



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CA 67/2023

In the matter between:

JACO MEYER

Appellant

and

SEAN McGEER

First Respondent

COLLETTE McGEER

Second Respondent

JUDGMENT ON APPEAL

Govindjee J

Background

[1] The respondents ('the plaintiffs') instituted action against the appellant ('the defendant') in the regional court, Humansdorp, for breach of contract arising from allegedly defective or incomplete building work. The defendant pleaded that the

particulars of claim did not conform with the rules of court, alternatively lacked clarity or were vague and embarrassing to the extent that the defendant was unable to plead.

[2] Various pre-trial skirmishes between the parties ensued. A pre-trial minute of a conference convened before a regional magistrate on 8 March 2022 reflects agreement, inter alia, that the plea disclosed 'a defence that is good in law'. The matter was certified trial ready and set down for trial on 22 September 2022. Notwithstanding the earlier agreement, the attorney for the plaintiffs proceeded to argue at trial that the plea amounted to a bare denial, so as to be deemed an admission in terms of Rule 17(3)(a) of the Rules Regulating the Conduct of the Proceedings of The Magistrates' Courts of South Africa ('the Rules'). No evidence was led and the magistrate postponed the matter to 8 November 2022 for judgment.

[3] The defendant filed an application to amend the plea on 29 September 2022, to which the plaintiffs objected. That matter was argued on 15 November 2022. The magistrate gave an *ex tempore* judgment dismissing the application, coupled with a punitive costs order. This was on the basis that the application had not been supported by an affidavit and was therefore not properly before court. The defendant's attorney then sought a postponement for an affidavit to be drafted. That postponement was refused and the magistrate proceeded to give an *ex tempore* judgment on the merits of the matter, granting judgment in favour of the plaintiffs.

The appeal

[4] The appeal is based, in essence, on the following grounds:

- a) The application to amend the plea ought to have been allowed;
- b) The application to postpone the matter in order to permit a fresh application to amend ought to have been permitted;
- c) The magistrate erred in her treatment of the defendant's extant plea;
- d) The magistrate erred in granting judgment in favour of the plaintiffs absent any evidence as to the damages suffered.

[5] The appeal was unopposed, the plaintiffs filing a notice indicating their intention to abide by this court's decision. The matter may be determined based on the first and second grounds of appeal.

Analysis

[6] Amendments may be considered in the context of the constitutional right to have access to courts, and the resolution of disputes following a fair public hearing.¹ The primary object of permitting an amendment to pleadings is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them.

[7] Rule 55A regulates amendment of pleadings in the magistrates' courts:

'(1) (a) Any party desiring to amend a pleading or document other than an affidavit, filed in connection with any proceedings, shall notify all other parties of his or her intention to amend and shall furnish the particulars of the amendment ...

(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 ...

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, 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.'

[8] Subrule (4) must be read together with rule 55(5)(a)(i) and (ii):

'(4) (a) (i) Interlocutory and other applications incidental to pending proceedings must be brought on notice corresponding substantially with Form 1C of Annexure 1, indicating a date assigned by a registrar or clerk of the court or as directed by a magistrate before whom the matter is to be heard.

¹ S 34 of the Constitution of the Republic of South Africa, 1996.

(ii) The notice must be supported by affidavits if facts need to be placed before the court ...'

[9] Unlike High Court practice, and having regard to Form 1C, which refers to the so-called 'short form' notice of motion, it is apparent that the word 'notice' in Rule 55(4) means 'notice of motion'. Substantial compliance with Form 1C is expected, with such variation as circumstances require.² It is equally apparent that the notice must indicate a date on which the matter is to be heard. That date must be assigned by a registrar or clerk of the court or be directed by a magistrate before whom the matter is to be heard.³

[10] In this instance the notice of intention to amend in terms of Rule 55A was not brought on notice of motion in substantial compliance with Form 1C, irrespective of whether affidavits were necessary to support the application. This amounted to non-compliance with a peremptory requirement, so that the application was not properly before the court *a quo*. It is accordingly unnecessary to delve into the basis upon which the court *a quo* decided to dismiss the application for amendment. Considering the defendant's non-compliance with the rules, there is also no basis for this court to interfere with the magistrate's decision as to costs in refusing the application to amend the plea.

[11] Having made its ruling in this respect, the court *a quo* was faced, in essence, with an application for postponement. The record reflects that the defendant's attorney specifically requested an opportunity to place the proposed amended plea 'properly before the court ... in the interest of the defendant'.

[12] The learned magistrate gave short shrift to this application. In doing so, the magistrate was seemingly oblivious to the provisions of rule 55A(10), and the possibility of a party intending to effect an amendment to a pleading doing so orally,

² See DE van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* (Vol II: The Rules) (10th Ed) (RS 32, 2022) Rule-p55-30.

³ Ibid.

in facie curiae.⁴ That rule must be read with s 111 of the Magistrates' Courts Act, 1944.⁵

'(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.'

[13] While it has been held that the discretion in question is 'wide and generous', it is nonetheless a discretion to be exercised judicially, bearing in mind that the power to postpone and grant punitive costs would likely ameliorate any prejudice to be suffered by the plaintiffs. The court *a quo* erred in failing to consider such dimensions and in its summary dismissal of the defendant's further application.

[14] The usual position in respect of applications for postponement to amend pleadings has evolved to ensure the proper ventilation of disputes, bearing in mind the constitutional right to a fair public hearing. That being the case, the appeal must be upheld to afford the defendant the opportunity to bring a further application for amendment to its plea. Considering the time that has elapsed, it is appropriate to set a timeframe for this application.

[15] The defendant has achieved substantial success in this appeal and is therefore entitled to his costs of the appeal.

Order

[16] The following order is issued:

1. The appeal is upheld with costs.

⁴ Van Loggerenberg above n 2 (RS 18, 2018) Rule-p55A-2.

⁵ Act 32 of 1944.

2. The judgment and order of the regional court, Humansdorp (case no: EC HMD RC 11/2020C) dated 15 November 2022 is set aside and substituted as follows:

2.1 The defendant is granted leave to amend his plea in accordance with rule 55A of the Rules Regulating the Conduct of the Proceedings of The Magistrates' Courts of South Africa.

2.2 The defendant is directed to notify the plaintiffs of his intention to amend and shall furnish the particulars of the amendment, in accordance with rule 55A(1)(a), within ten days of the date of this order.

2.3 There is no order as to costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree

ZM NHLANGULELA
ACTING JUDGE PRESIDENT OF THE HIGH COURT

Heard: 16 February 2024

Delivered: 16 February 2024

Appearances:

For the Appellant:

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For the Respondent:

No Appearance