

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2022/14668

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

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M.C. MAUBANE
September 2023

28

In the matter between:

TRACKERS SERIES (PTY) LIMITED

Plaintiff

and

OXYGEN MEDIA (PTY) LIMITED
Defendant

First

REBECCA FULLER-CAMPBELL

Second Defendant

JAMES ANDREW FULLER CAMPBELL

Third Defendant

JUDGMENT

MAUBANE AJ

Background

- [1] The Plaintiff, a limited liability company duly incorporated and registered in accordance with the Company Laws of the Republic of South Africa issued summons against the Defendants for various claims.
- [2] The Defendants served and filed a special plea in that claim for the debts has prescribed, and subsequent thereto the defendants pleaded to the main action.

[3] Later on, the Defendants served and filed Notice of intention to amend their plea as follows:

3.1 By deleting and replacing paragraph 5.4 as follows:

“Amongst others, On 19 December 2018 at Johannesburg, South Africa, alternatively the United Kingdom, the plaintiff, represented by the second defendant, entered into a written Co-Production agreement with-

5.4.1 Three Rivers Fiction Limited as duly represented by Jonathan Drake;

5.4.2 Scene 23 Proprietary Limited as duly represented by Tim (LT) Theron;

5.4.3 Scribe Studio Proprietary as duly represented by Rebecca Fuller Campbell.”

3.2 By deleting and replacing paragraph 5.11 as follows:

“On the 18 December 2018, at Johannesburg, South Africa, alternatively the United Kingdom, the plaintiff, represented by the second defendant, entered into a written Executive Producer Agreement with Three Rivers Fiction Limited as duly represented by Jonathan Drake. A copy of the Executive Producer Agreement is attached hereto marked Annexure “**PL6**”

3.3 By deleting and replacing paragraph 5.12.1 as follows:

“On 21 December 2018, at Johannesburg, South Africa, alternatively the United Kingdom, alternatively United State of America, the plaintiff (described therein as “SPV”, represented by Jonathan Drake, entered into a written Inter Party with Electronic Media Network Proprietary Limited (“Mnet”) as duly represented by Glenn Marques, Home Box Office, Inc (“HBO”) as duly represented by Stephen J Sass; Three River Studio Limited (“TRS”) as duly represented by Jonathan Drake; Trackers Series Limited Proprietary as duly represented Jonathan Drake and Scene 23 Proprietary Limited (“Scene 23”) as duly represented by LT Theron. A copy of the Inter Party Agreement is attached hereto marked “**PL7**”. In this agreement it is recorded that for the purposes of the production, M-Net contributed R20 million to the plaintiff on their terms set out in such Inter Party Agreement.”

3.4 By deleting and replacing paragraph 5.14 as follows:

“The plaintiff also entered into an agreement with Zweites Deutsches Fernsehen (“ZDF”) for a fixed price deal of 1.15 million euros. The defendants are not in possession of a signed copy of this agreement and attach an unsigned copy thereof as “**PL8**”. Further, the defendants do not have knowledge of when, where and by whom acting for the parties was this agreement concluded”.

3.5 By deleting the prayer under the first special plea and replacing it with –

“WHEREFORE the first defendant prays that the plaintiff’s claim, constituted of the payments reflected in paragraphs 17.1 to 17.8, be dismissed with costs.”

[4] As a result of the defendants’ intended amendments of their pleas, the plaintiff served and filed its objection thereto, basing its objection on the following:

4.1 The purported amendment still fails to disclose a defence to the claim of the plaintiff.

4.1.1 In paragraphs 9 and 10 of the plea, the defendants plead that Scribe would be entitled to certain monies and that none of the parties has accounted to Scribe or the second defendant in terms of respective agreements;

4.1.2 Scribe is not a party to the proceedings and the allegations made herein are therefore irrelevant and inadmissible;

4.1.3 As such, the first to third Defendants have failed to make the necessary averments to sustain a defence on the papers of the Plaintiff, and accordingly, this proposed amendment is also excipiable, alternatively, vague and embarrassing.

4.2 In paragraph 10.6 of the plea, the defendants plead that the plaintiff, TRF and Scene 23 have not accounted to Scribe.

4.2.1 Scribe is not a party to the proceedings and the allegations made herein are therefore irrelevant and inadmissible.

4.2.2 Furthermore, the alleged claims of scribe cannot alleviate the Defendants of their liability to the Plaintiff, and accordingly, no defence is evident from the papers. Accordingly, this proposed amendment is excipiable, *alternatively*, vague and embarrassing.

4.2.3 The actions of the Defendants are nothing else than a delaying tactic to frustrate the Plaintiff in finalizing this action.

4.2.4 As such, the first to third defendants have failed to make the necessary averments to sustain a defence on the papers, and accordingly, the amendment is rendered excipiable, alternatively, vague and embarrassing as a result thereof.

4.2.5 In the result the proposed amendment is bad and ought to be refused.

[5] In addition to the Plaintiff's first objection, it served and filed a second objection which is based on the following:

5.1 The purported amendment still fails to disclose a defense to claim of the Plaintiff.

5.1.1 In paragraph 9 and 10 of the plea, the defendants plead that scribe would be entitled to certain monies, and that none of the parties has accounted to Scribe or the Second defendant in terms of the respective agreements;

5.1.2 Scribe is not a party to the proceedings and the allegations made herein are therefore irrelevant and inadmissible.

5.1.3 As such, the first to third defendants have failed to make the necessary averments to sustain a defence on the papers of the Plaintiff, and accordingly, this proposed amendment is also excipiable, alternatively, vague and embarrassing.

5.2 In paragraph 10.6 of the plea, the Defendants plead that the Plaintiff, TRF and Scene 23 have not accounted to scribe:

5.2.1 Scribe is not a party to the proceedings and the allegations made herein are therefore irrelevant and inadmissible.

5.2.2 Furthermore, the alleged claims of Scribe cannot alleviate the Defendants of their liability to the Plaintiff and accordingly no defence is evident from papers. Accordingly, this proposed amendment is excipiable, alternatively, vague and embarrassing.

5.2.3 The actions of the Defendants are nothing else than a delaying tactic to frustrate the Plaintiff in finalizing this action.

5.2.4 As such, the first to third Defendants have failed to make the necessary averments to sustain a defence on the papers, and accordingly, the amendments are rendered excipiable, alternatively, vague and embarrassing as a result thereof.

5.2.5 In the result the purported amendment is bad and ought to be refused.

[6] The defendants approached the court seeking leave to amend their pleas. Based on the defendant's intention to amend, and the plaintiff's objection thereto, I am not going to repeat each, and every allegation and counter allegation made by either in their respective papers.

Application of the Law

[7] Rule 28(1) states that:

Any party desiring to amend any 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.

[8] In *Vinpro NPC v President of the Republic of South Africa*,¹ the court summarized the position as follows:

“On this score, it is trite law, that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered thereof; that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay; that the party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that more loss of time is no reason, in itself for refusing the application”.

[9] In *Man IN One CC v Zyk Trading 100CC*² the court held that:

“a court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially.

¹ (Unreported WCC Case No 1741/2021 dated 3 December 2021) at paragraph 25

² (Unreported, FB Case No 5335/2014 dated 3 March 2022) at paragraph 13

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”, (

[10] In *Moolman v Estate Moolman & Another*,³ the court stated that:

“the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amend 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 purpose of justice in the same position as they were when the pleading which it is sought to amend was filed.”

[11] A prejudice is interpreted as:

- 10.1 where a party would be no worse off if the amendment was granted with a suitable order as to costs than if his adversary 's application or summons were dismissed unamended and proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of opportunity of gaining time is not in law prejudice or injustice.
- 10.2 The fact that the granting of the amendment would necessitate the reopening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to lead that evidence was state of the pleadings, and not a deliberate failure on the part of the Applicant (*Myers v Abramson* 1951 (3) SA 438 C at 450 A-B;
- 10.3 If a party makes a mistake in his pleadings by, for example, demanding too little when more is owing, he gives his opponent an advantage which justice and fair dealing could not command. If the opponent is then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleadings it is sought to amend was filed;
- 10.4 The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not of itself “prejudice” of the sort which will dissuade the court from granting it

[12] In *Khunou & Others v Fihrer & Son*,⁴ the court stated the following:

“the proper function of a court is to try disputes between litigants who have

³ 1927 CPD 27 at 29.

⁴ 1982 (3) SA WLD.

real grievances and to see to it that justice is done. The rules of civil procedure exist to enable courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence of society, is inextricably interwoven. The Rules of court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and inexpensively as possible with the real issues between them, but also to ensure that courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”

- [13] In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*⁵ at 639B, the court said:

“The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.”

- [14] The court further said at 642H:

“if a litigant had delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.”

- [15] In *Caxton Ltd & others v Reeva Forman (Pty) Ltd & another*,⁶ Corbett CJ stated at 565G:

“Although the decision whether to grant or refuse an application to amend a pleading rest in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles”.

- [16] In *Rosenberg v Bitcom*⁷ Groomberg J, stated that.”

“Granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of the amendment whenever such an amendment facilitates the proper ventilation of the disputes between the parties.”

- [17] In *Zarug v Parvathie NO*,⁸ Henochsberg J held that:

⁵ 1967 (3) SA(D) 632.

⁶ 1990 (3) SA 547(A).

⁷ 1935 WLD 115 at 117.

⁸ 1962 (3) SA 872 (1) at 876C.

“An amendment cannot however be heard for the mere asking. Some explanation must be offered as to why the amendment is not timeously made; some reasonably satisfactory account must be given for the delay”.

[18] On a point of law, an amendment will not be allowed if the application to amend is made mala fide or if the amendment will cause the other party such prejudice that it cannot be cured by an order for costs, and where appropriate, a postponement,

[19] Rule 28(1) should be read with Rule 18(6) which states that:

“A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[20] The Defendants, in their intention to amend, stated that a written agreement amongst others, “on the 18 December 2018, at Johannesburg South Africa, alternatively the United Kingdom, the plaintiff represented by the second Defendant, entered into a written Executive Agreement with Three Rivers Fiction Limited as duly represented by John Drake. A copy of the Executive Producer Agreement is attached hereto marked annexure “PL6”

[21] Upon perusal of the Rule 28(1) read with Rule 18(6) it is clear that the plaintiff is not prejudiced by the amendment, and it will be in both parties’ interest and in the interest of justice for amendment to be effected. There is and will be no mala fide for the amendment to be effected. The plaintiff’s objection does not meet the requirements that the objection clearly and concisely set out the ground upon which the objection is founded. It is true that the court must exercise its discretion judicially taking into consideration whether the plaintiff will suffer prejudice and the amendment is done mala fide by the defendants. In the absence of the above stated, the defendants should be given leave to amend their plea.

COSTS

[22] Both parties prayed for punitive costs against each other. It is a trite law that the court should assess both parties’ arguments regarding costs. Where the party has brought a frivolous application or opposes the application frivolously, disregarding the rights of other party in litigating fairly, then the court is duty bound to intervene and judiciously applied its discretion. In this instance, the court is of the view that punitive costs should not be granted against the losing party as there is justification for the court to intervene and as such normal costs should be granted.

ORDER

[23] After having heard both parties' legal representatives and having read papers filed of record, the following order is made:

1. The Defendants are granted leave to amend as per the Notice of Motion.
2. The Plaintiff to pay wasted costs on party and party scale.

M.C. MAUBANE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:
Judgment:

14 August 2023
28 September 2023

Appearances

**For Applicant:
Instructed By:**

M Desai
B M Monyatsi Inc.

**Respondent:
Instructed By**

JHF Le Roux
JB Haasbroek Attorneys