IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 1967/20
Reportable: Yes/No
Circulate to Judges: Yes/No
Circulate to Magistrates: Yes/No

In the matter between:

FRANCOIS JOHANNES VAN DYK N.O. (In his Official Capacity as Trustee of the Mostert Family Trust)	First Plaintiff
MADRE MOSTERT N.O. (In his Official Capacity as trustee of the Mostert Family Trust)	Second Plaintiff
WILMA FRANCIS MOSTERT N.O. (In her Official Capacity as trustee of the Mostert Family Trust)	Third Plaintiff
FRANCOIS JOHANNES VAN DYK	Fourth Plaintiff

and

MINISTER OF PUBLIC WORKS	First Defendant
THE SOUTH AFRICAN NATIONAL ROADS AGENCY	Second Defendant

Coram: Ramaepadi AJ

JUDGMENT

Ramaepadi AJ

Introduction

1 This is an application brought in terms of rule 28(4) of the Uniform Rules of Court, for leave to amend plaintiffs' amended particulars of claim dated 14 March 2017 (''the *particulars of claim''*).

2 The application is opposed by the second defendant only (''the Chief Executive Officer of the South African National Roads Agency ''). He does so essentially on two grounds.

2.1 First, the proposed amendment, if allowed, will have the effect that the Mostert Familie Trust (IT4625/99) will no longer be a party to the proceedings before Court; and

2.2 Second, the proposed amendment, if allowed, will render the plaintiffs' particulars of claim *excipiable,* because the proposed amendment does not disclose a cause of action against the second defendant.

3 In the discussion below, I consider each of the grounds of objection summarised above. Before doing so, it is important to set out the legal principles applicable to applications for amendment of pleadings. This is particularly important because a bulk of the second defendant's complaints in this case do not constitute good grounds of objection.

<u>The general approach to applications for amendment of pleadings</u>

4 The legal principles governing applications for amendment of pleadings are trite. They are neatly summarised in *Commercial Union Assurance Co Ltd v*

Waymark NO 1995 (2) SA 73 (Tk) at 77F-I. The following principles emerge from the above case-law:

4.1 The court has a discretion whether to grant or refuse an amendment.

4.2 An amendment cannot be granted for the mere asking; some explanation must be offered therefor.

4.3 The applicant must show that *prima facie* the amendment has something deserving of consideration, a triable issue.

4.4 The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the disputes between the parties.

4.5 The party seeking the amendment must not be mala fide.

4.6 The amendment must not cause an injustice to the other side which cannot be compensated by costs.

4.7 The amendment should not be refused simply to punish the applicant for neglect.

4.8 A mere loss of the opportunity of gaining time is no reason, in itself, for refusing the application.

4.9 If the amendment is not sought timeously, some reason must be given for the delay.

5 These principles have now crystalized into a coherent legal system, and have been widely accepted and applied by both the high court and the labour court, as the proper approach to adjudicating applications for amendment of pleadings. See for example, *Four Towers Investments (Pty) Ltd v Andre's Motors 2005 (3) SA 39 (N) at 43G-H; ASUWU & Others v Pearwood*

Investments (Pty) Ltd t/a Wolf Security & Another (2009) 30 ILJ 1852 (LC); Randa v Radopile Projects CC 2012 (6) SA 128 (GSJ) at 141C.

6 In what follows, I consider the second defendant's objections to the proposed amendments in light of the principles set out above.

The grounds of objection

7 The second defendant's objections are directed at three (3) paragraphs of the plaintiffs' notice of intention to amend. First, paragraph 2; second, paragraph 13; and third, paragraph 14.

The objection to paragraph 2 of the notice of intention to amend

8 This objection is formulated in the second defendant's notice of objection, as follows:

8.1 In the paragraph 2 of the intended amendment, the Plaintiffs delete paragraphs 2 and 3 of their Amended Particulars of Claim dated 14 March 2017. Paragraphs 2 and 3 of the Plaintiffs' Amended Particulars of Claim reads (sic) as follows:

8.1.1 Tweede Eiser is WILLEM ANDRIES MOSTERT N.O. 'n meerderjarige pensionaris van AOUBSTRAAT 12B, WALVISBAAI, NAMIBIe in sy amptelike hoedanigheid as trustee van die Trust.

8.1.2 Derde Eiser is WILMA FRANCIS MOSTERT N.O. 'n meerderjarige vroulike person van AOUBSTRAAT 12B, WALVISBAAI, NAMIBIe in haar amptelike hoedanigheid as trustees van die Trust."

8.2 The First to Fourth Plaintiffs instituted the action as trustees of the Mostert Familie Trust (IT4625/99).

8.3 The Plaintiffs cannot merely ''delete'' the Second and Third Plaintiffs as parties to the proceedings, without providing letters of authority indicating, that the First Plaintiff is the only trustee of the Mostert Familie Trust (IT4625/1999).

8.4 A trust is not a legal persona but a legal institution sui generis. Its assets and liabilities vest in its trustees. Trustees ought therefore to be cited in their capacity as trustees, since the trust itself cannot be either a Plaintiff or Defendant. Unless one of the trustees is authorised by the others, all the trustees must be joined in instituting or defending proceedings by or against the trust.

8.5 *The First Plaintiff fails to provide any documentation in the Plaintiffs' Notice of intended amendment indicating that he is authorised to solely act on behalf of the Mostert Familie Trust.*''

<u>The objection to paragraph 13 of the notice of intention to amend</u>

9 This objection is formulated as follows:

9.1 The intended amendment to the Plaintiffs' Particulars of Claim will render the Plaintiffs' Particulars of Claim excipiable as a result of the following:

9.1.1 In paragraph 13 of the Plaintiffs' Notice of intended amendment of their Particulars of Claim, the following is stated:

> *''As a result of the aforementioned action from the First Defendant were:*
>
> *9.1.1.1 Erf [….] and remainder of ERF [….], permanently deprived of the entrance, from the N7 roadway and/or any other public road;*

9.1.1.2 *The owners and visitors of the aforementioned ground did not have an entrance to the aforementioned erven.*''

The objection to paragraph 14 of the notice of intention to amend

10 This objection is formulated as follows:

10.1 In paragraph 14 of the Plaintiffs' Notice of intention to amend, the Plaintiffs refer to letters from the Second Defendant. Annexure ''MFT6'' of the letter specifically state (sic) the following:

> *''Die verantwoordelikheid vir die bou van die toegang binne die N7 padreserwe om aan the sluit by die serwituuut reg van weg is die applicant se verantwoordelikheid. SANRAL sal by geen onkoste in hierdie verband betrokke wees nie.''*

10.2 The Plaintiffs' (sic) therefore fail to indicate on what basis the Plaintiffs have a cause of action against the Second Defendant as a result of the alleged conduct of the First Defendant's, nor does it state on what basis the Second Defendant will be liable for the cost of building a road as set out in prayer (a) of the Notice of intention to amend, when it was specifically stated in Annexure ''MFT6'', that the Plaintiffs will be liable for all costs involved in building an entrance road.

10.3 The Plaintiffs' Notice of Intention of amendment therefore lacks averments which are necessary to sustain a cause of action against the Second Defendant.

10.4 In the premises, the Plaintiffs' Particulars of Claim will be excipiable in the event that the Plaintiffs proceed with the intended amendments.''

11 It is necessary, in order to understand my decision on the objections raised by the second defendant, to have regard to the three paragraphs of the notice of intention to amend, to which the objections are directed at.

11.1 The first, is paragraph 2 of the notice of intention to amend. The paragraph reads as follows:

''2. By deleting paragraphs 2 and 3''.

11.2 The second, is paragraph 13 of the notice of intention to amend. It reads as follows:

''13. By renumbering paragraph 13, to paragraph 12

12. As a result of the aforementioned action from the First Defendant were:

12.1 Erf [….] and remainder of Erf [….], permanently deprived of the entrance, from N7 roadway and/or any other public road;

12.2 The owners and visitors of the aforementioned ground did not have an entrance to the aforementioned erven.''

12 These are the only amendments that are relevant to this application. In the discussion below, I deal with each of the objections raised by the second defendant. I first deal with the objection to paragraphs 13 and 14 of the notice of intention to amend. Thereafter, I deal with the objection to paragraph 2 of the notice.

The objection to paragraphs 13 and 14 of the notice of intention to amend

13 The high watermark of the second defendant's objection to the proposed amendments to paragraphs 13 and 14 of the particulars of claim is that if

allowed, the proposed amendments will render the plaintiffs' particulars of claim *excipiable,* because paragraphs 13 and 14 of the proposed amendments lack averments which are necessary to sustain a cause of action against the second defendant.

14 The second defendant's objection, therefore, is premised on the misconception that paragraphs 13 and 14 of the notice of intention to amend, seek to introduce the contents of the new paragraphs 12 and 13 of the proposed amendment into the particulars of claim. That is not so.

15 Paragraphs 13 and 14 of the notice of intention to amend did not introduce anything new into the particulars of claim. Paragraph 13 of the proposed amendment merely seeks to re-number the existing paragraph 13 of the particulars of claim to become paragraph 12. The contents of paragraph 13 have remained the same since the first iteration of the plaintiffs' particulars of claim in this matter. Paragraph 13 of the original particulars of claim dated 12 September 2016, reads:

> *''13. Deur voormelde aksie van die Department van Openbare Werke was:*
>
> *13.1 Perseel [….] en Restant van Erf [….] van die vorige toegangsroete ontneem, as gevolg waarvan voormelde grondstukke geen toegang meer het vanaf die N7 snelweg of enige ander openbare pad nie;*
>
> *13.2 Het die eienaars en/of besoekers van voormelde grondstukke nie 'n toegangsroete tot die voormelde grondstukke nie.''*

16 Paragraph 13 of the particulars of claim was carried over into the amended particulars of claim dated 14 March 2017. It has now been carried over into the proposed amendment.

17 Save for the re-numbering, the contents of the proposed new paragraph 12 remain exactly identical to the contents of the existing paragraph 13 of the particulars of claim.

18 The same applies in respect of paragraph 14 of the notice of intention to amend, which seeks to re-number the existing paragraph 14 of the particulars of claim, to become paragraph 13. The contents of paragraph 14 have remained the same since the first iteration of the plaintiffs' particulars of claim in this matter. Paragraph 14 of the original particulars of claim dated 12 September 2016, reads:

> ''14. *Die Suid-Afrikaanse Padagentskap het skriftelik bevestig, in skrywes gedateer 20 Februarie 2015 en 15 Mei 2015 deur hul gevolmagtigde verteenwoordiger, MJ Runkel, dat 'n toegang vanaf die N7 snelweg, waar dit begin op die N7 by km 115,8 na die tersaaklike grondstukke goedgekeur was. Afskrifte van sodanige skrywes word hierby aangeheg as Aahangsels ''MFT5'' en ''MFT6'' onderskeidelik.''*

19 Save for the re-numbering, the contents of the proposed new paragraph 13 have remained exactly identical to the contents of the existing paragraph 14 of the particulars of claim.

20 Once it is so, then it follows that the second defendant's objection to paragraphs 13 and 14 of the plaintiffs' notice of intention to amend is flawed precisely because:

20.1 Paragraphs 13 and 14 of the proposed amendment do not introduce any substantive amendments to the particulars of claim. They only re-number the existing paragraphs of the particulars of claim, without introducing any material changes to the contents of the re-numbered paragraphs.

20.2 Re-numbering or adjusting the existing paragraphs of a pleading is not a substantive amendment, but merely a formal one. Amendments of this nature – formal amendments – are usually allowed in the normal course. See for example, Golden Harvest (Pty) Ltd v Zen-Don CC 2002 (2) SA 653 (O).

20.3 The second defendant will not suffer any prejudice if the amendment is allowed.

21 In the absence of prejudice to the second defendant, there is simply no basis to refuse the proposed amendment to paragraphs 13 and 14 of the notice of intention to amend, unless there are some other considerations that preclude the court from granting the proposed amendment. These include, an amendment which renders the pleading *excipiable (See for example, Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A) at 565H-J; Barnard v Barnard 2000 (3) SA 741 (W) at 754F; Krischke v RAF 2004 (4) SA 358 (W) at 363B; Nxumalo v First Link Insurance Brokers 2003 (2) SA 620 (T),* or which seeks to introduces a new cause of action which has since prescribed. See for example, Embling v Two Oceans Aquarium CC 2000 (3) SA 691 (C) at 697J-698A; Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit 2000 (2) SA 789 (SCA) at 794C-G; Malinga v Road Accident Fund 2012 (5) SA 120 (GNP) at 124C-G.

22 Adv. Sieberhagen who appeared on behalf of the second defendant strongly urged me to refuse the proposed amendment to paragraphs 13 and 14 of the notice of intention to amend, on the basis that, if allowed, the particulars of claim will be *excipiable* in that they will lack averment which are necessary to sustain a cause of action against the second defendant. In support of this argument, the second defendant relies on the following commentary from Erasmus: Superior Court Practice vol 2:

> ‘’*Save in exceptional cases, where the balance of convenience or some such might render another course desirable, an amendment ought not be allowed where its introduction into the pleading would*

render such pleading excipiable. In other words, the issue proposed to be introduced by the amendment must be triable issue. A triable issue is one (a) which, if it can be proved by the evidence foreshadowed in the application for amendment, will be viable or relevant; or (b) which, as a matter of probability, will be proved by the evidence so foreshadowed. If the plaintiff's particulars of claim do not disclose a cause of action, an amendment of the defendant's plea thereto would be an exercise in futility.''

23 The above statement is correct as a statement of substantive law, but it says nothing about whether in this case, the alleged *excipiability* in the particulars of claim has been brought about by the proposed amendment. This is particularly important in this case because the alleged *excipiability* in the plaintiffs' particulars of claim, has evidently not been brought about by the proposed amendment. Rather, it has existed right from inception of this action.

24 The second defendant is therefore, not entitled to rely on the objection mechanism provided for in Uniform rule 28(3) to attack the alleged excipiability of the plaintiffs' particulars of claim. To the extent that the second defendant intends to raise an exception against the plaintiffs' particulars of claim, his remedy lies, not in rule 28(3), but in the provisions of Uniform rule 23.

25 An objection under rule 28(3) can only be raised in circumstances where the excipiability of the pleading is brought about by the proposed amendment. This is not such a case. The second defendant has clearly misconceived his legal position.

26 In the result, I find the second defendant's objection to paragraphs 13 and 14 of the plaintiffs' particulars of claim to be without merits. The effect of the proposed amendments to paragraphs 13 and 14 is to do no more, than to re-number the existing paragraphs of the particulars of claim.

27 Accordingly, the second defendant's objection to paragraphs 13 and 14 of the notice of intention to amend is dismissed. Consequently, the amendments proposed in paragraphs 13 and 14 of the notice of intention to amend dated 25 February 2021 are allowed.

The proposed amendment to paragraph 2 of the notice of intention to amend

28 The second defendant relies, for the proposition that the plaintiffs cannot remove the second and third plaintiffs as parties to the proceedings, on two judgments.

28.1 First, the judgment of the Supreme Court of Appeal in Land and Agricultural Development Bank of SA v Parker and Others [2004] 4 All SA 261 (SCA). In particular, the second defendant relies on paragraphs [10] and [11] of that judgment.

28.1.1 The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate cannot be bound.[1]

28.1.2 It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining

[1] At para 10

condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf."[2]

28.2 Second, the judgment in *Cuba NO and Others v Holoquin Global (Pty) Ltd and Others [2016] All SA 77 (GJ).* The second defendant relies on paragraph [8] of the judgment.[3]

> '*'It is trite that the general rule is that the trustees of a Trust must join in suing (Cameron, Honore's South African Law of Trusts (5ed) page 322, paragraph 197 and the authorities cited in footnote 454 and paragraphs 256 page 419). While it may be possible for a trustee to execute a power of attorney to a fellow trustee to conduct litigation if authorised by the Trust Deed, the trustee so authorised is not substituted for the trustee granting the power of attorney in suing. All trustees must still sue and represent the Trust. All that the authorisation effects is that one trustee may conduct the litigation on behalf of himself and the trustee who has authorised him to do so, in both their names (see Lupacchini NO and another v Minister of Safety & Security 2010 (6) SA 457 (SCA at para 2 at 459D-E [also reported at [2011] 2 All SA 138 (SCA) – Ed])".*

29 The extracts of the judgments [referred to above] on which the second defendant relies, emphasise the general rule that all the trustees of a trust must act jointly when suing, or being sued, unless the other trustees have delegated their duties or powers to one of the trustees to conduct the litigation in the name of the trust.

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[2] At para 11
[3] At para 11

30 There is no averment in the notice of intention to amend, express or implied, that the second and third plaintiffs have delegated their duties or powers to the first plaintiff (also trustee), to conduct the litigation on their behalf and on behalf of the trust.

31 Nor, is it the plaintiffs' case that the first plaintiff has been authorised to conduct the litigation on behalf of the remaining trustees. Rather, the plaintiffs' argument is two-fold:

31.1 First, that paragraph 2 of the notice of intention to amend is not an application for the removal of second and third plaintiffs as trustees.[4]

31.2 Second, that since the second defendant did not file a notice disputing the plaintiffs' authority to act, then there was no obligation on the part of the plaintiffs to file a power of attorney confirming their authority to act in the matter.[5]

32 The second defendant's objection against paragraph 2 of the notice of intention to amend is clear – it is not that the effect of paragraph 2 of the notice of intention to amend is to remove the second and third plaintiffs as trustees. Rather, it is that the effect of paragraph 2 is to remove the second and third plaintiffs as parties to the proceedings. This is a different point from the one sought to be addressed in the plaintiffs' heads of argument.

33 Contrary to the misconceptions promulgated in the plaintiffs' heads of argument, there can be no confusion about the effect of paragraph 2 of the notice of intention to amend.

33.1 Paragraph 2 reads, ''By deleting paragraphs 2 and 3.''

33.2 Paragraph 2 of the particulars of claim is the relevant paragraph of the particulars of claim where the second plaintiff (WILLEM ANDRIES

[4] Plaintiffs' heads of argument p2 para 1
[5] Plaintiffs' heads of argument p2 para 2

MOSTERT N.O.) is cited in his official capacity as a trustee of the Mostert Family Trust, whereas paragraph 3 is the relevant paragraph of the particulars of claim, where the third plaintiff (WILMA FRANCIS MOSTERT N.O.) is cited in her official capacity as trustee of the Mostert Family Trust.

33.3 The effect of the proposed amendment, therefore, is to delete the second and third plaintiffs as parties to these proceedings.

34 If allowed, paragraph 2 of the proposed amend, therefore, will result in the Mostert Family Trust not being properly represented before Court by all the trustees of the Trust. Failure to join all the trustees of the Trust in the legal proceedings is of course, contrary to the well-established principle that requires all the trustees of a trust to be joined in any legal proceedings instituted by or against a trust.

35 The requirement pertaining to joinder of all the trustees of a trust must not be confused with the locus standi point – it is not concerned with the *locus standi* of the remaining trustees of the trust to institute the action on behalf of the Trust. Rather, it is about the authority of the first plaintiff to conduct the proceedings on behalf of the Trust as well as the second and third plaintiffs.

36 *Locus standi* concerns the direct interest of a party in the relief sought in legal proceedings. Authorization, on the other hand, concerns the question of whether a party is properly before court in legal proceedings. The two concepts should never be conflated. They must at all times, be kept separate, because they deal with two distinct situations.

37 It is now trite, that the remedy of a party who wishes to challenge the authority of a person acting on behalf of another, now lies in rule 7(1) of the Uniform rules of Court. This was explained by the SCA in Ganes.[6]

[6] Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)

> ‘’*However, as Flemming DJP has said, now that the Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent’s challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical argument on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its director of legal services? That question can, in my view, be answered only in the negative.*’’

38 It is important to point out that whilst in Ganes the SCA was concerned with motion proceedings, the wording of rule 7(1) makes plain that the subrule applies to both action and application proceedings. Rule 7(1) reads:

> ‘’*Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.*’’

39 To the extent that the second defendant wish to dispute the authority of the first plaintiff to conduct the litigation on behalf of the Trust and the remaining

trustees of the Trust, he should have done so by delivering a notice to that effect, within ten (10) days of becoming aware that the first plaintiff was so acting, or such longer period as the court may on good cause shown, permit. Needless to say that the second defendant has not done so. Instead he has resorted to raise an objection against the plaintiffs' proposed amendment, without directing challenging the authority of the first plaintiff to act on behalf of the Trust and the second and third plaintiffs in the matter.

40 It is irrelevant for adjudication of the application for leave to amend, that the plaintiffs are attempting through the proposed amendment, to remove the second and third plaintiffs as parties to these proceedings. It is equally irrelevant that the deletion of the second and third plaintiffs as parties to these proceedings will result in the Mostert Family Trust no longer being properly before the Court, as contended by the second defendant. Irrelevant too, is the fact that the plaintiffs have not attached to their notice of intention to amend, proof that the first plaintiff has been authorised to act on behalf of the Trust, as well as the second and third plaintiffs in the matter.

41 As a matter of practice, the second defendant cannot challenge the authority of the first plaintiff to act on behalf of the Trust, as well as the second and third plaintiffs in this matter, without invoking Uniform rule 7(1).

42 Rule 7(1) is not reserved only to challenges to the authority of attorneys to act in proceedings. It equally applies to challenges directed at the general authority of any person to represent or act on behalf of another in legal proceedings. This was made clear by Flemming DJP in *Eskom*.[7]

43 The opportunity is not completely lost to the second defendant to challenge the authority of the first plaintiff in terms of the rules of court. He may, despite expiry of the ten (10) days period specified in rule 7(1) and on good cause shown, challenge the authority of the first plaintiff to act on behalf of the Trust, as well as the second and third plaintiffs in the matter. Case-law suggests that

[7] Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705H. See also Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at 207C-E

such a challenge may be mounted at any stage of the proceedings, but before judgment is granted.

44 This means, therefore, that if allowed, the proposed amendment will not result in injustice or prejudice to the second defendant which cannot be compensated by costs. Prejudice in this context has been interpreted to include a situation where the parties cannot be put back for the purpose of justice in the same position as were when the pleading it is sought to amend was filed.[8] This is definitely not so in this case. Even if allowed, the second defendant still has an opportunity to challenge the authority of the first plaintiff to act on behalf of the Trust, as well as the second and third plaintiffs in this matter.

45 The following examples have emerged from the case-law on what does not constitute prejudice for purposes of rule 7(1).

45.1 Where a party will be no worse off if the amendment is granted with a suitable order as to costs.

45.2 The mere loss of the opportunity of gaining time is not in law prejudice.[9]

45.3 The fact that the granting of the amendment would necessitate the reopening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to lead that evidence was the state of the pleadings, and not a deliberate failure on the part of the applicant.

45.4 If a party makes a mistake in his pleading by, for example, demanding too little when more is owing, or by admitting that the defendant has paid a portion when in fact he has not, he gives his opponent an advantage which justice and fair dealing could not commend. If, the opponent is

[8] See for example, Moolman v Estate Moolman 1927 CPD 27 at 29
[9] See for example, Amod v SA Mutual Fire & General Insurance Co Ltd 1971 (2) SA 611 (N) at 617H-618A

then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed. The opposing party suffers no injustice and is not prejudiced, for he is in no worse position than he would have been if the pleading in its amended form had been filed in the first place.

46 I have considered the application for leave to amend in light of the submissions made on behalf of the plaintiffs and the second defendant, both in the written heads of argument and in oral argument. I have also considered the principles set out in *Commercial Union Assurance Co Ltd* (*supra*), governing applications for amendment of pleadings. To me, the crucial aspect is the consideration of how a judicial officer should exercise his or her discretion when faced with an application for amendment. An equally important consideration is that an amendment that facilitates the proper ventilation of the dispute between the parties must always be granted, unless the amendment will result in an injustice to the other side, which cannot be compensated by costs.

47 In my view, there is no injustice or prejudice that will be suffered by the second defendant, if the amendment were to be allowed. Any prejudice (if any) which may be suffered by the second defendant as a result of the proposed amendment will be adequately compensated for with an appropriate cost order.

48 There being no injustice to the second defendant, the application for leave to amend must therefore be granted. Only the question of costs remains, and there are two issues in this regard. One relates to the costs of the application for amendment. In my view, the plaintiffs must bear such costs as would have arisen had the application been unopposed.

49 The other question relates to the costs of the opposed application for leave to amend. There is no reason why the plaintiffs should not be entitled to the costs of the application for leave to amend.

50 In the result, the following orders are made:

50.1 The second defendant's objections to the plaintiffs' notice of intended amendment in terms of rule 28, dated 25 February 2021 are dismissed.

50.2 The plaintiffs' application for leave to amend is granted.

50.3 The plaintiffs shall bear the costs of the application for amendment as would have arisen had the application been unopposed.

50.4 The second defendant shall pay the costs of the opposed application for leave to amend.

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M J Ramaepadi

Acting Judge

Northern Cape Division, Kimberley

Date of Hearing:	21 January 2022
Date of Judgment:	20 May 2022
For the plaintiffs:	Adv. Eillert
Instructed by:	Van Dyk & Co c/o Engelsman Magabane
For the First defendant:	Ms Msibi
Instructed by:	The State Attorney

For the second defendant:	Adv. A.S. Sieberhagen
Instructed by:	Nompumelelo, Hadebe Inc c/o Towell & Groenewaldt Attorneys

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