REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 87/11

REPORTABLE

In the matter between:

FRANCOIS SONDORP **First Appellant**

PETRUS JACOBUS DE VAAL **Second Appellant**

and

EKURHULENI METROPOLITAN MUNICIPALITY **Respondent**

Fly note: Appeal: Amendment of statement of case - Judicial discretion - Long delay partly due to dilatory conduct of respondent - Automatically unfair dismissal is species of unfair dismissal - Same cause of action - *Driveline* principle restated – Appeal upheld and amendments allowed.

Coram: Ndlovu JA et Zondi AJA et Musi AJA

JUDGMENT

NDLOVU JA

Introduction

[1] This appeal is against the judgment and order of the Labour Court (per Modise AJ) handed down on 6 April 2011 (the reasons whereof were furnished on 1 August 2011), in terms of which the Court *a quo* dismissed with costs the appellants' application to amend their statement of case.

[2] On 16 August 2011, the appellants filed the application for leave to appeal against the said judgment. The respondent, Ekurhuleni Metropolitan Municipality (Ekurhuleni) opposed the application, in terms of its notice dated 7 October 2011. Notwithstanding, on 6 December 2011, the Court *a quo* granted leave to the appellants to appeal to this Court.

The issue

[3] The only issue in this case is whether the Court *a quo* properly exercised its discretion when it disallowed the proposed amendment of the appellants' statement of case.

Background facts

[4] The first and second appellants were employed by the Municipal Council for the Greater Benoni (the Benoni City Council or the BCC) during May 1970 and June 1973 respectively. Ekurhuleni is the statutory successor of the BCC. The appellants pursued their careers in the fire and emergency services department of the BCC and, over the years, they climbed up the promotion ladder, until they both reached the rank of senior divisional officer. However, they were both dismissed on 31 October 2000 on the ground of their employer's operational requirements.

[5] Prior to the appellants' dismissal, certain developments and dynamics had evolved which impacted on the status of their employment, in relation to the identity of their employer at one stage or another. This situation had a significant influence on the application for amendment of the statement of case which was brought before, and rejected by, the Court *a quo*.

[6] During the period 1991-1992, the BCC embarked on a programme of seeking to outsource its fire and emergency services. As a result, in or about September 1991, a "privatisation agreement" was concluded between the BCC and a company known as Benoni Fire and Emergency Services (Pty) Ltd (BFES) in terms of which the BCC retained the responsibility of the fire and emergency services but the actual rendering of these services was outsourced to BFES.

[7] Negotiations were commenced aimed at BFES taking over those employees of the BCC who worked in the fire and emergency services department, including the two appellants. Consequently, on or about 7 April 1992, the appointment of the appellants by BFES was confirmed and they were both appointed as assistant chief fire officers.

[8] On or about 20 October 2000, the appellants met separately with Mr Barber and Mr Hurford, BFES managing director and chief fire officer respectively. It was then that the appellants were informed that BFES had decided that it was necessary to restructure the management of BFES and, as a result, the three positions of assistant chief fire officer (two of which were occupied by the appellants) would become redundant as from 31 October 2000. The third position was held by a Mr Meyer. The appellants were further advised that two new posts would be created with effect from 1 November 2000 and the new posts were described as follows:

Manager: Operations and Quality Control (Deputy Chief Fire officer level) and

Manager: Fire Safety and Logistics (Senior Divisional Officer level)

[9] On 23 October 2000, the appellants were served with written confirmation that their positions would become redundant with effect from 31 October 2000 and they were invited to apply to be considered for the newly created posts which would be filled on 1 November 2000. They were further advised that in the event of their applications being unsuccessful, they could then opt for either early retirement or retrenchment packages.

[10] Both the appellants applied for both newly created posts on 25 October 2000. However, on the same day, they were advised by BFES management that their applications were unsuccessful. This then placed them in the situation where they had to elect either early retirement or retrenchment packages. It may be pointed out that on the same day (i.e. 25 October 2000) the appellants' then representative trade union, the Independent Municipal Allied Trade Union (IMATU or the union) wrote a letter to BFES complaining that BFES had not complied with the provisions of section 189 of the Labour

Relations (the LRA)[1] when it took, what the union described as a unilateral decision against the appellants. BFES replied on the same day and denied that the decision it had taken was unilateral, stating that the issues of restructuring of BFES had been discussed with the appellants.

[11] There was a period of over a month during which there were some exchanges between BFES and IMATU. In the main, BFES sought to know whether the appellants opted for early retirement or retrenchment packages. On the other hand, IMATU was persistently querying the manner in which the appellants' dismissal had been handled by BFES.

[12] Eventually, on 22 December 2000, BFES paid retrenchment packages directly into the appellants' respective bank accounts. On 12 February 2001, the appellants referred a dispute to the CCMA against BFES claiming unfair dismissal, unfair labour practice and breach of their employment rights. The conciliation meeting was held on 23 October 2001, but it failed to resolve the dispute between the parties. A certificate of outcome to that effect was issued on the same date. Thereupon the appellants referred the matter to the Labour Court for adjudication.

The original statement of case

[13] On 3 January 2002, the statement of case (the original statement of case) was issued by the registrar of the Labour Court at the instance of the appellants. As part of their pleaded case in terms thereof the appellants made the following allegations (which will be particularly referred to later in this judgment):

> '21. During the course of their employment with the respondent [then BFES], the first and second applicants [appellants] served as members of the Board of Trustees of the Fire & Emergency Services Pension Fund, representing the Members. Barber and two other individuals represented the respondent and Barber also served as Chairman of the Fund.

[1] Section 189 of Act 66 of 1995.

22. Between 1998 and 2000, the applicants [appellants] made certain enquiries in respect of, *inter alia*, the allotment of certain demutualized shares to the Pension Fund, the failure of the employer [BFES] to pay contributions regularly between the period 1999 and 2000 and the issue of a contribution holiday in respect of the Fund. The first and second applicants [appellants] were still in dispute with Barber on the above issues as at the date of their dismissal.

44. The applicants contend that their dismissal was procedurally and substantively unfair and not effected in accordance with the fair procedure as envisaged by section 189 of the LRA, in that:

44.1 …

44.2 the dismissal of the applicants [appellants] was motivated not by a *bona fide*, commercial rationale or sound operational requirements as defined in s213 of the LRA, but due to the applicants' [appellants'] activities in respect of, *inter alia*, the Fire & Emergency Services Pension Fund in their respective capacities as elected employee trustees.'

[14] In the original statement of case, the appellants sought relief in the following terms:

'1. Declaring that their respective dismissals were neither for fair reasons based on the respondent's [i.e. BFES's] operational requirements, nor in accordance with a fair procedure

2. Compensation in terms of s194 of the LRA

3. A severance payment calculated in terms of section 41 (2) of the Basic Conditions of Employment Act 75 of 1977

4. Four months' notice pay in terms of clause 7(1)(b)(ii) of the respondent's Terms and Conditions of Employment

5. Costs

6. Further and/or alternative relief.'

Proceedings in the Labour Court In Re: Trial pursuant to the original statement of case

[15] The trial in the Court *a quo* commenced on 16 February 2004. The proceedings continued up to the stage where the witness for the then respondent (BFES) had testified and BFES had closed its case, and the first witness on behalf of the appellants' case had also given evidence. It was at that stage that, on 8 July 2004, when the matter was already part-heard, BFES brought an interlocutory application for an order declaring that a settlement agreement between itself and Ekurhuleni constituted a transfer of business in terms of section 197 of the LRA and that Ekurhuleni be substituted as respondent in the matter.

[16] It is apparent that Ekurhuleni opposed the interlocutory application aforesaid, but the appellants did not. However, it is common cause that on 18 May 2005, the Court *a quo* granted the declarator sought and thus substituted Ekurhuleni for BFES, as the respondent, in the part-heard matter before the Court *a quo.*

[17] On 31 May 2005, Ekurhuleni filed a notice of its intention to apply for leave to appeal against the order granted by the Court *a quo* on 18 May 2005 substituting it for BFES, as the respondent (the substitution order). Leave to appeal was granted on 19 April 2006. However, no further steps were taken by Ekurhuleni in terms of prosecuting the intended appeal. BFES lodged a further interlocutory application seeking an order compelling Ekurhuleni to prosecute the appeal. However, BFES subsequently withdrew this application on 19 September 2007, although when this information came to the attention of the appellants, on 12 December 2007, it was as though the appeal itself had been withdrawn by Ekurhuleni. But, it seems to me, nothing turns on that aspect of the matter. What is important is that the order of the Court *a quo* substituting Ekurhuleni for BFES, as the respondent, thus stood.

Application for amendment of the original statement of case

[18] Since 12 December 2007 nothing happened in terms of reinstating the part-heard matter before the Court *a quo* until 16 April 2009 when the appellants filed an application for amendment of the original statement of case, in the

light of the substitution order. The appellants' current attorney of record, Mr Schmidt, deposed to the affidavit in support of the appellants' amendment application.

[19] Mr Schmidt alleged, among other things, that it was only after perusal of the Court file, the transcript of the record (in the part-heard main trial) and the order substituting the respondent as the responsible employer, as well as consultations with the appellants that it became apparent that an order for the reinstatement of the appellants became an option. It was also only then that it became relevant and necessary to prove that the dismissals of the appellants were automatically unfair and to claim their reinstatement.

[20] It was further alleged that, after all, the appellants had, initially and after their retrenchment, insisted upon their reinstatement until they became aware of the fact that the BFES's service delivery contract with Ekurhuleni was not to be renewed.[2]

[21] To the extent relevant to this appeal, the appellants' proposed amendments to the original statement of case included the following:[3]

> '2. That paragraphs 21*bis,* 21 *ter*, 21*quad* and 21 *quin* be inserted as follows:
>
> '21(*bis)* During or about March 1996 Mr SJC Barber proposed that the Benoni Fire and Emergency Services' employee's trust invest its capital alternatively the value of its shares in a farm in which Mr Barber had interest alternatively which he owned. The Applicants [appellants] opposed the proposal and/or the terms thereof.
>
> 21*(ter)* During 1996 the Applicants' [appellants] researching the possibility that the employees join another medical scheme than the one they were members of. The Benoni Fire and Emergency Services' Mr Barber was opposed to the employees' proposed joining of any other medical scheme despite the better benefits and/or reductions in premiums that were offered and prevented (sic) alternatively opposed the employees from joining the

[2] Appellants' founding affidavit, para 31 at p12 of the indexed papers.
[3] At pp21-25 of the indexed papers.

other medical scheme and accused the Applicants [appellants] of acting in their own interests.

21 *(quad)* During or about November 1998 to April 1999 the Benoni Fire and Emergency's Mr Barber proposed that the employees' trust exchange[d] its shares in the company for shares in another company in which Mr Barber had interests and/or an interest. The Applicants [appellants] opposed the proposal and/or the terms thereof.

21 *(quin)* During or about February 2000 the Applicants [appellants] opposed the Benoni Fire and Emergency's Mr Barber's proposal that the employees' pension retain[ed] their shares in the Old Mutual and not [to] sell the shares and distribute the proceeds of the sale among the members."

3. That paragraph 22 *bis* be inserted as follows:

'22(*bis)* During 1999 and 2000 and at the Pension Fund's trustees meetings the Applicants [appellants] raised and/or objected to the employer's failure to make all the contributions to the Pension Fund that it was obliged to make and raised alternatively objected to the deficiencies that existed in the administration of the Pension Fund, alternatively the employer's administration alternatively participation in the administration of the fund.'

4. By introducing the following words after the words 'the applicants contend that their dismissal was' in paragraph 44: 'automatically unfair and/or'.

5. By introducing a paragraph 44.3 as follows:

'44.3. Their dismissals were on account of or partly on account of them having raised the employer's failure to make all the contributions to the Pension Fund that it was obliged to make and having raised alternatively objected to the deficiencies that existed in the administration of the Pension Fund, alternatively the employer's administration alternatively participation in the administration of the fund and having opposed the Benoni Fire and Emergency's Mr Barber's proposals relating to the employees' trust funds and assets and having made proposals and having done research that the said Mr Barber dislike, disagreed with and did not want introduced.

44.4 Their dismissals on the aforesaid grounds and/or the direct and indirect influence that the aforesaid grounds had on them having been dismissed lead to and constituted discrimination against them on arbitrary grounds as contemplated in section 187(1)f alternatively the reason for their dismissals were that they took action and/or indicated that they intended to take action against the employer by exercising a right conferred by the LRA and that they opposed the employer's Mr Barber as aforesaid and their dismissals therefore constituted discrimination against the Applicants [appellants] for the exercise of their rights to social justice and/or their rights to fair labour practices.

44.6 Consequently and pursuant to clause 187 their dismissals were automatically unfair as contemplated in section 187 of the Labour Relations Act.'

7. By introducing the following words after the words 'declaring that their respective dismissals were' the following: 'automatically unfair, alternatively that their respective dismissals were'.

9. By substituting prayer 2 with the following:

'2. (a) Compensation in terms of Section 194 of the LRA

(b) Reinstatement in terms of Section 193(2), retrospectively from the dates of dismissals to the dates for the retirement of the First and Second Respondent respectively;

(c) Payment in terms of the reinstatement for the period between the dates of the applicant's respective dismissals to the dates for their respective retirements together with payment of all benefits attached to the positions which they should have occupied had they not been dismissed.'

Ekurhuleni's opposition to the application for amendment

[22] On 20 April 2009, Ekurhuleni filed a notice of its opposition to the granting of the proposed amendments referred to in paragraphs 2 to 5 and 7 of the appellants' notice of amendment. The opposition was based on several grounds, mainly the following:

22.1 At no stage during the trial proceedings did the appellants request the Labour Court to amend their statement of case and it was already eight

and a half years after instituting the said proceedings and after BFES had been replaced by Ekurhuleni as the respondent that the appellants sought the amendment.

22.2 The Labour Court made an order, on 18 May 2005, substituting the respondent in the place of BFES, which meant that a period of three years and10 months had elapsed since the order was made, and thus the conduct of the appellants in only applying for amendment after the lapse of such long period of time severely prejudiced the respondent.

22.3 Evidence had already been adduced in the case before the Labour Court to the extent that the then respondent (BFES) had already closed its case and the appellants' first witness had already testified.

22.4 The proposed amendment sought to introduce a new claim, namely the claim for reinstatement; alternatively the claim had since become prescribed.

22.5 In their original statement of claim, the appellants expressed their wish and made the election to seek an order for compensation and not reinstatement.

<u>Proceedings in the Labour Court In Re: Application for amendment of the original statement of case</u>

[23] It would appear that the application for amendment was argued before the Court *a quo* on 29 June 2009 and the Court order (without reasons) was handed down on 6 April 2011. The reasons for the judgment and order were furnished on 1 August 2011.

[24] In rejecting the appellants' application for amendment of the original statement of case, the Court *a quo* stated the following:

> '9. It is trite that this Court has to exercise its decision whether to allow an amendment of pleadings. While the Court will generally lean towards granting an application to amend pleadings, in doing so, the overriding consideration is that where an amendment is allowed it must be done without prejudice and

without causing an injustice to a party. In *Moolman v Estate Moolman and Another* 1927 CPD at 29, the Court held as follows:

> "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."

12. The applicants' notice of amendment was served on 17 February 2009. The notice of amendment was served more than three years after my judgement was handed down on 18 May 2005. In my view the amendments also have the effect of introducing new claims. One of the new and far reaching claims sought by the proposed amendments is an order for reinstatement. The applicants initially did not ask for reinstatement but opportunistically sought to do so by way of an amendment.

13. I am further of the view that the amendments allowing will cause an injustice and prejudice to the respondent. I am therefore not persuaded that it would be in the interests of justice to allow the amendments.'

[25] Accordingly, the Court *a quo* dismissed with costs the appellants' application for amendment of the original statement of case. It is against this order that the appellants now appeal to this Court.

The appeal

[26] The appellants' grounds of appeal, as set out in the notice of appeal, included the following:

26.1 The Court *a quo* erred in finding that the appellants' proposed amendment to the original statement of case would cause an injustice and prejudice to the respondent.

26.2 The Court *a quo* should have found that the delay in the proceedings after the judgment by the Court, in terms of which the respondent was substituted for the erstwhile respondent (BFES) was not caused by and

was not as a result of any inaction, failure to act or dilatoriness on the part of the appellants.

26.3 The Court *a quo* should have found that it was as a result of the respondent's actions, alternatively failure to act, alternatively dilatoriness that there was a lapse of more than three years and six months after the judgment in the aforementioned application was handed down and that the appellants are not to blame for the delay between 17 May 2005 and 17 February 2009.

26.4 The Court *a quo* further erred in finding that the amendments which the appellants seek to effect, introduce new claims. The Court *a quo* should have found that the claims which the appellants sought to introduce:

26.4.1 Were the same as the claims which were set out in the statement of claim and that the claims were based upon the unfair dismissal of the appellants; and

26.4.2 That the facts set out in the notice of amendment had already been, alternatively had already largely been canvassed during the hearing.

26.5 The Court *a quo* should further have found that, even if new claims are introduced through the amendment, the amendment should be allowed if there is no specific prejudice caused to the respondent which cannot be compensated by costs.

26.6 The Court *a quo* further erred in not giving consideration to the fact that the respondent had given notice that it intends to re-open its case and present further evidence and that the respondent itself has not yet lead any evidence in the matter. The Court *a quo* should have also considered that, by giving the aforesaid notice, the respondent indicated that the witnesses necessary to address the issues which have been dealt with in evidence so far in the hearing, are available and will be called to give evidence.

26.7 The Court *a quo* erred in not finding that the objections which Ekurhuleni raised to the appellants' application to amend and which deal with special defences or the merits of the appellants' entitlement to the relief sought should be dealt with during the hearing of the matter and in light of the evidence which is to be presented. The Court *a quo* should have found that such issues cannot and should not be decided upon without having regard to all the evidence. The Court *a quo* should have found that the amendments should be allowed to facilitate a proper ventilation of all the issues between the parties.

[27] Mr van Vuuren, for the appellants, submitted that the objective of the proposed amendments was to enable certain issues to be placed before the trial Court which would then decide whether the appellants were entitled to the rights which they claimed in terms of the amendments. It was not for this Court to assess the evidence whether the appellants were entitled to those rights.

[28] Counsel further submitted that, after all, the claims for unfair dismissal and for automatically unfair dismissal remained the same dispute, in the context of this case. In this regard he referred us to the decision of this Court in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd.*[4] He further argued that, according to the decisions of the Courts, applications for amendment of pleadings should always be granted unless doing so would cause prejudice and injustice to the other party, which could not be compensated by costs or postponement of the case.

[29] Mr Pauw SC, for Ekurhuleni, submitted that the facts necessary to prove unfair dismissal were not the same as those necessary to prove automatically unfair dismissal. He further submitted that the pronouncement by this Court in *Driveline* that an automatically unfair dismissal was but a species of unfair dismissal, could not be correct as a broad exposition of the law, in that automatically unfair dismissal had special and distinguishing attributes.

[4] (2000) 21 ILJ 142 (LAC).

[30] Counsel further argued that the appellants could have claimed reinstatement in the original statement of case but they chose not to do so. They must, therefore, be bound by their election. The principles of election applicable in the case of breach of contract should equally apply in the case of an alleged unfair dismissal and remedies consequent thereto. In this regard, Mr Pauw referred us to the decision in *Mahabeer v Sharma NO and Others*[5] in support of his proposition. He further argued that the proposed amendments sought to introduce new claims which had, in any event, become prescribed.

The judicial discretion to grant or refuse an application for amendment of pleadings

[31] Clearly, this case has a long and curious historical background, but much of which is not, in my view, really relevant to the outcome of this matter. The issue on appeal is about the refusal by the Court *a quo* to grant the appellants' application for amendment of the original statement of case.

[32] Rule 28(10) of the Uniform Rules provides that '[t]he court may … at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.' This provision clearly confers a discretionary power on the forum that considers the application for amendment.

[33] In *Ex Parte Neethling and Others,*[6] the Appellate Division (per Greenberg JA) stated:

> 'I think, therefore, that if an appeal lies, this Court would be entitled to interfere, not on the ground that in its opinion the contract was in the interests of the minors, because if it did so it would be substituting its discretion for that of the upper guardian, but only if it came to the conclusion that the Court *a quo* had not exercised a judicial discretion. *Rex v Zackey* 1945 AD 505, dealt with the question of an appeal court's power to overrule a lower court's decision where the decision had been on a matter within the discretion of such lower court and three classes of such cases were referred to, viz decisions on the question of costs, on a postponement and on an amendment of pleadings in the lower court. To this might be added the question of an

[5] 1985 (3) SA 729 (A).
[6] 1951 (4) SA 331 (A), at 335A-C.

> alteration of sentence on appeal. … I see no distinction in principle between these and the present case. At p. 513 of the report in *Rex v Zackey supra* instances were given to show what is meant by "judicial discretion" and these are apposite here. … Can it be said in the present case that the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?'

[34] In exercising its discretion in this regard, the lower court should always reflect, in its assessment of the application, a degree of generosity and strive to ensure, as its objective, a proper ventilation of the real dispute between the parties.[7] An appeal court will not lightly interfere with the exercise of such discretion unless it is satisfied that the lower court misdirected itself or failed in its exercise of the judicial discretion.

Whether the long delay to submit the application justified refusal of the proposed amendments

[35] It would appear that the Court *a quo* placed too much focus on the fact that there was a long delay before the appellants filed the application for amendment and that, on this basis, Ekurhuleni would suffer prejudice and injustice if the amendments were allowed. Further, the Court *a quo* noted that the notice of amendment was served more than three years after the Court's judgment of 18 May 2005; and that the proposed amendments had the effect of introducing new claims. For these reasons, the Court *a quo* held that it was not in the interests of justice to grant the amendments.

[36] However, it should be borne in mind that a delay in bringing forward an application for amendment is not *per se*, in the absence of prejudice to the other party, a ground for the Court to refuse an amendment.[8] In this instance, the Court *a quo* lost sight, in my view, of the fact that a substantial part of the long delay in the appellants' filing of the application for amendment was as a

[7] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) para 12.
[8] *Trans-Drakensberg Bank v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D), at 642C-D. See also*: SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 175A-F; *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A-B.

result of no fault or blame on the part of the appellants. In the first place, it was not at the appellants' instance that BFES (the former respondent) interrupted the trial on 8 July 2004 by its lodgement of the interlocutory application for the substitution order, which was granted on 18 May 2005. It was obviously this interruption that started the derailment of the trial focus and, as I have said, it had nothing to do with the appellants.

[37] The Court *a quo's* conclusion, that 'the notice of amendment was served more than three years' after the Court's judgment, was based on its computation of the period 18 May 2005 to 17 February 2009. However, in doing this, the Court *a quo* failed, as I have already pointed out, to appreciate the fact that the appellants had nothing to do with a substantial part of this period of delay. For instance, the Court *a quo* never made mention, in its judgment, of the fact that subsequent to its judgment of 18 May 2005 (the substitution order) Ekurhuleni, on 31 May 2005, filed a notice of application for leave to appeal against that judgment, which leave to appeal was granted only on 19 April 2006 – some 11 months later. Further, that for a long period of time Ekurhuleni failed to take the necessary steps to prosecute the intended appeal, which could justifiably be construed, in the circumstances, as a deliberate, reckless or negligent conduct on the part of Ekurhuleni and which, in turn, could be legitimately regarded as an act of dilatoriness on its part.

[38] As indicated earlier, the application for amendment was argued before the Court *a quo* on 29 June 2009 and the Court's order (short of reasons) was handed down only on 6 April 2011- nearly 2 years later. The reasons for the judgment and order were furnished on 1 August 2011. In other words, the delay during the period 29 June 2009 to 1 August 2011 (over 2 years) cannot be attributed to neither the appellants nor, for that matter, Ekurhuleni, but the Court *a quo* itself.

[39] Despite the leave to appeal against the substitution order having been granted to Ekurhuleni on 19 April 2006, Ekurhuleni did nothing to prosecute the appeal until 15 January 2007 (some nine months later) when BFES lodged the application to compel Ekurhuleni to prosecute the appeal. We now know that BFES subsequently withdrew that application to compel, on 19

September 2007. Nevertheless, it is clear that Ekurhuleni never proceeded with the appeal against the substitution order.

[40] Thereafter nothing happened until 12 December 2007, when the appellants made inquiries from their erstwhile attorneys about any progress in Ekurhuleni's contemplated appeal. The appellants' explanation for making the inquiries only on 12 December 2007 was that all along the file was being handled by their erstwhile attorney Mr A Goldberg of Perrot Van Niekerk & Woodhouse and that when Mr Goldberg left that practice towards the end of 2007 the file was then taken over by another attorney who did not perform to the appellants' satisfaction. Hence, the appellants had moved on and engaged the services of their current attorneys of record.

[41] However, there was a factual dispute as to whether Mr Goldberg left the said practice at the end of 2007 or about July 2005. To my mind, this makes no much difference, given the fact that by July 2005 the Court *a quo* was still considering Ekurhuleni's application for leave to appeal, the ruling whereof was given only on 16 April 2006.

[42] It seems to me, therefore, that the delay for the period commencing at least from 18 May 2005 (the date of the substitution order) to 12 December 2007 (the date when the appellants were informed that the appeal against the substitution order had been withdrawn) could justifiably be laid squarely at the door of Ekurhuleni itself, on account of its dilatory conduct in relation to the aborted appeal against the substitution order. This is a period of some 2 years and 7 months.

[43] The appellants could not be blamed for being unaware about the progress in the aborted appeal because, even though they had a direct and substantial interest in the outcome of that appeal, they were not a party to the whole process, which was specifically a dispute between BFES and Ekurhuleni. Nor can they be faulted for electing not to oppose the application for the substitution order, in the first place. Further, there is no suggestion that either BFES or Ekurhuleni kept the appellants informed about the status and progress of the interlocutory litigation between themselves, until the

appellants investigated the matter through their erstwhile attorneys on 12 December 2007. In my view, therefore, it cannot be said that any delay for the period aforesaid was as a result of any fault, failure or inaction on the part of the appellants.

[44] It was only after 12 December 2007 that the appellants became discontented with the manner and pace their erstwhile attorneys were handling the matter. However, it is common knowledge that during that time of the year they would not have been able to appoint new attorneys and get the process going at once. It was not unreasonable of them to request their union to look into the matter which, indeed, culminated in the union appointing the current attorneys of record on 4 March 2008. The attorneys had to requisition for the transcription of the Court record in the part-heard matter, which they received on 13 November 2008, consisting of 462-page material.

[45] There was then a need for the responsible attorney in charge of the file to conduct an extensive perusal and consideration of the relevant documentation. The documentation would naturally include the pleadings in the Court file, the said 462-page transcript, the Court *a quo's* judgment in the substitution order and the aborted appeal.

[46] The appellants alleged that they had then established that there were three Court files in respect of the matter and that one of them could not be found, until it was found by the registrar on 4 December 2008.[9] This allegation was not disputed, but merely noted, by Ekurhuleni in its answering affidavit.[10] It seems, therefore, that it was only then (after 4 December 2008) that any meaningful consultation of the appellants by the responsible attorney could take place.

[47] It was not in dispute that on 17 February 2009 the appellants filed their initial notice of amendment which relied mostly on the Protected Disclosures Act[11] and that Ekurhuleni, on 5 March 2009, correctly objected to their reliance on the said Act on the ground stated earlier. Just over a month later (on 16 April

[9] Appellants' founding affidavit, para 27 at p. 11 of the indexed papers.
[10] Respondent's answering affidavit, para 8.9 at pp61-2.
[11] Act 26 of 2000.

2009) the appellants filed the second application for amendment, which is the subject of this appeal. In comparison, therefore, to the long unexplained delay caused by Ekurhuleni, which I have alluded to already, it does not appear to me that the appellants are to be solely blamed, if at all, for the lateness of their amendment application filed on 16 April 2009.

Whether the proposed amendments would introduce a new cause of action

[48] It has also always been said that the Court will allow the amendment of a pleading or prayer where the main issue between the parties remains the same. In *Tomassini v Dos Remendos and Another,*[12] the Court (per Kruper J), after distinguishing that case with the facts in *Hy-cap Vulcanising Co (Pty) Ltd v South African Motor Trade Association,*[13] stated as follows:

> 'I do not think that that case *[i.e. Hy-cap Vulcanising]* is applicable to the circumstances in the present case. Here the main issue remains the same. The main issue is whether or not a contract of sale was entered into between the parties. That is fundamental to both questions, whether the plaintiff would be entitled to obtain specific performance, or whether he would be entitled to claim damages. It is quite true, of course, that the claim for damages introduces certain further features that have to be considered, but in my view that does not make a different case from the case originally envisaged by the parties to the proceedings.' (Underlined for emphasis)

[49] Whilst the Court will not readily grant an amendment where the granting thereof would introduce a new cause of action,[14] the courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in original proceedings;[15] provided that an amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned thereby.[16]

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[12] *Tomassini v Dos Remendos and Another* 1961 (1) SA 226 (W) at 228B-C.
[13] 1946 W.L.D. 495.
[14] *Bestenbier v Goodwood Municipality* 1955 (2) SA 692 (C).
[15] *OK Motors v Van Niekerk* 1961 (3) SA SA 149 (T) at 152C. See also: *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153H-154A; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 357G-H; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 745H.
[16] *MacDonald v Forman*, above, at 153D.

[50] There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, where that is necessary to determine the real issue between the parties.[17] Of course, the amendment must be *bona fide*,[18] especially where the effect of refusing it would again bring the same parties before the same court on the same issue.[19]

[51] Importantly, there should be a distinction made between an amendment introducing a new cause of action (i.e. the right of action)[20] and one which merely introduces fresh and alternative facts supporting the original right of action.[21] In my view, the latter appears to be the case here. Whether the dispute is about unfair dismissal in terms of section 186 of the LRA or automatically unfair dismissal in terms of section 187, the cause or right of action, in this case, remains the same – i.e. the dispute about the fairness of their dismissal. In *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another,*[22] this Court (*per* Zondo AJP, as he then was) stated, amongst others, as follows:

> '[62] At 1214J-1215A in *Cementation Africa Contracts*[23] the Labour Court made statements to the effect that, after conciliation, a party which wants to take a dismissal dispute further is bound by the conciliating commissioner's description of the dispute in the certificate of outcome. I do not agree with this. The position is, as the Labour Court correctly pointed out in that case, that a party cannot change the nature of the dispute. I would add that the conciliating commissioner is also bound not to change the nature of the real dispute between the parties. If he did, the party that seeks to take the matter further would not be bound by a wrong description of the dispute but would have a right to take further the true dispute that was referred to conciliation

[17] *Myers v Abramson* 1951 (3) SA 438 (C) at 449H-450A.
[18] *Trans-Drakensberg Bank Ltd v Combined Engineering above* at 643A-C.
[19] *Greyling v Nieuwoudt* 1951 (1) SA 88 (O).
[20] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15B-E.
[21] *Sentrachem*, above, at 15B-16C. See also: *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D.
[22] (2000) 21 ILJ 142 (LAC).
[23] *NUM-SA and Others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC).

> and to give a correct description of the dispute. What the parties are bound by is the correct description of the real dispute that was referred to conciliation.
>
> [63] …
>
> [64] At any rate, it matters not for purposes of jurisdiction whether at the time of the conciliation of a dismissal dispute, the reason alleged for the dismissal was operational requirements or an automatically unfair reason. The dispute is about the fairness of the dismissal. Therefore, provided the alleged reason is one referred to in s 191 (5)(b), the Labour Court will have jurisdiction to adjudicate the real dispute between the parties without any further statutory conciliation having to be undertaken as long as it is the same dismissal.' (Underlined for emphasis).

[52] Mr Pauw submitted that the decision in *Driveline* should, after all, be seen in light of the facts thereof. He contended that in that case the argument raised by Driveline was that the Labour Court did not have jurisdiction over the proposed automatically unfair dismissal dispute, because that dispute had not been conciliated. To my mind, I do not see why *Driveline* should be distinguished from this case. On the principle, it is, in my opinion, practically on all fours with the present case. *Driveline* involved an application for amendment of the statement of case. Originally, the dismissed employees had alleged that their dismissals for operational requirements were unfair in that the employer had not fully complied with its obligations under section 189 of the LRA. In the proposed amendment, which was declined by the Labour Court, the employees sought to attack the fairness of their dismissals, apparently in the alternative, on a further ground that the dismissals were automatically unfair in terms of section 187(1)(c) of the LRA. This is about the same scenario as in the present case.

[53] The fact that an automatically unfair dismissal has special and distinguishing attributes, as Mr Pauw submitted, does not, in my view, detract from it being a species of the broad concept of unfair dismissal. Having considered the reasoning of the Court in *Driveline*, I have no cause to doubt that the decision remains good law on the subject.

Whether the appellants are bound by their original election of compensation

[54] Indeed, it is settled law that where in breach of a contract, an aggrieved party has a choice of remedies, that party must exercise an election to enforce the remedy within a reasonable time. However, the decision in *Mahabeer,* to which we were referred by counsel, does not assist Ekurhuleni. In *Mahabeer,* [24], the Appellate Division (per Hefer JA) stated the position clearly, thus:

> 'It is often said (usually on the authority of Voet *Commentarius Ad Pandectas* 18.3.2) that the right to cancel an agreement must be exercised within a reasonable time. I have no quarrel with that statement – as far as it goes. But it does not follow that failure to exercise the right within such a time results *ipso iure* in its loss. In ***Potgieter's*** case *supra* this Court also approved in the present context of a passage which appears in *Pollock* at 629 to the effect that
>
> > "the contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that right of rescission is waived",
>
> which puts failure to exercise the right to cancel within a reasonable time in its perspective. Depending on the circumstances, such a failure may, eg, justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so (cf *Pienaar v Fortuin* 1977 (4) SA 428 (T) at 433G; *Becker v Sunnypide Park (Pty) Ltd* 1982 (1) SA 958 (W) at 964-5; *Smit v Hoffman en 'n Ander* 1977 (4) SA 610 (O) at 616G-H), or it may open the door to some other defence. In such cases the lapse of an unreasonably long time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But *per se* it cannot bring about the loss of the right. (Cf *Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 325F-G)'. (Underlined for emphasis)

[55] Clearly, therefore, it does not follow that the appellants, by not making their election to claim reinstatement 'within a reasonable time', have to lose their right in that regard. The peculiar facts and circumstances of this case do not justify that conclusion. There is nothing, in my view, to suggest that the appellants waived their right to claim reinstatement at the time they filed the

[24] At 736E-I.

original statement of case. Their election at that time to claim only compensation and not reinstatement should be properly contextualized on the facts and circumstances of the case. I have noted that, notwithstanding their former employer, BFES, having persistently urged them, directly and through their union, to make an election between early retirement or retrenchment packages, the appellants stood their ground and declined to commit themselves to either of the two options presented to them. Indeed, it was as a result of their steadfastness on this point that BFES eventually unilaterally decided to proceed and deposit the cash retrenchment packages into the appellants' respective bank accounts on 22 December 2000.[25]

[56] It is apparent, on the papers, that the contractual relationship between Ekurhuleni and BFES had started getting frosty and limping at least as early as during or about December 2001. Certain factual background material in this regard appeared in the judgment of Botha J of the Transvaal Provincial Division (as it was then known) under case number 7905/2003,[26] to which I refer presently.

[57] The initial service delivery contract between Ekurhuleni and BFES dated 28 September 1998 was for a period of four years, effective from 27 September 1996 and expiring on 27 September 2000. This contract was subsequently extended by means of an addendum for another year to 28 September 2001. In terms of the addendum, it was agreed that after the expiry date, the contract would continue to operate until either party gave the other six months' notice of its termination. On 19 December 2001, Ekurhuleni's Executive Mayor, on behalf of Ekurhuleni, served the BFES with the notice of intention to terminate the contract. BFES challenged the decision and launched a court application, under case number 6446/2002, to have the decision to terminate set aside. However, that matter was settled between the parties on 15 May 2002. Then on 5 December 2002 the Executive Mayor again decided, on behalf of Ekurhuleni, to terminate the contract with six months' notice. That dispute culminated in the matter before Botha J.

[25] See original statement of case, paras 33 and 40, at 44 and 47 respectively of indexed papers.
[26] The case was between the BFES and Mr Barber as first and second applicants respectively, on the one hand, and Ekurhuleni and its Executive Mayor as first and second respondents respectively, on the other. A copy of this judgment was made available to us.

[58] There seems to have been no doubt that the appellants' continued stable employment with BFES was dependent on the continued operation of the service delivery contract between BFES and Ekurhuleni. Therefore, when the appellants filed the original statement of case on 3 January 2002, the future of the continued contractual relationship between BFES and Ekurhuleni was in doubt, or at least no longer guaranteed. On this basis, it was reasonably not unexpected that the appellants did not claim reinstatement. However, the substitution order completely changed the complexion of the situation. Once Ekurhuleni was substituted as the respondent, on the basis of its receipt of transfer of the business of BFES as a going concern, the right to claim reinstatement from Ekurhuleni became an option available to the appellants. I am, therefore, satisfied that they tendered a plausible explanation as to why they did not elect to claim reinstatement against BFES, which is outlined above. Their right of action against Ekurhuleni is founded on the same alleged unfair dismissal[27] which they alleged in the original statement of case. They were dismissed only once, not twice.

[59] It would therefore, in my view, be unreasonable and unfair to hold and pin the appellants to their election of compensation only, in terms of the original statement of case, because that would be completely overlooking and ignoring the changed circumstances brought about by the effect of the substitution order. The fact that the appellants may now have entered the retirement age and, therefore, unable to tender their services in return for reinstatement is, in my view, irrelevant for the purpose of determining whether to grant the proposed amendments. That would be an issue for consideration by the trial Court, which will have a discretionary power in relation to the extent of the retrospectivity of the reinstatement, if the reinstatement is ordered at all. In determining whether such order is appropriate, the trial Court will have to consider, as its focal point, the underlying notion of fairness between both Ekurhuleni, as the employer, and the appellants, as the

[27] See *Driveline*, above.

dismissed employees, on the objective assessment of the particular facts of this case.[28]

Whether Ekurhuleni was likely to suffer prejudice if amendments were allowed

[60] In *Moolman v Estate Moolman and Another,*[29] the Court held as follows:

> '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.'

[61] The *onus* is on the party seeking the amendment to prove that the other party will not be prejudiced by the amendment.[30] In *Union Bank of South Africa Limited v Woolf; Union Bank of South Africa Limited v Shipper,*[31] the Court stated:

> 'Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed it should be refused.'

[62] It does not appear to me that there was a likelihood of any specific prejudice being suffered by Ekurhuleni if the amendments were allowed. After all, it is noted that Ekurhuleni did not allege any specific prejudice in this regard. For instance, there is no suggestion that its witnesses would no longer be available to testify.

[63] Indeed, it is not uncommon that, in many instances, the amendments have the effect of changing the character of the action and thus necessitate the

[28] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) Also reported as [2008] 12 BLLR 1129 (CC), para 39. See also: *Billiton Aluminium SA Ltd v Khanyile and Others* 2010 (5) BCLR 422 (CC).
[29] 1927 CPD 27, at 29. See also: *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) at 42H47I.
[30] *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225. See also: *Euro-shipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1090B.
[31] 1939 WLD 222, at 225.

other party requesting to reopen its case, which is reasonable and necessary in the determination of the real issue between the parties.[32] In my view, the following events are significant to note in relation to that aspect. In their initial reaction to the proposed amendments, Ekurhuleni, among other things, filed a notice requesting to reopen its case.[33] On 1 June 2005, the appellants filed a notice of opposition to Ekurhuleni being allowed to reopen its case.[34] Hence, Ekurhuleni, in its answering affidavit, further reacted as follows:

> 'Save to admit that the Respondent gave notice on 31 May 2005 that it intended to reopen its case, the remainder of the allegations herein are denied… It appears that the First and Second applicant(s) are still intending to oppose the respondent's intention to reopen its case and as a result there is prejudice to the respondent of the proposed amendment being applied for at this stage.'

[64] However, Mr Van Vuuren made it clear that the appellants were no longer opposing Ekurhuleni's application to reopen its case. Thus, any potential prejudice which Ekurhuleni may have complained about in this regard should fall away. Similarly, any other defence that Ekurhuleni would seek to raise, consequent upon the introduction of the amendments, it would be entitled to do so when it reopens its case and during the trial.

[65] Indeed, I do not believe that the granting of the amendments would place the appellants at an advantage over Ekurhuleni at the hearing. It does not necessarily follow that allowing the amendments will necessarily entail a finding that the appellants' dismissals were automatically unfair and that the appellants are entitled to reinstatement. Again, those are matters for consideration by the trial Court. In the event of Ekurhuleni possibly thinking that, for whatever reason, the amendments would result in it losing some tactical advantage over the appellants at the trial, such a scenario would not *per se* translate to any sort of prejudice or injustice to Ekurhuleni.

[32] *Myers v Abramson*, above.
[33] Respondent's application dated 31 May 2005, referred to in appellants' founding affidavit, para 42 at p15 of the indexed papers.
[34] See notice to oppose, at pp 78-79 of the indexed paper.

[66] As indicated earlier, what the Court should be concerned about is ensuring that as much relevant facts and material as possible are placed before it, to facilitate and expedite the determination of the real issue between the parties. In *Myers v Abramson*[35] the Court stated:

> 'The attitude of the Courts is that pleadings are made for the Court and not the Court for the pleadings (*Robinson v Randfontein Estates Gold Mining Co., Ltd.,* 1925 AD 173 at p. 198), and in my opinion no Court would so interpret the rules, unless thereto compelled by the plain meaning thereof, as to create a situation wherein the Court loses its power to allow such amendments to the pleadings as are designed to ensure that the real issue between the parties is determined. It may well be that to allow the interposition of an application for an amendment during the hearing of an application for absolution may deprive the party applying for absolution of a tactical advantage he might otherwise enjoy over his opponent, but I do not think that this can outweigh the major concern of the Court to secure the expeditious and most direct determination of the real dispute between the parties.' (Underlined for emphasis)

Whether the claim of reinstatement was precluded by prescription

[67] It was further argued on behalf of Ekurhuleni that the appellants' claim of reinstatement had, after all, become prescribed in terms of the relevant provisions of the Prescription Act.[36] In this regard counsel referred us to the decision of the Labour Court in *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Limited*[37] in terms of which the Labour Court held that any claim based on an unfair dismissal is a debt contemplated by the Prescription Act.

[68] Mr Pauw submitted, however, that the Labour Court (in *Gaoshubelwe*) was wrong in holding that prescription was interrupted by the initiation of the process through the referral to the CCMA, in that the Labour Court failed to have regard to section 15 of the Prescription Act, which dealt with the interruption of prescription under certain specified conditions.

[35] Above, at 446D-G
[36] Act 68 of 1969
[37] (2009) 30 ILJ 347 (LC) para 17

[69] When dealing with an application for amendment of pleadings it is important to avert confusing that process with the determination of whether there has been interruption of prescription, as one envisaged in section 15(1) of the Prescription Act. Even though the two situations may sometimes be practically closely linked in a given case, they remain different concepts and are governed by different rules and principles. In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd,*[38] the Supreme Court of Appeal (per Heher JA) remarked as follows, in part:

> '[12] The approach adopted by the Court a quo reveals confusion. There seems to have been no consideration of whether a difference in approach is called for between applications for amendment of pleadings and the determination of whether there is compliance with a statutory provision such as s 15(1). The cases referred to in para [8], which related to the first problem, were applied willy-nilly to the second. It is clear that there are fundamental differences between the two situations. Amendments are regulated by a wide and generous discretion which leans towards the proper ventilation of disputes and are granted according to a body of rules developed in that context. Whether there has been compliance with a statutory injunction depends upon the application of principles wholly unrelated to the rules just mentioned and without the exercise of a discretion, principles which were expressed by Van Winsen AJA in the well-known passage from *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E as follows:
>
> > "The enquiry, I suggest, is not so much whether there has been "exact" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what according to the requirement of the injunction it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with that which it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether the object has been achieved are of importance. Cf JE*M Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327-8."' (Underlined for emphasis)

[38] 2004 (3) SA 160 (SCA) para 12

[70] The present instance is about the application for amendment of the original statement of case, and not about whether the claim of reinstatement, in terms of the proposed amendments, had become prescribed, or whether the running of prescription in that regard was interrupted in terms of section 15 of the Prescription Act. As stated, the issue is about whether the Court *a quo* exercised its discretion judiciously, when it disallowed the proposed amendments. In other words, the determination of whether the Court *a quo* properly exercised its discretion in that regard is not dependent on the determination of the prescription-related issues that I have just mentioned. It further has to be borne in mind that the exercise of judicial discretion, in relation to amendment of pleadings, has to reflect a degree of generosity on the part of the Court or tribunal considering the application.[39]

[71] Like the allegation of discrimination raised by the appellants in the proposed amendments (that Mr Meyer was unfairly preferred over them and not dismissed), the defence of prescription (raised by Ekurhuleni) is a triable issue which, in my view, also deserves a proper ventilation and consideration at the trial. To my mind, therefore, these issues are rather premature to deal with at this stage. I also note that although Ekurhuleni did raise the issue of prescription in its notice of opposition to the amendments, the learned Acting Judge *a quo* elected, correctly so in my view, not to deal with that issue in his reasons for the ruling.

[72] However, even if I am wrong with the view that I postulate above, I would still hold, for the reasons that follow, that the appellants have a reasonable prospect of success against Ekurhuleni's defence of prescription against the amendments. In *Evins v Shield Insurance Co Limited,*[40] the Appellate Division (per Corbett JA, delivering the majority judgment) stated:

> 'Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely

[39] *Blaauwberg Meat Wholesalers*, above.
[40] 1980 (2) SA 814 (A) at 836D-E. See also: *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (W) at 199E-G. Compare: *Driveline*, above.

> represents a fresh quantification of the original claim or the addition of a further item of damages (see *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 601 - 2).' (Underlined for emphasis)

[73] It seems to me, therefore, that the additional facts proposed to be introduced in terms of the amendments in this case are 'part and parcel of the original cause of action and merely represent a fresh quantification of the original claim'. Hence, the amendments would not render the appellants' claim a new right of action and, thus, the defence of prescription would probably not succeed.

[74] In other words, the running of prescription would have been interrupted because the right of action sought to be enforced by the appellants in the proposed amended statement of case is, in my view, recognizable as the same or substantially the same right of action as that disclosed in the original statement of case. In *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd,*[41] the Supreme Court of Appeal (per Scott JA) once again visited this issue and stated as follows:

> 'Even a summons which fails to disclose a cause of action for want of one or other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. (See *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H - 16B; *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517B - C.) If it is, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to clarify or even expand the claim. (As to the expansion of the claim, see eg *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W) at 520H - 521G.) The sole question in the present appeal is therefore whether the right of action relied upon in the particulars of claim as

[41] 2004 (6) SA 317 (SCA), at 321A-C; para 4. See also: *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517B–C; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) 622 (SCA) ([2003] 2 All SA 597) at 26H-27B; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W).

amended is recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form.' (Underlined for emphasis)

[75] Indeed, the appellants' averments contained in paragraphs 2, 3 and 5 of the proposed amended statement of claim, referred to above, are, in my opinion, merely an elaborate replica of the allegations in paragraphs 21, 22 and 44.2 of the original statement of case, also referred to above. Put differently, the appellants' evidence to prove the allegations in paragraphs 21, 22 and 44.2 of the original statement of case would basically be the same evidence as to prove the allegations contained in paragraphs 2, 3 and 5 of the proposed amended statement of case.

[76] In my judgment, I am satisfied that the Court *a quo* failed in the exercise of its judicial discretion when it refused the application. In my view, the appellants succeeded to show *prima facie* that they had something deserving of consideration [42] and, thus, the proposed amendments should have been allowed.

[77] As the granting of the amendments would be an indulgence to the appellants, there is no reason, in my view, why they should not bear the costs of the application. With respect to the costs of the appeal, it seems to me fair and just that no order be made in that regard.

The order

[78] In the result, the following order is made:

1. The appeal is allowed.

2. The order of the Court *a quo* is set aside and replaced with the following order:

'(1) The application for amendment is granted as prayed.

(2) The applicants are directed to pay the costs of the application, jointly and severally the one paying the other to be absolved.

[42] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd En' Ander* 2002 (2) SA 447 (A) at 463E, 462J-463B, 464F/G-G/H, 464E/F.

3. The matter is remitted to the Court *a quo* for a further hearing, in the light of this judgment, and in accordance with the Rules or as the Court may otherwise direct.'

4. There is no order as to costs of the appeal.

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Ndlovu JA

Zondi AJA and Musi AJA concur in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANTS:		Adv PHJ van Vuuren
		Instructed by AC Scmidt Inc, Brakpan
FOR THE RESPONDENT:		Adv P Pauw SC
		Instructed by Du Plessis De Heus & Van Wyk, Benoni
Heard	:	6 November 2012
Delivered	:	26 June 2013