

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 14906/2022

In the matter between

VISIGRO INVESTMENTS (PTY) LTD

APPLICANT

And

SFF ASSOCIATION

FIRST RESPONDENT

CITY OF CAPE TOWN

SECOND RESPONDENT

**DIRECTOR GENERAL OF THE DEPARTMENT
OF EMPLOYMENT AND LABOUR**

THIRD RESPONDENT

JUDGMENT

VAN DEN BERG AJ

NATURE OF APPLICATION AND RELIEF

1. This is an interlocutory application enrolled for hearing in the Fourth Division on 20 May 2024. The applicant applies substantively on an opposed basis to amend its Notice of Motion which is opposed by the first respondent on various grounds.

2. The applicant is a property developer. The first respondent operates a petrochemical facility, which includes fuel storage tanks on the property adjacent to the property owned by the applicant. The applicant contends that it is entitled to extract commercial value from the property by developing it. Due to public safety

reasons, the applicant must maintain a “*separation distance*” between its development and the first respondent’s petrochemical facility.

3. Subsequent to the filing of the numerous affidavits in this matter, it has become evident that the first respondent is obliged to perform a risk assessment during specific statutory periods in accordance with its legal obligations. However, the parties dispute when and how these risk assessments should be conducted.

4. The applicant argues that the amendment of its Notice of Motion is necessitated, inter alia, by the fact that the Major Hazzard Installation Regulations 2001 (“*MHI Regulations, 2001*”)¹ were superseded by the MHI Regulations of 2022. According to the applicant, the 2022 MHI Regulations provide that when a facility risk assessment is conducted, it must consider and take into account SANS 1461, the South African National Standard Major Hazzard Installation—Risk Assessment.

5. The MHI Regulations of 2022 were promulgated subsequent to the institution of the main application and after the first respondent filed its answering affidavit in the main application during January 2023.

6. The applicant argues that the first respondent refuses to accept that the risk assessment should be conducted in accordance with the specific regulatory standards that the applicant contends are applicable, which refusal necessitates the amendment.

SYNOPSIS AND CHRONOLOGY OF LITIGATION

7. The main application was instituted on 9 September 2022. It is alleged in the main application that the first respondent was obliged to review its existing risk assessment before 28 December 2023 in accordance with Regulation 5(6)(a) of the then-prevailing MHI Regulations, 2001, which were in effect at the time. The notice of motion in the main application requires the first respondent to be directed to review

¹ The applicant contends that the amendment of its Notice of Motion is required, among other things, as a result of the substitution of the Major Hazzard Installation Regulations 2001 (“MHI Regulations, 2001”) by the MHI Regulations of 2022.

and perform forthwith the risk assessment required by MHI regulations 5(1) and 5(6)(a). The founding affidavit delineates the fundamental nature of the main application as follows:

“8. In short, in this application Visigro seeks an order to compel SFF to forthwith review the risk assessment of the Facility.”

8. The first respondent contends that the passing of 28 December 2023 signified the death knell for the main application because the dispute has been rendered moot. The principal objective of the main application was to compel the first respondent to obtain the risk assessment before 28 December 2023 on the grounds ventilated in the papers. This did not transpire, and no order was obtained prior to 28 December 2023.

9. The applicant contends, however, that the first respondent's answering affidavit in the main application indicated that it was uncertain whether the first respondent intended to implement the IEC-61511 Standard in relation to multiple tanks within the facility. The applicant avers that the first respondent, despite several requests, has pointedly refused to provide an undertaking that it will ensure that SANS 1461 will be taken into account. Mr Budlender SC, on behalf of the applicant, argues that if the first respondent complies with its obligations, there will be a reduction of the separation distance, which will mean that the City will either not be required to restrict the applicant's development rights on all or a portion of the affected erven (provided the separation distance does not extent into the Burgundy Estate). It follows that if the first respondent does not comply with IEC-61511, the applicant will be prejudiced.

10. The applicant contends that the first respondent's intention to implement the IEC-61511 Standard in relation to multiple tanks within the facility was ambiguous, as evidenced by the answering affidavit in the main application. The applicant argues that the first respondent refused to provide an undertaking that it would ensure that SANS 1461 was considered despite receiving numerous requests. The applicant submits that the actual dispute between the parties is whether, when the first respondent has the obligatory risk assessment carried out, the risk assessment must

adhere and comply with Regulation 10(1) of the 2022 MHI Regulations, which mandates SANS 1461 and the determination of the risk when the first respondent complies with its license condition incorporating IEC-61511.

11. On 28 March 2024, the applicant instituted a fresh application to compel the first respondent to carry out a revised risk assessment due to the passage of time and on the basis that 28 December 2023 had come and gone and that the first respondent was obliged to conduct a new risk assessment by virtue of the effluxion of time. This application to compel is not before the Court for consideration. However, its institution and the relief claimed in the application to compel are not disputed.

12. The first respondent filed a chronology that reaches far back into the litigious history between the parties, spanning several years. For purposes of the amendment, the following dates are of relevance:

9 September 2022	The main application is issued and served on the first respondent
10 January 2023	The first respondent files its answering affidavit
31 January 2023	The 2022 Regulations are promulgated in the Government Gazette Notice 2989
10 February 2023	The applicant files its replying affidavit in the main application
14 June 2023	The applicant serves its first notice of intention to amend in terms of Rule 28(1)
28 June 2023	The first respondent delivers an objection to the proposed amendment

10 July 2023	The applicant withdraws the first notice of intention to amend
11 July 2023	The applicant delivers a second notice of intention to amend its notice of motion
25 July 2023	The first respondent delivers an objection to the applicant's second proposed amendment
8 August 2023	The applicant institutes its application for leave to amend in terms of Rule 28(4) of the notice of motion
12 September 2023	The first respondent delivers its answering affidavit
28 September 2023	The applicant delivers its replying affidavit in the applicant to amend
28 March 2024	The applicant institutes an application to compel under case number 6232/2024
9 May 2024	The first respondent serves and files on the 10 th of May 2024 an application to grant leave to file the supplementary affidavit of MP Fusi
14 May 2024	The applicant files an application for leave to file a replying affidavit in response to the first respondent's supplementary answering affidavit. In paragraph 4 of the applicant's replying affidavit in response to the first respondent's supplementary answering affidavit the applicant states that it does not oppose the first respondent's application for leave to file the supplementary affidavit
17 May 2024	The first respondent (as could have been expected) files a supplementary affidavit seeking leave to file the second supplementary affidavit. The supplementary affidavit introduces the fact that a risk assessment has been obtained, and an extract of the report is attached to the supplementary affidavit.

13. In addition, the first respondent's counsel also provided in their heads of argument a helpful comparison of the relief applied for in the main application, the proposed amended notice of motion and the 2024 application to compel. It is reproduced below and marked as Annexure "A".

MOOTNESS OF THE MAIN APPLICATION

14. According to the first respondent, the applicant ought to have abandoned the main application since it is moot. The applicant acknowledges in its founding affidavit to the main application that the first respondent's risk assessment ordinarily remained valid until 28 December 2023. However, the applicant sought to compel the first respondent to perform an updated risk assessment prior to this by contending that the amendment of the first respondent's license conditions obliged it to review the risk assessment in terms of Regulation 5(6)(a) of the 2001 Regulations.

15. Because the applicant applied to the City for building plans, the applicant claims that the first respondent was required to conduct a risk reassessment before the five-year period ended. The City apparently declined to consider the application because it apparently shared the applicant's view that the 2018 risk assessment was no longer valid and had to be reviewed on a proper interpretation of Regulation 5(6)(a).

16. The first respondent disputes the applicant's interpretation of Regulation 5(6)(a) in the main application. The first respondent refuses to review the 2018 risk assessment because the conditions imposed by the 2019 amended license decrease the risk requirements. The first respondent contends that it is not obliged to review the 2018 risk assessment.

17. The first respondent argues in opposing the amendment, that the applicant failed to have the main application enrolled timeously to be adjudicated upon prior to 28 December 2023. By its own failure, so the argument goes, the applicant caused the main application to become moot due to the effluxion of time.

18. In addition, the regulatory regime changed when the 2022 Regulations were Gazetted in January 2023. The applicant concedes that the relief applied for in the main application will have no practical effect in its current form. According to the applicant, this necessitates amending the Notice of Motion. The dispute to be answered is not when the risk assessment should be performed but how it should be performed.

19. In *Vinpro NPC v President of the Republic of South Africa and Others*² the applicant attempted to overcome the mootness of its application by applying to amend the Notice of Motion to include further prayers, including additional relief. The respondent opposed the amendment on the grounds that it attempted to advance a new cause of action that was unrelated to the original advanced in circumstances where the original cause of action, which had become moot by effluxion of time. The Full Court held that the amendment stood to be refused due to the fact that the applicant could not introduce a new cause of action by way of an amendment after the exchange of affidavits, as this would prejudice the opposing respondents in light of the manner in which they have pleaded their case.³

20. The founding affidavit did not address the disagreement over whether Regulation 10(1) of the 2022 MHI Regulations applies exclusively to SANS 1461 or if it also requires the first respondent to abide by its licence condition incorporating IEC-61511.

21. The applicant argues that the real dispute regarding how the risk assessment's methodology is conducted emerged from the answering affidavit. If this is indeed the case, one would have expected that this would have triggered the applicant to apply immediately, or at least concurrently, for the amendment or at least to have done so simultaneously with the filing of its replying affidavit. However, the replying affidavit was filed on 10 February 2023 and the first notice of amendment on 14 June 2023.

² (147/2021) [2021] ZAWCHC 261 (3 August 2021)

³ *Vinpro NPC v President of the Republic of South Africa supra* at para 23 to 32

APPLICATION TO COMPEL AND RISK REPORT

22. When the 5-year period of the previous risk assessment expired, and the first respondent allegedly did not comply with its obligation, the applicant instituted the application to compel under case number WCHC6232/2024 for an order compelling the first respondent to have the mandatory risk review assessment undertaken.

23. The first respondent argues that the application to compel proves that the main application and, by consequence, the application to amend have become moot. The facts have overtaken the litigation.

24. Moreover, on Friday, 17 May 2023, the first respondent filed an additional supplementary affidavit that included an extract from a new risk assessment report. It is understandable that the applicant reserved its rights regarding the new risk assessment report, however, the fact remains that the first respondent has obtained a risk assessment report.

25. The first respondent states in the supplementary affidavit as follows:

“...Even though the SSF owes no duty to account to Visigro, I can confirm that SFF has appointed M M Risk (Pty) Ltd as an inspection authority to undertake a new risk assessment of the facility. An updated risk assessment report was furnished to the SFF by M M Risk on 16 May 2024. The report is confidential and commercially sensitive. I only attach the cover and the signature page of the report for the limited purpose of demonstrating its existence to the Court...”

26. The first respondent, therefore, argues that the application for amendment will have no practical effect and was frivolous⁴. No order granted in terms of the amended notice of motion will be enforceable or of practical effect.

⁴

Motala v Master, North Gauteng High Court 2019 (6) SA 68 (SCA) at para 96 to 100

27. The first respondent avers that it will be prejudiced by the amendment. Whereas the applicant argues that any potential prejudice may be addressed by permitting the first respondent to file an additional affidavit and an appropriate cost order could mitigate any potential prejudice.

THE LAW AND AMENDMENTS

28. The commencement of a trial is the fulcrum upon which the Court's stance in respect of applications for amendments to pleadings should be balanced. The more distant the parties are from the trial's inception, the more straightforward it should be for a litigant to obtain an amendment. Conversely, the more engrossed the parties are in the trial and the closer they are to obtaining judgement, the more challenging it should be.⁵

29. The primary principle is to enable parties to adequately ventilate their dispute and determine whether the prejudice caused could be cured by any order for costs or a postponement.

30. In Affordable Medicines Trust and others v Minister of Health and others⁶ the Constitutional Court confirmed the well-known rule of practice that:

“The practical rule that emerges from these cases 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 it is sought to amend was filed.””

31. The Supreme Court of Appeal in Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd⁷ quoted with approval from the judgment in Trans-Drakensberg⁸ as follows:

⁵ Herbstein & Van Winsen's *The Civil Practice of the High Courts of South Africa*, 5th Edition by Cilliers *et al* , , (2009) Juta: Cape Town p 558

⁶ 2006 (3) SA 247 (CC) at para 9

⁷ 2002 (2) SA 447 (SCA) at para 34

“Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable. ...”

32. The first respondent argues that the main application and proposed amended Notice of Motion are moot. In this regard, the first respondent relies upon the judgment by the Constitutional Court in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs⁹ which established that a case is moot and not justiciable if it no longer presents an existing or live controversy which should exist if a Court is to avoid issuing advisory opinions on abstract propositions of law.

THE COURT’S POWER AND MOOTNESS

33. The first respondent argues that this Court, as a court of first instance, is not vested with the power to grant judgment upon a matter that is moot, in contrast to an appeal court that has discretion in this regard.

34. In Minister of Justice v Estate Stransham-Ford¹⁰ Wallis JA (as he was then) held as follows:

“In any event, I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task.

⁸ 1967 (3) SA 632 (D) at 641A to B

⁹ 2000 (2) SA 1 (CC) footnote 18

¹⁰ 2017 (3) SA 152 (SCA) at para [24]

The courts have no plenary power to raise legal issues and make and shape the common law. They must wait for litigants to bring appropriate cases before them ...”

35. The Court further distinguish between matters becoming moot and the extinguishing of a claim (by for example) as in the Stransham-Ford matter by death before judgment. At paragraph 26 the Court stated:

“I do not think that the extinguishing of a claim by death before judgment is an instance of mootness in the sense in which that expression is used in these cases. If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication. Mootness is the term used to describe the situation where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal will not produce a judgment having any practical effect. Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the high court at the time it made its order. Was there anything on which it was entitled to pronounce? The principles governing mootness have little or no purchase in that situation.”

36. This principle was confirmed by the Full Court of this Division in the Vinpro NPC v President of the Republic of South Africa¹¹.

37. As in the Vinpro matter, the first respondent argues that the mootness of the main application and, by implication, the application for amendment arose at the end of December 2023. Almost five months have passed, and the first respondent obtained a risk assessment.

DECLARATORY RELIEF

38. The first respondent further opposes the amendment on the grounds that it seeks to introduce declaratory relief that is excipiable, raises no triable issue, and

¹¹ *Supra* at [38]

prejudices the first respondent. This is due to the fact that it violates the MHI Regulations 2023 and seeks to provide guidance, in the abstract and in advance of a future risk assessment, which is a matter of future legal challenge, if any, wherein the Court can adjudicate the matter on the full and complete facts. The amended relief will not provide clarity or finality to any existing, future, or contingent right or obligation.

39. Paragraphs 3.1 and 3.2 of the proposed amended notice of motion seek to dictate the particular manner in which the revised risk assessment is to be conducted despite this already being specified in the MHI 2022 Regulations.

40. Regulation 10(1) provides that a duty holder is required to ensure that an approved inspection authority carries out a risk assessment in accordance with SANS 1461. The first respondent argues accordingly that the 2022 Regulation does not mandate the application of any standard other than SANS 1461.

41. The amendment is limited to the introduction of a matter that serves only as a guide for future risk assessments. The issue of whether the risk assessment obtained by the first respondent and produced in its supplementary affidavit on 17 May 2024 complies with the applicable standards was not addressed in any of the affidavits. This corroborates the first respondent's submission that the Court will not grant declaratory relief in cases where the issue raised is hypothetical, abstract and academic¹².

DECISION AND ORDER

42. The applicant no longer seeks in its application to compel to prescribe to the authorised inspection authority that the standards outlined in its intended amended Notice of Motion be considered by the authority when preparing a revised risk assessment. The relief sought in the application to compel has overtaken the relief sought to be introduced in the amended and renders the amendment moot. The

¹² Minister of Finance v Oakbay Investments (Pty) Ltd: Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Center 2018 (3) SA 515 (GP) at para 63 and Proxi Smart Services (Pty) Ltd v Law Society of South Africa 2018 (5) SA 644 (GP) para 76

acquisition by the first respondent of the risk assessment report, in addition thereto, demonstrates that the facts have overtaken the applicant's case made out in the main application.

43. The parties have exchanged all the affidavits in the main application and ventilated the latest developments in the affidavits filed in support of the application for amendment. Subsequently, a third set of supplementary affidavits was filed. The granting of the amendment will necessitate the filing of a number of additional affidavits.

44. I do not believe granting the amendment is in the interest of justice. To do so would require all the parties to file further affidavits dealing with different facts and issues that are not ventilated in the main application. Once the amendment is granted, the court will not be in a position to adjudicate the application without first allowing the parties to file a possible comprehensive set of additional affidavits.

45. In motion proceedings, the affidavits constitute both the pleadings and the evidence. The issues and averment in support of parties' cases should appear clearly therefrom. It is trite that an applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in its favour.

46. It is not possible to grant an order that will have any practical effect in the absence of further evidence. It is not merely a case of introducing a new cause of action. The new cause of action which the applicant wants to introduce by way of the amendment is not borne out by the pleaded case and evidence in the affidavits in the main application.

47. Only the application for amendment serves before this Court. Some of the grounds upon which the first respondent opposes the granting of the application for opposition go to the merits of the main application. It would be inappropriate for me to deal with the merits at this stage since it would amount to prejudging matters that may be addressed in due course before a different Court.

48. Both parties employed and requested the costs of two counsels as per Rule 67A(4)(b). The parties agreed that the complexity of the issues at hand justified an award of costs on Tarif C in terms of Rule 69(7). I accept that this is reasonable regarding the matter's importance, value and complexity. As a matter of logic and practice, the senior or leading counsel would charge more per hour based on experience or seniority than the junior counsel. Accordingly, a distinction should be drawn between the applicable Tariff for the senior and junior counsels in terms of Rule 69(2).

49. In the premises, I grant the following order:

[1] The applicant to amend the Notice of Motion is denied.

[2] The applicant is ordered to pay the costs of the application for amendment, including the costs of two counsel, respectively and in order of seniority on Tarif C and B of Uniform Rule 69(7).

VAN DEN BERG AJ
ACTING JUDGE OF THE HIGH COURT

HEARD ON 20 MAY 2024

JUDGMENT 3 JUNE 2024

APPEARANCES:

FOR THE APPLICANT: ADV G BUDLENDER SC
ADV A TOEFY

INSTRUCTED BY CULLINAN & ASSOCIATES INC

FOR THE FIRST RESPONDENT: ADV T SCOTT
ADV L BRIGHTON

INSTRUCTED BY

CLIFF DEKKER HOFMEYER

FOR THE SECOND AND
THIRD RESPONDENTS:

NO APPEARANCE