IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

12/6/2014

Case Number: 47245/2013

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

12.06.2014 DSMolefe
DATE SIGNATURE

In the matter between:

GLEN WILLIAM HARRIS N.O.	**FIRST APPLICANT**
RENE-LYNNE BARRY-KLEYNHANS N.O.	**SECOND APPLICANT**
GREYSTONE TRADING 820 CC	**THIRD APPLICANT**
(In Liquidation)	
and	
MUHANGA MINES (PTY) LTD	**RESPONDENT**

JUDGMENT

MOLEFE, J:

[1] This is an application in terms of which the applicants seek the leave of the court to amend their notice of motion. The application is opposed by the respondent.

Factual Background

[2] The first and second applicants are joint liquidators of the third applicant (in liquidation). The respondent is a creditor in the estate of the third applicant.

[3] On 1 August 2013, the applicants launched an application under the above-mentioned case number in terms of which it sought orders in the following terms:

> *3.1 That all payments made by the Respondent and on behalf of Greystone Trading 820 CC (in liquidation) and as per the schedule attached to this notice of motion as annexure "X" be set aside as a collusive dealing before the liquidation of Greystone Trading 820 CC and in terms of section 31 (1) of the Insolvency Act, 24 of 1936;*
>
> *3.2 That the Respondent being a party to a collusive disposition be held to be liable to make good any loss thereby caused to the insolvent estate in question, and that the Respondent be ordered to pay for the benefit of the estate by way of a penalty, such sum as the Honouable Court may adjudge, not exceeding the amount by which the Respondent benefited and as envisaged in terms of the provision of section 31 (2) as read with section 31 (3) of the Insolvency Act, 24 of 1936;*
>
> *3.3 In the alternative to prayers 3.1 and 3.2 above, that the payments made by the Respondent and on behalf of the insolvent company, Greystone Trading 820 CC as set out in annexure "X" be set aside as a voidable preference as set out in terms of the provisions of section 30 of the Insolvency Act, 24 of 1936;*

3.4 In a further alternative to prayers 3.1, 3.2 and 3.3 above that the payments made by the Respondent and on behalf of the insolvent company, Greystone Trading 820 CC, be set aside as a voidable preference as set out in terms of the provisions of section 29 of the Insolvency Act 24 of 1936;

3.5 That the respondent be ordered to pay the applicants the amount of R8 656 309, 30, (Eight Million Six Hundred and Fifty Six Thousand Three Hundred and Nine Rand and Thirty Cents) being the total of the payments made by the Respondent and ostensibly on behalf of Greystone Trading 820 CC and as per the schedule attached to the notice of motion as annexure "X";

3.6 That the Respondent be ordered to pay the costs of this application on an attorney and own client scale.

3.7 Further and/or alternative relief.

[4] *In limine,* the respondent in the answering affidavit raised a contention that they were of the view that neither the provisions of section 29, 30 or 31 of the Insolvency Act ("the Act") entitled the applicants to obtain the relief sought in prayers 1, 2, 3, 4 and 5 of the notice of motion and that the relief could not be granted upon the facts as set out in the founding affidavit.

[5] Consequently, and in reply, the applicants indicate that it has always been their intention to seek the setting aside of the payments insofar as it constitutes a discharge in respect of the admitted indebtedness of the respondent to the third applicant. The applicants attached an amended notice of motion, which they state they will seek to move at the hearing of the application.

[6] The amendment sought by the applicant in the amended notice of motion is in effect the following:

> 6.1 Insofar as paragraph 1 of the notice of motion is concerned, by including the words *". . . . insofar as it is alleged that they constitute a discharge of debt owed by the respondent to the third applicant"* at the end of the paragraph;
>
> 6.2 By amending paragraph 2 by inserting the words *"being the sum of R8 656 309, 30"*;
>
> 6.3 By amending paragraph 3 and 4 of the notice of motion by including the words *"- - - - insofar as it is alleged that they constitute a discharge of the debt owed by the respondent to the third applicant"* at the end of the paragraph.

[7] Subsequent to the filing of the applicant's replying affidavit and on 8 October 2013, the respondent filed a notice in terms of Rule 30 (2) (b) and Rule 30A that the applicants were required to bring a formal application for amendment prior to amending its notice of motion.

[8] Consequently, and on 22 October 2013 the applicants filed a notice of intention to amend in terms of Rule 28 in terms of which the amendments as set out in the amended notice of motion are proposed.

[9] The respondent subsequently filed a Rule 28 (4) objecting to the proposed amendment in terms of which the respondent contends that it is prejudiced by the proposed amendments in that:

9.1 it contains a new cause of action which is introduced in the replying affidavit to which the respondent has not been afforded an opportunity to respond;

9.2 the relief sought in terms of the proposed amendment is not supported by evidence in the founding affidavit;

9.3 the evidence in support of the relief claimed in the proposed amendment is inadmissible and ought to be struck out from the replying affidavit;

9.4 the relief sought in the proposed amendment is inconsistent with the case upon which the respondent was called on to meet in its answering affidavit;

9.5 there is no explanation by the applicants as to the late introduction of the amendment of the notice of motion.

[10] Subsequent to the respondent's objection to the amendment, applicants have launched the current application for leave to amend which is before me.

[11] Applicants' counsel[1] submitted that the general approach to be adopted in applications for amendment has been set out in numerous cases[2], however 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 or costs and where appropriate a postponement. Counsel relied in ***Union Bank of SA Ltd v Wolff 1939 WLD 222 at 225.***

[12] Counsel for the applicants argued that the amendment is not material and does not results in an insurmountable prejudice to the respondent. From the

[1] Adv. J Hershensohn
[2] Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 638 A

applicants' founding affidavit, it is clear that the applicants wanted to claim monies from the respondent, which the respondent allege that payments made to the creditors constitutes a discharge of debt owed by the respondent to the third applicant.

[13] Applicant's counsel further argued that if the amendment is granted, the respondent may file a supplementary affidavit to make consequential adjustments to its documents and addressing the issues which the respondent feels it is prejudiced by. Furthermore, the applicants are in terms of Rule 28, to tender the wasted costs occasioned by the proposed amendment which tender has been made in the notice of amendment.

[14] Respondent's counsel[3] submitted that the relief sought by the applicants is incompetent and inconsistent with the provisions of the Act relied upon. Counsel argued that the effect of the relief sought by the applicants in the notice of motion, is to set aside the payments made by the respondent to third parties, who are not joined in these proceedings, and for the relief the Act makes no provision. It is counsel's contention that the entities referred to in annexure "X", ought to have been joined in the proceedings as they had a material and direct interest in the subject matter of the relief sought in the application.

[15] Counsel for the respondent argued that there is no evidence in the founding affidavit of any loss suffered by the third applicant or its creditors as a consequence of the payments by the respondent to the creditors of the third applicant. The respondent relies on the terms of a written contract between the respondent and the third applicant in terms of which the respondent was contractually entitled, in the

[3] Adv. Philips Daniels SC

course of its contractual relationship with the third applicant, to make payments to the said third parties, in the event of the third applicant not doing so. It is counsel's argument that the applicants sought to introduce an entirely new claim in the replying affidavit for different relief to that sought in the notice of motion. This necessitated the amendment of the notice of motion, which according to the respondent's counsel was done in an irregular manner. Furthermore, counsel argued that there are no allegations in the founding affidavit that the payments made by the respondent to those entities referred to in annexure "X" constituted a discharge of the indebtedness of the respondent to the third applicant. Accordingly, the relief sought by the applicant in the amended notice of motion cannot be sustained.

[16] It is the contention of the respondent's counsel that payments made by the respondent to the third party creditors of the third applicant, cannot conceivably constitute a collusive dealing or a voidable disposition, or an undue preference to the prejudice of the creditors of the third applicant. If anything, the creditors of the third applicant benefitted from such payments because those creditors who were paid, were no longer creditors in the estate of the third applicant.

[17] Respondent's counsel argued that there were deficiencies in the applicant's notice of amendment; the amendment is not supported by an affidavit; therefore there is no explanation for the lateness of the notice of amendment, no evidence to explain the *bona fides* and no explanation for the new case which is made in reply. Counsel in this regard relied in the case of ***Oblowitz Bros v Guardian Insurance Co Ltd 1924 CPD at 84.***

It is counsel's contention that the amendment is substantial, and attempts to address and change the cause of action of the applicants. It was therefore necessary for the

applicants to explain on oath why the amendment is sought. It is counsel's submission that, not only is it improper for the applicant to introduce a new case in a replying affidavit, but the evidence will be inadmissible and cannot be relied upon to support the new relief sought in the notice of motion. In the circumstances the applicants, in seeking an amendment, after having heard and considered the respondent's defence is not *bona fide.* It is counsel's argument that the prejudice which the respondent stands to suffer if the amendment is granted cannot be cured by a postponement.

Applicable Legal Principles

[18] The party seeking an amendment bears the onus of showing that it is made *bona fide* and that there is an absence of prejudice[4]. The granting or refusal of an application for the amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. The tendency of South African courts has been to allow amendments where this can be done without prejudice to the other party. In ***Moolman v Estate Moolman***[5], Watermeyer J reflected the widely held view of our courts when he remarked that:

> *"the 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".*

[4] Krische v Road Accident Fund 2004 (4) SA 358 (W) at 363
[5] 1927 CPD 27 at 29

[19] In ***Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co Ltd***[6] the court relied on certain passages quoted in ***Rishton v Rishton***[7] from English decisions to the same effect:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise".*
>
> And:
>
> *"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no prejudice if the other side can be compensated by costs".*

[20] In ***Trans-Drakensberg Bank Ltd*** case **supra** the court held that the primary object of allowing an amendment is *"to obtain a proper ventilation of the dispute between the parties"*. The vital consideration in the decision whether to grant an amendment is whether the amendment will cause the other party *"such prejudice as cannot be cured by an order for costs and where appropriate, a postponement".*

[21] In *casu,* the applicants in the founding affidavit relied on the provision of sections 29 (i); 30 or 31 of the Act. The applicants sought an order in terms of which the dispositions in annexure "X" are declared disposition without value, alternatively are declared voidable preferences, further alternatively are declared an undue

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[6] 1923 TPD 718 at 720
[7] 1967 (3) SA 632 (D) at 637 A – 641 C

preference to creditors, further alternatively are declared a collusive dealing before sequestration.

Section 29 (1) of the Act provides as follows:

> "**Voidable preference**
>
> *(1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another".*

Section 30 (1) of the Act provides as follows:

> "**Undue preference to creditors –**
>
> *(1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another and his estate is thereafter sequestrated, the court may set aside the disposition".*

Section 31 of the Act provides as follows:

"**Collusive dealings before sequestration**

(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question".

[22] I am of the view that there is no evidence in the founding affidavit to support the relief sought by the applicants in the notice of motion. The consequent proposed amendment clearly contains a new cause of action, and which was only introduced in the replying affidavit. The relief sought in the proposed amendment is inconsistent with the case upon which the respondent was called on to meet in its answering affidavit. Furthermore, the proposed amendment is not supported by evidence in the founding affidavit. The application to amend would, in my view, cause an injustice to the respondent as the proposed amendment will put the respondent in a different position they were when the notice of motion which it sought to amend was filed. The prejudice which the respondent stand to suffer if the

amendment is granted cannot be cured by a postponement or costs (tendered by the applicants).

[23] Where no cause of action existed at the time of the issue of summons, the courts have been prepared to allow an amendment to introduce a cause of action which have come into existence or have been perfected after the issue of summons only upon proof of "*exceptional or special circumstances*[8]".

[24] Regarding the respondent's objection to the amendment on the basis that it was not supported by an affidavit, it has been held that the application to be made in terms of subrule 28 (4) is not an application where the formal notice of motion procedure supported by affidavit as contemplated in rule 6 (1) has to be used. Claasen J in ***Swartz v Van der Walt\ T\A Sentraten 1998 (1) SA 53 at 57*** stated as follows:

> "*In cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admission".*

[25] Delay in bringing the application for leave to amend will not in itself constitute a sufficient reason for refusing the amendment. (See ***Trans-Drakensberg Bank Ltd case supra***). Where however, the delay causes prejudice to the other party which cannot be cured by an order for costs and (where appropriate) a postponement, the amendment will generally be refused. An explanation for the delay should be furnished.

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[8] Western Bank v Wood 1969 (4) SA 131 (D) at 136

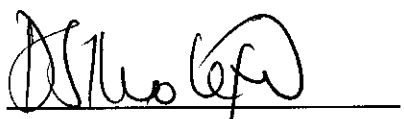
In ***Rossouw v Bonthuys 1933 CPD 201*** the court indicated that a party applying for an amendment of the pleading should explain on affidavit why the pleading was not put in proper order at the outset.

In *casu*, the applicants did not explain the substantial proposed amendment not the delay in bringing the application for leave to amend.

[26] Due to the above-mentioned reasons, it is my view that the respondents stand to suffer prejudice by the proposed amendment which may not be cured by costs nor by a postponement.

[27] In the circumstances, the following order is made:

The application for the amendment of the notice of motion is dismissed with costs.



D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicants	:	**Adv. J Hershensohn**
Instructed by	:	**Deysel Attorneys**
Counsel on behalf of Respondent	:	**Adv. Philips Daniels SC**
Instructed by	:	**Malan Scholes INC.**
Date Heard	:	**26 March 2014**
Date Delivered	:	**12 June 2014**