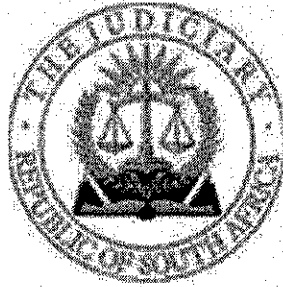


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

30 MAY 2022

FHD VAN OOSTEN

CASE NO: 40764/2015

In the matter between:

SISI JULIA MADONSELA

APPLICANT

and

**EKURHULENI METROPOLITAN
MUNICIPALITY**

RESPONDENT

IN RE

**EKURHULENI METROPOLITAN
MUNICIPALITY**

PLAINTIFF

and

SISI JULIA MADONSELA

DEFENDANT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an application in terms of Uniform Rule of Court 28(4), for leave to amend the defendant's plea in the pending action between the parties.

[2] The respondent has filed a notice of objection to the proposed amendment, premised on altogether 7 grounds. Only two grounds of objection were pursued in argument before me. First, the proposed amendment, by virtue of it being raised at such a late stage in the action proceedings, is prejudicial to the respondent in conducting and finalising the action and second, the respondent is prejudiced in its ability to investigate and respond to the allegations contained in the proposed special plea due to the late stage at which the amendment is sought. For these reasons, and in view of the manner in which the applicant conducted the proceedings, to which I shall revert, the respondent contends, the application has not been made bona fide.

Background

[3] Summons in the action was issued on 18 November 2015. The cause of action relied upon is an alleged misappropriation by the applicant during her employment as cashier with the respondent, of monies paid to the respondent by members of the public and received by the applicant, in respect of pre-paid electricity, in the total sum of R247 383.10.

[4] The applicant filed a plea in February 2016. A pre-trial conference was held on 15 November 2016. The action was enrolled for hearing on 12 March 2018 and in the absence of an appearance by or on behalf of the applicant, judgment by default was granted. In February 2019 the applicant launched an application for rescission of the default judgment which was opposed, and granted on 30 August 2019. In June 2020 the respondent applied for a trial date.

[5] On 4 August 2020 the applicant filed a notice of amendment, substantially identical to the present notice of amendment (the first amendment). The respondent objected to the proposed amendment. The applicant failed to pursue the amendment resulting in the lapse and subsequent withdrawal thereof.

[6] In March 2021 the fourth pre-trial conference was held. The applicant's legal representatives requested the respondent to consent to the first amendment, but the respondent indicated that is stood by the respondent's notice of objection having been filed at the time. On 28 September 2021, at the fifth and final pre-trial

conference, the parties agreed that the matter was ready for the trial, which was a requirement for the respondent to apply for a trial date.

[7] In October 2021 the notice of amendment to which the present application relates, was served on the respondent's attorneys in response to which, as I have indicated, a notice of objection was filed.

Discussion

[8] In regard to the objection relating to the lateness of the proposed amendment and the introduction of a new matter contained in the special plea of prescription, counsel for the respondent relied on the judgment in *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 745 F-G. In that matter, in addition to the amendment being sought late in the proceedings, the court considered as dispositive to the granting of the proposed amendment, the fact that the amendment sought to introduce omissions relating to a completely new incident, as narrated by Ms Mazimba, not bearing any relevance to the original incident that was pleaded.

[9] The present matter, on the facts set out by the applicant in regard to the prescription, is clearly distinguishable. Those facts are peculiarly within the knowledge of the respondent, and are the following: The respondent, in terms of the particulars of claim, relies on the applicant's alleged misappropriation of monies during the applicant's term of employment, during the period from 1 June 2008 to 29 December 2009. The dates and amounts involved are set out in an annexure to the particulars of claim. Summons was issued on 18 November 2018 and served on the applicant, on 20 November 2015. The 2008- and 2009-end year audits revealed the total amount claimed in the action, to be missing from the takings by the applicant. The respondent laid a criminal charge of theft against the applicant during 2010, which 'was dismissed' due to a lack of evidence. On 16 July 2015 the respondent dismissed the applicant from her employment following a disciplinary hearing at which she was found guilty of one count of misconduct.

[10] Premised on these facts, the respondent is alleged to have had knowledge of the debt as early as 2010. The summons having been issued and served more than 3 years after that, in 2015, the claim is alleged to have become prescribed.

[11] The respondent, with reference to the by now 7 year delay in finalising the action, states that although it has secured the 'necessary' witnesses, documents and other evidence to prove its claim, 'it now finds itself in the position where not only it is unlikely that the plaintiff will be able to properly investigate and respond to the special plea of prescription (if the amendment is permitted), but will have enormous difficulty in obtaining any direct and first-hand evidence to such a special plea'. The names of two potential witnesses are mentioned, who were dismissed by the respondent some 5 years ago and are likely to be unavailable or uncontactable. The nature of the evidence they would have been able to tender, has not been revealed. The absence of any detail as to actual attempts that were made to contact those witnesses, especially in view of the earlier statement that all necessary witnesses and evidence have been secured for trial, is significant and the contentions advanced are not only generalised but also do not transcend speculation.

[12] It follows that the respondent has failed to show prejudice which cannot be cured by an appropriate costs order.

[13] The principles for allowing amendments are dealt with in *Moolman v Estate Moolman* 1927 TPD 27 at 29. Firstly, there must be an absence of mala fides and secondly, the amendment must not cause an injustice which cannot be compensated by costs. Counsel for the respondent contended that there was an absence of bona fides with reference to the history of the litigation between the parties, and in particular the dilatoriness of the applicant in failing to appear when the default judgment was granted, the numerous pre-trial conferences that were held, the unequivocal admission in the certification court that the matter was trial ready and the belated first notice of amendment that was abandoned. Although constituting valid criticisms, I am not persuaded that mala fides can be attributed to the applicant, who after all is a lay person in regard to court rules and procedures.

[14] Having considered all the facts and circumstances of this matter, and in the exercise of my discretion, I consider it in the interest of justice to allow the amendment.

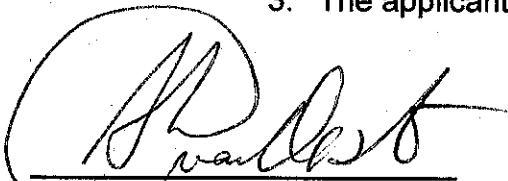
Costs

[15] The applicant seeks and is granted an indulgence (*Minister van SA Polisie v Kraatz* 1973 (3) SA 490 (A) 512E-H). The respondent's opposition to the application was reasonable. It follows that the applicant must pay the costs of the application.

Order

[16] In the result the following order is made:

1. The applicant is granted leave to amend the defendant's plea by introducing an adding a special plea of prescription.
2. The amended pages in respect of the amendment shall be filed and uploaded onto *CaseLines*, within 10 days of the date of this order.
3. The applicant is to pay the costs of this application.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV PW MAKHAMBENI

APPLICANT'S ATTORNEYS

NGCINGWANA INC

COUNSEL FOR RESPONDENT

ADV SP STONE

RESPONDENT'S ATTORNEYS

KATLEGO MMUOE ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

24 MAY 2022
30 MAY 2022