IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 20/44373

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

[redacted]

02/05/2023

In the matter between:-

DBT TECHNOLOGIES PROPRIETARY LIMITED	**Applicant**
and	
MHI POWER ZAF PROPRIETARY LIMITED	**First Respondent**
MITSUBISHI POWER EUROPE GMBH	**Second Respondent**
ESKOM HOLDINGS SOC LIMITED	**Third Respondent**

Neutral Citation: *Dbt Technologies Proprietary Limited v Mhi Power Zaf Proprietary Limited and Others* (Case No. 20/44373) [2023] ZAGPJHC 412 (2 May 2023)

JUDGMENT

YACOOB J:

1. This matter came before me in the commercial court. The main application was set down for three full days of argument, and the record comprised more than three thousand six hundred pages. The applicant had by that time amended its notice of motion more than once, the latest amendment having been effected on 10 November 2021, the second day of the hearing of the application.

2. Before judgment was given, the first and second respondents ("the respondents")[1] filed an affidavit on 30 November 2021, whereafter the applicant indicated on 07 December 2021 that it intended to file a response to the further affidavit, in the new year. The letter also informed that the applicant intended to file another notice of intention to amend its notice of motion in the new year.

3. On 4 February 2022 the applicant filed its notice of intention to amend in terms of Rule 28, together with its further confidential replying affidavit. The respondents filed a notice of objection to the amendment on 18 February 2022 and the applicant duly filed an application to amend on 04 March 2022. Once answering and replying affidavits had been filed in accordance with the Rule, the application to amend was heard during the short recess on 08 April 2022. This judgment determines the application to amend.

THE MAIN APPLICATION

4. The applicant is a subcontractor to the respondents, who in turn have contracted with Eskom to carry out works including relation to Medupi and Kusile power stations. The subcontracts between the applicant and the respondents rely to an extent on the main contracts between Eskom and the respondents with regard to certain contractual benefits, delay damages, extensions of time and limitations/exclusions of liability.

5. The applicant sought from the respondents access to documents it contends are relevant to these issues, through proceedings before the contractual Dispute Adjudication Board ("the DAB"). The applicant contends that the respondents have not provided to it the documents they are obliged to provide in terms of the decisions of the DAB.

6. In the main application, the applicant seeks to make the DAB decisions orders of this court, and seeks also an order that the respondents provide certain

[1] The third respondent did not participate in these proceedings as no relief is sought against it and it abides the decision of the Court.

documents identified in schedules annexed to its confidential affidavit.

7. Over the three days in which the main application was heard, the applicant spent much time demonstrating why it is that it considered that it needed documents which may be relevant to delays, damages, benefits and extensions that had been granted or taken place in respect of the main contracts, in order to be able to determine its own damages. The respondents, on the other hand, concentrated on demonstrating that the application was an abuse of process, that it was impermissibly broad, and that had the applicant done the painstaking exercise of checking what documents had been provided and cross-referencing against what was sought, it would have realized that it had in its possession a number of the documents. The respondents submitted that it was the job of neither the court nor the respondents to carry out this exercise.

8. The respondents also conceded that certain documents had not been provided and tendered to provide them.

9. The respondents then filed the affidavit referred to above, which dealt with a further DAB decision which had been delivered determining a dispute between the respondents and Eskom, and which they agreed fell within the ambit of the documents they had been ordered by the DAB to make available, and which they had tendered at the hearing to provide.

THE AMENDMENT

10. In its further confidential replying affidavit, filed in response to the respondents' further affidavit, the applicant states that it took a decision to circumscribe the relief sought against the background of the respondents' arguments that they had already disclosed a significant number of documents, and according to them had disclosed all the documents in their possession that were covered by the DAB decisions, and that the applicant ought to have done a critical analysis of the documents already disclosed and specifically asked for what it contends was

missing. It suggests that the new notice of motion circumscribes what is sought as required by the respondents.

11. The applicant submits that the new relief is narrower than the original relief sought, but does not fundamentally change what was sought in the main application, nor does it change the argument on which the relief sought is based. The applicant submits that the relief sought now directly mirrors the terms of the DAB decisions, but that it is more focused and more limited, which the assists the court in determining the dispute, and that the respondents' opposition to the amendment is unreasonable. In any event, the applicant submits, it is not relevant whether the new prayers can succeed or in fact assist the court in determining the dispute. It would be more appropriate, for example, to allow the amendment and then dismiss the application because the case has not been made out, or because a sufficiently clear order cannot be made, than it would be to disallow the amendment.

12. The respondents submit that there is no need for any amendment – if certain relief was simply abandoned, the applicant simply had to inform the respondents and the court that this was so. The applicant has amended its notice of motion three times without any objection and the applicant is reconceptualizing the relief sought in a way that makes all the work that has been done so far in the main application either irrelevant or of unclear application. The amendment results in greater uncertainty rather than greater certainty, because rather than simply delete certain prayers, the relief is reformulated using terminology that has not been defined in the pleadings or the argument, and which is open to interpretation in the same way that the disputed DAB decisions are. The amendment is prejudicial and is intended to attempt to resurrect a case that is devoid of merit.

13. Although it was not necessary to do so, the applicant instituted its application to amend by means of a notice of motion supported by affidavit. The respondents filed an answering affidavit and the applicant a reply, even though it was, strictly speaking, unnecessary, and the parties are agreed that the amendment is a legal question, not a factual one.

14. Taking into account that none of the affidavits was necessary save perhaps for one affidavit setting out the stated purpose of the amendment (the need for which I simply assume in the applicant's favour) I do not propose with the skirmishes between the parties regarding the adequacy or appropriateness of the contents of those affidavits.

15. Considering the rather contradictory submissions made by the applicant, it is necessary to set out the criteria for the grant of an opposed application to amend a notice of motion. A cursory examination of the two sets of written argument leads one to believe that the parties are *ad idem* about what the law requires and provides, but closer examination shows that they are not.

THE LAW RELEVANT TO THE AMENDMENT OF A NOTICE OF MOTION

16. Rule 28 of the Uniform Rules of Court governs amendments. Subrule 28(1) provides for notice of intention to amend to be provided, 28(3) and (4) for an objection and a subsequent application to amend, and subrule 28(10) for a Court to grant leave to amend any document at any stage before judgment, on any terms which it deems fit.

17. There is no dispute that a court has a wide discretion when it comes to whether to allow an amendment to a notice of motion. As the Constitutional Court held in *Affordable Medicines Trust & Others v Minister of Health & Others*[2]

> [9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases 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'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?
> [*Footnotes omitted*]

[2] 2006 (3) SA 247 (CC) at [9]

18. *Commercial Union Assurance Co Ltd v Waymark NO*,[3] referred to by the Constitutional Court above, distills the principles from the applicable cases: as follows:[4]

    1. The Court has a discretion whether to grant or refuse an amendment.
    2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
    3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.
    4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
    5. The party seeking the amendment must not be *mala fide.*
    6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.
    7. The amendment should not be refused simply to punish the applicant for neglect.
    8. A mere loss of time is no reason, in itself, to refuse the application.
    9. If the amendment is not sought timeously, some reason must be given for the delay.

19. In exercising its discretion, and determining what the interests of justice are, the court must consider these issues. However, as can be seen from the manner in which the court formulated these principles, none of them is definitive, and each requires the court to look at the overall context in which the amendment is sought.

20. For example, although a court may look at the issues from the perspective of facilitating proper ventilation of the issues, this requires the issues to be identified, and a decision to be made about whether the amendment does in fact enhance the ventilation of those issues.

21. It is also worth keeping in mind this dictum from *Benjamin v Sobac South African*

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[3] 1995 (2) SA 73 (Tk)
[4] At 77F-J

Building and Construction (Pty) Ltd[5]

> "Whilst an amendment remains an indulgence which has always to be justified by the seeker, it is the prejudice to the opponent that is the touchstone for the grant or refusal of the application. Even an application to amend a cause of action or the relief claimed is subjected ultimately to the prejudice test.
> …
>
> Where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not to be granted. To grant such an amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party…"

22. Ultimately, the question is in fact whether the amendment is in the interests of justice, and each of the factors set out above is relevant to that determination. However, it is clear that this cannot be a closed list, as there can never be a closed list of what is relevant to the interests of justice.

23. The argument of the applicant is, essentially, that the *ratio* of the Constitutional Court in the *Affordable Medicines Trust* case is that, unless the amendment is *mala fide* or causes prejudice to the other side that cannot be cured by costs, the interests of justice require that an amendment be permitted.

24. This is, in my view, an impermissible simplification of the complexities of the concept of the interests of justice. It also ignores the fact that the Constitutional Court relies on the cases set out in *Commercial Union*, which make it clear that there are more than just two factors to be considered, and that an amendment is not simply there for the asking. By invoking the "interests of justice" test, the Constitutional Court clearly does not seek to limit what may or may not be in the interests of justice. This would be inconsistent its jurisprudence since inception. The Court is simply making it clear that the interests of justice are the ultimate or overarching deciding principle.

CONCLUSION

25. It is clear from what is set out above that a number of the applicant's arguments must

[5] 1989 (4) SA 940 (C) at 957I-958C

be rejected. In particular, the notion that if the amendment it is not *mala fides* or otherwise prejudicial, the real effect of the amendment on the matter is irrelevant, can have no weight. The amendment must actually contribute to the real issues before the court. If it does not, it cannot be in the interests of justice to allow it. (It must be noted that this is relevant only to an amendment that is contested.)

26. The applicant submits on the one hand that the amendment results in the relief sought mirroring the DAB decisions to avoid ambiguity, and also that they are more focused that the existing relief. These submissions are mutually incompatible, because if they exactly mirrored the DAB decisions they could not be more focused than the previous relief, which sought to give content to the DAB decisions.

27. There would be nothing served by allowing an amendment that "simply mirrored" the DAB decisions, because it is the meaning of the DAB decisions that has already taken up three days of oral argument, many pages of analysis, and many weeks of reading and analysis. To the extent that the amendment mirrors the decisions nothing can be gained by permitting it, since it would only result in an ambiguous order which the parties have already demonstrated cannot be implemented simply between them.

28. The relief sought also is not more focused. It reformulates what was asked for, but it still does so in broad and general terms, and certainly does not meet the criticism that, according to the applicant in the further confidential replying affidavit, the new relief is formulated to meet. It does not, in my view, assist in ventilating or determining the real issues between the parties.

29. For these reasons, I do not consider that it is in the interests of justice to grant the amendment.

30. The application to amend the notice of motion is dismissed with costs.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	MM Antonie SC with E Eksteen
Instructed by:	Webber Wentzel
Counsel for the first and second respondents:	RM Pearse SC
Instructed by:	Pinsent Masons

Date of hearing: 08 April 2022
Date of judgment 02 May 2023