IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16136/2012

In the matter between:

ROBERT ROSS DEMOLISHERS (PTY) LTD	**Applicant**
vs	
ALL PERSONS LISTED ON "RJR1" PORTION 20 OF FARM 7787 CAPE DIVISION	**First Respondent**
THE CITY OF CAPE TOWN	**Second Respondent**
MINISTER OF HUMAN SETTLEMENTS	**Third Respondent**
MINISTER OF PUBLIC WORKS	**Fourth Respondent**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**Fifth Respondent**
MINISTER OF HUMAN SETTLEMENT IN THE WESTERN CAPE PROVINCIAL GOVERNMENT	**Sixth Respondent**
MINISTER OF HUMAN SETTLEMENT IN THE WESTERN CAPE PROVINCIAL GOVERNMENT	**Seventh Respondent**
THE NATIONAL MINISTER OF POLICE	**Eighth Respondent**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Ninth Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON: 28 AUGUST 2023

MANTAME J

Introduction

[1] This is an application in terms of Rule 28(4) of the Uniform Rules of Court for leave to amend the applicant's notice of motion in the main application *("eviction application")* by deleting certain paragraphs and substituting them with the paragraphs in the notice in terms of Rule 28 of the Uniform Rules of Court. The eighth respondent opposed this application for amendment on the basis that the applicant cannot be allowed by this Court to introduce a number of claims and prayers against it by means of a declaratory in relation to events which occurred more than a decade ago, i.e. 2012. Amongst other objections, it was said such claims have prescribed. Further respondents did not oppose this application.

Brief History

[2] On 20 August 2012, the applicant launched an application for eviction of the first respondents who invaded its property, known as Portion 20 of Farm 7787, Phillipi Cape Division ("*the property*"). The City of Cape Town ("*the City*") was cited as the second respondent in the normal course. At that stage, there were two (2) respondents in the main application.

[3] After the first respondents opposed the main application, this Court handed down an order on 26 November 2012 in the eviction application and a similar application, brought by Lyton Props Twelve CC ("*Lyton Props*") in which the applicant was the third respondent, the City was the fourth respondent, and Ross and Sons (Pty) Ltd t/a Ross Demolishers was the second respondent. The order directed the City and the applicants

(in both applications) to file reports under oath by 25 January 2013, dealing with (a) how they have "meaningfully and reasonably" engaged on whether it was possible for the City to (i) lease the properties pending the provision of alternative accommodation to occupiers, and if not, why not; and / or (ii) purchase either or both of the properties, and if not, why not; and / or (iii) take the steps set out in Section 2.7 of Vol. 4, part 2 of the National Housing Code, 2009 to identify and acquire land for the relocation of the persons making up the first respondents, and if not, why not; and / or (iv) take steps to expropriate either or both of the properties, and if not, why not.

[4] The City delivered its compliance affidavit by 25 January 2013, and the applicant filed its compliance affidavit on 1 February 2013. In its affidavit, the applicant stated that it had two (2) suggestions which it wished the parties to explore, i.e. (a) the purchase of the land by the second respondent; or (b) the lease [of] the land from the applicant by the City.

[5] As contemplated by the court order of 26 November 2012, the applicant filed an affidavit in response to the City's compliance affidavit in April 2013 and the first respondents likewise. The City delivered its response to these affidavits at the end of April 2013.

[6] On 3 June 2013, this Court handed down an order in both cases in which it joined certain national and provincial Ministers, i.e. the national Minister of Human Settlements; the national Minister of Public Works, the national Minister of Rural Development and Land Reform; the Western Cape Provincial Minister for Human Settlements; and the Western Cape Provincial Minister of Public Works "for purposes of providing the reports

referred to in paragraphs 3 and 4 [of the order] and providing the Court with any information it may require to make a just and equitable order." The Court order went further to state that, on receipt of the reports, it "shall issue such further directions as it considers appropriate" and that any party may re-enrol the matter for a further hearing on reasonable notice.

[7] During the course of 2013, the national and provincial Ministers that were joined in the proceedings provided their affidavits and reports in the eviction application. Further affidavits and notices were exchanged between the applicant, the City and the Western Cape Minister for Human Settlements (sixth or seventh respondent) in the last quarter of 2013 and the first quarter of 2014.

[8] Pursuant to the Court order of 25 October 2013 which confirmed the joinder of the third to the seventh respondent in the eviction application, both applications were set down to be heard on 12 May 2014. However, the Provincial Government of the Western Cape in mid-April 2014 brought a postponement application to enable a survey to be conducted of every household on the two (2) properties within four (4) months. The two (2) applications were postponed on 12 May 2014 to allow the surveys to be conducted. A subsequent Court order was issued on 6 October 2014 which amended the earlier Court order directing that the surveys be completed by 14 November 2014.

[9] Between November 2014 and February 2022, when the applicant launched an application to join the Minister of Police as the eighth respondent and the Government of the Republic of South Africa as the ninth respondent, there appears to be no activity in the eviction application. It laid dormant for over seven (7) years.

[10] The applicant stated that when a group of persons began to invade the property, attempts were made by the applicant to safeguard the property by deploying guards. The security guards sought assistance from the police and they were informed by the police that as the occupation of the land related to a conduct taking place on private land, the police were unable to assist. By the time the eviction application was instituted, there were approximately two hundred (200) informal structures on the property, with approximately ten (10) new structures being erected every day. The property became wholly occupied and the persons on the property are in their thousands.

[11] According to the applicant, as the litigation progressed it became apparent that a successful eviction of the occupiers from the property was an objective impossibility due to the cost of carrying out such an eviction. The prospect of successfully keeping the occupiers off the property in the event they were evicted, and the lack of alternative accommodation for such a large group of persons militated against them being successfully removed. The applicant therefore stated that it elected to join parties without objection, i.e. the third to ninth respondents. The eighth respondent denied this assertion and stated that it was not correct that the joinder of the eighth and ninth respondents was attributable to developments in the progression of the litigation. When the eighth and ninth respondents were joined in February 2022, the litigation had stalled since the second half of 2014. Also, it was incorrect that they were joined without objection, in the Court order of March 2012 paragraph 3 specifically stated that:

> *'It is recorded that the eighth respondent's non-opposition to its joinder in the main application is in no way an admission of the merits or otherwise of any claim which the applicant intends to seek to advance against the eighth respondent in the main*

application and is with reservation of the eighth respondent's rights to object to the proposed amendment of the applicant's notice of motion upon consideration of the papers in the main application, should it be considered appropriate to do so."

[12] It was pointed out by the eighth respondent that when the main application was brought and prior to February 2022, at no stage did the applicant indicate that any relief would be sought against the eighth respondent on account of alleged acts and / or omissions of the South African Police Services *("SAPS")*, or that the Minister of Police would be joined as a party to the proceedings.

[13] It was said that only recently the applicant has since sought to amend its claim to reflect primarily a declarator that various of the respondents had failed to protect the constitutional proprietary rights of the applicant, and a consequent relief that the City be ordered to purchase the property, with the purchase price to be paid by the third and / or fourth and / or sixth and / or seventh and / or eighth and / or ninth respondents. The purchase price to be paid as if the land was vacant, *and alternatively,* that the second, third, fifth, sixth, seventh, eighth and ninth respondents pay constitutional damages pursuant to the breach of the applicant's proprietary rights.

Application for Leave to Amend

[14] The applicant filed a substantial application for leave to amend its notice of motion dated 20 August 2012 by the deletion of paragraphs 1 – 13 inclusive of sub-paragraphs, and by the substitution with the following:

"1. Declaring that the second, eighth and ninth respondents, in failing to take steps to protect the property of the applicant known as Portion 20 of Farm 7787 Cape Division, Province of the Western Cape ("the property") violated the constitutional rights of the applicant to such property.

2. Declaring that the second, third, fifth, sixth and ninth respondents in failing to have mechanisms in place to relocate the first respondents from the property, violated the constitutional rights of the applicant to such property.

3. Ordering and directing the second respondent, or such other respondent as the court may deem appropriate, to take all steps and sign all documents necessary to effect the purchase [of] the property from the applicant for a price to be determined as set out hereunder ("the purchase price").

4. Ordering the third and / or fifth and / or sixth and / or seventh and / or eighth and / or ninth respondents [to] pay the purchase price for the property, to give effect to the purchase as set out in paragraph 3 above, insofar as same may not fall within the budgetary constraints of the second respondent.

4.1 That the purchase price payable to the applicants for the property be determined by an arbitrator ("the arbitrator") in due course, the arbitrator, failing agreement between the parties within 14 days of such order as this honourable court might hand down, to be appointed by the president of the Cape Bar Council;

4.2 That, in determining the purchase price, the arbitrator will take into account all relevant considerations and determine the purchase price based on market related value of the property as at date of the

arbitration award. Without derogating from the generality of the aforesaid the arbitrator will take specific note of the following considerations;

4.2.1 *That the purchase price to be determined as if the property in question and the surrounding area were vacant land, and that the informal settlement that has arisen on the property and in the surrounding area be accordingly disregarded for purposes of valuation and determination.*

4.2.2 *That the purchase price of the property be determined with cognizance of all services, including but not limited to roads, drainage systems, water access points and electrical access points, already installed by the applicant.*

4.2.3 *That the purchase price of the property be determined with cognizance of the use to which the applicant put the property prior to the occupation thereof and the use to which it would have put the property in the event the occupation thereof had not taken place.*

5. *Alternatively to prayer 4 above, that the second and / or third and / or fifth and / or sixth and / or seventh and / or eighth and / or ninth respondents pay the applicant compensation / constitutional damages pursuant to their breach of its constitutional rights as set out above, the quantum of such compensation / constitutional damages to be equivalent to the value of the property, same to be determined in the same manner, and taking into account the same considerations, as the determination of the purchase price as set out in paragraphs 4.1 – 4.2.3 above.*

6. *Alternatively, to prayers 4 and 5 above, that the second respondent expropriate the property as contemplated [in] the Expropriation Act 63 of 1975 with the compensation payable as contemplated in section 12 thereof to be determined in the same manner, and take into account the same considerations, as the determination of the purchase price as set out in paragraphs 4.1 – 4.1.3 above.*

7. *Alternatively, to prayer 4, 5 and 6 above, that the first respondents be ordered to vacate the property together with all their goods and belongings, including but not limited to all structures erected by the first respondents on the property, on a date to be determined by the above honourable court.*

   7.1 *That in the event the first respondents fail to vacate the property as set out above, that the Sheriff of the above honourable court, duly assisted by the second and eighth respondents, be ordered and directed to evict them from the property, together with all their goods and belongings, on a date to be determined by the honourable court.*

   7.2 *That the second and / or third and / or fifth and / or sixth and / or seventh and / or eighth and / or ninth respondents pay all costs and expenses of giving effect to the eviction of the first respondents as set out above.*

8. *That the first respondents, in the event of their vacation of / eviction from the property, be interdicted and restrained from thereafter entering into or being present upon the property for any purpose whatsoever or from erecting or seeking to erect any structure on the property be it of a permanent, semi-permanent or informal nature.*

8.1 That in the event the first respondents indeed act in a manner as contemplated in 8 above, then the sheriff of the above honourable court, duly assisted by the second and eighth respondents, is ordered and directed to remove them from the property together with their belongings.

8.2 That all costs of so removing the first respondents from the property shall be borne by the second and / or eighth respondents.

9. That the second and eighth respondents, alternatively such of the respondents as the above honourable court may deem meet, pay the costs of this application jointly and severally the one paying the other to be absolved.

10. ..."

[15] The eighth respondent objected to this application on the basis that prayers 1, 3, 4, 5, 6 and 9 seeks to implicate the eighth respondent. In addition, the applicant does not have a sustainable cause of action against the eighth respondent. Even if the lack of substantive merit against the eighth respondent could be put aside, any potential or alleged claim against the eighth respondent has prescribed. For its claim, the applicant relies on alleged acts or omissions which occurred during the second half of 2012. Meaning, any cause of action which the applicant considers itself to have against the eighth respondent arose during the second half of 2012, which the applicant knew the identity of the alleged debtor and the facts giving rise to the alleged debt.

[16] It was therefore said that the period of prescription provided for in the Prescription Act 68 of 1969 ("*Prescription Act*") in particular section 12(3) was completed by the end of 2015. The eighth respondent was only joined in this matter in March 2022. At that time, the notice of motion made no mention of the eighth respondent. A notice to amend the notice of motion to introduce new relief and amongst others, a relief against the eighth respondent was only delivered at the beginning of April 2022. In light thereof, it was stated that the alleged claim which the applicant might have against the eighth respondent has become prescribed in terms of section 11 and 12 of the Prescription Act. The applicant is therefore precluded from effecting its intended amendments, insofar as they seek to implicate or potentially implicate the eighth respondent.

[17] The applicant stated that its claim was based, *inter alia*, on the principle enunciated in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae),*[1] *("Modderklip CC")* which stated as follows:

> *"[42] It is obvious in this case that only one party, the State, holds the key to the solution of Modderklip's problem. There is no possibility of the order of the Johannesburg High Court being carried out in the absence of effective participation by the State. The only question is whether the State is obliged to help in resolving the problem, in other words, whether Modderklip is entitled to any relief from the State.*
>
> *[43] The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the*

[1] 2005 (5) SA 3 (CC) paras 42 - 51

social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case.

...

[45] It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State, of providing the occupiers with accommodation. Land invasion of this scale are a matter that threatens far more than the private rights of a single property owner. Because of their capacity to be socially inflammatory, they have the potential to have serious implications for stability and public peace. Failure by the State to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed could not look upon the State and its organs to protect them from invasions of their property. That would be a recipe for anarchy.

...

[48] The question that needs to be answered is whether the State was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of the law and fulfil the s34 rights of Modderklip. I find that it was unreasonable of the State to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers."

[18] The eighth respondent denied that it had a role to play in the invasion of the land belonging to the applicant. In fact, it did not understand clearly the motive for its joinder so belatedly. It pointed out that the Minister of Police was not party to the main application when it was launched. It observed that there were few references to the SAPS when the application was launched, both in its founding and replying affidavits. Even then, these were not designated to support any relief against the belatedly-joined eighth respondent. Moreover, there is nothing which explicitly seeks to make out a case for a breach of constitutional rights by the Minister of Police, by virtue of SAPS failing to take steps to protect the applicant's property. In addition, there is no motivation why the Minister of Police should pay, or contribute to, the purchase price of the property if the City cannot afford to buy it.

[19] The Court's attention was drawn to merely four (4) references to the police services in the applicant's founding affidavit. For instance, in paragraph 16 of the founding affidavit, it was said that, when the police were contacted during the week of 5 April 2012 to assist the applicant with removing unlawful occupiers from the land the applicant was allegedly informed that "*because it was privately owned land the police could not assist the applicant and that as the registered owner of the land it would have to deal with the situation itself.*" That statement constitutes hearsay, so said the eighth respondent. Further, in paragraph 20, when the applicant sought assistance from the police to deal with further invasions of the property on 25 July 2012, "*the security guards were once again told that it was private land and that they were therefore unable to assist them.*" Furthermore, in paragraph 48 in support of the interdictory relief, it was alleged that "*In spite of approaching the police and the anti-invasion unit, the applicant has been advised that, without a Court Order, they would be unable to assist the applicant.*" The

fourth and final reference to the police or SAPS in the founding affidavit is at paragraph 58, where it is stated, once an interim order is in place "*the police would at least be authorised to control any violence that might erupt and thereby protect all concerned.*" The applicant's case against SAPS relates to SAPS' failure to remove occupiers from the land or prevent further occupation during 2012. The eighth respondent denied the assertion that the main application need not be considered by this Court in determining the application for amendment. In the contrary, it was stated that the Court should consider the main application papers to satisfy itself as to the true position.

[20] The eighth respondent observed that it is bizarre for the Minister of Police to be one of only two (2) respondents singled out for an adverse costs award in the principal costs prayers. The eighth respondent acknowledged that an award for costs lie in the discretion of the Court and that a claim for costs against a party cannot be time-barred.

Discussion on the principles applicable to amendments (Rule 28)

[21] The applicant contended that the principles relating to grant of an amendment were recently restated by the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Shap Dohme Corporation and Others*[2] ("*Ascendis*") where it was stated:

> *"[89] It is evident that this rule is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment. This was enunciated in Moolman where the court held that:*
>
> > *'The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless*

[2] 2020 (1) SA 327 (CC) at para [89] – [90] relying on Moolman v Estate Moolman 1927 CPD 27 ("Moolman")

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.'

[90] Therefore there appears to be no good reason why the High Court refused to allow the amendment of the applicant's plea in light of this enabling rule and the principle laid out in Moolman. The respondents did not show that the amendments were requested mala fide and did not argue that there is prejudice that would be suffered by it that cannot be cured by an appropriate costs order."

[22] It was the applicant's submission that the eighth respondent does not contend in any way that its application for leave to amend was *mala fide.* The only question in this application that could arise is the question of costs. The material allegation of prejudice is as to costs, for which the eighth respondent could be compensated as stated in *Ascendis* and *Moolman.*

[23] The applicant submitted that the eighth respondent appears to argue that it does not have a duty to act to protect the rights of citizens of the Republic. That contention, it was said is wholly without merit as SAPS, as an organ of state has legal and constitutional duties to members of the public, including the applicant. It cannot stand passively by and watch while crimes are committed and person's constitutional rights accordingly negated. The courts are clear that organs of state are under a positive obligation to protect citizens

and more specifically constitutionally guaranteed rights. In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*[3] it was held that:

> "*... the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. This court held that in determining the wrongfulness of an omission to act, the concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. It was stressed that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms and that s12(1)(c) of the Constitution requires the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. In particular, it was held that s12(1)(c) of the Constitution places a positive duty on the state to protect everyone from violent crime. In this regard reference was made to the seminal decision in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741; [2002] ZASCA 79) para 20, where this court concluded that while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.*" (Emphasis supplied)

[24] It was argued further that in *Minister of Justice and Constitutional Development v X ("X")*,[4] the comments in this matter were premised on the Constitutional Court judgment in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies*

---

[3] 2003 (1) SA 389 (SCA); ([2002] 4 All SA 346) paras 11 - 14
[4] 2015 (1) SA 25 (SCA)

Intervening) 2001 (4) SA 938 (CC) ("Carmichele"), where the court held at paragraph [44] when discussing section 7 and 8 of the Bill of Rights, that:

> *"It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights in some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."*

[25] The eighth respondent strongly disagreed with the applicant's assertion in this regard. It stated that in its heads of argument the applicant seeks to characterise the amendments differently, evidently in an attempt to bypass the prescription difficulties inherent in the characterisation in its supporting affidavit. The applicant now places considerable reliance on the fact that the conduct of which it has complained about in the main application purportedly consists of 'a continuing wrong.'

[26] The main objection of the Minister of Police to the proposed amendments is, in essence that *"the Applicant does not have a sustainable cause of action against the Eighth Respondent because, even leading aside the lack of substantive merit of the claim sought to be advanced against the Eighth Respondent, any potential or alleged claim against the Eighth Respondent has prescribed."*

[27] In any event, it was stated that the Minister of Police would be considerably prejudiced if the amendments implicating the Minister were permitted to be introduced by the applicant, as the Minister of Police and SAPS can hardly be expected to respond in

2022/2023 to allegations about what a particular police officer may allegedly have said or done, or failed to do, in 2012, or what a police station might allegedly have done or not done more than a decade ago.

[28] The eighth respondent highlighted that the principles applicable to amendments as the applicant stated are incomplete and accordingly not entirely accurate. The applicant's summation is that an amendment should always be allowed unless it is *mala fide* or results in prejudice which cannot be compensated by costs. Meanwhile an amendment could be refused on either of those basis, but they are not the only grounds on which an amendment can be refused. The Court moreover retains a general discretion and other factors are also relevant.

[29] The case-law shows that a party seeking to amend a pleading or document must at least:[5]

29.1 explain the reasons for the amendment and show that it is acting bona fide;

29.2 show that any new cause of action or defence which is sought to be introduced involves a triable issue; and

29.3 demonstrate that the amendment, if granted, will not cause prejudice to the other side which cannot be remedied by an appropriate order as to costs.

[30] The eighth respondent stressed that an amendment would not be a foregone conclusion. In *Florence Soap & Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd,*[6]

---

[5] Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 640H – 641C (referred to with approval in Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 546 (A) at 565G; Flemmer v Ainsworth 1910 TPD 81; Minister van die SA Polisie v Kraatz 1973 SA 490(A) at 512 E – H; Harnaker v Minister of Interior 1965 (1) SA 372 (C) at 384 D - E

[6] 1954 (3) SA 945 (T) at 947 A – B (with reference to the judgment of Greenberg J in Rosenberg v Bitcom 1935 WLD 115) as well as at 948 A - C

it was held that an amendment may also be refused where there was an unreasonable delay in bringing the application for leave to amend.[7] Amendments which are moved at a late stage are moreover a particular indulgence.[8]

[31] The greater the disruption caused by a late amendment, the greater the indulgence sought and accordingly the greater the burden upon the applicant to convince the Court to accommodate it.[9] Where a litigant seeks to introduce a new claim or defence very late in the day, it must also show that it did not delay once it had become aware of the evidentiary material upon which it seeks to find its new claim or defence.[10] In addition, where an application for leave to amend is moved at a late stage in proceedings, the applicant's prospects of succeeding with its new amended case are a relevant element in the exercise of the Court's discretion as to whether or not to allow the amendment, and it may be appropriate for the Court to require the applicant to indicate how it proposes to establish / prove its amended case.[11]

[32] As a general, the eighth respondent argued that an amendment will not be allowed where the issue proposed to be introduced by the amendment is not a triable, or thus potentially sustainable one.[12] That means, in the case of an application – where affidavits serve not only as 'the pleadings,' but also the evidence – is that the allegations on affidavit

---

[7] See Van Aswegen & Another v Fechter 1939 OPD 78 at 88 (per Van den Heever J, as he then was) and Tengwa v Metrorail 2002 (1) SA 739 (C)
[8] Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914 (A) at 928D
[9] Ciba – Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd 2002 (2) SA 447 (SCA) at 464 E-F
[10] Ciba – Geigy (supra) at 463
[11] Ciba – Geigy (supra) at 464 G-H
[12] Caxton v Reeva Forman (supra fn 41) at 565 H-J; Cross v Ferreira 1950(3) SA 443(C) at 449H; Przybylak v Santam Insurance Ltd 1992 (1) SA 588 (C) at 599-600; De Klerk and Another v Du Plessis and Others 1995(2) SA 40 (T) at 43I – 44A; Barnard v Barnard 2000 (3) SA 620 (T) at para 5; and YB v SB and Others NO 2016(1) SA 47 (WCC) at para 11

(in this case, the allegations in the affidavits in the main application) must be capable of sustaining any new claim or defence which is sought to be introduced.

[33] The applicant noted that the eighth respondent wishes to avoid becoming involved in these proceedings based on prescription. In its understanding Section 11 and 12 of the Prescription Act applies to "periods of prescription of debts." A declaratory relief does not constitute a claim of debt. A mandatory relief that the applicant seeks, that is, the compulsory purchase or expropriation of the property does not constitute a debt.

[34] The eighth respondent was adamant that the applicant's Rule 28(4) founding affidavit indicated that the new claims were all intended to obtain monetary compensation from *inter-alia*, the Minister of Police for a commercial entity, Ross Demolishers. The applicant, so said the eighth respondent, is not seeking a constitutional declarator in the public interest; it is merely seeking a declarator as a means to claim money from the State respondents – whether by means of a purchase or expropriation price, or by way of constitutional damages. Therefore, a declaratory relief must therefore be read together with the monetary relief. By virtue of a claim for monetary relief, the applicant is trying to claim payment of a 'debt' owed to the 'debtor.'

[35] In addition, the ninth respondent said, the fact that the applicant seeks to characterize the new relief as a "*special constitutional remedy pursuant to [or premised on] the violation of a right*" does not change the fact that Ross Demolishers is endeavouring to claim money from *inter-alia* the Minster of Police which it claims is owed to it as a result of the latter's wrongs. It does not assist the applicant to rely on the

passage in the Constitutional Court's judgment of *Modderklip (supra)* where it stated that:

> "*[42] Court should not be overawed by practical problems*" and should "*mould an order that will provide effective relief to those affected by a constitutional breach.*"

[36] Apart from the fact that the Court in *Modderklip* did not make any award against the Minister of Police, prescription is not merely a "practical problem," but a legal impediment.

[37] The eighth respondent refuted the applicant's assertion that the new claims are not barred by prescription because "*the harm alleged is ongoing and … the applicant's rights continue to be infringed.*" It went further to note that the cause of action giving rise to Ross Demolishers' damages claim arose out of an alleged act and / or omission "in and during 2012" and nothing purported to be made out against SAPS that occurred thereafter. That is the only mention of SAPS in the applicant's affidavit in the main application. It was said that the applicant wants to rely on subsequent unpleaded events in support of its amended relief. That cannot be allowed. Even if the eighth respondent accepts that the occupation of the property by the first respondents persists that could not be the basis for an argument that the Minister of Police has purportedly continued to infringe the applicant's rights.

[38] With regard to the duty imposed on the eighth respondent, it submitted that all these decisions *(Van Duivenboden, X and Carmichele)* do not find application in this case. The three (3) decisions involves the failure of the state to prevent extreme violence

towards women and girls. In addition, the applicant cannot take issue with SAPS stance on the basis of the Trespass Act. The present case does not concern anything similar. It observed that it is deeply offensive to the occupiers, as well as inconsistent with the constitutional norms to which SAPS is obliged to adhere, to equate the actions of the occupiers with violent crimes of sexual predators and other abusers of women.

[39] Contrary to what the applicant suggests, the eighth respondent pointed out that different considerations apply when persons without homes are seeking to occupy, or have occupied, vacant land in an attempt to give effect to their right to access to land and housing. For example, SAPS is under a duty to ensure that any unlawful occupiers are treated with the requisite dignity and respect, and that they are not subjected to ineffective or inhumane state action, or treated unfairly. SAPS duties in a situation such as the one with which the present case is concerned are thus extremely different from, and in no way comparable to those which apply to rapists, murderers and women abusers.

[40] The eighth respondent contended that if the applicant argues that the persons making up the first respondents acted illegally in contravention of the Trespass Act, and that the SAPS has a "positive obligation" to address any contraventions of that statute, the applicant then:

40.1 *First*, it overlooks the fact that trespassing charges would have to be laid against the members of the first respondent, and the applicant does not say it has done so.

40.2 *Second*, trespass complaints would not permit the SAPS summarily to

arrest all the persons on the property. In light of the infringement of a person's liberty occasioned by an arrest, the SAPS would be very careful about arresting a person accused of a crime of that nature, which does not involve a threat or imminent harm or physical harm which is seldom prosecuted. Even if the SAPS were to arrest the occupiers of the property, they would not be detained indefinitely, they would be charged and released. The applicant's complaint would thus not be addressed.

40.3 *Third*, to the extent that the SAPS is responsible for preventing statutory contraventions, it 'cannot simply be concluded that it has failed to discharge its responsibilities because a vacant land has been occupied. In *JR 209 Investments v City of Tshwane Metropolitan Municipality and Others,*[13] the Pretoria High Court held that it could be unreasonable of persons owning property such as that owned by the applicant to expect SAPS to prevent people from moving onto large pieces of unfenced private property. Regard should be had by the applicant to considerations such as SAPS' resources and constraints in the area and the nature of the property, before any conclusions could be reached as to whether SAPS had breached any duty owed to the applicant.

[41] The eighth respondent posited that the Courts over the past two (2) decades have applied these principles in matters such as that of the applicant.

41.1 *First*, it is not permissible or appropriate to grant interdicts against unnamed

[13] (Case No. 76139/2015) [2015] ZA GPPHC 1024 (13 November 2015)

persons, which are then sought to be used as if such orders are valid as against any and all persons.[14]

41.2 *Second*, SAPS is not responsible for evictions – that is the duty of the Sheriff. SAPS can merely assist with the maintenance of law and order during evictions, and can also merely do so pursuant to a valid court order.[15]

41.3 *Third*, SAPS is not responsible for securing people's properties, that is the primary responsibility of the landowner.[16] Yacoob J stated the following in *Mkontwana para 59*:

> "*This unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs such duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of her property. It is accordingly not unreasonable to expect the owner to bear the risk.*"

41.4 *Fourth*, SAPS has no obligation to prevent occupation of private property

---

[14] Kayamandi Town Committee v Mkhwaso and Others 1991 (2) SA 630 (C) at 634F – 636D; City of Cape Town v Yawa [2004] 2 All SA 281 (C) at 634 F-I

[15] Modderfontein Squatters, Great Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) at paras 29-30; section 26 of the Constitution; sections 4(11) and 8(1) of PIE

[16] Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC) at para 59; Modderklip (Constitutional Court supra) at para 29

by homeless persons where it is not reasonable or practical to take preventative measures (e.g., because of budgetary or capacity constraints).[17]

41.5 *Fifth,* SAPS can only arrest persons as a last resort, and where an infringement of a person's right to freedom and security is justified in all the circumstances, and can also only make an arrest of a person reasonably suspected of having committed, or being about to commit a crime, when there is a reasonable likelihood of a prosecution and a custodial sentence.[18]

---

[17] JR 209 Investments v City of Tshwane Metropolitan Municipality and Others (Case No. 76139/2015) [2015] ZAGPPHC 1024 (13 November 2015) at paras 17-18 – where the court stated as follows:

"[17] As pointed out earlier the relevant subject properties extend a good measure of 167 [hectares]. It is indeed so that there is a legal duty on the first and second respondents [the municipality and the SAPS] to, inter alia, prevent commission of crime, such as trespassing or illegal invasion on the property of the applicant. In this regard it is apposite to cite the following: 'The existence of a legal duty to avoid or prevent loss is a conclusion of law depending upon the consideration of all the circumstances of each particular case and depending on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perception of the community as assessed by the Court' [Vide Van Eeden v Minister of Safety and Security 2001(4) SA 646 TPD at 653D].

[18] The extent of the property of the applicant, just on the outside border is vast and would require a large contingency of manpower deployed to police for purposes of preventing the encroachment and trespassing complained of. In my view, it would be unreasonable to expect of the first and second respondents to deploy manpower to prevent trespass or even illegal dumping on the relevant property. Such deployment would come with great financial constraints to their purse, and severe criticism from the public which would frown upon such deployment for the protection of an individual's private property."

[18] Sex Worker Education & Advocacy Task Force (SWEAT) v Minister of Safety and Security 2009 (6) SA 513 (WCC) at paras 17-28 (where the SAPS was found to have unlawfully arrested prostitutes who were plying their trade on the streets in Cape Town because there was to the police's knowledge little chance of the prostitutes being prosecuted.

41.6 *Sixth*, SAPS cannot arrest pursuant to charges of trespass in order to enable a landowner to secure an eviction of allegedly unlawful occupiers in this manner, and thus to enable an eviction other than in terms of s26(1) of the Constitution and PIE. In addition, a court sentencing someone found guilty of trespassing must also take into account the circumstances relevant to PIE in circumstances where the person being sentenced has unlawfully entered land in an endeavour to find a home.[19]

41.7 *Seventh*, SAPS must ensure that any unlawful occupiers are treated with the requisite dignity and respect. This includes not referring to or describing the unlawful occupiers in a way which "detracts from the humanity of the occupiers," or criminalises them.[20] Related to this is the fact that SAPS is under no duty to assist with evictions of unlawful occupiers when eviction would be ineffective or inhumane, due to the absence of alternative land on which the occupiers could reside, and that SAPS should also not be seen to be aligned with one side.[21]

[42] In light thereof it was pointed out that the applicant has not even begun to take cognizance of these legal principles, or to attempt to show the case it wants to bring against the Minister of Police is sustainable.

---

[19] S v Koko 2006 (1) SACR 15 (C) at para 11-12, 14-16, 22-24; S v Samuels 2016 (2) SACR 298 (WCC) at paras 25-26. The two-judge Bench stated the following at para 24 of S v Koko: "The case is the clearest possible support for the viewpoint that the Director of Public Prosecutions should guard against prosecutions under section 1 of Act 6 of 1959 [the Trespass Act] being used by owners and persons in charge of land and / or buildings as a means to procure the eviction of persons from their home without compliance with onerous, but clearly statutory provisions of the PIE Act, especially where the duration of the occupation has not been of a merely transitory nature."

[20] Ekurhuleni Metropolitan Municipality v Various Occupiers 2014 (3) SA 23 (SCA) at para 12 (quoting Government of the RSA v Grootboom 2001 (1) SA 46 (CC) at paras 82-83, See Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at paras 18, 36-37, as well as Occupiers of Portion R25 of the Farm Mooiplaats 335 JR v Golden Thread and Others 2012 (4) SA 337 (CC); 2012 (4) BCLR 372 (CC) at para 4.

[21] Modderklip (SCA supra) at paras 26-29, Modderklip (Constitutional Court supra) at paras 46-14

Analysis

[43] In its application for leave to amend its notice of motion, the applicant asked this court to condone its failure to observe the time periods as stipulated in Rule 28(4) of the Uniform Rules. This application was not opposed by the respondents. Although there was no opposition, condonation is not for the mere asking. The Courts have an oversight role in all matters that come before it. If the application is late, the Court has a discretion whether to grant it or not. Despite the applicant acknowledging that its alleged cause of action for the claimed constitutional damages that it seeks to introduce at this late stage, commenced in or during 2012, it has failed to take this Court into confidence why these constitutional damages became apparent in March 2022.

[44] In its application for condonation, no reasons are advanced and / or a convincing explanation is put before this Court for consideration. Mr Robert William Ross for the applicant in his affidavit in support of this application merely stated that, "*The delay was not as a result of the applicant's disregard for the rules of the Honourable Court but was created by practical difficulties outside of the applicant's control, including service of the Notice of Amendment on the respective Respondents."(para 16)* ...He went on to state that "*I submit that the Respondents will not be prejudiced by the amendment sought, alternatively, to the extent that any prejudice is suffered by the Respondents, it is submitted that this may be overcome by way of an appropriate cost order.*"(para 17)

[45] This suggestion with respect, fails to address the degree of lateness, the satisfactory explanation of lateness, the actual prejudice to the eighth respondent and a triable case against the eighth respondent, if any should the amendment be granted. The applicant fails to appreciate that it has failed to amend its pleadings for over ten (10)

years. Nothing comes closer to the explanation of its non-compliance with the rules. The applicant did not explain at what stage was it difficult to locate the respondents to serve its notice of amendment. Moreover, the applicant seems to reason that its inaction could be cured by an appropriate cost order. Again, that cannot be so as the Court has to exercise its judicial discretion before awarding a cost order.

[46] It is trite that a party seeking condonation must make out a case entitling it to the courts indulgence. It must show sufficient cause why the condonation should be granted. This requires the applicant to give a full explanation for the non-compliance with the rules of Court. The Constitutional Court had an opportunity to consider the circumstances in which condonation could be granted. In *Steenkamp and Others v Edcon Limited,*[22] the Constitutional Court stated as follows:

> "*Granting condonation must be in the interests of justice. This Court in Grootboom set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:*
>
> > *[T]he standard of considering an application for condonation is the interest of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal (in this case, the importance of the issue to be raised in the main application); and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the*

[22] (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BCLR 1189 (CC) (30 April 2019) at para [36]

ultimate determination of what is in the interest of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default. The interest of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice. [Emphasis supplied]

[47] The Courts have an oversight role in matters that come before it. The fact that parties have given themselves collegial indulgencies with regard to time periods on filing

papers does not in any way affect the determination of issues by the Court. In any event, this period of over a decade that is not accounted for becomes an issue in the eighth respondent's opposition of the application for leave to amend – that the applicant does not have a sustainable cause of action against the eighth respondent because, even leading aside, the lack of substantive merit of the claim sought to be advanced against the eighth respondent, a potential or alleged claim against the eighth respondent has prescribed.

[48] In my view, the applicant has not attempted to show cause why it should be granted condonation. According to the notice of amendment, the applicant knew in 2012 that it had a constitutional claim against the respondents. For over a decade, nothing was done to ensure that the respondents are made aware of this alleged claim. Despite the alleged claim being known to the applicant, it did not indicate how it proposed to prove its case. The applicant sort of downplayed its non-compliance by suggesting that it could be cured by an appropriate court order. It somehow disregarded the gravity of its obligations. In my conclusion, the applicant has failed to satisfy this Court that it should be granted condonation. As a result thereof it should fail.

[49] To the extent that the merits of the application for amendment were fully argued before this Court, it would be prudent to deal with the merits of this application. The applicant filed a substantial and comprehensive notice of amendment in March 2022. In considering this application, the general approach to an amendment of a notice of motion is the same as to a summons or pleading in an action.

[50] Notwithstanding, the Court has a discretion on whether or not to grant leave to amend. It is trite that such discretion must be executed judicially.[23] The eighth respondent has pointed out the requirements for granting an order for leave to amend at paragraph [32] (*supra*).

[51] In its application for amendment, the applicant stated that alleged cause of action came into effect during the second half of 2012 when a group of persons began invading the property. It was said that the applicant's unnamed security guards approached the SAPS to assist them. The applicant does not identify the form of assistance that their security guards sought against the SAPS, and it is not for this Court to speculate. It appeared that the unnamed security guards were informed by unidentified policemen that the occupation of the property by a group of persons related to a conduct taking place on private land and without a Court order, they were unable to assist.

[52] The eighth respondent clearly articulated the circumstances in which the SAPS assist in eviction matters. The applicant did not say that they complied with those circumstances. The applicant merely relied on *Modderklip(supra)* in its argument that the SCA and the Constitutional Court awarded constitutional damages against the State respondent in those matters. Indeed, the constitutional damages were awarded against the Department of Agriculture and Land Affairs as the relevant department that was responsible for the provision of land. The order made sense. In a situation where the SAPS was cursory mentioned four (4) times as stated in the applicant's founding affidavit in the main application (see also para [22] *supra)*, it is mind boggling why the applicant would rely on this decision in justifying their alleged claim against the eighth respondent.

---

[23] YB vs SB (supra) at 50 H-J, para [8] and [9]

In any event, it is not the applicant's contention that the trespassing charges were made against the unlawful occupiers of the property. Again, even after the applicant was armed with a court order of eviction, it is not its case that it approached the SAPS and they refused to assist in ensuring that the order is served peacefully to the unlawful occupiers without impediments.

[53] The applicant requires this Court to be convinced that the conduct of the eighth respondent was ongoing and therefore the issue of prescription does not come into place. From the applicant's own application, the period between 2012 to 2022 is unaccounted for. For this Court to be convinced that the litigation in this matter has been ongoing, the applicant must show that the proceedings indeed continued without an interruption. The record does not support the applicant's contention. Instead, it supports the eighth respondent's assertion that this matter was dormant after the filing of the reports that were requested by the Court.

[54] To escape the eighth respondent's defence that whatever claim that the applicant might have against it has prescribed, the applicant pointed out that the alleged claim is not a debt, it merely claimed constitutional damages, since the eighth respondent failed to protect its constitutional property rights. The applicant said a declaratory relief does not constitute a debt. In the applicant's understanding, a mandatory relief that is a compulsory purchase or expropriation of land does not constitute a debt. It is not clear in the application where the applicant derives those rights from the Constitution.

[55] However, in terms of section 38 (Enforcement of Rights) of the Constitution of the Republic of South Africa Act 108 of 1996, a court may award damages for a violation of

rights in the Bill of Rights. The applicant might and / or might not have a claim against the other respondent. But, judging from the allegations in the notice of amendment a claim for constitutional damages is not viable.

[56] According to the applicant, the issue raised in its notice of amendment are not new, they were there since 2012. If that be the case, the question to be asked is why was the eighth respondent not made aware of the claim against it from the onset. In my view, the onus is on the applicant that its amendment is made *bona fide* and the cause of action sought to be introduced comprises a triable issue.

[57] If due regard is had to the definition of 'damages claim'- *'Cambridge dictionary defines damages claim as a demand for money from someone or from their insurance for harm that has been done'.* This is what the applicant seeks to claim, *albeit* at this stage it employed a constitutional route utilizing a declarator. It is trite that prescription in respect of a claim for damages commences as soon as the cause of action accrues and the debt in respect of the payment of damages is claimable. Since the eighth respondent was mentioned in the applicant's affidavit in 2012. That means the applicant knew of its claim in 2012. It is of paramount importance that the claimant is aware of or should reasonably be aware of the identity of the debtor and the facts of the cause of action. In such circumstances prescription is concluded after three years. It does not assist the applicant to deny that what it seeks to claim constitutes a debt. Simply put, the applicant stated that the Court should order the purchase of property or the payment of constitutional damages and the quantum of the compensation should be equivalent to the value of the property. In my view that is a commercial transaction for the sale of land. It then follows that such claim constitutes a debt.

[58] The applicant has not convinced this Court why it failed to join the eighth respondent in the main proceedings in 2012, if at that point it was aware that the eighth respondent is liable for its constitutional damages. The authorities cited by the applicant where constitutional damages were awarded by the Court involved protected rights not to be tortured or subjected to cruel, inhumane and degrading treatment. This case is distinguishable from those cases as the applicant alleged that it merely sought assistance from the SAPS and they were advised that they were unable to assist more so without a Court order. In *Modderklip (Constitutional Court supra*), Langa ACJ had this to say:

> *"[29] There is no doubt, as was held by this Court in Mkontwana v Nelson Mandela Metropolitan Municipality and Another, that owners of property bear the primary responsibility to take reasonable steps to protect their property."*

[59] In this matter, the SAPS was criticised for its failure to safeguard the applicant's property, but the Constitutional Court held that it remains the primary duty of the owner of the property to safeguard its property and not the State. Hence no adverse order was made against the SAPS in that matter.

[60] In addition, based on the fact that the applicant requires its land to be valued and quantified as if there were no unlawful occupier in the property, suggest that the applicant wants to be compensated for the loss suffered as a result of the invasion of its property. It has always been said that the court in determining whether it is appropriate to award constitutional damages, alternatively, whether an alternative remedy is sufficient to vindicate the rights, the court will determine each case on its merits. For instance, the Court will take into account, *inter alia* (i) the nature and relative importance of the rights

that are in issue; (ii) alternative remedies that may be available to assert and vindicate the rights; and (iii) the consequences of breaching these rights for the claimants.[24]

[61] Clearly, if the applicant is able to resolve the issue of compensation for his loss of land in a civil claim without invoking the provisions of the Constitution, then, it should do or have done so. The fact that the Court called for some reports from the respondents to be filed in order to determine an alternative remedy, suggests that that process was left hanging without reaching its conclusion.

[62] Undoubtedly, the applicant's claim against the respondents is the loss of land as a result of unlawful invasion. I repeat, if according to the applicant, it needs its land to be valued and quantified in monetary form, that without a doubt will constitute a debt. In my view, it does not assist the applicant to suggest that its claim does not constitute a debt within the meaning of Section 11 and 12 of the Prescription Act. If the debt became due in 2012 and the proceeding became dormant in succeeding years, I agree with the eighth respondent that whatever claim that the applicant might have against it has prescribed. In any event, the applicant failed to enumerate the proprietary rights which the eighth respondent has breached. In conclusion, based on the aforesaid analysis, the applicant has no triable issue against the eighth respondent. It would therefore be a futile exercise to grant the applicant leave to amend as it would have no prospects of success in the main application.

[63] In the result, I grant the following order:

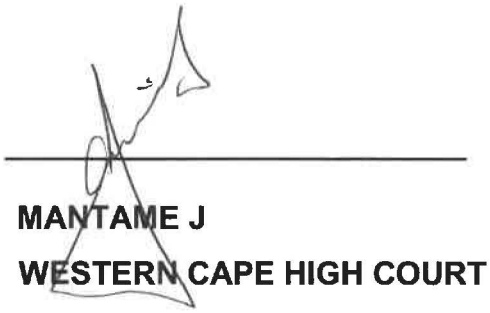
63.1 The application for condonation is dismissed;

---

[24] MEC for Department of Welfare v Kate [2006] ZASCA 49 at para [25]

63.2 Leave to amend the applicant's notice of motion against first, second, third, fourth, fifth, sixth, seventh and ninth respondent is granted.

63.3 The application for leave to amend the applicant's notice of motion against the eighth respondent is dismissed with costs.



MANTAME J
WESTERN CAPE HIGH COURT