

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32206/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


SIGNATURE

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DATE

In the matter between:

JEANETTE DOS SANTOS

APPLICANT/PLAINTIFF

and

MADIBENG RENTAL (PTY) LTD t/a

RESPONDENT/DEFENDANT

CHAS EVERITT PROPERTY RENTALS HARTBEESPOORT

JUDGMENT

Introduction

- [1] This is an opposed interlocutory application brought by the Applicant for leave to amend the applicant's particulars of claim. The Respondent (Defendant) has objected to the proposed amendment. The application is dated 28 July 2022.
- [2] Jeanette Dos Santos, a female adult, the Applicant, is the Plaintiff in the main matter.
- [3] Madibeng Rental (pty) Ltd t/a Chas Everitt Property Rentals Hartbeespoort, the Respondent, and the Defendant in the main matter, is a private company, duly registered in accordance with the Companies Act 71 of 2008, with registration number: 2010/363717/09.

Background

- [4] From the details, a summation of the original dispute is as follows. Dos Santos gave to 'Chas Everitt' a mandate to lease certain property. This was in a detailed contract, consisting of an eight-page closely typed document, which by its title 'Chas Everitt Property Rentals' appears to be authored by the Respondent (Defendant). It contains sixteen (16) clearly demarcated sections, with headings. Many of these sections contain subsections and numerous clauses. On the final page, the document is signed by Dos Santos and an 'agent' of Chas Everitt Property Rentals.
- [5] A tenant was procured by Chas Everitt. The tenant moved in and occupied the premises.
- [6] Dos Santos' case is that:
- 6.1 The tenant did not pay the necessary deposit.
 - 6.2 The tenant failed to pay rent.
 - 6.3 The tenant caused damage to the property.

Current Situation

[7] Dos Santos is claiming a total of R715, 009.21 from Chas Everitt, based on 'defendant's (Chas Everitt's) gross negligence'.

[8] As per the applicant's (plaintiff's) notice of intention to amend, the following are the intended amendments to its particulars of claim:

8.1 By adding subparagraph 5.14 to paragraph 15:

'The plaintiff complied with all the material terms of the agreement'.

8.2 By amending Number paragraph 9.2 by adding the following words:

'The tenants damaged the property to such an extent that the Plaintiff was not able to re-let the premises after the tenants vacated the property until date of issue of this summons'.

8.3 By amending Numbered Paragraph 9.3:

'9.3 The damages suffered by the Plaintiff are as follow:

9.3.1 Arrear rent, utilities and interest as per statement from the Defendant to the tenants dated 23 September 2021 attached hereto marked as Annexure "B" R102 252.79

9.3.2 Damages assessment to property as per attached annexure "C" R391 756.42

9.3.3 Loss of income 1 August 2021 – until date of summons
R221 000.00

TOTAL R715 009.21'

[9] The respondent contends that the relief sought (in this notice of intention to amend), is the rectification of a written agreement as well as for payment of damages which were allegedly suffered.

[10] The respondent objects to the 'intention to amend the Particulars of Claim'. In summation, the objections in essence revolve around:

- 10.1 First Objection: Should the amendment be allowed, it would interfere with the Procurement and Management Mandate.
- 10.2 Second Objection: Should the amendment be allowed, it would leave the particulars of claim vague and embarrassing.
- 10.3 Third Objection: The Plaintiff's particulars of claim not disclosing a cause of action.
- 10.4 Fourth Objection: Should the amendment be allowed, the particulars of claim would be excipiable.

[11] The respondent in the circumstances asks the Court that the application for the amendment of the pleadings be refused.

The Law on Amendments

[12] Rule 28 of the Uniform Rules of Court regulates amendments to pleadings. The Court exercises a discretion when deciding whether to grant or refuse an amendment. Harms states that when exercising its discretion, the Court will lean towards granting an amendment to ensure that justice is done between the parties.¹

[13] The Applicant (Plaintiff) has referred to the case of *Affordable Medicines Trust and Others v The Minister of Health and Another*² where Ngcobo J stated:

¹ LTC Harms. Civil Procedure in the Supreme Court. LexisNexis. Cape Town at B189.

² [2005] ZACC 3; 2006 (3) SA 247 CC at para 9.

'The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO.³ The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a Notice of Motion. The question in each case, therefore is what do the interests of justice demand'.

[14] What was stated in the *Affordable Medicines Trust* case was reiterated, in summation format, in the case of *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape*.⁴ Here, Ebrahim J stated (at para 4):

'The principles governing the granting of an amendment have been summarised by White J in Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TkGD) At 77F-I. These are the following:

- 1. The court has a discretion whether to grant or refuse an amendment.*
- 2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.*
- 3. The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue',*
- 4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.*
- 5. The party seeking the amendment must not be mala fide.*
- 6. The amendment must not 'cause an injustice to the other side which cannot be compensated by costs'.*

³ 1995 (2) SA 73 (TkGD).

⁴ (416/96) [1998] ZAECHC 4 (16 February 2008).

7. *The amendment should not be refused simply to punish the applicant for neglect.*

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

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

The granting or refusal of an application for amendment is in the discretion of the court, which to be exercised judicially in the light of all facts and circumstances in the case. See: GMF Kontrakteurs (Edms) Bpk & Ander v Pretoria City Council 1978 (2) SA 219 (T)'.

[15] In the matter between *Shoprite Checkers (Pty) Ltd and the Trustees for the Time Being of 3 Broten Trust*, Senyatsi J stated:⁵

'It has been held by our courts in a number of cases, the aim in allowing amendment to pleadings is to do justice between parties by deciding the real issues between them. In Rosenberg v Bitcoin 1935 WLD 115, it was held that our courts should be in favour of an amendment whenever such amendment facilitates the proper ventilation of the dispute between the parties.'

[16] In the matter of *Lizinex (Pty) Ltd v FPC Solutions (Pty) Ltd and others*,⁶ Doso J stated:

'The test on whether an amendment should be allowed, was formulated in the matter of Moolman v Estate Moolman & ANO ('Moolman') where the Court stated that: 'The practical rule adopted seems to be that amendments will always be allowed unless the application for amendment 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 for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'.

⁵ (Case no. 39386/2021) HCSA Gauteng Division, Johannesburg at para 15.

⁶ 2022/17136 [2023] ZAGPJHC 1261 (3 November 2023) at para 21.

[17] Nicholls JA in the Supreme Court of Appeal matter of *Media 24 (Pty) Ltd v Nkosinathi Nhleko and Dr Nomcebo Mthembu*⁷ stated:

‘The primary role of pleadings is to ensure that the real dispute between litigants is adjudicated upon, courts are loathe to deny parties the right to amend their pleadings, sometimes right up until judgment is granted’.

That matter was the result of an appeal from the Western Cape High Court, Cape Town in which Media 24’s application to amend its plea was not authorised. However, such was subsequently allowed by the Supreme Court of Appeal.

[18] In *Macduff and Co. (in Liquidation) v Johannesburg Consolidated Investment Co Ltd*,⁸ in 1923, Stradford J stated with regard to the amendment of pleading applications:

‘My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise’.

Discussion

[19] In the circumstances of the facts of the main matter, any vagueness or embarrassment or the nondisclosure of a cause of action would be ventilated in the trial court. Further the respondent does not allege the applicant is acting in a mala fide manner. As can be seen from the decided cases a court would not readily refuse an application to amend.

The proposed amendment, in the circumstances of the dispute between the parties, can only assist the trial court in the proper ventilation of the dispute.⁹ Further, allowing the amendment as sought will not result in prejudice or an injustice to the respondent (defendant).

⁷ (Case no. 109/22) [2023] ZASCA 79 (29 May 2023) at para 16.

⁸ 1924 AD 573.

⁹ See *Nedbank Ltd v Centurion Townhouses (Pty) Ltd* [2022] ZAGPPHC 664 (para 20), where the Court stated in granting leave to amend: “The amendment will ensure that the pleadings reflect an accurate factual position which will ensure that a proper ventilation of issues can take place”.

Judgment

[20] I am of the view that all relevant aspects mentioned in the matter, by the parties, before this Court, have been taken into account even if not specifically referred to. In considering the facts in this matter certain aspects which have taken the matter no further have also not been addressed in this judgment.

[21] In the result, I find the Respondent's objection to the Applicant's application to amend to be without merit. The application does nothing more than to allow the matter to be correctly ventilated between the parties, in accordance with interests of justice.

Costs

[22] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event. The guiding principle is that *"...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based."*¹⁰

[23] It is also an accepted legal principle that cost are in the discretion of the court.¹¹ The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*¹²:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of

¹⁰ Cilliers AC 'Law of Costs' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; In re: *Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

¹¹ Ibid page 2-16(1); *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD).

¹² *Ferreira v Levin NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3]).

the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[24] In considering a costs award in this matter, cognizance was taken of the fact that the respondent opposed the application to amend. In the exercise of my judicial discretion, it is my view that the application (plaintiff) should not be burdened with unjustifiable costs.

Order

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

- 25.1 The application by the applicant (plaintiff in the main action) to amend its particulars of claim as set out in its Notice to Amend is upheld.
- 25.2 The plaintiff (applicant herein) is permitted to effect the amendments in issue here.
- 25.3 The defendant (respondent) is ordered to pay the costs of the application.

SIGNED AT PRETORIA ON THIS THE ____28th____ DAY OF MARCH 2024.

L BARIT
*Acting Judge of the High Court
Gauteng Division, Pretoria*

Appearances:

For the Applicant: Advocate Eugene Janse van Rensburg

Instructed by De Ridder Attorneys.

For the Respondent: DA De Kock

Instructed by: Langenhoven Pistorius Modihapula Attorneys.