Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2754/2016

In the matter between:

CORNELISSEN INCORPORATED Applicant/Plaintiff

and

NAMA KHOI LOCAL MUNICIPALITY Respondent/Defendant

Coram: Lever J

JUDGMENT

Lever J

1. This is an application to effect certain amendments to the plaintiff's Particulars of Claim. The applicant for the amendment is an attorney, the plaintiff in the main claim, who is claiming fees in the said main claim in respect of advice and professional services rendered to the respondent, who is the defendant in the main claim.

2. This sounds deceptively simple until one considers the political motivations of the councillors of the respondent at the material time, that underlay the various applications and legal proceedings for which plaintiff claims its fees. At the material time, one political party held the positions of mayor and speaker, but the balance of power was very finely balanced and a minor shift in the balance of power changed things to the extent that if the councillors from the opposing political party did not attend ordinary or special meetings, the respondent's council could not be quorate.

3. In these circumstances the respondent's council was effectively hamstrung and could not conduct any business, no matter how vital. Various approaches including litigation were tried to both retain political power and move the business of the respondent council forward.

4. None of these issues are before me for a decision at this stage. I shall also not deal with any of them. These issues are set out to provide context and illustrate the relevance of the proposed amendments.

5. At the time relevant to the main action and the present application, the influence and political power attaching to the respective political parties changed materially and affected both the respondent's council and the parties to this application.

6. The proposed amendments deal with the authority of the then representative of the respondent, in the circumstances spelt out above, to engage the services of the plaintiff. Such alleged authority is presently denied by the respondent in the Plea Over filed on its behalf, this is unlikely to change even if the proposed amendment is granted.

7. The first paragraph of the Particulars of Claim, which the applicant proposes to amend, before such amendment, reads as follows:

> "6. The plaintiff was duly represented by Jan Hendrik Cornelissen ("Cornelissen"), sole director of the plaintiff, and the defendant was duly represented by Josua Losper (hereinafter referred to as "Losper")."

8. The proposed amendment seeks to delete that version of paragraph 6 of the applicant's Particulars of Claim and replace it with the following:

> "6. The plaintiff was duly represented by Jan Hendrik Cornelissen ("Cornelissen"), sole director of the plaintiff, and the defendant was duly represented by Joshua Losper (hereinafter referred to as "Losper"), who was acting in the public interest as referred to in section 38 of the Constitution of the Republic of South Africa."

9. The proposed amendment is slightly ambiguous in that it is not clear if the person who drafted the proposed amendment intended to allege that Losper was both duly representing the respondent at the material time and at one and the same time acting in the public interest as contemplated by section 38 of the Constitution. Conversely, the person

who drafted the amendment might have intended reference to the public interest as an alternative basis on which Losper had authority to act.

10. As the proposed amendment currently reads it appears that the former was intended to be pleaded, ie that the authority of Losper was based on both grounds.

11. The phrase ‘duly represented by Losper’ implies that Losper had authority to act. In which case it would not be necessary to allege Losper acted in the public interest. At worst for the applicant, this is simply a statement of two different grounds on which the authority of Losper could be based. These two grounds of alleged authority are not mutually exclusive. Such proposed amendment does not render the proposed amended Particulars of Claim excipiable, nor is it vague and embarrassing. In any event the respondent did not object to the proposed amendment on the basis that it was vague and embarrassing, excipiable or even ambiguous.

12. In these circumstances if the applicant establishes either one of these grounds for authority to engage the plaintiff on behalf of the respondent, this would probably be sufficient. In these circumstances, the grounds alleged for the authority of the then representative of the

respondent are *de facto* alternatives, accordingly nothing further needs to be said about this apparent ambiguity.

13. The second proposed amendment is to paragraph 8 of the Particulars of Claim. Before amendment this paragraph reads as follows:

> "8. The above named Honourable Court was also requested to ratify and confirm the authority of, *inter alia* Losper. Baartman and Lubbe to act on behalf of the defendant. Such authority to act on behalf of the defendant was accordingly granted by the above Honourable Court."

14. The proposed amendment seeks to delete paragraph 8 of the Particulars of Claim and replace it with the following:

> "8 The above Honourable Court was also requested to ratify and confirm the authority of, *inter alia* Losper, Baartman and Lubbe to act on behalf of the defendant acting in the public interest in terms of section 38 of the Constitution of the Republic of South Africa. Such authority to act on behalf of the defendant was accordingly granted by the above named Honourable Court."

15. The respondent then filed a Notice to Oppose the proposed amendments. The applicant filed a Rule 30(2) Notice calling upon respondent to remove the cause of complaint. The cause of complaint being that the Notice of Opposition filed by the respondent did not comply with the requirements of Rule 28(3) in that it did not clearly and

concisely set out the grounds upon which the respondent objected to the said amendment.

16. Subsequently, the respondent filed an amended Notice of Objection. In the said Notice of Objection, the respondent objected on the following grounds:

> "1. The proposed amendment is mala fide for the following reasons, namely:-
>
> 1.1 It was filed 3 years and 4 months after the close of pleadings and 1 day before the trial;
>
> 1.2 On 5 December 2018, and at the pre-trial conference, the Plaintiff confirmed that it has no intention of amending its pleadings;
>
> 1.3 The proposed amendment, at such late stage in the proceedings and one day before the trial, is based on section 38 of the Constitution of the Republic of South Africa, 1996, which already came into operation on 4 February 1997.
>
> 2. The proposed amendment intends to place on record an issue for which there is no supporting evidence, which evidence will be required."

17. Then quite apart from the grounds raised in the objection, the respondent in the answering affidavit filed on its behalf raises a further unrelated objection in its answering affidavit, which reads as follows:

> "2.3 In the final instance, the proposed amendment introduces a new cause of action that was never pleaded by the Plaintiff, and which new cause of action has prescribed."

18. The respondent's contention that it introduces a new cause of action is merely denied by the applicant. The applicant did not object to this objection being raised outside of the Rule 28(3) Notice.

19. The decision whether to grant or refuse an amendment is one that is within the discretion of the court.[1] It is trite that this discretion must be exercised judicially.

20. In exercising this discretion, the primary considerations are prejudice or injustice to the other side.[2] In the practical application of this principle our courts have consistently been guided by the statement of Watermeyer J, who set out the position as follows:

> "[T]he 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."[3]

21. The purpose of adopting this approach that amendments be granted unless they are brought *mala fide* or are prejudicial to the opposing party, is to ensure that the real issues between the parties are properly raised and ventilated. Thus, allowing the court to determine the real

[1] Robinson v Randfontein Estate Gold Mining Company Ltd 1921 AD 168 at 243.
[2] Devonia Shipping v MV LUIS 1994 (2) SA 363 (C) at 369G.
[3] Moolman v Estate Moolman 1927 CPD 27 at 29.

issues between the parties. This is necessary to ensure that justice is done between such parties.[4]

22. The respondent in its Rule 28(3) Notice, the material portion of which is quoted verbatim above, contends that the application to amend is *mala fide*. Then, in the answering affidavit filed on its behalf raises the further ground that it would be prejudiced because such contemplated amendment would raise a new cause of action which had already prescribed.

23. It is convenient to deal with this last objection raised by the respondent in its answering affidavit, at the outset. Nepgen J on the basis of the wording of Rule 28(3) held that he could not entertain or uphold an objection that was not included in such notice.[5]

24. Even though the respondent in the instant case raises this issue in his answering affidavit and has thus forewarned the applicant that it intends to raise the point, respondent has not brought such ground of objection within the requirements of Rule 28(3). If the respondent wished to raise this objection, it ought to have moved an amendment of its Notice of Objection under the provisions of Rule 28. Accordingly, the respondent's objection based on an alleged new but prescribed cause of action ought not to be entertained. In the event that, for any

[4] Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering 1967 (3) SA 632 (D &CLD) at 640 G-H.
[5] Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd 1999 (1) SA 1153 (SE) at 1158 A-C.

reason, I might be wrong in adopting this approach, I will consider whether the proposed amendments do in fact introduce a new cause of action.

25. In this context it is important to consider whether the proposed amendment introduces a new 'right of action' (cause of action) or whether the proposed amendment merely supplements, amplifies or corrects the pleadings relating to the existing claim. This position was set out by Eksteen JA in the Sentrachem case, as follows:

> "Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesentlik dieselfde skuld prober afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteen gesit word. So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was, te red nie, of om 'n nuwe party tot die geding te voeg nie."[6] (references omitted)

26. Applying this approach to the facts of the present matter, it is clear that the same 'right of action' is being pursued by the plaintiff. The same debts are still sought to be enforced through the main action. This is not changed by the proposed amendments. What the proposed amendments do is to simply add an additional or an alternative ground for claiming the then representative of the respondent had the authority to engage the plaintiff for the legal work involved. It also adds

[6] Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) at 15J to 16C.

a basis for claiming that certain other municipal officials or representatives had authority to act.

27. Accordingly, the proposed amendments cannot be said to institute a new cause of action. It would be more appropriate to characterise the proposed amendments as supplementing the existing claim in the main action. On this basis the objection raised by the respondent in its answering affidavit that a new and prescribed cause of action is introduced by the proposed amendments, cannot stand.

28. Turning now to the argument that the proposed amendments are *mala fide*, as set out in the respondents Rule 28(3) Notice. The first ground raised in the said notice is that the proposed amendment is *mala fide* because it was filed three years and four months after the close of pleadings and one day before the trial.

29. Delay, in and of itself is not a reason to refuse an amendment[7]. An amendment will only be refused if such delay prejudiced the respondent.[8]

30. The respondent in this ground of objection suggests that the notice one day before the trial in the matter prejudiced respondent. However, by the time that respondent filed its amended Rule 28(3) Notice the

[7] Trans-Drakensberg case, above at 642 C-E.
[8] Fiat SA (Pty) Ltd v Bill Troskie Motors 1985 (1) 355 (O) at 357E-F, Trans-Drakensberg case, above at 642H.

trial referenced herein had already been postponed. Such prejudice as there might have been one day before the then trial date has already been offset by the postponement of the matter.

31. In argument, it was suggested on behalf of the respondent that there is now a delay of some nine years from the time of the relevant incidents to the time of the application to amend. That the respondent will be prejudiced in finding witnesses on whether the then officials of the respondent were acting in the public interest or not.

32. The question of whether the then officials of the respondent were acting in the public interest is built into the factual matrix of the 2013 applications as a group. If the papers on those applications are not sufficient to decide the question of acting in the public interest or not, the oral evidence of the deponents to such affidavits will certainly be sufficient to decide such issue. There is nothing to suggest that any of these deponents are no longer available or unable to give oral evidence.

33. The applicant in the founding affidavit filed on its behalf gave an explanation for the delay. This explanation indicates that there was oversight and negligence certainly, on the part of the applicant. None of which amounts to *mala fides*. The oversight and negligence was not such that the applicant should be punished by being deprived of the

opportunity to present its entire case to the trial court in the main action.

34. In these circumstances and on the grounds put forward by the respondent, I cannot find that the respondent is prejudiced by the delay.

35. The second ground raised by the respondent in attempting to show that the proposed amendment is *mala fide* is that: “On the 5 December 2018, and at the pre-trial conference, the plaintiff confirmed that it has no intention of amending its pleadings.”

36. The purpose of a pre-trial conference is to find ways to shorten the proceedings, to reach agreements on procedural matters that would ensure that the matter is ready for trial.

37. The assurance given by the applicant relates to a procedural matter that is routinely asked in pre-trial conferences. It states nothing more than at the time such assurance was given that the applicant did not intend to amend its pleadings. If due to negligence or oversight this changes and the party who gave such assurance subsequently realises that an amendment is needed in order to properly present its case to court, the assurance given is not a bar to an amendment. In and of itself it is also not evidence of *mala fides.* More is needed to establish

mala fides on the part of the applicant. The respondent has not provided anything further on this ground to show *mala fides*.

38. At most the issue of the assurance given at the pre-trial conference would entitle the respondent to a postponement and possibly costs. The respondent has already been given a postponement to deal with this amendment.

39. Turning now to the third ground alleged to be evidence of *mala fides* by the respondent, being that: “The proposed amendment, at such a late stage of the proceedings and one day before the trial, is based on section 38 of the Constitution of the Republic of South Africa, 1996, which had already come into operation on 4 February 1997”. As set out above the applicant overlooked the Constitutional ground for establishing authority to act. It was probably negligent in overlooking such ground. Such negligence does not bar applicant from seeking to amend its Particulars of Claim to place its full case before the trial court. Such negligence in and of itself does not show *mala fides* on the part of the applicant. Accordingly, I cannot find on the strength of this contention that the applicant moved the proposed amendment in a *mala fide* manner.

40. On behalf of the respondent in argument, it was submitted that Mamosebo J in case number 973/2013 had found that the officials the applicant represented were acting to further a political motive and

were not acting ‘in the public interest’. In my reading of such case, I could not find that Mamosebo J actually made such finding. If I have missed it, Mamosebo J made her finding in a particular context. The context in which the trial court will be called upon to assess such additional or alternative ground for authority raised on behalf of the then representative of the respondent will of necessity be different. In any event, this is not evidence of *mala fides* on the part of the applicant.

41. In this application for leave to amend it is not the job of this court to assess and decide upon such context. This court must assess whether the proposed amendment raises a triable issue which is not raised *mala fide* and which is not prejudicial to the opposing party.

42. In my view the respondent has not established that the applicant is acting *mala fide* in seeking leave to effect the proposed amendments.

43. The final ground upon which the respondent objected to the proposed amendments was that: “The proposed amendment intends to place on record an issue for which there is no supporting evidence, which evidence will be required.”

44. At the hearing hereof, this ground of appeal was not pursued by the respondent, but it was also not abandoned by the respondent.

45. The only reference to this ground of objection placed before this court was in the respondent's heads of argument, where there was a reference to the case of STRYDOM v DERBY-LEWIS[9]. I have read Strydom's case and the facts of Strydom's case are so far removed from the facts of the case before this court that the principle enunciated in this ground of objection can have no application to the case presently before this court.

46. On the issue of costs, Ms Stanton who appeared for the respondent suggested that the issue of costs stand over for the decision of the trial court in the main action. Given the circumstances I believe the trial court in the main application will be best placed to determine who should pay the costs of this application for leave to amend as well as the costs occasioned by the amendment that have not yet been determined.

Accordingly, the following order is made:

1) The applicant is granted leave to amend its particulars of claim as set out in its Notice of Intention to Amend, which bears the Registrar's date stamp of the 3 December 2020.

2) The said amendment shall be effected within ten (10) days of this order being made.

[9] 1990 (3) SA 96 (T).

3) The costs occasioned by such amendment are reserved for the court that determines the main action in this matter.

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Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

Applicant:	Adv C Simon oio HUGO MATTHEWSON & OOSTHUIZEN INC.
Respondents:	Adv A Stanton oio DUNCAN & ROTHMAN INC.
Date of Hearing:	22 March 2022
Date of Judgment:	15 June 2023