REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-018092

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

15/8/2024
DATE

[redacted]
SIGNATURE

In the application of:

Applicant

ABIEL JOHANNES WESSIE

and

BHEKUMZI MIKE GILBERT SANDLANA First Respondent

IN RE:

BHEKUMZI MIKE GILBERT SANDLANA Plaintiff

and

ABIEL JOHANNES WESSIE Defendant

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 15 August 2024.

Order: Paragraph [34] of this judgment.

JUDGMENT

TODD, AJ:

[1] This is an application by the Defendant for leave to amend his plea. The Plaintiff opposes the application.

[2] The matter first came before me on the trial roll on 13 May 2023. On that date the Defendant applied for a postponement of the trial on grounds that he had dismissed his erstwhile attorneys of record and that a newly appointed legal team required more time to prepare for trial. There was, in addition, an indication from the bar that the Defendant was ill and for that reason was unable to attend the trial over the two days for which it was expected to be conducted.

[3] The Plaintiff opposed that application. Mr Winks, who appeared for the Plaintiff, submitted that the Defendant was advancing "*two of the oldest tricks in the book*" in seeking to force a postponement of the matter.

[4] It was, however, clear that the Defendant had indeed terminated the mandate of his erstwhile attorney, and it was also apparent from the manner in which his erstwhile attorney had conducted the matter in the run up to the trial that the Defendant had good reason to be concerned about the state of preparedness of his legal team.

[5] In light of the obvious prejudice that the Defendant would suffer if the trial were to proceed on that date, after ascertaining the availability of the parties later in the term and with due regard to the interests of the Plaintiff and all other relevant circumstances, I postponed the trial to 18 and 19 June 2024 and ordered the Defendant to pay the wasted costs on an attorney and client scale.

[6] On 24 May 2024, two weeks after the matter was postponed and on the advice of his new legal representatives, the Defendant gave notice of intention to amend the plea. I should mention that the possibility that this might occur had been

foreshadowed by Mr Nxumalo when he appeared for the Defendant on 13 May 2024.

[7] The Plaintiff objected to the proposed amendments by notice delivered on 28 May 2024. This necessitated a formal application for leave to amend the plea. The application for leave to amend was brought on 31 May 2024.

[8] As was perhaps inevitable, that application came before me as the first order of business on the date to which the trial had been postponed, 18 June 2024.

[9] The Plaintiff opposes the application for leave to amend on grounds that the application is *mala fides*, that the amendment would cause prejudice which cannot be compensated for by an order of costs, and that in various respects the amendments sought to be introduced would be excipiable.

[10] The legal principles applicable to applications of this nature are well established. Amendments to pleadings are not simply "there for the taking", but will generally be allowed unless an amendment is *mala fide* or will cause an injustice to the other side which cannot be cured by an appropriate order for costs.[1]

[11] Overall, the interests of justice are paramount, but a court must exercise its discretion whether to allow an amendment with due regard to certain basic principles. A party wishing to amend his pleading must explain the reason and show that he has something deserving of consideration to put up in the amendment. A litigant is not allowed to "*harass his opponent by an amendment which has no foundation*" or to introduce an amendment which would make the pleading excipiable.[2]

[12] A party wishing to amend its pleading must show that "*the matter involved in the amendment is of sufficient importance to justify him in putting the court and the other party to the manifold inconveniences of a postponement.*[3]"

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[1] *Affordable Medicines Trust and others v Minister of Health and another* 2006 (3) SA 247 (CC) at paragraph [9]
[2] *Caxton Limited v Reeva Foreman (Pty) Ltd* 1990 (3) SA 547 (A) at 565, referring to *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641A.
[3] *Trans-Drakensburg Bank Ltd* supra, referring to *Krogman v van Reenen* 1926 OPD 191 at 195

[13] In support of the application Mr Nxumalo, who again appeared for the Defendant, submitted that the amendment was necessary because the previous plea did not disclose a full defence and that it was consequently necessary for the Defendant to amend the plea to enable a proper ventilation of the dispute and to arrive at a just determination. It followed that the Defendant would be "*immeasurably prejudiced*" if the amendment was not allowed, whereas prejudice to the Plaintiff would not be so significant that it could not be cured with an award of costs.

[14] The amended plea makes various significant admissions and amplifies existing denials with factual bases that were previously omitted. For that reason, Mr Nxumalo submitted, the Plaintiff would benefit from and could not be said to be prejudiced by amendments to the plea of the kind proposed. Insofar as there remained imperfections or "*missing averments*" in the proposed amendments, these did not render the amended plea excipiable, and the Plaintiff was not entitled to insist on evidence as opposed to pleading.

[15] Advancing the Defendant's first objection to the proposed amendments, namely that the amendments were *mala fides*, Mr Winks emphasised that it is for the Defendant to establish that the application is made in good faith and to explain any delay. He submitted that the Defendant's account of his reasons for having pleaded ineffectively at the outset were perfunctory and that the Defendant had failed in those circumstances to establish his *bona fides*. Particularly when this was seen against the background of the 11th hour postponement of the trial on 13 May 2024, he submitted that the Defendant had not done enough to establish that the application was made in good faith.

[16] I have explained the circumstances in which a postponement was sought on 13 May 2024 and the trial postponed to 18 June 2024 with the Defendant ordered to pay wasted costs on a punitive scale. While I accept that this background provides relevant context to the present application, I am satisfied that the Defendant has established that he seeks to amend his plea on *bona fide* grounds. As indicated, the possibility of this occurring was foreshadowed by Mr Nxumalo when he appeared on 13 May 2024. There are manifest deficiencies in the original plea and in my view the amendments sought will, for the most part, assist the Court and the Plaintiff in preparing for trial. They elaborate significantly

on what previously stood largely as a bare denial, and subject to what I say further below, go squarely to the pleaded case.

[17] In support of the Defendant's second ground for opposing the application, Mr Winks submitted that it would result in prejudice that cannot adequately be addressed by an order for costs. The primary ground for this contention was that harmful statements linger and that in a defamation claim time is of the essence. Mr Winks submitted that a Plaintiff is entitled to a speedy trial, and that a further delay in the trial would cause irreparable prejudice because there would be no way of undoing the extra year for which the Defendant's defamatory statements would be left to "*fester in the public mind*".

[18] I considered this aspect of the matter carefully before deciding that I should grant at least certain of the amendments sought, which had the inevitable result that the trail could not proceed on 18 June 2024. There is indeed no doubt that a party in the position of the Plaintiff, and not only in matters involving defamation, should be entitled to expect expeditious access to court. For various reasons, not always of the parties' making, this expectation is not always realised. Some delays are attributable to the limited resources available to courts and ever-increasing pressure on court rolls. In the present case further delay is attributable to the Defendant's lack of preparedness and his interest in amending his plea.

[19] This court should be careful to avoid allowing litigants to act strategically to force delay in a manner that will cause ongoing prejudice associated with an unresolved dispute. It is, however, also important for the court to ensure that parties have a proper opportunity to advance their contentions at trial. In the present matter I am satisfied that certain of the amendments sought are deserving of consideration and sufficiently important to justify putting the Court and the Plaintiff to the inconvenience of further delay, and it seems to me that such prejudice as may result from a further delay in the resolution of the matter may be adequately compensated with an order for costs.

[20] Finally, Mr Winks opposed certain of the amendments sought on grounds that they would render the amended pleading excipiable. I deal with each of these in turn.

[21] The Defendant seeks to introduce a special plea in which he contends that the Plaintiff's action amounts to an abuse of court process for ulterior or improper purposes and violates the Defedant's right to freedom of expression. The Plaintiff contends that the special plea sought to be introduced by the amendment is excipiable, on two grounds. The first is that the Defendant has failed to plead that the Plaintiff's claim lacks merit and has not been brought to vindicate a right. In this regard the Plaintiff relies on the decision of the Constitutional Court in *Mineral Sands Resources (Pty) Ltd v Reddell*[4]. Second, the Plaintiff contends that the proposed special plea is vague and embarrassing.

[22] I agree that the proposed special plea is excipiable on both of the grounds contended for by the Plaintiff.

[23] Although the merits of the proposed pleading are not usually relevant to an application to amend, I should state that the absence of an averment that the Plaintiff's claim is not brought to vindicate a right is significant not only because of its formal omission but also because there is little indication in the balance of the pleading that the Defendant is likely to be able to sustain a contention that the Plaintiff has not brought the action to vindicate a right. When one has regard to the nature of the statements which the Plaintiff claims are defamatory, and the nature of the defence on the merits, in which the Defendant admits that the statements were made and pleads various defences, primarily that the statements were true and were permissibly made, it seems to me that it will be very difficult for the Defendant, assuming it were properly pleaded, to establish that the Plaintiff's claim is not brought to vindicate a right. The mere fact that the Plaintiff has brought other defamation claims in a similar context and that this has occurred against the backdrop of a contentious succession battle in the church of which the parties are members does not serve to establish an abuse of court process.

[24] The second ground on which the special plea is in my view also excipiable is that it is vague and embarrassing. It refers to "*many other proceedings*" to "*criminal cases*" and "*some tragic instances*" and to matters "*reported widely in the media*

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[4] 2023 (2) SA 68 (CC) at paragraphs [96] to [98]

and commented upon very extensively by individuals". None of these averments are sufficiently clearly made to establish the cause of action sought to be pleaded.

[25] Whether or not it would be possible for the Defendant to formulate a special plea of this kind in terms that are not excipiable is of course not for me to say at this stage. There may also come a point where, from the Plaintiff's point of view, expeditious resolution of the matter requires that any further attempt to raise this plea should simply be dealt with and disposed of on its merits in the course of a trial rather than through further interlocutory litigation which gives rise to the risk of yet further delay.

[26] In any event, I agree that the proposed special plea lacks essential averments and is formulated in terms so vague that the Plaintiff would be prejudiced if it were to be allowed. For that reason I do not intend to allow it.

[27] The next proposed amendment to which the Plaintiff objects on grounds that it is excipiable concerns paragraph 6.1 of the proposed amended plea. In my view this objection goes to the merits of the defence raised and does not render it excipiable. Essentially the objection requires an interpretation of the meaning to be attributed to a statement which the Defendant admits having made. That is, in my view, properly a matter for the trial court to decide. I can see no prejudice to the Plaintiff in allowing the plea to be amended in the respect proposed.

[28] Next, the Plaintiff objects to an amendment in paragraph 6.3.1 of the proposed amended plea. Here the Defendant refers to "*false statements*" having been made in "*a case following the July 2020 attack on Silo*" without identifying which case it was or what statements were false. In addition, the pleading refers to "*another matter*" in which false statements were allegedly made under oath. The specific statement in the "*other matter*" is, however, identified as being a statement allegedly made by the Plaintiff that he "*was the son of the late Comforter MG Modise*".

[29] In my view, although there is indeed some vagueness in the statements, the proposed pleading adequately sets out the "*facta probantia*". Insofar as specific details are not set out these may reasonably be regarded as evidence, and I can

see no reason why the Plaintiff should not adequately be protected against prejudice or being surprised at trial by the provisions of Rules 21, 35 and 37 permitting requests for particulars, the discovery of documents and further requests for particulars for the purpose of preparing for trial. For that reason, I am satisfied that the amendment should be allowed.

[30] Last, the Plaintiff objects to the amendment proposed in paragraph 6.7.1 to 6.7.4 of the proposed amended plea, on various grounds. On closer scrutiny, however, it seems to me that these grounds essentially involve argument regarding the merits of the defence raised rather than grounds on which the pleading may on a proper basis be regarded as excipiable. Even if I am wrong in this regard it seems to me that the Plaintiff cannot reasonably complain of prejudice consequent upon these proposed amendments and may fairly be expected to deal with them on their merits at the trial.

[31] Regarding the costs consequent on this application and the amendments that will be allowed, the Defendant contends that the Plaintiff's opposition to the amendments were frivolous and that by opposing this application the Plaintiff is the author of the delay caused by the amendments.

[32] Mr Winks, for the Plaintiff, submitted that this is a cynical approach and that even if the amendments are allowed the Defendant should be ordered to pay the costs of the application because it was brought late and without adequate explanation, and will have caused delay.

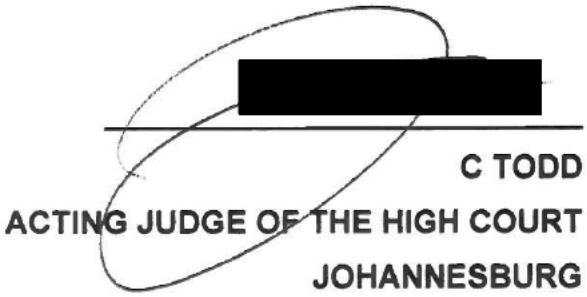
[33] Although I have decided that the Defendant should be permitted to amend his plea in all respects sought save for the proposed special plea, it is so that the amendments sought when they were, in the run up to the 18 June 2024 trial date, would, whether agreed or allowed on application, inevitably render the matter no longer trial ready. For that reason the Defendant should, in my view, be ordered to pay the costs consequent on the further postponement of the matter. As regards the costs of the application for amendment, which was largely but not wholly successful, it seems to me that each party should be ordered to pay its own costs.

[34] In the circumstances I make the following order:

1. The application for leave to amend is granted save in respect of the special plea: abuse of process set out in paragraphs 1 to 12 in the notice of intention to amend.

2. The Defendant is to pay the costs occasioned by the further postponement of the matter on 18 June 2024, including the costs of the appearance on 18 June 2024.

3. In the application for leave to amend, and save for the costs of the appearance on 18 June 2024, each party is to pay its own costs.



C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing:	18 June 2024
Date of Judgment:	15 August 2024

APPEARANCES

Counsel for the Applicant/ Defendant:	M Nxumalo and S Lindazwe
Instructed by:	Vuso Attorneys
Counsel for the Respondent/ Plaintiff:	B Winks
Instructed by:	S Twala Attorneys