

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40975/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
SIGNATURE	DATE

In the matter between:

UNDERWRITERS AT LLOYD'S OF LONDON

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

LE ROUX AJ

[1] This matter concerns interrelated interlocutory applications brought by the parties which have been set down for hearing together on the direction of Ledwaba DJP as a special allocation.

[2] The plaintiff's application comprises two parts, with the second brought in the alternative to the first.

2.1. Under part I, the plaintiff applies in terms of rule 30(1), alternatively rule 30A(2) for an order declaring that the defendant's notice of intention to amend its plea dated 17 September 2021 is an irregular step because it involves an irregular, improper (*mala fide*) and therefore impermissible attempt by the defendant to withdraw formal admissions on the record in these proceedings.

2.2. The plaintiff contends that the defendant admitted the findings of fact and law recorded in a judgment by Bam J dated 7 February 2018 in the case of *The State v Petra December Nkosi and 15 others* (case number CC212/15) in the High Court of South Africa, Gauteng Division, Eastern Circuit (Middelburg) ("the **Bam J Judgment**") insofar as they concerned the complicity of two police officers, Khubeka and Lekola, in the robbery of a high security cash depot in Witbank in 2014, resulting in the theft of approximately R100 million in bank notes.

2.3. Under part II the plaintiff asks the court under rule 28(3) to refuse the proposed amendment, on the same basis.

[3] The plaintiff contends in support of its application that:

3.1. The defendant's proposed amendment involves an irregular, improper (*mala fide*) and therefore impermissible attempt by the

defendant to withdraw formal admissions on the record in these proceedings;

3.2. The defendant first made the admissions under rule 37(4) on 25 September 2019, and thereafter repeated them in the course of various procedural steps taken before the trial was due to start on 7 October 2019;

3.3. The admissions were substantive, and resulted in the parties settling almost all the main issues on the merits of the plaintiff's action for damages;

3.4. The settlement of those issues saved about five days' evidence and relieved the plaintiff of the need to call at least four witnesses, including one expert witness.

[4] In both part I and part II of the application, the plaintiff applies conditionally for an order condoning any non-compliance with the relevant rules. This includes condonation if the court were to find that the plaintiff's objections to the defendant's notice to amend dated 17 September 2021 were (three days) late, as the defendant contends. The plaintiff contends its objections were not late, and that the defendant's contrary claim ignores three timeous written objections by the plaintiff, and that it otherwise rests on a misreading of rule 28. The plaintiff seeks punitive costs against the defendant on an attorney-client scale, alternatively *de bonis propriis* against the Office of the State Attorney for the defendant's attempts to withdraw its admissions and/or ascribe a different interpretation to the admissions made which were

supported by the judgment of Bam J and which plaintiff avers are made in bad faith and that the defendant's factual claims in these applications by the State Attorney, Mr Jan Nel, that the admissions were made in "error", are demonstrably false.

- [5] The underlying matter concerns a robbery at the SBV Witbank Cash Depot on 27/28 April 2014. Several individuals were criminally accused for their participation in that robbery. A criminal trial was held, commencing in October 2016 and culminating in a judgment by Bam J, dated 7 February 2018, in which several of the accused were convicted.

5.1. In May 2016, the plaintiff in this matter launched an action against the defendant. The action was launched due to the involvement of two erstwhile members of the South African Police Services, Khubeka and Lekola, who were found to have participated in the robbery by Bam J. As a result, the defendant is said to be vicariously liable for the loss caused by their conduct.

5.2. The plaintiff also relies upon the defendant's representatives, such as a Warrant Officer Holtzhausen, who was actively involved in the investigation and asset forfeiture proceedings resulting from the robbery, who, it is said by the plaintiff, demonstrates the defendant's awareness of the involvement of Khubeka and Lekola in the robbery and the loss said to arise and borne by the plaintiff, and their prosecution was assisted by investigation by the SAPS and AFU. In addition, Khubeka and Lekola were dishonourably

discharged from the SAPS on 9 February 2018, two days following their conviction by Bam J.

[6] Subsequent to delivery of plaintiff's rule 28(3) notice, defendant filed a rule 30 notice on the basis that the late delivery of the rule 28(3) notice by the plaintiff is an irregular step. In this regard, the defendant contends the following:

- 6.1. The plaintiff's rule 28(3) objection to the defendant's proposed plea amendment was delivered after the prescribed period of 10 (ten) days within which an objection had to be filed, thus out of time and is therefore an irregular step;
- 6.2. The plaintiff's rule 30 notice was delivered out of time. In addition, plaintiff delivered the rule 30 notice after plaintiff had taken a further step in the cause and plaintiff is therefore barred from proceeding with its rule 30 application;
- 6.3. There are no applications for condonation for the late filing of plaintiff's rule 28(3) or rule 30 notices;
- 6.4. Defendant's proposed amendment is not an irregular step and does not involve the withdrawal of any admissions;
- 6.5. Plaintiff's rule 30 application should be dismissed with costs; and
- 6.6. The relief sought in defendant's rule 30 notice should be granted and defendant should be allowed to proceed with the amendment of its plea as per defendant's notice of amendment.

[7] The plaintiff contends that defendant's rule 30 objection is frivolous and has no merit, and that it ignores the plaintiff's conditional application to condone any late delivery of its objection.

[8] The defendant further contends that:

8.1. Its attorney, Mr JH Nel ("**Nel**"), employed at the State Attorney, Pretoria, stated in his answering affidavits that the defendant does not intend to withdraw any of the admissions made, but the material dispute is an extensive interpretation that the plaintiff's legal representatives, as deposed to by plaintiff's attorney, Mr A Strachan ("**Strachan**"), attempts to attribute to the admissions. It is defendant's case that the admissions relating to the judgment of Bam J were merely to the effect that it was admitted that Bam J made the findings and rulings in the judgment and that certain admissions were made by the accused during the criminal trial in which Bam J presided. Nel unambiguously denies that the admissions were as contended by the plaintiff. It is further defendant's contention that Nel is the only person that can give factual evidence regarding the extent of the admissions and the instructions in that regard. The plaintiff's only defence in that regard is that Nel's evidence is "*demonstrably false in every material respect*". There is no legal or factual basis for such a "defence".

8.2. In the alternative, the defendant contends that should the Honourable Court find that the extensive interpretation that the

plaintiff attempts to attribute to the admissions can unequivocally be accepted as such, that the defendant be granted leave to withdraw the admissions, as it was made *bona fide* and in error and there is absolutely no trial-related or other prejudice for the plaintiff, as confirmed under oath by Strachan.

- [9] The defendant's application also includes a conditional application for leave to withdraw its admissions on the basis *inter alia* that Mr Nel did not hold instructions and that it was never intended by defendant to make the admissions to the extent as contended by plaintiff. The plaintiff contends that the defendant has failed to establish the grounds for such leave, including its *bona fides*. The plaintiff instead contends that the factual claims made by Mr Nel in support of that application are not supported by any evidence other than his say so, and that his evidence is demonstrably false in every material respect.

- [10] The relevant procedural and factual background in summary is that:

- 10.1. In June 2018, the plaintiff made its first request for admissions in terms of rule 37 and the defendant responded to that first request in July 2018.
- 10.2. More than a year later, in September 2019, the plaintiff filed a second request for admissions.

- 10.3. There, the plaintiff requested the following relevant admissions from the defendant in terms of Rule 37(6)(g) ahead of the second pre-trial conference:

“Rule 37(6)(g): Plaintiff’s request for admissions

25. The plaintiff hereby requests the defendant to make the admissions sought below concerning the issues arising in paragraphs 19, 20, 20A and 21 of the Plaintiff’s particulars of claim (as amended) and paragraphs 11, 12 and 13 of the Defendant’s plea. The requests are made to narrow the issues and to curtail the trial and to give due consideration of the following facts and circumstances regarding the complicity of Khubeka and Lekola in the robbery, while they were at all relevant times members of the SAPS, with Khubeka further being a member of the SAPS trio unit in Witbank; the judgment by Bam J dates 7 February 2018 in The State v Petra December Nkosi and 15 Others (case number CC215/15) (the judgment) in the High Court of South Africa, Gauteng Division, Eastern Circuit (Middelburg), (the Criminal Court); the findings of fact in the judgment; the rulings on the admissibility of evidence; the admissions by the accused during evidence; and to the further admissions recorded in paragraphs 4.3(a) to (p) of the judgment that were made on behalf of the relevant accused, including Lekola and Khubeka. Does the Defendant admit that:

25.1 The robbery was executed during the evening of 27 April 2014 and/or the morning of 28 April 2014?

25.2 In the course of the robbery, bank notes in the total sum of R101 207 456.28, alternatively (according to the admission recorded in the judgment at paragraph 4.3(a)) in the amount of R104 440 845.60 were stolen?

25.3 The bank notes stolen during the robbery were secured in the vault by SBV on behalf of its banking clients and retail customers?

25.4 Khubeka, Lekola, Accused 3, Accused 5, Accused 14 and Accused 16 were each convicted, amongst other crimes relating to the robbery, of robbery with aggravating circumstances and of conspiracy to commit robbery with aggravating circumstances?

25.5 Khubeka, Lekola, Accused 3, Accused 5, Accused 14 participated at all relevant time before, during and after the robbery in planning, directing and/or executing the robbery?

25.6 Khubeka, Lekola, Accused 3 and Accused 14 were at all relevant times during and immediately after the robbery, members of the SAPS?

25.7 Khubeka and Lekola was each on duty at any one or more time or times before, during and after the robbery?

25.8 Khubeka was 'on standby duty' (as recorded in para 27.5 of the judgment) at Witbank Police Station when the robbery was executed?

25.9 Khubeka came on duty at the Witbank Police Station at 08h00 on 28 April 2014?

25.10 Khubeka used cell phone number 0824554177 at the relevant times before, during and after the robbery to assist in coordinating and executing the robbery (as recorded in paras 27.5 and 47 of the judgment) in communications with others convicted in the judgment?

25.11 Khubeka conspired to commit the robbery with other members of the SAPS at the relevant times of the robbery, including Lekola, Accused 3 and Accused 14?

25.12 Khubeka obstructed and prevented lawful attempts by members of the SAPS to recover the stolen money, while he was on duty?

25.13 Khubeka conspired with other members of the SAPS to do so?

25.14 The correctness of the finding recorded at paragraph 50 (p83) of the judgment that Khubeka was 'actively involved in the commission of the robbery'?

25.15 The admissions recorded in paragraph 4.3 of the judgment were made?

25.16 *The admissions contemplated in paragraph 24 of the judgment were made?*

. . .”

- 10.4. The defendant’s response to this request for admissions by the plaintiff later in September 2019 reads as follows:

“Ad paragraph 25 (preface) read with paragraphs 25.1 to 25.16

Insofar as the admissions sought in these paragraphs are covered by the judgment of Bam J the admissions are made. If they are not so covered, the admissions are not made.”

- 10.5. A further request for admissions was received by the plaintiff from the defendant in October 2019, accompanied by a proposed amended plea served on the plaintiff on 2 October 2019. It is this proposed amendment and its scope that is the subject of these applications.

- 10.6. On 3 October 2019, the defendant formally filed its notice of intention to amend its plea. A second pretrial conference was also held.

- 10.7. On 3 October 2019, the plaintiff’s attorneys, Norton Rose Fulbright SA, also wrote a letter to the State Attorney setting out the plaintiff’s objections *“on at least the grounds listed below”* to the defendant’s notice of intention to amend its plea. The objections then listed

included that “[t]he proposed amendment appears to involve an impermissible attempt to withdraw the admissions made by your client in its response to the plaintiff’s latest request for admissions in terms of Rule 37(4).”

- 10.8. The plaintiff recorded in the same letter that “[t]he proposed amendment is objectionable for various reasons to be set out in our formal objection.” Significantly for the defendant’s case in these applications, this appears to contemplate a more formal notice of objection to be provided at some point in the future after the letter and it is difficult to conclude otherwise.
- 10.9. The civil trial before Mavundla J was set down for 10 days as part of a special allocation and was set to commence on 7 October 2019.
- 10.10. The day before, 6 October 2019, the plaintiff again objected to the defendant’s notice of intention to amend and on the morning of day 1 of the trial, 7 October 2019, the defendant filed yet another amended notice of intention to amend. That same day, the plaintiff objected to that amended notice of intention to amend.
- 10.11. The defendant’s application for leave to amend its plea was heard by Mavundla J on 8 October 2019 in which leave was denied and the application for leave was dismissed with costs.

- 10.12. On 14 October 2019 the defendant applied for leave to appeal against that decision, which was granted by Mavundla J. The appeal was heard by the Supreme Court of Appeal during May 2021, resulting in a judgment of the SCA dismissing the defendant's appeal with costs on 8 June 2021.
- 10.13. Later that month, on 28 June 2021, the trial of the matter was set down again from 18 to 22 October 2021 for a curtailed period of 5 days. The significance of this shortened agreed duration of the civil trial will be explained below.
- 10.14. In an echo of the 2019 events set out thus far, on 15 September 2021, the defendant filed yet another notice of its intention to amend its plea in terms of rule 28. A pretrial conference was held on 15 September 2021 and two days later, on 17 September 2021, the defendant served another notice of its intention to amend its plea.
- 10.15. This occasioned yet another exchange of correspondence between Norton Rose Fulbright and the State Attorney on 23, 27, 29 and 30 September and 6 October 2021, culminating in the plaintiff filing a formal notice of objection to the defendant's notice on 7 October 2021. The defendant objected to the lateness and form of that notice in a rule 30(2)(b) notice on 12 October 2021 and two days later, on 14 October 2021, the plaintiff filed its own application in terms of rule 30 and rule 28(3).

10.16. On 4 November 2021, the defendant filed a rule 30 application against the plaintiff's notice of objection and it is these two related interlocutory applications that are now before the court for determination.

[11] The essence of the dispute between the parties is whether the defendant's 17 September 2021 notice of intention to amend its plea withdrew admissions that the plaintiff contends the defendant made earlier regarding the involvement of accused number 4, Lekola, and accused number 6, Khubeka in the April 2014 robbery. The plaintiff contends that the defendant admitted their involvement in the robbery and that this admission curtailed the estimated duration of the trial. This was because the involvement of these former employees of the defendant, accused number 4 and 6 in the criminal trial, would not need to occupy the attention of the trial court due to the admissions said to have been made by the defendant.

[12] For its part, the defendant contends that all that was admitted was that Bam J made a finding in the judgment at the end of the criminal matter that accused number 4, Lekola, and accused number 6, Khubeka, took part in the robbery. In other words, the defendant contends that it has not admitted the fact of their involvement in the robbery, only the fact that Bam J made that finding in the judgment following the criminal trial.

[13] The defendant, through the State Attorney, Mr Nel, who has conducted the matter on behalf of the defendant throughout, claims that the defendant did not intend to make the admissions as contended for and that he held no

instructions to make that admission. Mr Nel denies the admissions and claims that if the admission means what the plaintiff contends they mean, then the defendant never intended to make them, they were made in error and/or he had no instructions to make these admissions.

- [14] The approach for determining whether a party should be permitted to withdraw a factual admission is set out in *MEC for Economic Affairs, Environment and Tourism Eastern Cape v Kruizenga* 2010(4) SA 122 (SCA) at 126E-127B in which rule 37 was said to have been

“ . . . introduced to shorten the length of trials to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference constitute sufficient proof of those facts. The minutes of a pretrial conference may be signed either by a party or a representative. Rule 37 is thus of critical importance in the litigation process. This is why this court had held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference.”

- [15] For this reason, the leave of the court is required before admissions may be withdrawn and it is that leave, among other relief, which the defendant seeks in its conditional application. Before leave may be granted, a full explanation

of the reasons for the withdrawal to ensure its *bona fides* is required as well as a determination that there is no prejudice that arises as a result.

[16] Before dealing with this issue, the defendant has raised several objections. The defendant contends that the plaintiff, notwithstanding formal notice in terms of rule 30(2)(b) dated 13 October 2021, neglected, alternatively, refused, to withdraw its notice of objection within the prescribed 10-day period, necessitating the defendant's related rule 30 application. The defendant complains that the plaintiff's objection to the defendant's 17 September 2021 notice of its intention to amend, which was delivered on 7 October 2021, was out of time, given that the 10-day period within which to object to a notice to amend regulated by rule 28(2) expired on 1 October 2021. The defendant contends further that it is being prejudiced by this irregular step taken by the plaintiff since the matter cannot proceed to trial until the issue about the plaintiff's belated objection is resolved. The defendant contends that the correspondence exchanged by Norton Rose Fulbright with the State Attorney does not comply with the requirements of the rule that written notice of the grounds of objection must be provided, does not satisfy the requirements of the rule and that the plaintiff acknowledged this in its own correspondence wherein it indicated that a formal notice of objection would follow the letters addressed to the State Attorney.

[17] The plaintiff, for its part, contends that the rule does not require any such formality and that its written correspondence setting out the grounds for its objection to the notice of intention to amend the plea, which included its

objection on the basis that the amendments resulted in an impermissible withdrawal of admissions previously made by the defendant, satisfy the rule.

[18] The defendant contends that subrules (2) to (5) of rule 28 are relevant. These provide that:

- “(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.*
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.*
- (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.*
- (5) If no objection is delivered as contemplated in subrule (4) every party who receives notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2) effect the amendment as contemplated in subrule (7).”*

- [19] The defendant contends that rule 28(2) specifically provides that a notice must be delivered within 10 days and that delivery as defined in rule 1 “*means to serve copies on all parties and file the original with the registrar.*” The defendant contends that this definition makes clear that it is not mere correspondence that complies with the rule, since this is not generally filed in original form with the registrar.
- [20] In the plaintiff’s letter dated 23 September 2021 at paragraph 7, Norton Rose Fulbright recorded “*we trust this clarifies why we contend that your most recent notices contemplate withdrawing the admissions made in the 7 October 2019 amendment and are therefore plainly objectionable.*” Its letter a week later, on 30 September 2021 at paragraph 4.1, records that “*the plaintiff objects to the amendments in your notice to amend of 17 September 2021 because they impermissibly aim to withdraw the far-reaching admissions recorded in the 2019 notice to amend. Our notice of objection will be delivered shortly.*”
- [21] On this basis, the defendant contends that the plaintiff was aware that a formal notice, rather than correspondence, was required, and that the earlier correspondence therefore did not suffice to timeously record its objections in a form acceptable under the rule.
- [22] The plaintiff contends that its correspondence was consistent with the grounds of objection finally filed by it, albeit that it concedes that this was only done three days after the expiration of the 10-day period provided for in the rule.

[23] Given the prompt and repeated repetition of the same grounds of objection in the correspondence from the plaintiff to the defendant, I find that the plaintiff timeously objected, alternatively that its three-day delay in providing the formal notice can be condoned in an exercise of this Court's wide discretion to condone non-compliance with time limits imposed by the rule.

[24] I turn to deal with the defendant's withdrawal of admissions. I find that the defendant's response to the request for admissions put to it cannot be interpreted to mean only that it admitted that findings were made in the judgment by Bam J in the criminal trial.

24.1. Given the detailed "preface" to the specific requests for admissions, the contextualising of the admissions as relating to "*the following facts and circumstances regarding the complicity of Khubeka and Lekola in the robbery, while they were at all relevant times members of the SAPS, with Khubeka further being a member of the SAPS trio unit in Witbank*", their announced purpose to achieve a shortened trial was clearly explained. The "preface" also clarified that the admissions sought related to earlier admissions made during the evidence of Lekola and Khubeka (and the other accused). It also confirmed that a separate source of the requested admissions were the findings of fact made by Bam J.

24.2. Moreover, the formulation of the admissions themselves following the "preface" ("*does the defendant admit that...*") cannot be

understood other than as a request to admit the facts then listed, and not merely that Bam J's judgment made certain findings.

24.3. Even when the requested admissions refer to the judgment's findings, this is done in a manner that cannot be understood to avoid the merits and truth of the facts referred to, and regarding which an admission was sought.

[25] As a result, I find that the defendant did admit the facts listed in the requested admissions, and not only that they are co-extensive with the factual findings by Bam J in the criminal trial judgment. The plain language used cannot accommodate the interpretation contended for by the defendant now.

[26] Turning to the leg of the test that requires consideration of the reasonableness of the explanation given for the amendment by the defendant, I find that the explanations given by the defendant are unsatisfactory and unreasonable. Indeed, the defendant submits several explanations for its conduct – including that the admissions do not mean what the plaintiff contends that they mean, that they were made in error and that they were made without instructions. This range of explanations itself is unreasonable since they are provided in the alternative. The defendant ought to be aware of the reasons for its conduct, rather than casting about for alternative after-the-fact explanations for it. Moreover, the affidavits provided by Mr Nel make these bald assertions without sufficient factual material provided to support them as reasonable or to enable the court to

choose between them so as to identify the actual reasonable explanation relied upon by the defendant.

[27] Finally, the manifest prejudice to the future conduct of the matter if the trial becomes protracted and the issues in dispute multiplied as a result of the amendment is clear and would be the direct and avoidable result of the withdrawal of the admissions.

[28] In light of all of this, I find that the defendant has not satisfied the test for leave to withdraw those admissions.

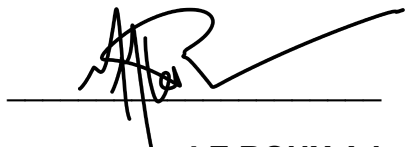
ORDER

[29] Accordingly, the following order is made:

- 29.1. Non-compliance with the time periods in rule 28 by the plaintiff in the filing of its notice of objection to the defendant's notice of intention to amend its plea is condoned;
- 29.2. Any other non-compliance with time periods in rule 30(2)(b) and (c) by the parties is condoned;
- 29.3. Defendant's notice of intention to amend dated 17 September 2021 constitutes an irregular step and is set aside;
- 29.4. Leave to amend as contemplated in the proposed new paragraphs 11.1, 16.2, 16.3 and 16.4 of the defendant's notice of intention to amend dated 17 September 2021 is denied since the amendments

impermissibly withdraw admissions made by the defendant in its notice of intention to amend of 7 October 2019 and/or paragraph 6 of the defendant's pretrial admissions of 25 September 2019; and

- 29.5. Costs of both parties' applications to be paid by the defendant on an attorney and client scale, including the costs of two counsel.



LE ROUX AJ

Acting Judge of the High Court
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 25 MARCH 2022 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 MARCH 2022.

DATE OF HEARING: 16 MARCH 2022

DATE OF JUDGMENT: 25 MARCH 2022

COUNSEL FOR THE PLAINTIFF: M KRIEGLER SC
A KOLLOORI

COUNSEL FOR THE RESPONDENT: MM VAN ZYL SC
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