

SOUTH AFRICA / JUDGMENT

FH Swanepoel Plant Hire CC v PMG Mining (Pty) Ltd (1291/2009) [2010] ZANCHC 36 (27 August 2010)

[2010] ZANCHC 36

COURT

Northern Cape High Court, Kimberley

BEFORE

SA Majiedt

CASE / FILE NUMBER

1291/2009

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IN THE HIGH COURT OF
SOUTH AFRICA
(Northern Cape High Court,
Kimberley)
Case no: 1291/2009
Date heard: 17 August 2010
Date delivered: 27 August 2010

In the matter of:

FH SWANEPOEL PLANT
HIRE CC PLAINTIFF
versus
PMG MINING (PTY) LTD
..... DEFENDANT

Coram:

MAJIEDT AJP

JUDGMENT

MAJIEDT AJP:

The plaintiff applies for the amendment of its particulars of claim in terms of Uniform Rule 28. The defendant opposes the application on the basis that the amendment is not bona fide. In this respect the defendant primarily relies on the well-known dictum of Watermeyer J in *Moolman v Estate Moolman*¹:

“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...”

The plaintiff’s proposed amendment envisages six separate claims, all of which arise from a written agreement between the parties concluded on 19 August 2008 (“the main agreement”). In terms of that agreement the defendant as owner of a manganese mine known as Bishop Mine appointed the plaintiff as mining contractor to extract manganese and iron ore. In the original particulars of claim the plaintiff sued for monies allegedly due to it in terms of the aforementioned main agreement and also for specific performance, alternatively damages for the alleged breach of a further written agreement between the parties concluded on 21 November 2008 (“the second agreement”). In the proposed amendment, the plaintiff completely abandons the claim based on the second agreement.

The second agreement precipitated a flurry of urgent applications between the parties. In terms of that agreement the plaintiff was permitted to sell ten thousand tons of manganese ore produced at Bishop Mine, which according to the defendant consist of a grade too inferior to sell to its customers. The plaintiff would sell this manganese ore, pay all its related expenses and repay to the defendant a loan in the amount of R796 009.28. The remaining profit would then be divided equally between the parties. In the first urgent application issued in this Court on 26 February 2009 (case no. 342/09), the plaintiff sought and obtained before me an order that it be granted access to Bishop Mine and to remove and sell the ten thousand tons of manganese ore. It also obtained an order that the income generated from the aforementioned sale be paid into the trust account of its attorneys in an interest bearing account pending the finalisation of an action instituted by the plaintiff within 30 days from the date of that order. A concomitant costs order was also made. That matter was heard before me, as I have said, on an urgent basis and I dismissed the subsequent application for leave to appeal. A further petition for leave to appeal to the Supreme Court of Appeal was also unsuccessful.

The implementation of my aforementioned order apparently led to certain difficulties and the defendant brought an urgent application before Pakati AJ when a rule nisi was issued on 30 May 2010. The plaintiff in turn brought a further urgent application on 5 May 2010 before Mjali AJ where the Sheriff for Kathu was also involved as a party. I do not deem it necessary to go into any detail regarding these further urgent applications. It would suffice to record that the second agreement has been the source of substantive, vigorous litigation between the parties with

resultant costs implications on both sides. The defendant's submissions as to the mala fide nature of the proposed amendment sought by the plaintiff is premised on the sudden and startling abandonment of the plaintiff's claim based on the second agreement.

On behalf of the defendant Mr Cassim SC has argued with some force that the plaintiff cannot simply abandon its claim based on the second agreement. He submitted that intrusive orders were made in the urgent application before me, based on the second agreement. That precipitated further urgent applications. To simply abandon the claim smacks of bad faith, so he submitted. Mr Janse Van Rensburg for the plaintiff countered this argument by submitting that the plaintiff is proceeding with the various claims on the main agreement. He submitted that there is no prejudice to the defendant, notwithstanding the abandonment of the claim based on the second agreement.

It is trite that a litigant who seeks an amendment is in effect seeking an indulgence from the Court. The general approach is further that an amendment will be allowed where no prejudice would ensue to the other party, or such prejudice that exist can be cured by a costs order and, where appropriate, a postponement. In this regard an applicant for amendment bears the onus to establish that the other party would not be prejudiced by such an amendment or that such prejudice can be cured by a costs order.

See in this regard: Moolman, *supra*2;

Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Limited3;

Affordable Medicines Trust v Minister of Health4.

Even fresh causes of action may be introduced by way of amendment as long as no prejudice is occasioned thereby. But as Mr. Janse Van Rensburg correctly pointed out, the additional claims in the proposed amendment essentially emanate from the same cause of action, namely the main agreement and the alleged breach thereof by the defendant.

See in this regard inter alia: Sentrachem Limited v Prinsloo.5

I am satisfied that the abandonment of the claim based on the second agreement would not be prejudicial to the defendant to the extent that it cannot be cured by an appropriate costs order. The parties were ad idem before me that the matter which was set down for trial over three days would be restricted to argument on the opposed application for amendment only and that the trial would be postponed. In the circumstances it seems to me that no prejudice would ensue beyond the costs incurred by the defendant in the opposed application.

Another aspect raised by Mr. Cassim is that the interim orders under case numbers 685/10 and 768/10 should be discharged and punitive attorney-client costs should be awarded against the plaintiff as a mark of this Court's displeasure. He submitted that the plaintiff as applicant has not adduced any facts in the supporting affidavit to demonstrate that it is not acting mala fide. He submitted further that the plaintiff is acting mala fide by simply abandoning a claim in excess of R5 million without any explanation. These submissions are devoid of merit. As I see the matter,

the plaintiff as dominus litis can elect whether to proceed on certain causes of action or not. At the appropriate time the defendant would have the opportunity to argue that the interim orders which are based on the second agreement should never have been issued at all and that the plaintiff should be held liable for the costs occasioned thereby. Now is not the proper time to consider such matters. If it should appear at the trial in the present matter that the plaintiff was not entitled to approach the Court based on the second agreement, then

the matter could be dealt with at that stage. I do not deem it prudent to interfere with the interim orders which remain extant.

In the premises I am of the view that the plaintiff should succeed in his application for amendment and that he should be ordered to pay the costs on an opposed basis. I must deal briefly with a submission made by Mr. Janse Van Rensburg that the order which I issued under case number 342/09 referred to above, was for security for its main action. This is indeed not the case. Having perused the papers in that case, it is plain that plaintiff brought the urgent application on the basis of an apprehension that the ten thousand tons of manganese ore may be alienated by the defendant contrary to the second agreement. It does not really matter whether it was brought for security or not because as I have indicated, the plaintiff in its original particulars of claim sued on two causes of action, one on the main agreement and one on the second agreement. With the proposed amendment it now seeks to proceed only on the main agreement.

The interim orders under cases numbers 685/10 and 768/10 must be extended until the trial date agreed upon by the parties, for final adjudication, namely 13 December 2010.

In the premises the following order is issued:

The application for amendment is granted.

The plaintiff is granted leave to amend its particulars of claim as per its notice of amendment in terms of Rule 28(4) dated 16 August 2010 within ten days from the date of this order.

The plaintiff is ordered to pay the defendant's costs of this application on an opposed basis.

The rules nisi in case numbers 685/10 and 768/10 are extended to 13 December 2010.

SA MAJIEDT

ACTING JUDGE-PRESIDENT

FOR THE PLAINTIFF : ADV F JANSE VAN RENSBURG

INSTRUCTED BY : ENGELSMAN MAGABANE INC, KIMBERLEY

FOR THE DEFENDANT : ADV N CASSIM SC

INSTRUCTED BY : HAARHOFFS INC, KIMBERLEY

1 1927 CPD 27 at 29

2at 29

3 [2004] 1 All SA 129 SCA at 133 h-i

42006(3) SA 247 (CC) at 261 C

51997(2) SA 1 at 15 H – 16 C

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Prepared on 10 October 2026 · Esheria