

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO.: 44528/10

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

15/10/12

[Signature]

In the matter between:

IMPREGILO SpA**Applicant**

and

MAHAMBA: SIPHO**Respondent**

in re:

MAHAMBA: SIPHO**Plaintiff**

and

IMPREGILO SpA**Defendant**

Neutral citation: *Impregilo Spa v Mahamba in re: Mahamba v Impregilo Spa* 2012 SA (GSJ)

Coram: SATCHWELL J

Heard: 4th and 5th October 2012

Delivered: 11th October 2012

Summary: Application for amendment of Defendant's plea.

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] This action was set down for a four to five day trial. On the first day, I was initially confronted with two opposed applications brought by the Defendant – one for provision by Plaintiff of Further and Better Particulars and one for leave to amend the Defendant's Plea. This has now escalated into three opposed applications since the Plaintiff seeks to bring an application for leave to amend Plaintiff's response to the Request for Further and Better Particulars.

[2] This is the judgment on the Defendant's application for leave to amend Defendant's Plea whilst the remaining applications have been postponed to be heard by myself in the opposed motion court in two weeks time.

[3] Plaintiff issued summons claiming payment from Defendant in the amount of sixty million Euros arising from a contract of mandate concluded between the Defendant and Plaintiff acting "personally". In terms of this mandate Plaintiff was to supply Defendant with lobbying and other services so as to position Defendant to be awarded a contract under a tender issued by a South African parastatal. Defendant has pleaded a denial of these allegations.

[4] Defendant now seeks to amend its Plea by insertion of an alternative Plea which introduces the averment that the Plaintiff did not act in his personal capacity but in a representative capacity for two principals – Mr A Khalifa alternatively Kwezi Group (Pty) Ltd.

[5] The authorities are clear that amendments should be granted unless the application to amend is *mala fide* or would prejudice or cause injustice to the other side which cannot be compensated by costs.

MALA FIDES

[6] The first issue before me is that of the presence or absence of *mala fides* on the part of Defendant.

[7] An affidavit by Defendant's attorney sets out the consideration given by Defendant's legal representatives to the adequacy of Defendant's Plea in the light of certain discovered documentation. Such queries and concerns arose during August 2011. The view was then taken that the pleadings, as they stood, permitted the Defendant to raise both the defence that there were no agreements to which Plaintiff personally was a party or that he had been acting in a representative capacity.

[8] At a pre-trial conference on 22nd August 2012 Defendant sought certain admissions of fact pertaining to the Kwezi Group (Pty) Ltd to which Plaintiff responded that the admissions sought were not relevant. Defendant then indicated that it persisted in its denial of any agreement concluded between Plaintiff and Defendant. However, if it was found by the trial court that there was an agreement then Defendant would assert that such agreement(s) were not concluded by Plaintiff in his personal capacity but for and on behalf of a principal. Plaintiff's response was to request Defendant to take the appropriate action with regard to pleadings if it wished to formalise the stance now indicated.

[9] For various reasons, it was not until the second week of September that counsel advised Defendant's attorney that, to obviate uncertainty, it might be necessary to seek to amend Defendant's Plea. After receiving instructions from Defendant, the Notice of Amendment dated 17 September 2012 was served on Plaintiff.

[10] In the affidavit motivating the application for the amendment the attorney has given a clear indication of the uncertainty experienced by both himself and his counsel with regard to the adequacy of Defendant's Plea. In argument, counsel confirmed that there were faltering views in regard to this issue and the amendment seeks to clarify the issues and obviate uncertainty as to the import of the Plea.

[11] It has been pointed out that there has been considerable delay since these queries concerning the Plea originally arose in 2011 and that this may suggest a lack of *bona fides*.

Certainly there has been a delay. However, both attorney and counsel have taken full responsibility for such delay, explained same, and assumed on their shoulders any blame or recrimination which should be levelled.

[12] I do not think legal representatives need grovel or abase themselves when seeking an indulgence from the court as indeed this is. To the extent that there has been doubt and delay on the part of attorney and counsel, this does not constitute *mala fides* in any shape or form.

[13] It was submitted that the Defendant itself was singularly absent from this application in that the Founding Affidavit emanates from and is deposed to by the Defendant's attorney and not the Defendant itself and that there is no indication that the Defendant applied its mind to the issue of whether the Plaintiff was acting "personally" or "in a representative capacity".

[14] I do not see that this takes the matter any further. An affidavit deposed to by a representative of the Defendant would do no more than contain the statement that the Defendant is a layperson in law and, as an Italian company, particularly in respect of South African law. The affidavit would state that it has therefore relied upon legal opinion and advice received from its legal representatives. An affidavit replete with phrases such as "I am advised by my legal representatives" or "my legal representatives have informed me" or "I am told that the legal position is..." is of little assistance. Hearsay is introduced as to legal advice given, discussed, accepted or rejected.

PREJUDICE

[15] The prejudice suffered by the Plaintiff is that he was ready for trial on the date argument was heard, time has been expended on this opposed application and, if the amendment is granted, the trial will have to be postponed.

[16] That is correct but it is not the entire story. When argument commenced in the application brought by the Defendant to compel the Plaintiff to furnish Further and Better Particulars, I queried the import of the Plaintiff's Response to this request. It then emerged that there was perhaps some ambiguity or misunderstanding on the part of Plaintiff's legal representatives as to the particular meaning of that Response to the Request for Further and Better Particulars. This has now resulted in an application by Plaintiff for leave to amend this

Response which application is opposed by Defendant. In short, Defendant's application for amendment of its Plea is not the only obstacle to the trial proceeding as diarised. The trial action has now been postponed *sine die* to allow for the two remaining applications (to amend Plaintiff's Response to the Request for Further and Better Particulars and to compel production of Further and Better Particulars) to be heard.

[17] The prejudice to Plaintiff is therefore that of delay and the incurring of costs in preparation for trial. Both these issues are, as I have indicated, intertwined with the other applications. However, such prejudice is not incapable of resolution by way of the appropriate costs order.

[18] It was suggested that the potential principals to whom reference is now made in the proposed amendment to Defendant's Plea and on whose behalf the Plaintiff may or may not have been acting are far more severely prejudiced. Neither Mr A Khalifa nor Kwezi Group (Pty) Ltd are now free to join these proceedings – their claim (if any) has prescribed.

[19] The interests of both Mr A Khalifa and Kwezi Group (Pty) Ltd are not for this court to protect. Firstly, they have never asserted any claim against Defendant. The proposed amendment has no impact upon them. Secondly, it was not for Defendant to issue any invitation to either Mr Khalifa or Kwezi Group (Pty) Ltd to join in these proceedings. Thirdly, the Plaintiff has an apparently undisputed close connection with Kwezi Group (Pty) Ltd which is presumably aware of these proceedings and could have intervened in the action had it ever wished so to do. Finally and most importantly, Rule 28 of the Supreme Court Rules¹ and the authorities are clear that the court, in exercising its discretion, is to have regard to any inconvenience or prejudice which may be suffered by the parties to the litigation² – not third parties who are not engaged in this legal process.

CONCLUSION

[20] In the result I am satisfied that this is an appropriate matter where the amendment should be granted.

¹ Rule 28(1) requires notice of a proposed amendment to be given "to all other parties".

² For instance in *Moolman v Estate Moolman & Another* 1927 CPD 27 and in *McDuff Co (in Liquidation) v Johannesburg Consolidated Investments Co. Ltd* 1923 TPD 309 the courts referred to "injustice to the other side" and "injury to his opponent".

[21] On the one hand, Defendant has been successful in its application for the amendment. However this application was certainly seeking an indulgence when one has regard to the delay in bringing the application and that it was brought on the first day of trial. On the other hand, I do not think that the opposition to this application was reasonable.

[22] I am mindful that, as I have already remarked, this application was initially argued at the same time as the application for Plaintiff to furnish the Further and Better Particulars. That application has been postponed. The result thereof will possibly be dependent upon the outcome of the forthcoming application by Plaintiff to amend its Response to the Request for Further and Better Particulars.

[23] I note further that the costs incurred on 4th and 5th October 2012 were trial costs which required considerable preparation and which costs are considerably more than those of an application for amendment of a plea.

[24] In the result I have decided to make no order as to costs in respect of this application. The wasted costs of trial and 4th and 5th October can be argued in the opposed motion court on 18th October 2012.

ORDER

1. The Defendant's Plea is amended by deletion of paragraph 5 thereof in its entirety and the substitution of the following paragraph to be paragraph number 5:

“5. AD PARAGRAPHS 6 TO 15 THEREOF:

(a) The Defendant admits:

- (i) Demand;
- (ii) Its refusal to pay the amount claimed or any portion thereof.

(b)

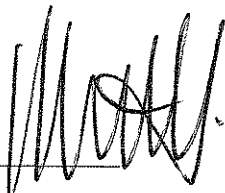
- (i) The Defendant denies each and every remaining allegation in these paragraphs contained as if

specifically traversed and puts the Plaintiff to the proof thereof

- (ii) Alternatively, and in the event of this Honourable Court determining that the agreements set forth in paragraphs 6 and 11 of the Plaintiff's Particulars of Claim, as amended, were in fact concluded (all of which is denied) then and in that event the Defendant avers that the Plaintiff in concluding the said agreements did not act in his personal capacity but in a representative capacity for and on behalf of Mr Abdurazaq A Khalifa, alternatively Kwezi Group (Pty) Limited."

2. There is no order as to costs.

DATED AT JOHANNESBURG ON THIS 11TH DAY OF OCTOBER 2012



SATCHWELL J

JUDGE OF THE HIGH COURT

APPEARANCES

APPLICANT/DEFENDANT:	RD Levin SC with M Naidoo SC Instructed by Mkhabela Huntley Adekeye Inc., Johannesburg
RESPONDENT/PLAINTIFF:	G Farber SC Instructed by Mahons Attorneys, Johannesburg