

SOUTH AFRICA / JUDGMENT

Eastern Cape Development Corporation v Cotterell and Others (EL518/2023) [2024] ZAECELLC 12 (16 April 2024) [2024] ZAECELLC 12

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

EL518/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, EAST LONDON CIRCUIT COURT)
CASE
NO.: EL518/2023
Reportable No

In the matter between:

EASTERN
CAPE DEVELOPMENT CORPORATION Applicant
and
ANTHONY
CHARLES PATRIC COTTERELL NO 1st
Respondent
RUSSEL
IAN GRIGG
N.O 2nd
Respondent
ANITA
BHIKA
N.O 3rd
Respondent

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

- [1] This is an application for the amendment of the pleadings in terms of Uniform Rule 28 of the Uniform Rules of Court.
- [2] The applicant is Eastern Cape Development Corporation (ECDC), a legal entity duly established and constituted in accordance with Eastern Cape Development Corporation Act 2 of 1997. The applicant's principal place of business is located at ECDC House, Ocean Terrace Office Park, Moore Street, Quigney in East London.
- [3] The first, second and third respondents are cited in their representative capacities as co-trustees of Ronnie Motors Trust, a trust duly registered in terms of the Trust Laws of South Africa and trading as Ronnie Motors.
- [4] The respondents object to the proposed amendment.
- [5] For consistency with the main action, the parties will be referred to as they were previously. The applicant will be referred to as 'the plaintiff', and the first, second and third respondents will be referred to as 'the defendants'.

The background

facts

- [6] The plaintiff is the owner of the immovable property currently occupied by the defendants. On 13 March 2023, the plaintiff initiated legal action by issuing summons against the defendants for the delivery of property. On 02 May 2023, the defendants filed a plea alleging that the plaintiff and the defendants entered a lease agreement. The lease agreement was intended to span a period of ten years with the option of renewal for an additional period of thirty years. The defendants would pay a rental amount of R15 000 per month. In addition to the terms and conditions of the lease agreement, the defendants would be liable for the payment of rates and would, inter alia, be liable for the maintenance of the property. The defendants pleaded that at the time the summons were issued, the lease agreement was still in effect between the parties and they have a right to occupy the property.
- [7] In pursuit of the defendants' plea, the plaintiff filed a notice to amend the particulars of claim by inserting paragraph 11 into the existing particulars of claim. The proposed amendment reads thus:

“Alternatively and only in the event of a finding by the above Honourable Court that Defendant occupies the property pursuant to a lease agreement concluded between the parties and annexed to the Defendants’ pleas annexure RM1 the plaintiff pleads as follows,

“11.1 It is denied that ‘RM1’ constitutes a valid and binding agreement of lease.

11.2 The signature on page 2 of annexure ‘RM1’ (that of Pamela Mfingwana) was intended by Ms Mfingwana to confirm receipt of a letter and not a signature to an agreement concluded between the parties.

11.3. Ms Mfingwana in any event was not in possession of the necessary authority to conclude such an agreement with the Defendant nor were any valid and compulsory procurement procedures required in law followed in concluding such purported agreement of lease:

11.3.1. The Plaintiff is a public entity as defined and referred to in Section (3)(1)(b) of the Public Finance Management Act No.1 of 1990 as amended.

11.3.2. Section 217(1) of the Constitution (which is peremptory) provides that where an Organ of State or an institution identified in National Legislation (such as the Plaintiff) contracts for goods and services it must do so in accordance with a system which is fair, equitable, competitive and cost-effective.

11.3.3. On a proper construction of the aforesaid provisions of the Constitution the word ‘contracts’ refers to instances where an Organ of State contracts for the acquisition of goods or services and when it contracts for the sale and letting assets.

11.3.4 Accordingly, the principles of fairness, equity, transparency and in particular competitiveness and cost-effectiveness are applicable to the

letting of assets which in ownership belong or under the control of an Organ of State such as Plaintiff.

11.3.5. The above-referred to Constitutional imperative is echoed in Preferential Procurement Framework Act N0. 5 of 2000 as amended and the Public Finance Management Act 1 of 1999.

11.3.6. The purported agreement relied upon by the Defendant was not authorised by any legislative provision and was contrary to the provisions of Section 217 of the Constitution.

11.3.7. Accordingly, the purported lease as recorded in ‘RM1’ was not non-compliant with the regulatory framework referred to above and in particular there was no process which ensured the selection of the respondent in a fair, equitable, transparent, cost-effective and competitive manner.

11.3.8. In addition, the purported lease agreement was non-compliant with the Plaintiff’s Property, Policy Act and Procedure Manual (which effectively is the Plaintiff’s supply chain policy relating to the letting of immovable property)

11.3.9. In terms of Clause 7 of such Policy (the policy is a public document and available on the Plaintiff's website) it is mandatory for all prospective tenants (including the Defendant) to fully complete an application (annexure B to Policy) and provide the following documentation:

11.3.9.1 Proof of banking details issued by the appropriate bank.

11.3.9.2. Latest 3 months bank statements.

11.3.9.3 Latest annual financial statements.

11.3.9.4. Registration documents.

11.3.9.5. Business plan.

11.3.9.6. ID documents of owners of the company.

11.3.9.7 Resolution from the Board Members.

1.3.10. Furthermore, the purported agreement in the present instance is not compliant with Clause 7.1.1. of the Policy nor were the procedures set out in Clause 7.1.2 thereof complied with.

11.3.11. There has in addition been non-compliant with Clause 7.1.3. of the Policy in that the purported agreement of lease deviates from the standard lease agreement annexure "C" which was not approved by the legal Department prior to signature.

11.3.12 Of more significance, Clause 7.1.3.7 of the Policy provides that the lease agreement period shall be 3 to 5 years for industrial and commercial property and in as much as the purported lease agreement far exceeds the stipulated period, the reason thereof should have been documented in the Property Allocation meeting minutes which was not the case.

11.3.13 The persons with authority to sign a lease agreement of those listed in Clause 7.1.3.11 of the Policy.

11.4. Accordingly, the purported agreement is unlawful and of no force and effect virtue of non-compliance with the statutory framework referred to above and, under the circumstances, the Plaintiff is entitled to collaterally challenge the Defendants' assertion in its Plea that a void agreement of lease exists between the parties.

11.5 Accordingly, the Plaintiff is entitled to an order setting aside any decision to lease the property to the Defendant pursuant to annexure RM1 attached to the Defendants 'Plea and in particular is entitled to an order reviewing or setting aside the conclusion of the purported lease agreement annexure 'Between the Plaintiff and the Defendant.

By substituting the prayers with the following:

WHEREFORE, the Plaintiff prays for judgment against the Defendants (The Trustees of the Trust) as follows:

- (a) Ejectment of the Trust/and all those holding through them from the property being RF 953 Mthatha commonly known as N0, 8 Industrial Road, Norwood, Mthatha.
- (b) In the alternative:
 - (1) An order setting aside the decision to conclude a lease agreement between the Plaintiff and the Defendant
 - (2) An order reviewing and setting aside the conclusion of the aforesaid lease agreement between the Plaintiff and the Defendant.
 - (3) Ejectment of the Trust/Defendants and all those holding through them from the property being ERF 953 Mthatha commonly known as NO.8 Industrial Road, Norwood Mthatha.
- (c) Costs of Suit.
- (d) Further and/or alternative”
- [8] The defendants object to the proposed amendment on several grounds. First, they argue that the plaintiff’s proposed amendment is mutually destructive, contradictory, and argumentative. In essence, the defendant’s objection to the plaintiff’s proposed amended particulars of claim is that if allowed, the proposed amendment will render the plaintiff’s particulars of claim excipiable. The last objection is that the plaintiff has failed to comply with the requirements of Uniform Rule 53 in the institution of the review proceedings and no condonation is sought.

The issues

- [9] The points of adjudication are whether the proposed particulars of claim will render the plaintiff’s particulars of claim excipiable and whether to grant or refuse an application for the amendment of the pleadings.

The legal framework

- [10] In order for the opposing party to respond to a pleading, it is necessary for the pleader to provide a succinct and unambiguous summary of the relevant facts that support the pleader’s claim, defence, or answer as the case may be.[1]
- [11] Generally, a pleading which does not comply with the provisions of Uniform Rule 18 of the Uniform Rules of Court may be considered vague and embarrassing. If the averments are contradictory and not pleaded in the alternative, an embarrassment may occur[2].
- [12] A party who wishes to apply for the amendment of the pleadings, as in the present case, must comply with Uniform Rule 28[3] of the Uniform Rules of Court.
- [13] The general approach to be adopted in applications for amendment of the pleadings has been eloquently set out in numerous cases and summarised by White J in Commercial Union Assurance Co Ltd v Waymark NO[4] as follows:

“1. The Court has discretion whether to grant or refuse an amendment[5].

2. An amendment cannot be granted for the mere asking; some explanation must be offered[6].
3. The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue[7]'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties[8]'

The party seeking the amendment must not be mala fide.

3. It must not 'cause an injustice to the other side which cannot be compensated by costs'[9].
4. The amendment should not be refused simply to punish the applicant for neglect.
5. A mere loss of time is no reason, in itself, to refuse the application.
6. If the amendment is not sought timeously, some reason must be given for the delay.”

The parties’ legal submissions

- [14] The plaintiff’s counsel argued that the proposed amendment is sought in the alternative claim and will render no prejudice to the plaintiff. The essence of the plaintiff’s case, so he contended, is that the lease agreement is of no force and effect and therefore a subject of review; in that, the signatory was not possessed of the necessary authority to sign the lease agreement. Furthermore, no valid procurement procedures were followed.
- [15] Referring to the case of *Nelson Mandela Bay v Metro Erastyle and Others*[10], counsel argued that where an organ of the state seeks to review a decision taken by its officials, it may utilise action proceedings

and is not required to utilise the provisions of Uniform Rule 53.

- [16] The defendants’ counsel, on the other hand, identified some errors in the proposed amended particulars of claim. The first error is a reference to the defendant in a singular form at paragraph 11.5 of the proposed amendment instead of the defendants. Counsel strongly argued that the plaintiff seeks to deny entering into an agreement with the defendants. Despite the lack of accuracy, the plaintiff seeks an order reviewing and setting aside its decision to enter into an agreement. This, so he argued, is plainly contradictory. Regarding the issue of the review, counsel contended that the plaintiff has not pleaded that a decision was taken, therefore, there is no decision to impugn or review and set aside.

The application of the law to the facts

- [17] The main purpose of Uniform Rule 53 is to facilitate and regulate review applications. This is an interlocutory application which was brought within the trial proceedings. Our courts have accepted that review proceedings can be instituted by way of action. A litigant will not

be disadvantaged if he is required to institute review proceedings by way of summons because he can call for discovery in terms of Uniform Rule 35[11]. In my considered view, as soon as all the documents are discovered, the defendants may file comprehensive pleas. This will cause no prejudice to the defendants, instead an opportunity to ventilate all these issues during the trial proceedings will not be lost. In this regard, the defendants' objection to the amendment of the pleadings is without any merit.

[18] Regarding the alleged contradictions which are set out in the defendants' objection to the amendment, it is common cause that the main claim relates to the ejectment. The fact that the property belongs to the plaintiff is uncontroverted. The alleged conclusion of the lease agreement is challenged at paragraph 11 as an alternative claim. This is the gist of the plaintiff's

application for the amendment of the pleadings. In this regard, I will apply the principle distilled in Levitan's case[12] and conclude that since the conclusion of the lease agreement is challenged in the alternative claim, there is no embarrassment in the proposed amended particulars.

[19] The last issue relates to the reference of the defendants in a singular form. It is not in dispute that there are three defendants in this matter, in my view, the typographical error cannot be allied with the vagueness of the pleadings.

[20] For all the reasons stated above, the application for the proposed amendment to the plaintiff's particulars of claim stands to be granted. The objection to the amendment cannot succeed.

Order

[21] The following order is issued:

1. The plaintiff's application for leave to amend is granted.
2. The plaintiff shall bear the costs of the application for amendment as they would have arisen had the application been unopposed.
3. The defendants shall pay the costs of the opposed application for leave to amend.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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Date Heard:

08 February 2024

Date Reserved:

08 February 2024

Date Delivered:

16 April 2024

[1] Uniform Rule 18 (4) of the Uniform Rules of Court.

[2] Levitan v Newhaven Holiday Enterprise CC 1991 (2) SA 297(c) At 298J and 300G.

[3] '(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any

proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected. (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded. (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend. (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7). (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization. (7) Unless the court otherwise directs, a party who is entitled to amend

shall effect the amendment by delivering each relevant page in its amended form. (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30. (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party. (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit’.

[3] ‘(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any

proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

- (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit’.
- [4] 1995 (2) SA 73 (TK).
- [5] Caxton Ltd and Others v Reeve Forman (Pty) Ltd D and Another 1990
- (3) SA 547 (A) Corbett CJ stated at 565G:
- [6] per H Henochsberg J in Zarug v Parvathie NO 1962
- (3) SA 872 (D) at 876C.
- [7] per Caney J in Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967
- (3) SA 632 (D) at 641A.
- [8] Rosenberg v Bitcom 1935 WLD 115 at 117 a judgment by Greenberg J, as he then.
- [9] Watermeyer J, as he then was, in Moolman v Estate Moolman and Another 1927 CPD 27 at 29.
- [10] 2019 (3) SA 559 (ECP).
- [11] Mamadi and Another v Premier of Limpopo Province and others [2022] ZACC 26.
- [12] Supra fn 2.

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