opposition of the respondent in this application. It is in the interest of justice that all the correct facts be placed before this Court.

*The issues*

12. The real issue for determination is whether the respondents have provided an explanation of the circumstances under which the admission was made and the reason for now seeking to withdraw it.

*The legal principles governing amendments and withdrawal of admissions*

13. It is trite that this Court has a discretion to allow an amendment of pleadings. Ordinarily amendments will be allowed where this can be done without prejudice to the other party. In *Moolman v Estate Moolman & Another* 1927 CPD 27 at 29 it was 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 which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed."*

14. In *MacDuff & Co v Johannesburg Consolidated Investments Co Ltd* 1923 TPD 309 it was held that:

*"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.*

15. Where the amendment involves the withdrawal of an admission, the party seeking the indulgence must provide the Court with a full explanation to convince the Court of the *bona fides* of the party seeking the amendment. A satisfactory explanation of the circumstances in which the admission was made and the reason for seeking to withdraw it. If the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him, then the application to amend will be refused. In this regard see *Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992(1) SA 167 (C).

16. In *President-Versekeringsmaatskappy Bpk v Moodley* 1964(4) OPD 109 the following appears in the headnote:

"An application for an amendment of a plea involving a withdrawal of an admission stands on the same basis as any other application for the amendment of pleadings, viz., the Court generally leans towards the granting thereof provided there has been a bona fide mistake on the part of the

party seeking to amend and the amendment does not cause prejudice to the other side which cannot be cured by an appropriate order as to costs. But, though the approach is the same, the withdrawal of an admission is usually more difficult to achieve because it involves a change of front which requires full explanation to convince the Court of the bona fides thereof, and it is more likely to prejudice the other party, who had by the admission been led to believe that he need to prove the relevant fact and might for that reason have omitted to gather the necessary evidence."

17. In *Bellairs v Hodnett & Another* 1978 (1) SA 1109 (A) at 1150 G the following was said:

"But as it has frequently been stated, an amendment cannot be had merely for the asking. This is equally, if not especially, true of a proposed amendment which involves the withdrawal of an admission - in such cases the Court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it."

*Analysis of the facts and arguments raised*

18. It is apparent from the affidavits filed by the respondents that there is no explanation given at all about both of the circumstances under which the admission was made and of the reasons why it is sought to withdraw it. The explanation given explains why the application to amend was brought late. This is clear from Nortje's affidavit. Kemp states in his that there was no intentional negligence involved in seeking this amendment at such a late stage.

19. This Court was informed by the respondents counsel that the admissions made which is sought to be withdrawn were made by van Deventer. She had given this information to the state attorney. Van Deventer was required to give an

explanation about the circumstances under which the admissions were made or an explanation had to be tendered how it came about that the admissions were made. There is no explanation given either by van Deventer or on her behalf.

20. The applicants had pointed out this defect to the respondents as early as 8 January 2003 that the respondents' amendment was retracting admissions made and that an admission could not be retracted unless explanations therefore were provided on affidavit. It pointed out further that the affidavits filed did not address the issue and accepted that the affidavits could be amplified. The respondents did not deem it necessary to deal with these defects. The application stands to be dismissed on this ground alone.

21. The respondents have not placed a true account of what actually took place to place the Court in a position to give a decision, based on the correct facts.

22. There is no reason why costs should not follow the result.

23. In the circumstances I make the following order:

1. The application to amend is dismissed with costs.

_____

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : R B ENGELA
INSTRUCTED BY MACROBERT INC

FOR THE RESPONDENTS : T J GOLDEN
INSTRUCTED BY THE STATE ATTORNEY

DATE OF HEARING: 15 OCTOBER 2003

DATE OF JUDGMENT : 17 OCTOBER 2003