

LIB

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 58679/2018

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

27-6-2019 *[Signature]*
DATE SIGNATURE

In the matter between:

UMBHABA ESTATES (PTY) LTD

APPLICANT

AND

THE MINISTER OF POLICE

FIRST RESPONDENT

FOOD AND ALLIED WORKERS' UNION

SECOND RESPONENT

JUDGMENT

TOLMAY J:

- [1] The Applicant (Umbhaba) applied in terms of Rule 28 for an amendment of its particulars of claim. The amendment is opposed by the second defendant, the Food and Allied Workers Union (FAWU). In the pending action, Umbhaba as Plaintiff has claimed damages from the first defendant, the Minister of Police (the Minister) and FAWU, arising from protest action at the plaintiff's farming operations in Mpumalanga.
- [2] The damages claimed against the Minister relates to the inaction of the Police to take steps to prevent damage to the Applicant's farming operations during a four month period of protests and riots. As far as FAWU is concerned, these damages are claimed in delict, for both direct and consequential loss arising from the protest action. As an alternative, liability is claimed in terms of Sec 11(3) of the Regulation of Gatherings Act, 2005.
- [3] In the particulars of claim as presently formulated, Umbhaba sues the Defendants for damages arising out of industrial/strike action. In the amendment Umbhaba seeks to substitute the word "industrial/strike action" with "protest action" and the word "strikers" with the word "protestors".
- [4] Umbhaba stated in the papers that the reference to strike action in the original particulars of claim was never meant to refer to conduct

specifically referred to in the Labour Relations Act 66 of 1995 (LRA). The incorrect reference came to Umbhaba's attention when FAWU filed a notice of exception to the particulars of claim. The gist of the exception was that damages caused by strike action falls within the exclusive jurisdiction of the Labour Court.

- [5] As a result of the aforesaid exception Umbhaba's legal representatives prepared a notice of amendment. In terms of the notice of amendment all references to "strike action" were deleted and replaced with "protest action" and all references to "strikers" were replaced with "protestors".
- [6] FAWU objected to the notice of intention to amend on three grounds. The first was that Umbhaba seeks to withdraw an admission. The admission FAWU alleged was that the conduct in question arose out of and was in furtherance of strike actions.
- [7] The second objection was that Umbhaba's proposed amendment does not cure FAWU's objection to the jurisdiction of this Court. It was stated that, if the amendment is granted, it will have the consequence that this issue cannot be determined at the exception stage, but only by way of a special plea, after the leading of evidence.
- [8] The third objection was that it was allegedly not clear whether Umbhaba's particulars of claim are based in delict or whether it arose

out of riot damage. This objection was not proceeded with at the hearing.

- [9] It is trite that a Court will take a benevolent approach to a proposed amendment and will be inclined to grant it, if it ensures the proper ventilation of all material issues at trial, as was stated in **Randa v Radopile Projects CC**¹:

*"Almost invariably, the decision by the courts to allow an amendment is made by reference to the statement of the rule or practice as 'always' to allow an amendment unless the party applying for it has acted 'mala fide' or the 'injustice' to the other side 'cannot be compensated by costs' or words to similar effect..."*²

- [10] The importance of creating an opportunity for the proper ventilation of disputes in Court was stated as follows in **Four Tower Investment (Pty) Limited vs Andre's Motors**:³

*"The function of a court is, of course, to resolve disputes between litigating parties, and justice can only be done if the real issues are defined in the pleadings and ventilated in court. For this reason it is by now well established that an application for amendment will always be allowed unless it is made mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement."*⁴

¹ 2012(6) SA 126 (Randa)

² Randa, par 12

³ 2001(4) SA 211 (W) at par [10] (Four Tower)

⁴ Four Tower. Par 15

[11] From the aforesaid three principles crystalized, regarding the approach that should be followed when an amendment is sought:

- a) a Court will generally grant an amendment especially if it ensures a proper ventilation of all the material issues at trial;
- b) it will not be granted if it does not introduce or relate to a triable issue; and
- c) it will be granted unless the other party suffers prejudice of a nature which cannot be cured by means of an appropriate costs order.

[12] The first objection to the objection is formulated by FAWU as follows:

- "1. The plaintiff's intended amendment seeks to delete all references to 'strike action' where presently pleaded and replace them with the words 'protest action'.*
- 2. This is in response to the second defendant's exception to the jurisdiction of this Court because the plaintiff's claim is one for loss or damages arising out of a strike and conduct in furtherance of such strike, which section 68(1)(9) of the Labour Relations Act 66 of 1995 requires to be adjudicated by the Labour Court;*
- 3. The plaintiff accordingly seeks to withdraw an admission that the conduct in question arose out of and was in furtherance of strike action and instead seeks to cloak it with a euphemistic phrase that does not accurately reflect the factual reality."*

[13] An allegation in a particular of claim does not constitute an admission. No plea has been filed and it cannot be said that an admission of the allegation in the particulars of claim has been made. It is trite that an admission can only be withdrawn with leave of the Court.⁵

[14] It seems that the main reason for the objection is that the allegation as amended differs according to FAWU from the "*factual reality*". However the factual correctness will have to be established at trial. Whether the conduct complained of constitutes strike action or protest action is a factual issue on which the parties ostensibly have different views. This makes it a matter for trial and the amendment should consequently be granted to facilitate a trial on this issue. The amendment of pleadings is not a stage at which it is permissible to establish the correctness of factual averments. That is what the trial is designed for. This ground of objection is therefore without merit.

[15] Regarding the objection that the amendment does not remove the objection to the jurisdiction of the High Court FAWU states the following:

16.1 *"The plaintiff's proposed amendment does not cure the second defendant's objection to the jurisdiction of this Court. If the amendment is allowed however, it will have the consequence that this cannot be determined at the exception stage, but only*

⁵ President Versekeringsmaatskappy v Moodley 1964(4) SA 109 (T) at p 110

by way of special plea, after leading of evidence. This will simply lead to an escalation in costs."

[16] The granting of the amendment, by FAWU's own admission, will provide it with an opportunity to still challenge the jurisdiction of the Court by means of a special plea. It is therefore not prejudiced in a manner that cannot be cured by means of an appropriate order for costs.

[17] FAWU accepts that the amendment will be destructive of its exception. That too does not constitute the type of prejudice that will preclude an amendment from being granted. Insofar as the exception challenges jurisdiction, that challenge will still be available to FAWU at the trial by means of a special plea, but only after the leading of evidence. There is therefore no basis in fact or in law upon which the amendment should not be granted.

[18] There is also another factor and this is that FAWU is not the only Defendant. Umbhaba also claims damages from the Minister. Considerations of convenience and effective administration of justice require that actions against multiple parties be heard in a single process, rather than piecemeal. The gist of FAWU's objection is that the Labour Court would have jurisdiction over the case against it. It however needs to be noted that the Labour Court does not have jurisdiction over the claim against the Minister. Due to the interrelated

conduct of the protestors, and the response, or lack thereof on the part of the Minister, as set out in the particulars of claim, it is necessary that the action against both the Minister and FAWU be heard in the same proceedings.

- [19] In the light of the aforesaid there is no merit in the objections raised and the amendment should be granted.

COSTS

- [20] A party seeking to amend its papers is seeking an indulgence from the Court and should ordinarily bear the costs of the application.

- [21] It was argued on behalf of Umbhaba that the opposition in this matter was unreasonable and that FAWU should be ordered to pay the costs. I am of the view that the opposition was indeed unreasonable and that FAWU should pay the costs. Both parties were represented by senior counsel, Umbhaba was also represented by junior counsel, but it was indicated that costs for two counsel will not be sought.

- [22] The following order is made:

21.1 The Plaintiff is granted leave to amend its particulars of claim in accordance with its notice of intention to amend served on 26 October 2018.

21.2 Second Defendant is ordered to pay Plaintiff's costs of this application, which costs will include the costs of senior counsel.

A handwritten signature in cursive script, appearing to read 'R G Tolmay', is written over a horizontal line.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 11 JUNE 2019

DATE OF JUDGMENT: 27 JUNE 2019

ATTORNEY FOR PLAINTIFF: ADAMS AND ADAMS

ADVOCATE FOR PLAINTIFF: ADV E C LABUSCHAGNE (SC)
ADV S G MARITZ

ATTORNEY FOR FIRST

DEFENDANT: STATE ATTORNEY

ADVOCATE FOR FIRST

DEFENDANT: NOT REPRESENTED

ATTORNEY FOR SECOND

DEFENDANT: CHEADLE THOMPSON & HAYSIM INC

ADVOCATE FOR DEFENDANT: ADV T M G EUIJEN (SC)