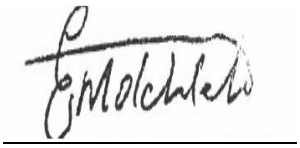
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2016/22545

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED:



06-12-2022
DATE SIGNATURE

In the matter between:

DIMENSION DATA MIDDLE EAST AND AFRICA (PTY) LIMITED **First Applicant**

NIPPON TELEGRAPH & TELEPHONE CORPORATION **Second Applicant**

JEREMY ORD **Third Applicant**

and

ANDILE ABNER NGCABA **Respondent**

IN RE:

ANDILE ABNER NGCABA **Applicant**

AND

DIMENSION DATA MIDDLE EAST

AND AFRICA (PTY) LIMITED **First Defendant**

NIPPON TELEGRAPH & TELEPHONE

CORPORATION **Second Defendant**

JEREMY ORD **Third Respondent**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on caselines electronic platform. The date for hand-down is deemed to be 6 December 2022.

Summary: Application to amend the defendants' special plea. The amendments relate to the following: (a) the application and or enforcement of a non-variation clause in the employment contract, (b) the relevance and applicability of an exemption clause, (c) the jurisdiction of the court.

The plaintiff opposed the application to amend the special plea on the grounds that it was *mala fide* and prejudicial to him. The plaintiff contends that the application is *mala fide* particularly because it's institution was delayed. In relation to the non-variation clause the plaintiff contends that the issue is *res judicata,* in that the issue was determined earlier in an interlocutory application. And in relation to the jurisdictional issue of the second defendant been a *perigrinus* the plaintiff contends that the defendants consented to the jurisdiction by accepting the service of the summons in South Africa.

The principles governing the assumption of jurisdiction over a *perigrinus* by a South African court considered. Held that the receipt of the service of summons in South Africa does not automatically mean consent to jurisdiction.

The principles governing the question of whether a new ground of defence can be raised once a plea has been filed considered.

JUDGMENT

Molahlehi J

Introduction

[1] The applicants, (the defendants in the main action) seek an order authorising the amendment of their plea in terms of rule 28 of the Uniform Rules of the High Court (the Rules). The application relates to the amendment of the plea filed against the respondent (the plaintiff in the main action), in the dispute concerning the contractual and delictual claims between the parties. The parties will, hereinafter be referred to as cited in the main action.

[2] The plaintiff, has instituted three but related claims against the defendants. The first claim is based on an alleged oral assurance given to him by the CEO, Mr Dawson of the first defendant, Dimension Data Middle East and Africa (Pty) Ltd . The second claim which is brought in the alternative to the first is delictual based on the alleged

discrimination against the plaintiff. The essence of this allegation is that the plaintiff was underpaid compared to white employees.

[3] In his particulars of claim concerning the alleged oral undertaking, made by the defendants, the plaintiff avers that the undertaking was that he would always be compensated in the manner that was either equal or better than other senior executives including white employees of the first defendant. He refers to the undertaking as “equal treatment agreement.” According to him, the first respondent, in breach of this agreement paid white employees for a period of twelve years on a salary scale that was higher than his. It is for this reason that he claims damages in the amount of R490,230,605.00.

[4] The alleged equal treatment agreement relied upon by the plaintiff was made after the parties concluded their written employment contract.

[5] The second claim, is based on the contention that the first defendant owed the plaintiff a legal duty not to unfairly discriminate him, inter alia, on the grounds of race and social origin by paying him less than other senior executives. He contends that due to the discrimination by the defendants he has suffered a shortfall in his salary in sum of R490,230.605.00. According to him the legal duty arose from the provisions of the Broad-based Black Economic Empowerment Act 53 of 2003 (the BBBEE Act) and or section 9(4) of the Constitution, as elaborated upon in sections 6, 7 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA")."

[6] The quantum for claim one and two are based on the payment allegedly received by the other senior executive employees who are alleged to have received the payment consequent their participation in the Long Term Incentive Scheme (LTRP), the Share Appreciation Rights Scheme (SARS) and NTT bonus. The claims are related to the period when the plaintiff was the executive chairperson of the first defendant.

[7] The defendants in their special plea and proposed amendments avers that it seeks to address the following:

"14.1. The Plaintiff's legally incompetent reliance on an oral agreement allegedly concluded after the conclusion of the employment contract in support of a claim which falls within the purview of the employment contract,

14.2. The Plaintiff's legally incompetent claim in delict, advanced in circumstances where the dispute is contractual, and the plaintiff has contractual remedies available to him,

14.3. The Plaintiff's unjustified avoidance of the arbitration and other dispute resolution clauses in the employment contract regulating the resolution of disputes arising thereunder.

14.4. The Plaintiff's attempt to bypass procedures set out in the Employment Equity Act and PEPUDA in respect of his claims, which require that he institute his claims in the manner and forums set out in those statutes.

14.5. The jurisdictional issue that arises in relation to the plaintiff's claim against the second defendant a peregrinus of South Africa."

[8] The defendants further aver in paragraph 15 of their affidavit in support of the application to amend the plea that the following are the general purpose for the amendment:

"15.1. They crystallise the defendants' objection regarding the plaintiff's reliance on the alleged equal treatment agreement in terms of which the applicant seeks to modify and subvert the terms of his employment relationship with DDMEA.

15.2. They highlighted the impact of the *parol* evidence rule on the first claim advanced by the plaintiff.

15.3. They clarify the precise scope of the relief that the defendants seek.

15.4. They set out the applicable terms of the employment contract, which regulate.

15.4.1. the plaintiff's remuneration;

15.4.2, the manner in which the plaintiff was required to prosecute a dispute regarding his remuneration and the legal rights and remedies which were available to him:

15.4.3. the manner in which the employment contract could have been varied to incorporate the terms of the alleged equal treatment agreement if the parties had truly intended to alter the terms of their employment relationship in any way."

[9] The plaintiff objected to the proposed amendment on the following grounds:

"16.1. that the proposed amendments (individually and/or collectively) would render the plea excepiable on the grounds that the plea would be vague and embarrassing, alternatively would fail to disclose any defences to the claims advanced by the plaintiff;

16.2. that the proposed amendments "amount to a *mala fide* attempt incurably and prejudicially to impede the proper and due ventilation of the real issues between the parties and to delay the finalisation of the dispute,

16.3 that the delictual claim referred to in the fourth special plea is pleaded in the alternative and not in addition to the contractual claim;

16.4. that, in relation to the fifth special plea:

16.4.1. fraud is alleged or subsumed in the allegations of a motive of racism on the part of the defendants,

16.4.2. the proposed amendment amounts to the withdrawal of an admission(s);

16.4.3. the special defence relating to arbitration is dilatory in that it is "in the form of a stay of the proceedings and not a dismissal of Claims 1 and 2, as prayed"

16.5. that, in relation to the sixth special plea the defendants ignore the plaintiff's reliance on the BBEEE Act and there is no legal or pleaded basis "for the inclusion of Claim 3 in the prayer thereto".

General principles on amendments

[10] As indicated earlier, this application is brought in terms of rule 28 of the Rules, and thus this court has a discretion to be exercised judicially in weighing whether the

amendment should be granted or refused. The discretion is to be exercised having regard to the facts and the circumstances of this case.[1]

[11] The underlying consideration, which is guided by the interest of justice, is whether the objective of the amendment is to obtain proper ventilation of the dispute between the parties and to determine the real issues between them.[2]

[12] The interest of justice would direct that leave to amend pleadings should not be granted if the application is *mala fide* or made in bad faith. In determining whether to grant or refuse leave to amend, the court would ensure that, ultimately, justice is done between the parties.[3]

[13] The general rule that the courts have followed over the years is that an application to amendment pleadings will always be permitted unless the amendment is *mala fide* or, unless the amendment would cause an injustice to the other side, which cannot be cured by an amendment order for costs or unless the parties cannot be put back to the same position they would have been when the pleadings sought to be amended were made.[4]

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[1] See: GMF Kontrakteurs (Edms) Bpk & Ander v Pretoria City Council 1978 (2) SA 219 (T) and Gainsford NO and others v Jawmend Rossi Capital (Pty) Limited [2013] JOL 30679 (GSJ) at paragraph 5.

[2] See Swartz the van Der Walt t/a Sentraten 1998. (1) SA 53 (W) at 56. I – J. 57 G – J.

[3] Supra Swartz at 57C.

[4] Moolman v Estate Moolman 1927 CPD 27 at 29. In that case the court in reflecting on the jurisprudence of the time relating the approach to application to amend of pleadings held that "amendments will always be allowed unless the application to amend is mala fide.

[14] In South British Insurance Co Ltd v Gusson,[5] the court held that:

> ". . . the Court will not lightly allow a late amendment even where it does not involve the withdrawal of an admission if the result thereof will be to the prejudice of the other party to an extent or in a manner which a special order as to costs will not adequately compensate."

[15] In Trans-Drukensburg Bank v Combined Engineering,[6] the court held that the aim of allowing an amendment of pleadings is to do justice between the parties by deciding the real issues between them. The applicant bears the onus of showing that the proposed amendment will not cause irreparable prejudice the other party.[7]

[16] In Coppermoon Trading 13 (Pty) Ltd v Government of the Province of the Eastern Cape and Another,[8] the court held that:

> "[16] In action proceedings, a special plea is raised in a defendant's plea filed in terms of Court Rule 22. In the present matter the defence raised by the application arose after the defendants had already filed their plea and the pleadings were closed. That in itself did not prevent the defendants from raising it. The appropriate procedure was however to seek an amendment of their plea in terms of Court Rule 28. A defendant will ordinarily be allowed to amend his plea where a new ground

[5] 1963 (1) SA 289 at 294A-B.
[6] 1967 (3) SA, 632 (D) at 640 G – 641A.
[7] Euro Shipping Corporation of Monrovia v Min of Agriculture & Others 1979 (2) SA 1072 (C) at 1090B.

[8] [20202] 2 ECL 14 (ECB).

for defence comes to the defendant's knowledge for the first time after he has filed his plea, provided the application is *bona fide* and is not prejudicial to the plaintiff."

Arguments by the parties

[17] As alluded to earlier, the defendant seeks to amend the third to the seventh plea, including certain aspect of the merits. The special plea that is sought to be amended relate briefly to the following:

(a) **The third special plea**: the application and/or enforcement of a non-variation clause,

(b) **The fourth special plea**: the alleged concurrence of claims or plaintiff's entitlement to institute a delictual claim "in addition to" a contractual claim.

(c) **The fifth special plea**: the relevance and applicability of an exemption clause,

(d) **The sixth special plea**: whether the High Court enjoys jurisdiction to entertain the matter, and

(e) **The seventh special plea**: whether the High Court has the jurisdiction to entertain Claim 3 against the second defendant in South Africa, more particularly in view of its alleged status as a *peregrinus.*

[18] The defendants' Counsel argued during the hearing that there are certain subtle changes that the amendment of the plea seeks to introduce in their defence. He emphasised that the amendment makes additional reference to the employment contract, in particular the implied terms thereof. Furthermore, the amendments introduce additional terms implied in the employment contract, which introduces the allegation that there is a dispute between the parties relating to the application of PEPUDA and Employment Equity Act.

[19] As concerning the issue of jurisdiction, the Counsel argued that the issue was not about proper service of the summons but about whether the defendants consented to the jurisdiction of the court over a *perigrini.*

[20] It was also argued on behalf of the defendant that this application was not *mala fide* and that there was no delay in launching it. If there was any delay, it was that occasioned by the objection to the matter proceeding on the date of the hearing because the plaintiff's failure the filing the expert reports timeously. It was as a result of this that the matter was postponed.

[21] The case of the plaintiff in objecting to the amendments is that the application is *mala fide*, prejudicial, and delayed in, particular concerning the attempt to raise the special plea relating to the arbitration clause. He contends that the application to amend is *mala fide* in particular consequent to the delay in instituting the same. He also refers to the engagement between the parties regarding the issue of the implementation of the

arbitration clause in the agreement. The issue was discussed between the parties at the pre-trial conference held on 22 September 2020 where the plaintiff opposed the referral of the matter to arbitration.

[22] According to him, the issue of delay should be understood in the context where the defendants seek the amendment after the heads of argument had already been delivered and the matter had been ready for hearing as of November 2020. His further complain is that the defendants do not explain why they delayed in bringing the amendments.

[23] The other point raised by the plaintiff is that the defendants have failed to deal with the issue of prejudice in their papers.

[24] Concerning the issue of the non-variation clause of the employment contract, the plaintiff contends that the equal treatment agreement did not constitute a variation of the employment agreement and further that the issue has become *res judicata* because this was resolved by the decision of Lamont J in the same matter.

Evaluation and analysis

[25] In my view, all the points raised by the plaintiff are not sustainable, when consideration is had to the facts and the circumstances of the case.[9] It is further my view that the issue raised in the special plea and amendments are real issues between the

[9] GMF Kontrakteur 1978 [2] SA 2019 (T) at 222B – D.

parties that deserve determination by the court. It is, thus, in the interest of justice that these issues be determined without being hindered by an overly technical and formalistic approach.[10] The key issue in this regard is to ensure proper ventilation of the issues raised in the proposed amendments. This approach will assist the court in determining whether prejudice exists or not and more importantly whether the interest of justice will be served by granting or declining the application.

[26] I am inclined to grant the defendants leave to amend the special plea because, in the first instance, I am not persuaded that the plaintiff has made out a case that the amendment would render the special plea excepiable.

[27] In my view, the complaint of *mala fide* by the plaintiff is also unsustainable. The complaint in this regard is mainly based on the delay in the prosecution of the action, more particularly because of the postponement of the matter when “it was ripe for a hearing,” according to the plaintiff.

[28] It is apparent from the papers that the overall delay in the prosecution of the proceedings cannot be blamed on the defendants only. The postponement was occasioned by the plaintiff’s failure to timeously file expert reports. The delay has also been occasioned by the applicant's earlier application to amend the particulars of claim.

[10] Four Tower Investment the Andrew's Motors 2005 [3] SA 39 (W) at 44.

[29] It is trite that an amendment to pleadings can be made any time before judgment as long as it is not *mala fide* or prejudicial to the plaintiff. I cannot entirely agree that the application to amend the special plea is *mala fide* or prejudicial to the plaintiff simply because it was made after the heads of arguments relating to the special plea had already been filed. In this respect, the nature of the dispute, the special plea and the amendments must be taken into account. The dispute involves, in the main, the written employment contract and the proposed amendments amongst others relate to whether the oral equal treatment agreement affects the non-variation clause in the written employment contract. The other issues relate to the jurisdiction of the court and the application of the arbitration clause in the employment agreement. These are issues of a technical legal nature that would make the defendants rely on the advice of their legal advisors. Their explanation for the proposed amendments is that the application was made following their counsel's advice.

[30] The complaint about introducing the arbitration clause at this stage of the proceedings is also unsustainable; regard being had to the facts and the circumstances of this matter. The issue has been alive between the parties since the institution of the proceedings. On the plaintiff's version, the defendants sought to resolve the issue through negotiations. The plaintiff can thus not complain of prejudice when he has always been aware of the stand taken by the defendant about this issue.

[31] It should be noted that the trial date in this matter is yet to be fixed. The proposed amendment in the first instance is made in the context of the trial preparation, and in the

circumstances, the plaintiff would have the opportunity to plead to the consequential amendment.

[32] The objection that the special pleas raised by the defendants are vague and embarrassing is also unsustainable. The objection is based on the contention that the defences:

(a) “amount to unnecessary duplication of the same objections.”

(b) “are mutually destructive and contradictory."

(c) there is "no proposed variation of the claimant contract.”

(d) the "no variation clause is *res judicata*."

(e) the proposed construction of clause 21.4 of the employment contract" would result in the invalid abandonment or waiver of the statutory and constitutional rights" of the plaintiff.

(f) lack of clarity as to which objections are raised in the alternative, and which stand-alone" and or "which paragraphs are proposed to be deleted."

[33] In my view, the above contentions are not substantiated and thus lack clarity as to which of the special plea amount to unnecessary duplication and which are mutually destructive or contradictory. The general reading of the special plea and the proposed amendment does not reveal any serious duplication to sustain the objection by the plaintiff.

[34] The contention that the proposed amendment will render the plea excepiable because the issue of the non-variation clause in the contract was raised and dealt with by Lamont J in his judgment of March 2019 is unsustainable. In other words, the contention that the issue of the applicability of the non-variation clause is *res judicata* has no merit. Lamont J in his judgment delivered in March 2019, held that the plaintiff was not required to plead a basis for reliance on the subsequent oral agreement in the particulars of claim but could do so in replication. This means that the issue was not finally determined so as to render the defence based on the non-variation clause *res judicata*.

[35] There is equally no merit in the objection that the proposed amendments ignore reliance by the plaintiff on the provisions of the BBBEE Act. The fact that the plaintiff in his claims relies on the provisions of that Act cannot be a valid reason to refuse the amendment, in particular when regard is had to the fact that this can be raised as a point of law. It is a point of law that arises on the basis of what the plaintiff in all his claims relies on; the employment relationship with the first defendant.

[36] It is common cause, as concerning the objection to the issue of jurisdiction, that one of the defendants is a *perigrinus* in South Africa. In this respect, the issue is whether this court lacks jurisdiction over that defendant. It is trite that the court may, under the following exceptions, assume jurisdiction over *perigrinus:*

(a) Consent to jurisdiction where a jurisdictional ground is present.

(b) Attachment to confirm jurisdiction.

(c) Service of the of the summons on the defendant while the defendants is in South Africa, where there is sufficient connection between the suit and area

[37] As pointed out by the defendants in the heads of argument, the plaintiff has not pleaded circumstances that would support the existence of the above exceptions. The acceptance of the service of the summons by the defendants in South Africa is insufficient to amount to consent to jurisdiction on the part of the defendants. It is apparent that the defendants have always disputed the jurisdiction of this court ever since the institution of these proceedings.

[38] The other complaint raised by the plaintiff concerns the proposed amendment to paragraph 56.5 of the plea. The complaint is that the proposed amendment under paragraph C1 and C2 amount to an impermissible introduction of events which occurred after the filing of the documents to be amended.

[39] The question of whether a new ground of defence can be raised once a plea has been filed was answered in Coppermoon Trading 13 (Pty) Ltd v Government of the Province of the Eastern Cape and Another,[11] in the following terms:

> "[16] In action proceedings, a special plea is raised in a defendant's plea filed in terms of Court Rule 22. In the present matter the defence raised by the application arose after the defendants had already filed their plea and the pleadings were closed. That in itself did not prevent the defendants from raising it. The appropriate procedure was however to seek an amendment of their plea in terms

[11] [1949/05] [2019] ZADCB HC 16, 2020 [3] SA391 [ECD] paragraph 16 to 17.

of Court Rule 28. A defendant will ordinarily be allowed to amend his plea where a new ground for defence comes to the defendant's knowledge for the first time after he has filed his plea, provided the application is bona fide and is not prejudicial to the plaintiff. (See *Flemmer v Ainsworth* 1910 TPD 81; *Combrinck v Strasburger* 1914 CPD 15; *Frenkel, Wise and Co Ltd v Cuthbert* 1947 (4) SA 715 (C), and *Erasmus Superior Court Practice* 2nd ed at page D-1-336.)

[17] In *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) (at 512 E – H), and *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) (at 928 D), it was stressed that a litigant that seeks to add a new ground of relief does not claim an amendment as a matter of right, but rather seeks and indulgence. It will require the litigant to prove that he did not delay the application to amend the pleadings after becoming aware of the evidentiary material on which he proposes to rely. He must further explain the reason for the amendment, and that it *prima facie* raises a triable issue (Erasmus, *op cit* at page D1 - 338)."

Costs

[40] The issue of costs in an application to amend pleadings in civil proceedings is governed by rule 28(9) of the Rules which provides:

"A party giving notice of amendment in terms of sub-rule (1) shall unless the court direct otherwise, be liable for the costs thereby occasioned to any other party."

[41] It is trite that an application for an amendment from the court amount to is seeking an indulgence and is thus usually the applicant is ordered to pay the costs unless the objection to the application is unmeritorious frivolous, or vexatious.

[42] In the circumstances of the present matter I see no reason why I should apply the exception provided for in rule 28(9) of the Rules. Accordingly, the costs of this application should be borne by the defendants.

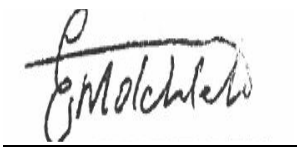
Conclusion

[43] In light of the above, I find that the defendants deserve leave to amend their plea, which is necessary for the proper ventilation of the real issues in dispute between the parties. The proposed amendments are made in good faith, and I do not believe that they will cause any undue prejudice or injustice to the plaintiff.

Order

[44] In the premises the following order is made:

1. The defendants are granted leave to amend their plea within ten days of date of this order.
2. The defendants are to pay the costs of this application on the party and party scale.



E Molahlehi

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, JOHANNNESBURG.

Representation:

For the applicant: Tembeka Ngcukaitobi SC.

Instructed by: ENSAfrica.

For the respondents: Jennifer Cane SC.

Instructed by: Eversheds Sutherland.

Heard on: May 2022

Delivered: 6 December 2022