IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 20141/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 14 FEBRUARY 2023

SIGNATURE: *ML SENYATSI*

In the matter between:

HYVE EVENTS S.A. LIMITED Applicant

and

THE AFRICAN ENERGY CHAMBER NPC First Respondent

N J AYUK Second Respondent

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 14 February 2023.*

JUDGMENT

SENYATSI J:

[1] This is an opposed application for leave to amend the notice of motion by inclusion of the additional offending publication material by the respondents.

[2] The applicant sued the respondent in motion proceedings in terms of which it seeks certain interdictory relief.

[3] Subsequent to the proceedings being issued, the respondents allegedly published additional offending material concerning the applicant. In the course of further research, the applicant discovered other alleged offending material which had been in existence prior to the institution of the proceedings. It is the additional alleged offending publication issued prior to the institution of the proceedings and additional alleged offending publication material subsequent to the issue of the notice of motion, that the applicant seeks to include in its application for leave to amend the notice of motion.

[4] The parties are competitors in arranging energy conferences in the African continent, but the applicant also does the conferences globally.

[5] The applicant contends that the proposed amendment will ensure that the dispute between the parties is fully ventilated and that leave should be granted for the amendment of the notice of motion.

[6] The respondents object to the amendment on the ground that it amounts to bringing new documents, because the applicant was aware that the pleadings in the application has closed when the delivery of their replying affidavit was filed. The respondents furthermore argue that they will be prejudiced by the proposed amendment as they will not be able to answer to the new allegations as prescribed by the Rules of Court.

[7] The respondents also contend that the new evidence to be introduced constitutes amending a sworn statement which is not allowed by Rule 28 of the Rules of Court. They contend that they will suffer injustice and prejudice by the proposed amendment that cannot be compensated by a costs order.

[8] The controversy in this matter is whether or not the respondent will suffer prejudice and injustice if leave is granted to amend the notice of motion.

[9] Both Mr Lamprecht for the applicant and Ms Leeuw for the respondents agree on the applicable principles that the court should have regard to relating to amendment of the pleadings.

[10] The legal principles are trite. party seeking an amendment bears the onus of showing that the amendment is made *bona fide* and that there is an absence of prejudice.[1] The general approach to an amendment of a notice of motion is the same as the summons or pleading in an action.

[11] In *Affordable Medicines Trust & Others v Minister of Health and Another*[2] the Constitutional Court approved the approach to be adopted in applications for

---

[1] Krische v Road Accident Fund 2004 (4) SA 358 (W) at 363
[2] 2006 (3) SA 247 (CC) at 261 C

leave to amend the pleadings and described same which was stated as follows by Watermeyer J in *Moolman v Estate Moolman*[3]:

> "... The practical rule adopted seems to be adopted that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[12] The question, in each case, is what the interest of justice demand[4] and in practical terms, a court retains a discretion whether or not to allow an amendment, which must be exercised judicially, in the light of all the facts and circumstances and which is only limited by considerations of prejudice or injustice to the opposing party which cannot be compensated by costs.[5]

[13] In principle, therefore, an amendment will be allowed if it is *bona fide*[6] in a sense that, *inter alia*, *prima facie*, a triable issue exists between the parties and the opposing party will not suffer prejudice, which cannot be avoided by a postponement or compensated by cost.[7]

---

[3] 1927 CPD 27
[4] Moolman at 26C
[5] Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 637; Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A) at 565 F – G; Cibi-Geig (Pty) Ltd v Lushof Farms (Pty) Ltd 2002 (2) SA 447 (A) at 462.
[6] Trans-Drakensberg Bank Ltd (supra) at 643 C
[7] Greyling v Nieuwoudt 1951 (1) SA 88 (0) at 91

[14] The introduction of a new cause of action has also been recognised as a reason for amendment. In affirming this approach, Hill J in *OK Motors v Van Niekerk* said the following:

> "It is for the reasons of convenience that fresh causes of action may be incorporated in original proceedings even if such fresh cause of action have arisen after the issue of summons. (*See Pullen v Pullen 1928 WLD 133*)". This approach was followed in many subsequent cases by our courts.[8]

[15] In *Erasmus: Superior Court Practice*, the issue is approached as follows:

"The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. The following statement by Watermeyer J in *Moolman v Estate Moolman* [1927 CPD 27 at 29] has frequently been relied upon:

'[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

> The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent."[9]

---

[8] MacDonald, Forman & Co v Van Aswegen 1963 (2) SA 150 (O) at 153 H – 154 A; Fiat SA Ltd v Bill Troskie Motors 1985 (1) SA 355 (O) at 357 G – H; Tengwa v Metro Rail 2002 (1) SA 739 (C) at 745H

[9] D E van Loggerenberg *Erasmus: Superior Court Practice* 2 ed (2015) Vol. 2 (RS 11, 2019, D1-332) (footnotes omitted).

[16] I now turn to deal with the grounds of objection and apply the principles set out above.

[17] The first objection is based on the ground that the proposed amendment amounts to bringing new documents whilst the applicant is aware that the pleadings in this application have closed by delivery of the replying affidavit. The reasons for introducing new material allegations are dealt fully in the affidavit by the applicant. It is also correct that some of the further offending publications were published subsequent to the issuing of the main application. The post-issue of the further offending publications was discovered after the proceedings commenced. I have no difficulty in accepting the explanation proffered by the applicant. Consequently, I do not see how the introduction of further offending publication will be to the prejudice of the respondents. On the contrary, the introduction of the further offending publication will certainly ensure that the dispute between the parties is fully ventilated and in any view, this is in the interest of justice. The introduction of the amendment is *bona fide*.

[18] The respondents furthermore, contend that the proposed amendment will be to their prejudice as they cannot answer to the new allegations as prescribed by the Rules of Court and will require an application to be made for leave of the Court and that the costs of amendment were not tendered. During the hearing of the matter, Mr Lamprecht submitted that the applicant invited the respondents to file a supplementary affidavit following the proposed amendment. In my view, once the applicant consents to the filing of a supplementary affidavit to deal with the additional averments contained in the proposed amendment, there is no need to seek leave of the court to file a

supplementary affidavit. As a consequence, the alleged prejudice is not well supported by facts and the objection must therefore fail.

[19] The respondents also argued that the pre-issue of the application further offending publication was always available to the applicant when the application was issued. During the argument of this matter, Ms Leeuw was invited to comment on the proposition whether or not the Rules of Court prohibit the amendment of a pleading to introduce material that was available at the issue stage of the application but discovered after issue. She conceded that the Rules do not prohibit the amendment of the pleading to introduce such material. I find no basis to reject the basis upon which the applicants' leave to amend the notice of motion should be rejected. Accordingly, the objection is rejected.

[20] The respondents argue furthermore that the proposed amendment amounts to the amendment of a sworn statement, not permitted by Rule 28 and that the amendment is *mala fide*.

[21] Rule 28 deals with amendments to pleadings and documents. It covers distinct situations of the amendment of any pleadings or document other than a sworn statement filed in connection with any proceedings consequent upon a party who intends such pleading or document having given notice of such intention to amend. The second scenario is that the Rule permits the court, other than in circumstances contemplated is sub rules (1) to (9) at any stage before judgment granting leave to amend any pleading or document.

[22] It is true that a sworn statement is not permitted to be amended because it constitutes the evidence before court in a written form.[10] An amendment of an affidavit would amount to a change of evidence which had been given on oath, by way of a mere notice. A party who wishes to change his evidence given on oath must do so on oath, if necessary by way of a further affidavit.[11]

[23] The question is whether the proposed amendment amounts to changing evidence given on oath by way of an affidavit. The answer is negative. There is no attempt by the applicant to amend its founding affidavit. There is no basis that by the proposed amendment of notice of motion, this is an attempt to amend the founding affidavit. The circumstances under which the applicant seeks to amend the notice of motion demonstrates that it is a *bona fide* amendment. The objection must therefore fail.

[24] Finally, the respondents contend that they will suffer injustice and prejudice that cannot be compensated by a costs order if the proposed amendment is allowed. The applicant expressly invited the respondents to file a further supplementary affidavit to deal with the introduction of the new offending publication following the amendment. The applicant does not preclude the respondent from filing any supplementary affidavit to deal with the new proposed material relating to the further alleged wrongful conduct by the respondents.

---

[10] S v Opperman 1969 (3) SA 181 (T) at 184F
[11] Brummund v Brummund's Estate 1993 (2) SA 494 (NmHC) at 498E

[25] The question of costs does not arise under the circumstances. To the contrary, it is the respondent's objection to the proposed amendment which results in unnecessary additional costs to be incurred.

[26] Accordingly, I am of the view that the applicant has met the requirements contained in Rule 28, for leave to be granted for the proposed amendment of the notice of motion.

ORDER

[27] It is ordered that:

(a) The applicant is granted leave to amend its notice of motion in accordance with its notice of amendment dated 1 August 2023; and

(b) The respondents are directed to, jointly and severally, pay the costs of the application for leave to amend on a party and party scale.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 08 February 2023

DATE JUDGMENT DELIVERED: 14 February 2023

APPEARANCES

Counsel for the Applicant: Adv A Lamprecht

Instructed by: Werksmans Incorporated

Counsel for the Respondent: Adv L Leeuw

Instructed by: Bazuka and Company Inc.