IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCT/0136/2016**

In the matter between

TOTAL LESOTHO (PTY) LTD **1ST APPLICANT**

TOTAL LESOTHO PROPERTIES (PTY) LTD **2ND APPLICANT**

And

THAPELO KHADI **RESPONDNET**

Neutral Citation: Total Lesotho (Pty) Ltd and another v Thapelo Khadi [2023] LSHC 51 Comm. (23rd February 2023)

CORAM: **M. S. KOPO, J**

HEARD: **23rd February 2023**

DELIVERED: **23rd February 2023**

SUMMARY

Civil Procedure – Amendment of Pleadings – discretion of the court to grant such – Rule 33 of the High Court Rules Restated.

Annotation

Books

Van Loggerenberg D.E: Superior Courts Practice. 1997. Juta and CO, Ltd

Cases

Lesotho

Farah Investments (Pty) Ltd V Total Lesotho (Pty) Ltd CIV/T/230/2011

Commissioner of Police v Seleso LAC (1990-1994) 628

South Africa

Coppermoon Trading 13 (Pty) Ltd. V Government, Eastern Cape Province 2020 (3) SA 391

Moolman v Estate Moolman 1927 CPD 27

Statutes

High Court Rules No. 9 of 1980

JUDGMENT

[A] INTRODUCTION

[1] The Applicants in this matter are the defendants while the Respondent is the Plaintiff in the main matter that was initiated through Summons filed with the Registrar of this court on the 09th day of May 2016. In this Application, the Applicants seek to amend their Plea in the main matter in terms of Rule 33 of the High Court Rules[1]. The prayer as stipulated in the Notice of Motion stand thus:

> ***A.*** *That the Plaintiff's Plea in the main trial be amended in the following terms and as set out in the Notice of Intention to Amend in terms of the provision of High Court Rule 33 by:*
>
> ***1.*** *Including a Second Plea, to be inserted after the Special Plea-Locus Standi:*
>
> ***2.*** *SPECIAL PLEA*
>
> ***2.1*** *The Second Defendant in the main trial, TOTAL LESOTHO PROPERTIES (PTY) LTD with registration number 12005/315 was struck off the roll of companies, with the Ministry of Trade and Industry, Registrar of Companies, it having the status of 'struck off".*
>
> ***2.2*** *The Second Defendant has not complied with the provisions of Section 187 (5) of the*

[1] Legal Notice No. 9 of 1980

Companies Act18 of 2011, it being a dormant entity.

2.3 *The Second Defendant has consequently become dissolved with the termination of its existence and Order of Court can be granted against it.*

Therefore, it is requested that Plaintiff's claim be dismissed with costs.

3. *By amending Paragraph 3 of the Plea and substituting it with the following:*

3.1 *By substituting paragraph, 3.1 with the following:*

3.1 The content of Ad Paragraph 2 is admitted.

3.2 *The Second Defendant was struck-off from the roll of Companies with the Ministry of Trade and Industry, Registrar of Companies, it becoming dissolved and terminated with no legal standing'*

B. *Awarding the Applicant/Plaintiff (sic) costs on attorney and client scale occasioned by the Application for Amendment.*

C. *Granting the Applicants/Plaintiff (sic) any further and/or alternative relief.*

[2] The Respondent is opposing this Application.

[B] THE APPLICANTS' CASE

[3] One Ms. 'Mabatho Khatleli deposed to the Founding Affidavit. She mentions that on or about the 5th day of June, 2022 she enquired from the Registrar of Companies about the status of the 2nd Applicant at the instruction of the Applicant's South African Attorneys. She found that the 2nd Applicant has been struck off the roll of companies.

[4] They alerted the Respondent about their finding, but the Respondent chose not to withdraw the matter against the 2nd Applicant and insisted that parties hold a pre-trial conference. On the 30th day of August, 2022, the Applicants filed a Notice to Amend Defendant's Plea which was objected to by the Respondent without any reasons for the objection hence the present Application. The Applicant's argument is that the 2nd Applicant is now struck off the roll and therefore cannot sue or be sued.

[5] Relying on **Erasmus**[2], Advocate Louw argued that in this type of applications, the power of the Court to allow amendments is limited only by considerations of prejudice or injustice to the opposing party. Moreover, citing **Coppermoon Trading 13 (Pty) Ltd. V Government, Eastern Cape Province**[3], Advocate Louw argued that when a new ground of defence comes to the knowledge of the defendant for the first time after it had filed a plea, the court can allow the amendment to the plea provided that the application for amendment is *bona fide* and not prejudicial to the opposing party.

[C] RESPONDENT'S CASE

[2] Erasmus, Superior Courts Practice, Second Edition page D1-332

[3] 2020 (3) SA 391

[6] The Respondent, first, attacks the application on the ground that the deponent to the Founding Affidavit lacks *locus standi in judicio*. The basis for this argument is that the deponent to the Founding Affidavit has not shown her interest to depose to the affidavit but for showing that she is an advocate in this country.

[7] On the other hand, the Respondent says that the issue that the Applicant seeks to amend the plea for can easily be solved through the discovery process.

[8] During arguments Advocate Sekatle argued that striking off a company and dissolving it are two different things from the reading of section 87 (7) of the **Companies Act**[4]. For that reason, therefore, he argued that the 2nd Applicant / 2nd Defendant has not been dissolved and there is no evidence to that effect.

[9] Advocate Sekatle also relied on Rule 14 of the **High Court Rules**[5] saying that no proceedings shall terminate by reason of change of status among other reasons.

[10] And finally, Advocate Sekatle argues that the Applicants are mala fide. His argument is that the *mala fides* of the Applicants is manifested by it seeking that the plaintiff's claim be dismissed with costs and therefore seeking a final order in that regard.

[D] ANALYSIS OF THE MATTER

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[4] Act No. 18 of 2011

[5] Supra.

[11] The relevant Rule in this Application is rule 33 of the High Court Rules. I had occasion to deal with this rule in **Farah Investments (Pty) Ltd V Total Lesotho (Pty) Ltd**[6]. In that matter I quoted with approval the words of **Van Loggerenberg et al**[7] citing Watermeyer J in the South African case of **Moolman v Estate Moolman**[8]. It is apposite to do the same herein. The quotation stands thus:

> *"The general approach to be adopted in applications for amendment has been set out in numerous cases. The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. The following statement by Watermeyer J in Moolman v Estate Moolman [1927 CPD 27 at 29] has frequently been relied upon:*
> *'..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 pleading which it is sought to amend was filed"*

[12] In *casu* the Applicants show that the information came to their attention at a late stage after they had already filed other papers. There seems to be no *mala fides* on their part on this issue. Advocate Sekatle seemed to place *mala fides* on the drafting of the amendment and how it was proposed to read when granted. He argued, in his Heads of Argument, that the Applicants were looking for the final order. That is an untenable argument.

[6] CIV/T/230/2011
[7] Erasmus Superior Courts Practice. Main Volume. Juta. 1994. B1-178A – B1-179
[8] 1927 CPD 27

It is possible that Advocate Sekatle misread the prayer and did not realise that it was a proposed amendment and not that the Applicant wanted a final order.

[13] During arguments, Advocate Sekatle also argued that the amendment will be prejudicial to the Plaintiff/Respondent as it will make his case thin. **Van Loggerenberg et al**[9], has opined, and rightly so in view, that "*the fact that an amendment may cause the other party to lose his case against the party seeking amendment is not of itself 'prejudice' of the sort which will dissuade the court from granting it*".

[14] Advocate Louw relied on the judgment of Browde J in **Commissioner of Police v Seleso**[10]. I am entirely in agreement and abide by that judgment too. *"Pleadings are intended to have the issues between the parties properly defined for the benefit of the court and, in the interests of justice, may be amended at any time …"*[11].

[15] It is apposite to address the ground raised by Advocate Sekatle in limine and also as a ground for attacking the application in the main. The argument raised is that the deponent to the Founding affidavit does not have *locus standi* to depose to what she has done. The said deponent has been explained as the employee of the correspondent attorneys of Applicant who actually found the information that the Applicants seek to rely on for their special plea. As Advocate Sekatle is not challenging the appointment of the said attorneys, I do not see how their employee can be challenged. This ground cannot stand as well.

[9] Supra at page B1-179
[10] LAC (1990-1994) 628
[11] Ibid at 630

[E] COSTS

[16] Rule 33 (7) provides that,

> *"A party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party."*

This rule still leaves the discretion with the court. In *casu*, a notice was given to the Respondent that there is an intention to amend the pleadings as is procedural. The Respondent gave an intention to object as is procedural. However, the grounds of objection were so untenable that the only reasonable conclusion is that the Respondents were objecting only for the sake of objecting. The Applicants prayed for punitive costs. I think that is going too far as this rule leans towards the party applying for costs to be the one to pay costs. Even if the grounds of the Respondent were so untenable, they do not deserve punitive costs as the Applicants are the ones who are applying for amendment. Be that as it may, the Respondents not having grounds for objecting to the amendment does justify that they should be liable to pay costs.

[F] CONCLUSION AND ORDER

[17] Having concluded that there is no prejudice that the Respondent/Plaintiff will suffer, that the application for amendment is not mala fide, the following order is made;

a. The application for amendment is granted as prayed.
b. Respondent to pay costs at a normal scale.

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Kopo J.
Judge of the High Court

For Applicant:	**Adv. H. Louw**
For 1st Respondent:	**Adv. B.E. Sekatle**