

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v Superfecta Trading 209 (Pty) Ltd and Others (GP06/2022) [2024] ZAST 3 (3 May 2024)

[2024] ZAST 3

COURT
Special TribunalBEFORE
L.T. ModibaCASE / FILE NUMBER
GP06/2022

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IN
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATING UNIT AND
SPECIAL
TRIBUNALS ACT 74 OF 1996
(REPUBLIC
OF SOUTH AFRICA)
CASE
NO: GP06/2022

In

the matter between:

SPECIAL
INVESTIGATING UNIT
First
Applicant
TRANSNET
SOC LTD
Second
Applicant
and
SUPERFECTA
TRADING 209 (PTY) LTD
First
Respondent
BBDM
BROS ADVERTISING AGENCY (PTY) LTD
Second
Respondent

ZAKHELE
EZEKIEL 'THABO' LEBELO
Third
Respondent
ZAKHELE
EZEKIEL LEBELO N.O.
In
his representative capacity as a Trustee of the Thabo Lebelo
Family Trust
Fourth
Respondent
ALETTA
MOKGORO MABITSI N.O.
In
her representative capacity as a Trustee of the Thabo Lebelo
Family Trust
Fifth
Respondent
PHATHUTSHEDZO
BRIGHTON MASHAMBA
Sixth
Respondent
MATLHODI
PHILLICIA MASHAMBA
Seventh
Respondent
INDUSTRIAL
DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED
Eighth
Respondent
TRANSNET
RETIREMENT FUND
AVIWE
NDYAMARA N.O.
OFFICE
OF THE DEEDS REGISTRAR, PRETORIA
STANDARD
BANK OF SOUTH AFRICA LIMITED
Ninth
Respondent
Tenth
Respondent
Eleventh
Respondent
Twelfth
Respondent

JUDGMENT

Summary: Civil procedure – application to amend the applicants’ notice of motion in terms of Tribunal Rule 15 – whether the requirements for an amendment are made.

MODIBA J:

INTRODUCTION

[1] The Special Investigating Unit (SIU) and Transnet SOC Limited (Transnet) as applicants seek to amend prayers 5, 6.1 and 6.2 in their notice of motion in the main application to increase the amounts of money they claim from the third respondent (Mr Lebelo) and the sixth respondent (Mr Mashamba).

[2] The particulars of the amendments sought are as follows:

2.1 In prayer 5, the applicants sought an order in terms of which Mr Lebelo is directed to pay to Transnet an amount of R5 182 767.73 as the bribe, gratification, and secret profits he unlawfully received, while employed at Transnet. They seek this payer amended to include an order in terms of which Mr Lebelo is directed to pay a further amount of R100,000.00 as the bribe, gratification, and secret profits he unlawfully received following his resignation from Transnet, for his role in the Superfecta contracts with Transnet.

2.2 In prayer 6.1 the applicants sought an order in terms of which Mr Mashamba is directed to Transnet pay an amount of R2 million as the bribe, gratification, and secret profits he unlawfully received, while employed at Transnet, for his role in the Superfecta contracts with Transnet. They seek an amendment to increase this amount to R2,3 million.

2.3 In prayer 6.2 the applicants sought an order in terms of which Mr Mashamba is directed to Transnet pay an amount of R4,5 million as the bribe, gratification, and secret profits he unlawfully received, while employed at Transnet, for his role in the BBDM contracts with Transnet. They seek an amendment to increase this amount to R 5,113,255.00 to recover an additional R613,255.00 from Mr Mashamba as additional bribes, undue gratification and secret profits he received pursuant to the BBDM lease, through an entity called Dundubala Trading CC, trading as Dundubala Projects (Dundubala).

[3] In relation to the additional amount of R100,000 the applicants seek to recover from Mr Lebelo in prayer 5, the applicants allege that on 21 January 2019, Mr Lebelo received this amount from Mr Mphephu’s personal account. Absent any credible and legitimate explanation, Mr Mphephu’s payment constitutes a bribe, gratification, or secret profit for Mr Lebelo’s role in awarding Superfecta the Generators contract and/or emergency maintenance contract with Transnet.

- [4] In relation to the additional amount of R300,000 the applicants seek to recover from Mr Mashamba, the applicants allege that in addition to the R2 million identified in the founding affidavit, Mr Khoncha paid these funds to Tonkin Clacey for the purchase of the Diepsloot property. These funds accordingly also constitute part of the bribe, gratification, or secret profit Superfecta paid to Mr Mashamba for his role in the Superfecta contracts with Transnet.
- [5] Mr Lebelo, Mr Mashamba and the parties associated with them as the third to seventh respondents initially objected to the proposed amendment. They have since withdrawn their opposition. Superfecta Trading 209 (Pty) Ltd (Superfecta) as the first respondent opposes the proposed amendment to prayers 5 and 6.1. Consequently, the proposed amendment to prayer 6.2 is unopposed. It stands to be granted. Only the proposed amendments to prayer 5 and 6.1 remain in issue. They affect Superfecta. Its counsel filed its heads of argument one day late due to ill-health. It has apologised to the Tribunal and applicants for the delay and seeks condonation. The applicants have taken no issue with the late filing of Superfecta's heads of argument. It stands to be condoned.
- [6] The basis for Superfecta's opposition is as follows:
- 6.1 The proposed amendments introduce the new cause of action, alternatively new issues for the first time in the replying affidavit;
- 6.2 No explanation is tendered for the belated proposed amendments;
- 6.3 The proposed amendments are not bona fide;
- 6.4 The Superfecta will suffer prejudice which cannot be compensated by an order of costs; and
- 6.5 Granting of leave to amend is not in the interest of justice.
- [7] In determining this application, I am guided by the trite principles that govern amendments. The have been put up by the applicants. Superfecta has taken no issue with them. I set them out below.

APPLICABLE LEGAL PRINCIPLES

- [8] The applicants rely on the general principles that govern applications for an amendment as set out in the seminal judgment in *Moolman v Estate Moolman*,^[1] *Pienaar Brothers*,^[2] and *Affordable Medicines Trust*.^[3]
- 8.1 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. It is for that reason that requests for amendments are always granted.
- 8.2 A request for an amendment may be refused when it is mala fide or it would cause a prejudice to the other side which cannot be compensated by way of a cost order, in other words; unless the

parties cannot be put back for the purposes of justice in the same position as they were when the pleading sought to be amended was filed.

8.4 In motion proceedings, when the applicant seeks to amend its relief at the time of filing its reply:

- (a) The court has a discretion to permit the proposed amendment and the filing of further affidavits.
- (b) When exercising its discretion, the court will be guided by the principle that the parties should be permitted to have the case adjudicated on the full facts. It will consider the following factors:
 - (i) the reason why the evidence was not produced timeously;
 - (ii) the degree of materiality of the evidence;
 - (iii) the possibility that the further affidavit may have been shaped to cure a material defect in the papers;
 - (iv) the balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted;
 - (v) the stage which the particular litigation has reached;
 - (vi) the general need for finality in judicial proceedings;

8.4 Whether the filing of further affidavits should be permitted is essentially a question of fairness to both sides.

8.5 The court will readily allow the amendment of a prayer if the main issue or cause of action between the parties remains the same.[4]

8.6 The fact that granting the amendment would necessitate the leading of further evidence is no ground for refusing the amendment. Even where an amendment has led to the re-opening of a case and a new cause of action, it has been allowed.[5]

8.7 Delay in seeking an amendment is, in and of itself, no ground for its refusal.[6]

8.8 In the absence of prejudice to the other party, leave to amend may be granted at any stage, however careless the mistake or omission may have been, and however late may be the application for amendment'.[7]

WHETHER THE REQUIREMENTS FOR AN AMENDMENT ARE MET

New cause of action; alternatively new issue introduced for the first time in a replying affidavit

- [9] The proposed amendments do not introduce a new cause of action. They relate to the same cause of action that is set out in the applicants' founding papers, namely, the recovery of monies Mr Lebelo is alleged to have unlawfully received as the bribe, gratification, and secret profits he unlawfully received, while employed at Transnet for his role in the

Superfecta contracts with Transnet. Essentially, they mainly seek to increase the amounts claimed. To the extent that these amounts relate to separate transactions, the proposed amendments introduce a new issue. There is no bar to introducing new

issues

in a replying affidavit. The respondents have been afforded an opportunity to supplement their answering affidavits to respond to

the new issue(s) introduced in the applicants' affidavit.

[10] The respondents will have an opportunity in the main proceedings to petition the Tribunal for compensation for any wasted costs occasioned by this belated amendment.

No explanation is tendered for the belated proposed amendments

[11] Contrary to the contention by Superfecta, the applicants have tendered an explanation for the amendments.

[12] Regarding prayer 5, the applicants' explanation for not including the relevant transaction in their founding papers is that they only identified the payment in December 2022 after the founding papers were filed and upon receipt of Mr Mphephu's bank statements. The SIU had obtained Mr Lebelo's bank statements on or about 26 July 2022, before the founding affidavit was filed, but did not have any contra-account information. The reference on Mr Lebelo's bank statement for the R100,000.00 payment of 21 January 2019 was "IB Payment from Dollars". Since the reference is cryptic, it was not possible to identify the source of this payment at that stage. The SIU received Mr Mphephu's Standard Bank account records on or about 22 December 2022 and analysed them in January 2023. Only then did they learn for the first time that Mr Mphephu had made the payment to Mr Lebelo.

[13] The applicants did not seek an amendment to prayer 5 earlier. Investigations were ongoing. In the meantime, other payments that constitute its cause of action were unearthed. As advised by their legal representatives, they only sought the proposed amendment in their replying affidavit having regard to all the information at the applicants' disposal and considering all the additional alleged gratifications that had by then been uncovered. Cumulatively, these payments amount to approximately R1 million. Bringing amendment applications each time every payment was uncovered would have been costly, tedious and would have only delayed the closing of pleadings.

[14] Regarding prayer 6.1, the applicants had explained at paragraphs 176 to 179 of the founding affidavit that the full purchase price of the Diepsloot property was R2,3 million. At the time, the SIU had traced the R2 million deposit Tonkin Clacey received on 30 July 2018 from Mr Khoncha. However, two further payments were made to Tonkin Clacey towards the purchase price which the SIU had not been able to trace before filing the founding papers. These were a cash deposit of R230,000 on 23 June 2018; and another EFT of R70,000 on 30 July 2018.

[15] In his answering affidavit, Mr Mashamba averred that “I advanced the sum of R300 000.00 in terms of the agreement with Mr Khoncha so I admit that the unknown person who made the deposit was in fact me.” Mr Mashamba provided no evidence to support his averment. During its investigation, the SIU sought to verify Mr Mashamba’s claim. It established that the EFT payment of R70,000 to Tonkin Clacey on 30 July 2018 was derived from another bank account held in Mr Khoncha’s name. These banking records prove that contrary to his evidence under oath, it was not Mr Mashamba who made the R70,000 payment, but Mr Khoncha.

[16] The same transaction reference was used for all three payments to Tonkin Clacey for the purchase of the Diepsloot property, i.e., the initial cash deposit of R230,000.00 made on 23 June 2018; the R70,000.00 paid from Mr Khoncha’s FNB account on 30 July 2018; and the R2 million paid from Mr Khoncha’s Standard Bank account on 30 July

2018. Given the common transaction reference, and the absence of any evidence that Mr Mashamba paid the cash deposit of R230,000.00 as he had claimed, the conclusion the SIU seeks drawn, that Mr Khoncha also made this payment on Superfecta’s behalf for Mr Mashamba’s

benefit is supported by its version, which is Superfecta has not seriously disputed.

Bona fides, prejudice, and the interests of justice

[17] The allegation that the proposed amendments are not made bona fide is baldly made without substantiation. The explanation the applicants have put forward for the proposed amendments and their timing is rational. Superfecta has not meaningfully counteracted it.

[18] The allegation that the proposed amendment is prejudicial to Superfecta and not in the interests of justice has also not been substantiated. The proposed amendments mainly relate to the quantum of the applicants’ claims. They relate to the same cause of action. The applicants have afforded the respondents an opportunity to supplement their answering affidavit to deal with the new issues on which the proposed amendments are based. The issues are narrow and within the respondents’ personal knowledge. It is clearly in the interests of justice that, if the applicants successfully establish their cause of action, they recover these amounts from the respondents.

[19] Superfecta has not established that if the amendments are allowed, it will suffer any prejudice that cannot be compensated by a compensatory cost order.

[20] In the result, Superfecta’s grounds of opposition fall to be dismissed. The applicants’ amendment application stands to succeed.

COSTS

[21] The applicants seek the costs of Superfecta's opposition as it was not warranted. I am satisfied that they should be awarded these costs. From the reasons set out above, Superfecta's opposition was not warranted because none of its grounds of opposition were sustainable, and most were merely made without any substantive basis.

ORDER

[22] The following order is made:

1. Prayer 5 is amended to read as follows (with insertion underlined):

"5. The third respondent ("Mr Lebelo") is directed to pay Transnet an amount of R5 182 767.73 as the bribe, gratification and secret profits he unlawfully received, while employed at Transnet, and the further amount of R100,000.00 as the bribe, gratification and secret profits he unlawfully received following his resignation from Transnet, for his role in the Superfecta contracts with Transnet.

2. Prayers 6.1 and 6.2 are amended to read as follows (with amendments underlined):

"6. The sixth respondent ("Mr Mashamba") is directed to pay Transnet the following amounts:

6.1 R2,3 million as the bribe, gratification and secret profits he unlawfully received, while employed at Transnet, for his role in the Superfecta contracts with Transnet; and

6.2 R 5,113,255.00 as the bribe, gratification and secret profits he unlawfully received, while employed at Transnet, for his role in the BBDM contracts with Transnet".

3. The first respondent shall pay the applicants' costs of opposition.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances

For Superfecta Trading 209 (Pty) Ltd

Counsel: Adv. N.O. Manaka

Attorney: Mr J. Maluleke, Maluleke INC t/a Maluks Attorney

For The Special Investigating Unit and Transnet SOC LTD

Counsel: Adv. C. Steinberg SC, assisted by Adv. J. Bleazard

Attorney: Ms S. Machado, Bowman Gilfillan Attorneys

Date of hearing: Not applicable. Application determined on the papers filed as Directed by the presiding Judge. Last day of filing of heads of arguments 15 April 2024.

Date of judgment: 3 May 2024

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, uploading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 am.

- [1] 1927 CPD 27.
- [2] Pienaar Brothers Proprietary Limited v Brian Pienaar North Proprietary Limited and Others (21220/21) [2023] ZAWCHC 151 ("Pienaar Brothers").
- [3] Affordable Medicines Trust and Others v Minister of Health and Others [[2005] ZACC 3[2005] ZACC 3; ; 2006 (3) SA 247 (CC)].
- [4] Tomassini v Dos Remendos 1961 (1) SA 226 (W) at 228D-E.
- [5] Myers v Abramson 1951 (3) SA 438 (C) at 450A-B; followed by the Supreme Court of Appeal in Media 24 (Pty) Ltd v Nhleko & Another (Case no 109/22) [2023] ZASCA 77 para 17. See also the quoted passage above from Pienaar Brothers at para 30.
- [6] See Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 638 to 642, and the cases discussed there.
- [7] Krogman v Van Reenen 1926 OPD 191 at 193. These words derive from a dictum in Clarapede & Co v Commercial Union Association
- (1883) 32 WR 262 at 263 which has often been cited with approval: see, for example, Rishton v Rishton 1912 TPD 718 at 719, SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd 1951 (4) SA 167 (T) 175D and Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) 638F and 641H-642A. In Mabaso v Minister of Police 1980 (4) SA 319 (W) at 323D Goldstone AJ (as he then was) said that 'even in a gross case' the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order for costs.
- [7] Krogman v Van Reenen 1926 OPD 191 at 193. These words derive from a dictum in Clarapede & Co v Commercial Union Association
- (1883) 32 WR 262 at 263 which has often been cited with approval: see, for example, Rishton v Rishton 1912 TPD 718 at 719, SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd 1951 (4) SA 167 (T) 175D and Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) 638F and 641H-642A.

In Mabaso v Minister of Police 1980 (4) SA 319 (W) at 323D Goldstone AJ (as he then was) said that 'even in a gross case' the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order for costs.

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