



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: 4669/2017

In the matter between:

MAFUBE LOCAL MUNICIPALITY

APPLICANT

and

N AND C MAINTENANCE AND SPARES

RESPONDENT

In re:

N AND C MAINTENANCE AND SPARES

PLAINTIFF

and

MAFUBE LOCAL MUNICIPALITY

DEFENDANT

Neutral citation: *Mafube Local Municipality v N and C Maintenance and Spares*
(4669/2017) [2025] ZAFSHC 217 (18 July 2025)

Coram: Ntanga AJ

Heard: 9 May 2025

Delivered: 17 July 2025

Summary: Civil procedure – amendment of plea – consideration of prejudice in court exercising its discretion.

ORDER

- 1 The defendant is granted leave to amend its plea within ten days of this order.
 - 2 There is no order as to costs.
-

JUDGMENT

Ntanga AJ

Introduction

[1] This matter appeared before me as an application for amendment of the defendant's plea by the defendant in the main action. The application for amendment is opposed by the plaintiff. The trial proceedings were postponed by agreement between the parties to a later date.

[2] On or about May 7, 2025, the defendant filed a notice to amend its plea by including the following special plea:

'(a) Plaintiff's claim is based on a partly written, partly verbal service level agreement as pleaded in paragraphs 4, 5 and 6 of its particulars of claim.

(b) The Plaintiff furthermore states in paragraph 6 of its particulars of claim that the various statements on which it relies are attached and marked to the particulars as annexure "POC2".

(c) In terms of the Plaintiff's amended particulars of claim, paragraph 17, served on the 3rd April 2015 invoices are attached in support of the Plaintiff's claim.

(d) Invoices attached as "POC55.1" and "POC 5.26" up to and including invoice 1550, annexure "POC 5.49" were not included in annexure "POC 2" when the summons was served on 18 September 2017.

(e) Thus, the claims for services rendered in terms of the above invoices would have prescribed prior to their inclusion in the amended particulars of claim, which is more than three (3) years after the date on which the claims regarding these invoices arose.

(f) The premise of Plaintiff's claim relating to these invoices prescribed in terms of Section 11 of the Prescription Act, Act 68 of 1969.'

Background

[3] The plaintiff instituted action against defendant for payment of the amount of R3 667 617.70 for services rendered in terms of a partially written and partially oral

service level agreement entered into between the plaintiff and the defendant. The defendant filed a plea to the plaintiff's particulars of claim.

[4] The plaintiff filed amendment of its particulars of claim on February 21, 2018. The defendant filed its plea to the plaintiff's particulars of claim on May 17, 2018, and another plea to the amended particulars of claim on August 22, 2018. The defendant filed a third plea to the amended particulars of claim on April 23, 2021. The matter was set down for trial on the civil trial roll of May 6, 7 and 9, 2025.

[5] On April 3, 2025, the plaintiff filed amended particulars of claim. The defendant filed a consequential amended plea to plaintiff's amended particulars of claim on May 5, 2025. On May 6, 2025, the defendant filed a notice on intention to amend its plea for the purposes of introducing a special plea. The plaintiff objected to the defendant's notice of intention to amend its plea.

The defendant's submission

[6] The defendant sought leave of the court to amend its plea to include a special plea of prescription of some of the invoices introduced by the plaintiff in the amended particulars of claim and supplementary discovery affidavit dated April 3, 2025. The defendant argued that the plaintiff had 2754 days from the date of service of the summons to discover the impugned invoices and amend its claim but only made these amendments and discovery a month before trial. The defendant averred that the matter was previously set down for trial on November 20, 2024, and the matter was postponed by agreement between the parties at the instance of the plaintiff who indicated intention to file a supplementary affidavit to discover invoices. The defendant averred that the original summons served by the plaintiff did not contain 25 invoices that were introduced by way of an amendment and supplementary discovery affidavit on April 3, 2025.

[7] The defendant argued that its notice of intention to amend its plea is directly caused by the plaintiff's late amendment and late discovery. The defendant submitted that subsequent to postponement of the matter in November 2024, the plaintiff waited for a period in excess of four months before filing a supplementary discovery affidavit or amendment of its particulars of claim.

The plaintiff's submission

[8] The plaintiff argued that the matter has been dragging for nearly eight years and that, a day before commencement of trial and on trial day, the defendant filed notice of intention to amend its plea. The plaintiff averred that its amendment of particulars of claim did not introduce new facts, but it merely sought to place all evidence before the court and properly ventilate the matter. The plaintiff argued that there is no new ground for a defence. The plaintiff disputed the defendant's argument that it introduced a new claim in its amended particulars of claim. The plaintiff argued that the grounds upon which it is claiming payment have always remained the same, as has the amount claimed from the defendants. The plaintiff averred that the failure to attach page 2 of 'POC' to the summons, was a *bona fide* mistake on the part of the plaintiff, to which it intended to rectify with its amended particulars of claim.

Legal framework and analysis

[9] Rule 28 of the Uniform Rules of the High Court provides that:

'(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.

(2) The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(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.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(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 23 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 judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.'

[10] It is trite that amendment should be granted unless the application to amend is *mala fide* or would prejudice or cause injustice to the other party to the proceedings. The court will have to consider whether the prejudice cannot be cured by an award of a costs order.¹

[11] The plaintiff referred to the decision of *Moolman v Estate Moolman and Another*,² where the Court stated that:

'The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 Ch.D. 393); *Steward v North Met. Tramways Co.* (16 QBD 556) and 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.'

[12] In *McDuff Co (in liquidation) v Johannesburg Consolidated Investments Co., Ltd*,³ the Court in following the decision of *Rishton v Rishton (Rishton)*,⁴ stated that:

'On page 720 I find WESSELS, J., referred to some English cases as laying down the proper rule which should guide the Court. Quoting Lord BRAMWELL, he sets out these words: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, so that by his blunder he has done some injury to his opponent which could not be compensated for by costs or otherwise." He also quotes BRETT, M.R., who said in a different case. "However neglectful or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side; there is no injustice if the other side can be compensated by costs.".'

¹ *Impregilo SA v Mahamba: In re: Mahamba v Impregilo SpA* [2012] ZAGPJHC 194; see also *National Media Ltd and Others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A).

² *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

³ *McDuff Co (in liquidation) v Johannesburg Consolidated Investments Co., Ltd* 1923 TPD 309 at 310.

⁴ *Rishton v. Rishton* 1912 T.P.D. 718.

[13] In *Nedbank Ltd v Petch Manufacturing (Pty) Ltd & Others*,⁵ the court stated that:

‘The primary object of allowing an amendment 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.

...

an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable. The issue proposed to be introduced by the amendment must, accordingly, be a triable issue. A triable issue is one which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence so foreshadowed. Where the Plaintiff’s Particulars of Claim do not disclose a cause of action, an amendment of the Defendant’s pleas thereto would be an exercise in futility.’

[14] The plaintiff referred to the decision of *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Ltd (Trans-Drakensberg Bank Limited)*,⁶ where the court stated that:

‘The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.’

[15] The Court, in *Trans-Drakensberg Bank*, followed the decision of *Rishton*,⁷ where the Court stated that:

‘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. Now the old English practice was not very favourable to amending. But the practice which has been gradually adopted in English Courts, now crystallised by rules and orders, and which has also been followed very largely in our Courts, is to allow amendments to be made provided the other side is not in any way prejudiced by such amendments.’

⁵ *Nedbank Ltd v Petch Manufacturing (Pty) Ltd & Others* [2007] ZAGPHC 303 paras 3 and 6; see also *Media 24 (Pty) Ltd v Nhleko and Another* [2023] ZASCA 77.

⁶ *Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Ltd* [1967] 4 All SA 105 (D) at 638A.

⁷ Op cit fn 4.

[16] The plaintiff in its opposition of the amendment application cited prejudice and the fact that this matter has been awaiting commencement of trial for nearly eight years. This may be correct, however, the totality of the history and the manner in which this matter has been handled does not end there. Whilst I note the length of time that it took for this matter to commence trial, I do not believe that the defendant's amendment is not *bona fide*. The defendant argued that the amendment is occasioned by the plaintiff's amendment of its particulars of claim and supplementary to its discovery affidavit which introduced invoices that according to the defendant were not included in the original particulars of claim. Whilst I have noted the plaintiff's counter argument that these invoices do not introduce a new cause of action, in my view, it will not be in the interest of justice to deny the defendant an opportunity to raise a special plea of prescription which should be ventilated during determination of the plaintiff's claim. There is clearly a dispute which needs to be ventilated, and the special plea of prescription sought to be introduced by the defendant is relevant to the defence that is competent to be raised. The amendment of the plaintiff's particulars of claim has resulted to the defendant's application to amend the plea, which is opposed by the plaintiff.

[17] The court has a dual responsibility to protect both the interests of the plaintiff and the defendant. The history of this matter shows a pattern of various amendments effected by both the plaintiff and the defendant. The court has a duty to balance the interests of both parties. The court has a discretion in terms of rule 28 of the Uniform Rules of the High Court to either grant the amendment or refuse it. When exercising this discretion, regard must be given to prejudice or inconvenience that may be suffered by either of the parties to the litigation.

[18] Taking into consideration the manner in which this matter has been handled, I am not persuaded that the plaintiff will suffer prejudice by amendment of the defendant's plea. I do not think that the delay by the defendant in seeking the Court's indulgence for amendment of its plea constitute *mala fides* in any manner.

[19] I am satisfied that the defendant has made out a proper case for the amendment to be granted.

Costs

[20] The general rule is that the successful party should be granted costs. This rule should not be departed from unless there are grounds for doing so. However, the defendant seeks an indulgence, it delayed in bringing the application to amend its plea. Whilst I do not believe that the objection to the amendment was reasonable, I do not deem it necessary to make a cost order in respect of this application.

Order

[21] In the circumstances, I make the following order:

- 1 The defendant is granted leave to amend its plea within ten days of this order.
- 2 There is no order as to costs.



M NTANGA AJ

Appearances

For the applicant: LA Roux

Instructed by: Peyper Attorneys, Bloemfontein

For the respondent: N van der Sandt

Instructed by: Anthony Whatmore & Co., Durban
c/o Mayet & Associates, Bloemfontein