IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Case No: 2938/2022

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

NDIYAKHOLWA GOQWANA Respondent

JUDGMENT

METU AJ

INTRODUCTION

1. This an application by the National Director of Public Prosecutions (the applicant") seeking leave to amend her plea which, in some parts, has an effect of withdrawing admissions.

2. The respondent, Ndiyakholwa Goqwana is resisting the application contending that such withdrawal of admissions is *mala fide* and no satisfactory explanation has been proffered as to the basis on which they were made and why the withdrawal thereof is now sought.

3. On 30 August 2023, the applicant served the Notice of Intention to amend on the Respondent's attorneys of record[1].

4. On 04 September 2023, the respondent's attorneys delivered a Notice of Objection in terms of Rule 28 (3) of the Uniform Rules of Court.

5. The applicant delivered a Notice to Oppose on 12 September 2023 followed by his opposing affidavit on 19 September 2023.

6. The matter was set down for hearing on 04 December 2023 and on that date, it was postponed to 06 June 2024 to allow the applicant to deliver her replying affidavit by no later than 15 December 2023. This was duly done as the applicant delivered her replying affidavit on 14 December 2023.

7. On 06 June 2024, the matter served before me and after hearing submissions by both parties, I reserved judgment, which I now pen.

THE ISSUE

8. The issue for determination is whether it is permissible for the applicant to withdraw admissions made at paragraphs 3 and 4 of the original plea through the proposed amendment.

[1] See: p16 – 20 of Index to Pleadings.

DISCUSSION

9. In broad terms, where a proposed amendment involves a withdrawal of an admission, the Court will generally require a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it, and the Court will also consider the question of prejudice to the other party. If the prejudice cannot be compensated by a special order as to costs, the application to amend will be refused.[2]

10. In ***Krogman v Est. Moolman*** 1926 OPD 191 it was held that an amendment cannot be claimed as of right. An amendment is generally granted to enable a proper ventilation of issues between the parties.

11. The application to amend should not be predicated on *mala fides* on the part of the party seeking the amendment. By the same token, it must not be prejudicial or unjust to the other party.

12. The inconvenience must be capable of being compensated by a postponement or an order of costs. This is done to put the Respondent in the same position he was in before the filing of the original plea. On this point, Spilg J in ***Ergo Mining (Pty) Ltd***[3] succinctly outlined this requirement as follows:

> *'An amendment will generally be granted to enable the real issues between the parties to be properly ventilated. It follows that a pleading which does not disclose a cause of action or defence will not qualify or where it is self-evident that no case could be made out in fact or law. An*

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[2] ***Zarug v Parvathie NO 1962 (3) SA 872 (D), J R Janisch G (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd*** 1992 (1) SA 167 (C); and ***Amod v South African Mutual Fire and General Insurance Co Ltd*** 1971 (2) SA 611 (N).

[3] ***Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality & Ano*** [2020] 3 All SA 445 (GJ) at para.8

amendment will also not be granted if it results in prejudice that cannot be cured by an award of costs or a postponement. <u>In this regard an amendment to cure a tactical advantage which the other party may enjoy is not the type of prejudice which will suffice</u> and although an exception may be raised if the other party fails to cure a pleading which is vague and embarrassing the requirement of prejudice remains'.

[Emphasis added]

13. Pertaining to the withdrawal of an admission, Leon J in ***Amod v South African Mutual Fire and General Insurance Co Ltd***, [4] had this to say:

'I consider that the true position in the case of the withdrawal of an admission is as follows. The Court has a discretion but will require a reasonable explanation both of the circumstances under which the admission was made and of the reasons why it is sought to withdraw it. In addition, the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him then the application to amend will be refused. It should, however, be noted that the fact that the amendment will cause the Goqwana to lose his case is not of itself "prejudice" or "injustice" in the sense discussed above'.

14. In Erasmus. <u>*Superior Court Practice*</u>. @ B1-1182/2 read with footnotes 8 and 1, respectively, it is stated:

'…withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation

[4] ***Amod v South African Mutual and Federal Insurance Co Ltd*** 1971 (2) SA 611 (N) at p 614H – 615A.

to convince the court of the benefit is there and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that not prove that relevant affect and might, for that reason, have omitted together the necessary evidence. The court will, therefore, in the exercise of its discretion, require an explanation of the circumstances and that which the admission was made and the reason for now seeking to withdraw it'.

FACTUAL MATRIX

15. The District Court Prosecutor, Ms. Saziwe Ncaza ("Ms. Ncaza"), on the first appearance of Goqwana, requested that he be remanded in custody at the Wellington Prison in Mthatha for further profiling. This brought detention by police to end[5].

16. The respondent asserts in paragraph 6 of the Particulars of Claim, that the judicial detention endured until 14 April 2022. It must be borne in mind that according to the respondent, Ms. Ncaza requested that the matter be postponed to 19 April 2022, which was a period in excess of the prescribed seven (7) days.

17. Notably, the respondent's first appearance was on 29 March 2022. The respondent's gripe is for the period 09 to 14 April 2022. The period from 30 March to 08 April 2022 is not accounted for and nothing is said about it in the Particulars of Claim. One would assume that this further detention was lawful.

18. Then in paragraph 7, it is contended that the applicant is liable for the respondent's unduly extended detention because:

[5] Index to pleadings; p5 para 5 – Plaintiff's Particulars of Claim.

18.1. she was exercising her powers;

18.2. she was carrying out her duties; and

18.3. she was performing her functions conferred, upon her or assigned to her by the Constitution, the National Prosecuting Act, 32 of 1998 or any other law.

19. It is worth mentioning that the Particulars of Claim are expiable as no cause of action is disclosed.

20. In paragraph 8 of the Particulars of Claim, it is stated that Ms. Ncaza postponed the bail hearing to 19 April 2022, which according to the Respondent was a dereliction of a statutory duty[6].

21. Paragraph 9 of the Particulars of Claim asserts that Ms. Ncaza had a public law duty not to violate the respondent's right to freedom. It is further averred that Ms. Ncaza omitted to perform her public duty and according to the respondent, this was wrongful in private law terms. The respondent does not elaborate on the cornerstone of this public law duty nor provides reasons for his conclusion that Ms. Ncaza's conduct was wrongful in private law terms[7].

22. In the original plea, the applicant in paragraphs 1 to 3 simply noted these paragraphs. Effectively, these are to be taken as admissions. Then, in respect of paragraphs 5 to 7, the applicant admitted the contents thereof. The plea pertaining to paragraphs 8 to 14 of the Particulars of Claim admitted the contents of these paragraphs except for the allegation that the postponement

[6] *Loc cit* @ para 8.
[7] See: Index to Pleadings @ p6, para 9.

of the bail hearing disclosed a dereliction of statutory duty, and put the respondent to proof thereof.

THE TEST

23. The Court has to first determine the presence or absence of jurisdictional fact, which is the reasonable basis of initially having made the admission and subsequently the reason of seeking to withdraw such an admission[8]. This is objectively assessed.

24. The jurisdictional fact will be determined by assessing the basis for the original admission and comparing it with the reason for the later withdrawal.

25. The Court must also consider whether the prejudice or injustice can be compensated by a postponement or an order of costs placing the respondent in the same or similar position he would have been in before the admission was made.

26. In ***Jomovest Twenty-Five CC v Engel & Volker Western Cape (Pty) Ltd***, Moosa J, said[9]:

> *'Before the court exercises its discretion whether or not to grant the amendment to withdraw the admissions, the court is required to determine the presence or absence of the jurisdictional fact. The test to determine the presence or absence of the jurisdictional fact, in this matter, is an objective one. Should the court find that the Defendant has failed to establish the jurisdictional fact, the proposed amendment is refused. On the other hand, should the court find that the Defendant has established jurisdictional fact, such finding triggers the exercise of*

[8] Ibid.
[9] [2010] 4 All SA 619 (W) Para.11

the court's discretion. In exercising such discretion, the court considers the question of ***mala fides*** *on the part of the Defendant in seeking the amendment and of the potential prejudice or injustice that the Plaintiff may suffer if such amendment is granted'.*

EVALUATION

27. I now turn to evaluate the evidence to determine whether the respondent has made a case for withdrawing the admissions and has, therefore, established the jurisdictional fact. This is an objective test.

28. The first question is whether the applicant has tendered evidence showing the reasonable basis for making the admission in the original plea.

29. In respect of the pleading to paragraphs 1 to 3 of the Particulars of Claim, the applicant contends that the original plea did not meet the requirements and/or threshold laid down in Rule 22 (2) of the Uniform Rules of Court. As such, the respondent should have made an exception to the plea.

30. Paragraph 3 of the original plea, pleaded to paragraphs 5 to 7 of the Particulars of Claim, wherein the contents of those paragraphs were simply admitted without any qualification. The proposed amendment seeks to introduce a denial that Ncaza made the request for the criminal case to be remanded to 19 April 2022.

31. The applicant's explanation for the admission in the original plea is found in paragraph 8, read with paragraph 13 and their subparagraphs of the founding affidavit filed in support of the application to amend.

32. The reason proffered is that the Particulars of Claim were not clear in saying whether the Prosecutor requested a remand of the case, whether the respondent should be kept in custody, or whether the Prosecutor requested the case to be remanded to 14 April 2022. The applicant argues that the language used in the Particulars of Claim did not exactly express properly a clear case for the applicant to answer in the manner in which the allegations were made. In the circumstances, the allegations could neither be admitted nor denied[10].

33. Paragraph 6 remains admitted, and paragraph 7 is denied, as the applicant contends that retaining an admission would be a deviation from the admission contained in paragraph 4 of the original plea.

34. The original plea's paragraph 4 is couched differently. The admission to the contents is followed by a specific denial of the postponement of bail being a dereliction of duty by Ms. Ncaza and the respondent being put to proof.

35. The proposed amendment does not deviate from this posture but seeks to put flesh to the bones.

36. A cogent explanation is proffered in respect of the proceedings of 28 March 2022, which puts light on the roles played by:

36.1. Ms. Ncaza as a District Prosecutor;

36.2. Ms. Peti as Goqwana's legal representative; and

36.3. the Magistrate who presided on the day.

[10] See: Revised Index @ p8 – 9 para 13 and subparagraph 13.1.1.

37. It is important to note that in terms of procedure and the law, it is the Magistrate who has to apply his/her mind and decide whether to postpone the bail hearing for seven (7) days to allow further investigation. This does not take away the magistrate's power and authority to make the decision to postpone the bail hearing.

38. It is unclear what the basis is for the respondent's legal representative to impute vicarious liability to the applicant for a decision the Magistrate took.

39. What is noteworthy is the fact that the presiding Magistrate is not joined in these proceedings.

40. It must also be borne in mind that the respondent has not laid any basis that there was a departure from the well-established law and procedure regarding who is vested with decision-making in bail applications and postponements.

41. A reading of Sections 50 (3) and 60 (2) tells us that *the <u>Court 'may' postpone any proceedings contemplated</u>* in Section 50 (3) of the CPA. This brings about the examination of Section 50 (6) (d) (i) which reads: [Emphasis added]

> *'The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if -*
>
> *(i) the court is of the opinion that it is has insufficient information or evidence at its disposal to reach a decision on the bail application…'*

42. Clearly, the lower Court is vested with the power and authority to decide. This power does not reside with the District Prosecutor and cannot be delegated. The premium is on the Court to make a well-informed decision on bail proceedings. The procedure followed in these proceedings may very well be inquisitorial, and the lower Courts are encouraged to be proactive.

43. In this matter, the original plea was just a blanket admission, which in the proposed amendment is a bare denial. The applicant does not proffer a reasonable explanation about how the admission was made in the original plea. All the applicant does in paragraph 13 and subparagraph 13.1.1 of the founding affidavit is to deny that Ms. Ncaza requested that the case be postponed to 14 April 2022. The confirmatory affidavit by Ms. Ncaza does not shed any light in this regard as it is just the standard confirmation without attesting to any specific facts that she has personal knowledge of.

44. In as much as I cannot say that the respondent has provided a model explanation establishing the jurisdictional fact in respect of the withdrawal of admission made to paragraph 7 of the Particulars of Claim, I cannot turn a blind eye to the fact that the exposition of what took place in Court and how the respondent regards the respondent liable is not in consonance with the law. It is true, as alleged in paragraph 6, that the respondent was remanded in custody from 09 to 14 April 2022 as a result of judicial detention. However, it is incorrect that the applicant bears legal liability for the further detention of the respondent[11]. Theron J cited with approval some cases which unambiguously state that the Magistrate in a Court of first appearance has to apply his/her

[11] ***De Klerk v Minister of Police*** 2021 (4) 585

mind to the question of bail. In paragraph 50, Madam Justice Theron aptly states:

> *'...Under s 60(1) of the Criminal Procedure Act and as recognised in* ***Minister of Police v Kader*** *1991 (1) SA 41 (A) the magistrate was obliged to apply their mind to the question of bail. Failure to do so, and the resultant remand, was unlawful'.*

45. I cannot ignore the fact that such further detention can only be imposed by a decision taken by the Magistrate who presided on the day the matter was postponed. It bears mention that the said Magistrate has not been joined in these proceedings.

46. It would be a miscarriage of justice to allow a blanket admission to an otherwise incorrect exposition of fact and law in the Particulars of Claim.

47. Hathorn AJA in ***Gordon v Tarnow*** 1947 (3) SA 525 (A) propounded:

> *'…*speaking of judicial admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error. It does not seem to me that such discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading*'.*

48. I find that the proposed amendment raises a genuine and *bona fide* defence. Taking a cue from the decision of Searle AJ in ***Frenkel Wise & Co Ltd*** [12]: where it was held:

> 'I had proposed to t follow the case of **Rossouw v Bonthuys** (1933 CPD 201), in which SUTTON J, held that, in applications for

[12] ***Frenkel Wise & Co Ltd v Cuthbert*** 1947 (4) SA 715 (C)

amendment of pleadings, it is not sufficient that there should be a mere notice if the matter is one of substance, but there should, in addition, be an affidavit explaining why the pleading was not put in proper order at the outset'.

49. The applicant has bolstered her application with an affidavit in which, *inter alia*, she canvasses that the amendment results from a new attorney coming on board after the attorney who was handling the matter left the State Attorney's employ. The question is whether the previous attorney's remissness binds the applicant even in the face of the glaring shortcoming to pleading to excipiable Particulars of Claim. Let alone that the original plea is also excipiable.

50. The test for exercising discretion on whether or not to grant an amendment to withdraw an admission was laid down in ***Amod***[13]. Leon J put the test as follows[14]:

> *'I consider that the true position in the case of the withdrawal of an admission is as follows. The Court has a discretion but will require a reasonable explanation both of the circumstances under which the admission was made and of the reasons why it is sought to withdraw it. In addition, the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him then the application to amend will be refused. It should, however, be noted that the fact that the amendment will cause the Goqwana to lose his case is not of itself "prejudice" or "injustice" in the sense discussed above'.*

[13] ***Amod v South African Mutual Fire and General Insurance Co Ltd*** 1971 (2) SA 611.
[14] *Loc cit* @ p614H – 615A

51. It must be borne in mind that the functionary that was handling the case is no longer with the office of the State Attorney and therefore it is not possible to have an affidavit from a person with personal and direct knowledge of the basis for making the original mistaken admission. It appears that the Prosecutor who was involved in the matter denounces the plea in its form that it is not in accordance with the information and/or facts furnished during the consultation held before the plea was crafted[15].

52. The mistake is so apparent as the decision maker for further detention is the Magistrate who was presiding on that day. The respondent on the other hand does not state where this legal liability of the applicant comes from.

53. It is apposite that the respondent was legally represented on the day of first appearance i.e. on 29 March 2022, wherein the matter was postponed for the respondent's profiling to 19 April 2022. The respondent's legal representative did not oppose or protest against the postponement to a date beyond the prescribed seven (7) day period. This did not militate against the subsequent application made by the respondent, challenging the legality and appropriateness of his further detention. The same principle should apply that the door should not be closed to the applicant for her to amend the plea accordingly.

54. *Herbstein and van Winsen* are perfectly correct in stating (at p. 329):

> *'It is submitted that, while in most cases the reason for wishing to withdraw an admission may be due to some mistake of fact or law, the Court's discretion to grant an amendment involving a withdrawal is not*

[15] Revised index @ p40 41, para 14.6 – 14.7 of replying affidavit r/w confirmatory affidavit of Ms. Saziwe Ncaza @ p45 – 46.

fettered by the necessity to find that there has been an error before it can allow such amendment'.

55. During the hearing of this matter, Mr. Siwahla, who appeared for the respondent, could not advance any argument regarding the prejudice the respondent would suffer if the amendment is allowed.

56. I am mindful of the decision in ***Trans-African Insurance Co Ltd v Maluleke***[16], which was quoted with approval in ***Life Healthcare Group (Pty) Ltd v Mdladla and Another*** (42156/2013) [2014] ZAGPJHC 20 (10 February 2014) where it was said:

> *'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'.*

57. Having regard to the whole conspectus of facts and the test on whether to allow an amendment withdrawing an admission, which was formulated some fifty- two (52) years ago, I find that the applicant has provided a reasonable explanation for the original mistaken admission which she now seeks to withdraw.

[16] ***Trans-African Insurance Co Ltd v Maluleke*** 1956 (2) SA 273 (A)

58. The prejudice that the respondent may suffer is capable of being cured by an order of costs. On the other hand, if the amendment is not allowed, grave injustice will occur.

59. Both parties filed heads of argument, for which I am thankful, in this regard, Mr. Siwahla further referred me and handed a copy of an unreported judgment, which was not cited in his heads of argument, in the matter between **Standard Bank of South Africa Limited v Davenport *NO & Others*** (847/10) [2014] ZAECGHC 27 (25 April 2014) wherein at paragraph 6, Plasket J said the following:

> *'This Court has the greatest latitude in grunting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts...'*

60. This statement cannot be truer than the salient facts of this matter.

61. This leaves me with the discretion of whether or not to allow the proposed amendment in the circumstances.

CONCLUSION

62. I am of the view that proper ventilation of the issues will ensue when the amendment is effected and perfected.

63. In the circumstances, the amendment ought to be allowed.

COSTS:

64. The applicant has been successful. It does not follow, however, that costs should follow the event. This is one case where the general rule should be deviated from. The applicant sought and obtained an indulgence. The opposition was not frivolous. In my discretion, the respondent cannot be put out of pocket for the lackadaisical manner in which the original plea was crafted.

ORDER

65. The following order will issue:

65.1. The applicant is granted leave to amend her plea in accordance with the notice of intended amendment dated 14 August 2023.

65.2. The leave to amend will lapse if the amendment is not effected within ten (10) days of the delivery of this order. The amendment must be effected and perfected no later than 03 July 2024.

65.3. The applicant is to bear the costs of the application.

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B. METU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Date Heard	:	06 June 2024
Date Delivered	:	18 June 2024