REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2009/15228

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

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DATE SIGNATURE

In the matter between:

LOUREIRO, LICINIO First Plaintiff/Applicant

LOUREIRO, VANESSA Second Plaintiff/Applicant

LOUREIRO, LUCA-FILIPE Third Plaintiff/Applicant

LOUREIRO, JEAN-ENRIQUE Fourth Plaintiff/Applicant

And

IMVULA QUALITY PROTECTION (PTY) LTD Defendant/Respondent

JUDGMENT ON APPLICATION TO STRIKE MATTER FROM THE ROLL

MAKUME, J:

[1] On the 11th February 2015 the applicants served on the respondent a notice of intention to amend particulars of claim. The amendment which is directed at paragraph 9.3 of the particulars of claim reads as follows:

> "*The perpetrators stole property belonging to the First Plaintiff alternatively the Second Plaintiff to the value of R13 180 994.00. The schedule annexed hereto marked 'B' lists the aforesaid stolen property and the fair and reasonable replacement value of each such item, the First Plaintiff has been compensated in respect of a portion of the stolen items to the extent of R2 056 422.00 leaving a shortfall of R11 124 572.00.*"

[2] On the 25th February 2015 the respondent promptly filed his notice objecting to the proposed amendment and set out his grounds of objection.

[3] A day later on the 26th February 2015 the applicants served and filed a notice of intention to amend their particulars of claim in terms of Rule 28(4). The application was set down for hearing in the Trials Interlocutory Court on the 3rd March 2015. The application served before Masipa J on the 3rd March 2015 and was postponed to the Trials Interlocutory Court for the 17th March 2015. There is disagreement between the parties whether the postponement was by agreement or not.

[4] When the file was placed before me it only had the notice of motion to amend supported by affidavit as well as the respondent's notice of objection. Counsel for the respondent informed me in chambers that there is an application to strike the application from the roll as it should not be heard in the Trials Interlocutory Court.

[5] When the matter was called it was only then that I was handed a full set of the papers containing not only the application to strike but also the answering affidavit in the application to amend as well as the answering affidavit in the application to strike.

[6] I allowed the parties to argue the application to strike and reserved by ruling until Friday the 20th March 2015 on which day the parties will also appear to seek certification of trial readiness for the 15th April 2015.

[7] The respondent is the applicant in the application to strike the matter from the roll. However, to avoid confusion I shall refer to the parties in the title used in the application to amend.

[8] At the heart of the application to strike is whether the Practice Directive for 2015 First Term of this Court envisages that applications of this nature should be heard by this Court or should be heard in the normal opposed motion court.

[9] The respondent argues that this type of application should be heard in the normal court and says that paragraphs 4.2 and 4.3 of the practice directive exclude applications such as the one before me. The applicants argue that Uniform Rule 6(11) governs interlocutory applications and that the Trial Interlocutory Court was specifically designated for such applications.

BACKGROUND HISTORY

[10] This matter concerns a claim instituted by the applicants against the respondent for payment of contractual and delictual damages arising out of a guarding service contract.

[11] The action served before Satchwell J in the year 2011 who found in favour of the applicants on the merits there having been an agreement to separate merits from quantum. The respondent was in turn successful at the Supreme Court of Appeal which set aside the judgment by Satchwell J. This prompted the applicants to appeal the SCA judgment to the Constitutional. The Constitutional Court delivered judgment in March 2014 and found in favour of the applicants thus reinstating the Satchwell judgment.

[12] The issue of quantum is to be dealt with on the 15th April 2015 provided that a certificate of readiness for trial shall have been sanctioned by this Court.

AMENDMENT OF PLEADINGS IN GENERAL

[13] It is trite law that with consent of other parties amendments may be made at any stage of the proceedings and in the event of an objection an application to court may be made at any stage before judgment. This procedure is regulated by Rule 28. In the matter of *Waja v Orr* 1931 TPD 149 the court indicated that applications for material amendments to pleadings should be made before trial so that pleadings would be settled by the time of hearing.

RULE 6(11) AND PARAGRAPHS 4.2 AND 4.3 OF THE PRACTICE DIRECTIVE

[14] Rule 6(11) reads as follows:

> "*Notwithstanding the aforegoing subrules interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a judge.*"

[15] The applicants rely to a large extent on this rule and argue that this Court is the correct forum to deal with the amendment. The applicants themselves set the application for hearing on the 3rd March 2015. It was not a date assigned to them by the Registrar nor by a Judge hence the respondent objected to the matter being set down. At paragraph 7 of the founding affidavit

to the application for striking the defendant speaking through its attorney Jacobus Stephanus Marais says the following:

> "*On 26 February 2015 during a telephone conversation I had with the Plaintiff's attorney Burton Meyer he confirmed that the matter would be removed from the roll of 3 March 2015. No agreement was reached regarding re-enrolment of the application for 17 March 2015. It was agreed that the date for enrolment of the application be discussed at the parties' pre-trial conference.*"

[16] The applicants confirm in their answering affidavit that no agreement was reached on the re-enrolment of the application. The applicants say they thought it prudent to enrol the matter for the 17th March 2015 so as ensure that the matter is ready for trial on 15 April 2015.

[17] It is clear that the applicants want this Court to treat this application as an urgent matter without saying so in many words even though their urgency is self-created. The High Court judgment by Satchwell J which was handed down on the 30th September 2011 found that the respondent is liable in contract to the first applicant for the loss/damage he the first applicant suffered as a result of the robbery on 22nd January 2009. That judgment was upheld by the Constitutional Court when it delivered judgment on the 20th March 2014 in the following terms:

> "*3. The order of the Supreme Court of Appeal is set aside and the order of the High Court is replaced with the following order:*
>
> *(a) The Respondent is declared liable in contract to the First Applicant for whatever damages may be proved.*"

[18] The applicants waited some 12 months from the time of the Constitutional Court judgment to bring the amendment. There is nowhere in the affidavit where the applicants explain why they waited so long to bring this application to amend.

[19] It is clear that the amendments that the applicants seek to effect are material in that firstly the amendment seeks to introduce the second applicant as a direct beneficiary of the judgment on contractual liability. Secondly, it seeks to alter the calculation of quantum from market value to replacement value. These amendments are material and in view of the objection raised cannot be dealt with as a matter of urgency in a Trial Interlocutory Court.

[20] The Trial Interlocutory Court like the urgent court as was said by his Lordship Cachalia J (as he then was) in the matter of *Digital Printers v Riso Africa (Pty) Ltd* Case No 17318/02 WLD a judgment delivered on the 4th February 2003 that the urgent court is not geared to dealing with a matter which is not only voluminous but involves some complexity and even some novel point of law. The fact that the litigants have chosen eminent senior counsel from the bar to represent them serves to emphasise this point.

[21] The sentiments and thoughts expressed in that matter by Cachalia J apply equally to the matter before me. The rules and directives contained in the Practice Manual are there to assist judges to prepare for and hear matters expeditiously. The rules and directives were introduced to assist the judge who is to hear matters to be able to properly prepare for the hearing. In this

instance the Trial Interlocutory Court was introduced to sift non-compliance with the rules and to make sure that when a matter is certified ready for trial all obstacles shall have been cleared and the issues for trial are clearly defined.

[22] Paragraphs 4.2 and 4.3 of the Trial Interlocutory Court read as follows:

> "*4.2 This Court will in particular deal with all instances of non-compliance in trial matters with the rules and the practice manual and practitioners are encouraged to use Rule 30A.*"

[23] Paragraph 4.3 which expands on the category of matters envisaged in 4.2 reads as follows:

> "*4.3 Among the matters which this Court will deal with will be the failure to deliver timeously any practice note or heads due in the trial matters a failure to sign a rule 37 minute promptly, a failure to comply timeously with any undertakings given in a rule 37 conference, or the failure to secure an expert for a meeting of experts.*"

[24] The language used in the practice directive is simple and uncomplicated and what has not been mentioned therein is by implication excluded. An opposed application for leave to amend particulars of claim or a plea do not fit into the description of matters for the Trials Interlocutory Court.

[25] The applicants were warned on numerous occasions especially on the 2nd March 2015 by respondent's attorneys in a letter not to enrol the

application to amend in the Trials Interlocutory Court. The applicants did not heed the warning and proceeded to enrol the matter without consulting the respondent.

[26] In my view the applicants has set the application to amend in the wrong court. Accordingly I make the following order:

1. The application for leave to amend the plaintiff's particulars of claim is struck off from the roll.

2. The applicants are ordered to pay costs of this application including costs of two counsel.

DATED at JOHANNESBURG on this 20th day of MARCH 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:	17TH MARCH 2015
DATE OF JUDGMENT:	20TH MARCH 2015
COUNSEL FOR APPLICANTS/ RESPONDENTS IN THE APPLICATION TO STRIKE	ADV W VERMEULEN
INSTRUCTED BY	MESSRS CLIFFE DEKKER HOFMEYR INC JOHANNESBURG
COUNSEL FOR THE RESPONDENTS/ APPLICANTS IN THE APPLICATION FOR STRIKING FROM THE ROLL	ADV HELENS
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