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

CASE NO: 482/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

IN THE MATTER BETWEEN:

ABSA BANKLIMITED

APPLICANT

AND

DANIEL POCKLINBERG ERASMUS

RESPONDENT

JUDGMENT BY: MPAMA, AJ

DATE HEARD: 04 AUGUST 2022

DELIVERED ON: This judgment was handed electronically by circulation to

the parties' representatives by email. The date and time for hand-down is deemed to be at 12h15 on 21 October 2022.

[1] This is an application brought in terms of Rule 28 (4) of the Uniform Rules of Court. The applicant seeks leave to amend its notice of motion dated 20 October 2021 in terms of which the applicant sought the following orders:

"1.....

2.....

3. The sheriff of this Honourable Court is hereby directed to forthwith remove the vehicle from wherever it may be located and to store the same in safekeeping pending the finalisation of main action.

4.

5 "

[2] The amendment is intended to substitute the relief sought in the notice of motion with the following proposed amendments:

"1. By deleting paragraph 3 and adding the following new paragraphs after existing paragraph 2 to read as follows:

2.

3. Directing the Respondent to deliver into the possession of the sheriff the **2010 MERCEDES-BENZ ML 500 A/T** with engine number [...] and chassis number [...] (the vehicle) who shall then deliver the vehicle to the applicant.

4. Directing the Respondent to deliver into the possession of the sheriff the **2014 HONDA BRI 1.2 COMFORT 5 DR A/T** with engine number [...] and chassis number [...] ("the vehicle") who shall the deliver the vehicle to the Applicant.

5. Directing the Respondent to deliver into the possession of the sheriff the **2012 NISSAN NAVARA 3.0 DCI LE A/T 4X4 P/U** with engine number [...] and chassis number [...] ("the vehicle") who shall deliver the vehicle to the Applicant.

6. Directing the Respondent to deliver into the possession of the sheriff the **2013 JEEP GRAND CHEROKEE 3.0L V6 CRD** with engine number [...] and chassis number [...]

("the vehicle") who shall deliver the vehicle to the Applicant.

7. In the event of the Respondent failing to comply with the contents of paragraph 3 to 6 above within five days of the service of this order on the Respondent's Attorneys, the sheriff is authorised and directed to take the vehicles into his possession from wherever he may find the vehicles and return the vehicles to the Applicant as aforesaid.

8. The Respondent is ordered to return the vehicles to the Applicant and the latter is ordered to forthwith commence marketing the vehicle in the open public market and dispose and/or alienate and/or sell it to the person making the highest offer thereon.

9. The proceeds of the sale of the vehicle, less all costs incurred by the Applicant from the date of receipt of the vehicle including but not limited to marketing and maintenance of it, are to be credited to the Respondent's respective accounts so as to reduce the outstanding indebtedness owed thereon, alternatively be placed in an interest - bearing trusting account administered by the firm Strauss Daly Inc."

[3] Numerous objections were raised by the respondent on his notice of objection, however I propose for the sake of convenience not to deal with the objections individually as they are correlated. The respondent's primary contention with the proposed amendments is that if the amendments are allowed, they have a potential of withdrawing or disposing of the litigation in the main action proceedings. In

addition the respondent contends that this application introduces new issues between the parties and is made with the intention to prejudice the respondent.

[4] What was once a harmonious relationship between the applicant and the respondent has turned into a chequered history. It is common cause that the applicant and the respondent entered into several instalment sale agreements and are now embroiled in a legal dispute that has been pending before this court since 2016 when the applicant instituted five action proceedings against the respondent. On the 20th October 2021, the applicant further instituted five interlocutory applications flowing from the said action proceedings. The five action proceedings and the five applications were on 17 February 2022 consolidated under case number, 482/22.

[5] Before I labour on the specific issues to be determined in this application it is necessary to set out the legal principles applicable to applications for amendments of pleadings.

[6] Amendments to pleadings are governed by Rule 28 of the Uniform Rules of Court. In terms of this rule, a party wishing to amend any pleading shall notify the other party of its intention to amend, clearly and concisely state the grounds of the proposed amendment. In the event of an objection by the other party, the court may subject to the provisions of this rule grant leave to amend any pleading at any stage before judgment.

[7] The main purpose of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.¹

[8] The general rules applicable in amendment applications are set out succinctly in **AFFORDABLE MEDICINES TRUST AND OTHERS**² as follows:

"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

¹ Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd [2004] 1 All SA 129 (SCi6.) at [133].

² 2006 (3) SA 247 (CC) at para [9].

governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *ma/a tide* (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 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."

[9] A court hearing an application for an amendment has discretion whether or not to grant it and such discretion must be exercised judicially.

[10] The purpose of the pleadings is to properly define issues in dispute between the parties. If a pleading is somehow deficient, then an amendment will generally be allowed subject to certain requirements.

[11] An amendment will not be granted if there will be prejudice to the other party which cannot be cured by an order for costs or postponement.

[12] In **MOOLMAN v ESTATE MOOLMAN**³ it was said:

"the practice rule adopted seems to be that amendments will always be allowed unless the application to amend is malafide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to amend were filed."

[13] The onus rests upon the applicant seeking an amendment to show that the other party will not be prejudiced by the amendments.

³ 1927 CPD 27 at [29).

[14] The applicant on its heads of arguments contended that "this application is not malafide and it has not changed and essentially, the anticipated amendment, if granted, constitutes new strategy and does not seek to make up a new case....." It was argued by the applicant that this application will be "beneficial" to the respondent as it will save him from incurring costs that flow from the preservation orders as with the proposed amendments; the intention is to apply to court for disposal of the vehicles in question. The applicant referred to respondent's objection as objection "without merit" and submitted that the court should grant the applicant leave to amend its notice of motion.

[15] What is sought to be achieved by the proposed amendments, if this application succeeds is to substitute a relief sought for a preservation order regards the vehicles forming the gist of the action proceedings with a relief to have the vehicles handed over to the applicant and to be disposed of by the applicant as proposed in amendments.

[16] The court must determine whether if leave is granted to amend, the proposed amendments are not malafide, they are in the interest of justice and not prejudicial to the respondent. It must in addition consider if allowing the amendments will afford the parties an opportunity to properly ventilate their dispute.

[17] The applicant has labelled the respondent's objections as opposition "*without merit*". The applicant lodged this application by way of a notice of motion supported by an affidavit (though it is not mandatory to file the application with an affidavit). However, the aforesaid affidavit is silent on why these objections are labelled as being "without merit." Even in court there was no basis laid for referring to these objections as being without merit.

[18] The querter for an amendment bears an onus to show that there will be no prejudice to the other party if the amendment sought is granted and that the application is not mala tide. During arguments, the applicant was invited to address court on whether the respondent will not be prejudiced by the proposed amendments. In response the applicant was grasping at straws, making reference to issues that bear little or no relevance to the principle of prejudice.

[19] It is the respondent's contention that should this application succeeds, the applicant will be placed in a position where it can choose to abandon or withdraw the action proceedings as the proposed amendments have a potential of disposing of the main action. There is merit in this argument; the proposed amendments have a potential of extinguishing issues between the parties without affording them an opportunity to properly ventilate their dispute. Should this application be successful, the applicant will now be armed with a relief to dispose of the vehicles, whereas the same vehicles are a subject of the main proceedings still pending before this court. In a way, with these proposed amendments the applicant is trying to dispose of the issues between it and the respondent using a "backdoor approach".

[20] It was argued by the respondent that by bringing this application under this case number (482/2022), the consolidated case, the applicant creates an impression that the interlocutory applications (forming the subject of this application) and the action proceedings have been" conflated into a new singular and hybrid quasi action/application". Reference was made to the decision of **SOLAR BASIC INDUSTRIES INC v ADVANCE TRANSFORMER CO OF SA (PTY) LTD**⁴ where it was said "action and an application cannot be consolidated. I align myself with these sentiments, action proceedings cannot be consolidated with application proceedings. However, I have had sight of the consolidation order granted by my sister, Judge Opperman. My interpretation of the order is that five action proceedings were consolidated together and five interlocutory applications consolidated together. These proceedings were then placed under the same case number, 482/2022 for the purposes of being heard simultaneously. In the event that my own interpretation of this order is incorrect, I find that this issue is immaterial as it is clear to everyone which pleadings the applicant seeks leave to amend.

[21] The application for leave to amend shall be successful only if the court is satisfied that there will be no prejudice to the other party, it is in the interest of justice and is made in good faith. This application does not surpass these requirements and should fail.

[22] In the circumstances, I make the following order:

22.1 The application is dismissed with costs.

L. MPAMA, AJ

On behalf of the Applicant:

Instructed by:

Ms Bester

Strauss Daly Inc.

Bloemfontein

On behalf of the Respondent:

Instructed by:

Adv. C Snyman

JG Kriek & Cloete Attorneys

Bloemfontein

⁴ 2006(3) SA 247 (CC) in para [9].