IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 10991/2010

DATE: 14 JULY 2010

In the matter between:

TRENCHLESS ROAD CROSSINGS CC Applicant

And

THE MUNICIPAL MANAGER

SALDANHA BAY MUNICIPALITY First Respondent

SALDANHA BAY MUNICIPALITY Second Respondent

ASLA MAGWEBU CIVILS (PTY) LTD Third Respondent

VARIOUS BENEFICIARIES OF THE AFFORDABLE HOUSING UNITS IN THE ONGEGUND, PHASE 1 Fourth Respondent

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J U D G M E N T

KLOPPER, AJ:

The Applicant, in essence, seeks an amendment of the pleadings in its present form to read as follows, 'that an interim interdict be granted pending the amplification of the relief sought in the review under case number 2493 and final

determination of the review application before this Honourable Court under case 2493/10 enrolled for hearing on 31 August 2010 in the following terms', and then of course the normal terms as indicated in the pleadings apply. So the amendment that is sought is that the interim interdict be granted and that the following words be inserted ' pending the amplification of the relief sought in review under case number 2493'.

Mr Moller for the applicant made this application during the course of proceedings and did not, for reasons still not totally clear to me, decide that it was necessary to invoke the provisions of Rule 28, which provide the procedure for amendments to pleadings and documents. This issue was raised, and it is one of the points which were raised in objection to the granting of this amendment. Rule 28 stipulates that there is a process which has to be followed when an amendment is required. Of course this process can be dispensed of where the amendment takes place with the consent of parties, but where it is obvious that objections are to be raised, then in my view the rule must be followed.

It requires a notice in which it states terms in respect of objections which can be raised. It allows for a process whereby these objections can be clearly and concisely stated in writing and then it follows that if the court grants leave for

the amendment, then the amendment will be effected once notice of such amendment is given to the parties. Now this process was not followed for some or other reason. I did raise this issue, but it seems Mr Moller is of the opinion or reiterated the fact that he can apply for an amendment at any time, although this does not indicate that he can apply in any way for an amendment, or by way of any process and can merely, in these circumstances, just ask that his pleadings be amended.

Strangely enough there are other documents which deal with amendments in the papers, which are dealt with in a more formal manner, but be that as it may, objections were raised, objections as to the manner in which the application was made and in particular objections concerning the vagueness of the insertion of these words and the particular amendment, and the reasons behind it. I must add that I still have difficulty in understanding the real relevance of the request for this amendment. I did canvass this issue during the argument and attempted to obtain clarity. There were various suggestions put forward by counsel for the Respondents as to why this amendment is being sought.

Mr Moller also indicated that there were probably various reasons why it should be inserted, but in essence it would

appear that it makes the interim interdict dependent upon not only the final determination of the review application in case 2493/10, but also dependent upon the Applicant amplifying in some or other way, the relief that it seeks in that particular case. And I think the main objection to the amendment lay in the fact that it incorporates a fact which cannot be determined with any amount of clarity at this stage, which is vague and which is uncertain, because, as the arguments went, there has been no amendment of the relief sought in the case under review up to this stage.

There has been frequent mention throughout the papers of the impending amplification of the application due to the circumstances and this continues right through from the founding affidavit to the replying affidavit and it even is still an uncertain event, and has not been established with any real amount of clarity in a subsequent affidavit made by the Applicant. So the main objection in the arguments of counsel for the Respondents is that it is uncertain, it is vague and in particular the Third Respondent is not in a position, in the light of these circumstances, to answer to anything that may arise from that particular set of circumstances.

I have considered the arguments of counsel for the Applicant, as well as for the Respondents. I have attempted to apply the

principles in respect of the granting of an amendment of this nature, which are well known and which have been set out in various cases. Just by way of summary I can refer to what is indicated in *Devonia Shipping Limited v MV "Luis" (Jomen Shipping Company Limited intervening)* 1994 (2) SA 363 (CPD), a judgment of Rose-Innes, J, (as he then was) on page 369. It reads as follows:

> *"The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is mala fide, or unless the amendment could cause an injustice or prejudice to the other side, which cannot be compensated by an order for 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 notice of motion, which it sought to amend, was filed."*

The same principles are found in the case of *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), where Mgobo, J at 261, indicates as follows:

> *"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 Company Limited v Waymark N.O. 1995 (2) SA 73 (TK) at 76d-76i. 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 sought to amend, was filed. These principles apply equally to a notice of motion."

And in the case referred to, that is to say the matter of Commercial Union Assurance Company Limited v Waymark N.O. at 73, these principles are indicated in the head note and I will just quote from there:

"The principles enunciated in the reported cases governing applications for the amendment of pleadings are as follows:

1. The court has a discretion whether to grant or refuse an amendment.

2. *An amendment cannot be granted for the mere asking. Some explanation must be offered therefore.*

3. *The applicant must show that prima facie the amendment has something deserving of consideration, a triable issue.*

4. *The modern tendency lies in favour of amendment if such facilitates the proper ventilation of the dispute between the parties.*

5. *The parties seeking the amendment must not be mala fide.*

6. *The amendment must not cause an injustice to the other side which cannot be compensated by costs.*

7. *The amendment should not be refused simply to punish the applicant for neglect.*

8. *A mere loss of (the opportunity of gaining). time is no reason in itself for refusing the application.*

9. *If the amendment is not sought timeously, some reason must be given for the delay."*

Those are the basic principles governing an application for an amendment.

I have indicated that I still have some difficulty in understanding why the interim interdict, (which clearly is an interdict which is requested, pending the final determination of the review application, which is already pending before this Court), should now be based on the fact that the relief at some or other stage and in some or other form, is to be amplified. I am not going, at this stage, to indicate all the aspects mentioned in argument by counsel as to why the Applicant deems it necessary to request this amendment, which includes the fact that:

- It wishes to avoid the application for striking out,
- It wishes to avoid the application for not joining the Third Respondent, and,
- It wishes to incorporate in some or other form a sanction for a document for which there is an application to strike out and which otherwise would not be included for consideration, because of the application for striking out.

A lot of these reasons were given by counsel.

Certainly Mr Moller for the applicant has referred to this document in particular when the uncertainty and vagueness of this amendment was brought to the fore and it is in fact the document which is the subject of an application for striking out and which is included for the first time in the replying affidavit

of the Applicant.

Bearing all these circumstances in mind, I am of the view that the amendment sought is, in the first instance, not an essential one. It does not, in my view, create a situation where issues are further ventilated in any way. The dispute between the parties being whether an interim interdict should be granted, pending the outcome of a review application.

I do believe that in its present form (and with the uncertainties around what the amplification in fact entails, the fact that there is constant referral to further amplification, and amplification of even the draft proposals or the proposed amendments,) that it does, because of its vagueness and uncertainty, create a situation which does prejudice, in particular the Third Respondent, and in these circumstances this cannot be remedied by an order for costs and can also not be remedied by the postponement of the matter to allow counsel for the Respondents to consider their situation and perhaps to amend their papers, because the uncertainty still reigns. It has not been changed in any way up to this stage and any prejudice cannot be remedied in this manner.

I am, therefore, of the view that the application for the amendment of pleadings as requested should be refused and that in the circumstances the Applicant should pay the costs of

the application, including in the circumstances the cost of two counsel in respect of the First and Second Respondents.

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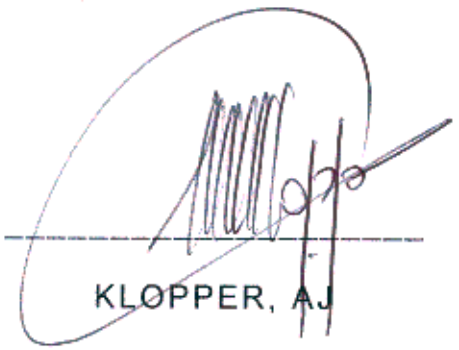

KLOPPER, AJ