

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO : A3003/2011



REPORTABLE

In the matter of the appeal between:

FREDERICK PAPE RANDA

Appellant

and

RADOPILE PROJECTS CC

Respondent

JUDGMENT

WILLIS J:

[1] This is an appeal against the decision of the learned magistrate to disallow an amendment to the defendant's plea during the course of a trial. I am indebted to Bava AJ for preparing this judgment. Ordinarily, as the senior judge hearing this appeal, I should have taken the responsibility to prepare the first judgment. This case is concerned with an important feature of our adjectival law.

[2] The issue in question arises frequently in our courts. In the light of the fact that my disallowing an amendment during the course of a trial was reversed in the Supreme Court of Appeal in the case of *Rustenburg Platinum Mines Limited v Industrial Maintenance Plumbing Services CC*¹, I considered it proper that I should invite Bava AJ to commit his conclusions to writing first. Bava AJ graciously acceded to this request. He has also conveniently summarized the relevant facts. I am much indebted to Bava AJ.

[3] During the course of hearing the appeal, I became increasingly concerned that, despite my inner conviction that the learned magistrate had correctly dismissed the defendant's application to amend his plea and counterclaim, the weight of precedent and prevailing practice would compel the upholding of the appeal. Following the British system, South African judges operate under a system of

¹ [2009] 1 All SA 275 (SCA)

precedent.² In the case of *Cassell & Co Ltd v Broome*³ the House of Lords made it clear that courts lower in the judicial hierarchy may disagree with decisions of those that are higher and may even say so but they are bound to follow the decisions in higher courts. This decision has been approved *by our Supreme Court of Appeal in the case of S v Kgafela*.⁴

[4] It has long been my conviction that the commencement of a trial is the fulcrum upon which the courts' stance in respect of applications for amendments to pleadings should be balanced. The further away the parties are from the commencement of the trial, the easier it should be for a litigant to obtain an amendment and, conversely, the deeper the parties are into trial and the nearer they may be to obtaining judgment, the more difficult it ought to be.

[5] I am fortified in this conviction by reference to Halsbury's *Laws of England* in which it is stated that the function of pleadings is to

enable the parties to decide *in advance of* the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. (my emphasis).⁵

2 See *Harris & Others v Minister of Interior & Another* 1952 (2) SA 452 (A); *Fellner v Minister of Interior* 1954 (4) SA 523 (A). In *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) 149 (T) Coetzee J (as he then was) seems to have enjoyed giving an overview of the topic, while being astute to not 're-inventing the wheel' (at 183I-187H). In that judgment Coetzee J refers to Professor Ellison Kahn's 'fascination' with the subject and the 'vast mass of judicial material' which he contributed to the subject in the *South African Law Journal* and elsewhere (see 184G-185D). See, also, Hahlo, H.R and Kahn, E. 1960. *The Union of South Africa, the Development of its Laws and Constitution*. Cape Town: Juta & Company at p30.

3 [1972] AC 1027; [1972] All ER 801 (HL)

4 2003 (5) SA 339 (SCA) at para [3]

5 4th Edition (Reissue) Volume 36 (1) paragraph [1]. This *dictum* has been quoted with approval in Herbstein and Van Winsen's *The Civil practice of the High Courts of South Africa*, 5th Edition by Cilliers, Loots and Nel, 2009, Juta's; Cape Town at p558.

Furthermore, as litigants approach a trial and, even more so, once a trial commences, costs increase exponentially; there are not infrequently considerable logistical difficulties in securing the timeous attendance of witnesses at court. As the trial progresses, the court hearing the matter will have begun to form impressions of witnesses and develop a sense the direction in which the wind may be blowing. These factors mitigate against the more relaxed or 'liberal' attitude that may prevail before trial.

[6] In the case of *Robinson v Randfontein Estates Gold Mining Company Limited*⁶ Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere the trial court's refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.⁷

[7] More recently, the judgment of Caney J in *Trans-Drakensberg Bank Limited (Under Judicial Management) v Combined Engineering (Pty) Limited*⁸ has been one of the leading cases on the issue.⁹ Caney J delivered a comprehensive review of the law. This judgment of Caney J was approved by Corbett CJ, delivering the unanimous judgment of the appeal court in *Caxton Limited and Others v Reeva Forman (Pty Limited)*.¹⁰ Judicial imprimatur was

6 1925 AD 173

7 At p213.

8 1967 (3) SA 632 (D)

9 1967 (3) SA 632 (D)

10 1990 (3) SA 547 (A) at 565G-I

given, once again, by the Supreme Court of Appeal in its unanimous judgment in *Ciba-Geigy (Pty) Limited v Lushof Farms (Pty) Limited en 'n Ander*.¹¹ Caney J held that 'the primary principle' was to allow 'a proper ventilation of the dispute between the parties' and another 'the vital consideration' was whether prejudice could 'be cured by an order for costs and, where appropriate, a postponement'.¹²

[8] In my past experience as an advocate appearing not only in courts in South Africa but also in central Africa, 'claims sounding in money'¹³ were often treated with judicial hauteur. Counsel, protesting against the law's delays when a postponement was sought in such matters, would be told from the bench that 'this case is only about money'. The riposte would be delivered without a trace of irony. Made to feel that they were guilty of both a legal and a social solecism for daring to think that it would be wrong to postpone a matter when it was 'only about money', lawyers had little choice but to defer to the attitude from the bench.

[9] That such attitudes towards claims 'sounding in money' were expressed not only within South Africa but also outside of the country indicates that the attitude was neither peculiarly South African nor confined to white males elevated to the bench. It may have had to do with the fact that judges were so steeped in the traditions of classical scholarship that they came to believe

11 2002 (2) SA 447 (SCA) at paragraph [34]

12 At p638A-B.

13 The expression 'claims sounding in money' was used by Pollak W. in *The South African Law of Jurisdiction*, 1937, Hortors Limited: Johannesburg at p25 and Broome JP in *Minister of the Interior v Cowley* 1955 (1) SA 307 (N) at p310-11.

in the conviction of the educated classes in pre-modern times that the only patrimony that mattered was immovable property. This attitude towards immovable property resonated in the circumlocution, prevalent until recent times, in which to be described as a 'person of property' was synonymous with being a landowner. Moreover, in pre-modern times, litigation was the preserve of the wealthy, with the estates of landowners being largely impervious to any award that a court may make in regard to claims 'sounding in money'.

[10] Modernity has fundamentally changed the importance of cash. This is deftly summarized in the colloquial aphorism, 'cash is king'. 'Modernity' is a term that is not amenable to easy definition. Generally, it refers to the period (and the social conditions and processes) consequent upon the Enlightenment.¹⁴ The period is marked by the rise of capitalism, increasing complexity of economic institutions, industrial production, the market economy, large-scale social integration, the nation state and mass production.¹⁵

[11] Those who doubt the importance of cash flow in modern societies, may reflect upon the fact that the global economic crisis that has driven innumerable millions of human beings out of work around the world and which may account for the loss of at least 500 000 jobs in South Africa, had its roots in a 'cash crisis'.

¹⁴ See, for example, Giddens, A. 1998. *Conversations with Anthony Giddens: Making Sense of Modernity*. Stanford, California: Stanford University Press, p94; Leppert, R. 2004. "The Social Discipline of Listening" in Drobnick, J. Ed. *Aural Cultures*. Toronto: YYZ Books, pp19-35; Norris, C. 1995. "Modernity" in Honderick, T. Ed. *The Oxford Companion to Philosophy*. Oxford: Oxford University Press, p583.

¹⁵ *Ibid*.

The efforts of governments and bankers around the world to resolve this crisis has predicated upon trying to facilitate the flow of cash. Debtors who wait too long for payments due to them are often forced into insolvency thereby, with all the concomitant evils that flow therefrom, including unemployment and a loss of tax revenue for the State. Those who are under the shadow of contingent liability also need to know, sooner rather than later, whether they have been discharged from such liabilities.

[12] Almost invariably, the decision by the courts to allow an amendment is made by reference to the statement of the rule or practice as 'always' to allow an amendment unless the party applying for it has acted '*male fide*' or the 'injustice' to the other side 'cannot be compensated by costs' or words to similar effect. See, for example, within the area of jurisdiction of this court, the following cases: *Ferreira Deep Limited v Olver*,¹⁶ *Clayton v Feitelberg*,¹⁷ *Pavie v St Croix*,¹⁸ *Whittaker v Roos*; *Morant v Roos*,¹⁹ *Rishton v Rishton*,²⁰ *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Company Limited*,²¹ *Bitcon v City Council of Johannesburg & Arenow Behrman & Co*,²² *Rosenberg v Bitcom*,²³ *Union Bank v Woolff*,²⁴ *Smith v Williams*; *Smith v Kok*,²⁵ *Geldenhuis v Wilson*,²⁶ *Steel Equipment Company (Pty) Limited v*

16 1903 TS 145 at 149

17 1903 TH 99

18 1903 TH 106

19 1911 TPD 1092 at 1102-04

20 1912 TPD 718 at 719

21 1923 TPD 309

22 1931 WLD 273 at 293

23 1935 WLD 115 at 117-9

24 1939 WLD 222

25 1952 (2) SA 682 (W)

26 1949 (4) SA 534 (T)

Lurelk (Pty) Limited,²⁷ *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council*,²⁸ *Mabaso v Minister of Police*,²⁹ *O'Sullivan v Heads Model Agency CC*³⁰ and *Luxavia (Pty) Limited v Gray Security Services (Pty) Limited*.³¹ Similar views have been expressed by courts having jurisdiction in other parts of the country.³²

[13] In *Bankorp Limited v Anderson-Morshead*³³ Flemming DJP said that 'Arguments that amendments are to be refused only because of delay in seeking an amendment repeatedly fail.'³⁴ In *Four Tower Investments (Pty) Limited v André's Motors*³⁵ Galgut DJP endorsed what he perceived to be 'a gradual move away from an overly formal approach'.³⁶

27 1951 (4) SA 167 (T) at 175D

28 1978 (2) SA 219 (T) at 222F-G

29 1980 (4) SA 319 (W) at 323D

30 1995 (4) SA 253 (W) at 255A-B

31 2001 (4) SA 211 (W) at paragraph [10]

32 See, for example *Callaghan v Callaghan* (1882) 2 EDC 251; *Trustees of Pentz v Van Druten* (1886) HCG 81; *Levy v Rose* (1903) 20 SC 189 at 193; *Van Gend & Sons and Van Gend's Brothers' Trustee v G A G Van Gend & H J Van Gend* 1913 EDL 114 at 120-1; *Thomas v Thomas* 1914 CPD 310 at 311-3; *Vorster v Van Der Walt*; *Van Eetveldt v Vorster* 1914 EDL 303 at 305-6; *Norton v Crooks* 1914 EDL 532 at 536-7; *De Wet v Bouwer* 1918 CPD 433 at 438-9; *Winshaw v Gie Bros* 1920 CPD 662; *Krogman v Van Reenen* 1926 OPD 191; *De Lange v Herman & Co* 1930 EDL 137 at 139; *Fish Hoek Village Management Board v Romain* 1932 CPD 304 at 307; *Cecil v Champions Limited* 1933 OPD 27; *Perlman v Zoutendijk* 1934 (1) PPH F68 (C); *Lawson & Kirk v SA Discount Acceptance Corporation (Pty) Limited* 1937 (2) PH F129 (C); *Wehmeyer v Williams Hunt & Brook Limited* 1940 CPD 511 at 513; *Coetzee v Steyn* 1955 (3) SA 48 (O); *Heeriah v Ramkissoo* 1955 (3) SA 219 (N); *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876D-E; *Simmons NO v Gilbert Hamer & Co Limited* 1963 (1) SA 897 (N); *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 107072 (C); *Meyerson v Health Beverages (Pty) Limited* 1989 (4) SA 667 (C); *Benjamin v Sobac SA Building & Construction (Pty) Limited* 1989 (4) SA 940 (C) at 957H-958B; *Devonia Shipping Limited v MV Luis (Yeoman Shipping Co Limited Intervening)* 1994 (2) SA 363 (C); *Commercial Union Assurance Co Limited v Waymark NO* 1995 (2) SA 73 (Tk); *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 391 (C) AT 694H-695D

33 1997 (1) SA 251 (W)

34 At 253E-F

35 2005 (3) SA 39 (N)

36 At paragraph [19]

[14] It is a short jump to the right (or the left, depending on one's perspective) to interpret the principle that an enquiry should be held as to whether any prejudice by an amendment can be cured by an order for costs and, where appropriate, a postponement as a rule of practice as follows:

In claims sounding in money, any potential prejudice by an amendment is cured by a postponement and order for the costs wasted costs occasioned by that postponement.

[15] In *Krogman v Van Reenen*³⁷ De Villiers DJP referred to the 'manifold inconveniences of a postponement' and emphasized that a litigant could not obtain a postponement 'as of right' but had to show 'reasonable grounds' therefor.³⁸ These observations were endorsed by Van Heerden J (as she then was) in *Embling and Another v Two Oceans Aquarium CC*.³⁹ In that case, Van Heerden J described the attitude of the courts towards amendments as 'liberal'.⁴⁰

[16] Nowhere, as far as I have been able to ascertain, has a superior court been on record as having said something like this:

We are now well advanced in a trial action. The amendment, if granted, will necessitate the recalling of witness and may also necessitate the need to *subpoena* witnesses whom it was not previously intended to call by the other party. The litigant seeking the amendment ought reasonably to have known, a long time ago, what his case was all about. If the amendment is granted, a

³⁷ 1926 OPD 191

³⁸ At 194-5

³⁹ 2003 (3) SA 691 (C) at 695C

⁴⁰ *Ibid.*

postponement will have to follow. A postponement will result in a part-heard trial, bringing about massive inconvenience not only to the other side but also their witnesses and this court as well. The registrar's office will be vexed. Even if this court makes a costs order against the party seeking the amendment, it is far from certain that the other side will succeed in fully recovering costs upon taxation. If a debtor owes money, it is only right that the creditor is paid sooner rather than later. Interest a *tempore morae* does not relieve cash flow. Conversely, if a plaintiff's case is without merit, it matters greatly for the defendant to be discharged from liability sooner rather than to have the millstone of litigation around the neck. The application to amend is dismissed with costs.

[17] The principle that an amendment will be refused if the party seeking it is *mala fide* (or, as it has sometimes been expressed 'not *bona fide*') takes on a different colour once an application to amend is brought before a trial court, rather than a motion court before trial has commenced. The reason for the metamorphosis is that, ordinarily, it is inappropriate for a trial judge to express an opinion as to the credibility of witnesses before the parties have closed their cases and argument has begun.⁴¹ What is a judge to do if an application to amend is brought during the trial in circumstances where it appears that the application is not *bona fide*? The court cannot say so. I do not think it is appropriate for the 'liberal approach' to the ventilation of the issues to prevail in such circumstances.

[18] The only conceivable basis, in law, upon which we could interfere with the decision of the learned magistrate to disallow the amendment, would be to conclude that she decided the matter according to a 'wrong principle'.⁴² I have

41 See *Vilakazi v Santam Assuransie Maatskappy Beperk* 1974 (1) SA 23 (A) at 26G-27A

42 See the case of the *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [11]. Similar views have been expressed in *Ex parte Neethling &*

been narrowly persuaded by Bava AJ that the learned magistrate acted with appropriate judicial discretion in deciding to disallow the amendment. I am pleased that my inner convictions are able to coincide with the order of this court.

[19] The following is the order of the court:

The appeal is dismissed with costs.

BAVA AJ:

[20] In this matter the Respondent (the Plaintiff in the Court *a quo*) issued a summons out of the Randburg Magistrates' Court in 2002 where it claimed R100 000,00 from the Appellant (the Defendant in the Court *a quo*) arising out of a building dispute.

[21] The trial in the matter commenced in 2009. The appeal record does not contain a transcript of the proceedings before the Magistrate. Both the Appellant's Counsel and the Respondent's Counsel indicated that the appeal should be determined from the documents contained in the appeal record and the facts emanating therefrom.

[22] The appeal is against the judgment and order handed down by the Magistrate in the Court *a quo* where she dismissed the Appellant's application for leave to amend his plea and counterclaim. The facts of the matter are sketched out by the

Others 1951 (4) SA 331 (A) at 335E; *S v Kearney* 1964 (2) SA 495 (A) at 504B-C.

Magistrate in her reasons for judgment where she states the following:

i)After the summons was issued by the Respondent in 2002, the trial commenced in 2009.

ii)There had been several postponements in the matter at the instance of both parties andthere were many costs orders against the Appellant including costs of a punitive nature.

iii)The Respondent had alerted the Appellant on the date of the commencement of the trial in March 2009 of its intention to object to evidence being led outside that specified in the Applicant's discovery affidavit and more particularly in respect of the specific items and the costs of those items.

iv)The Magistrate had on the day that the trial began, in May 2009, raised her own concerns with the Appellant regarding the approach of the Appellant in possibly seeking to amend his plea or counterclaim at a later stage. It appears that the Magistrate had indicated that an amendment that would be brought at a later stage by the Appellant may result in unnecessarily drawing out the proceedings and may necessitate the recalling of witnesses.

v)The Appellant, despite that caution by both the Magistrate and the Respondent, elected to proceed with the trial and not to amend its

plea and counterclaim at the initial stage.

[23] Prior to the trial, the Respondent amended its Particulars of Claim and the Appellant also amended its plea and its counterclaim.

[24] On the 17th of August 2010, the Appellant served a notice of intention to amend his already amended plea to the Plaintiff's amended Particulars of Claim dated 24th June 2005 and to amend his counterclaim. In this amendment the Appellant sought to, *inter alia*, increase the quantum of his damages from R84 456,66 to R332 243,75. The Appellant sought to abandon R232 243,75 of his claim which was the portion that exceeded the monetary jurisdiction of the Magistrates' Court.

[25] On the 26th of November 2009, the Respondent filed a notice of objection to the Appellant's notice of intention to amend and the grounds of objection are summarised as follows:

vi) That the trial in the action had already commenced and two of the three expert witnesses of the Respondent had already completed their evidence and had already been cross-examined.

vii) That the Appellant had not filed expert notices in respect of his damages claim and in view of the fact that the expert witnesses of the Respondent had been cross-examined and re-examined that the Appellant would be able to adapt the evidence, taking into account

the evidence led by the Respondent's expert witnesses as well as the cross-examination and re-examination of those witnesses.

viii)The Respondent would suffer extreme prejudice as a result of such evidence being introduced by the Appellant and would lead to another delay in finalising the matter which, the Respondent states, would occur in spite of repeated punitive cost orders against the Appellant and by the delay that the Appellant has caused in the matter.

ix)If the proposed amendment were to be granted, the Respondent would have to recall its witnesses including the expert witnesses.

x)The Respondent indicated that it will be unjustly and irretrievably prejudiced in that it is incurring costs on a scale as between attorney and own client as well as what the Respondent regarded as the practicalities of the case, more particularly, that the Appellant at that stage had insight into the Respondent's expert evidence under cross-examination and that the Appellant could now prepare his evidence at that late stage in opposition to such evidence.

[26] On the 23rd of March 2011, the Appellant served a notice of set down of the application in terms of Rule 55A(4) on the Respondent. The matter was set down for the 1st of July 2011. In support of this application in terms of Rule 55A(4), the Appellant's attorney, Michael Bernstein, deposed to an affidavit in terms of which

he indicated the following:

xi) That the Appellant filed two discovery affidavits, one in May 2009 and the other in October 2009. The discovery affidavit of May 2009 contained a general description of Defendant's expenditure on building materials and building costs but did not itemise each item.

xii) The trial proceeded before the Magistrate and had run for 2 days on the 25th and 26th May 2009 and thereafter was postponed *sine die* after the Respondent's first two witnesses had testified.

xiii) On the morning of the 25th May 2009 and at Court and prior to the trial continuing, the Respondent's Counsel informed Mr Bernstein that they would object to any evidence from the Appellant where the evidence did not comply with the schedule of the discovery of May 2009.

xiv) Thereafter on the 26th of May 2009 and after considering the statement, Mr Bernstein came to the conclusion that the individual documents should be specified specifically and not generally and as a result thereof and after the postponement, the Appellant attested to a further discovery affidavit in September 2009.

xv) He indicates that after the discovery affidavit was prepared in September 2009, it became apparent that the Defendant's

counterclaim had been grossly under-calculated and that it became necessary for a proper ventilation of the defence and for the counterclaim that they be amended as set out in Rule 55A(1).

RULE 55A OR SECTION 111 AMENDMENT

[27] The Magistrate in her reasons for the judgment indicated that the application should not have been brought in terms of Rule 55A(4) but rather, as the trial had already commenced and evidence had already been adduced by the Respondent, that the application to amend falls within the ambit of Section 111 of the Magistrates' Court Act 32 of 1944.

[28] At the hearing of the appeal, the Appellant's Counsel conceded that the application ought to have been brought in terms of Section 111 and not in terms of Rule 55A. The relevant portions of Section 111 read as follows:

"111. Amendment of proceedings

- 1) In any civil proceedings, the court may, at any time before judgment, amend any summons or other document forming part of the record: Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.*

2) *In civil proceedings an amendment may be made upon such terms as to costs and otherwise as the Court may judge reasonable.*

3) ...

4) ...”

APPELLANT’S SUBMISSIONS

[29] In dealing with the amendment, the Appellant relies on the submissions that an application for amendment will always be allowed unless it is made *mala fide* or would cause prejudice to the other party, which cannot be compensated for by an order for costs or by some other suitable order such as a postponement. In support of this proposition, the Appellant relied on the decision of **Four Tower Investments (Pty) Limited v Andre’s Motors** 2005 (3) SA 39 (N) where it was held at paragraph [15] that:

“The function of the court is, of course, to resolve disputes between litigating parties, and justice can only be done if the real issues are defined in the pleadings and ventilated in court. For this reason it is by now well established that an application for amendment will always be allowed unless it is mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement.”

[30] The Appellant indicates that in the affidavit deposed to by the Appellant's attorney in support of the amendment, the Appellant tendered the costs and also agreed to the recalling of the expert witnesses. The Appellant, accordingly, argues that the Respondent could not have suffered any prejudice and if there was any prejudice, this would be ameliorated by a costs order or alternatively a postponement and the recalling of the witnesses.

[31] The Appellant then further relies on the case of **Luxavia (Pty) Ltd v Grey Security Services (Pty) Ltd** 2001 (4) SA 211 (W) where the Court held at paragraph [10] that:

*“[10] In **Moolman v Estate Moolman and Another** 1927 CPD 27 at 29, a ‘practical rule’ which developed in a number of English cases was applied being 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 ...’. A fuller and more recent statement of this rule is to be found in the judgment of Rose-Innes J, in **Devonia Shipping Ltd v M V Luis (Yeoman Shipping Co Ltd intervening)** 1994 (2) SA 363 (C) at 369 F-I :*

‘The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for 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 notice of motion which it is sought to amend was filed ...”

RESPONDENTS SUBMISSIONS

[32] The Respondent in its submission relied heavily on the judgment of Naser J in the case of **Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd** 1954 (3) SA 945 (T) where Respondent’s Counsel submitted that the facts are akin to the current matter and where Naser J stated at page 948 A-D as follows:

“... The object of pleadings is to define the issues in the action and the failure by a party to plead causes of action or defences of which it is aware cannot be condoned if the only reason for the failure is a desire to cross-examine witnesses before the issues are pleaded. The fact that some order in regard to costs could be made which would compensate the other party is not the only consideration. In the present case, the trial had proceeded for 5 days and was nearing its end before notice of the amendment was given. Defendant is, in my opinion, entitled to claim that the trial should proceed on the issues raised in the pleadings and that it should not at this late stage be called upon to decide whether it would have proceeded to the trial had the issues sought to be raised in the amendment been timeously pleaded.”

[33] It is also interesting to note that the concept of the ‘modern tendency’ of the

Courts granting an amendment where such amendment facilitates the proper ventilation of the disputes between the parties emanates from the judgment of Greenberg J in **Rosenberg v Bitcom** 1935 W.L.D. at 115 at page 118 where he stated:

“Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.”

DELIBERATIONS

[34] During argument, Willis J referred both Counsel to the case of **Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Services CC** [2009] 1 All SA 275 where Willis J’s refusal to allow the Plaintiff to amend its Particulars of Claim by adding two alternatives to its cause of action, allegedly so as to accord with the evidence already tendered and after three witnesses had testified on its behalf, was reversed on appeal.

[35] I have considered the current appeal in the light of the submissions made by the Appellant and the Respondent and in light of the **Rustenburg Platinum Mines Limited v Industrial Maintenance Painting Services CC** judgment that was handed to me by Willis J. The crucial aspect, to me, is the consideration of how a judicial officer who is involved in a trial ought to exercise his or her discretion when faced

with an application to amend during the trial.

[36] In **Commercial Union Assurance Co Ltd v Waymark NO** 1995 (2) SA 73 (Tk), White J, at 77 F-I, set out the general principles governing applications for amendment of pleadings and summarised them as follows:

xvi)The Court has a discretion whether to grant or refuse an amendment.

xvii)An amendment cannot be granted for the mere asking; some explanation must be offered therefor.

xviii)The Applicant must show that *prima facie* the amendment '*has something deserving of consideration, a triable issue*'.

xix)The modern tendency lies in favour of an amendment if such '*facilitates the proper ventilation of the disputes between the parties*'.

xx)The party seeking the amendment must not be *mala fide*.

xxi)The amendment must not '*cause an injustice to the other side which cannot be compensated by costs*'.

xxii)The amendment should not be refused simply to punish the Applicant for neglect.

xxiii) A mere loss of (the opportunity of gaining) time is no reason, in itself, for refusing the application.

xxiv) If the amendment is not sought timeously, some reason must be given for the delay.

THE JUDICIAL DISCRETION

[37] It is trite that each case has to be considered on its own facts. 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 of the case before it. In this regard see **GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council** 1978 (2) SA 219 (T) and **Zarug v Parvathie NO** 1962 (3) SA 872 (D).

[38] A presiding officer who has been hearing evidence in a matter and especially after the matter has proceeded to trial, is placed in a position where he/she is able to:

xxv) have regard to the conduct and the demeanour of the litigants;

xxvi) have regard to the tensions that exist between the parties and how these are dealt with;

xxvii) have regard to the progress of the matter and he/she will have a

keen sense of what would cause an injustice or prejudice to either party;

xxviii)the presiding officer would also have an appreciation of whether a costs order would compensate for the prejudice suffered by a party or whether such costs order would not serve the purposes of justice by placing the parties in the same position as they were prior to the amendment being sought.

[39] In the case before us, the Magistrate indicated that, in addition to the delays caused by the Appellant which included punitive costs orders being granted, the Appellant filed an application dated 20th August 2009, which is not part of the appeal record, which contradicts the allegation by the Appellant that he only became aware of his increased quantum later. The Magistrate in having regard to the contradictory affidavits indicated that from her reading of the affidavits prepared in respect of the discovery, it was apparent to her that the Appellant was aware of its increased quantum prior to the trial commencing in May 2009. The Magistrate indicated that there was no satisfactory explanation by the Appellant explaining the discrepancy between the submission in the application for leave to amend and the affidavit of August 2009 which discrepancy the Appellant attributed to “a mistake”.

[40] The Magistrate considered that the prejudice suffered by the Respondent due to the lengthy delays in the trial and that the matter had become unduly protected, due mostly to the conduct on the part of the Appellant in the matter.

The Magistrate was of the view that the amendment brought by the Appellant was to, once more, delay the finalisation of the matter. The Magistrate considered the submissions of the Respondent as well as having regard to the fact that the Respondent would suffer further prejudice should the Appellant be allowed the opportunity to tailor his evidence in accordance to that of the Applicant's expert witnesses' testimony.

[41] The Appellant sought to argue, before the Magistrate, that the delay in bringing the application to amend was as a result of the non-availability of the presiding officer. This notion was dispelled by the Magistrate who indicated that the Appellant had from May 2009 when the further hearing of the trial was postponed until November 2010 to place his application to amend before the Court. The Appellant offered no explanation for such a delay. The Magistrate found that the conduct of the Appellant had been nothing short of tardy and dilatory. She was not satisfied with the Appellant's delays in bringing the application or the failure to properly compute his claim was satisfactorily explained by the Appellant.

[42] The Magistrate found that if the application was granted it would result in further delays in the matter which would cause prejudice to the Respondent and which prejudice would not be cured by an appropriate order of costs. It is not just one aspect that the Magistrate considered but rather the combination of facts and circumstances of the conduct of the parties and the effect that they have that made her conclude that in the interests of justice that the application for amendment must be refused.

[43] In considering all the aspects of the matter, I am of the view that the Magistrate exercised her discretion correctly by refusing the Appellant leave to amend his plea and counterclaim.

[44] The Appellant has raised one additional aspect pertaining to the fact that the Magistrate should have confined herself to the affidavit filed by Mr Bernstein. This, the Appellant argues, relates to the fact that an application should only be considered on the papers before the Court. From my reading of Section 111, there is no requirement that an applicant files an affidavit. In these circumstances the failure by the Respondent to file an opposing affidavit does not preclude the Magistrate from having regard to all the facts of the matter. In fact, in my view, it is the duty of the presiding officer to have regard to all of the facts of the matter in exercising his/her discretion.

THE ORDER

[45] Accordingly, I would dismiss the appeal with costs.

DATED AT JOHANNESBURG THIS 30th DAY OF AUGUST, 2012

N. P. WILLIS

JUDGE OF THE HIGH COURT

A.BAVA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. *K. Ioulianou*

Counsel for the Respondent: Adv. *I. Strydom*

Attorney for the Appellant: Michael Bernstein

Attorney for the Respondent: Raymond C Kosviner

Dates of hearing: 2nd August, 2012

Date of judgment: 30th August, 2012