

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NO: 19020/17

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

13/01/2023

DATE

A handwritten signature in blue ink, appearing to be 'S. Nkomo', written over a circular stamp.

SIGNATURE

MINISTER OF POLICE

1st APPLICANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

2nd APPLICANT

And

JWILI ISAAC SIPHIWE

RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO AMEND

KEKANA AJ

INTRODUCTION

[1] This is an opposed application for leave to amend the defendant's plea in terms of Rule 28 (4) of the Uniform Rules of Court. For convenience I shall refer to the parties as in the main action.

PLAINTIFF'S CLAIM

[2] The plaintiff sued the defendant for payment in the sum of R2 000 000 (Two Million Rands) plus interest for damages. It is alleged in the summons: (a) that the first defendant's servants 'maliciously set the law in motion by laying false charges of attempted murder and robbery against the plaintiff...'; (b) further that the second defendant's servants 'maliciously or negligently set the law in motion when deciding to prosecute the plaintiff on the said charges of attempted murder and armed robbery ...'; (c) alternatively, that the first defendant's servants unlawfully or wrongfully detained the plaintiff.

DEFENDANTS' PLEA

[3] In the defendants' plea dated the 16th April 2019, which is an amended plea, (a) The first defendant denied that its servants 'maliciously, alternatively set the law in motion by laying false charges of attempted murder and armed robbery against the plaintiff. (b) The first defendant specifically pleaded that the plaintiff was arrested and charged for conspiracy to commit robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 as per charge sheet'.

[4] The first defendant further pleaded that the plaintiff was lawfully arrested by a peace officer on reasonable grounds in terms of section 40(1) (b) of Act 51 of 1977 after being implicated by co-suspect in a statement made in terms of 204 of Act 51 of 1997. Further that the detention was lawful in terms of section 50 of Act 51 of 1977 read with section 35 of Act 108 of 1996. The defendants further aver that further detention was at the instance of the court of law.

[5] Second defendant's plea is that the plaintiff was lawfully prosecuted on conspiracy to commit robbery with aggravating circumstances.

FACTORS LEADING TO THE AMENDMENT

[6] Summons in this matter was served on the 4th July 2017, and the amended plea dated 16th April 2019 was filed on the 17th April 2019. The trial commenced on the 26th May 2019 and the trial continued well into October 2019. During November the defendants brought 2 applications for leave to amend which they later withdrew. On the 3rd December 2019, the matter was set down for arguments, the defendants brought an application for leave to amend from the bar. The matter was then postponed to afford the defendants an opportunity to bring an application in terms of rule 28 of the Uniform Rules of Court.

THE INTENDED AMENDMENT

[7] The defendants seek to amend their plea as follows:

"1. By deleting the contents of paragraph 2 thereof and substituting same with the following:

AD PARAGRAPH 9

Save to deny that the servants of the First Applicant maliciously, alternatively negligently set the law in motion by laying false charges, the First Applicant admits that the Respondent was charged with attempted murder and armed robbery. The First Applicant specifically pleads that its servants had reasonable suspicion that the Respondent had committed an offence in terms of section 40(1) (b) of the Criminal Procedure Act 51 of 1977 ("the Act").

2. By deleting the contents of paragraph 3 thereof and substituting same with the following:

AD PARAGRAPH 9.1 THEREOF

Save to admit that the Respondent was arrested, the First Applicant denies that the arrest and detention were malicious, alternatively negligent. The First Applicant specifically pleads that the arrest was sanctioned by section 40(1) (b) of the Act. The Respondent's arrest and detention were on charges of attempted murder and armed robbery.

3. By deleting the contents of paragraph 4 thereof and substituting same with the following:

AD PARAGRAPH 9.2 THEREOF

Save to admit that a docket was opened and the Respondent cited as a suspect on charges of attempted murder and armed robbery, the First Applicant denies that such conduct was malicious, alternatively negligent and puts the Respondent to the proof thereof.

4. By deleting the contents of paragraph 7 and 6 thereof and substituting same with the following:

AD PARAGRAPH 9.3 and 9.4 THEREOF

The First Applicant denies that the Respondent's detention was malicious, alternatively negligent. The First Applicant specifically pleads that the detention was in terms of section 50 of the Act, read with section 35 of Act 108 1996 and in conditions consonant with human dignity.

5. By deleting the contents of paragraph 7 thereof and substituting same with the following:

AD PARAGRAPH 9.5 THEREOF

Save to admit that the servants of the First Applicant took the Respondent to the criminal court to be charged with attempted murder and armed robbery, the First Applicant denies that its conduct was either malicious or negligent and puts the Respondent to the proof thereof.

6. By deleting the contents of paragraph 8 thereof and substituting same with the following:

AD PARAGRAPH 9.6 THEREOF

Save to admit that the Respondent was charged with attempted murder of his cousin, the First Defendant denies the rest of the allegations made in this paragraph. The First Applicant specifically pleads that the Respondent conspired with others to rob the vehicle belonging to his cousin's employer.

7. By deleting the contents of paragraph 9 thereof and substituting same with the following:

AD PARAGRAPH 9.7 THEREOF

Save to admit that the Respondent was charged with attempted murder and armed robbery, the First Applicant denies that the further detention was at its instance. In amplification, the First Applicant pleads that the Respondent further detention was as a result of an order by the criminal court which refused the Respondent's bail.

8. By deleting the contents of paragraph 14 thereof and substituting same with the following:

AD PARAGRAPH 10 THEREOF

Save to admit that the Second Applicant made a decision to prosecute the Respondent on charges of attempted murder and armed robbery, the Second Applicant denies that such decision was either malicious or negligent and puts the Respondent to the proof thereof.

9. By deleting the contents of paragraph 15 thereof and substituting same with the following:

AD PARAGRAPH 10 THEREOF

The Second Applicant denies the contents of this paragraph and puts the Respondent to the proof thereof. The Second Applicant specifically pleads that based on the information placed before its servants, it had reasonable probable cause and no intention to injure the Respondent when it decided to prosecute him.

10. By deleting the contents of paragraph 31 thereof and substituting same with the following:

AD PARAGRAPH 10 THEREOF

Save to admit that the Respondent was arrested without a warrant, the First Applicant denies that the arrest was either malicious or negligent and puts the Respondent to the proof thereof. The First Applicant specifically pleads that the arrest was in terms of section 40(1) (b) of the Act."

THE OBJECTIONS

[8] The basis for the respondent's objection to the proposed amendment is that:

- (a) It is brought too late and after both parties have closed their cases and filed their heads of arguments;
- (b) It will call for the reopening of the parties' cases;
- (c) It will prejudice the respondent as it seeks to withdraw admissions made.

THE LAW

[9] It is trite that the court hearing an application for leave to amend has a wide discretion which should be exercised judicially. The party seeking the amendment bears the onus of showing that it is made bona fide and that there is an absence of prejudice. *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363.

[10] The practical rule adopted by our courts is that 'amendments will always be allowed unless the application to amend is mala fide or unless such an 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 purposes of justice in the same position as they were when the pleading which it sought to amend was filed'. (Moolman v Estate Moolman 1927 CPD 27 at 29. This approach has been endorsed in numerous later decisions.

[11] The primary object of the amendment is to obtain proper ventilation of the issues. A party seeking to amend must offer some explanation for why the amendment is sought and where the amendment is not timeously made, some reasonable satisfactory account for the delay (Zarug v Parvathie N.O 1962 (3) SA 872 (D) at 876 C-D)

[12] Rule 28 of the Uniform Rules of Court provides as follows:

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

SUBMISSIONS BY THE PARTIES

[13] The defendants indicated that the plaintiff will not suffer any prejudice as the amendment seeks to only make a fact that was previously in dispute to be common cause. It was submitted further that whatever prejudice that the plaintiff would suffer, if any, would be offset by an order as to costs and/or a postponement.

[14] The plaintiff on the other hand indicated that the amendment was prejudicial and the prejudice he would suffer cannot be cured by an order as to costs or postponement. Furthermore, the plaintiff questioned the bona fides of the defendants pointing to the number of previous attempts to amend their plea and the fact that they brought their application after both parties had closed their cases.

EVALUATION

[15] The aim of allowing amendments to pleading is to do justice between the parties by deciding the real issues between them. Neglect or mistake on the part of one of them is not

a bar. (Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D)

WITHDRAWAL OF ADMISSIONS

[16] The plaintiff contends that the amendment seeks to withdraw admissions regarding (a) the charges upon which the plaintiff was arrested; (b) the involvement of the plaintiff in the crimes committed; (c) the jurisdictional facts upon which the defendants relied for the purposes of the arrest; (d) the charges preferred against the plaintiff and the sequence of charges the plaintiff had to meet at various stages of the trial.

[17] The defendants had previously denied that the plaintiff was charged with attempted murder and armed robbery, however in the intended amendment, the defendants admit that the plaintiff was in fact charged with attempted murder and armed robbery. In addition to this, the defendants are withdrawing some of the allegations that constituted their defence and substituting them. A proper reading of the proposed amendments to the defendants' plea does not support the conclusion that the defendants are withdrawing admissions.

EXPLANATION FOR THE DELAY AND BONA FIDES

[18] Another objection raised by the plaintiff is that the application is brought late, when the parties have already closed their respective cases. The defendant correctly pointed out that an application for leave to amend may be brought at any time before judgment. However, where the application is brought at an advanced stage of the proceedings, like in the present case, the defendant is expected to provide some 'reasonable satisfactory account for the delay'.

[19] The defendants knew as early as 27th May 2019 (a day before the commencement of the trial) that they intended to amend their plea. The first notice in terms of rule 28 of the Uniform Rules of Court dated the 07th November 2019 was filed approximately six months later and was objected to by the plaintiff and withdrawn by the defendants. The defendant then filed their second notice in terms of rule 28 of the Uniform Rules of Court

dated the 28th November 2019 which was objected to by the plaintiff and withdrawn on the 10th December 2019. A further notice in terms of rule 28 of the Uniform Rules of Court was filed dated 10th December 2019 which is the subject of this application. The defendant brought this application after the plaintiff objected to the intended amendment.

[20] The founding affidavit is silent on the reasons for the filing and withdrawal of the other rule 28 notices. The defendants do not provide a reasonable satisfactory account for the delay except to state that their attorney was overloaded with work. There is no attempt to account for the 6 months before they filed their first notice in terms of rule 28 of the Uniform Rules of Court. The defendants sat through a lengthy trial and did not at any time indicate that they intended to amend their plea.

DEFENDANTS' EXPLANATION FOR THE AMENDMENT

[21] The defendants aver that at the time of drafting the amended plea, the defendants' attorney had not consulted with the servants of the second defendant who were dealing with the matter. He relied on the information contained in the police docket which indicated the charges as attempted murder and robbery on one page while on another page the charges are preferred as armed robbery, conspiracy to commit robbery and attempted murder. He consulted for the first time with the prosecutor on the 27th May 2019 and it became apparent that he needed to amend the plea.

[22] The defendants' contention is that the amendment seeks to make a fact that was initially in dispute to be common cause. In its earlier plea the defendants denied that the plaintiff was arrested on a charge of attempted murder and armed robbery. In the proposed amendment the defendant admits that the plaintiff was charged with attempted murder and armed robbery.

[23] In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd and Another* 2002 (2) SA 447 the court outlined considerations that are applicable when a party wishes to amend his pleadings at an advanced stage of the proceedings.

The first matter which the applicant has to prove is that he did not delay his application after he became aware of the evidentiary material upon which he proposes to rely. Furthermore he must explain the reason for the amendment and show prima facie that

he has something deserving of consideration, a triable issue. A triable issue is (a) a dispute which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant; or (b) a dispute which will probably be established by the evidence thus foreshadowed. Although, in the case of a timeous and less disruptive application, it will often not be appropriate to require the applicant to indicate how he proposes to establish his amended case, an applicant's prospects of succeeding will properly be an element in the exercise of the court's discretion where the application is moved at an advanced stage of the proceedings. The greater the disruption caused by an amendment, the greater the indulgence sought and accordingly, the burden upon the applicant to convince the Court to accommodate him.' (Headnote)

[24] In *Krogman v Van Reenen* 1926 OPD 191 at 194-195 the court refused to grant leave to amend where the amendment was brought at an advanced stage in the proceedings. The court held that 'even if the prejudice to the defendant could be cured by a cost order or a postponement, that did not entitle a litigant to claim an amendment as of right: he would have to show that the amendment was sufficiently important to justify his putting the Court and the defendant to the inconvenience of a postponement and that the necessity for the amendment had arisen through some reasonable cause, even if by a bona fide mistake'. The court found that the plaintiff failed to show good cause.

PREJUDICE

[25] According to the defendants the amendment is meant to align the plea with the evidence before court and also to make the allegation that the plaintiff was arrested for attempted murder and armed robbery common cause. In essence, the defendants' amendment will support the plaintiff's case as far as the reason for the arrest is concerned.

[26] It was submitted on behalf of the defendants that the amendment does not affect the respective cases of the parties and that there would be no need for either of the parties to reopen their cases or to redraft their heads of argument. This is important considering the timing of the amendment.

[27] In *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B Selikowitz J stated "where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not to be granted. To grant such amendment will simply prolong and complicate the proceedings for all concerned and must in particular cause prejudice to the opposing party who will have to devote his energy and expend time and money in dealing with an issue the resolution of which may satisfy the need or (curiosity) of the party promoting it, but which will not contribute towards the adjudication of the genuine dispute between the parties."

[28] The policy that guides the court in applications for amendments is to encourage full and proper ventilation of the real dispute between the parties. This application remains an indulgence that must be justified by the applicant thereof. The prejudice to the plaintiff is the deciding factor in the granting or refusal of the application. (*Benjamin v Sobac South African Building and Construction (Pty) Ltd*). The defendants cannot claim that they will be prejudiced should the amendment sought not be granted, especially since the defendants contend that: (a) the amendment merely seeks to admit the reason for the arrest which is supported by the evidence led on its behalf; and (b) they do not need to re-open their case or file new heads of argument.

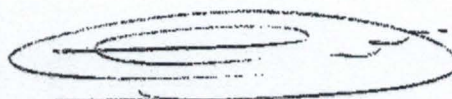
[29] There is no question, the proposed amendment will dispose of an issue regarding the plaintiff's arrest. It is my view that such an amendment will 'simply prolong and complicate the proceedings for all concerned and in particular cause prejudice to the plaintiff who will have to devote his energy and expend time and money' dealing with an issue that can easily be dealt with by the court since the defendants admit that their evidence support the plaintiff's averment that he was arrested for attempted murder armed robbery. (see *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B)

[30] Considering the amount of time that has lapsed since the summons were served, I find that the amendment will be prejudicial to the plaintiff especially since the defendants do not intend to reopen their case or amend or supplement the heads of argument already filed. The prejudice that the plaintiff will suffer cannot be cured by an order as to costs.

The amendment will in no way contribute to the resolution of the dispute between the parties and therefore ought not to be granted. The defendant to pay the costs of the application.

WHEREFORE I make the following order:

1. Application for leave to amend is dismissed with costs.

A handwritten signature in black ink, appearing to be 'P D KEKANA', enclosed within an oval-shaped stamp or seal.

P D KEKANA
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Applicant : Adv Mhlanga

Instructed by : State Attorney

On behalf of the Respondent : Adv. Kerr-Phillips &
Adv. Ashil Naidoo

Instructed by : Wits Law Clinic

Date of hearing : 08 December 2022

Date of judgment : 13 January 2023