



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 5335/2014

In the matter between:

MAN IN ONE CC

Applicant

and

ZYKA TRADE 100 CC

First Respondent

YC & A TOOLS CC

Second Respondent

JUDGMENT BY: MTHIMUNYE, AJ

HEARD ON: 17 FEBRUARY 2022

DELIVERED ON: 03 MARCH 2022

- [1] The applicant, Man In One CC, seeks an order in terms of Rule 28 (4) of the Uniform Rules of Court to amend its particulars of claim dated 17 September 2014. The first and second respondents, Zyka Trade 100 CC and Y.C Tools CC respectively, object to the amendment and submit that the application be dismissed with costs.

- [2] The parties hereto are involved in a protracted litigation that has spanned seven years, which litigation emanates from a contract purportedly entered into by and between the applicant and the first respondent on or about 20 March 2013. In terms of the said contract, the applicant would provide security services to the first respondent at the Theronia Waste Treatment Plant for a fixed period of three (3) years. The said contract is attached to the papers and is referred to throughout this judgement as Annexure "A". The second respondent had signed a Deed of Surety for the first respondent in respect of the said contract. Due to circumstances tagged by the first respondent as 'unforeseen', the first respondent on 01 August 2013, sent a letter to the applicant terminating the contract with immediate effect. The cancellation was not accepted by the applicant.
- [3] On 3 December 2014, the applicant issued summons against the respondents claiming payment of an amount of R1 810 000.00 based on payment it would have received from the first respondent in the period from June 2013 to August 2014 in terms of the fixed term agreement, had it not been for the alleged unlawful cancellation thereof. After the exchange of pleadings and pre-trial procedures, the trial began on 13 April 2021. During evidence in chief of Mr Mehi, the applicant's representative, the applicant requested a postponement to effect amendments to its particulars of claim, which postponement was granted.
- [4] On 28 Jul 2021 the Applicant filed a Notice of Intention to Amend its particulars of claim in terms of Rule 28 to which the Respondents objected. This respondents' objection prompted the applicant to bring this application in terms of Rule 28(4). The respondents argue that the proposed amendments, if allowed, will render the particulars of claim vague and embarrassing and consequently excipiable for alleged want of compliance with Rule 18(4) and Rule 23(1) of the Uniform Rules of Court. Although the respondents listed eleven reasons in their objection, most are collapsible under the rendering of the particulars of claim vague and embarrassing,

excipiable, and failure to disclose the parties' common intention. The respondents' objections can be summarised follows:

- (i) That what the applicant seeks is rectification of the contract and in order to succeed therewith, the applicant must prove that there was an agreement between the parties, which agreement was reduced to writing which reduction was the intention of parties; and that the written document did not reflect the common and continuing intention of the parties correctly; and there was a drafting mistake which may have been as a result of a bona fide mutual error. The respondents aver that at no stage did the first respondent enter into an agreement with the applicant on the terms as reflected in Annexure "A". They argue that the first respondent had a verbal agreement with the first respondent which was not reduced into writing and it was never the parties' intentions to reduce same to writing. They argue further that the error referred by the applicant is not *bona fide* as it (the applicant) ought to have been aware that Man in One Security Guards was not its name nor was it a registered company.
- (ii) That the applicant has failed to allude to any facts which demonstrate a triable issue foreshadowed by any evidence which it will lead to demonstrate that rectification is warranted and should be granted in the trial action of Annexure "A" to its particulars of claim.
- (iii) That granting the applicant the proposed rectification will render the applicant's particulars of claim excipiable on the basis that although the applicant seeks that the name "Zyka Trade 100, a company incorporated under the Companies Act" be amended and substituted to read "***Zyka Trade 100, a close corporation incorporated under the Close Corporation Act***",, it does not seek an amendment in the same Annexure "A" that refers to "***a Resolution having being passed by the Board of Directors of Zyka Trade 100***" which speaks to a company since close corporations do not have directors. Consequently, if the amendment is allowed, it would result in the applicant's particulars of claim being incongruent with Annexure "A".

- (iv) That the amendment sought will not cure the fact that the contract the applicant seeks to enforce is vague and unenforceable at law and that the averments made in regard thereto in the Particulars of Claim are excipiable in that, amongst others, paragraph 1 of Annexure “A” does not indicate the number of guards that were to keep watch; the amount payable, although mentioned in the Particulars of Claim, was inserted by manuscript on Annexure “A” and was not countersigned by either party as a material term of the contract; the contract fails to disclose the place where it was entered into and to indicate who was duly authorised to represent the First Defendant in concluding Annexure “A”; it also does not indicate the names of persons who concluded Annexure “A” on behalf of the first respondent. As a result, thereof, the respondents argue that the contract fails to indicate the common intentions of the parties to conclude Annexure “A”.
- (v) That the Deed of Suretyship relied on by the applicant against the second respondent refers to an undertaking by the second defendant to make payment to ‘Man in One Security “Company”. If the amendment is allowed, the applicant’s claim against the second respondent will be excipiable as there will be no cause of action made out against the second respondent.

[5] The applicant submits that the amendments do not seek to introduce a new party to the action, in other words, the parties to the action will not change; no new cause of action will be introduced, no withdrawal of any admissions is envisaged, no prejudice will be suffered by the respondents if the amendment is allowed. Further, the applicant has no *mala fides* in seeking an amendment at this late stage of the litigation.

[6] It argues that it is explicitly alleged in the envisaged paragraph that Mr Domingo Mathebula was the first respondent’s employee and that before Annexure “A” was sent to Welkom, it was signed (executed) by a duly

authorised representatives and/or employees. The lack of details in respect of the date of his employment therefore does not render the plea excipiable.

- [7] The applicant further avers that the objection relating to Mathebula having referred to the applicant as a company and not a close corporation is irrelevant and that the reasons why Mr Mehi signed the incorrectly worded agreement need not be pleaded as that is *facta probantia*; the relevant *facta probanda* have been pleaded as required by precedent.
- [8] In respect of the Deed of Surety, the applicant avers that the objection is irrelevant as no amendment is proposed in the Notice of Intention to amend paragraphs which deal with the second respondent and that in any event, the respondents in their plea admitted that a Deed of Suretyship was concluded by Mr Y C Naidoo on behalf of the second respondent; and that the respondents made the required admissions in the Rule 37(4) Pre-trial questionnaire dated 16 August 2016.
- [9] The applicant avers that most objections are *facta probantia*, which need not be pleaded and state that it is the lack of amendments that would render the already existing particulars of claim excipiable. It argues that the respondents have no legitimate grounds to object to the current proposed amendments and rectifications of Annexure "A".
- [10] The applicant further clarifies, which clarification is what I believe is what is before this court to determine, that at this stage, all it seeks is the amendment of the particulars of claim and not the rectification of Annexure "A". The issue of the rectification will be dealt with at trial when *viva voce* evidence is led. In this judgment I will then focus on whether or not the applicant can amend its particulars of claim at this stage.

[11] Rule 28 of the Uniform Rules of Court reads:

“28 Amendment of Pleadings and Documents

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

[12] One of the grounds of objection by the respondents is that that amendment will render the particulars of claim excipiable for want of compliance with Rule 23(1) which reads:

“ 23 Exceptions and Applications to Strike Out

- (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.”

[13] Although Rule 28 does not stipulate the circumstance under which an amendment should be allowed, sufficient precedent has provided guidance on how courts should approach applications to amend. It is trite that a court hearing an application for an amendment has a wide discretion, which discretion should be exercised judicially (**Embling v Two Oceans Aquarium**

CC¹). In exercising this discretion, the court should lean in favour of granting an amendment to ensure that justice is done between the parties by deciding the real issue between them (**Commercial Union Assurance v Waymark**²). The *locus classicus* on approach to amendments is **Moolman v Estate Moolman**³ where the court held:

“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 for the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed”

- [14] The respondents have argued that a party seeking an amendment at a late stage does not do so as a matter of right, but is seeking an indulgence from the court and there is no justification to do so after a seven-year delay. It has however been held that in the absence of prejudice to an opponent, an amendment may be granted at any stage before judgment, despite such delay and however careless the mistake or omission may have been (**Krogman v Van Reenen**⁴). It is also my view that although the trial had commenced, the parties are not ‘deep’ into the trial in that it was on its first day and the applicant was leading evidence in chief from its first witness when it sought a postponement for purposes hereof. In **Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another**⁵ the court held that:

“In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment”

¹ 2000 (3) SA 691 (C) 694G-H

² 1995 (2) SA 73 (TkGD) at para 77 F-I

³ 1927 CPD 27 at 29

⁴ 1926 OPD 191, 194-195

⁵ 1967 (3) SA 632 (D) at para 642H

[15] Counsel for the respondents argued that the amendment will amount to introducing a new cause of action which will be prejudicial to the respondents. I am persuaded that this has been sufficiently dispelled in the assertion that no new cause of action is being introduced by the applicant. The cause of action remains the same i.e. Annexure “A” which the respondents have pleaded to in their plea and special plea. Counsel for the respondents further argued that the respondent may have to look for witnesses that may be difficult to locate given the passage of time. I am not convinced that this is the case, but even if it were, I am of the view that it is prejudice that can be cured by a cost order and will have taken this into consideration in my cost order.

[16] Guided by the principles laid out in the cases cited above, I hold the view that granting this application will ensure a proper ventilation of the real issues between the parties. That is the primary object of amendments as articulated in **Cross v Ferreira**⁶.

[17] Consequently, I make the following **order**:

1. The Applicant is granted leave to amend its particulars of claim in accordance with its notice of intention to amend dated 17 September 2014
2. The Applicant shall deliver its amended pages within five (5) days from the date of this order.
3. Costs shall be costs in the course.

D. P. MTHIMUNYE, AJ

⁶ 1950 (30 SA 443 (CPD at para 447

Appearances:

For the Applicant:

Adv H J Benade

Instructed by Symington & De Kok

Bloemfontein

For the First Respondent:

Adv A Nankan

A B Pretorius & Partners

Bloemfontein