



**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: 2359/2015

In the matter between:

**MUTUAL & FEDERAL INSURANCE
COMPANY (PTY) LTD**

Applicant

and

HENTIQ 1353 (PTY) LTD

Respondent

HEARD ON: 24 NOVEMBER 2016

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 15 DECEMBER 2016

A INTRODUCTION AND BACKGROUND FACTS:

[1] These are interlocutory proceedings. The factual matrix that gave rise to the present application are briefly as follows:

- [2] The applicant (Defendant in the main action), seek leave to amend its plea in terms of the Provisions of Rule 28(1) of the Uniform Rule of Court. The plea sought to be amended is dated 24th August 2015, in accordance with its notice of intention to amend dated 29 June 2016.
- [3] Upon delivery of the relevant Notice in terms of the Uniform Rule of Court 28(1), the Respondent (Plaintiff in the main action), served a Notice of Objection to the proposed amendment in term of the Uniform Court Rule 28(3), contending that firstly the proposed amendment is at a late stage of litigation and is without a substantive explanation giving grounds for the delay. Furthermore, that no sufficient reasons have been advanced by the Applicant of the withdrawal of the admissions it made in its plea at this late stage.
- [4] During 2015 the Applicant and Respondent concluded a written Short Term Insurance contract in terms whereof, several items being 32 mechanical horses/trucks and trailers were insured.
- [5] The description of the insured items, their registration numbers, the sums insured, the excesses to be paid and the premiums, were stipulated on an annexure to the insurance schedule.
- [6] On 24th January 2015 an accident occurred on N1 national road near Winburg, Free State Province, in which a mechanical horse with registration number DGN 898 FS, engine/VIN number 93SRUAPT47R446623, the first trailer with registration number

DVM 907 FS and the second trailer with registration number DVM 905 FS were damaged.

- [7] The Respondent issued summons for the damages to the items totalling R572 310.56, in terms of its insurance contract with the Applicant on 20 May 2015. The Applicant repudiated the claim in its plea filed on 24th August 2015 and where in, it admitted that the trailers were insured.
- [8] Subsequent thereto, a consultation took place between the Applicants and its legal advisors at Bedfordview, Germiston, Gauteng on 21st June 2016. At this consultation, it was discovered by the Applicant that as a matter of fact, the two trailers were not insured by the Applicant at the time of the accident, in as far as they did not appear on the list of the insured items to the schedule.
- [9] After making this discovery, the Applicant filed a Rule 28 Notice of its intention to withdraw the admission it made in its plea. On 5th July 2016, the Respondent filed a Rule 28(3) Notice of Objection to the amendments. The Applicant proceeded to file an Application for Leave to Amend.

C. ISSUES FOR DETERMINATION

- [10] In the first instance, the crisp question that calls for consideration is whether the Applicant may withdraw an admission in its plea, by amending the plea. To determine if a litigant is allowed to

amend a pleading, the first question is whether a satisfactory explanation has been proffered to the Court, why a wrong admission in a pleading was made. If the question is answered in the affirmative, it follows therefore that the amendment ought to be allowed by the Court. In the second instance, the issue to consider is the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will, inevitably cause prejudice or injustice to the other party, which cannot be offset by a special order of cost, then the Application to Amend ought to be refused.

D. APPLICABLE LEGAL PRINCIPLES

- [11] In deciding whether to grant or refuse an application for amendment, the court exercises a discretion and, in doing so, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issues between them.¹
- [12] An amendment will usually be allowed unless the amendment is made mala fide or would cause prejudice to the other party which cannot be compensated by a costs order or some other suitable order such as a postponement.²
- [13] An amendment must raise a triable issue – ie, it must be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the

¹ Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (N), Kasper v André Kemp Boerdery CC 2012 (3) SA 20 (WCC), Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TKGD)

² Imperial Bank Limited v Hendrick Barnard NO (349/12) (2013 ZASCA 42 (28 March 2013) at (8)

issue is viable and relevant or will probably be covered by the available evidence.³

[14] There will not be prejudice if the parties can be put back for the purpose of justice in the same position as they were when the pleading, which is sought to be amended, was originally filed.⁴ The onus rests upon the applicant seeking the amendment to show that the other party will not be prejudice by the amendment.⁵

[15] An amendment will be granted (even at a late stage) if it leads to a proper ventilation of the dispute and if it does not occasion an injustice to the opposing party which cannot be remedied by an appropriate costs order.⁶

[16] An amendment which has the effect of withdrawing an admission of fact is permissible, but not readily granted⁷. The applicant must under oath, provide a reasonable explanation both of the circumstances under which the admission was made and the reasons why it is sought to withdraw it.⁸

³ Caxton Ltd v Reeve Forman (Pty) Ltd supra; Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd (2002) 2 All SA 525 (A) 537,

⁴ Moolman v Estate Moolman 1927 CPD 27; Euroshipping Corp of Monrovia v Minister of Agriculture supra

⁵ Union Bank of SA Ltd v Woolf 1939 WLD 222

⁶ Kasper v André Kemp Boerdery CC 2012 (3) SA 20 (WCC)

⁷ Cordier v Cordier 1984 (4) SA 524 (C); Mabaso v Minister of Police 1980 (4) SA 319 (W)

⁸ Western Bank Ltd v Wood 1969 (4) SA 131 (D); Dladla v President Insurance Co Ltd 1982 (3) SA 198 (W)

D. SUBMISSIONS ON BEHALF OF THE APPLICANT

[17] The affidavit deposed by the legal representative on behalf of the applicant, Mr Angelo Raynard, sets out the circumstances under which the admission was made as well as the reasons why it should be withdrawn. Those circumstances are recorded as follows in his affidavit at paragraph 5.3 – 5.7:

- “5.3 The fact came to the notice of the Applicant’s legal team during a consultation at Bedfordview, GERMISTON on **21 June 2016**. It was not previously known to me, nor the Applicant’s current advocate. I was simply under the impression that the trailers were insured. During the aforesaid consultation I saw that they were not insured as they do not appear on the list of insured items to the Schedule.
- 5.4 As can be seen from the current Plea it was drafted and settled by the Late Advocate FWA Danzfuss SC. I cannot talk on his behalf but apparently he must have assumed that the two trailers were indeed also insured. But that was wrong. Why he was under that assumption, I cannot explain.
- 5.5 But the fact is that if those two trailers were insured, they would have been described as insured on the list of the schedule to the insurance contract MER0001775. They are not. The aforesaid International mechanical horse appears on the schedule. I attach that list of insured items (under MER0001775) as Annexure “**M1**” hereto.
- 5.6 In any event, the Respondent (as Plaintiff) and its insurance broker (Piet Bester Makelaars of WESSELSBRON) should all the time have known that the trailers were indeed actually not insured with the Applicant. I attach as Annexure “**M2**” an email by this broker dated **6 May 2015** which proves that they knew before summons already that these trailers do not appear on the list to the Schedule.

5.7 Under the circumstances, leave is sought to effect the aforesaid amendment.”

D. SUBMISSIONS ON BEHALF OF THE RESPONDENT:

[18] Counsel for the Respondent Mr Van Aswegen, argued that the submission that applicant seeks to withdraw, is a submission of fact which is fundamental to the applicants claim against the respondent. He contended that by simply stating that both former counsel of the applicant, the late Adv Danzfuss and the attorneys Mr Raynard, made incorrect assumption, could not in itself be a sufficient explanation, without applicant providing a factual bedrock thereto.

[19] He submitted further that, beyond the explanation of the legal representatives, the applicant ought to have also proffered a further explanation on its part. For these reasons, he submitted that the application be refused.

F. ANALYSIS

[20] Turning to the contentious issues in the present application, one needs to examine closely if the applicant proffered a satisfactory explanation on the circumstances in which the admission was made as well as the reasons for seeking the withdrawal.

[21] In submission, Adv Benade posed a rhetorical question:

“Why don’t they want to hear the truth Why are they afraid to allow the amendment...”

- [22] There is merit in the question he posed because the court can grant an amendment of a pleading, even at a late stage, if it leads to a proper ventilation of a dispute and if it does not occasion an injustice to the opposing party which cannot be remedied by an appropriate cost order.
- [23] I am of the opinion that the applicant has indeed provided a satisfactory explanation of why the admission was made in the first place and why it needs to be withdrawn. There is nothing sinister about the explanation given by the legal representative on behalf of the applicant. In my view, it is bona fide to justify the discretion by this court to allow the amendment of applicant’s plea.

G. RELIEF

- [24] In light of the afore going considerations, I come to the conclusion that there exist no real impediment why an amendment should not be permitted in these circumstances.

24.1 The applicant’s (defendant in the main action) are hereby granted leave to amend the plea dated 24th August 2015, in the notice in terms of Rule 28(1) of the Uniform Rules of Court.

24.2 The applicants are ordered to deliver and file their amended pages within 10 (TEN) days from the granting of this order.

24.3 The cost of application are costs in the cause.

I. R.O. BOKWA, AJ

On behalf of applicant: Adv. Benade
Instructed by: Advocates Chambers
Bloemfontein

On behalf of respondent: Adv. Van Aswegan
Instructed by: Advocates Chambers
Bloemfontein