

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:3247/2020

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

Signature

Date: 31st JULY 2024

In the matter between:

NATIONAL COMMUNITY RADIO FORUM

APPLICANT

And

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF EDUCATION, LIMPOPO

1ST RESPONDENT

N P MASETLA

2ND RESPONDENT

 JUDGMENT

MONENE AJ

[1] Them in the morality and religious realm that hold up erring as human, hold out further that continuing in error is diabolical and go on to call for them that erred to cure their errors or sins, be it per confessionals and/or per prayer and/or per restitution of them that fell victim to the errors.

[2] In the legal drafting minefield of preparing pleadings for litigation, Uniform rule 28 is in general a medium through which errors per commission or omission are by consent between litigants or, subject to the prevention of unmitigable prejudice, cured by courts.

[3] How far in correcting a drafting sin an amendment of pleadings can go and whether the respondents are prejudiced by an intended amendment mooted by the applicant in *casu* are the key questions for determination in this interlocutory application where, post the institution of action proceedings by the applicant as plaintiff in the main action and after the first respondent as first defendant therein had filed his plea, an amendment application is opposed.

[4] The parameters within which this application plays out up to determination are set by Uniform rule 28 which reads, in part, as follows:

“28 Amendment of Pleadings and Documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend shall furnish particulars of the amendment...

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule 3 is delivered within the period referred to in subrule 2, the party wishing to amend may, within 10 days, lodge an application for leave to amend...

(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules and 30.

(9) A party giving notice of amendment in terms of subrule 1 shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgement grant leave to amend any pleading or document on such other terms as to costs or other matter as it deems it fit.”

[5] Giving shape to the rule 28 field operation, at least in the context of this application as it stands in the papers before this court, is the apex court of this land in ***Affordable Medicines Trust and Others v Minister of Health and Others 2006(3) SA 247 (CC)*** (“***Affordable Medicines***”) which at paragraph 9 distilled the key principles attendant to granting or denying an amendment of pleadings to be the following:

“the practical rule that emerges...is that amendments will always be allowed unless the amendment is mala fide(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.”

[6] In my view, while many other courts have reflected elegantly and consistent with the Constitutional Court in *Affordable Medicines*, no further and better clarity is provided better than as per Reddi AJ who, referring approvingly to para 35 of ***Dreyer v Metsimaholo Local Municipality (5899/2017) [2021] ZAFSHC 186(23 august 2021)***, at paragraph 13 of ***Nedbank Limited v Ouderajh Haresh (Case number 11969/2015) Kwazulu-Natal Local Division, Durban (“Nedbank Limited”)*** stated as follows:

“In granting an amendment, the fundamental goal 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.’ However, as was stated in **Commercial Union Assurance Co Ltd v Waymark NO 1995(2) SA 73(Tk) at 77**, the ultimate decision of whether to grant an amendment is an issue at the discretion of a judicial officer, which discretion must be exercised wisely after deliberating on all relevant legal and factual considerations.”*

BRIEF FACTUAL BACKGROUND AND THE PARTIES’ KEY STANDPOINTS ON THE APPLICATION

[7] On the 3rd June 2020 the applicant issued combined summons against the first respondent, then as the only defendant, in the main suing the first respondent for R6 000 000.00 arising out of contract in which contract the plaintiff averred that the second respondent had, as an employee of the first respondent, represented the first respondent.

[8] The first respondent, as then the only defendant, filed a plea to the applicant’s particulars of claim which for some unfathomable reason is titled as an amended plea. The plea denied that the applicant had rendered any services pursuant to a contract between the parties as well as denying that the second respondent had any authority to bind the first respondent contractually. I hasten to state that the lack of clarity as to

whether there was an initial plea which was subsequently amended has no relevance nor bearing on the determinations to be made in this application.

[9] Realising what it considered to be a drafting and pleading error in its case, the plaintiff successfully applied for the joinder of the second respondent as a second defendant in its action. The joinder application had proceeded unopposed.

[10] After the successful joinder application, the applicant proceeded to, on the 3rd March 2023, give notice of its intention to amend its particulars of claim ostensibly occasioned by the joinder. The proposed amendment effectively amounted to redrafted particulars of claim as it was not just a few paragraphs, or few pages sought to be visited with changes.

[11] While the second respondent failed to enter an appearance to oppose the amendment much like his attitude to the earlier joinder application, the first respondent took issue with the amendment and filed, on the 6th April 2023, a notice of objection to the notice to amend in terms of rule 28(3).

[12] The applicant thereupon, in terms of rule 28(4) filed a substantive application to amend in line with its notice to amend, to which the first respondent countered with an answering affidavit in opposition.

[13] The matter then appeared before this court on special allocation for determination of the rule 28 amendment application with both parties having filed heads of argument the contents of which, like oral submissions made before me, are factored into this judgment.

The applicant's key submissions in brief

[14] As I understand the case made by the applicant before me it is the following:

14.1 It had at joinder application already informed the first respondent that the joinder would necessitate an amendment.

14.2 The amendment only related to a claim against the joined second respondent.

14.3 The original claim and the second claim against the second respondent arose from the same facts and would call for the needless and avoidable leading of the same evidence before different courts if the amendment is granted.

14.4 The amendment as proposed did not bring to bear the introduction of a new cause of action.

14.5 The amendment merely seeks to bring in the alternative claim of undue enrichment brought by the plaintiff.

14.6 The amendment will ensure that the *lis* between the parties is properly ventilated before court in a manner that ensures that all the voices are heard on the same issues.

[15] On the other hand the first respondent opposes the application on the following grounds:

15.1 That the intended amendment went beyond bringing a claim against the second respondent in that it introduced new causes of action based on new averments against the first respondent.

15.2 That the intended amendments at most are prejudicial to the first and at least could potentially be prejudicial.

[16] My reading of the *lis* before me reveals that the parties agree that the second respondent is or at least at the time of the conclusion of the contract was in the employ of the first respondent. Where they differ is whether the amendments sought to be made by the applicant are all arising from or occasioned by the joinder of the second respondent as second defendant in the action, whether the amendments attach only to the second respondent, whether the amendments are or have in them new factual averments which predicate new causes of action against the first respondent, whether the amendments are prejudicial to the first respondent and whether such prejudice, if it obtains, is capable of being mitigated with a costs order or any other order and whether the amendment being granted or refused will lead to an injustice.

[17] I do not understand Uniform rule 28 to be providing that amendments need not introduce new causes of action, nor do I as matter of fact and law, understand the rule to in anyway be circumscribing the extent to which an amendment can materially go.

If it was so the rule would be explicit in that regard and unequivocal as to what types of amendments are allowed and which ones are outlawed. I understand the rule from both its text and from the ***Affordable Medicines*** and ***Nedbank Limited*** exposition thereof to be an enabling rule generally permissive of any amendment to pleadings and documents, save for affidavits, for as long as such amendment does not lead to an unmitigable prejudice. In that regard therefore the question of whether the amendment sought by an applicant introduces a new or new causes of action or new averments against whomever is of itself, that is, outside the prejudice determination sphere, most unhelpful.

[18] However, I still deem it meet, if it be only for completion's sake, that I determine whether factually the amendments sought in *casu* introduce a new cause or new causes of action. They do not and to that I shall come shortly.

[19] Beyond the meagre and threadbare two points taken, in a fluffing manner I must interpose, by the first respondent in his answering affidavit and reflected on in paragraph 15 *supra*, I was addressed by counsel for the respondent in both his Heads of Argument and submissions in court that the following new averments in the intended amendment are tributaries leading into an allegedly prejudicially precipitous river of "new ideas and new causes of action":

19.1 The new averment about the first respondent having appointed teachers and arranged meetings allegedly pursuant to the contract signed by the second respondent which contract the first respondent pleaded was unenforceable.

19.2 The averment that the first respondent had requested the applicant to attend to SBD forms and tax matters as if to suggest recognition of the contract signed by the second respondent allegedly on behalf of the first respondent.

19.3 The averment that the applicant had previously delivered services to the first respondent like the ones captured in the disputed contract.

19.4 That the applicant had not “explained” why these averments had not been made in the initial particulars of claim.

19.5 That because the amendments sought to, unlike in the initial particulars of claim, hold the first respondent vicariously liable for the conduct of the second respondent, they are sought with *mala fides* and are thus prejudicial. The *mala fides* arising from the fact that, it was argued, vicarious liability was introduced to scupper or defeat or dilute the point of lack of authority of the second respondent to represent the first respondent already pleaded in the first respondent’s “amended plea”. Further *mala fide* intentions were said to be the unexplained possibility of the applicant being desirous of sidestepping possible prescription points.

[20] I am not persuaded that any of the averments in the amendment papers or submissions arising from them referred to immediately *supra* introduce a new cause of action at all. The cause of action around which all the averments about previous services rendered, about meetings of teachers and the completion of SBD forms and Receiver of Revenue forms swirl is the original cause of action involving or centered around damages arising from an alleged contractual breach by the first respondent to the prejudice of the applicant.

[21] I also fail to find anything in the implicated rule which calls for an amendment to only be permitted if there is a good reason supplied for any earlier omission or for any other drafting sin or error which gave birth to the need to amend. That, in my view, is simply not the law.

[22] That a particular legal device or defense or legal approach or new point, which is ordinarily legally available in litigation will, because of an intended amendment, become available to an opponent and/or become sharper and/or become stunted, cannot by any stretch of imagination, be deemed to be proof of *mala fides* which negate an amendment. It remains available to any party to legally fight out all points taken against them at pleading and at trial. In this regard, it remains available to the first respondent to plead to the vicarious liability point and to the new averments as well as to take any prescription point that the first respondent deciphers to be

available. The intended amendment is not a bar to the employ of any legal strategy or legal point by the first respondent at this stage. Rule 28(8) grants the first respondent latitude to make any adjustments consequential to the amendment sought by the applicant.

[23] This then leaves remaining the only question that is key in *casu*, which is whether the amendments sought to be made are prejudicial to the first respondent and if so, whether a costs order or any other order may ameliorate that prejudice. Married thereto is the question of what prejudice exactly has been alleged and proven in *casu*.

[24] In the context of this matter prejudice means hurdles, hardships or impediments that could, because of the amendment being visited upon the first respondent as a litigant in the action, frustrate the first respondent in prosecuting its case.

[25] According to the first respondent it is for the applicant who must prove to this court that the amendment it seeks will not prejudice the first respondent. The first respondent then falls through with an argument that the applicant has failed to prove that the first respondent will not suffer any prejudice.

[26] In my view, while the applicant has a bit to say about whether there is a likelihood of prejudice or not, an applicant can most times do no more than state that there is no prejudice that will befall a respondent to an amendment of pleadings or further that a

costs order can cure any semblance of prejudice. What must happen is that he who alleges there to be prejudice or the potential thereof must go the extra mile and prove the nature, extent and impact thereof. He must demonstrate how he will be prejudiced and not merely pay lip service to that question by glibly throwing in the word “prejudice”.

[27] But the first respondent in *casu* has not expatiated on any prejudice, that is, beyond blandly alleging it. All the first respondent has done is to repeatedly allege that the amendment will result in prejudice without remotely indicating the nature and form of the prejudice as well as the extent of such prejudice. Mere allegations without evidence giving the allegations the stature of proven facts have never been sufficient to prove any case before a court of law and will not so become in this matter.

[28] As alluded to above, the first respondent has every right and opportunity to plead to the amended particulars and given the fact that the stage of litigation in this matter is at its most embryonic pleading stage, very little prejudice may exist. Whereas a pleading can be effected at any time before judgement, it stands to reason that the later in the litigation proceedings an amendment is sought the less likely is there to be condonable prejudice and further that amendments, as in *casu*, made much earlier in the proceedings, necessitate far less drafting readjustments on litigants visited upon by such amendments.

[29] Absent any proven prejudice or demonstrable potential prejudice therefore, it becomes unnecessary to determine the employability of ways of ameliorating prejudice. It also consequently means that there is no impediment on the way of an application for such an amendment being granted. Indeed, as was argued on behalf of the applicant, an essential and key ground for the refusal of an amendment application is prejudice to the party being served with an amendment. An amendment being a cure for a consultation and/or drafting error or sin should not be refused merely as some form of gamesmanship red carding for some mistake or neglect on a party seeking an amendment's part as if drafting pleadings is tantamount to some chess or *ludo* game where a touch is an irreversible move.

[30] In all the above premises I am persuaded that a case for the amendment of the particulars of claim in this matter has been made and further that the resistance or objection thereto is without merit.

[31] Resultantly, I make the following order:

31.1 The application succeeds.

31.2 The applicant as plaintiff in the action is granted leave to amend its particulars of claim in terms of the plaintiff's notice of intention to amend dated 3rd March 2023.

31.3 The applicant/plaintiff is ordered to pay the costs of this application inclusive of counsel's costs on scale B.


MALOSE.S. MONENE

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : 17 May 2024

Judgement delivered on : 31st July 2024

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