

SOUTH AFRICA / JUDGMENT

115 Electrical Solutions (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another (86870/19) [2021] ZAGPPHC 146 (16 March 2021)

[2021] ZAGPPHC 146

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

86870/19

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86870/19

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE:16 March 2021

In the matter between:

115 ELECTRICAL SOLUTIONS (PTY) LTD

First Applicant

ANTONY MPATI

Second Applicant

and

THE CITY OF JOHANNESBURG

First Respondent

METROPOLITAN MUNICIPALITY

NEXUS FORENSIC SERVICES (PTY) LTD

Second Respondent

J U D G M E N T

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 16 March 2021.

TEFFO, J:

Introduction

- [1] The applicants seek an order that the respondents be interdicted from disseminating, replicating or referencing in any manner whether electronic or otherwise, the document or any part thereof, titled “Investigation into allegations of theft, fraud and corruption at the Johannesburg Market” dated 6 February 2017 (“the report”) until any reference to them has been redacted from it. Alternatively, until an addendum correcting the findings made against them and/or recording their version in relation to such findings has been prepared and attached to it (“the main application”).
- [2] The applicants have also filed an application for leave to amend their notice of motion (“the interlocutory application”).
- [3] The main application is opposed by the first and the second respondents.
- [4] The interlocutory application is only opposed by the first respondent.

The parties

- [5] The first applicant is 115 Electrical Solutions (Pty) Ltd, hereinafter referred to as “115 Electrical”. The second applicant is Mr Mpati. He is a professional electrical engineer registered with the South African Institute of Electrical Engineers. He is the sole shareholder and director of the first applicant. The first and second applicants will be referred to jointly as the applicants. Where appropriate they will be referred to separately as 115 Electrical and Mr Mpati.
- [6] It is alleged that 115 Electrical provides various services which include inter alia supplying electrical equipment, electrical consultation services, mechanical and electrical construction and industrial services to various private persons, state-owned and private juristic entities.
- [7] The first respondent is the City of Johannesburg Metropolitan Municipality contemplated as such in terms of section 2 of the Local Government Municipal Systems Act, 2000 (“the COJ”).

- [8] The second respondent is Nexus Forensic Services (Pty) Ltd (“Nexus”). It is a forensic investigative company whose services cover all aspects of fraud and corruption deterrence and promote an effective anti-fraud environment.
- [9] The other party is Johannesburg Market (hereinafter referred to as “Joburg Market”). It is a municipal-owned entity which renders services to the COJ and the COJ hold shares in the Joburg Market.

Background

- [10] In 2015, 115 Electrical in a joint venture with Uphilo Trading CC (“Uphilo Trading”), was awarded two tenders by Joburg Market for the supply, delivery, testing, commission and handover of 12 (twelve) 1 000kVA power transformers at the Joburg Market to replace the existing 500kVA transformers and all other associated construction works that come with the upgrades.
- [11] The overall electrical infrastructure upgrade program was intended to install 18 (eighteen) 1 000kVA transformers in 3 phases. Phases 1 and 2 of the project under tender reference codes of INFR 021-2014/15 and INFR 011- 2014-2015 were awarded to the joint venture between 115 Electrical and Uphilo Trading. Another contractor, SSM Molekoa/MNP Joint Venture, was awarded Phase 3 of the project relating to a further 6 (six) transformers.
- [12] The work in Phase 1 commenced in May 2015 and was completed in September 2015.
- [13] The work in Phase 2 started in November 2015 and was finalised in March 2016.
- [14] In or about October 2016 the COJ appointed Nexus to perform certain investigations. The investigation commenced on 11 October 2016 and a report that spoke directly to the investigation was compiled and subsequently released on 6 February 2017.
- [15] The report states that Nexus’ mandate was to perform a forensic investigation into allegations of theft, fraud and corruption by officials and service providers at the Joburg Market and to establish the veracity of inter alia the following allegations: the procurement of power transformers; the delivery and commissioning of the power transformers; the possible collusion between the project manager (one Mr Modiba) and the appointed service provider in the award of the services; and the conflict of interest, maladministration mismanagement; negligence and lack of supervision by Joburg Market officials.
- [16] The report further states that Nexus found that there were instances of corruption when the improvements were undertaken at the Joburg Market. Pursuant to the findings of fraud and corruption made against the applicants, the report recommended that the services of 115 Electrical be discontinued and that any further contracts 115 Electrical may have had with Joburg Market or the COJ be terminated or suspended.

- [17] The applicants allege that the report was disseminated to the public by Nexus and/or the COJ and in December 2018, it became the premise on which an investigative piece was prepared by Carte Blanche which was aired on National Television. The broadcast was styled as an investigative piece regarding the failure of the National Prosecuting Authority (NPA), the South African Police Services (the SAPS) and the Hawks to prosecute cases of fraud and corruption reported to them by the COJ.
- [18] Mr Modiba who was among the people implicated in the report, lodged a complaint against Carte Blanche to the Broadcasting Complaints Commission of South Africa (“BCCSA”). The complaint was adjudicated upon and a judgment became available online.
- [19] The judgment quoted extensively from the report and included quotes which implicated the applicants in theft, fraud and/or corruption allegations.
- [20] 115 Electrical never featured in the Carte Blanche episode. Mr Mpati asserts that he discovered that each time any online searches for his name or that of 115 Electrical were made around that time, the BCCSA judgment which included references in the report to his alleged corruption, appeared. He was unaware of the contents of the report until in April 2019 when he conducted a web search on his company’s name to determine its web presence as he was in the process of updating the website.
- [21] He instructed his attorneys to intervene and they subsequently complained to the BCCSA about the report. As a result, the judgment was subsequently removed from the BCCSA website and the BCCSA undertook not to publish it again.
- [22] Mr Mpati alleges that he has been in recent communication with the COJ and Nexus and has pleaded that they desist from disseminating and relying on the report, especially the portions of the report that unjustifiably defame him and his company.
- [23] Nexus has refused to retract the report. It indicated through its attorneys that it stands by the contents of the report. Nexus denies that any aspect of the report was misleading, false or unfounded.
- [24] Mr Mpati claims to have corresponded with the COJ regarding the report and the COJ has not responded to his letter.
- [25] Following the above, and in order to prevent further reputational damage, he launched the application.

The applicants’ case

- [26] The applicants claim that they have been defamed by the report unfairly, wrongly and without good cause. They assert that the report is characterised by inaccuracies, misstatements of fact, improper and incomplete investigative work and baseless conclusions predicated on conjecture and improper and unprofessional investigative methodology. They allege that the report was prepared and published without them having had an opportunity to respond to or correct any of its false allegations.
- [27] It is averred that the prospect of the report being further disseminated traumatises Mr Mpati who is a prominent figure in his field and engages in business through 115 Electrical, with major entities in the public and private spheres. The baseless and incorrect allegations about him in the report threaten to jeopardise these relationships by unwarrantedly calling the applicants' integrity and honesty into question.
- [28] The applicants assert that there are objectionable portions of the report which wrongfully and unlawfully implicate them as being involved in corruption, fraud, dishonesty and theft. Their names are being unjustifiably tainted. The report incorrectly finds that: there was a close relationship between Mr Modiba and Mr Mpati which was not disclosed by Mr Modiba during the tender process. That the Joburg Market overpaid R8 837 114,89 for the transformers that 115 Electrical installed during Phase 1 and Phase 2 of the project as the cost price of the transformers were R2 207 250,00 and the contract price paid was R10 864 364,89. 115 Electrical was employed to deliver 12 transformers but only delivered 11 and was paid for 12 transformers. The assumption is that the money for the 12th transformer was either misappropriated or that 115 Electrical was overpaid. Further that Mr Mpati did not want to supply documentation
- or meet Nexus implying that he was not cooperative in the investigation.
- [29] The report concluded that there was a corrupt relationship between Mr Modiba and the applicants. As a result, Nexus opened a criminal case against the applicants.
- [30] The applicants claim that the findings made against them are illogical and a result of negligent and sloppy investigative work which does not behove an entity like Nexus which holds itself out as an expert in forensic investigations into corruption.
- [31] They submit that they have satisfied the requirements for an interdict and are therefore entitled to the relief sought.

The first respondent's case

- [32] The COJ denies the allegations. It contends that the Nexus report was completed in February 2017. The applicants did not take action to prevent the report from being disseminated, replicated or being referred prior to its publication. The proverbial horse has bolted. Granting the relief, which the applicants seek in their notice of motion, will serve no purpose. It will also have no practical effect.

- [33] It has reason to believe that the applicants were contacted prior to the report being published. The applicants were thus invited to respond and deal with what Nexus' Forensic Investigation revealed.
- [34] The COJ contends that whether the report contains objectionable portions and whether the applicants are correctly or incorrectly implicated, in matters of corruption, fraud, dishonesty and theft can only be decided once oral evidence has been led and witnesses have been cross-examined. It is not possible for the court to decide whether statements set out in the applicants' affidavit are factually true or correct. Without the benefit of cross-examination, it is not possible to determine whether the version put forward by the applicants should be accepted above what the forensic investigators had set out in their report.
- [35] Mr Modiba who served as project manager to the contract, falsely reported to the Capital Expenditure Committee of Joburg Market that the project had been properly executed. When he reported to the Committee on the matter, he did so in circumstances where delivery and performance were defective in numerous respects. Not only were no rocker bins delivered, but various deficiencies in performance were found to exist. Matters dealing with pricing and delivery were subsequently identified by Nexus. In addition, when five rocker bins were later delivered, they were not new, but second-hand bins.
- [36] It is submitted that the COJ acted reasonably and in accordance with the prescripts of the law. It caused a professional investigation to be carried out and acted on the findings of the investigation, by, inter alia, reporting the matter to the SAPS. It was vindicated when the disciplinary action against the employees incriminated in the report led to their dismissal. The COJ was fully justified in publishing the report and acted lawfully in exposing the irregularities which had been discovered.
- [37] The COJ further contends that the events referred to and dealt with in the applicants' application have been completed. They can no longer be undone. Further that the relief sought in the notice of motion can thus not undo or remedy what has occurred.

The second respondent's case

- [38] Nexus raised a point in limine that the applicants failed to join Joburg Market in the application. It contends that the non-joinder of Joburg Market in the application is a ground to dismiss the application.
- [39] Nexus submits that the averments made by the applicants give rise to an apparent factual dispute that cannot be resolved without the hearing of oral evidence.
- [40] It contends that its findings and recommendations in the report are correct, and that the conclusions and recommendations reached, based on the extensive investigation conducted, are justified and reasonable.

- [41] Nexus denies the defamation of the applicants. It contends that it only prepared and compiled the report and then furnished same to the COJ in accordance with its mandate.
- [42] Its stance is that it cannot be blamed for the continued dissemination of the report. The report is already the subject of a finding by the BCCSA and has been widely distributed in the public domain on the applicants' own version.
- [43] The averments that the applicants are currently unjustifiably prejudiced and that their reputation has been tainted as a result of the report, are denied.
- [44] It is admitted that a criminal case has been opened against the applicants, which is the subject of a pending criminal investigation.
- [45] The allegations that the findings made in the report against the applicants are illogical and a result of negligent and sloppy investigative work, have been denied.
- [46] It is also denied that the applicants have satisfied the requirements of an interdict.

The application for leave to amend the applicants' notice of motion

- [47] Before I deal with the above contentions, I deal with the applicants' application for leave to amend their notice of motion.
- [48] The applicants seek to amend their notice of motion by adding a new prayer declaring the findings of the Nexus report dated 6 February 2017 to be inaccurate and irrational and thus defamatory of them.
- [49] The late filing of the application was not opposed. It was accordingly granted.
- [50] The basis of the applicants' application is that the additional relief sought by the proposed amendment flows naturally and in the ordinary course from the relief sought in the first prayer of the applicants' notice of motion. It is the applicants' case that the determination of whether the applicants are entitled to the relief sought in prayer 1.1 of their notice of motion will involve substantially the same enquiries as the additional relief sought by the proposed amendment. The issues of the accuracy, rationality and defamatory nature of the Nexus report are central to the papers as they stand and both the applicants and the COJ have addressed these issues in their papers or have failed to address them for reasons known only to them but not because they were not germane to the issue.
- [51] The applicants assert that there will be no prejudice to the COJ if the court permits the proposed amendment to the applicants' notice of motion.
- [52] They claim that the COJ's opposition of the application is unreasonable, vexatious and frivolous.

- [53] The COJ denies the allegations made by the applicants. It contends that the correctness of the report is not relevant to the question of whether the horse has bolted or not. Further that it also has very little, if anything, to do with the question whether the COJ can be blamed for the dissemination of the report.
- [54] The COJ further denies that it will not suffer any prejudice if the amendment is granted. It contends that not only will further affidavits have to be filed, but such affidavits will be filed to no avail. Ultimately the court hearing the application will not be in a position to determine the correctness or otherwise of the various versions, without the hearing of oral evidence.
- [55] It is further contended that the relief claimed in the main application was principally aimed at the further dissemination, replication and referencing of the report. The COJ's stance has always been that no further dissemination of the report was necessary as the report had already been dealt with by Council. The COJ claims that its answering affidavit was accordingly prepared to strictly address and only answer the relief claimed in the notice of motion, inter alia, explaining that no further dissemination or replication of the report was necessary or taking place.
- [56] It is submitted that at no stage did it deem it necessary to deal with the veracity or correctness of the content of the report. No relief in that regard was, at the time, being sought.
- [57] It is the COJ's case that persons who are able to comment or elaborate on the correctness of the report are all employees of Joburg Market. Joburg Market is a separate and distinct legal entity to the COJ. It is a municipal-owned entity which renders services to the COJ. Once the veracity or correctness of the report becomes an issue, the Joburg Market will be an interested party. A joinder will be necessary to enable Joburg Market to deal with the veracity or otherwise of the respondents' version of events.

Applicable legal principles

- [58] It is trite that a court hearing an application for an amendment has a discretion whether or not to grant it. This discretion must be exercised judicially.[1] 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".[2]
- [59] Watermeyer J made the following statement in *Moolman v Moolman*[3] which has been relied upon[4]:

"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 pleadings which is sought to be amended was filed."

[60] If the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issues will be allowed.[5] The legal position on an amendment introducing a new cause of action has been summed up by Erasmus as follows:

“The courts have recognised that in many cases it may be convenient to incorporate fresh causes of action in original proceedings. An amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned thereby. There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led if that is necessary to determine the real issue between the parties. The amendment must be bona fide and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue. If there is a valid cause of action upon the summons the court may allow the plaintiff to add a new cause of action which has accrued or been perfected since the issue of the summons. Except in special or exceptional circumstances, a summons may not be amended so as to include a cause of action not existing at the time of its issue. It has further been held that in terms of its inherent powers the court may grant an amendment of a fatally defective summons so as to cure the defect where such amendment will occasion no prejudice and will prevent the waste of costs.”[6]

[61] Prejudice has been interpreted as follows:

“Where a party would be no worse off if the amendment was granted with a suitable order as to costs than if his adversary’s application or summons was dismissed unamended and the proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of the opportunity of granting time is not in law prejudice or injustice.”[7]

Discussion

[62] One of the reasons why the COJ objects to the proposed amendment is that the issue pertaining to the declaration sought was not dealt with in the founding papers. I respectfully disagree. The basis of the main application is that the report is inaccurate, irrational and therefore defamatory of the applicants. The founding papers extensively dealt with parts of the Nexus report which the applicants regard as being inaccurate, irrational and defamatory of them. It is correct that the COJ in its defence to the main application did not deal with the merits. This was the COJ’s election not to venture into the merits of the application. The fact that the defence of the COJ has nothing to do with the question whether or not the contents of the Nexus report is accurate, rational and therefore defamatory of the applicants cannot be used against the application for leave to amend the relief sought in the main application.

[63] It is common cause between the parties that the amendment is only being sought after all the affidavits have been exchanged and the heads of argument have been filed. The fact that the amendment comes at a very late stage of the proceedings as alluded to by the COJ is neither here nor there. An amendment can be allowed at any stage of the proceedings provided that judgment has not been delivered or a decision has not yet been taken on the matter.

[64] The COJ contends that the amendment will serve no useful purpose where a dispute of fact is already looming and where the evidence involves serious allegations of fraud. There can be no substance in this contention as the issue whether or not the amendment will serve a useful purpose and whether or not there are disputes of fact which cannot be resolved on the papers, are issues for determination by the court. Sight should not be lost that the issue relating to the existence of the disputes of fact in the main application has already been raised and has to be dealt with when the main application is entertained.

[65] The COJ further contends that unless Joburg Market is joined as an interested party, the amendment should not be allowed. This issue has been raised in the main application. I prefer to deal with the issue in the main application as it was raised by Nexus.

[66] The COJ referred the court to the case of *Bestenbier v Goodwood Municipality*, [8] in support of its objection to the proposed amendment. The passage referred to reads as follows:

“Reference was made to Cooper v Natal Law Society and Another ..., in which it was laid down that the court had a discretion, similar to that it had in regard to pleadings, to allow amendments of orders prayed for in an application. It is assumed that this discretionary power would cover the case of allowing the addition of a new prayer based upon allegations essentially different from those on which the original relief was claimed. It seems to me, however, that in such a case the discretion must be a more guarded one. To allow an addition of a new cause of action based on entirely different allegations at a late stage of the proceedings might lead to grave prejudice.

... If the applicant is left to launch a fresh motion, fresh costs will no doubt be incurred, but in such other proceedings the issues will be properly formulated and be supported by the necessary facts which will then enable the respondent to deal fully with the allegations.

In all the circumstances it seems to me that the court should not, in the exercise of its discretion, allow this amendment but leave the applicant, if so advised, to bring fresh proceedings.”[9]

[67] The *Bestenbier* case referred to above is distinguishable to the present matter in that the relief sought in the current application is not based on allegations essentially different from those on which the original relief was claimed.

[68] The COJ claims that it will suffer prejudice if the amendment is granted. It submits that not only will further affidavits have to be filed, but such affidavits will be filed to no avail. It is contended that the court hearing the application will not be in a position to determine the correctness or otherwise of the various versions, without the hearing of oral evidence.

[69] Whether or not further affidavits will have to be filed should the amendment be granted, lies in the discretion of the court having regard to the facts that are already before court. Under the circumstances I cannot find any prejudice that the COJ will suffer should the amendment be granted. There is also no evidence that the application is mala fide or that the amendment thereof would cause an injustice to the COJ which cannot be compensated by costs. Under the circumstances I am inclined to allow the amendment as prayed for.

[70] The COJ was not the author of the report and neither did it conduct the investigations. In my view, the COJ will not be in a position to express a view on the correctness, or otherwise, of the content of the report. Nexus is the relevant party to express a view on the correctness of the report and it has done so accordingly. Nexus did not oppose the application to amend the notice of motion. I therefore do not find it necessary to allow the further filing of affidavits in the main application as alluded to by the COJ.

The main application

[71] I now turn to deal with the main application. Before I deal with the defences raised by the COJ, it will be prudent to first deal with the points in limine raised by Nexus.

Non-joinder of Joburg Market

[72] Nexus contends that with specific reference to the alleged variation of the deliverables in Phase 2, and the variation orders allegedly granted by Joburg Market, there is a clear obligation upon the applicants to have joined the Joburg Market as a party to the application. It is submitted that 115 Electrical did not contract with the COJ. It contracted with the Joburg Market in both Phase 1 and 2 of the respective tenders. Furthermore, Mr Modiba who is implicated in the report, was a Project Manager in the employ of Joburg Market and not the COJ.

[73] Nexus submits that Joburg Market is a party that has a direct and substantial interest in the application. The failure to join the Joburg Market is a ground alone for the dismissal of the application.

[74] In the application for leave to amend the notice of motion, the COJ submits that should the amendment be granted, Joburg Market has to be joined as an interested party. Once so joined, Joburg Market must be afforded an opportunity to file affidavits setting out their version of events and that of its respective employees. The COJ contends that Joburg Market has acted upon the correctness of what is recorded in the report. It has held disciplinary enquiries and terminated the employment of certain of its staff members. A finding by a court, dealing with the correctness, or otherwise, of the content of the report may thus have far-reaching consequences for Joburg Market.

[75] The court in *Stefanutti Stocks Civils, A Division of Stefanutti Stocks (Pty) Ltd v Trans Caledon Tunnel Authority*[10] held as follows:

“[10] The first question to be answered is whether Group Five has a direct and substantial interest in the outcome of these proceedings and whether it is necessary for it to be joined in these proceedings. In the matter of Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) at 33B, the SCA said:

[7] The right to demand joinder is limited to special categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order the court might make.’

- [11] Where a party has a direct and substantial interest in the results or the order which might be given in the proceeding, the matter cannot be proceeded without such party having been joined as a party; vide *Standard Bank v Swartland Municipality*; *Tau v Agricultural Minister of Agriculture & Land Affairs*. In the matter of *Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA)* at 1234D, the Supreme Court of Appeal stated that: “The basic principle of our law that interested parties who may be prejudiced by an order issued by a court should be joined in the suit, as set out in *Amalgamated Engineering and Pretorius* cases *supra*, and expressed in Rule 6(2) of the Uniform Rules of Court should have been applied ...”[11]
- [76] Van Loggerenberg in the publication “*Erasmus Superior Courts Practice*” further summarises the position as follows:
- “Though it was said in *Morgan v Salisbury Municipality* that the right of a defendant to demand the joinder of another party is limited to the cases of joint owners, joint contractors and partners, the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court’s order may affect the interests of third parties ... The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party unless the court is satisfied that he has waived his right to be joined.”*[12]
- [77] In *Matjhabeng Local Municipality v Eskom Holdings Ltd*,[13] the Constitutional Court held that:
- “The law of joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it.”*[14]
- [78] In reply to the point in limine of non-joinder raised by Nexus, the applicants simply said “Nexus’ point in limine will be dealt with in legal argument”.
- [79] In the application for leave to amend, in reply to the point in limine raised by the COJ, the applicants contend that they did not join the Joburg Market to the proceedings as it is not the owner of the report, nor is there any contractual relationship between it and Nexus in terms of which it could insist that Nexus amend the report it has authored, nor to the best of the applicants’ knowledge at the time, had the Joburg Market any intentions to further disseminate the report, and despite the report, continued to employ the first applicant.
- [80] It is further contended that Joburg Market does not have a legal and substantial interest in these proceedings. They claim to have invited Joburg Market to join the proceedings after the issue was raised by Nexus and Joburg Market never responded. It was submitted that if the court deems it fit to join Joburg Market in the proceedings, they would not object.
- [81] I do not agree with the reasons of the applicants for not joining the Joburg Market to the proceedings. The contract which is the subject matter of the report that is being questioned and criticised was entered into between the first applicant and the Joburg Market. There is

merit in the submissions made by Nexus and COJ regarding the joinder of the Joburg Market. Joburg Market has a direct and substantial interest in the issues involved in these proceedings and the order the court might make. The applicants should have joined the Joburg Market in these proceedings. They cannot invite the court to join a party they had failed to join.

Disputes of fact

- [82] Nexus further contends that the applicants have elected to institute these proceedings by way of application despite being acutely aware of the current factual dispute regarding the conclusions made in the report. It submits that its position is that the findings and recommendations in the report are correct, justified and reasonable in the circumstances. According to it the allegations made by the applicants give rise to an apparent dispute of fact which cannot be resolved without the hearing of oral evidence.
- [83] The applicants were requested to timeously take the necessary steps to refer the matter for oral evidence.
- [84] It was further contended that the alternative relief sought, is dependant on the court making findings on the correctness of the conclusions and recommendations. This, also, gives rise to a substantial factual dispute that will require the presentation of oral evidence.
- [85] In reply the applicants' claim that there are no bona fide disputes of fact which would prevent the court from resolving the matter. It is contended that Nexus has denied many facts stated by them in the founding affidavit purely to attempt to create a dispute of fact. The denials are mala fide and Nexus puts up no facts to disprove the facts alleged by the applicants.
- [86] I do not agree with the applicants' contentions if one takes into account the following averments from the papers to quote a few:

"In summary, the second respondent's investigations revealed that the Joburg Market purchased a total of 12 transformers in the two phases for which the applicants were appointed; however only 11 were delivered."

In paragraphs 17 to 19 of the applicants' founding affidavit it is alleged that the second applicant consulted with Mr Modiba (the project manager) and Mr Nthambeleni Rampeiwa (the maintenance manager) of Joburg Market and it was agreed that it was allegedly not necessary to replace one of the transformers ...

It is respectively emphasised that the applicant has failed to attach a confirmatory affidavit from either Mr Modiba or Mr Rampeiwa.

Besides, during the second respondent's investigations, no documentary evidence of written amendment or variation to the terms and conditions of the respective tenders could be found to support the applicants' allegations in this regard. The fact remains that the applicants submitted invoices for the supply of 12 transformers and (signed and accepted by Modiba on behalf of Joburg) were still paid for 12 transformers despite only delivering 11 transformers."

[87] In their founding papers, the applicants allege that the Nexus report concludes that one transformer was not accounted for because the applicants only installed 11 transformers and not 12. That, according to them, is not correct. It is averred that Joburg Market was not undersupplied by one transformer. Rather, the tender document incorrectly specified a requirement for six transformers for Phase 2 when in actual fact, only five were needed. Phase 2 of the transformer project had 2 variation orders which fell outside the initial transformer installation plan; i.e. it was not provided.

[88] There are factual disputes of fact in the conclusions and findings made in the report as against the version of the applicants.

[89] These in my view are bona fide and genuine disputes of fact which are not capable of resolution on application. I am persuaded that the applicants were aware of the disputes of fact or ought reasonably to have foreseen them before launching the application.

[90] Under the circumstances and having regard to the failure to join Joburg Market as a party to this application, the application is bound to fail.

Costs

[91] In the application to amend the notice of motion, the applicants contend that the COJ's opposition to the amendment has been unjustifiable and increased the costs of the application to amend. They submit that they made it clear to the COJ that it would be permitted to file a further affidavit to overcome any alleged prejudice. The COJ refused and insisted that they launch the application. It has failed to show that it will suffer prejudice if the amendment is granted which cannot be cured by being allowed to file a further affidavit. The applicants contend that the COJ should pay the costs of the opposed application for leave to amend. They submit that considering the multiple opportunities they gave the COJ to avoid the costs of the application, the COJ should be ordered to pay costs on the scale as between attorney and client.

[92] The general rule is that the applicant should pay the costs of the application for leave to amend and in certain instances even be ordered to pay the costs of the opposition to the application for leave to amend. The party applying for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application for leave to amend which costs include the costs of such opposition as are in the circumstances reasonable and not vexatious or frivolous.[15]

- [93] In cases where the opposition is fair and reasonable, the respondents ought not to be put into a position where they oppose the granting of an indulgence at their peril, in the sense that, if the amendment is granted, they cannot recover their costs of the opposition, or may even have to pay such costs as are occasioned by their opposition.[16] Where the opposition is unjustifiable and increases the costs of an application to amend, the opposing party forfeits his costs of the opposition and should be ordered to pay the applicants' costs in so far as they had been increased by the opposition.[17]
- [94] Whilst an award of costs on the attorney and client scale is not granted lightly, it should be granted in circumstances where there is a lack of bona fides in defending the application. It is not necessary to find dishonesty or a vexatious intention. Even with the most upright and most firm belief in the justice of its cause, a litigant can be vexatious by putting the other side to unnecessary trouble and expense, which it ought not to bear.[18]
- [95] The application to amend was brought at a very late stage of the proceedings. All the affidavits and heads of argument had already been filed. The COJ was within its right to oppose the application. It cannot be said that the opposition was not reasonable and neither was there any evidence that it was vexatious, frivolous and/or lacked any bona fides.
- [96] It is the applicants who sought an indulgence to have the notice of motion amended. They have to pay the costs of the application to amend.
- [97] The COJ sought costs which costs include costs consequent upon the employment of two counsel. The matter is not complex. I am not inclined to grant such a costs order.
- [98] In the result the following order is made:
1. The applicants are granted leave to amend their notice of motion in accordance with their notice of intention to amend, dated 27 May 2020.
 2. The applicants are to pay the costs of the application for leave to amend.
 3. The applicants' application for an interdict and an order declaring the findings of the Nexus report dated 6 February 2017 to be inaccurate and irrational and thus defamatory of them, is dismissed.
 4. The applicants are to pay the costs of the aforesaid application jointly and severally, the one paying the other is absolved

M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

For the applicants

H Gray

Instructed by

Fairbridges Wertheim Becker Attorneys

For the first respondent

R Stockwell SC and T C Lithole

Instructed by

Phambane Mokone Inc

For the second respondent E van As

Instructed by

VZLR Attorneys

Heard on

21 October 2020

Handed down

16 March 2021

[1] YB v SB 2016 (1) SA 47 (WCC) at 50H-J and the authorities there cited

[2] Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 638A; Bankorp Ltd v Anderson-Moreshead 1997 (1) SA 251 (W) at 253D-G

[3] 1927 CPD 27 at 29

[4] See Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd 2009 (1) SA 492 (SCA)

[5] Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A) at 329E-F

[6] Erasmus Superior Court Practice, RS1, 2016, D1-335

[7] Erasmus Superior Court Practice, RS11, 2019, D1-334

[8] 1955

(2) SA 692 (C)

[9] At 697H to 698E

[10] 2012 JDR 2073 (GNP)

[11] At para 1-11

[12] Van Loggerenberg, “Erasmus Superior Courts Practice”, Volume 2, D1-124

[13] 2018

(1) SA 1 (CC)

[14] at 33E-F

[15] Celliers Law of Costs October 2019 SI 40 update para 2.31, Meintjies v Administrasieraad van Sentraal-Transvaal 1980 (1) SA 283 (T)

[16] Celliers par 2.34 cited with approval in Ge No v Rudick Holdings (Pty) Ltd 1983 (2) SA (W) at 72

[17] Celliers par 2.31 Makings v Makings 1958 (1) SA 338 (A) 342

[18] Law on Costs A.C. Celliers Issue 36 para 4.13 p 4-26

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