



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

Case Number: 50189/2021

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

.....
**E.M. KUBUSHI
MARCH 2023**

DATE: ...

In the matter between:

DEAN HAWKINS

1ST APPLICANT

MONIQUE HAWKINS

2ND APPLICANT

And

SEBENZA SANITARY ENGINEERING (PTY) LIMITED

RESPONDENT

In re:

SEBENZA SANITARY ENGINEERING (PTY) LIMITED

PLAINTIFF

And

DEAN HAWKINS

1ST DEFENDANT

MONIQUE HAWKINS

2ND DEFENDANT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on ... March 2023.

INTRODUCTION

[1] The First and Second Applicants (“the Applicants”) in this interlocutory application, have approached Court seeking leave to amend their Plea. The Applicants are the First and Second Defendants in the main action whilst the Respondent is the Plaintiff.

BACKGROUND

[2] On 11 October 2021, the Applicants were served with summons issued by the Respondent. The cause of action in the summons is based on an alleged verbal agreement entered into between the Applicants and the Respondent, whereby it was agreed that the Respondent would provide construction services and supply of related materials and related services on the site known as 20 Hamilton Road, Craighall, Johannesburg. It is common cause that at the conclusion of the agreement, the site was the residence of the First Applicant.

[3] In terms of the said agreement, the Respondent was to be remunerated by the Applicants at its then standard rates for services rendered and materials supplied, which remuneration would become immediately due and payable by the Applicants to the Respondent upon presentation by the Respondent to the Applicants of an invoice. It is alleged that the Respondent complied with all its obligations under the agreement and presented an invoice in the amount of R462 720,56 to the Applicants, but the Applicants have failed to pay the said amount to the Respondent, which amount is said to be due, owing and payable.

[4] The Applicants, having entered appearance to defend, failed to file their Plea within the stipulated time. Subsequent to a Notice of Bar filed by the Respondent, the Applicants caused their Plea to be delivered on 15 December 2021. Thereafter, on 23 February 2022, the Applicants delivered a Notice of Intention to Amend their Plea, in accordance with Uniform Rule 28(1) (“Rule

28(1)"). An objection to the said notice was duly delivered by the Respondent on 7 March 2022. Consequently, the Applicants approached Court in terms of Uniform Rule 28(4) ("Rule 28(4)"), seeking leave to amend their Plea. The Respondent is opposing the application. As it will appear more fully hereunder, the Respondent's opposition is aimed at the Applicants' intended amendments in respect of the insertion of the special plea and the proposed amendments to paragraphs 3 and 4, thereof.

PROPOSED AMENDMENTS OF THE PLEA

[5] In the application for leave to amend their Plea, the Applicants intention is to amend a number of paragraphs, however, for purposes of this judgement only the amendments which the Respondent is objecting to, will be set out.

[6] Leave to amend the Plea is sought by the Applicants, amongst others, in the following manner:

"By replacing the whole of paragraphs 1 and 2 of their Plea with the following –

The insertion of a special plea that this Court does not have jurisdiction to hear this matter in that:

Both the First and Second Defendants reside at 505 Plover Crescent, Brettenwood Coastal Estate, Salt Rock, Durban in Kwa-Zulu Natal.

The First Defendant's address averred in paragraph 4 of the Plaintiff's particulars of claim does not confer jurisdiction.

The Plaintiff's particulars of claim do not contain any averment(s) that the cause of action arose wholly within the district of the above Honourable Court.

In the premises the above Honourable Court is not vested with the necessary jurisdiction to adjudicate the matter."

[7] In respect of the Plea Over, the following is pleaded:

"3. AD PARAGRAPHS 7 to 12 (including sub-paragraphs)

3.1 The Defendants deny the allegations contained in these paragraphs.

3.2 The Defendants specifically plead that

- 3.2.1 During January 2020, the First Defendant, together with his brother Dale Hawkins, were directors of the Plaintiff.
- 3.2.2 The First Defendant was a shareholder of Sebenza Plumbing (Pty) Ltd and Sebenza Plumbing was a shareholder in the Plaintiff.
- 3.2.3 During July 2020, the First Defendant undertook renovations to his then residence, situated at 20 Hamilton Road, Craighall Park, Johannesburg.
- 3.2.4 The Plaintiff rendered plumbing services at the First Defendant's residence as it also did at Dale Hawkins' residence when he did renovations.
- 3.2.5 The First Defendant and Dale Hawkins, jointly elected to make use of the Plaintiff's services at their respective residences.
- 3.2.6 It was never intended for the Plaintiff to be paid for its plumbing services.
- 3.2.7 Apart from the plumbing carried out by the Plaintiff, the First Defendant paid the remainder of the expenses for the renovation of his residence.

4. AD PARAGRAPH 13

- 4.1 The Defendants admit that the Plaintiff provided them with an invoice, but deny the veracity of the invoice.
- 4.2 The Defendants specifically plead that
 - 4.2.1 the invoice was rendered some 10 months after the services have been rendered by the Plaintiff.
 - 4.2.2 the invoice does not indicate how the amount of R462 720, 56 has been made up.
 - 4.2.3 the amount of the invoice far exceeds the value of the plumbing services rendered by the Plaintiff."

OBJECTION BY THE RESPONDENT

[8] The Respondent is objecting to the Applicants' intended amendments on the ground that they render the Applicants' Plea vague and embarrassing, alternatively, to lack averments which are necessary to sustain a defence, and if

allowed, they will render the Applicants' Plea excipiable or shall constitute an irregular step.

[9] There are essentially, three objections raised by the Respondent, namely

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- 9.1. The first objection deals with the special plea of jurisdiction.
- 9.2. The second objection deals with the allegation that 'It was never intended for the Plaintiff to be paid for its plumbing services', as contained in paragraph 3.2.6 of the intended amendment.
- 9.3. The third objection deals with the veracity of the invoices as contained in paragraph 4 of the intended amendment.

[10] The objections will be dealt with hereunder in turn. But first the law applicable is set out.

THE APPLICABLE LAW

[11] The main principles governing amendment applications are crystallised in the judgment in *Affordable Medicines Trust*,¹ where it was held that

“the 'practical rule that emerges ... 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".

[12] Therefore, a Court hearing an application for amendment must consider whether or not the amendment is *mala fide* or it 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 purpose of justice in the same position as they were when the pleading which it is sought to amend was filed.

ISSUE FOR DETERMINATION

[13] The main issue for determination is whether the amendments sought by the Applicants should be granted. Underlying this issue is whether the

¹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9.

amendments sought by the Applicants are *mala fide* or whether if granted, will cause an injustice to the Respondents which cannot be cured by an appropriate order of costs, or the Respondent cannot be put back for the purpose of justice in the same position as it were when the Plea was filed.

DISCUSSION

The First Objection is based on the Special Plea

[14] The ground for this objection is that the Applicants are attempting to alter an admission duly made in paragraph 1 of the initial Plea, into a denial without an application for the withdrawal of that admission, properly motivated and justified to convince the Court of the *bona fides* thereof. In this regard, the Respondent relies on the judgment in *President-Versekeringsmaatskappy Bpk*,² wherein it was held that a withdrawal 'requires full explanation to convince the Court of the *bona fides* thereof'.

[15] The Respondent's submission, in this regard, is that no objections were raised in the Plea as to lack of jurisdiction of the Court. It is, further, submitted specifically that as it was agreed between the relevant parties that the Combined Summons could be served upon the Applicants' then attorneys of record as their duly authorised agent, the said acceptance and authority constitute *de facto*, or implied, acceptance of the Court's jurisdiction to hear this matter. In paragraph 1 of their initial Plea, the Applicant admitted these allegations as they were set out in paragraph 4 of the Respondent's Particulars of Claim, and by seeking to insert the special plea in the proposed amendment, the Applicants seek to withdraw this admission, so it is argued.

[16] The crux, on this point, is whether the Applicants should be granted leave to amend their Plea by inserting the Special Plea in the proposed Plea. Underlying this question, is the issue of whether by inserting the Special Plea in the proposed Plea, the Applicants seek to withdraw an admission made in the initial Plea, which established the jurisdiction of the Court.

² *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H —111A. See also *JR Janisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* '1992 (1) SA 167 (C) at 170.

[17] It is apparent from the initial Plea that such an admission was made, however, what is also clear is that the admission was made in respect of the First Applicant, only. In Paragraph 4 of the initial Plea, the following is stated:

“The First Defendant is an adult male businessman whose full and further particulars are unknown to the Plaintiff who for purposes of this action has agreed to accept service of this process on his attorneys of record, Carreira & Associates Incorporated of Suite 103A, Waterkloof Gardens, 270 Main Street Brooklyn, Pretoria.”

[18] This paragraph, which is admitted in the initial Plea, refers only to the First Applicant. There is no such admission for or on behalf of the Second Applicant. Therefore, if it is to be accepted that such an admission or rather service of the summons upon the attorneys of record, establishes jurisdiction, then in that event, there is no jurisdiction established over the Second Applicant who it is stated, precisely, in paragraph 6 of the Particulars of Claim, that she resides at 505 Plover Crescent, Brettenwood Coastal Estate, Salt Rock Durban.

[19] However, the question of whether the said admission by the First Applicant that service of the summons be effected on his attorneys of record founds jurisdiction, still remains to be determined.

[20] It is trite that the High Court will assume jurisdiction based on either of the following factors: the defendant's place of employment and/or residence; where the whole cause of action or a portion of that action occurred; or the quantum in dispute.

[21] From the aforementioned factors, it is clear that consent to serve summons on the attorneys of record does not establish the Court's jurisdiction. The Applicants' argument that the admission made in the initial Plea was not an admission to confer jurisdiction on the Court, but merely an admission that the First Applicant agreed that service of the summons be effected upon his attorneys of record, is in this Court's view, sustainable. This Court finds that there was, in essence, no admission made by the First Applicant and/or the Applicants in the initial Plea, which conferred jurisdiction on the Court. Consequently, there is no admission that the Applicants seek to withdraw in the proposed Plea.

[22] It has been held that if the proposed amendment raises a point of law which would dispose of the case in whole or in part, the Court should determine that point of law.³ This Court aligns itself with that decision, and the issue of jurisdiction, being a point of law, stands to be determined by this Court.

[23] In determining the point of law, this Court takes into consideration the Applicants argument that the Respondent does not address the issue of jurisdiction in its Particulars of Claim. The contention is that the Respondent ought to have made averments in the Particulars of Claim that the whole cause of action arose within the jurisdiction of the Court. Having not done so, it is the Applicants' submission that the Particulars of Claim as they stand do not confer jurisdiction on the Court.

[24] In *SOS-Kinderdorf International*,⁴ the Court held that, in order to establish jurisdiction, where the summons does not disclose facts to show that the Court has jurisdiction no relief can be claimed *ex facie* such a summons.

[25] It is this Court's view that *ex facie* the Particulars of Claim, in this matter, the Respondent has established the jurisdiction of the Court, in that, it has alleged facts that show that the cause of action arose wholly within the area of jurisdiction of this Court.

[26] In terms of the Respondent's Particulars of Claim, the agreement was concluded in Pretoria and the construction services and supply of related materials and related services were provided to the Applicants on the site known as 20 Hamilton Road, Craighall, Johannesburg. The Applicants, at paragraphs 3.2.3 and 3.2.4 of their proposed Plea, also, admit that the plumbing services were rendered at the First Applicant's residence which was at 20 Hamilton Road, Craighall, Johannesburg. It is trite that Johannesburg and Pretoria both fall within the area of jurisdiction of the Gauteng Division of the High Court, and that the Pretoria High Court and the Johannesburg Division share concurrent jurisdiction.

³ *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363F-G.

⁴ See *SOS-Kinderdorf International v Effie Lentin Architects* 1991 (3) SA 574 (Nm).

[27] This Court is satisfied that from the contents of the Particulars of Claim, as well as, in the proposed amendment, it is clear that the services rendered or performance, were effected at 20 Hamilton Road, Craighall Park, Johannesburg, which falls within the area of jurisdiction of this Court, which means that this Court has jurisdiction to entertain this matter.

[28] Whether an amendment ought to be granted is a matter in the discretion of a judicial officer, whose discretion must be exercised judiciously after giving due consideration to all the relevant legal and factual considerations.⁵ Having made a finding that the Respondent has established the jurisdiction of this Court,⁶ this Court, in the exercise of its discretion is of the view that this amendment ought not to be granted.

The Second Objection deals with Paragraph 3.2.6 of the Proposed Amendment.

[29] In paragraph 3.2.6 of the proposed amendment, the Applicants seek to amend their plea by stating that “it was never intended for the Plaintiff to be paid for its plumbing services”.

[30] The Respondent objects to the proposed amendment on the ground that the proposed amendment fails to disclose the basis of the allegation for the existence of the intention, that is, whether it is based on contract, and if so whether such contract is oral, written or otherwise; it, also, fails to allege material facts or on what basis the “intention’ would amount to a defence to the Respondent’s claim; and, further, allege a shareholding in an entity unrelated to these proceedings without displaying or alleging any legal nexus to the Applicants’ defence or that the allegation amounts to a defence to the Respondent’s claim or relevance to the proceedings. Consequently, the contention is that if the Applicants’ Plea, is amended as such, it will constitute an irregular step, alternatively, will be excipiable or lack averments to sustain a defence.

⁵ Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk) at 77.

⁶ See Erasmus: Superior Court Practice Volume 2 pD1-338A and the case law referred to at ft 4.

[31] In response to the Respondent's argument that the Applicants' allegation for the existence of the intention does not disclose whether it is based on a contract or not, it is the Applicants contention that their defence is not based on any contract, whether written or verbal. The Applicants submit that there is no averment whatsoever in their intended amendment that the parties have entered into any agreement. They, specifically, deny that there was a verbal agreement between them and the Respondent. The basis of their defence as stated in the proposed Plea is clearly set out, the allegation is that there was no contract with the Respondent and that there was an intention by both directors, who at the time were the First Applicant and Mr Dale Hawkins, to make use of the Respondent's services for free, so they argue.

[32] The Applicants' defence, as this Court understands, is that there was no oral agreement entered into between the First Applicant and the Respondent in respect of the plumbing services rendered by the Respondent. The Applicants admit that there were renovations, which included the plumbing services, made to the First Applicant's house by the Respondent. The First Respondent paid for certain of those renovations but did not pay for the plumbing services as it was never intended that those services be paid. Their submission is that at the time the said renovations were made, the First Applicant and one Dale Hawkins were directors of the Respondent. The First Applicant and Mr Dale Hawkins decided to use the services of their company, the Respondent, to renovate their respective houses for free.

[33] In their intended Plea, the Applicants, deny the allegations contained in paragraphs 7 to 12 which includes amongst others, the allegation that there was an oral agreement between the First Applicant and the Respondent. They, further, specifically, plead at paragraph 3.2.6 that it was never intended for the Respondent to be paid for the services rendered for plumbing services. It is, thus, clear that they do not rely on a contract for their defence in this regard. There, is nowhere in their Plea were they refer to an agreement whether written or verbal.

[34] The reference to the entity known as Sebenza Plumbing, referred to in the Applicants' proposed Plea is no issue at all. It is evident from the reading of the intended amendment that the entity has no bearing to the allegations either in the Respondent's Particulars of Claim or in the Applicants' intended amendments. The entity is mentioned merely for background purposes, and nothing else.

[35] This Court agrees with the Applicants' contention that there is nothing in the proposed Plea that is vague and embarrassing. It is indeed so, as the Applicants argue, all the averments the Respondent is complaining about in this objection, do not detract from the Applicants' defence, and do not change the Respondent's case that must be proven. Of importance, which the Respondent ought to prove, is the existence of the alleged oral agreement between the First Applicant and the Respondent. It is this Court's view that the Applicants' proposed Plea discloses a cause of action and, consequently, the Applicants ought to be granted leave to amend this paragraph of the proposed Plea.

The Third Objection deals with Paragraph 4, of the Proposed Amendment

[36] The third objection to the proposed amendment relates to the invoice that was rendered to the First Applicant by the Respondent. In paragraph 4 of the Applicants' Notice of Intention to Amend, the Applicants wish to amend their Plea by alleging that the veracity of the invoices is questionable. In particular, the invoice is questionable because it was rendered some ten (10) months after the services were rendered, its makeup has not been indicated, and the amount therein far exceeds the value of the services rendered.

[37] In denying the veracity of the invoice, the Applicants' contention is that the ordinary lexical meaning of veracity is its truthfulness, its validity, or its authenticity. The contention being that the invoice was, in essence, fabricated.

[38] The Applicants argue that the fact that the invoice was rendered some ten months after the services were rendered, indicates that it was an afterthought; and that the invoice does not indicate how the amount of

R462 720, 56, is made up – it does not state the services performed, and the materials bought, it just states the amount owed. In addition, they argue that whatever was done at the First Applicant's residence by the Respondent, is far less than the value that the Respondent has charged in the alleged verbal agreement. The submission is that all this is a matter of evidence and the Respondent must prove exactly what is denied by the Applicants.

[39] Conversely, the Respondent objects to the proposed amendment on the ground that the allegations in paragraph 4 of the Applicants' intended amendment, constitute an admission which is at variance to the denial contained in paragraph 3 of the proposed amended Plea. The contention is that in the initial Plea, the Applicants denied the agreement, as well as, the invoice *in toto*, and argue, further, that the Applicants, yet again, proffer a contradictory version in the proposed amendment without any explanation. Consequently, if this paragraph is amended as requested by the Applicants, it will render the Applicants' plea excipiable in that it will be vague and embarrassing, so the Respondent submits.

[40] It is this Court's view that the Respondent seems to be conflating issues here. The Respondent fails to notice the point that in paragraph 3 of the proposed amended Plea, the Applicants deny the allegations in paragraph 11.2 of the Particulars of Claim which states that remuneration would become immediately due and payable by the Applicants to the Respondent on the presentation by the Respondent to the Applicants of its invoice. The admission in paragraph 4.1 of the Applicants' intended amendment, on the other hand, relates to the receipt of the invoice by the Applicants. These are two different matters that have nothing to do with each other.

[41] This Court agrees with the Applicants' argument that the admission by the Applicants that they received the invoice, does not mean that they are admitting the contents or the veracity thereof. It is this Court's view that the two allegations by the Applicants when admitting that they received the Respondent's invoice, and their denial that the remuneration would become due on presentation of the invoice, can never be regarded as being at variance with

one another. It can, also, not be said that by admitting that the invoice was sent to them, they are admitting the contents or the veracity of that invoice. In that vein, it is this Court's view that the intended amendment can, therefore, not render the proposed Plea vague and embarrassing as the Respondent want to suggest.

CONCLUSION

[42] It, therefore, this Court's finding that the Respondent has failed to establish that the Applicants' intended amendment would, if allowed, render the proposed Plea excipiable on the ground that it will be vague and embarrassing alternatively, lack averments which are necessary to sustain a defence, or shall constitute an irregular step.

[43] This Court having found as such, it follows that the proposed amendments should be allowed because they are not mala fide or cause an injustice to the Respondent, which cannot be cured by an appropriate cost order. There is, in essence, no injustice or prejudice that will be caused to the Respondent by the proposed amendments, and if leave to amendment is granted, the Respondent will not be put in any different position as to where he was before the amendments were applied for. That is, the Respondent has still to prove the alleged verbal agreement and the veracity of the invoice.

COSTS

[44] It is trite principle of our law that a flexible approach to costs has over the years been developed by our Courts which proceeds from two basic principles. The first principle is that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer. The second is that ordinarily costs follow the result and a successful party is, therefore, entitled to his or her costs.⁷ In this case the Applicant is the successful party and should be entitled to costs.

[45] However, the Respondent argue that the Applicants' filing of their Plea, which is regarded as a bare denial, as a means to avoid being placed under

⁷ Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at 624B—C par 3.

bar, and are now applying for the amendment of that Plea in an effort to cure that it, together with the extent of time it took the Applicants to apply for the amendment of their Plea, should be viewed in a negative light by this Court and as punishment for that, the Applicants should be mulcted with a punitive cost order as this is an abuse of the Court process.

[46] The Applicants concede that a proper Plea had not been filed and have invoked the provisions of Rules 28(1) and 28(4) which allows them to correct an insufficient pleading. They contend, therefore, that doing so, is not abuse of the Court process as argued by the Respondent, but is a right given to them by Rule 28(1) read with Rule 28(4). The right, as they argue, is not tight to any time period as the amendment of any pleading may be applied for at any time before the Court grants judgment. There is, according to the Applicants, no reason why they should be mulcted with a punitive cost order.

[47] Conversely, they argue that, should the Court find that it should grant leave to amend the Plea, a cost order should be granted against the Respondent as there was no merits in any of the objections they raised.

[48] The question is whether in the circumstances of this matter the Applicants deserve to be mulcted with a punitive cost order.

[49] Uniform Rule 28(10) gives authority to the Court to grant leave to amend any pleading or document at any stage before judgment. This subrule has been held to be in the widest possible terms and does not envisage any period before the judgment during which the possibility of making an application for an amendment is precluded.⁸

[50] When considering whether to grant a punitive cost order, the Constitutional Court in *Tjiroze v Appeal Board of the Financial Services Board*,⁹ expressed itself as follows:

“[22] . . . There is no reason not to award costs against the applicant. The question is: is the punitive scale prayed for warranted?”

⁸ See Erasmus: Superior Court Practice Volume 2 pD1-345 and the case law cited at ft 9.

⁹ [2020] ZACC 18 para 22 and 23.

[23] In *Public Protector v South African Reserve Bank*,¹⁰ Mogoeng CJ noted that

“[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process”.

Although that was in the minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J further noted that

“a punitive costs order is justified where the conduct concerned is ‘extraordinary’ and worthy of a court’s rebuke”.¹¹

Both judgments referred to *Plastic Converters Association of SA*,¹² in which the Labour Appeal Court stated:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

[51] It is this Court’s view that the Respondent has not made out a case for a punitive cost order against the Applicants. There is no conduct of the Applicants that is indubitably vexatious and reprehensible, which calls for the cost order sought by the Respondent.

[52] On the other hand, the Applicants are asking for an indulgence in this application and should be liable for the costs of this application. However, it is this Court’s view, in the exercise of its discretion, that no order of costs should be made and that each party should be liable for own costs.

ORDER

[53] In the circumstances, this Court makes the following order:

- a. The First and Second Applicants are granted leave to amend their Plea.
- b. There is no order as to costs.

¹⁰ 2019 (9) BCLR 1113 (CC) at para 8.

¹¹ Id at para 226.

¹² [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46.

**E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

APPLICANTS' COUNSEL:	ADV A DU PLOOY
APPLICANTS' ATTORNEYS:	KYPRIANOU ATTORNEYS
RESPONDENTS' COUNSEL:	ADV C ELLIS
RESPONDENTS' ATTORNEYS:	DJ STEYN ATTORNEYS