

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2012/22976

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

22 February 2013


FHD VAN OOSTEN

In the matter between

REAL PEOPLE HOUSING (PTY) LTD

APPLICANT

and

TYRONE SIPHIWE MAOKA

RESPONDENT

Practice - application for amendment of notice of motion in terms of rule 28(4) - objection to - nature and merit of - no prejudice alleged or shown - amendment allowed - respondent ordered to pay costs.

Practice - Rule 30 - objection to notice of amendment not containing a tender for payment of wasted costs occasioned by amendment - such tender not necessary as rule 28(9) provides that party giving notice shall be liable for costs unless court otherwise directs - application dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

[1] There are two interlocutory applications before me: firstly, an application for leave to amend the notice of motion in the main application, which is for the eviction of the respondent from a residential property, and secondly, the respondent's application in terms of Rule 30 in which he seeks an order declaring the applicant's notice of amendment defective on the basis that it does not contain a tender for the payment of the wasted costs occasioned by the amendment.

[2] I shall first deal with the Rule 30 application. It is ill-conceived. Rule 28, providing for amendments, does not require the notice of amendment to contain a tender for the payment of costs. On the contrary, it provides specifically in sub-rule (9) that the party giving notice of amendment *shall*, unless the court otherwise directs, be liable for the costs thereby occasioned. A tender for such costs in the notice of amendment, would accordingly be superfluous.

[3] A brief history of the matter needs to be set out for a proper understanding of the proposed amendment. The main application was launched on 20 June 2012. Prior thereto, in April 2007, an identical application was launched (the first application). The first application came up for hearing before Moshidi J, who, on 3 October 2007, ordered that the application be referred for the hearing of oral evidence on one single issue only, being "the question of First National Bank's foreclosure of the bond and the disposal of the property". Counsel for the applicant submitted that the referral was incorrect in the face of an admission by the respondent that the applicant was the registered owner of the property concerned. I refrain from commenting on the correctness of the order as this is not an issue before me. On 23 October 2007, and before the set-down of the hearing of oral evidence, the applicant withdrew the first application by way of a notice of withdrawal. In the respondent's answering affidavit filed in the present main application, a point *in limine* in the nature of a plea of *lis pendens* is raised on the basis that the applicant's purported withdrawal of the first application was irregular. The order accordingly sought is that this application be stayed pending finalisation of the first application. This prompted the applicant to file a notice of intention to amend the notice of motion in the present main application, by the insertion of a new prayer that the applicant be granted leave to withdraw the first application. The respondent opposed

the amendment sought resulting in the applicant's application for leave to amend in terms of Rule 28(4), which is opposed by the respondent.

[4] The respondent has failed to advance any objections to the proposed amendment. Mr van Schalkwyk, who appeared for the respondent, merely referred to the desirability of finalising the disputes between the parties. He was moreover unable to point to any prejudice the respondent might suffer consequent upon the amendment being allowed which cannot be cured by an appropriate order as to costs (see *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) para [9]). It follows that the amendment must be allowed.

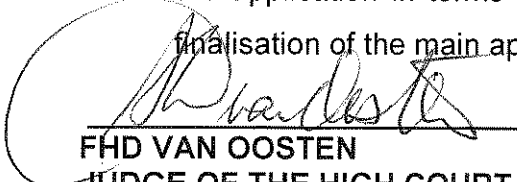
[5] It remains to deal with the costs of the two applications. The applicant, being the successful party in both applications, is entitled to the costs thereof. I do however consider it to be of importance that the respondent is unemployed and impecunious and that therefore the payment of costs, at this stage, might result in effectively closing the door of the court on him. The inference moreover arises that the respondent was not properly advised on these applications. I therefore, in the interests of justice, decided to postpone the taxation and consequent payment of the costs orders I propose to make, until the finalisation of the main application.

[6] In the result the following order is made:

1. The applicant is granted leave to amend its notice of motion in case no 2012/2297 by the insertion of prayer 5, which reads as follows:

"5 Insofar as same may be necessary, that the applicant be granted leave to withdraw its application for eviction against the respondent in the above Honourable Court under case no 7765/2007."

2. The respondent's application in terms of Rule 30 is dismissed.
3. The respondent is ordered to pay the costs of the application to amend as well as the application in terms of Rule 30, the taxation of which is to stand over until finalisation of the main application.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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MR J VAN SCHALKWYK

RESPONDENT'S ATTORNEYS

JOHANNESBURG JUSTICE CENTRE

DATE OF HEARING

21 FEBRUARY 2013

DATE OF JUDGMENT

22 FEBRUARY 2013