



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

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

Case number: 617/2018

In the matter between:

NALA LOCAL MUNICIPALITY

Applicant

And

LFC MEULE (PTY) LTD

Respondent

IN RE:

NALA LOCAL MUNICIPALITY

Plaintiff

and

LFC MEULE (PTY) LTD

Defendant

HEARD ON:

18 NOVEMBER 2021

JUDGMENT

DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 March 2022.

- [1] The parties are litigants in a pending trial which arose from an action instituted by the applicant against the respondent for payment of an amount of R11 780 300.77. The amount claimed is in relation to electricity charges incurred by the respondent as a result of an illegal electricity connection to the applicant's electrical network.
- [2] For the sake of convenience I refer to the parties as cited in the action, plaintiff and defendant respectively.
- [3] The trial served before me on 11, 12 and 14 August 2020. After the plaintiff led the evidence of Mr Gabriel Jacobus Rossouw ("Rossouw") the parties agreed to stay the trial pending an application for the amendment of the plaintiff's particulars of claim.
- [4] The plaintiff is a municipality and a distributor of electricity in the area of the defendant's business premises. It is the plaintiff's case that on 23 February 2016 the parties¹ concluded an oral agreement in terms of which the defendant admitted to have unlawfully connected and consumed electricity from the plaintiff's electrical network since 2015 and its liability to pay for those charges. The defendant failed to make the payment as agreed with the result that the plaintiff issued a summons. In the particulars of claim it is alleged that the average electrical consumption during the three month period after the installation of the electrical meter shall be utilised as the basis for the calculation of the unlawful usage² and that the defendant undertook to compensate the plaintiff for the unlawful electricity consumed for a three year period ending on 19 October 2016³ while in his testimony, Rossouw said the highest electrical consumption over a period of three months will serve as the basis for the calculation of the unlawful usage and that the period for which the defendant shall compensate the plaintiff for the unlawful electricity usage

¹ The plaintiff was represented by Messrs Chris Mekomela, Boelie Bothma and Mr Koos Rossouw. Mr Kobus van

der Linde represented the defendant.

² Paragraph 3.2.5 of the plaintiff's particulars of claim.

³ Paragraph 3.2.6 of the plaintiff's particulars of claim.

shall be calculated for a three year period prior to the installation of the electricity meter.

- [5] The plaintiff submits that an amendment of the aforesaid plaintiff's particulars of claim including a consequential adjustment of the claimed amount to an amount of R12 628 440.88 is necessary to align the particulars of claim with Rossouw's evidence.
- [6] Counsel for the plaintiff argues that the defendant will not be prejudiced by the amendment as in its Plea, the existence of the agreement between the parties is disputed and Rossouw has already been vigorously cross-examined on all the aspects pertaining to the sought amendment.
- [7] The application is opposed by the defendant on lengthy grounds which are essentially that:
 - 7.1. The notice to amend was delivered at a late stage of the proceedings after the trial had run for three days;
 - 7.2. The notice to amend was delivered after Rossouw had completed his testimony in which he contradicted himself, the pleadings and the letter that the plaintiff had addressed to the defendant referring to the terms of the agreement;
 - 7.3. The new issues raised in the notice of amendment do not have a proper foundation nor constitute a triable issue in that Rossouw probably altered his version when he testified and this is based on his contradictory testimony despite the fact that had consulted with the plaintiff's attorneys before trial and, the notice to amend was not filed before the trial commenced and there was also no explanation why the plaintiff failed to do so;
 - 7.4. It is also the defendant's case that if the amendment is granted the defendant will be prejudiced as Rossouw has already completed his testimony therefore the defendant will not be able to cross-examine

him regarding the proposed new issues and the reasons why such issues were not raised in the particulars of claim.

- [8] The defendant's objection to the lateness of the notice of the amendment is meritless. It is trite that a delay in seeking an amendment is not on its own a sufficient ground for the refusal of an amendment. Pleadings can be amended at any stage of the proceedings before judgment unless the amendment will cause prejudice to the other party which prejudice cannot be alleviated by an appropriate costs order.⁴ In this matter, it is not the defendant's case that it is prejudiced by the late notice of amendment and that such prejudice cannot be cured by a cost order.
- [9] Similarly, the fact that the amendment is sought after a witness had completed its testimony and even tendered contradictory evidence is not, in my view, a basis upon which leave to amend should be refused. As correctly argued by counsel for the plaintiff, evidence is evaluated at the end of the trial after the parties had closed their respective cases.
- [10] There is also no merit to the defendant's contention that the plaintiff has failed to provide an explanation why the notice to amend was not filed before trial. On the papers,⁵ it is clear that the notice of amendment was initiated by Rossouw's testimony and it is intended to align the pleadings with his testimony.
- [11] As regards prejudice, the fact that the defendant would not be able to cross-examine Rossouw regarding the proposed new issues does not establish prejudice in the context of this matter. I'm in agreement with counsel for the plaintiff that Rossouw was cross-examined extensively with regard to the alleged agreement, the terms thereof and the discrepancies in his evidence and between his evidence and the pleadings.

⁴ *Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* **1967(3) SA 632** (D) at 639.

⁵ Paragraph 6.3 to 6.6 and 7 at 7.1 to 7.5. of the plaintiff's founding affidavit.

[12] Taking into consideration that the defendant has disputed the contract in *toto* it cannot be said that the amendment would constitute new facts to the extent that the defendant cannot be put back to the same position it was before the pleadings were amended.

[13] In conclusion, having regard to the available facts I'm not persuaded that the plaintiff's amendment is motivated by malice or that the defendant will be prejudiced thereby. I'm of the view that it will be in the interests of justice and also of the parties that the sought amendment is granted to enable a proper ventilation of the dispute between the parties.⁶

[14] There was no basis for objecting to the amendment, the defendant should therefore bear the costs herein.

[15] In the premises, I hereby make the following order:

1. Leave is granted to the plaintiff to amend its particulars of claim in terms of the notice dated 26 March 2012.
2. The defendant shall pay the costs of this application.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Adv. PJJ Zietsman SC

Honey Attorneys

BLOEMFONTEIN

Counsel on behalf Respondent:

Instructed by:

Adv. DJ van der Walt SC

Symington & De Kok

BLOEMFONTEIN

⁶ *Cross v Ferreira* **1950(3) SA** 443 (CPD) at 447.

