



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: 20 February 2023

Signature: _____

CASE NO: 2220/19

In the matter between:

DEON LOMBAARD

1st Plaintiff

PAUL VAN DER LINDE

2nd Plaintiff

And

SAAS EMS (PTY) LTD

1st Defendant

JOHAN VAN HUYSTEEN

2nd Defendant

LEONARD VAN HUYSTEEN

3rd Defendant

OSWALD TONKEN

4th Defendant

IZAK LODEWICKUS VAN HEEREDEN

5th Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] This is an interim application brought by the plaintiffs in the main action that is pending between them and the defendants. I will stick to referring to the parties in that order to avoid any confusion.
- [2] The plaintiff had served the defendants with a notice to amend their notice of motion in terms of Rule 28, by amongst others, substituting a clause 28 thereof with an amplified clause. There was no objection to the notice.
- [3] The notice to amend was issued in response to a notice of exception in terms of Rule 23(1) which had been served by the defendants.
- [4] The instant matter concerns a Rule 30 application brought by the defendants seeking an order declaring the plaintiff's service on 4 May 2021, on the defendants, of the amended pages an irregular step and setting it aside.
- [5] The notice to amend was served on 27 March 2019 and the amended pages served on 17 March 2019. The period of possible objection was

thus 28 March to 10 April 2019. The 19 and 22 April were part of the Easter public holiday and fell out of the reckoning.

- [6] It should be placed on record at this stage that the current attorneys of both the plaintiffs and defendants have recently been appointed as attorneys of record for the said parties and are entirely new in this matter.
- [7] The defendants' main contentions are that from the pleadings filed on record it is apparent that the amended pages which were served were not drafted in accordance with the notice of amendment and that therefore at no stage were the amended pages filed as provided for in terms of the provisions of Rule 28(5) as read with 28(7) and in terms of the notice of amendment in terms of Rule 28(1).
- [8] The defendants therefore contend that since the plaintiffs failed to file the amended pages within the timeframe of ten days as provided for in terms of Rule 28(5) as read with Rule 28(7), the amendment accordingly lapsed.
- [9] It is common cause that the initial amended pages were served on the 17 April 2019. At the centre of the dispute are the papers filed on 4 May 2021 that seek to insert the amplified paragraph 28 which had been omitted by the erstwhile attorneys in the 17 April filing. According to the plaintiffs' counsel, this apparent oversight was identified by the current attorneys of record who had been brought on board only in January 2021. The new attorney then sought to salvage the situation by amongst other means corresponding with the defendants' attorneys.
- [10] By way of clarification, the original notice of motion contained a paragraph 28 which read as follows:

10.1 “*Relief is sought from ail five Defendants, jointly and severally liable.*”

[11] The amended and amplified form reads thus:

11.1 “A. Relief is sought from all five Defendants, jointly and severally liable in terms of Section 77(2)(a) being in accordance with the principles of common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty.

B. The said five (5) directors to be held accountable jointly and severally liable in terms of Section 77(2)(b)(i), (ii) and (iii) being in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 76(3)(c), any provision of the Act not otherwise mentioned in this section, or any provision of the company’s Memorandum of Incorporation.”

[12] The intended amendment in the notice of amendment is mirrored in the amended particulars of claim. The reality however, is that whilst the notice of amendment had the intended expansion of paragraph 28, the amendment that was timeously filed on 17 April did not reflect the intended change due to tardiness on the part of the initial attorneys for the plaintiffs.

[13] The plaintiffs followed the requirements of Rule 28(1) in serving the notice of its intention to amend to the affected parties.

[14] An objection by the defendant/respondent is catered for in Rule 28(2). There was no objection in this instance. The plaintiff then gave effect to

the amendment as provided in Rule 28(5). The only misfortune is that the purported amendment was the one with the omission of changes to paragraph 28 of the particulars of claim. The fact remains however, that the notice on amendment carried the correct amendment.

[15] The plaintiffs' attorneys reached out to the defendants' attorneys seeking an indulgence by way of correspondence, but it was all in vain.

[16] In *Van Heerden v Van Heerden*¹ the court found that because the plaintiff had not delivered an amendment as required by rule 28 (5) the further steps taken by the plaintiff constituted an irregular step. This instant case is distinguishable from *Van Heerden* matter.

[17] I find no merit and legal support in the defendants' argument that the plaintiff's amendment has lapsed. What is clear in this case is that the plaintiff had an opportunity to effect an amendment consonant to the rules, but somehow the documents filed were missing the amendment to paragraph 28 of the particulars of claim.

[18] Courts usually lean in favour of granting proposed amendments when hearing rule 28 applications. In *Trans-African Insurance Co. Ltd v Maluleka*² the court said that after all, the purpose of pleadings is to allow a proper airing of the dispute between the parties, which may only be possible if the amendment is permitted.³

[19] *Moolman v. Estate Moolman and Another*⁴ is the leading case on whether to permit or refuse an amendment. The approach was summarised as follows:

¹ 1977 (3) SA 455 (W).

² 1956 (2) SA273 (A) at 279C.

³ Pete, Hulme et al – Civil Procedure, a practical guide 2nd edition p204.

⁴ 1927 CPD 27 at 29.

“...the practical rule...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, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it sought to amend were filed.”

[20] The above approach has been reconfirmed by the Constitutional Court in *Affordable Medicines Trust and Others v. Minister of Health and Others*.⁵

[21] It is not the remit of the courts considering an amendment to seek to punish any party for perceived or real tardiness or negligence. In *Mabaso v Minister of Police*⁶ Goldstone AJ said that ‘even in a gross case’ the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order for costs.

[22] It is thus not this court’s intention to consider form over function and be swayed by defendant’s appeal to exclude the amendment and order the plaintiff to make an application afresh on an issue that defendant has been aware of since the time notice to amend was filed on 27 March 2019. The Plaintiff are not seeking a new amendment but merely seek to rectify an omission.

[23] The defendants’ resistance to permit the correction to be made, leading it to approach the courts is an abuse of the legal process. The court will mark its disapproval by awarding costs of this application against the defendants, thus letting costs follow the cause.

[24] I make the following order:

⁵ 2006 (3) SA 247 (CC) at 261 B-F.

⁶ 1980 (4) SA 319 (W) at 323D.

24.1 The amendment served on 17 April 2019 and the subsequent corrected papers filed on 15 June 2021 are allowed to stand. The defendant may file its plea thereto accordingly.

24.2 This application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of Judgment: 20 February 2023

Date of hearing: 24 May 2023

Appearances

On behalf of the Applicants: Adv. J. Hershensohn

Applicant's Attorneys: VENEZIANO ATTORNEYS

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 20 February 2023.