IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

CASE NO: 82504/2016

10/5/2019

In the matter between:

CALLY DEVELOPMENT AND CONTRACTORS CC **APPLICANT**

and

CITY MANAGER

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

KUBUSHI J

[1] The application before me is an opposed interlocutory application in terms of uniform rule 28 in which the applicant seeks leave to amend its notice of motion. Uniform rule 28 (1) provides that any party desiring to amend a pleading or document, other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of its intention to do so. Any other party to which a notice of intention to amend has been served may in terms of uniform rule 28 (2) object to the proposed amendment. On receipt of the objection the party intending to amend may

lodge an application, in terms of uniform rule 28 (4), for leave to amend, hence the interlocutory application.

[2] The background matrix to the notice of motion is that the applicant was awarded a tender by the respondent, as one of a few tenderers, to provide the community with water services. The allegation is that in order for the applicant to provide the services as *per* the tender the applicant was required to sign a Service Level Agreement with the respondent. The applicant was, however, never furnished a Service Level Agreement and consequently could not render and/or provide the services tendered for. Other tenderers who were awarded the tender together with the applicant were provided with Service Level Agreements and they rendered the services tendered for and were even remunerated for such services. The said tender ran its course without the applicant having rendered any of the services tendered for.

[3] The applicant felt hard done by the failure of the respondent to furnish it with a Service Level Agreement and approached court for an order to, in the main, review the respondent's decision not to provide the applicant with a Service Level Agreement and/or to allow the applicant to provide the services in terms of the tender awarded. When the applicant launched the notice of motion, the tender was still running, as such the application was for the review of the impugned decision.

[4] I am informed that the notice of motion was set down for hearing on 17 August 2017 when it was postponed *sine die* at the behest of the applicant to allow for the amendment of its notice of motion due to the fact that the tender by then was about to expire. The notice of amendment was filed on 20 October 2016 together with a supplementary affidavit. On 28 March 2018, the respondent served a notice of objection to the proposed amendment in terms of uniform rule 28 (2).

[5] The interlocutory application emanates from the notice of motion wherein the applicant seeks an order in the following terms:

> "1.1 The decision of the· Respondent not to grant the Applicant a Service Level Agreement after Tender Number: CB198/2013 was awarded to the Applicant and/or not to allow the Applicant to perform work tendered for, after the Letter of Appointment was issued to the Applicant, be declared unlawful, unreasonable procedurally unfair therefore, invalid and reviewed and set aside;
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> 1.2 That the failure by the Respondent to provide written reasons to the Applicant regarding the decision not to grant and/or allow the Applicant to perform work tendered in terms of the Letter of Appointment after Tender Number: CB198/2013 was awarded to the Applicant, be declared unlawful therefore, invalid and reviewed

and set aside;

1.3 The respondent be ordered to issue a Service Level Agreement and to allocate work to the Applicant and allow the Applicant to render services in accordance with Letter of Appointment of Tender Number: CB198/2013.

1.4 The Respondent be ordered to pay the Applicant an amount of R16 925 581 being damages suffered for loss of income as a result of Respondent's refusal or failure to allow Applicant the opportunity to provide services in accordance with Letter of Appointment of Tender Number: CB198/2013."

[6] The relief sought, in the notice of amendment, by the applicant seeks to amend the above prayers in the notice of motion as follows:

1. By deleting the prayers set out in paragraph 1 of the notice of motion, namely, prayer 1.2 and 1.3 and substituting same for the following prayers:-

1.1 It is declared that the Respondent's failure to grant and/or allow the Applicant to perform work and/or render services to the Respondent, following the award of tender CB198/2013 be declared unlawful and illegal.

2. By adding further prayers to the notice of motion as follows:-

2.1 In the alternative to prayer 1.4 of the existing notice of motion and in the event that there is a dispute of fact in respect of the amount of the loss of income suffered by the Applicant, the matter be referred for oral evidence.

2.2 In the event that the matter is referred for oral evidence in respect of the dispute amount, that it is ordered that the notice of motion constitutes summons and the respective parties' affidavits serve as pleadings.

[7] As a point of departure I should state that what is before me, as earlier stated is an application for the amendment of the notice of motion. The issue, therefore, is whether the amendment sought is feasible. Put differently, whether the amendment sought ought to be granted or not.

[8] I put emphasis in this regard mainly because most of the arguments by the respective parties were based on issues that go to the merits of the notice of motion itself. For example, the

dispute in the amount and whether the matter should be referred to trial; the questions whether the claim for damages is feasible in the circumstances of this matter and whether it is for past or future loss of earnings, are issues that go to the root of the merits and ought not to be entertained by this court. The issues can only be determined after the proposed amendments are effected.

[9] What is apparent is that the amendment, if granted, will change the whole thrust of the application. The respondent's contention is that the true import of the amendment is to convert motion proceedings into action proceedings. This might be so but on my earlier finding the determination thereof can be only after the amendment has been effected. At this stage of the proceedings that issue does not arise. What is clear is that, when initially the purpose of the notice of motion was a review application, should the amendment be granted, the notice of motion will now be a claim for damages for loss of earnings.

[10] The question becomes whether this court can make such an amendment? The answer can be found in the judgments I was referred to during argument by the applicant, where the following is stated

> In *Kirsh Industries v* Vosloo:[1]
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> "The factors to be taken into account by a court in exercising its discretion under Rule 28 (4) of the Rules of Court to grant or refuse an amendment have been dealt with in a number of cases . . . the primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them so that justice be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party prejudice as cannot be cured by an order for costs and where appropriate a postponement."
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> and
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> In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pyy) Ltd and Another**[2]***
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> ". . . I consider, that the aim should be to do justice between the parties by deciding the real issues between them, the mistake or neglect of one of them in the process of placing the issues on record is not to stand on the way of this; his punishment is his being mulcted with

the wasted costs. The amendment will be refused only if allowed it would cause prejudice to the other party not remediable by an order of costs and where appropriate a postponement . . ."

[11] On the grounds of what is stated in the above judgments, it is my view that the amendment sought by the applicant can be granted. I do not think that such an amendment if allowed can cause prejudice to the respondent not remediable by an order of costs.

[12] Even though I am prepared to grant the amendment, there are, however, some considerations to be made. The amendment may not be granted if such amendment will result in the application being excipiable. It is the respondent's contention that should the amendment be granted it will render the notice of motion excipiable on the basis that our law does not recognise a claim arising from government tendering. In support of this contention, the respondent referred me to the judgments in *Steenkamp N.O. v Provincial Tender Board, Eastern Cape**[3]*** and *South African Post Office v De Lacy and Another.**[4]***

[13] The court in *Cross v Ferreira,**[5]*** after having surveyed the conflicting decisions in its division on whether or not to allow an amendment that would be excipiable, came to the conclusion that such must not be allowed.

[14] An exception complains of a defect inherent in the pleading: admitting for the moment that all the allegations in the summons are true, it asserts that even with such admission, the pleading is excipiable.[6] The court should look at the pleading as it stands and no facts outside those stated in the pleading can be brought into issue. There can be no reference to any other document.[7]

[15] It is, thus, worthy to note that the purported supplementary affidavit filed in this instance, though filed together with the notice of amendment, supplements the founding affidavit in an attempt to explain why it is necessary to amend the notice of motion. It, however, does not necessarily support the notice of amendment itself. It is a further affidavit to the affidavits already filed in the notice of motion proceedings. It is trite that a further affidavit filed when all the required affidavits in motion proceedings have been filed, cannot be considered by the court without leave of the court. Leave to file the supplementary affidavit, in this instance, ought to have been applied for before such affidavit is filed. This court is not the one to consider whether the purported supplementary affidavit ought to be allowed or not. In any **way,** no application for such leave is before this court. Therefore, for purposes of the interlocutory application before me the supplementary affidavit is *pro non scripto.*

[16] I have to accept for purposes of the application to amend the notice of motion that the

allegations in the notice of motion once amended read together with the founding affidavit are true and not excipiable in order for me to allow the amendment sought. However, this cannot be the case for the thrust of the notice of motion would be changed by the amendment. I expect therefore that, in the event I allow the amendment, when such amendment is effected the applicant will have to file a further affidavit to explain and to give meat to the new cause of action. I cannot, therefore, at this stage and without the benefit of sight of the further affidavit be in a position to decide whether the applicant's notice of motion, once amended will be excipiable or not.

[17] I state in passing, without finally deciding the issue that, my understanding of the applicant's claim is that once the amendment is allowed it shifts the goal posts. The relief sought is no longer that of a review but a declarator coupled with a claim for damages for loss of earnings. As such, the respondent's argument that our law does not recognise a claim for damages arising from government tendering, might fall flat.

[18] I have to conclude, therefore, that for a proper ventilation of the dispute between the parties, and in the interest of justice, the amendment ought to be allowed with an award of wasted costs against the applicant.

[19] Consequently, I make the following order:

1. Leave to amend the notice of motion is granted.
2. The amendment should be effected within twenty (20) days of this order.
3. The applicant is ordered to pay the wasted costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant : Adv. E.Z. Mnisi

Instructed by : Davi Masilela Attorneys

Counsel for Respondent : **Adv. P.R. Msaule**

Instructed by : **Malebye, Malebo Attorneys**

Date heard : **03 December 2018**

Date of judgment : **10 May 2019**

[1] 1982 (3) SA 479 (W) at 484F - G.

[2] 1967 (3) SA 632(0) at 640G - 641C.

[3] 2007 (3) SA 121 (CC) para 37.

[4] 2009 (5) SA 255 (SCA) para 14.

[5] 1950 **(3) SA 443** (CPD).

[6] See Makgae v Sentraboer (Kooperas(e) Bpk 1981(4) SA z'39 (T) at 244H - 245A.

[7] See Vermeulen v Goose Valley Investments {Pty) Ltd (2001] 3 Al SA 350 (A).