IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:8839/2021

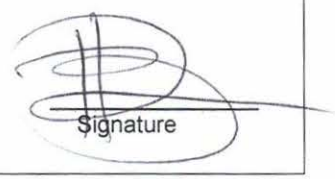
Delete whichever is not applicable

(1)Reportable: No.

(2) Of interest to other judges: No

(3) Revised.

16 November 2022
Date



Signature

In the matter between:

ACE PLANT HIRE (PTY)LTD	**Applicant**
And	
ROAD TRAFFIC MANAGEMENT CORPORATION	**First Respondent**
DEPARTMENT OF PUBLIC WORKS, ROADS AND MPUMALANGA	**Second Respondent**
LEKWA LOCAL MUNICIPALITY	**Third Respondent**

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 16 November 2022.

JUDGMENT

Munzhelele J

Introduction

[1] This is an interlocutory application for leave to amend the main application brought by the applicant. The applicant seeks to amend its notice by:

1.1 Inserting a new paragraph, paragraph 1 to read as follows:

"To the extent necessary:

1.1 That the decision taken by the first respondent to place a mark on the Camelia Logistics CC and/or the vehicles be declared unlawful and constitutionally invalid,

1.2 Directing the first respondent to remove the mark on Camelia Logistics CC and/or the vehicles."

1.2 Re-numbering the existing paragraph 1 to 5 as paragraphs 2 to 6.

1.3 Amending the first sentence of the renumbered paragraph 2 to include the underlined wording and delete the wording in square brackets:

"Directing the third respondent against the payment by the applicant of sum of R1 115 610,25 (one million one hundred and fifteen- thousand six hundred and ten rand and twenty-five cents) to approve, consent and take all steps necessary

(including signing such documents as are necessary) to register and license the following motor vehicles (the vehicle) in the name of the applicant."

[2] The first respondent opposed this application and set the following grounds for objection:

1. The intended amendment does not introduce a triable issue.

2. It introduces a new cause of action, which is a judicial review.

3. No case is made out in the founding papers for judicial review, and the first respondent did not deal with it in the answering affidavit. This will be prejudicial to the first respondent.

4. The judicial review requires compliance by the applicant with Rule 53.

5. Review relief in terms of sections 7, 8, and 9 of the Promotion of Administrative Justice Act (PAJA)[1] has to be brought within the specified time limit; an application for condonation should have been brought where judicial review is out of time. This was not done and as such; the amendment does not introduce a triable issue and should not be allowed.

Arguments by the parties

[3] The first respondent contends in his arguments that it is not competent for the applicant to challenge the validity of the mark by way of a declaratory order where there was no live issue between the parties on the papers pertaining to the validity of the mark. See *Offit Enterprises Pty Ltd and Another v Coega*

[1] 3 of 2000

Development Corporations Pty Ltd [2].

[4] Furthermore, it is argued on behalf of the first respondent that the amendment introduces a review of an administrative decision taken by the first respondent to place a mark against the applicant's vehicles, and the PAJA is applicable. Such review should have been brought within the time frame contained in section 7 of PAJA. As a result, the amendment needs to be more competent. A further argument is that the founding papers do not foreshadow a review in terms of PAJA.

[5] In the respondent's case, the applicant's amendment does not raise a triable issue. The respondent relied on the case of *Trans Drakensberg Bank Ltd v Combined Engineering Pty Ltd and another* [3] where it was held that:

> "Having already made his case in his pleadings, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence where evidence is required or save perhaps in exceptional circumstances introduce an amendment which would make pleading excipiable."

[6] The respondent further argued that judicial review in terms of Rule 53 prescribed a process to be followed in order to assist the court in knowing how the administrative decision came about. It is submitted that the applicant should have complied with Rule 53 of the Uniform Rules of Court and placed the record of the decision in the hands of the reviewing court.

[7] The applicant argued that they have applied for leave to amend because

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[2] 2010 (4) SA 242 SCA
[3] 1967 (3) SA 632 (D) at 641A

the Road Traffic Management Corporation (RTMC) should have uplifted the mark as requested by the Kwa-Zulu Natal Department of Transport (KZN DoT). Their continued refusal, therefore, becomes unlawful and violates the applicant's rights.

[8] The applicant argued that the court, when assessing this application, should accord with the well-established principles that *'the rules are made for the court to facilitate the adjudication of cases'*. See *PFE International INC (BVI) v Industrial Development Corporation of South Africa*[4]. The applicant further referred the court to the case of *Trans – African Insurance Co Ltd v Maluleka*[5]; the Appellate Division held that:

> "Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[9] The applicant further contends that the role of the RTMC is merely a rubber stamp that gives effect to the instructions and decisions of the KZN DoT to impose the mark by virtue of the RTMC's control of the *e-Natis* system. RTMC does not decide the mark. RTMC enforces the decision of KZN DoT, and KZN DoT had decided to uplift the mark in 2019. Therefore, RTMC has to obey. There is no basis for RTMC to retain the administrative mark.

Applicable law

[10] Rule 28(1) provides that:

> *"Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all the parties of his intention to amend, and shall furnish particulars of the amendment."*

[11] In *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and*

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[4] 2013 (1) SA 1 (CC) at para 30-31
[5] 1956(2) SA 273 (A) at 278F-G

Others[6] Khampepe J said that:

> "It is evident that Rule 28 is an enabling rule, and amendments should generally be allowed unless there is good cause for not allowing an amendment. This was enunciated in *Moolman v Estate Moolman* 1927 CPD 27 at 29, where the court held that:
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> > "[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."

[12] In *Commercial Union Assurance Co Ltd v Waymark NO*[7], the ultimate decision of whether to grant an amendment is an issue at the discretion of a judicial officer, which discretion must be exercised wisely after deliberating on all relevant legal and factual considerations.

Analysis of the case

[13] The applicant's leave to amend the application will not be allowed if it is found that the first respondent will be prejudiced to the extent that the prejudice cannot be cured by an order for costs and/or postponement to allow the first respondent to file further affidavits. In *Grayling v Neuwwoudt* [8] De Beer JP cited the case of *Moolman v Estate Moolman*[9] by Watermeyer J with approval referring to the rule 28 of court and said that:

> "the general trend of the rule implies that amendments necessary for determining the real issue should be allowed. However, to prevent abuse certain safeguards have been imposed, which suggests that the line of approach should in each, be an inquiry into whether the application is *bona fide* in the sense that material new factors have arisen or

[6] [2019] ZACC 41 at para 89
[7] 1995 (2) SA 73 (Tk) at 77
[8] 1951(1) SA 88 (O) at para 91H-92A
[9] 1927 CPD 27 at 29

have come to the notice of a party thereby making the application necessary; whether the application was thereupon timeously made and whether any injustice would be caused by the amendment which cannot be avoided by a postponement or compensation by costs."

[14] However, it is trite law that the primary object of allowing an amendment is to obtain proper ventilation of the dispute between the parties and to determine the real issues between them so that justice may be done. See *Trans-Drakenberg Bank Ltd v Combined Engineering Pty Ltd*[10].

[15] The applicant argued that this amendment aims to prevent the first respondent from raising a factual defence that it knows to be incorrect, thereby misleading this court. However, the first respondent argued that the applicant misunderstood the order that it was requesting from the court. The amendment it seeks does not raise a triable issue because it is a judicial review based on PAJA, where sections 7, 8, and 9 are applicable. The respondent further argued that the amendment seeks to introduce a new cause of action in the form of a judicial review without first making a case on the founding papers.

[16] My observations regarding the issue of an administrative decision concerning the mark are that, even though this issue has always been there from the beginning, the facts relating to the instructions from the KZN DoT were raised in the answering affidavit as a defence and as a reason for the RTMC not to uplift such mark. The applicant had to clear the issue in their reply. I am therefore satisfied that there is no malice for the applicant to bring an application for amendment at this point.

[17] The real issue here is about the registration of the vehicles, which is hindered because of the mark which KZN DoT authorized as per the following email written by Refia Sayed on 28 December 2017, which was addressed to Kevin Kara-Vala which reads:

"good day Kevin

Please can you assist by forwarding this to the respective person/s. An admin mark has

[10] 1967 (3) SA 632 (D) at 638 A

to be placed on this record as per the attached proof. R6 m is owed! This record is just a dumping site for outstanding fees.
Your assistance is appreciated."

[18] On 21 February 2018, Refia Sayed again wrote another letter addressed to Christine, which reads:

"Good day Christine
Our telephone conversation reference:
Camelia logistics are trying to register vehicles in their name as they have settled the bank. They have sold those vehicles and wish to transfer them to the new owners. I have spoken to Robert at the Standerton office, and he confirmed that the system does not allow for registration; the admin mark is red and not yellow.
Please assist by uplifting the mark in order for Camelia Logistics to settle their debt."

[19] The issue of the admin mark needs to be resolved completely. It is in the parties' interest that litigation should be brought to finality. From the above letter dated 21 February 2018, it is clear that there was a request for the upliftment of such an admin mark coming from KZN DoT, but the RTMC refuses to uplift same. The lawfulness of such refusal should be dealt with, hence the application for amendment. It is clear to me that the amendment is not an abuse of court processes or harassment of the first respondent by an amendment which came about during a reply by the applicant, but an attempt by the applicant to bring to the attention of the court proper ventilation and determination of the fundamental issues and to bring justice to the parties. See *Roenberg v Bitcom*[11] *where* Greenberg J said that:

> "although it has been said that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate, modern tendency of the Courts lies in favor of an amendment whenever such an amendment facilitate the proper ventilation of the dispute between parties."

[20] The main objective of the amendment is to do justice between the parties. It is not

[11] 1935 WLD 115 at 117

a game in which, if some mistake is made, then the forfeit is claimed. The court should be more concerned with seeing an accurate account of what took place and give a decision based upon the correct facts, not the wrong facts or the incomplete facts. See *Whittaker v Roos and Another*[12] (Wessels J presiding). This amendment will assist the main case to give a full picture thereof.

[21] The respondent argued that the amendment is prejudicial because it was introduced during the reply by the applicant after the first respondent had filed the answering affidavit. This situation can be remedied. In terms of Rule 6(5)(e) of the Uniform Rules of Court, the court will grant the first respondent permission to file a further affidavit to avoid a substantial injustice from occurring. The fact that the applicant is bringing a new cause of action in this amendment would not be a reason to refuse the amendment either because the first respondent will be given enough time to file the supplementary affidavit.

[22] The first respondent alleged that this amendment does not yield a triable issue because it is an administrative decision, and sections 7, 8, and 9 of PAJA should be observed. The time limit of 180 days has already lapsed, and the applicant did not apply for condonation for an extension of time to bring the review application. The first respondent has raised an arguable question in law. The applicant opposed the view held by the first respondent. I would leave this issue to be decided by the court dealing with the main case. However, I cannot refuse amendment on the basis of this issue.

Costs

[23] The issue of costs is within the discretion of the court. A person who requests an amendment requests an indulgence; therefore, the first respondent should not be out of pocket because of the indulgence given to the applicant. The applicant has to pay costs on a party and party scale for this application for leave to amend.

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[12] 1911 TPD1092 at 1102

Order

[24] As a result, the following order is made:

1. The applicant is granted leave to amend its notice of motion as follows:

    1.1 Inserting a new paragraph 1 to read as follows:

    "1. To the extent necessary:

    1.1 that the decision taken by the first respondent to place a mark on Camelia Logistics CC and/or the vehicles (defined below) be declared unlawful and constitutionally invalid; and

    1.2 directing the first respondent to remove the mark on Camelia Logistics CC and/or the vehicles (defined below)."

    1.2 renumbering the ensuing paragraphs from 1 to 5 to 2 to 6 respectively;

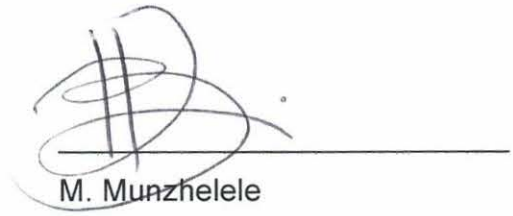
    1.3 amending the first sentence of paragraph 2 (as renumbered) to include the underlined wording and delete the wording in square brackets:

    "2 Directing the third respondent[s], against payment by the applicant of a sum of R1 115 610.25, to to approve, consent and take all steps necessary (including signing such documents as are necessary) to register and license the following motor vehicles ("the vehicles") in the name of the applicant: ..."

2. The applicant is directed to serve its amended pages affecting the amendment within 5 days of this order.

3. The first respondent is granted leave to file a further affidavit within fifteen (15) days of receipt of the applicant's amended pages.

4. The applicant is ordered to pay costs on a party and party scale for this application for leave to amend.



M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 17 May 2022

Electronically Delivered: 16 November 2022

Appearances:

For the Applicant: Adv. H.F Oosthuizen SC

Adv. T Scott

Instructed by: Froneman Roux & Streicher Attorneys

For the First Respondent: Adv. E Labuschagne SC

Adv. V Mabuza

Instructed by: MMMG Attorneys