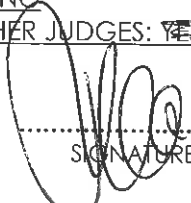


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33045/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>8 Jul 2013</u> DATE	
 SIGNATURE	

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant/Plaintiff

and

WAVERLEY COURT CC

Respondent/Defendant

J U D G M E N T

MAKUME, J:

[1] This is an application for leave to amend the Plaintiff's particulars of claim which is preceded by an application for condonation for the late filing of the application for leave to amend.

[2] The application to amend is opposed by the Defendant on the basis that the amendment sought will render the Plaintiff's particulars of claim excipiable as no cause of action would be disclosed. The application for condonation is likewise being opposed on the basis that the Plaintiff has failed to show good cause why the late filing of the application for leave to amend was not filed timeously.

[3] In these proceedings I have to decide whether the Plaintiff's application for amendment of its particulars of claim should be allowed and whether the amendment if allowed will render the Plaintiff's particulars of claim excipiable on the basis that the particulars of claim would lack the necessary averments to sustain an action.

[4] The Plaintiff who is the Applicant in these proceedings instituted action against the Defendant who is the Respondent. I will for sake of simplicity refer to the Applicant as the Plaintiff and the Respondent as the Defendant. The action was instituted during September 2013.

[5] The Defendant entered appearance to defend the action and on the 14th October 2013 served on the Plaintiff's attorney notices in terms of Rule 35(12) as well as Rule 35(14) in which notices the Defendant requested from the Plaintiff the following:

5.1 The consumer agreement referred to in paragraph 5.1 of the particulars of claim.

5.2 The prescribed form referred to at paragraph 5.2 of the particulars of claim.

5.3 The promulgated tariffs referred to in paragraph 5.4.

5.4 All tax invoices dispatched to the Respondent by the Applicant, all monthly statements provided to the Respondent by the Applicant and all water and electricity meter reading sheets in relation to the account referred to in paragraph 6.

[6] On receipt of the notices the Plaintiff responded and provided the Respondent with the documentation required this was still in October 2013. The Defendant complained that the information provided was insufficient and accordingly launched an application to compel the Plaintiff to properly reply to the aforesaid notices.

[7] On the 21st February 2014 the Plaintiff delivered a notice in terms of Rule 28(1) to the Defendant notifying the Defendant that it intends amending its particulars of claim by deleting paragraphs 4, 5 and 6 of the particulars of claim and replacing same with the following:

"4. The Plaintiff is a public utility empowered in terms of the provisions of legislation and by-laws to:

4.1 supply electricity, water and other municipal services to consumers;

- 4.2 *provide for the provision, management and regulation of water supply within its municipal area and to provide for matters incidental thereto;*
- 4.3 *provide for collection and removal of business, domestic and industrial refuse within its municipal area and to provide for matters incidental thereto;*
- 4.4 *...*
- 4.5 *have debt collecting measures and policies in place.*
- 5. *On 29 November 2001 and 26 March 2001, the council of the Plaintiff adopted an electricity by-law commencing from 24 April 2002.*
- 6. *The material express provisions of section 3(1) of the by-laws provide:-*
 - 6.1 *If a person uses an electrical supply without entering into an agreement, he shall be liable for the cost of electricity and any other costs incurred by the council in such circumstances.*
- 7. *The Defendant has not concluded a written agreement with the Plaintiff for the supply of electricity, water, refuse removal and other municipal services."*

[8] On the 4th March 2014 the Defendant filed objection to the proposed amendment in accordance with Rule 28(2) read with Rule 28(3).

[9] On the 19th June 2014 the Plaintiff delivered the present application for leave to amend together with an application for condonation for not setting down the application for leave to amend within 10 days from the date of the objection as is required by the provisions of Rule 28(4).

[10] Rules 28(4) and 28(10) of the Uniform Rules read as follows:

"28(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2) the party wishing to amend may within 10 days lodge an application for leave to amend.

28(10) The court may notwithstanding anything to the contrary in this rule at any stage before judgment grant leave to amend any pleading or documents on such other terms as to costs or other matters as it deems fit."

[11] I do not find or read in those rules a definite obligation that an applicant must or shall file or deliver the application to amend within 10 days to the contrary Rule 28(4) uses the word "*may*" and not shall. There is in my view nothing that precludes an applicant to set such application after a period of 10 days shall have lapsed. In *Waja v Orr* 1931 TPD 149 the court indicated that application for material amendments to the pleadings should be made before trial so that the pleadings would be settled by the time of the hearing and in *Moolman v Estate Moolman* 1927 CPD 27 it was held that an application for amendment can be made even after close of pleadings.

[12] In the matter of *Trans-Drakensberg Bank Ltd v Combined Engineering* 1967 (3) SA (D) it was held that if a litigant has delayed in bringing a formal application to amend this in itself is no ground for refusing the amendment unless the Respondent can show prejudice. In the current matter the Defendant has not shown any prejudice in any event the Defendant has not as yet filed any plea. There can therefore be no prejudice and in my view an application for condonation for the late filing of the application to amend was not even necessary. All that the Defendant says at paragraph 9.2.6 is that in accordance with the provision of Uniform Rule 28 the application ought to

have been made by the Plaintiff on or before the 18th March 2014. The Defendant has clearly misread the provision of Rule 28(4) they are not peremptory. See also *Christies Fish Supplies (Pty) Ltd v Ornelas Fishing Co* 1978 (3) SA 431 (C).

[13] I deal now with the question whether the amendment should be granted or not in view of the Defendant's argument that the amendment if granted will cause the particulars of claim to be excipiable.

[14] It is trite law that the granting or refusal of an application for the amendment of pleadings is a matter for the discretion of the court to be exercised judicially in the light of all the facts and circumstances before it. In *Moolman v Estate Moolman (supra)* Watermeyer J reflected the widely held view of our courts when he said:

"the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back the purposes of justice in the same position as they were when pleadings which it is sought to amend was filed."

[15] It is correct that the proposed amendment alters the cause of action relied on. In the present particulars of claim the cause of action is based on a credit agreement and the proposed amendment bases the cause of action on the by-laws. The Plaintiff says that reliance on the credit agreement was an oversight by a senior paralegal in the employment of the Plaintiff's attorneys

of record. What this means is that the Plaintiff incorrectly pleaded its case and this is rectifiable by an amendment prior to a plea being filed. There can thus be no prejudice whatsoever to the Defendant.

[16] In the matter of *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C Schreiner JA said the following:

“There is no introduction of a fresh cause of action but only a clarification of a step in the proceedings which it is assumed has insufficiently or imperfectly set out the one cause of action that throughout has been relied upon.”

[17] In the present matter it is common cause that the Plaintiff seeks payment of money from the Defendant for services rendered in terms of the governing legislation and by-laws with regard to the same claim and amount for outstanding municipal services.

[18] Kuper J in the matter of *Tomassini v Dos Remedios and Another* 1961 (1) SA 226 (W) summarised the aspect dealt with above in the following words at page 228B-E:

“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.

In the ordinary way, if the amendments are formal, or if the amendments are of such kind that the scope of inquiry is not unduly

enlarged there seems to me no reason why such amendments should not be granted. Failure to grant amendments of this kind might lead to injustices as between the parties. It might lead to the necessity of introducing further action in order to arrive at the same position that could be arrived at by a simple amendment of pleadings."

[19] The main reason why the Defendant opposes the application for leave to amend is set out in its heads of argument and that is that should the amendment be allowed the Plaintiff's particulars of claim would be excipiable as no cause of action would then have been pleaded. In this regard it will suffice if the Plaintiff demonstrates that the proposed amendment is deserving of consideration and introduces a triable issue. A triable issue is:

- (a) A dispute which if it is proved on the basis of evidence foreshadowed by the reasons furnished by an applicant in his application will be viable or relevant.
- (b) It is a dispute which will probably be established by the evidence.

[20] This issue was well captured in the words of Carvey J in *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A and reads as follows:

"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 for which he has no

supporting evidence where evidence is required or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[21] In the present matter it is not suggested by the Defendant that the Plaintiff will be unable to produce evidence to support the amended particulars of claim.

[22] In my view the proposed amendment seeks to ventilate the issues properly before the court. There is no prejudice to the Defendant who has in any case not as yet pleaded. The only prejudice is that suffered by the Plaintiff who has to continue rendering services in accordance with legislation and receives no payment in return.

[23] The Defendant seems to also argue that an amendment will assist the Plaintiff to avoid having to comply with the court order by Modiba AJ of the 16th April 2014. The reality of the matter is that having been granted the order the Defendant has not executed same in any case it is clear that once I grant this amendment which I intend doing that court order will become obsolete. The Defendant will be afforded to issue fresh Rules 35(12) and 35(14) notices.


[24] The learned writer Herbstein & Van Winsen in *Civil Practice of the High Court* 5th Edition at page 683 writes as follows on the aspect of excipiability of the amendment:

"An amendment should be refused on the ground of excipiability only if it is clear that the amended pleading will (not may) be excipiable (see Krische v Road Accident Fund 2004 (4) SA 358 (W). 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. It will be left to the aggrieved party to file exception if he so wishes."

[25] In my view the Plaintiff's particulars of claim in the amended form clearly set out a cause of action and accordingly I grant the order in the following terms:

- (a) Condonation for late filing of the application for leave to amend is granted.
- (b) The objection is dismissed.
- (c) The amendment to the particulars of claim as set out in the notice to amend is granted.
- (d) The Defendant is ordered to pay the costs of these applications.

DATED at JOHANNESBURG on this the 8th day of JULY 2015.


M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING 15TH APRIL 2015

DATE OF JUDGMENT 8TH JULY 2015

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