


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 33867/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
26/02/19	
DATE	 SIGNATURE

In the matter between:

SPECIAL INVESTIGATIVE UNIT

PLAINTIFF/APPLICANT

And

**ODENDAAL ERASMUS & THULARE
INCORPORATED**

**FIRST DEFENDANT/
FIRST RESPONDENT**

ANDRE ODENDAAL

**SECOND DEFENDANT/
SECOND RESPONDENT**

VAUGHN SUMMERTON

**THIRD DEFENDANT/
THIRD RESPONDENT**

MEYERTON OPSPOORDERS

**FOURTH DEFENDANT/
FOURTH RESPONDENT**

JUDGMENT

COLLIS J:

1. This is an opposed interlocutory application, seeking amendment in terms of Rule 28(4).

BACKGROUND

2. As per the particulars of claim, the plaintiff is cited as the Special Investigating Unit established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 (*"the SIU Act"*), and with powers to investigate serious malpractices or maladministration within state institutions in terms of the SIU Act, and to conduct and institute civil proceedings in relation to such malpractices or maladministration in any court of law in its own name or on behalf of state institutions.
3. These powers and competency it derives from the SIU Act and the relevant proclamation authorising the investigation whose scope it defines.
4. For purposes of these proceedings the plaintiff/applicant was under section 2(1) of the SIU Act and in terms of Proclamation R33 of 2011 published in Government Gazette Number 34305 of 20 May 2011, requested to investigate the matters relating to any alleged *inter alia* serious maladministration in connection with the affairs of the Midvaal Local Municipality (*"the MLM or the Municipality"*), of improper or unlawful conduct by councillors, officials,

employees and/or agents of the Municipality unlawful appropriation or expenditure of public money or property, unlawful irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property, unlawful and improper conduct by any person which has caused, may cause serious harm to the interest of the public, or any category thereof.

5. The Plaintiff, as alleged in the Particulars of Claim, was by such Proclamation directed to thereafter investigate, exercise or perform all the functions and powers assigned to or conferred upon the Special Investigating Unit by the SIU Act including the recovery of any losses suffered by the municipality in relation to the matters referred to in the SIU Act. The referred maladministration, malpractices, unlawful and improper conduct it was required to investigate covered the period between and included those which occurred prior to 1 January 2002, and the date of proclamation being published or after the date of publication of the proclamation.
6. As per the Particulars of Claim, it is further alleged that after conclusion of these investigation and the delivery of a report in which certain findings were made of some malpractices discovered by its investigations, the Applicant issued Summons against the Defendants in which it claimed for the following relief: **firstly** that a declaratory order be made against the Defendants that their disposal of certain fix properties on behalf of the MLM while they were acting as its agents is unlawful. Further, that all such profits made as a results or pursuant to the unlawful conduct be paid to the State. **Secondly**, that the Defendants had breached their fiduciary duties to the MLM and that such profits

made in breach of their fiduciary duties be disgorged from them and paid over to the State.

LEGAL PRINCIPLES APPLICABLE TO AMENDMENTS

7. Rule 28(1) provides as follows:

- (1) "Any party desiring to amend any pleading or documents 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.
- (2)
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2) the party wishing to amend may within 10 days lodge an application for leave to amend.

8. A court hearing an application for an amendment has a discretion whether or not to grant it and that discretion that must be exercised judiciously.¹

9. The aim of pleadings is to define the issues and disputes between the parties in which all that is relevant for purpose of the proceedings, should be included in such pleadings. The primary object of allowing an amended is to determine

¹ Robinson v Randfontein Estate Gold Mining Company Ltd 1921 AD 168 at 243; GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219T @222 B - D

the real issues between them and that there is a proper ventilation of the dispute between the parties.²

10. Our courts would usually permit amendments. In *Moolman v Estate Moolman* 1927 CPD 27 at 29 Watermeyer J reflected the widely held view of our courts when he remarked 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 amendment 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 purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.

11. Amendments however will not be granted in the following circumstances:

11.1 where amendments would render pleadings excipiable.³

11.2 amendments involving the withdrawal of admissions.⁴

11.3 amendments involving the introduction of new causes of action and new claims.⁵

12. In the present action the Combined Summons was issued on 17 May 2017 and served on the Defendants on 21 June 2017.⁶

² *Blauuwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133h - i

³ *Dean of Law Faculty; University of North-West and Others v Masisi* 2014 (6) SA 61 (SCA) @ [10]

⁴ *President-Versekeningsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) @ 110H-111A

⁵ *Sprinston v Commonwealth Trading Co Ltd. Mail v Du Plessis* 1997 (1) SA 251 (W) at 253 – 254.

⁶ Bundle pages 4-31

13. Pursuant to the service of the summons, the Defendants entered an appearance to Defend and on 20 July 2017 the Defendants served a Notice to Remove the Cause of Complaint in terms of Rule 23(1) on the Plaintiff. As there was no removal of the cause of complaint the Defendants thereafter proceeded to serve the Plaintiff with an exception on 15 August 2017.⁷
14. In response to being served with an exception the Plaintiff then proceeded to serve the Defendants with a Notice to amend its Particulars of Claim on 25 August 2017.⁸
15. On 6 September 2017 the Defendants then served the Plaintiff with their Notice of Objection.⁹
16. In terms of the Notice of Objection three parts constituting a general nature are taken:
- 16.1 The Notice of Amendment is not accompanied by an offer of costs occasioned by the proposed amendment or by the Defendants exception dated 14 August 2017;
- 16.2 The Notice of Amendment does not address or resolve the Defendant's Exception dated 14 August 2017. Its failure to do so will therefore still leave the Particulars of Claim excipiable on the grounds set out in that exception which is to be read as if incorporated herein;
- 16.3 The Notice of Amendment seeks to attach 255 documents without pleading the contents, relevance or purpose thereof. This will render the

⁷ Defendants Exception: Bundle pages 61 – 73.

⁸ Bundle pages 74 - 77

⁹ Defendant's Notice of Objection Bundle pages 3.58 – 3.63

particulars of claim prejudicial to the Defendants and excipiable for being vague and embarrassing.

17. In more specific terms the objection relates to:

17.1 The Plaintiff attempts to introduce the terms of a written contract without pleadings the terms of such contract;

17.2 By the addition of the following sentence to paragraph 10 to the Particulars of Claim i.e. *"The prepared list by the MLM of affected properties is annexed hereto marked "SIU 7".* As the proceeding portions of paragraph 10 of the Particulars of Claim do not refer to "affected properties" or to any property at all and contains no explanation or allegation as to what is meant by the words "affected properties" the said proposed amendment to paragraph 10 will leave paragraph 10 excipiable for being vague and embarrassing.

17.3 The proposed amendment to paragraph 4, by inserting a heading and date would result in the proposed amendment seeking to introduce a cause of action that had already prescribed.

18. As mentioned in paragraph 16 *supra*, one of the grounds listed in the notice of objection relates to the proposed amendment's failure to address or resolve the Defendants exception dated 14 August 2017. Its failure to do so, the Defendants alleges will therefore still leave the particulars of claim excipiable.

19. It as a result necessitates consideration to be given to the first exception raised by the Defendants which relates to the Plaintiff's purported lack of legal standing.

LACK OF LEGAL STANDING

20. As previously mentioned, the citation of the Plaintiff is set out in paragraphs 1-4 *supra*. In the present instance the Plaintiff purports to institute a claim to recoup losses suffered by the Midvaal Local Municipality and alleges that it derives its *locus standi* from section 4(1)(c) of Act 74 of 1996.

21. The relevant section is quoted hereunder for ease of reference:

“(c) to institute and conduct civil proceedings in a special tribunal or any Court of Law for –

- (i) any relief to which the State institution concerned is entitled including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by a State institution;.....”

22. The relevant proclamation determines the civil *locus standi* of the Plaintiff and in terms of the proclamation empowers the Plaintiff to exercise or perform all the functions and powers assigned to or conferred upon the SIU by the Act, including the recovery of any losses suffered by the Municipality in relation to the said matters in the Schedule.

23. In order to properly assess the powers and functions conferred upon the SIU, it is important to have regard to the Schedule. The Schedule in part reads as follows:

“(I) Maladministration of the affairs of the Municipality by its councillors, officials, employees and /or agents in respect of the following:

- (a) The improper negligent or erroneous disposal of the Municipality’s operating assets as being redundant assets;
- (b) The failure to properly implement the Municipality’s indigent policy;
- (c) The erroneous issuing of town planning certificates.
- (d) The failure to obtain money belonging to the Municipality from the trust account of the Municipality’s attorneys and the failure to utilize such money for Municipal purposes;
- (e) The failure to properly control the debt owned by the municipality’s debtors;
- (f) The failure to record the Municipality’s assets in its asset registers; and
- (g) The appointment of staff of the Municipality at incorrect of post levels.

(2) The procurement of legal services by or on behalf of the Municipality and payments made in respect thereof¹⁰

24. The question of *locus standi* concerns the sufficiency and directness of a person’s interest in the litigation in order for that person to be accepted as a litigating party.¹¹

¹⁰ Proclamation No 33 of 2011. Bundle pages 58-59

¹¹ Jacobs v Waks 1992 (1) SA 521 (A) p 534D

25. The general rule is that for a party instituting proceedings to allege and prove its *locus standi* and the *onus* of establishing that issue rests on that party. It must accordingly appear *ex facie* the founding pleadings that the parties thereto have the necessary legal standing or *locus standi in iudicio*.¹²

26. The claims formulated as per the Combined Summons reveals that they are based on the purchasing and resale of fixed property, most of which did not belong to the municipality or the MLM. The purchase and resale was done by the defendants who at the time were acting as agents of MLM in the disposal of its assets. Such disposals, so the Plaintiff contends is governed by law and required to have been conducted in a manner where none of the parties were conflicted as in the instant. The relevant Proclamation is clear that it empowers the plaintiff to investigate specified acts “which are relevant, incidental or ancillary to or connected with the matters mentioned in the Schedule or which involve the same persons, entities or contracts investigated under authority of this Proclamation.”¹³ The matters therefore, falls within the ambit of the plaintiff’s mandate.

27. In reply the defendants/ respondents sets out in their answering affidavit that the failure by the defendants as alleged, to fulfil its mandate as agents of the municipality is not one of the instances described in the schedule and it cannot therefore be read into the schedule. Furthermore, that the claim which the deponent attempts to formulate in the founding affidavit, should have been

¹² *Kommissaris van Binnelandse Inkomste v Van der Heever* [1999] 3 ALL SA 115 (A), 1999 (3) SA 1051 (SCA) para 10

¹³ Founding Affidavit para 18.1-18.4

formulated in the particulars of claim.¹⁴ Since the claim falls outside the terms of reference contained in the schedule, the Applicant does not have *locus standi* to institute sets out in the particulars of claim.

28. Mr. Ngutshana, appearing on behalf of the plaintiff had argued that the investigation conducted by the plaintiff in relation to the terms of reference referred to in the Proclamation and the schedule attached to it, did not merely restrict the plaintiff to only investigate matters which took place between 1 January 2002 or after the date of publication of the Proclamation, but also permitted the plaintiff to investigate matters which took place prior to 1 January 2002, which is relevant, incidental or ancillary to, or connected with the matters mentioned in the schedule, or which involve the same persons, entities or contracts investigated, under authority of the Proclamation and to exercise or perform all the functions and powers assigned to or conferred upon the plaintiff including the recovery of any losses suffered by the municipality in relation to the matters referred to it in the schedule.

29. Furthermore, the disposal of all state properties, in particular fixed properties is governed by law, and at a municipal level by the Municipal Management Act 56 of 2003. Such disposals are also required to be conducted in a manner which is transparent, free of corruption, which is costs effective as also contemplated in section 217 of the Constitution. As this was not done in accordance to the relevant laws governing such disposals, the plaintiff has suffered damages due to a breach of mandate on the part of the defendants.

¹⁴ Answering Affidavit para 37.3 page 469

30. Now having regard to the citation of the plaintiff as per the Combined Summons it places exclusively reliance on the provisions of section 4(1) (c) of Act 74 of 1996, wherein its powers is derived from. In its citation no reference is made of its *locus standi* also being derived from the Municipal Finance Management Act 56 of 2003 or the Constitution and any reliance to be placed of these legislation ought to have been pleaded as part of the citation of the plaintiff. If one further has regard to the pleaded case, any allege damages which the plaintiff contends was suffered, was clearly suffered by the MLM. Therefore the Combined Summons as it stands ought to have cited the MLM at the very least as a co-plaintiff.

31. The proposed Notice to Amend clearly does not address the attack on the *locus standi in iudicio* as formulated by the defendants in its exception. Therefore, I cannot, but conclude that the plaintiff lacks the necessary locus standi to institute the claims as set out in the Particulars of Claim. In the absence of the plaintiff having locus standi, allowing the amendment would cause an injustice to the Defendants which, it must follow be prejudicial to the Defendants.

32. The plaintiff's lack of *locus standi*, in my view is dispositive of the application and any adjudication on the remainder of the grounds of objection would as a result not be necessary in the circumstances.

ORDER

33. Consequently, the application is dismissed with costs, including the cost consequent on the employment of counsel.



COLLIS J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances:

For the Applicant:	V.P.NGUTSHANA
Attorney of the Applicant:	STATE ATTORNEY: PRETORIA
For the Respondents:	S.D.MARITZ
Attorney for the Respondents:	ODENDAAL & SUMMERTON ATTORNEYS
Date of Judgment:	26 February 2019