

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4702/2013

In the matter between:

THE APOSTOLIC FAITH MISSION OF
SOUTH AFRICA
TEBEJANE ALFRED MLANGENI

First Applicant
Second Applicant

and

A. A. MOLOI

First Respondent

M E MOLOI

Second Respondent

T A CHARLIE

Third Respondent

P P LESIA

Fourth Respondent

D J MATELA

Fifth Respondent

I V Y MOTSOENENG

Sixth Respondent

G T MOTSOENENG

Seventh Respondent

P M HLALELE

Eighth Respondent

B M SELEVU

Ninth Respondent

Me NKWANE

Tenth Respondent

S NKWANE

Eleventh Respondent

B RADEBE

Twelve Respondent

N E MALKOANE

Thirteenth Respondent

T SETLABA

Fourteenth Respondent

L S LENYEHELO

Fifteen Respondent

JUDGMENT BY: MBHELE, AJ

HEARD ON: 19 JUNE 2014

DELIVERED ON: 11 SEPTEMBER 2014

[1] This is an application in terms of Rule 28(4) for an amendment of Notice of Motion filed on the 15th November 2013. A rule *nisi* was granted at the instance of the first applicant on the 16th November 2013 with a return date of the 30th January 2014.

[2] The interim order required of the respondent to show cause why the following order should not be made final:

2.1 That the respondents and/or anyone under their instruction be interdicted and restrained from disturbing, alternatively, disrupting in any manner whatsoever Sundays' church service of the applicant.

2.2 That the respondent and/or anyone under their instruction be interdicted and restrained from threatening in any manner board members of the applicant.

[3] Paragraph 2.1 and 2.2 above shall operate as interim interdicts with immediate effect.

- [4] The respondents, jointly and severally, the one paying the others to be absolved to pay the costs thereof.

Background

- [5] On 30 January 2014 the 2014, the matter was postponed to 6 March 2014. On 6 March the application was postponed to 13 March. On 13 March 2014, second applicant was granted leave to intervene in the application and the rule *nisi* was extended until 15 May 2014.

On the 28th March 2014 the second applicant filed a notice to amend the notice of motion.

On the 23rd April 2014 the first applicant withdrew its application against all the respondents and the respondents delivered their answering papers in opposition of the second applicants' application in terms of rule 28.

- [6] The applicant seeks to amend the Notice of Motion in the following manner:

By deleting the whole of paragraph 3 and replacing it with the following:

- (3) That pending the finalisation of an investigation into acts of misconduct by the respondents or possible institution of

disciplinary steps against the respondents by the disciplinary body of The Apostolic Faith Mission of South Africa, alternatively, the holding of an elective General Meeting (AGM) whichever occurs first, that prayers 2.1 and 2.2 shall operate as interim interdicts with immediate effect

The respondents filed a notice of objection on 22 April 2014 on *inter alia* the following basis:

- (i) Paragraph 3 is already an interim order and the proposed amendment seeks to vary an existing order.
- (ii) The proposed amendment seeks to extend the life span of the interim order beyond the extended return day of the rule *nisi*.
- (iii) The proposed amendment introduces a new fact and matter which was not raised in the application by the first applicant.

Rule *nisi*

- [7] I requested parties to address me further on a Rule *nisi* that seemed to have lapsed.
- [8] There was an agreement between the parties that the rule *nisi* be regarded as having not lapsed.

Amendment

- [9] Rule 28 of the uniform rules regulates the procedure to be followed for the amendment of a pleading.

In **Moolman v Estate Moolman and Another** 1927 CPD 27 the court held that

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

- [10] In **Rosenberg v Bitcom** 1935 WLD 115 on 117 Greenberg J said:

“Although it has been stated that the granting of an amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.”

- [11] In **Whittaker v Roos and Another** 1911 TPD 1092 at 1102 Wessels J said:

“This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not the game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.”

In **Rishton v Rishton** 1912 TPD 718 at 719 it was said:

“There is, however, another principle in our practice, and that is to allow a party, up to the very last stage of the case, the full right to amend, so that the Court may not be deceived or judgment may not be wrongly given against the party, and also to enable the Court to know exactly the nature of the dispute and the facts of the dispute in a particular case.”

The observation in all cases *supra* is that amendment will only

be refused if allowing it would cause prejudice to the other party. The attitude of the Courts is not to close the door in the face of a litigant whose additional information may assist the court to come to a just decision.

- [12] In **Morgan & Ramsay v Cornelius & Hollis** 1910 NPD at 262. Dobe Wilson J said at 265:

“In my opinion the court ought to allow all such amendments as may be necessary for the purpose of determining in an existing action or proceedings the real action between the parties. Personally I see no objection to a new ground of action on defence being stated by way of amendment, nor should I in all circumstances object to amendment merely because it goes the length of changing the character of the action, where that is necessary to determine the real question between the parties.”

The second applicant, when seeking leave to intervene in this matter, told the court that the relief he is seeking would be substantially on the same facts as stated by the first applicant who has since withdrawn its application against the respondents.

- [13] Mr Tshabalala, on behalf of the respondents, argued that the amendment of a notice of motion when a rule *nisi* has been granted is bad in law as it will have the effect of amending the court order itself.

An interim order is a court issued proclamation that is meant to be effective only until a court has had a chance to hear a complete case and has entered a final order.

[14] The proposed amendment does not seek to strike out the existing interim order nor does it alter the same in the absence of a specific order directed at the interim order. The Notice of Motion as amended will be adjudicated upon by the court for the purpose of a final order. Allowing the amendment will in my view not affect the existing interim order.

[15] In **Beng v Gossyn** 1965 (3) SA 702 the court granted applicant leave to supplement his petition where the cause of action upon which the applicant founded his case was not properly made out in his original affidavit but there was an indication of these allegations upon which reliance was made in his replying affidavit, which discloses a new cause of action.

[16] Hofmeyer J said:

“Na my oordeel is die huidige in ieder geval ‘n tipe saak waar die aansoek toegestaan moet word: Hoewel die oorsaak van aksie waarop die applikant wou steun nie behoorlik uitgemaak in in die oorspronklike eedsverklaring nie, is daar tog ‘n aanduiding van die bewerings waarop nou gesteun word.”

[17] The argument by the respondents cannot hold centre in the

face of the legal principles set out above and provisions of rule 28 of the Uniform Rules.

[18] Church is a place of worship where the highest level of order and discipline must be maintained in order to protect the members' right to freedom of religion.

[19] The amendment sought by the second applicant seeks to narrow down the prayers as set out in the notice of motion to a specific future event.

[20] Disruption of church services is an undesirable phenomenon at any given time. I do not see how the respondents will be prejudiced by the proposed amendment.

ORDER:

[21] In the circumstances I give the following order:

1. The second applicant is granted leave to amend the notice of motion as per its notice in terms of Rule 28(4) filed on 28 March 2014.
2. Each party to pay their own costs.

N. M. MBHELE, AJ

On behalf of the applicant:

Adv. Greyling
Instructed by:
Duncan Motaung Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Adv. Tshabalala
Instructed by:
Hill, McHardy & Herbst
BLOEMFONTEIN

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