



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

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

DATE

SIGNATURE

CASE NO: 21/27354

In the matter between:

REUBEN MILLER N.O

First Applicant

NORMAN KLEIN N.O

Second Applicant

VIMBAI ANGELA TSOPOTSA N.O

Third Applicant

REFILWE TLHABANYANE N.O

Fourth Applicant

(in their capacity as the duly appointed final liquidators of Nkonki Incorporated (In Liquidation), Registration Number 2002/017422/21, Master's Reference G416/2018)

and

JAYSON DESIGA RAMSAMMY

Respondent

JUDGMENT

FRIEDMAN AJ:

- 1 In this application, the applicants seek leave to amend their notice of motion to introduce an alternative prayer for relief.
- 2 In the original notice of motion, the applicants seek an order that the respondent pay to them the sum of R3 million, plus interest. There is then, as is normally the case, a separate prayer for costs. The claim is based on an alleged oral agreement between the applicants and the respondent. The applicants provide various pieces of evidence in their founding affidavit for the conclusion of that oral agreement, and it is not necessary for me to comment on that evidence here.
- 3 In his answering affidavit in the main application, the respondent disputes the applicants' entitlement to relief on various grounds. In what might be described as a

throwaway line, the respondent says that he never received an invoice for the R3 million now claimed by the applicants.

- 4 After the applicants read the answering affidavit, they decided to seek leave to amend their notice of motion to introduce an alternative claim. While persisting with the main prayer for payment of the R3 million plus interest, the applicants now seek to introduce an alternative prayer for relief which provides:

“Alternatively, the Respondent shall make payment to the Applicants in the amount of R3 000 000.00 within 7 days of issuing of an invoice by the Applicants to the Respondent for such amount”.

- 5 In their application for leave to amend, which was necessary because the respondent objected to the amendment, the applicants explain that they wish to introduce the alternative prayer for relief out of caution; and, in particular, to cater for a finding by the court seized of the main application that it is a precondition of the respondent’s liability that an invoice be issued for the R3 million.
- 6 The law on amendments to pleadings is well-known and trite. As Mpati P put it in *Imperial Bank Ltd v Barnard*,¹ “[a]n application for amendment will always be allowed ‘unless it is made mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement’”. The example of the type of prejudice falling into this category given by Mpati P, was an amendment which seeks to introduce a claim which has prescribed. Another example of prejudice which would lead to the refusal of an amendment is if the amendment would introduce a pleading which is excipiable – either because it is

¹ *Imperial Bank Ltd v Barnard and others* NNO 2013 (5) SA 612 (SCA) at para 8. Mpati P quoted from *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) para 15; *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071B; and *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F – I.

impermissibly vague or because it discloses no cause of action.² Another example of prejudice is where a party, through an amendment, seeks to withdraw an admission.³

7 The respondent attempted to argue before me that the proposed amendment would be excipiable. But I cannot see how this could be. The respondent's main complaint (which was his main complaint even before this issue of the invoice was introduced by him in the answering affidavit) is that this entire application is not a matter for motion court because there are irresolvable disputes of fact. Without commenting on this argument, I simply note that I understand it, and it will be something with which the court hearing the main application will need to grapple. However, I cannot see how the introduction of the alternative prayer changes the nature of that dispute. In other words, whether this matter may be decided in the applicants' favour in motion court, is not changed by the introduction of the alternative prayer. It does not make the applicants' stronger or weaker on that particular issue.

8 *Ms Shahim*, who appeared for the respondent, argued that the proposed amendment is excipiable because, if one reads the founding affidavit, one will not find any explanation of the basis for the claim for alternative relief. But this criticism does not withstand scrutiny. The only reason why the applicants wish to introduce the alternative prayer for relief is because of something said by the respondent in his answering affidavit. Their primary case is that no new or additional invoice had to be issued after the oral agreement was concluded and that purely by virtue of the oral agreement, the respondent is indebted to the company in respect of which the applicants are the liquidators. The respondent, in his answer, denies the oral agreement and says that this

² See, for example, *Recycling and Economic Development Initiative of South Africa v Electronic Media Network* 2022 JDR 0456 (GJ) at para 8

³ See, for example, *Small Enterprise Finance Agency Soc v Razoscan (Pty) Ltd* 2022 JDR 0508 (GP) at para 6.9

is not a matter to be decided on motion. And, he then in essence says “oh, and by the way, I also never received an invoice for the R3 million”, which the applicants interpret as another basis for denying liability. To meet what they perceive as the denial of liability based on the failure to issue an invoice, they have included the alternative prayer for relief. In these circumstances, it escapes me how the applicants can be criticised for failing to make out a case for the alternative relief in the founding affidavit; the amendment is sought as a fall-back position and to cater for a stance taken by the respondent in his answer. Whether or not the applicants can make out a case for the alternative relief if the main relief is not granted – an issue in respect of which it would be improper for me to express a view – it would not be correct to describe it as excipiable.

- 9 In the respondent’s heads of argument, it is argued that the applicants have failed to make out a case for the amendment because they have not addressed the issue of prescription in their founding affidavit. To quote the respondent’s heads of argument: “Put differently, it [ie, the founding affidavit] does not explain why – in the event that the foreshadowed amendment were to be allowed and an invoice were to be issued in due course – the alleged debt would not have prescribed”.
- 10 In the first place, this argument suffers from the same flaw as the criticism addressed above – it overlooks the fact that the issue of the invoice was never part of the applicants’ case and so the applicants cannot be criticised for not dealing with it preemptively in their founding affidavit. Secondly, there is no duty on an applicant or plaintiff to anticipate the question of prescription. It for a respondent or defendant to take the point. If the respondent considers prescription to be an issue which arises once the amendment is effected, then it is free to raise the point in the further affidavit which

it may file once the amendment is allowed. Lastly, this is not something which was raised in the notice objecting to the amendment, or even in the answering affidavit in the amendment application, and so it is not appropriate for it to be raised for the first time in heads of argument. This is important because if one accepts the premise that it is for a respondent/defendant to raise prescription, then it follows that it must also do so if it wishes to rely on this point as a basis for opposing an amendment. The caselaw which I have discussed above gives, as an example of prejudice, the introduction of a claim which has prescribed. So, it is certainly open to a respondent to object to a proposed amendment on the basis that it will introduce a prescribed claim. But it is self-evident that this must be done in the objection and in the answering affidavit if leave is sought to amend, to enable the applicant to deal with it. That was not done in this case.

- 11 Other than the argument about the amendment being excipiable (and the issue of prescription raised late in the day) – which I have shown above to lack merit – I asked *Ms Shahim* to point to any other prejudice arising from the amendment. She said that the respondent would have to file a further affidavit to deal with the alternative relief.
- 12 In *Affordable Medicines Trust and Others v Minister of Health and Others*,⁴ the Constitutional Court said the following:

"[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or '**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**'. **These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?**"

⁴ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 9, emphasis added

- 13 That extract is directly applicable here. The fact that the respondent may need to file a further affidavit to deal with the amendment is not prejudicial to him; on the contrary, it cures any prejudice he might otherwise have suffered by enabling him to be put in the same procedural position he would have been in had the amended notice of motion been the notice of motion in the first place – ie, being in the position to file an answering affidavit to oppose each prayer in the notice of motion. If I understood *Ms Shahim* correctly, the prejudice to which she intended to refer was the prejudice of being put to the time and expense of filing a further affidavit. But that is not the type of prejudice which our courts take into account in amendment applications. This is unsurprising because, if they did, no amendment could ever be allowed if it triggered the need for the further exchange of pleadings. This would dramatically undermine the purpose of rule 28 of the Uniform Rules.
- 14 It follows that the respondent has been unable to point to any prejudice arising from the proposed amendment, and that the amendment application should be granted.
- 15 On the question of costs, *Mr Hoffman*, who appeared for the applicants, quite fairly accepted that, if the opposition to the amendment had been reasonable or arguable, the applicants could be ordered to pay the costs of this application, even if I grant the amendment. He argued, however, that the respondent's opposition was unreasonable and he should be ordered to pay the costs of this amendment application. I agree. No arguable or reasonable basis has been suggested – in the notice objecting to the amendment, the answering affidavit in the amendment application or in argument before me – for the respondent's objection to the amendment. He would have saved himself and the applicants a lot of time and money by simply agreeing to it and then

getting on with the merits. Since he chose a different path, he should pay the costs of this application.

16 The parties helpfully uploaded a draft order very shortly after the conclusion of the hearing, providing for the respondent to file a further affidavit to deal with the amendment. I am grateful to them for that and it is self-evidently appropriate that he be allowed the opportunity to do so.

17 In the light of what I have said above, I make the following order:

- 1. The Applicants are granted leave to amend their Notice of Motion in the terms stated in the Notice of Intention to Amend dated 8 February 2022 and which was delivered by the Applicants' attorneys to the Respondent's attorneys on 21 February 2022.**
- 2. The Respondent shall deliver a supplementary Answering Affidavit (if any) within 10 days of the date of this order.**
- 3. The Applicant shall deliver a supplementary Replying Affidavit (if any) within 10 days after receipt of the supplementary Answering Affidavit.**
- 4. The Respondent is ordered to pay the Applicants' costs of this application.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 15 March 2023.

APPEARANCES:

Attorney for the applicants: Mendelson Attorneys Inc

Counsel for the applicants: JM Hoffman

Attorney for the respondent: Thomson Wilks Inc

Counsel for the respondent: C Shahim

Date of hearing: 14 March 2023

Date of judgment: 15 March 2023