IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 22557/2015

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

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SIGNATURE **DATE**

In the matter between:

SUMMER SEASON TRADING 63 (PTY) LTD APPLICANT

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY FIRST RESPONDENT

THE ILLEGAL OCCUPIERS OF THE REMAINING EXTENT OF PORTION 34 OF THE FARM KAMEELZYNKRAAL 547 JR SECOND RESPONDENT

THE MEC FOR THE DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING, GAUTENG THIRD RESPONDENT

THE MINISTER OF HUMAN SETTLEMENTS FOURTH RESPONDENT

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS FIFTH RESPONDENT

THE PREMIER OF THE GAUTENG PROVINCE SIXTH RESPONDENT

JUDGMENT

BASSON J

INTRODUCTION

[1] This is an application by Summer Season Trading 63 (Pty) Ltd ("Summer Season") in terms of Rule 28 of the Uniform Rules of Court to amend its Notice of Motion dated 26 March 2015 in the main review application under case no: 22557/2015 by replacing it with the Amended Notice of Motion dated 16 November 2018.

[2] When the first respondent ("the City of Tshwane") objected to the proposed amendment, Summer Season made application for leave to amend the (original) Notice of Motion in an application dated 7 December 2018. The only parties before court and who have an interest in this application are Summer Season and the City of Tshwane.

[3] In the original (or existing) Notice of Motion, Summer Season seeks to review and set aside the expropriation of the City of Tshwane by Notice of Expropriation dated 11 March 2015 ("the first expropriation notice"). In the proposed Amended Notion of Motion, Summer Season seeks to amend the (original) Notice of Motion to provide (*inter alia)* for an order reviewing and setting aside the withdrawal of the first notice of expropriation (dated 11 March 2015) and for an order that the second expropriation notice dated 26 October 2018 be reviewed and set aside ("the second notice of

expropriation"). In essence, the proposed amendment seeks to introduce a review of an expropriation notice that was only issued *subsequent* to Summer Season having launching the present review application in terms of the Notice of Motion dated 26 March 2015. The relevant issue in this application is whether this court should allow Summer Season to introduce a further or new cause of action to the present review application to provide for a review of the second expropriation notice.

BACKGROUND

The first notice of expropriation – 11 March 2015

[4] Summer Season is the registered owner of the Remaining Extent of Portion 34 of the farm Kameelzynkraal situated towards the east of Pretoria ("the property"). The City of Tshwane expropriated the property in a Notice of Expropriation dated 11 March 2015 ("the first expropriation notice"). As already pointed out, Summer Season brought this application to review and set aside this Notice of Expropriation (attached to the original Notice of Motion).

[5] The property is occupied by a large number of illegal occupiers in an informal settlement that is known as Kanana Village. Various court actions preceded this application. It is not necessary to refer to those proceedings in detail except to mention that an eviction order was granted at some stage against the Kanana Village and its occupiers with extensive orders against the City of Tshwane regarding the relocation of the occupiers. The City of Tshwane and the occupiers brought unsuccessful applications for leave to appeal against the eviction order in this court to the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court dismissed the application for leave to appeal against the eviction order on 14 May 2014. The matter then served before Muller AJ on 28 November 2014. The court ordered the City of Tshwane to file its report by 12 January 2015. Its response was that, although the property is not suitable for permanent development, it is sufficient to temporarily accommodate the occupiers and then stated that it would expropriate the property for those purposes. It did so in the Notice of Expropriation dated 11 March 2015 which forms the subject matter of the pending review application ("the first expropriation notice").

The second notice of expropriation

[6] On 29 October 2018 Summer Season's attorneys received two documents from the City of Tshwane. The first document informed Summer Season that the City of Tshwane was withdrawing the (first) notice of expropriation. In the second document, Summer Season was informed that the City of Tshwane again expropriated the property with immediate effect. In paragraph 3 of the Notice of Expropriation dated 26 October 2018, the basis of the expropriation was stated to be "Public purpose … to settle the Kanana village on the property described above". The first notice of expropriation was withdrawn in terms of section 23 of the Expropriation Act[1] pursuant to a resolution by the Council of the City of Tshwane on 24 October 2018 to expropriate the property.

[7] In the papers Summer Season refers to this withdrawal as a "purported withdrawal" arguing that the ("purported") notice to withdraw and the second expropriation notice were legally ineffective. It contends, in the alternative, that these alleged decisions reflected in the two documents are to be reviewed and set aside. From the supplementary affidavit before court it appears that Summer Season will argue that the City of Tshwane could not withdraw the first expropriation notice without its written consent and that it had previously requested the City of Tshwane to withdraw the second expropriation notice.

[8] This issue is, of course, an issue that will have to be decided as part and parcel of the review (if the amendment is granted). These contentions are, however, relevant in these proceedings in as far as they impact this court's discretion whether or not to grant the amendment. I will return to this issue hereinbelow.

[9] The crux of the opposition to the proposed amendment of the Notice of Motion is the City of Tshwane's contention that the second notice of withdrawal constitutes a new decision separately reviewable in terms of Rule 53 of the Uniform Rules. Summer Season disagrees and submits that this further attempt to expropriate the property is but a continuation of the same conduct that forms the subject matter of the pending review.

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[1] 63 of 1975.

[10] The City of Tshwane remains adamant that it was entitled to withdraw the previous expropriation and, in the same notice, again expropriate the applicant's property for a second time. It is of the view that Summer Season's attempt to now attempt to expand the initial review application (which was confined to the March 2015 decision to expropriate) to include the two subsequent decisions by the City of Tshwane by way of amending its Notice of Motion and filing a supplementary affidavit, is procedurally improper.

The first respondent's objection to the proposed amendment

[11] The objections raised (and expanded upon in the heads of argument filed on behalf of the City of Tshwane) are the following:

(i) The first objection is that it is impermissible for Summer Season to seek to introduce a new cause of action founded on decisions taken in October 2018 when the founding affidavit supported a cause of action founded on the expropriation of March 2015.

(ii) The second objection is that the withdrawal decision contained in the document dated 23 October 2018 and signed on 26 October 2018 is a new decision separately reviewable in terms of Rule 53 of the Uniform Rules of Court.

(iii) The expropriation decision, contained in a document dated 23 October 2018 and signed on 26 October 2018, is a new decision separately reviewable in terms of Rule 53 of the Uniform Rules of Court.

(iv) The fourth objection is that the proposed amendment is legally incompetent and prejudicial to the first respondent.

[12] Summer Season submits that it is in the interests of justice for this court to grant the amendment and that both purported expropriations can and should be dealt with in the same review application. Summer Season, with reference to a legal opinion that served before the Council when the resolution was taken which led to the second

expropriation notice, points out that Council was advised at that stage that the first expropriation was unlawful and not in accordance with the applicable legislation (for reasons not relevant at this stage). Summer Season submits that, despite this legal advice the City of Tshwane made the same mistakes when it again expropriated the applicant's property after the withdrawal of the 11 March 2015 Notice of Expropriation.

[13] Summer Season further contends that this is why substantially the same grounds of review therefore apply in respect of both expropriations.

[14] It is important to point out that the record of proceedings in respect of *both* expropriations have now been filed with the court. Summer Season submits that it would not serve any purpose, and it would not be in the interest of any of the parties, to compel it to bring a new (separate) review application in respect of the second expropriation, simply repeating what is already before the court in the present application: It is, according to Summer Season, not in the interests of justice to have two hearings into essentially the same subject matter.

PRINCIPLES

Although Mr. Mokhare (for the City of Tshwane) did not take issue with Mr. Havenga's (for Summer Season) exposition of the law and the general approach of our court's towards amendments, I will nonetheless briefly set out what these principles are and why I have decided to exercise my discretion to allow the amendment to the Notice of Motion.

[15] The general approach to amendments is set out in *Moolman v Estate Moolman:*[2]

> "[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 is sought to be amended was filed".

[2] 1927 CPD 27 at 29.

[16] It is accepted that the primary object of allowing an amendment is to "obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done"[3]. Where an amendment will facilitate the proper ventilation of the dispute between the parties, a court will be inclined to grant same.[4]

[17] The general approach therefore seems to be that a court will be inclined to allow material amendments limited only by considerations of prejudice or injustice to the opponent.

[18] The disputed issue in this application is whether an amendment amounting to the introduction of a *new cause of action* should be allowed. Although it is accepted that a court should always be mindful of the considerations set out hereinabove, allowing an amendment in such circumstances, is not unusual. In *Bankorp Ltd v Amderson-Morshead,*[5] the court allowed an amendment even in circumstances where a new cause of action was introduced where there was no valid cause of action in the summons. A similar approach was followed in *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1).*[6] The court in the latter case granted leave to amend the summons to complete a cause of action where no cause of action existed at the time when the summons was issued and even where it had the effect of constituting a substantially new summons (as from the date when the summons was issued). In *Fiat SA (Pty) Ltd v Bill Troskie Motors,*[7] the court granted the amendment, *inter alia*, on the basis that it would be *convenient* to do so even though the amendment resulted in fresh causes of actions to be incorporated:

> "I do not intend to burden this judgment with the principles which should be considered in deciding whether to grant or refuse an application for leave to amend a pleading. These principles have been fully dealt with in *Trans-Drakensberg Bank Ltd (under*

[3] *Viljoen v Baijnath* 1974 (2) SA 52 (N) at 53H.
[4] *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 77 F-H.
[5] 1997(1) SA 251 (W).
[6] 1976 (1) SA 93 (W).
[7] 1985 (1) SA 355 (O) at 357 G-H.

Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D).

It is true that applicant has delayed for a considerable time in bringing this application. Although there is no explanation for this delay, it does not appear to me that the applicant is mala fide, or that the application has been brought to delay the proceedings. It also does not appear to me that the respondent would be prejudiced by the proposed amendments. (Cf Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another (supra at 642).) I am therefore of the view that the application should not be refused on the grounds set out in (a) and (c) above.

In *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) at 152 HILL J stated:

> "It is for reasons of convenience that fresh causes of action may be incorporated in original proceedings even if such fresh causes of action have arisen after the issue of summons. (See Pullen v Pullen 1928 WLD 133.)"

POTGIETER J, as he then was, approved of these remarks in *Mac-Donald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 154. A perusal of the new claims reveals that these claims also relate to the trading relationship which gave rise to the original claims. This, in itself, is in my view a strong indication that it would be convenient to incorporate the fresh causes of action in the original proceedings. There is in my judgment no merit in the opposition based on ground *(d)*."

[19] Where it is practical to do so, a court may also be persuaded to grant an amendment. The court in *Philotex (Pty) Ltd and Others v Snyman and Others; Textilaties (Pty) Ltd and Others v Snyman and Others* held:[8]

> "On the other hand, practical considerations have in the past dictated that causes of action which arose after issue of summons be joined to the existing ones in the same action (see *OK Motors v Van Niekerk (supra)*; *Pullen v Pullen* 1928 WLD 133; *Ritch v Bhyat (supra* at 592); *Van Deventer v Van Deventer and Another* 1962 (3) SA 969 (N); and see also *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856G-857A).

[8] 1994 (2) SA 710 (T) at 716G-I.

> This is not the *ex post facto* introduction of a fresh cause of action to an action between parties who are properly before Court, because there is no objection to the *locus standi* of some plaintiffs. The effect of this amendment is that it seeks to introduce parties to an existing action with causes of action which arose after the issue of summons."

[20] Ultimately, however, the overarching consideration will be whether or not it is in the interests of justice to allow the amendment. In the decision of *Affordable Medicines Trust and Others v Minister of Health and Others,*[9] the Constitutional Court echoed the well-known principles developed over many years but added that the question ultimately should always be "what do the interest of justice demand?":

> "[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or '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'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?"

EVALUATION

[21] Although the arguments on behalf of the City of Tshwane ultimately were more succinct, I nonetheless find it necessary to briefly deal with the objections as they are set out in the heads of argument filed on behalf of the City of Tshwane.

The first objection

[22] The first objection is that it is impermissible for Summer Season to seek to introduce a new cause of action founded on the decisions taken in October 2018 "when the founding affidavit support the cause of action founded in the expropriation of March 2015".

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[9] 2006 (3) SA 247 (CC).

[23] The City of Tshwane submits that the circumstances in this case are not exceptional so as to warrant such an intrusive amendment. It is further submitted that the amendment sought by Summer Season is not in the interests of justice and will cause prejudice or an injustice to the City of Tshwane if the amendment is allowed.[10] It is also submitted that the relief now sought to be introduced by Summer Season is quite evidently substantively different in nature.

[24] There is no merit in either of these submissions. At the outset, the mere fact that a new cause of action is introduced, does not in itself, prevent a court from granting an amendment. It may, as is evident from the case law, be convenient or practical to incorporate fresh causes of action in original proceedings.[11] Only where such an amendment introduces a new cause of action that would cause prejudice to the other party will the court refuse such an amendment. There is, however, no such prejudice in the present case since the City of Tshwane has not filed any answering affidavits yet and will still have the opportunity to oppose the review application on its merits in respect of both expropriations. Also, the record in respect of the second expropriation notice has been filed and is before court.

[25] An important consideration in favour of granting the amendment is the fact that a refusal will only result in Summer Season bringing a second review application involving the same parties and pertaining to the same issues before court in the present review application. Furthermore, if a court ultimately finds that there is merit in the submission that the City of Tshwane could not competently withdraw the first expropriation notice and issue the second one, it is not only practical but also, in my view, in the interests of justice to allow Summer Season to introduce a further or new cause of action; namely an application to review and set aside the second expropriation notice. The events which gave rise to the second expropriation notice are closely tied up with the events that gave rise to the first expropriation notice and

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[10] *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G.
[11] See *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) at 152C: "It is for reasons of convenience that fresh causes of action may be incorporated in original proceedings even if such fresh causes of action have arisen after the issue of summons. (See *Pullen v Pullen,* 1928 W.L.D. 133)." See also *MacDonald Forman & Co. v Van Aswegen* 1963 (2) SA 150 (O) at 153H – 154A and *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 357 G-H.

the events that gave rise to the withdrawal of the first expropriation notice and the issuing of the second expropriation notice. If Summer Season is compelled to launch a further review application pertaining to the second notice of expropriation, this court may well be called upon further down the line to consider an application to consolidate the two review applications. Not only is this impractical and a waste of public resources (in the case of the City of Tshwane), it is in turn not in the interest of justice.

[26] In as far as it is required that exceptional or special circumstances must exist before an amendment introducing a cause of action not existing at the time when proceedings were initiated would be allowed, I am of the view that such special circumstances have been established by Summer Season.[12]

[27] I am also in agreement with the sentiments expressed by Harms in his section on *Civil Procedure: Superior Courts*[13] where he states, with reference to *Du Toit v Vermeulen,*[14] that:

> "The requirement that a cause of action has to exist at the time of the initiation of the action is something that may have to be reconsidered. A strict approach may be too technical".

[28] In conclusion therefore: Apart from the fact that there are, in my view, exceptional circumstances present, it is further in the interests of justice and the speedy resolution of the dispute between the parties that the amendment introducing the new cause of action based on the new decisions, be allowed to be adjudicated in the same proceedings. It cannot be ignored that both expropriations were in respect of the same property and taken for similar reasons and based on the same facts. Summer Season's case for the review and setting aside of both expropriations will therefore essentially be the same grounds of review and relying on the same background facts.

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[12] See *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); Barclays *Bank International Limited v African Diamond Exporters (Pty) Ltd* 1976 (1) SA 93 (W); *Bankorp Limited v Anderson-Morshead* 1997 (1) SA 251 (W) and *Solomon v Spur Cool Corporation Limited* [2002] 2 All SA 359 (C) at 368.
[13] Volume 4 (third edition replacement) of LAWSA.
[14] 1972 (3) SA 848A at 856 – 857.

The second objection

[29] The second objection is that the "withdrawal of the decision contained in the document dated 23 October 2018 and signed on 26 October 2018 is a new decision separately reviewable in terms of Rule 53 of the Uniform Rules of Court".

[30] In this regard it is submitted that the decisions by the City of Tshwane to withdraw the 10 March 2015 expropriation notice constitutes a new and separate decision from the decision to expropriate on 10 March 2015. Similarly, the decision to adopt the Council resolution to expropriate on 24 October 2018 is a new and separate decision from both the decisions related to 10 March 2015. It is argued that the decision followed different processes and therefore introduced different causes of action for Summer Season. It follows, according to the City of Tshwane, that these decisions, if reviewable, must be reviewed separately. Summer Season's approach to review proceedings is thus improper in that it is improper to circumvent the rules of court by attempting to bring one review application for separate decisions. The City of Tshwane further argues that Summer Season ought to have instituted Rule 53 proceedings in respect of each separate decision. By following this procedure, it would have had to request the record for the 2018 decisions in order to adequately interrogate the decisions before bringing the review applications. The extended purported review application is therefore premature in respect of the two 2018 decisions.

[31] I have already largely dealt with these arguments where I deal with the first objection. There is no merit in these submissions. Ultimately, this court has to decide what do the interests of justice demand?

[32] The City of Tshwane also contends that the initial review application has indeed become moot and academic as a result of the concession that the first expropriation offended the provisions of the Expropriation Act. I do not agree. As already pointed out, the issue whether or not the City of Tshwane was entitled to withdraw the notice of expropriate remains alive and Summer Season is entitled to a determination of this issue.

[33] Lastly, it is submitted on behalf of the City of Tshwane that Summer Season has acted *mala fide* in the manner in which it seeks to bring these amendment proceedings which will then in future purport to be review proceedings. The City of Tshwane contends that it cannot be correct to accept the approach adopted by Summer Season to cross-reference allegations founded on the initial expropriation for purposes of making out grounds of review in respect of wholly new decisions. For this further reason Summer Season should not be permitted to amend its pleadings.

[34] I cannot find on the papers that Summer Season is *mala fide*. It was confronted with further developments in a dispute that is rooted in the same property, between the same parties and which essentially have the same effect – namely expropriation. It is, in principle, entitled to review any further decisions taken subsequent to the decision that forms the substratum of the review application already before court. The only question is whether Summer Season should be allowed by way of an amendment of the Notice of Motion to introduce a further review pertaining to the subsequent decisions in the existing review application.

The third objection

[35] The third objection is that the "expropriation decision, contained in a document dated 23 October 2018 and signed on 26 October 2018, is a new decision separately reviewable in terms of Rule 53 of the Rules of Court". I have already dealt with this issue. There is no merit in this objection.

The fourth objection

[36] The fourth objection is that the proposed amendment is allegedly legally incompetent and prejudicial to the first respondent. There is no merit in this objection for the reasons already referred to.

COSTS

[37] In respect of costs, Summer Season submits that, although a party seeking an amendment is seeking an indulgence, the City of Tshwane unreasonably objected to the proposed amendment and should therefore be ordered to pay the costs of the application for leave to amend. The applicant further submits that the opposition to this application for amendment is unreasonable and only had the effect of again

delaying the finalisation of this matter for another two years while Summer Season continues to suffer prejudice as a result of the unlawful occupation of its property and the failure of the City of Tshwane to comply with the court order.

[38] It is an accepted principle that the issue of costs falls within the discretion of the court. I have considered the submissions advance in this regard. Although costs should follow the result, I am not persuaded that a punitive costs order is warranted. It is therefore ordered that the City of Tshwane pay the costs of this application on a scale as between party and party. Such cost to include the costs occasioned by the employment of senior counsel.

ORDER

[39] The following order is made:

1. The application to amend is granted in terms of prayers 1, 2 and 3 of the amended Notice of Motion.

2. The applicant, Summer Season Trading 63 (Pty) Ltd, is ordered to file its supplementary affidavit within 10 days of the date of this order.

3. The City of Tshwane Metropolitan Municipality is ordered to pay the costs of this application on the scale as between party and party. Such costs to include the costs consequent upon the employment of senior counsel.

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 1 February 2021.

Case number: 22557/2015

Matter heard on: 26 January 2021

APPEARANCES

For the Applicant:	ADV HS HAVENGA SC
Instructed by:	PEET GROBBELAAR ATTORNEYS
For the Respondent:	ADV W R MOKHARE SC
	ADV M P MOROPA
Instructed by:	DIALE MOGASHOA ATTORNEYS