

SOUTH AFRICA / JUDGMENT

Burrie Smith Ontwikkelaars (Pty) Ltd v Rustenburg Local Municipality (2868/08) [2017] ZANWHC 92 (17 August 2017)

[2017] ZANWHC 92**COURT**

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

2868/08

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Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO IN THE HIGH COURT OF SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG CASE NO: 2868/08 In
the matter between:	BURRIE SMITH ONTWIKKELAARS (PTY) LTD Applicant And RUSTENBURG LOCAL MUNICIPALITY Respondent

JUDGMENT

DJAJE J

- [1] The Applicant brought this interlocutory application in terms of Rule 28 of the Uniform Rules of Court in terms of which:

“(a) leave is granted to the Applicant to amend its Particulars of claim according to the notice of amendment dated 19 October 2016;

- (b) the Applicant is ordered to deliver its amended pages within 10 days;
- (c) the Defendant is ordered to file any amendments to its Plea, if it so desires, within 10 days after it received the amended pages;
- (d) the Defendant is ordered to pay the costs of this application on an attorney-client scale; and/or
- (e) further and/or alternative relief.”

- [2] The Respondent opposes the amendment on the basis that it will render the particulars of claim vague and embarrassing, alternatively not sustain the cause of action based on section 25(3) of the Constitution of the Republic of South Africa 108 of 1996 (“the Constitution”) in that:

“(a) No material facts have been pleaded entitling the Plaintiff to invoke the provisions of section 25(3) of the Constitution;

- (b) The alleged constitutional illegality of section 12 of the Expropriation Act 63 of 1975 (“the Expropriation Act”) has been raised irregularly;
 - (c) The prescribed two stage approach to determine compensation has been invalidly/irregularly applied by the Plaintiff/Applicant;
 - (d) The proposed amendment will render the particulars of claim vague and embarrassing for various reasons.”
- [3] The action instituted by the Applicant against the Respondent flows from an expropriation of land. The Applicant’s property was expropriated on 31 July 2004 by way of notices of Expropriation, expropriating portion 183, a portion of portion 43, Waterval 306 JQ and a number of servitudes

were also expropriated. The dispute in the action is about the compensation to be paid for these expropriations. The action is

defended and pleadings have been exchanged between the parties.

- [4] The issue to be decided is whether the Applicant's application for amendment should be allowed and if allowed, would it render the particulars of claim vague and embarrassing as stated in paragraph
- [2] above.
- [5] The granting or refusal of an application for the amendment of pleadings is a matter for the discretion of the court to be exercised

judicially in the light of all the facts and circumstances before it. In the case of *Moolman v Estate Moolman* 1927 CPD 27, Watermeyer J stated that:

"the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when pleadings which it is sought to amend were filed."

- [6] The following was stated by Carvey J in *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A:

"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 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 the pleading excipiable."

- [7] The Applicant in its particulars of claim has not pleaded section 25
- (3) of the Constitution but only pleaded section 12 of the Expropriation Act. In the main, the purpose of this application by the Applicant is to amend the particulars of claim in order to make provision for the conflict between section 25(3) of the Constitution and section 12 of the Expropriation Act.

- [8] Section 25 (3) of the Constitution provides that:

"(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including

- (a) The current use of the property;
- (b) The history of the acquisition and use of the property;
- (c) The market value of the property;
- (d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) The purpose of the expropriation."

[9] On the other hand section 12 of the Expropriation Act provides that:

“(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection

(2) exceed-

(a) In the case of any property other than a right, exceeding a registered right to minerals, the aggregate of-

(i) The amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and

(ii) An amount to make good any actual financial loss caused by the expropriation; and

(b) In the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the

expropriation or the taking of the right:

Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined-

(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or

(bb) in any other suitable manner.”

[10] The Applicant argued that section 12 of the Expropriation Act only provides two yardsticks or a combination thereof as a closed list of factors for determining compensation being, the amount that does not exceed the market value of the expropriated property and/ or the actual financial loss caused as a result of the expropriation. Whilst on the other hand section 25(3) of the Constitution provides that the amount of compensation and the time and manner of payment must be just and equitable having regard to the five factors listed therein. It is the Applicant’s case that section 12 of the Expropriation Act may be declared to be inconsistent with the Constitution although no such finding has been made currently. Further that whether section 25(3) of the Constitution is pleaded or not, the court is still under a duty to consider the provisions of the Constitution.

[11] In contention the Respondent’s submission was that there are no material facts pleaded by the Applicant to invoke the provisions of section 25(3) of the Constitution. The Respondent argued that the Applicant is pleading law with the amendment without giving the facts relied on. The other argument raised by the Respondent was that the Applicant raises the issue of constitutionality of section 12 of the Expropriation Act irregularly. On this aspect of constitutionality of the section the argument by the Respondent was that any issue relating to constitutionality should be raised at the institution of the proceedings. On this the

Respondent referred to the case of *Prince v President, Cape Law Society, and others* [2000] ZACC 28; 2001 (2) SA 388 (CC) at paragraph 22, where the following was stated:

“Parties who challenge the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provision”

A further ground raised by the Respondent was that the amendment will render the particulars of claim vague and embarrassing in that the claim for compensation in terms of section 12 of the Expropriation Act is for determination of compensation for which the necessary pleadings have to be made. However, with the invocation of section 25(3) of the Constitution and failure to make the necessary allegation will result in uncertainty in the calculation of the quantum claimed.

[12] In the current matter the cause of action in the particulars of claim is the determination of compensation for expropriated land and the proposed amendment elaborates on the factors that the court should take into account when determining quantum of the compensation and not introduce a new cause of action.

[13] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C Schreiner JA said the following:

“There is no introduction of a fresh cause of action but only a clarification of a step in the proceedings which it is assumed has insufficiently or imperfectly set out the one cause of action that throughout has been relied upon.”

[14] In this matter, the Applicant seeks compensation for expropriated land as set out in the particulars of claim. The Applicant has made out a case for compensation on the particulars of claim. However the court as the super valuator remains with the responsibility to determine the compensation in relation to section 12 of the Expropriation Act. In doing so, it is incumbent upon the court to

consider the Constitution. The Respondent in opposing the leave to amend the particulars of claim argued that the factors listed in section 25(3) of the Constitution are law and there are no material facts relied upon. This argument by the Respondent is without merit as the five factors stated in section 25(3) of the Constitution are allegations of fact which can be proven with the production of evidence. It is not suggested by the Respondent that the Applicant will be unable to produce evidence to support the amended particulars of claim.

[15] In my view the proposed amendment seeks to ventilate the issues properly before the court taking into consideration the provisions of the Constitution. There is no prejudice to the Respondent who will have the opportunity to plead to the amended particulars of claim.

[16] The writers Herbstein & Van Winsen in *Civil Practice of the High Court* 5th Edition at page 683 write as follows on the aspect of excipiability of the amendment:

*“An amendment should be refused on the ground of excipiability only if it is clear that the amended pleading will (not may) be excipiable (see *Krische v Road Accident Fund 2004 (4) SA 358 (W)*). If the excipiability of the pleading is merely arguable or can be cured by the furnishing of particulars then it is proper to grant the amendment where the other considerations are favourable. It will be left to the aggrieved party to file exception if he so wishes.”*

[17] In my view the Applicant’s particulars of claim in the amended form clearly set out a cause of action and accordingly I grant the order in the following terms:

ORDER

1. The amendment to the particulars of claim as set out in the notice to amend is granted.
2. The Respondent is ordered to pay the costs of this application which costs shall include the employment of two counsel.

DJAJE J T

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 29 June 2017

DATE OF JUDGMENT

: 17 August 2017

COUNSEL FOR APPLICANT : Adv MM Oosthuizen SC

with Adv RF de Villiers

COUNSEL FOR RESPONDENT : Adv SJ Du Plessis SC

with Adv IM Lindeque

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Prepared on 14 October 2026 · Esheria