THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS658/17

In the matter between:

AMCU OBO WAYISE AND 98 OTHERS **Applicant**

and

RAND URANIUM (PTY) LTD **Respondent**

Heard: 6 July 2022

Date Delivered: **08 December 2022**

JUDGMENT

SASS, AJ

Introduction

[1] The applicant, AMCU obo Wayise and 98 others, seeks leave to amend its undated statement of claim filed on 21 August 2017 in accordance with rule 11 of the Rules for the Conduct of Proceedings in the Labour Court (the Rules).

[2] The applicant delivered an undated Notice of Amendment. In response thereto, the respondent, Rand Uranium (Pty) Ltd (previously Sibanye Gold (Pty) Ltd) filed a Notice of Objection to Proposed Amendment dated 22 September 2021. The applicant subsequently filed an Application for Leave to Amend the Statement of Claim dated 6 October 2021 consisting of a Notice of Motion and Founding Affidavit with annexures (the Application for Leave to Amend the Statement of Claim).

[3] The respondent opposed the Application for Leave to Amend the Statement of Claim. It filed an answering affidavit in that regard and the applicant responded with a Replying Affidavit. The respondent opposes the Application for Leave to Amend on various grounds which I deal with later below.

[4] Accordingly, this Court is called upon to determine whether it should permit the amendment of the applicant's statement of claim. It is important to firstly address the nature of the application before this Court and the relief sought by the applicant in terms of its Notice of Motion and Founding Affidavit. Before doing so, I turn to deal with the relevant background facts giving rise to this application.

Background Facts

[5] In and during November 2019, the applicant and the respondent concluded a Pre-Trial Minute (the Pre-Trial Minute). The unfair dismissal dispute between the applicant and the respondent was enrolled for trial before this Court for 15 March 2021 (the trial).

[6] The trial commenced on 15 March 2021. The applicant applied to amend its Statement of Claim which amendment was granted by agreement. In brief, the respondent agreed to allow the applicant to amend its Statement of Claim to reflect

that 12 members/individual applicants out of the ninety-nine members/individual applicants did participate in the strike in question.

[7] When the trial continued on 16 March 2021, the applicant applied for a postponement to proceed with a formal application to amend its Statement of Claim further. The postponement was granted, and the trial was postponed, with costs awarded against the applicant.

[8] On or about 21 September 2021, the applicant filed its Notice of Amendment. One of the reasons proffered by the applicant for the delay between 16 March 2021 and 21 September 2021 was that it was only able to convene a mass meeting on 26 May 2021 in order to, *inter alia*, obtain the further instructions required to prepare and file the Application to Amend the Statement of Claim (so that the applicant's proper instructions could be given effect to in an amended Statement of Claim, with such instructions alleged not having been given proper effect to by a previous employee of AMCU and the applicant's previous attorney).

[9] The applicant then delivered an undated Notice of Amendment which the respondent objected to, filing the Notice of Objection to Proposed Amendment. The applicant subsequently filed its Application for Leave to Amend the Statement of Claim, which application was opposed by the respondent. The applicant sought approximately eighteen changes/amendments to its Statement of Claim – set out in its Founding Affidavit deposed to by Nicole Musiker, an attorney in the employ of the applicant's attorneys of record at the relevant time (deposed to on 6 October 2021).

[10] The changes/amendments sought by the applicant broadly covered the following:

10.1 Twelve of the ninety-nine members/individual applicants did participate in the strike (when it was originally contended that all ninety-nine did not participate in the strike). The original Statement of Claim stated that the individual applicants denied participating in the unprotected strike. As a result of the pleadings as they stood, prior to any amendment, the following was agreed in the Pre-Trial Minute – *"The Individual Applicants did not*

participate in the strike and therefore do not allege provocation on the part of the Respondent. PTM confirms this."

10.2 Whether SMSs that were sent by the Respondent were actually received by the individual applicants, and if received, whether the SMSs were understood.

10.3 The validity of final written warnings received by the individual applicants.

10.4 The authenticity of a document purporting to be an AMCU pamphlet.

10.5 Inconsistent application of discipline in respect of NUM members, Solidarity members, UASA members and no union employees, when compared to the individual applicants (members of AMCU).

[11] I now turn to address the preliminary question set out above, namely – what is the nature of the application before this Court and the relief sought by the applicant in terms of its Notice of Motion and Founding Affidavit?

Preliminary issue for determination - Has the applicant applied to this Court to amend both its Statement of Claim and Pre-Trial Minute in certain respects, and may this Court grant any relief to the applicant in respect of amending the Pre-Trial Minute or permit the applicant to resile from the Pre-Trial Minute?

The procedure followed by the parties in prosecuting this application

[12] The applicant has proceeded in this Court with an application in terms of rule 11. The Rules do not cater for an application to amend pleadings, in the way that rule 28 of the Uniform Rules of Court (URC 28) does. URC 28 permits a party to amend its pleadings.

[13] Rule 11 allows a party to bring an application on notice supported by affidavit that is incidental to, or pending, proceedings referred to in the Rules which are not specifically provided for in the Rules. Rule 11 further allows this Court to adopt any

procedure that it deems appropriate in the circumstances if a situation arises in proceedings which the Rules do not provide. The procedure set out in URC 28 is the procedure to be applied by this Court in applications to amend pleadings. The applicant and the respondent have followed the procedure of URC 28 by filing a notice of amendment, filing a notice of objection, filing an application to amend consisting of a notice of motion and founding affidavit, and subsequent answering and replying affidavits (and heads of argument).

The contents of the applicant's Notice of Motion and Founding Affidavit (i.e., its application)

[14] It is trite that an applicant must: (i) set out the relief which it seeks in its notice of motion; (ii) make out its case for the relief it seeks in its founding affidavit; (and iii) cannot make out its case for the relief it seeks in a replying affidavit (or heads of argument for that matter).[1]

[15] In addition, an applicant cannot seek different relief in the replying affidavit to that which is sought in the notice of motion without seeking at least an amendment and providing a respondent with an opportunity to deal fully with such new relief.

[16] The applicant's notice of motion makes no mention at all of the pre-trial minute or any relief being sought in respect of the amending of the pre-trial minute. It only refers to amendments to the Statement of Claim. The founding affidavit also makes out no case for the amending of the pre-trial minute or the applicant resiling from it (whether through abandoning a point/points, agreeing not to pursue or rely on a point/points, or informing the respondent that a point/points will not be relied on).

[17] No case has been proffered by the applicant in its Notice of Motion and Founding Affidavit in relation to amending the pre-trial minute or resiling from the pre-trial minute. The applicant may be entitled to the relief sought in its Notice of Motion (addressed in more detail below) but is not entitled to the relief as sought in relation to the pre-trial minute as set out in its Replying Affidavit (in which its

[1] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraph 29.

responds to aspects raised by the respondent in respect of amending the pre-trial minute), its Heads of Argument or during argument.

[18] I have considered whether the applicant may, in respect of the relief being sought in respect of the pre-trial minute, rely on the reference to "*further and/or alternative relief*" as set out in paragraph 6 of its Notice of Motion in order to obtain the relief which it is now seeking in respect of the pre-trial minute through its Replying Affidavit, its Heads of Argument, and its submission during oral argument.

[19] I am of the view that such an approach would not legally sustainable. The reference to "*further and/or alternative relief*", as set out in almost every notice of motion that is filed in an application, clearly refers to alternative relief that relates to, or is subsidiary or accessory to, the main relief as sought in the notice of motion.

[20] The amending of the pre-trial minute or the applicant resiling from the pre-trial minute does not amount to alternative relief that relates to, or is subsidiary or accessory to, the amending of the Statement of Claim (the main relief as sought in the Notice of Motion), for the reasons set out further below.

<u>An amendment to the statement of claim does not automatically result in an amendment to the pre-trial minute – that relief must be sought specifically</u>

[21] In *Putco Limited v Transport and Allied Workers Union of South Africa and Another*[2], the Court considered an interlocutory application in terms of which the respondents sought to amend their statement of response (i.e., a pleading). The application to amend related to the withdrawal of admissions made in the statement of response. The respondent applied to amend the statement of response – they did not apply to amend the admissions contained in the pre-trial minute (i.e., there was no application before the Court to amend the pre-trial minute.

[22] In dealing with this aspect, the Court said the following (Molahlehi, J):

[2] [2015] ZALCJHB 42 (18 February 2015).

"[25] Turning to the admission as made in the pre-trial minutes, it has to be noted that the respondents have not filed any application to have the admission withdrawn.

[26] The approach adopted by the courts in dealing with the status of pre-trial minutes in our law is well established. It has been stated in this regard by the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd and Another*, that:

> "It is true, of course that a pre-trial minute is a consensual document which binds the parties thereto and obliges the court (in the same way as parties' pleadings do) to decide the issues set out therein.'

[27] And as concerning the issue of withdrawal of an admission made in the pre-trial minute, the court in *Filta-Matrix (Pty) Ltd v Freudenberg*, held that:

> "to allow a party, with a special circumstances, to resile from an agreement reached at a pre-trial conference will be to the objects of rule 37 which is to curtail the scope of the litigation."

[28] In light of the above, I am of the view that the respondents' application stands to fail."

(Footnotes omitted)

[23] The applicants were therefore required to not only apply to amend the Statement of Claim but also apply to amend the pre-trial minute. They have not done so in their Notice of Motion and Founding Affidavit. The amending of the Statement of Claim would not automatically result in an amendment to the pre-trial minute – that relief must be sought specifically.

<u>The test for determining whether a pleading may be amended a pleading is different to the test/s for determining whether a pre-trial minute may be amended or resiled from</u>

[24] The legal principles applicable to determining whether an application to amend a pleading is addressed in detail below. In summary, the following three-factor/fold test is to be applied for determining whether to grant the amendment:

- Is the amendment necessary for the proper ventilation of the dispute between the parties?

- In the event that leave to amend is granted, will the respondent be prejudiced?

- In the event that the respondent is prejudiced, can the respondent's prejudice be cured and/or corrected?

[25] The principles applicable to the withdrawal of an admission made at a pre-trial conference/contained in a pre-trial minute and the test/s to determine whether a pre-trial minute may be amended or resiled from, were comprehensively considered by the Court in *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v CTP Ltd and Another*[3]. The Court stated the following in respect of the applicable test (Myburgh, AJ):

> "[102] Before dealing further with the application, it is convenient to briefly consider the principles applicable to the withdrawal of an admission made at a pre-trial conference.
>
> [103] In *MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga and another* (*Kruizenga*), the SCA said the following about the role and importance of pre-trial conferences and the significance of admissions of fact made in the course thereof:
>
> > "The rule (i.e., rule 37) 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

[3] [2013] 4 BLLR 378 (LC) at paragraphs [103] to [110]

which the pleadings raise. Admissions of fact made at a rule 37 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. Rule 37 is thus of critical importance in the litigation process."

[104] These findings made in relation to rule 37 of the High Court Rules are equally applicable to rule 6(4) of the Labour Court Rules.

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

[106] It is precisely because of the critical importance played by pre-trial conferences/minutes in the litigation process that the SCA has twice held that, in the absence of special circumstances, a party cannot resile from the agreement. In *Filta-Matix* (*Pty*) *Limited v Freudenberg and others* (*Filta-Matix*), the SCA stated the principle as follows:

> "To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation. (Authority omitted.) If a party elects to limit the ambit of his case, the election is usually binding (authorities omitted). No reason exists why the principle should not apply in this case."

[107] *Filta-Matix* was one of the judgments considered by the LAC in *NUMSA v Driveline Technologies* (*Pty*) *Ltd and another* (*Driveline Technologies*) in arriving at this summary of the legal position:

> "To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pre-trial agreement or pre-trial minute has been concluded in a case depends on whether it can be said that the party seeking to rely upon or to introduce or raise such cause of action or

issue *has abandoned that cause of action or has agreed either expressly or by implication* (*I would say necessary implication*) *not to pursue or rely upon such cause of action or point or has informed the court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed.* If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement *on the same basis as he would be able in law to resile from any other contract.*" (Emphasis added.)

[108] As I interpret this judgment, 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.

[109] In *Rademeyer v Minister of Correctional Services* ("*Rademeyer*"), the High Court found as follows regarding the requirements of 'special circumstances' in the present context:

"Applying the above criteria to the application now before me, the defendant in order to succeed, must show that special circumstances exist for this court to exercise its discretion in his favour. Three requirements must be met: firstly, the defendant 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*."

[110] The court in *Rademeyer* (*supra*) did not cite any authority for these being the requirements of special circumstances in the present context; nor have I been able to find any such authority. In my view, setting

the test for special circumstances as being substantially equivalent to the test for the grant of condonation (as *Rademeyer* does) is too lenient and does not take account of the fact that a pre-trial agreement equates to a contract between the parties. Once this is accepted, then special circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract. To my mind, this interpretation accords with *Driveline Technologies* (*supra*) and is consistent with *Kruizenga* (*supra*). In any event, in assessing the present application, I do so with reference to both tests."

(Footnotes omitted)

[26] Whether the amendment is necessary for the proper ventilation of the dispute between the parties coupled with whether the opposing party would suffer any prejudice, and if so, could that prejudice be cured and/or corrected is a different test to whether there are special circumstances present (i.e., an enquiry substantially similar to the test for the granting of condonation) or whether there is a basis for resiling the pre-trial minute or part thereof in terms of the law of contract. The amending of the pre-trial minute or the applicant resiling from the pre-trial minute does not amount to alternative relief that relates to, or is subsidiary or accessory to, the amending of the Statement of Claim.

Conclusion

[27] The applicant is required to the follow the ordinary procedures that are applicable to an application to amend a pre-trial minute or resile wholly or in part from a pre-trial minute (i.e., a contract) and not '*piggy-back'* on the amendment to the Statement of Claim.

[28] It is trite that a pre-trial minute constitutes a binding agreement between the parties and that a party may only to resile from that agreement if:

- the other party consents;

- if there are special circumstances which entitle that party to do so; or

- a basis has been established for doing so in the law of contract.

[29] The respondent has of course not consented to the applicant resiling from the pre-trial minute.

[30] I agree with the assessment of Myburgh AJ in *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v CTP Ltd and Another*[4], as set out in detail above, in relation to the test for '*special circumstances'.* The test as set out in *Rademeyer supra* is too lenient (it simply cannot be the equivalent of the condonation application test) and does not take account of the fact that a pre-trial agreement equates to a contract between the parties. '*Special circumstances'* should be understood to mean that, in order to resile from a pre-trial minute (or part thereof), the applicant must establish a basis for doing so in the law of contract. '*Special circumstances'* should equate to a basis being laid by the applicant in the law of contract for the applicant to resile from the pre-trial minute or part thereof.

[31] The applicant submitted in its heads of argument that it has provided a reasonable and acceptable explanation to resile from the pre-trial minute as the errors made in the pre-trial minute were not the fault of the individual applicants and if the amendments were not allowed this would prevent the proper ventilation of the matter which is not in the interests of justice.[5]

[32] I do tend to agree with the applicant's abovementioned submission. The applicant's founding affidavit does not, however, contain similar allegations. The high-water mark of allegations made by the applicant on this score is contained in the applicant's replying affidavit where it makes the following allegation, *albeit* whilst pleading over the respondent's answering affidavit – "*Insofar as the amendment would result in having to resile from the pre-trial minute, it is submitted that the*

[4] See fn 3 *supra.*
[5] Applicant's Heads of Argument: para 68

Applicants have provided a reasonable and proper explanation as to why in the circumstances of this matter it should be allowed".[6]

[33] This allegation is problematic for two reasons - firstly, it is trite that an applicant may not make out its case in its replying affidavit; and secondly, any amendments to the Statement of Claim would not automatically result in the applicant resiling from the pre-trial minute.

[34] Most crucially, the applicant's Notice of Motion in the Application to Amend the Statement of Claim contains no prayers whatsoever in relation to resiling from the pre-trial minute. The Notice of Motion contains no prayers even mentioning the pre-trial minute.

[35] In order to resile from the pre-trial minute (or part thereof), the applicant must establish a basis for doing so in the law of contract. It does not appear that the applicant has not done so in its Founding Affidavit (or its Replying Affidavit for that matter). Therefore, the Court is not in a position to decide that aspect of the matter because of the limitations in the applicant's Notice of Motion and Founding Affidavit (and the restrictions which apply to the applicant's Replying Affidavit and Heads of Argument).

[36] If the Court does decide to amend the Statement of Claim, which is addressed in detail below, the applicant would need to apply to amend the pre-trial minute by seeking the necessary relief in that regard in a notice of motion and establishing in the accompanying founding affidavit that there is a basis to do so in the law of contract as opposed to merely relying on a test that is substantially equivalent to the test for the granting of condonation, for establishing the presence of 'special circumstances'. Alternatively, and in light of the Statement of Claim being amended, the respondent could potentially agree to amend the pre-trial minute so that it accords with and accurately reflect the contents of the pleadings (including a possibly amended Statement of Claim), without this matter being delayed by a further application to amend the pre-trial minute.

[6] Applicant's Replying Affidavit – para 31.4

[37] In the Respondent's Further Authorities' Note dated 7 July 2022, the respondent submits that the principle of *stare decisis* applies to judgments of this Court and that I am therefore bound by the *Putco supra* decision and *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others*[7] at paragraphs 3, 4, 7 and 8.

[38] The respondent sought to rely on the *stare decisis* principle in relation to: (i) there not being a full and reasonable explanation before this Court as to the circumstances under which the admission was made and why the applicants now seek to withdraw that explanation in the absence of affidavits from any current AMCU officials or any individual applicants; and (ii) the absence of an application before this Court to withdraw the admission in the pre-trial minute dooms the application.

[39] In relation to the first aspect: (i) as stated elsewhere in this judgment it is the view of this Court that a sufficiently full and satisfactory explanation has been provided; and (ii) even if not, the arguments in Putco *supra* and Patmar *supra* related to an application to amend a pre-trial minute and the withdrawal of admissions contained therein (and agreed to as a matter of contract law) –this Court is not being properly seized with such an application for the reason stated elsewhere in this judgment.

[40] In relation to the second aspect which I have also addressed above to some degree, my assessment is that the absence of an application to withdraw admissions in the pre-trial minute does not doom the application to amend the Statement of Claim for the following reasons.

[41] In Putco *supra*, his Lordship Justice Molahlehi states the following in paragraph 1 of his judgment – *"This is an application in terms of which the respondents seek to amend their statement of response….."*. At paragraph 12, his Lordship states the following - *"The issue for determination in this matter is whether the respondents. In their founding affidavit, have made out a case justifying the*

[7] 2018 (4) SA 107 (SCA)

withdrawal of the concession they made at paragraph 5.13 of their statement of defence".

[42] His Lordship Justice Molahlehi then states at paragraph 19 – *"In considering an application for an amendment of pleadings, the Court has (a) discretion to exercise."*

[43] A statement of response is of course a pleading. A pre-trial minute is not.

[44] His Lordship then goes on to explain the factors which the Court must consider in deciding an application to amend pleadings[8]– i.e., (i) is the application *mala fide*; (ii) whether if granted or refused, will it result in an injustice and/or prejudice; and (iii) can any prejudice be cured by a cost order.

[45] The learned judge then goes on to add the following (at paragraph [20]) – *"In order to succeed, the party seeking the amendment of pleadings must provide a full explanation to convince the Court of his or her bona fides for seeking the amendment. This is even more so where the amendment relates to the withdrawal of an admission. In this respect, the applicant has to provide a full and satisfactory explanation of the circumstances in which the admission was made and the reason for seeking its withdrawal."*

[46] At paragraph [24] of the Putco judgment, the learned judge states the following – *"For these reasons, the respondents' application stands to be dismissed"*. This of course means the application to amend the pleading – i.e., the statement of response. In the preceding paragraphs of the judgment, the learned judge sets out his reasons. In summary, the reasons are as follows – (i) the respondents did not provide a satisfactory explanation as to how the admission was made; (ii) the respondents' founding affidavit reveals very little effort on the part of the respondent to persuade this Court that there is justification to indulge them and grant the amendment; and (iii) confirmatory affidavits were missing which needed to confirm a number of aspects.

[8] See paragraph 19.

[47] As elaborated on below, and in the exercise of my discretion in this regard, I am satisfied of the following: (i) The *bona fides* of the applicant's application based on the explanation provided by the applicant, regardless of whether or not there are affidavits from AMCU officials or any individual applicants who authorised any admissions in 2019 or who were consulted in May 2021. In any event, Nicole Musiker, the attorney of the applicants that deposed to the Founding Affidavit in the Application to Amend the Statement of Claim took over the file from another attorney, Lee Wrench, in May 2020 and consulted with the individual applicants after May 2021. Ms Musiker gave evidence in respect of her consultations with the individual applicants and with Lee Wrench. Her evidence of her discussions with the individual applicants would not amount to hearsay evidence and a confirmatory affidavit from any of the individual applicants may be moot. Ms Musiker also sought to obtain a confirmatory affidavit from Mr Maphinda, the relevant AMCU official in 2019 but was unable to do so as he had been dismissed by AMCU and his relationship with it had soured. Ms Musiker does, however, attach a confirmatory affidavit from the General Secretary of AMCU, Jeff Mphahlele, and she explains why she did so. (ii) There is no prejudice to the respondent that would mitigate against the amendments being granted, and even if there was, such prejudice could have been cured by a cost order or a postponement. (iii) The absence of a full and satisfactory explanation would doom an application to amend the pre-trial minute.

[48] For the reasons set out above, this Court is not properly seized with such an application. If it was, then it may well have constituted a basis to dismiss the application to amend the pre-trial minute. It does not, however, doom the application to amend the statement of claim which must be considered on its own merits and in light of the relevant and applicable legal principles.

[49] I now turn to consider the application to amend the Statement of Claim and the relief sought by the applicant in that regard in its Notice of Motion.

The Application for Leave to Amend the Statement of Claim

The applicable legal principles – application for an amendment of pleadings (i.e., the applicant's statement of claim)

[50] Amendment of pleadings in our law has always been a contested terrain. It is a constant strife between two competing rights, namely; a right for one party to amend its pleadings on the one side, where such amendment is not *mala fide*, and a right by the other party to object to the amendment on the other side, where such amendment has a potential to prejudice that other party.[9]

[51] As held in the matter of *Cross v Ferreira*,[10] the primary object of allowing amendments 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*". This should be contrasted with the court's inclination to disallow the amendment if such is not made in good faith or done with the sole purpose of prejudicing the other party or in cases where obvious injustice to the other party would result if the amendment was allowed.[11]

[52] The principles governing an application for an amendment of pleadings received attention by this Court in *South African Transport and Allied Workers Union and Another v South African Airways (Pty) Ltd*[12], where it was held that:

> '… the Court has discretion to exercise in considering whether or not to grant an amendment sought by the applicant. An amendment of pleadings will generally be granted where such an amendment will not prejudice the other party.'

[53] The leading case in dealing with an application for amendment in pleadings is *Moolman v Estate Moolman and another*[13] where the Court 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

[9] DH Horwarth v Fargoworx Investment (Pty) Ltd and Another [2018] ZAECGHC 144 at para 4.
[10] 1950 (3) SA 443 (CPD) at 447.
[11] See: *Horwarth* (Id fn 9) at para 4.
[12] (2010) 31 ILJ 1938 at para 15.
[13] 1927 CPD 27 at 29.

back for the purposes of justice in the same position as they were when the pleading which is sought to amend was filed."

[54] In *MacDuff & Co v Johannesburg Consolidated Investments Co Ltd*[14], the Court 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."

[55] In considering an application to amend pleadings the Court is enjoined to make sure that the interest of justice prevails, between both parties. In balancing the interest of both parties, the Courts in general lean towards granting an amendment, in consideration of ensuring full and proper ventilation of the dispute between the parties.

[56] In amendment applications, the applicant must persuade the court that the proposed amendment is worthy of consideration and introduces a triable issue. The court must then weigh the reasons or explanation given by the quester for the amendment against the objections raised by the opponent and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.[15] I am of the view that the issues introduced by the applicant are triable and relevant for the proper ventilation of the dispute between the parties.

<u>The main questions for determination</u>

[57] Having regard to the Application for Leave to Amend the Statement of Claim and the above legal principles, the main questions that stand to be determined in relation to this aspect of the matter are as follows:

[14] 1923 TPD 309

[15] See: *Horwarth* (Id fn 9) at para 13.

- Is the amendment necessary for the proper ventilation of the dispute between the parties in order to determine the real issues between them so that justice may be done?

- The question above is to be contrasted with the inclination to disallow the amendment – (i) if such is not made in good faith; or (ii) if done with the sole purpose of prejudicing the other party; or (iii) in cases where obvious injustice to the other party would result if the amendment was allowed.

- Does the amendment introduce a triable issue?

- Is the proposed amendment excipiable?

- In the event that leave to amend is granted, will the respondent be prejudiced?

- In the event that the respondent is prejudiced, can the respondent's prejudice be cured and/or corrected?

[58] I now turn to deal with each of these questions having regard to the parties' respective submissions. I do not intend to deal exhaustively or in any detail with the merits of the applicant's claim against the respondent

<u>The parties' submissions (in brief)</u>

[59] The applicant submitted that the Application for Amendment is *bona fides* and is motivated purely by the need to bring this Statement of Claim in line with the applicants' members' proper instructions and to ensure that the real issues in the case are clearly expressed so as to afford the respondent an opportunity to be fully prepared for the issues at trial.

[60] The amendments do not introduce a new cause of action and the nature of the dispute remains the same, namely whether the individual applicants were procedurally and substantively fairly dismissed or not.

[61] If the amendment is not allowed, it will result in the individual members' voices not being heard and the opportunity for them to present their versions at trial. In the circumstances it would result in an injustice to the members.

[62] In respect of the twelve individual applicants that admitted to participation in this strike, the amendments are required as the original statement of claim was drafted on the basis that none of the individual applicants participated in the strike. As the pre-trial minute was concluded based on the pleadings as they stood, it did not and could not address the issue of the individual applicants that admitted to participating in the unprotected strike.

[63] The respondents will not suffer any prejudice if the amendment to the Statement of Claim is granted. The individual applicants, however, will suffer great prejudice in that they will not be able to have the opportunity to properly ventilate their dispute and afford the court to come to a decision on the proper facts.

[64] The respondents submit that litigation is not a game and parties are required to plead their cases carefully. The respondents, however, fail to appreciate that in litigation mistakes can be made and that is why parties are allowed to amend their pleadings. The reality of litigation is that parties are required from time to time to seek amendments to bring the pleadings in line with the facts of the matter. Such amendments should be allowed particularly when the application for the amendment is not *mala fides.*

[65] The true reason why the respondent does not wish the amendments to be allowed is that it exposes the weaknesses of its case, and it is concerned that if the amendments would be allowed, it may cause them to lose the case. The respondent is attempting to capitalise on concessions made in error which were contrary to the individual applicants' instructions and in doing so are attempting to prevent a proper ventilation of this matter based on the truth.

[66] The opposition to the amendment is nothing more than an attempt by the respondent to avoid having to deal with the weaknesses in its case and by exploiting

the fact that the pleadings do not accurately reflect the true instructions of the individual applicants.

[67] To not allow parties the opportunity to correct their mistakes would result in the court having to reach conclusions based on limited facts that do not reflect the true disputes and issues between the parties. It is submitted that this is not in the interest of justice.

[68] The respondent submitted that:

- The applicant has tactically crafted a path to replead its entire case if this amendment is granted. There are simply no plausible reasons as to why the amendment is sought, save for that, the applicant wants to resile from the pre-trial minute wherein it has made several concessions. Furthermore, the amendment effectively means that the applicant is changing its version. In essence, the applicant is referring a new Statement of Claim to this honourable court. In light of the aforementioned, the amendment proposed cannot be said to be *bona fide.*

- The amendment, if allowed, would render the amended Statement of Claim susceptible to a successful exception and/or special plea, on the grounds that are vested in the answering affidavit.

- The respondent will be severely prejudiced if the amendment is granted.

Analysis/evaluation

[69] There is no evidence before this court for it to conclude that the applicant's intended amendment is occasioned by *mala fides*. To the contrary, the purpose of the amendment is extensively explained in the applicant's papers and appears to be made in good faith.

[70] It is further important to bear in mind that an amendment may be granted at any stage of the proceedings prior to a judgment being handed down. The need to amend or correct pleadings is part and parcel of the litigation process, hence the provision for this in the court's rules.

[71] In amendment applications, the applicant must persuade the court that the proposed amendment/s is worthy of consideration and introduces a triable issue.

[72] I am of the view that the issues introduced by the applicant are triable and relevant for the proper ventilation of the dispute between the parties. The amendment/s sought do not appear to be without foundation or made for the purposes of harassing the respondent.

[73] The court must weigh the reasons or explanation given by the party requesting the amendment against the objections raised by the opponent and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused.[16]

[74] In *Trans-Drakensburg Bank v Combined Engineering (Pty) Ltd*[17] the court said:

> "Having already made his case in his pleadings, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of 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 of which he has no supporting evidence where evidence requires or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[75] In *Telemetric v Advertising Standards Authority South Africa*[18] it was held:

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[16] See: *Horwarth* (Id fn 9) at para 13.
[17] 1967 (3) SA 632 (D) at 641.
[18] 2006 (1) SA 461 (SCA).

> "Exceptions should be dealt with sensibly. They provide a useful mechanism, to weed out cases without legal merit. An over-technical approach destroys their utility."

[76] It is trite that the excipient bears the onus of persuading the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. The question to be asked in the present case is whether the applicant has not pleaded such material facts that upon every interpretation its statement of claim can reasonably bear, no cause of action is disclosed.

[77] The respondent submits in the penultimate paragraph of its heads of argument (paragraph 10) that the amendment, if allowed would render the amended statement of claim susceptible to a successful exception and/or special plea, on the grounds addressed in the answering affidavit. Those grounds appear to be found at paragraph 30 of the answering affidavit, which read as follows:

[30] The amendments as pleaded will, if allowed, be subject to exception, as they would have the effect of changing versions in material respects, and the terms of the pre-trial minute, a binding contract between the parties as to the further conduct and subject matter of a trial. To allow the amendments would negate the entire rationale underlying the filtering process given effect to in the exchange of pleadings, discovery of documents, and pre-trial process. It would render (the) statement of claim subject to exception on the grounds of vagueness and embarrassment.

[78] The restatement of the applicable legal principles in relation to whether the amendment/s render the pleading excipiable, is correct, but no factual or other basis is laid by the respondent in its affidavits for why those legal principles would be applicable *in casu*. The explanation of the respondent referred to in the preceding paragraph does not explain why the amendment/s, if made to the statement of claim, would no longer sustain an unfair dismissal cause of action against the respondent. The respondent also does not explain precisely why the amendment/s, if made to the statement of claim, would render it vague and embarrassing. The respondent will have an opportunity to plead to the amended statement of claim should the amendment/s be effected. The alleged changing of the versions in material respects

does not render the pleading excipiable. In any event, our law even permits the introduction of a new cause of action through an amendment,[19] although in this case it does appear that the applicant's case has at all material times centered around the unfair dismissal of the individual applicants. There may well be other potential adverse consequence for the applicant because of this, all of which may be explored at trial, and once the respondent has had an opportunity to plead to any such versions that have changed in material respects.

[79] The amendment/s sought by the applicant to its statement of claim does not render its cause of action unsustainable in law. Suffice it to say that if the excipiability of the pleading is merely arguable or can be cured by the furnishing of particulars, then it is proper to grant the amendment where the other considerations are favourable.[20]

[80] That is of course not the end of the road for the objector as he or she can simply file an exception to the pleading at an opportune stage.[21] The objector/excipient has an obligation to comply with the provisions of rule 23 (1) by, for example, requiring the applicant to remove the cause of compliant before excepting to such a pleading.[22]

[81] This Court does not understand the respondent's submission to be that the objection it has raised is not curable. In view of that, this submission does not constitute a basis for refusing the amendment/s to the Statement of Claim.

[82] The respondent's submissions in respect of prejudice focussed on the following:

- The closure of the mine in 2017 and how the delay between then and any trial that is to come will impact negatively on the ability of the respondent to locate relevant witnesses, the failure of the respondent to source further evidence to support a completely new cause of action, the potential

[19] See: *Trans-Drakensburg Bank Ltd* (Id fn 18) at 643C.
[20] See: *Horwarth* (Id fn 9) at para 28.
[21] Ibid.
[22] See: *Horwarth* (Id fn 9) at para 30.

witnesses are no longer in the employ of the respondent, and the failure of potential witness to recall the events of five years ago.

- The delay in the conclusion of the pre-trial minute.

- The repleading by the applicant of its case.

- The failure of the applicant to request a postponement timeously before trial.

- The delay in delivering the notice to amend.

[83] As indicated above, I do not agree with the respondent's submission that the applicant is repleading its case. Any delay in the conclusion of the pre-trial minute or delay in delivering the notice of amendment can be ameliorated by a cost order and/or an adjustment to any relief that may be granted to the individual applicants. The failure of the applicant to request a postponement timeously before trial has already been addressed by the cost order granted when the trial was postponed in and during March 2021. As for the submissions in relation to the availability of witnesses, the recollection of witnesses etc., these contentions appear to be overly broad, generalised (having regard to the applicable legal principles, and lacking any factual foundation. To the extent that any such difficulties did exist, save for those in relation to the alleged 'completely knew cause of action' (which I have already dealt with), those difficulties may already have existed by the time of the trial that was enrolled to commence during March 2021 – they are not exacerbated by the delay from March 2021 onwards, a delay which the respondent itself has contributed to now in no small measure by opposing the application to amend the statement of claim. The respondent is of course entitled to do so but should then not lose sight of the impact of that decision on delaying the ultimate hearing of the merits of the matter.

[84] The fact that an amendment may cause the other party to lose its case against the party seeking the amendment is not in and of itself "*prejudice*" of the sort which would dissuade the Court from granting it. Prejudice of that sort is not the type

of prejudice that is contemplated in the applicable judgments when determining whether or not to grant an amendment.

[85] This matter was postponed in March 2021 in order for the applicant to apply for an amendment and it was ordered to pay the wasted costs of the respondent occasioned by that postponement. Once the amendment/s have been effected, if this application is successfully, the Respondent will be afforded an opportunity to make any consequential amendments and the parties could then hold a further pre-trial conference and deal with a request for further particulars if such further particulars are required. The respondent will not suffer any prejudice as a result of any subsequent need to amend as it is the understanding of this court (as confirmed by the applicant in its heads of argument – paragraph 61 thereof) that the applicant has tendered these costs.

[86] The amendment/s were also sought before any evidence was led at the trial (enrolled in March 2022). As no new trial date has not been obtained yet, the respondent will have an opportunity to amend its own pleadings in response to the applicant's amendment/s and to deal with any of the issues raised in the applicant's proposed amendment/s.

[87] In light of the above, it is the view of this Court that the respondents will not suffer any prejudice (of the kind that would preclude the granting of the relief sought in the application to amend) if the amendment/s are granted. In any event, and if the respondent did suffer any prejudice of the kind contemplated, then the balance of convenience would favour the applicant as the individual applicants would suffer greater prejudice if the application for the amendment/s is dismissed in that they will not be able to have the opportunity to properly ventilate their dispute and afford the Court to come to a decision on a conspectus of the available and relevant evidence.

[88] The submissions of the respondent in relation to prejudice relate more to inconvenience rather than prejudice. The manner in which the applicant has sought to amend its statement of claim does not appear to *per se* occasion prejudice on the respondent.

[89] Any prejudice to the respondent in the circumstances of this case can be cured by an appropriate cost order as well as by appropriate relief being granted to the applicant, should it be ultimately successful, that reduces any compensation of back pay granted *pro rata* with or commensurate to the delays that have inconvenienced the respondent.

[90] The interest of justice will be better served if the amendment is permitted to allow the parties to ventilate the disputes between them properly and to reach finality in the matter.

Conclusion

[91] In all the circumstances, I see no reason why the applicant's Statement of Claim cannot be amended as prayed for in its application and I am of the view that the Applicant's application stands to succeed and should be allowed for the reasons as set out above in order to ensure a proper ventilation of the dispute between the parties at trial to determine the real issues between them so that justice may be done.

[92] Having said the above, I now turn to consider the issue of costs.

Costs

[93] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking into account all of the relevant facts and circumstances.

[94] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*[23] reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[24] with regard to costs in employment disputes and stated that '*when making an adverse costs order in a*

[23] (2019) 40 ILJ 965 (CC) at para 30.
[24] (2018) 39 ILJ 523 (CC) at para 25.

labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.'

[95] Taking account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.

[96] In the premises, the following order is made:

Order

1. The applicant is granted leave to amend its Statement of Claim in accordance with its Notice of Motion in the Application to Amend the Statement of Claim.

2. The applicant is directed to effect the aforesaid amendment within 10 (ten) days of its receipt of this order.

3. No order is made in respect of the Pre-Trial Minute. Should the applicant intend to apply to amend the pre-trial minute it should do so in accordance with the relevant legal principles and procedures applicable to resiling from contractual obligations.

4. There is no order as to costs.

M. Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. L Hollander
Instructed by:	LDA Inc.
For the Respondent:	Adv. S Khumalo SC
Instructed by:	Webber Wentzel