

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER:502/20

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

In the matter between:

**LEKWA-TEEMANE
MUNICIPALITY**

LOCAL APPLICANT

and

H[...] P[...] B[...] obo B[...] B[...]

FIRST RESPONDENT

CHARLIE SPARKS

SECOND RESPONDENT

Coram: WESSELS AJ

Date: 29 JANUARY 2025

ORDER

- i. The applicant is granted leave to amend its plea in terms of its notice in terms of Rule 28(1) dated 20 September 2023.
- ii. The amendment shall be effected within a period of 5 days from the date of this order.
- iii. The applicant is ordered to pay the costs of the application including the first respondent's opposition of the application and the wasted costs occasioned by the amendment on scale A.
- iv. There shall be no order as to costs relating to the point in limine raised by the first respondent.

JUDGMENT

- [1] Before this Court is an application for the amendment of the applicant's plea in terms of the provisions of Rule 28(4) of the Uniform Rules of Court.

History

- [2] The first respondent is the biological father of a minor child who was attacked by a dog belonging to the second respondent. The attack took place on the sports grounds of the municipal Cloverdale Sports Stadium in Bloemhof ('the stadium') which is the property of the applicant. As a result of the attack, the minor child suffered serious injuries.

- [3] The first respondent's case is in essence that at the time of the attack, the second respondent (the owner of the dog) was employed by the applicant and resided on the premises of the stadium in his capacity as an employee of the applicant.
- [4] The first respondent instituted action against the applicant in a representative capacity as the father of the minor child for the damages sustained as a result of the attack.
- [5] The applicant's defence, in a nutshell, is that the alleged negligence of the second respondent cannot be attributed to the applicant as the dog was neither a requisite and/or necessary 'tool' in respect of the duties performed by the second respondent and the applicant had no control over the personal life of its 'contract employee', the second respondent.

The proposed amendment

- [6] The first respondent's particulars of claim contains the following allegation:

'At all material times one Charlie Sparks, the owner of the dog, was in the employee of the Defendant and acted within the course and scope of his employment with the Defendant, alternatively furthering the Defendant's interests'.

- [7] Applicant's plea to this allegation is as follows:

'3.1 Save to admit that Charlie Sparks was the owner of the dog that caused the injuries sustained by the minor child, the rest of the other allegations herein are denied.

3.2 In amplification of the denial as aforesaid, the Defendant pleads that Charlie Sparks was, at the relevant time hereto, employed as a General Worker on a fixed term contract by the Defendant.'

[8] Following the filing of the plea, the applicant effected subsequent amendments thereto but these amendments are irrelevant to the issue at hand. The matter was set down for trial on 14 August 2023 and was postponed at the request of the applicant to allow the applicant to effect further amendments to its plea.

[9] During September 2023, the applicant filed its notice in terms of Rule 28(1) seeking to delete paragraph 3.2 of its amended plea in its entirety and replacing it with the following:

‘3.2 In amplification of its denial as aforesaid, the Defendant pleads that Charlie Sparks was, at the relevant time hereto, employed as a general worker on a fixed term contract by the Department of Public Works and placed on a Secondment Contract with the Defendant on an Extended Work Programme (EPWP); which is a programme of the Department of Public Works.’

(own emphasis)

[10] The first respondent objected to this amendment which gave rise to the application for leave to amend (the Rule 28(4) application) that forms the subject of this judgment.

[11] The nub of the first respondent’s objection is found in paragraph 4 of its notice of objection which reads as follows:

‘In terms of the First Defendant’s notice of intention to Amend Plea above, the amendment seeks to withdraw and delete the admission of the Second Defendant’s locus standi in paragraph 3.2 of the First Defendant’s Amended Plea (and paragraph 10 of the pre – trial minutes) and replace the admission with the allegation that the Second Defendant was, at the relevant time hereto, employed as a general worker on a fixed term contract by the Department of Public Works and placed on a Secondment Contract with the

First Defendant on an Extended Works Programme, which is a programme of the Department of Public Works.'

Point in limine

[12] In the Rule 28(4) application, the applicant filed a supplementary affidavit on 23 April 2024 (after the filing of its replying affidavit) without obtaining the leave of the Court to do so. The first respondent took issue with the supplementary affidavit only in its heads of argument by means of a point in limine.

[13] Bearing in mind that the matter was argued only on 29 October 2024, the first respondent had ample opportunity to object to the supplementary affidavit. The enabling means of objection is found in the provisions of Rule 30 of the Uniform Rules of Court which provide a structure and timeframe for such types of objections.

[14] In the recent case of *Hlophe v Freedom under Law, and Other Matters*¹ Sutherland DJP made the following remarks in relation to the purpose of the Rule 30 procedure:

'The Uniform Rules of Court prescribe the manner of presentation of documents that serve the process of court. Sometimes practitioners fail to satisfy these prescripts. Such failures are the subject-matter of rule 30 which deals with 'irregular proceedings' and what an aggrieved party may do about the irregularities allegedly perpetrated by an adversary.'

[15] The failure to raise the filing of the applicant's supplementary affidavit in a timely and structured manner without advancing any grounds for prejudice is a practice that should be discouraged. Such an approach stifles the proper ventilation of issues and more often than not leads to litigation by ambush.

¹ *Hlophe v Freedom under Law, and Other Matters* 2022 (2) SA 523 (GJ) at para 11

- [16] The applicant satisfactorily explained the reason for the filing of the supplementary affidavit and the Court could not find any prejudice to the first respondent if the supplementary affidavit was allowed.
- [17] Resultantly, the point in limine is dismissed. The issue of costs of the point in limine will be encompassed in the cost order dealt with later on in this judgment.

Legal principles

- [18] The amendment of pleadings is governed by Rule 28 of the Uniform Rules of Court. A court hearing an application for amendment is left with a wide discretion in adjudicating such. It is furthermore important to note that Rule 28(10) provides that a court may grant leave to amend any pleading or document at any stage before judgment has been granted. Rule 28(10) reads as follows:

‘(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.’

- [19] In *Shoprite Checkers (Pty) Ltd v Trustees for The Time Being of The 3 Broten Trust*² the position regarding the amendment of pleadings is summarised as follows:

‘[10] The amendment of pleadings and documents is done in terms of Rule 28 (1) of the Uniform Rules of Court. The rule permits the amendment of any pleading and document other than the sworn statements and sets out a process that should unfold to enable the court to consider the amendment application.’

² *Shoprite Checkers (Pty) Ltd v Trustees for The Time Being of The 3 Broten Trust* (39386/2021) [2023] ZAGPJHC 130 (6 February 2023) para 10-13

[11] It is permissible for the court exercising its discretion and notwithstanding anything to the contrary in the rule, at any stage before the judgment, to grant leave to amend any pleading and document

[12] It is trite that the onus is on the party seeking the amendment in this case, the plaintiff, to establish that the other party, namely, the defendant will not be prejudiced by it.

[13] The principles governing the granting of an amendment have been summarised by White J in Commercial Union Assurance Co Ltd v Waymark NO. These are the following:

(a) The court has a discretion whether to grant or refuse an amendment;

(b) An amendment cannot be granted for the mere asking; some explanation must be offered therefore;

(c) The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue';

(d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the dispute, between the parties;

(e) The party seeking the amendment must not be mala fides;

(f) The amendment must not cause an injustice to the other side which cannot be compensated by costs;

(g) The amendment should not be refused simply to punish the applicant for neglect;

(h) A mere loss of opportunity of gaining time is no reason, in itself, for refusing the application;

(i) The amendment is not sought timeously; some reason must be given for the delay;

- [20] In the matter of *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape*³, Ebrahim J referred to the following trite principles underlying the enquiry into whether an amendment should be allowed.

“It has been said in a number of matters that the aim in allowing amendments to pleadings is to do justice between parties by deciding the real issues between them. Management) See: Trans-Drakensberg Bank Ltd (Under Judicial v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 633 (D & CLD)

The modern tendency it was said in 1935 already (See: Rosenberg v Bitcom 1935 WLD 115) was in favour of an amendment whenever such amendment facilitates the proper ventilation of a dispute between the parties.

Facts

- [21] The amendment sought to be affected by the applicant was not mala fide and the reasons therefore are set out in the Rule 28(4) application.
- [22] The applicant applies for the intended amendment to correctly reflect the position regarding the employment of the second respondent. This intended amendment inter-alia allows for the proper ventilation of the dispute between the parties.
- [23] In fact, the applicant makes it clear in the application that it is not withdrawing the admission that the second respondent was employed by the applicant on a contractual basis but merely wishes to amplify and clarify the basis of the contractual engagement of the second respondent with the applicant. To that extent, the applicant attached a written agreement of

³ *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape* (416/96) [1998] ZAECHC 4 (16 February 1998) para 15

appointment as an EPWP beneficiary, concluded between the second respondent and the applicant (annexure “BG3”), to the founding affidavit in the Rule 28(4) application. What emanates from this agreement (although concluded in 2018) is that the applicant agreed, in paragraph 5 thereof, that the applicant shall remunerate the second respondent for his services during the service period.

- [24] The basis of the employment relationship between the applicant and the second respondent, as initially pleaded, remains unaltered albeit refined by the intended amendment.
- [25] The conclusion to be drawn from the facts contained in the application is that if this amendment is allowed, the first respondent will not suffer any prejudice or injustice insofar as the prosecution of his claim is concerned.
- [26] There is no conceivable impediment to the proposed amendment and the application stands to be granted. The clear prejudice that the first respondent suffered is the wasted costs incurred as a result of the belated amendment of the applicant’s plea.

Costs

- [27] This Court has considered the fact that due to the opposition of the applicant’s notice of intention to amend, it was necessary for the applicant to lodge the application in terms of Rule 28(4). The necessity to lodge this application and its subsequent success, in itself, does not entitle the applicant to costs.
- [28] Generally, the applicant as the party seeking the amendment, is responsible for the costs thereof. After all, the applicant is seeking the indulgence. The indulgence that the applicant is seeking is to improve its plea, which should have been properly formulated in the first place.

[29] An additional consideration for a cost order in favour of the first respondent is the haphazard manner in which the applicant brought and prosecuted the Rule 28(4) application. This inter-alia included the unsigned affidavit of Mr Yanta, which was rectified without leave of this Court and the outright filing of the supplementary affidavit that should have formed part of the answering affidavit.

[30] These factors combined are deemed as satisfactory reasons to hold the applicant responsible for the costs incurred by the amendment. The costs of the point in limine, though, are excluded from this order.

Order

[31] Resultantly the following order is made:

- i. The applicant is granted leave to amend its plea in terms of its notice in terms of Rule 28(1) dated 20 September 2023.
- ii. The amendment shall be effected within a period of 5 days from the date of this order.
- iii. The applicant is ordered to pay the costs of the application including the first respondent's opposition of the application and the wasted costs occasioned by the amendment on scale A.
- iv. There shall be no order as to costs relating to the point in limine raised by the first respondent.

M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Date of hearing : 29 October 2024

Date of judgment : 29 January 2025

APPEARANCES

Counsel for Applicant : Adv R Sempe

**Instructed by : Sibeko Inc.
Sandton
c/o TL Seeletso Attorneys
Mahikeng**

Counsel for First

Respondent : Adv MV Botomane

**Instructed by : Mphela & Associates
Pretoria
c/o Mothusi Marumo Attorneys
Mahikeng**