**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE DIVISION – GQEBERHA**

**Reportable/Not Reportable**

**Case No: 3357/2022**

In the matter between:

**TIMBER SHAVINGS CC** Applicant

and

**HOMELY PROPERTY AND BNB (PTY) LTD** Respondent

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**JUDGMENT**

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**ELLIS AJ:**

[1] This is an opposed application in terms of rule 28 of the Uniform Rules ("the application") in terms of which the applicant is seeking an order that:

1. The applicant be given leave to amend its particulars of claim in accordance with the notice to amend, dated 22 March 2023; and
2. The respondent pays the costs of the application on the scale as between attorney and client.

[2] The application followed as a result of the respondent delivering a notice of objection in terms of rule 28(3) on 30 March 2023 ("the objection"), objecting to the proposed amendment on the following grounds:

> "1. On the 24th of November 2022 defendant caused a notice in terms of Rule 35(14) to be served on plaintiff. In terms of this notice plaintiff was requested to furnish copies of the invoices rendered as required by paragraphs 4.2, 4.2.2 and 6 of Plaintiff's Particulars of Claim as read with paragraph 3, 4.1 and 4.2 of the agreement attached thereto marked "A" and as read with paragraph 1 under the heading "Rates" of Addendum A attached to the agreement marked "A".
>
> 2. On the 2nd of December 2022 plaintiff replied to defendant's request as follows: *"As per the Agreement and intention of the parties, no invoices were rendered for the initial 100 plots cleared and the 37 plots trenched, as the plaintiff intended on receiving transfer of a plot in lieu of part payment for the works done".*
>
> 3. Plaintiff's reply as abovesaid is in clear contradiction to the proposed amendment plaintiff now seeks to introduce. The amendment therefore renders plaintiff's proposed amended Particulars of Claim excipiable.
>
> 4. Annexure "B" to the amendment is clearly a forgery and plaintiff's application if therefore also clearly *mala fide.*
>
> 5. Defendant will be seriously prejudiced should plaintiff be permitted to effect the proposed amendment".

[3] On an analysis of the pleadings, the applicant's claim against the respondent is based on a written agreement ("the agreement") between the parties in terms of which the applicant would provide certain services to the respondent, including removing grass and rubble, digging house foundations and perform rock-breaking services and the like ("the services"). Payment by the respondent is regulated under "Fees" in clause 3 of the agreement and also refers to Addendum "A" to the agreement.

[4] It is specifically recorded in clause 3 of the agreement that any delivery of service in accordance with the agreement was subject to the parties entering into a separate deed of sale in terms of which the respondent undertook to transfer Erf No. 317 situated on the Wedgewood Estate to the applicant, on such terms as would be set out in that separate deed of sale, and to construct a dwelling on the property on such plan as to be determined by the applicant.

[5] Payment for the services is regulated by clause 4 of the agreement, which obliges the applicant to render invoices as required by the respondent from time to time, to enable the respondent to process payment, and again records that payment would be dependent upon full compliance with the payment arrangements as set out in Addendum "A" to the agreement.

[6] The relevant part of Addendum "A" reads as follows:

"**RATES**

> The Company, or its nominated agent, undertakes to transfer a plot in the Wedgewood Estate to the nominated entity of the Service Provider *in lieu* of part payment for the rendering of services as set out herein which plot is to be nominated by the Service Provider. In the event that the Company does not transfer the plot to the nominated entity of the Service Provider in terms of the agreement between the parties or in the event that the Company fails to build a dwelling as set out below the parties agree that the Company will pay the Service Provider an amount of R2 600.00 per plot that has been so cleared <u>upon the presentation of an invoice</u>". (My emphasis underlined.)

[7] The applicant pleads in its particulars of claim that 100 plots were cleared, and 37 plots trenched. The applicant pleads further that due to non-compliance of the agreement with the Alienation of Land Act, 68 of 1981, it is not enforceable and accordingly the applicant is unable to claim transfer as per the agreement *in lieu* of works completed. As such, the applicant pleads that its claim lies in the payment of monies for the work done. It is common cause that no separate written agreement of sale was entered into between the parties.

[8] Prior to delivery of its plea, the respondent filed a notice under rule 35(14) (as referred to in the objection) and to which the applicant replied (in the manner as referred to in the objection).

[9] The respondent then delivered its plea, which included two special pleas and the plea over, contending in its second special plea that summons was prematurely issued, as the applicant confirmed that no invoices were rendered and the applicant was not entitled to payment sounding in money as the respondent remained willing and able to transfer an immovable property; that the applicant refused to accept transfer of such property; and that the applicant had failed to render any invoices. The first special plea is irrelevant for current purposes.

[10] In the respondent's plea over, the respondent denies that the applicant's claim lies in the payment of monies for the works done and repeats that the applicant can only insist on payment in the event of the respondent failing to transfer Erf 317, Wedgewood Estate to the applicant. Further, the respondent pleads that applicant refused to accept transfer of the property and was therefore precluded from

demanding any form of payment *in lieu* of transfer. The respondent repeated that applicant was compelled to render invoices and that the applicant failed to do so and was therefore not entitled to demand payment.

[11] It is against this background that the applicant's application is to be considered, as at the heart of the intended amendment the applicant seeks to attach an invoice, dated 19 January 2023, in the amount of R270 020.00 in respect of the clearing and trenching done.

[12] Mr du Toit, appearing on behalf of the respondent, accepted that the statement by Watermeyer J in *Moolman v Estate Moolman* (1927 CPD 27 at 29) is frequently relied upon by the court in deciding whether to allow an amendment:

> "[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend in *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 the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".

[13] The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.

[14] The Supreme Court of Appeal in *Media 24 (Pty) Ltd v Nhleko & Another* ((Case No. 109/22)[2023] ZASCA 77 29 May 2023)) at para [17] repeated the principles of prejudice and restated that the principle that an amendment that may

lead to the defeat of the other party is not the type of prejudice to be taken into account in deciding whether to allow an amendment.

[15] At para [19] of *Media 24* Nicholls JA reminded trial courts that an adherence to the fundamental principles of pleadings should be observed and parties should be allowed to ventilate their case as they determine, within the bands of the principles that the *facta probanda* must be pleaded, not the *facta probantia.* A litigant is not required to prove its case in the pleadings, nor to describe the evidence to be led, but to state the material facts on which it relies and which it intends to prove at the trial.

[16] Mr du Toit argued that the intended amendment would render the particulars of claim excipiable for being vague and embarrassing and failing to disclose a cause of action as the particulars of claim do not contain allegations why the applicant is entitled to claim payment in money or allegations that the relevant steps relating to breach were followed. However, the root of the excipiability, as set out in the objection, lies in the contradiction between the applicant's version on 2 December 2022, being that no invoices were rendered, against the invoice issued and dated 19 January 2023.

[17] The highwater mark of the prejudice that respondent alleges it would suffer if the amendment is allowed, is that the invoice purports to be an invoice issued in terms of the agreement, which it contends it is not, and as such, the respondent will

be prejudiced in its defence if the applicant is permitted to introduce irrelevant evidence not created in terms of any agreement between the parties.

[18] Mr du Toit argued further that an invoice could only be issued once the respondent failed to transfer Erf 317 to the applicant, and then failed to rectify the breach after the applicant acted in accordance with clause 13 of the agreement by notifying the respondent of the breach and affording it the opportunity to rectify it. Allowing the invoice to be introduced, so the argument went, would be tantamount to condoning the applicant's non-compliance with the agreement and the respondent would be prejudiced as it would not be able to challenge the admissibility of the invoice.

[19] I find myself unable to agree with Mr Du Toit that to allow the amendment and introduction of the invoice would be tantamount to amending the contract to the applicant's benefit and to the prejudice of the respondent. It also does not follow that the mere introduction of the invoice, without further proof thereof at the trial, would immediately render the invoice valid. The amendment will do nothing more, or less, than to allow the applicant to place its case before the trial court. It is common cause that the invoice did not exist on 2 December 2022. The applicant's entitlement to claim payment based on the invoice issued and dated 19 January 2023 instead of taking transfer *in lieu* of payment, is to be ventilated at trial. That determination is not for the court required to decide whether to grant or refuse an application to amend.

[20] The main issues between the parties are whether the terms of the agreement (without a further separate deed of sale) are enforceable and whether the applicant is entitled to claim payment in money for the services rendered. The respondent's defence, in my view, remains unaltered by the introduction of the invoice. Allowing the amendment will only prejudice the respondent insofar as costs are concerned, which prejudice can be ameliorated by ordering the applicant to pay the costs occasioned by the amendment.

[21] As to the allegations of forgery in the respondent's objection, this can readily be disposed of as the director of the applicant in his affidavit in support of the application confirmed the authenticity of the invoice.

[22] Turning now to the aspect of costs. I do not believe that the notice of objection was vexations or frivolous, as the applicant on its own version confirmed that by 2 December 2022, no invoices had been rendered. It was only when the affidavit in support of the application was filed, that the applicant tendered an explanation as to why there were no previous invoices and why an invoice had now been issued – mainly based on the respondent's special plea that monies could not be claimed without an invoice.

[23] The principles governing costs in circumstances where a party seeks an indulgence need not be restated. Mr Friedman, for the applicant, rightly contended that costs occasioned by the amendment are to be for the applicant's account. In finding that the basis for the amendment was only fully explained in the application, it

follows that the applicant ought to also pay its own costs in respect of the drafting of the application.

[24] As to the costs incurred as a result of the opposition to the application, these are costs that the applicant ought not to bear, as the respondent was unable to demonstrate prejudice within the ambit of the relevant legal principles, nor could the respondent demonstrate *mala fides* on the part of the application.

[25] I am not persuaded by Mr Friedman's submission that the current circumstances can be likened to those in *Media 24* where the objection was found to be reckless and vexatious and as such, I am not inclined to award costs on a punitive scale.

[26] In the result, the following order will issue:

1. The application for leave to amend is granted.
2. The applicant shall deliver the amended particulars of claim no later than 10 days after the date of this order.
3. The respondent may, within 15 days after the amendment has been effected, make any consequential adjustment to the documents filed by it and may also take the steps contemplated in rules 23 and 30.
4. The applicant shall pay the wasted party and party costs occasioned by the amendment.
5. The respondent shall pay the costs of the application from 20 April 2023, on the scale as between party and party.

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**L ELLIS**
**Acting Judge of the High Court**

Appearances:

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| For the applicant: | Mr GJ Friedman |
| Instructed by: | Friedman Scheckter Attorneys |
| For the respondent: | Adv P Du Toit |
| Instructed by: | Britz Attorneys |
| | c/o Lizelle Pretorius Inc |
| Date heard: | 20 July 2023 |
| Date delivered: | 1 August 2023 |