REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO	
(2)	OF INTEREST TO OTHER JUDGES: YES	
(3)	REVISED: YES	
[redacted]		22/08/2024
....		....
SIGNATURE		DATE

CASE NO: 618/2022

In the matter between:

THE MEC FOR HEALTH: MPUMALANGA Applicant

and

MKHAGO SUPPLY AND CONSTRUCTION CC t/a
MKHAGO HEALTH CARE SERVICES Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 22 August 2024 at 10:00.

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is an application to amend a plea launched by the Applicant ("the Department"). The Department seeks to introduce two amendments. Firstly, that this Court lacks jurisdiction because the agreement between the parties provides for arbitration, which the parties failed to observe. Secondly, the agreement concluded by the parties violated procurement policies and procedures and therefore void *ab initio*. The Respondent ("Mkhago") is opposing the application on the following grounds:

1.1 The proposed amendment is exceedingly late. That fact, notwithstanding, the Department extends no explanation for the inordinate delay;

1.2 The amendment will cause prejudice to Mkhago, which cannot be alleviated by this Court granting a cost order against it.

FACTUAL MATRIX

[2] On 30 August 2013, the parties concluded an agreement whose terms, among others, were that:

2.1 Mkhago was to perform circumcisions as per National Guidelines;

2.2 To train appointed clinical staff on the forceps guided method as approved by the National Department of Health;

2.3 The Department would settle invoices issued to it by Mkhago within 30 days of date of receipt.

[3] In a letter dated 19 September 2013, the Department suspended the agreement. The letter, in relevant parts states:

> *"This letter serves as a notification whereby the above-mentioned contract between yourself and the Department is hereby suspended, in terms of Treasury regulations 16A9.1 with immediate effect.*
>
> *Due to allegations of improper supply chain processes having been followed, to award this contract we will be handing the matter with the Provincial Treasury to assist us with the investigation into the matter."*

[4] The agreement terminated by effluxion of time before Its reinstatement and or cancellation, following the report, or outcome of the investigations.

[5] On 23 May 2017, the Department wrote to Mkhago stating the following:

> *"The SLA provides for mediation and arbitration to settle disputes between parties. Your client has not pleaded compliance with the arbitration clause nor why it should not apply. This issue needs to be carefully canvassed to determine whether your client is in the correct forum."*

[6] Responding to the previously mentioned letter, Mkhago wrote back and said:

> *"As to paragraph 3.6 of your letter, referring to the arbitration clause, writer hereof urges you to seriously reconsider your view/position. Firstly, you have not indicated whether you want to amend your client's plea to include same as a special plea, which is the correct procedure to follow..."*

ASSERTIONS BY THE PARTIES

[7] The stance of the Department is that Uniform Court Rule 28 is couched in a manner to allow amendments at any time before judgment is granted hence its open-endedness. Its approach is therefore that if the Court has not delivered judgment in the main case, nothing precludes it from amending the plea. Besides, says the Department, Mkhago fails

to explain the prejudice and how it is related to the amendment. Additionally, the delay in the bringing of the counter claim seeking a declaratory relief is a defence, if sustained by the Court, to the merits of the review or declaratory order.

[8] Mkhago, on the other hand, argued that amendments of pleadings are not there for the taking. A party seeking amendment is asking for indulgence. If it wants to do so out of time, it is required that it properly accounts for any delay. The need to do this is even more raised where the delay is unconscionably immoderate. In this matter, the Department has for no reason waited for virtually 10 years prior to wanting to introduce the amendment pertaining to the agreement being void *ab initio* and 6 years or so in the case of the jurisdiction issue, maintains Mkhago.

ISSUES

[9] The issue for consideration is whether the Department has made a case for this Court to exercise its wide discretion in favour of allowing the amendment.

LEGAL FRAMEWORK

[10] Uniform Rule of Court 28 deals with amendments of pleadings and documents excluding sworn statements. Sub-rule (1) and (10) are of particular interest in this matter. For that reason, I proceed to cite them in full below and in the order mentioned aforesaid:

> *"(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 and shall furnish particulars of the amendment."*

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

[11] Amendments of pleadings are a daily occurrence, consequently the provisions of Rule 28 have often drawn the attention of various Courts across this country. It is correct that, depending on compliance with requirements attendant upon an application of this

nature, Courts invariably lean in favour of an Applicant. The exception to the aforegoing principle is that where the application is made in bad faith or will prejudice the other party to the proceedings, which cannot be cured by a cost order and, where appropriate, a postponement. One exceptionally important case to which the attention of this Court has been drawn is *Commercial Union Assurance Co Ltd v Waymark NO*[1] where the following were enumerated:

> *"11.1 the court has a discretion whether to grant or refuse an amendment;*
>
> *11.2 An amendment cannot be granted for the mere asking; some explanation must be offered therefor;*
>
> *11.3 The applicant must show that prima facie the amendment has something deserving of consideration, a triable issue;*
>
> *11.4 The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties;*
>
> *11.5 The party seeking the amendment must not be mala fide;*
>
> *11.6 The amendment must not cause an injustice to the other side which cannot be compensated by costs;*
>
> *11.7 The amendment should not be refused simply to punish the applicant for neglect;*
>
> *11.8 A mere loss of the opportunity of gaining time is no reason, in itself, for refusing the application."*

See also, *Ebling v Two Oceans Aquarium CC*[2] *and Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*[3].

[12] The above cases are cases where the Court felt that it was appropriate to grant the amendment because sufficient ground had been prepared for it to exercise its wide discretion in favour of the Applicant. I have mentioned *supra* that the rule that Courts will generally allow amendments is not intransigent. Thus, in *Dolowitz Bros v Guardian*

---

[1] 1995 (2) SA 73 (Tk) at 77F-I.
[2] 2000 (3) SA 691 (C) 694G–H).
[3] 2020 (1) SA 327(CC) at [89]

Insurance Company Co Ltd[4] the Court declined an application to amend. The ground for the refusal was that the Applicant in the matter only launched it after 18 months and gave no explanation why it was delayed.

[13] A party is also obliged to furnish explanation of its failure to put the pleading in proper order right at the beginning[5]. An application without such an explanation may be destined to fail. Similarly, in *Krause v SAR*[6] an application to amend a plea by the insertion of a special defence after the Plaintiff closed its case was refused. The Court reasoned that an amendment would cause multiple inconveniences to the Plaintiff and that the Defendant had failed to show that the necessity for the amendment had arisen through reasonable cause.

ANALYSIS

[14] I am somewhat baffled by the Department's referral to the case of Commercial Union Assurance Co. Ltd *supra* in circumstances where it is manifest that it falls short of most of the requirements listed in paragraph 11. One of the requirements per the case is that amendment is not there for the taking, which means that it is expected that a party in the position of the Department would go to great lengths explaining how it found itself in this invidious position.

[15] The only attempt to account for the unreasonable delay turns out to be *mala fide* insofar as it is a blatant lie, which Mkhago has laid bare. In this regard it is befitting to refer to the affidavit of Advocate Charles Ndlovu, the erstwhile counsel of the Department,

---

[4] 1924 CPD 64

[5] *Rossouw v Bonthuys* 1933 CPD 201

[6] 1948 (3) SA 1145 (O)

wherein he was seeking postponement of this matter. I have uplifted the pertinent parts from the answering affidavit of Mkhago. It reads:

> *"5.1 Before, Makwakwa Attorneys was terminated, he briefed Advocate Matebese SC with Advocate Zwane, and the current attorneys of record continued with the said set of counsel.*
>
> *5.2 Secondly, counsel advised that we need to amend our plea, in order to seek an order that the agreement which is the subject matter of this litigation be declared void ab initio. Counsel further advised that, this issue was discussed with Makwakwa attorneys before they were terminated."*

[16] It is discernible from the contents of the paragraph above that the issue of the amendment was discussed with the erstwhile attorneys of the Department, Makwakwa, prior to the appointment of the attorneys on record now. The paragraph quoted *supra* is head-to-head with the allegations made by Mr Lamola in his affidavit filed in support of this application for amendment at paragraphs 12.1 to 12.3 where he states the following:

> *"12.1 Firstly, it is important to state that our law firm was recently instructed to represent the Department, after the Department terminated its previous attorneys due to the termination of contract by effluxion of time. I must mention that when we were appointed, we noted that senior counsel had just been appointed immediately before the termination of the previous attorneys' mandate. We were instructed to continue to brief ZZ Matebese SC and Zwane LP.*
>
> *12.2 Counsel accepted the brief. In addition, thereto, counsel advised that they seek a consultation with the Department so that the manner and process of procuring or appointing the Respondent should be adequate discussed.*
>
> *12.3 It was during the aforesaid consultation that it emerged that the appointment of the respondent was contrary to the provisions of the Constitution, the PFMA and other applicable legislation regulating procurement of goods and services by state organs."*

[17] More aberrant is the failure of the Department to deal with these significant and conspicuous contradictions in its replying affidavit. This, of course, must mean only one

thing – the Department has no answer that can explain the inconsistencies. In these circumstances I am bound to accept the version of Mkhago.

[18] It is also apparent that when the Department suspended the agreement on 19 September 2013, it knew that the agreement was flawed for lack of compliance with the applicable legislation pertaining to procurement of goods on behalf of Government. Enigmatically, no explanation is proffered why this so-called defence was not included right at the onset. I am deliberately refraining from pronouncing on the wisdom of putting forward such as a defence in circumstances where the agreement was obviously contaminated with illegality.

[19] The Department's attitude that it is at liberty to amend throughout the life of the litigation if judgment has not been handed down is correct but misplaced on the facts of this case. It is plain from the *Commercial Union* case *supra* that a party cannot wait for 10 years, as is the position here, wake up one morning and amend its pleadings without properly accounting for the period of the delay. The explanation that is there in this matter is *mala fide* because it is clearly false, and no attempt has been made to explain the glaring contradiction. See also the *Oblowitz Bros* case *supra* where the delay was 18 months without any account for it and the amendment was refused as a result.

[20] The failure to explain the delay is not only in respect of the counterclaim but also with the introduction of the jurisdiction issue. The Department intimated as early as 23 May 2017 that this Court may not have jurisdiction because of the arbitration clause in the agreement. Mkhago promptly wrote back and invited it to amend if it thought it was appropriate to do so. This invitation elicited silence until last year on 18 October 2023 when the amendment application was launched. It is noteworthy to point out that this came after 6 years and without explanation of the delay.

[21] I am at loss why the Department contends that there is no prejudice or that if there is, Mkhago has failed to show how it is related to the amendment. The mere fact that it waited for 10 years to be served with this amendment is prejudicial on its own. A party

should expect some semblance of stability in the litigation instead of being taken back to matters that should have been introduced years ago. This is the inconvenience that is often referred to in case authority.

[22] For what it is worth, I think I should indicate that the agreement that is said to be illegal was never set aside because of its non-compliance with procurement procedures and policies. Given this situation, I wonder whether an amendment would assist the Department as it would still be stuck with an agreement tainted by illegality. Illegal contracts in this instance should be reviewed and set aside. For these reasons it is questionable that the route chosen when approaching this Court was well reasoned.

[23] In the result the application for amendment must fail and I make the following order:

The application is dismissed with costs.

[redacted]

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Applicant: Adv LP Zwane
Instructed by: Lamula KB Attorneys
C/O PN Hlatswayo Attorneys

Counsel for the Respondent: Adv TS Ngwenya
Instructed by: Gerhard Lourens Inc

Date of Judgment: 22 August 2024