IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS173/2003

In the matter between:

HENDRIK PIETER STRAUSS Applicant

and

INVESTEC GROUP LIMITED Respondent

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JUDGMENT

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NDLOVU AJ

[1] This is an application for amendment of the Statement of Claim launched by the Applicant in the main action. The application was opposed by the Respondent.

[2] The Statement of Claim was filed on the 18 March 2003. The

Respondent's response, in terms of Rule 6(3), was filed on 2 April 2003. In its response the Respondent raised a few points *in limine*, which included the following:

"1 Although the respondent commenced and engaged the applicant in respect of consultations relating to his intended termination for operational requirements the applicant resigned from his employ from the respondent (sic) by letter dated 2 January 2002 to take employment with Citibank with effect from 13 January 2002. In the circumstances the respondent denies that the applicant has any claim against the respondent arising out of his employment or the termination thereof and denies that it dismissed the applicant;

2 In the event of its being established that the applicant's services were terminated by the respondent for operational requirements (which is denied for the reasons set out above) then the respondent avers that:

2.1 the termination of employment of the applicant for operational

requirements was at the latest 3 January 2002. The applicant however filed an application to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 7 October 2002. No application for condonation was sought by the applicant in respect of such application and no application for condonation was accordingly granted;

2.2 in the circumstances the respondent avers that the application of the applicant has not been brought within the time limits prescribed within the Labour Relations Act and accordingly this Honourable Court does not have jurisdiction to entertain that claim....."

[3] The proposed amendment related to a few aspects of the Applicant's original Statement of Claim, but it was only item 2 thereof which the Respondent objected against. For this reason, it is only that specific item of the Applicant's notice of amendment which I propose to deal with in more detail. In terms of this item the Applicant sought to amend paragraph 3 of his Statement of Claim which in its

original and present form reads as follows:

> **"3. The Applicant is Hendrik Pieter Strauss an adult male who was at all relevant times hereto in the employ of the Respondent and who resides at 117 Boundary Lane, Parkmore."**

[4] In terms of Item 2 of the notice of amendment the Applicant proposes that the said paragraph 3 be amended as follows:

> **"2. by deleting paragraph 3 on page 2 and substituting same with The Applicant is Hendrik Pieter Strauss an adult male who was in the employ of the Respondent from 1 December 1998 and who was unfairly dismissed on 7 January 2002 and whose last working day was 8 January 2002 (the period of the employment as well as the period after the termination thereof up to and including 24 October 2002, being the relevant time period in respect of this action), and who resides at 117 Boundary Lane, Parkmore, Sandton, Gauteng."**

[5] On 26 June 2003 Respondent filed its notice of intention to oppose the Applicant's proposed amendment. On 18 July 2003 Respondent filed its affidavit in support of its opposition to the proposed amendment.

[6] In particular, paragraphs 5 and 6 of the Respondent's opposing affidavit read as follows:

> **"5. The respondent objects to the notice of amendment in respect of item 2 thereof. In this regard the respondent wishes to point out that in terms of its response it has contested the jurisdiction of this Honourable Court to entertain this application by virtue of the fact that the alleged dispute relates to an *unfair dismissal* which is alleged to have taken place on "*8 January 2002*". The respondent has indicated that the Applicant only filed an application to the Commission for Conciliation, Mediation and Arbitration on 7 October 2002.**

"6. Accordingly, it is submitted that the only purpose of the amendment which is sought by the applicant is in an attempt to incorporate into the application a time period way beyond the date of the alleged dismissal in order to avoid the consequences of him having brought the application late. Accordingly, it is submitted that on the basis of an allegation of an alleged unfair dismissal on 8 January 2002 (which is denied by the respondent) that there is no basis for the amendment sought by the applicant in terms of which he states the following "(the period of the employment as well as the period after the termination thereof up to and including 24 October 2002, being the relevant period in respect of this action)". The applicant may well have had other remedies that he could have sought but on the basis of the claim brought by the applicant i.e. his alleged unfair dismissal which is alleged to have taken place on "*8 January 2002*" the amendment sought is not only not competent but is prejudicial to the respondent. "

[7] Mr Snider (for the Applicant) submitted that the Applicant had always maintained that his dismissal was on 8 January 2002. The Applicant had never pretended that he was dismissed in October 2002. What happened was that he only realised of the real reasons of his dismissal from the events that took place up to and including 24 October 2002, which, in the Applicants submission, were the reasons which rendered his dismissal unfair. Mr Snider further argued that by the proposed amendment it was not intended to put the referral of dispute to the CCMA within the prescribed time limits. He further contended that the Respondent ought to have filed its objection to the CCMA that it (the CCMA) did not have jurisdiction to conciliate the dispute which had been referred out of time in terms of the Act and its Rules, without the application for condonation of the late referral having first been granted. Nor has the Respondent (Mr Snider further argued) taken the Commissioners decision to conciliate the dispute on review. He submitted that the issuance of the certificate of non-resolution of the dispute (which was common cause between the parties) was the basis on which this Court found its jurisdiction to adjudicate the dispute. The Respondent was not challenging the certificate of outcome either.

[8] Mr Snider further submitted that the granting of the proposed amendments would not prejudice the Respondent in any manner.

[9] Mr Bleazard (for the Respondent) submitted that the proposed amendment was simply unacceptable and that, therefore, the question of prejudice did not come into the picture. He submitted that the intention and purpose of the proposed amendment was to circumvent the time frame provided for by the Act within which to refer a dispute to the CCMA. The Applicant was allegedly

dismissed on 8 January 2002. He referred his dispute to the CCMA for conciliation only on 7 November 2002, which was way out of time in terms of the Act. (Incidentally, it may be mentioned for the record that although the referral form (LRA 7.11) reflects that the dispute was referred on 7/10/02 it was common cause between the parties that this was a clerical error. The correct date was 7/11/02). No application for condonation of the late referral was filed. Now, by seeking the proposed amendment, the Applicant was attempting to ensure that the period, within which the dispute was referred to the CCMA for conciliation, was calculated from 24 October 2002 and not (as it should be) 8 January 2002. He pointed out that if the calculation was started from 24 October 2002 the Applicant would be within the prescribed time limit to have referred the dispute, as he did, on 7 November 2002. In terms of section 191 of the Act the dismissal dispute must be referred for conciliation within 30 (thirty) days from the date of dismissal.

[10] The Court has a discretion whether to grant or refuse an application of this nature, which discretion must be exercised judicially. *(Robinson v Randfontein Estates Gold Mining Co Ltd, 1921 AD 168*

at 243; Caxton Ltd v Reeva Forman (Pty) Ltd 1990(3) SA 547 (A) at 565 G). It has been held by the courts that the primary object of allowing an amendment is :

"to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done." *(Cross v Ferreira 1950(3) SA 443 (C) at 447; Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967(3) SA 632 (D) at 638 A; Viljoen v Baijnath 1974(2) SA 52 (N) at 53 H; Barclays Bank International v African Diamond Exporters (Pty) Ltd (1) 1976(1) SA 93 (W) at 96 A - C; Kirsh Industries Ltd v Vosloo & Lindeque 1982(3) SA 479 (W) at 484 G).*

[11] Prejudice is the main consideration which the Court would take account of in determining an application for amendment of pleadings. Where the amendment will cause, or is likely to cause, prejudice to the other party, which prejudice cannot be compensated by a costs order and, where applicable, an adjournment of the matter, the amendment shall be refused.

(Trans-Drakensberg Bank Ltd, supra at 638 H - H - 639 C; Amod v S A Newveld Fire & General Insurance Co Ltd 1971(2) SA611 (N) at

618 (A); Euroshipping Corporation of Monrovia v Minister of Agriculture 1979(2) SA 1072 (C) at 1087 C. The following well renown statement by Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27 at 29, is needless to emphasise:

> **"..... 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, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to amend were filed."**

[12] It does not seem to me that the granting of the proposed amendment would cause the Respondent to suffer any prejudice which could not be compensated by an appropriate costs order and, if deemed necessary, an adjournment of the matter to accord the Respondent the opportunity to re-adjust its pleadings and/or its preparation for the trial, or for whatever other reason the Respondent might reasonably require the adjournment for, being occasioned by the amendment.

[13] It would appear that the particulars of the proposed amendment are not entirely new. In terms of the Applicant's referral form (LRA 7.11), at paragraph 4 thereof, the following information was furnished by the Applicant:

> ***"4. DATE DISPUTE AROSE***
>
> **The dispute arose on: 8/01/2002 / Alternatively Malicious intent revealed to me on 8/10/02 when speaking to Veli Sithole;**
>
> **The dispute arose where: Sandton (both 8/01/2002; 8/10/2002)."**

[14] On that basis it follows that the Applicant, when he referred the dispute for conciliation, did not only mention the date of his dismissal (that is, 8 January 2002) but he further mentioned 8 October 2002, as being the date on or by which the alleged Amalicious intent, (presumably on the part of the Respondent, and which was the real reason for dismissing him), was revealed to him. What he meant

thereby, it seems to me, was that the events which rendered his dismissal to be unfair were only brought to his attention on or up to 8 October 2002. The only difference from what he alleged at the conciliation referral stage and what he now alleges in his proposed amendment is that, instead of referring to 8 October 2002 he now refers to 24 October 2002. The immediate question is: *Does the difference in these two dates in October 2002 make any material difference in terms of the Respondent's ground of objection?* In my view, the answer is "no". If the referral was made on 7 November 2002 (as was indeed the case) then both dates (that is, 8/01/02 and 24/10/02) would, after all, fall within the prescribed time period within which the referral would have had to be made.

[15] When I raised the question with Mr Bleazard as to why the dates (as reflected in paragraph 4 of the LRA 7.11 form, referred to above, namely: 8/01/02 and 24/10/02 were not queried at the conciliation meeting) he told the Court that in actual fact there was no conciliation meeting held in this matter. Therefore, no attempt was ever made towards conciliation of the dispute. He told the Court that what happened was that the Commissioner simply issued the

certificate of outcome after a period of 30 (thirty) days had elapsed without the parties having resolved their dispute. (Section 135(5)(a) of the Act). Unfortunately, Mr Bleazard's submission in this regard related to matters which did not appear in any of the parties' pleadings before the Court. Therefore, such a submission was irrelevant and inadmissible.

[16] The Respondent had already raised the point *in limine* (in its Rule 6(3) Response) which related to the very same issue it now objects against to be included in the Applicant's Statement of Claim, by way of amendment. Paragraphs 2.1 and 2.2 of its Response (quoted above) appear to refer to this objection. In other words, even without the amendment, the Respondent was still intent on raising the issue (*in limine*) of the Court's lack of jurisdiction, by virtue of the Applicant having allegedly referred the dispute to the CCMA out of time and there being no condonation application having been sought and granted in that regard.

[17] The granting of the proposed amendment would not *per se* mean the acceptance by the Court of the Applicant's version on the issue. It

should only have accorded the opportunity "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done". (*Cross v Ferreira*, supra).

[18] In any event, Mr Bleazard, in his submission, intimated that the issue of prejudice was not a ground on which the Respondent founded its objection against the amendment. He argued, instead, that the proposed amendment was, in law, excipiable and that it was at this stage the appropriate time for the Respondent to raise the objection.

[19] The matter before the Court was one of an application for amendment and not one of an exception. These concepts are governed by different rules and different considerations. The Respondent opposed the Applicant's application for amendment and gave its grounds for its opposition. Hence the application for amendment was set down for hearing. If the Respondent intended to except to the Applicant's statement of claim or to his application for amendment, it should have formally done so in terms of the Rules. The exception would then have been set down for hearing

accordingly.

[20] In any event, it does appear from Mr Bleazard's own submissions, that the issue the Applicant complained about was likely to involve a real factual dispute between the parties which could properly be determined after hearing oral evidence. The trial, in my view, would therefore be the ideal forum to deal with the issue. As I have indicated already, this issue was raised by the Respondent as a point *in limine* and, as such, will necessarily be dealt with at the trial of this matter.

[21] As for the question of costs, an amendment is an indulgence in favour of the party seeking the amendment and, therefore, such party ordinarily pays the costs occasioned by the amendment. However, it does not seem to me that the opposition to the amendment in the present case was a reasonable step for the Respondent to have taken. It should therefore bear its own costs in this regard.

[21] In consequence whereof the Court makes the following Order:

1 The application for amendment of the Applicant's Statement of Claim is granted.

2 The Applicant is to pay the costs occasioned by the amendment, save the costs for the opposition.

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NDLOVU, AJ

Appearances:

For the Applicant	:	Mr A N Snider
Instructed by	:	Larry Chimes Attorney Rosebank, Johannesburg
For the Respondent	:	Mr B Bleazard
		c/o Brian Bleazard Attorneys Saxonwold, Johannesburg
Date of Judgment	:	28 November 2003