IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 15996/2017

Date: 2 December 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

2/12/2019 DATE

SIGNATURE

In the matter between:

DUDUZILE CYNTHIA MYENI **Applicant**

And

ORGANISATION UNDOING TAX ABUSE NPC **First Respondent**

SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	**Second Respondent**
SOUTH AFRICAN AIRWAYS SOC LTD	**Third Respondent**
AIR CHEFS SOC LTD	**Fourth Respondent**
MINISTER OF FINANCE	**Fifth Respondent**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Applicant brought an application in terms of Rule 28(4) of the Uniform Rules of Court to amend the plea delivered by her in this matter. She also launched an application in terms of Rule 10(3) for the Joinder of other Defendants.

[2] The applications were heard separately but the Court will deal with both applications in this judgement, but obviously under separate and distinct headings.

BACKGROUND

[3] In the main action, the Plaintiffs (Respondents) seek an order declaring the First Defendant (Applicant) to be a delinquent Director in terms of Section 162(5) of the Companies Act 71 of 2008 (Companies Act).

[4] The Respondents issued summons on 07 March 2017. On 19 June 2017 a plea was filed on her behalf, by her erstwhile Attorney, Mr Van Niekerk of ENS Africa (ENS). On 28 February 2018, the matter was allocated for trial from 07 October 2019 to 01 November 2019. ENS terminated their mandate on 29 January 2019. The formal notice of withdrawal by ENS was filed on 07 June 2019.

[5] On 29 August 2019, Applicant's present Attorneys Lugisani Mantsha Incorporated placed themselves on record, but withdrew on 20 September 2019, stating that they had no financial instructions.

[6] At the commencement of the trial on 07 October 2019, Applicant failed to appear. The matter stood down in order to afford the Applicant an opportunity to appear in Court. On 08 October 2019, Applicant's former attorney, Mr Mantsha, appeared and informed the Court that Applicant requested a postponement. The matter stood down to allow Applicant to file a properly motivated application for postponement. On 10 October 2019, the Court refused a lengthy postponement and directed that the matter would proceed from 21 October 2019 to 01 November 2019 and then again from 25 November 2019 to 06 December 2019.

[7] At the commencement of proceedings on 21 October 2019, Counsel for Applicant announced that she intended to seek further amendments to her plea in addition to those set out in a partial Rule 28 notice which was delivered on 20 October 2019, during the evening before the trial was supposed to commence. At this point the Court was also informed that the Applicant in addition wished to bring an application to join all former directors of South African Airways (SAA). In order to afford the applicant an opportunity to file those applications and any other interlocutory application, the Court again awarded an indulgence to the applicant and directed that these applications would be heard form 25 November 2019 to 6 December 2019.

ACCESS TO COURT IN TERSM OF SECTION 34

[8] Before proceeding to deal with the two applications before Court, Applicant's assertion that she had a right in terms of section 34 of the Constitution to pursue any interlocutory application in any manner she may choose to must be dealt with.

[9] This assertion is simply incorrect. Both parties are entitled to a fair hearing.[1] In **Apleni v President of South Africa**[2] the Constitutional Court held that section 34 does not say that a person is constitutionally entitled to access to Court irrespective of relevant provisions of substantive and procedural law.

---

[1] Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety & Security 2012 (2) SA 13 SCA par 24.
[2] [2018] 1 ALL SA 728 (GP) at par 17.

[10] As a result access to Court will be determined by this Court in terms of the Superior Court Act No 10 of 2013, the Uniform Rules of Court and the relevant Practice manual and Directives.

THE AMENDMENT APPLICATION

[11] The Applicant's proposed amendments can be divided into three categories at this stage namely:

a) The withdrawal of admissions;

b) Elaboration on bare denials contained in the plea;

c) The introductions of objections and exceptions to the particulars of claim.

[12] The Respondents opposed the proposed amendments on the following grounds:

a) The Respondents contended that the Applicant failed to provide a full and honest explanation for these amendments, specifically with regard to the withdrawal of admissions and alleged that it demonstrated bad faith;

b) Secondly, it was alleged that Applicant failed to account for the delays in seeking these amendments, which they alleged also pointed towards bad faith;

c) They alleged that the proposed amendments and withdrawal of admissions would cause substantial prejudice;

d) They lastly alleged that the proposed amendments did not raise triable issues and are irregular as they seek to introduce legal argument, evidence and exceptions disguised as amendments.

[13] In her founding affidavit Applicant stated that she was made aware of deficiencies in her pleadings by her present legal representatives.

[14] She stated that there were factual errors in a number of admissions made and that she was under the impression that her previous legal representative, Mr Van Niekerk accurately captured the essence of points discussed during consultations. Although she stated in her founding affidavit that she did not want to cast aspersions on her previous legal representative, the essence of her complaint was that he did not follow her instructions and did not explain the legal implications of the plea to her. She said that as a layperson, she did not appreciate the legal implications of how some of the admissions and denials had been framed and could not ascertain whether the plea correctly conveyed her version of events. It must be noted that the amendments seek to withdraw no less than eleven admissions previously made.

[15] She furthermore, stated that in numerous instances the plea, as it presently stands, does not comply with Rule 22 of the Uniform Rules of

Court. In particular in many instances serious allegations are made against her, indicating impropriety unlawful conduct and violations of statutory provisions, which are presently met with bare denials. She states that the admissions that she seek to withdraw are in the main corrections of factual inaccuracies and rectification of evasiveness and ambiguity in the plea. According to her the withdrawal of the admissions are not material allegations, but are merely of context and background information. She denied all allegations of bad faith and impermissible legal argument being introduced. To illustrate her good faith, she stated that she withdrew her special plea of *locus standi*. We know now however, that in the meantime the withdrawal of the special plea was retracted and will be argued after this judgement is delivered.

[16] Applicant stated that she will be severely prejudiced if not allowed to introduce the proposed amendments and that a refusal of the amendments will actually amount to a violation of the *audi alteram partem* rule and will infringe on her right to a fair hearing as envisaged in Section 34 of the Constitution and will not be in the interest of justice.

[17] She therefore sought leave to amend her papers. It must be noted that no Notice of Motion was filed in this application or the joinder application and despite an invitation by the Court to rectify this, a belated notice of motion was filed after her hearing, relating only to the joinder application. For purposes of this matter I will ignore this

procedural flaw, as one can ascertain her prayers from a perusal of the papers.

[18] The Respondent's obtained an affidavit by Applicant's erstwhile attorney in which he denied that he did not consult properly with the Applicant and that he did not follow her instructions. He stated that he could not file a Notice of Withdrawal prior to June 2019 as he was unable to determine who the applicant's new attorneys were.

[19] Mr Van Niekerk denied the allegations made by the Applicant against him and his firm, and stated that as a result of the fact that Applicant put the blame for the alleged shortcomings and errors in the plea on him and his firm, she had waived attorney and client privilege. He stated that he only disclosed information necessary to refute allegations against them and only to the extent necessary.

[20] The following statements made by him are relevant for the determination of this application. He set out the procedure that was followed in drafting the plea as follows:

a) They had several consultations and extensive correspondence with Applicant and recorded her instructions accurately and comprehensively in the plea;

b) The legal implications of specific defences advanced by her and the risks of bare denials were explained to her;

c) Applicant was requested to furnish them with paragraph by paragraph written response to the allegations made in the particulars of claim. While waiting for her response they proceeded with a draft plea based on the information at their disposal;

d) Applicant was provided with a list of questions in order to complete the first draft of the plea. They consulted with her for 3½ hours on 25 May 2017 to take instructions and afterwards updated the plea in accordance with her instructions. However the plea was still incomplete and they left her with a list of issues and questions in respect of which they required instructions. By 01 June 2017, they had not received any further instructions and drafted the plea as far as they were able to;

e) On 01 June 2017, Mr Cohen sent Applicant a WhatsApp message and stressed the urgency and need for instructions and asked for feedback on the plea;

f) On 02 and 05 June 2017, the Applicant furnished them with further documents relevant to the plea. By 06 June 2017, Applicant had still not furnished them with a complete paragraph by paragraph response to the particulars of claim. On 06 June 2017, Mr Cohen sent an email to the Applicant, stressing that it

was critical that she provided paragraph by paragraph comment to the particulars of claim, in order for them to complete her plea;

g) On 06 June 2017 and in response to Mr Cohen's email, Mr Nick Linell, who was Applicant's adviser sent an email requesting the questions and stated that he would see whether he could expedite the issue;

h) On 06 June 2017 Mr Cohen replied to the aforesaid email and sent him a list of the questions;

i) On 08 June 2017, Senior Counsel was briefed to settle the plea. A copy of the plea was sent to the Applicant the following request contained in that email is of importance:

> *"Please work your way through the attached document, together with the particulars of claim, and confirm that what is stated in the plea is correct and if anything is incorrect, please let us know".*

[21] The email reflected that the Applicant said that she did not have in her possession, or had access to, many of the documents referred to in the particulars of claim. The attorneys had served notices in terms of Rule 35 (12) and (14) but the Respondents had not replied to them. This also contributed to the difficulties they experienced in completing the plea.

[22] An extension was obtained until 19 June 2017 to deliver the plea. On 14 June 2017 they again consulted with the Applicant on the basis of the email and worked with her through the e-mail. This telephonic consultation lasted more than 3 hours and Applicant was taken to each paragraph of the particulars of claim. Her response was recorded and Senior Counsel was briefed to settle the plea.

[23] Mr Van Niekerk stated that he specifically cautioned Applicant more than once that the plea contained bare denials where more was required. He urged her to apply her mind to these so that a more comprehensive and meaningful plea could be prepared.

[24] Senior Counsel sent the plea to them on 15 June 2017 and it was in turn forwarded to Applicant and Mr Linell. They were requested to peruse it and to ensure that they agreed with the contents. Despite stressing the urgency of a response, no response was forthcoming. During the afternoon of 19 June 2017, Mr Gadidge and Mr Cohen called the Applicant to obtain a final instruction. Mr Cohen in a telephone note noted that she was indeed happy with the plea.

[25] As a result ENS Attorneys denied that there were a number of factual errors, that the plea was not canvassed with her and that she was unaware of the legal implications pertaining to the content of the plea. The relevant emails and telephone note were attached to the papers.

[26] In her reply Applicant denied that she waived her privilege and stated that her new legal representatives were entitled to give her different advice. She also denied that her legal representatives were informed of respondent's legal representatives intention to consult with her previous legal representative and that no proof of communication was attached and that it was improbable that they would have agreed to it. She stated that Respondent's Attorneys acted unethically, and are guilty of gross professional misconduct. She repeated these allegations against ENS Attorneys.

[27] Regarding the allegation that Respondent's attorney did not inform Applicant's attorney of their intention to consult with Mr Van Niekerk's , attached to the papers before me was a letter addressed to applicant's Attorneys dated 16 October 2019 in which in paragraph 3, Mr Pandor, the Attorney for Respondents state *inter alia* as follows:

> *"We also notify you that we would like to consult with Mr Van Niekerk in this regard and that in any event we propose to subpoena him to testify in this regard at the trial".*

[28] No reference was made to this letter in the reply, yet Mr Buthelezi persisted with the allegation that they were not informed. If for one reason or the other Applicant's legal representatives did not receive the letter, I would have expected an affidavit by them attesting to that fact, or even an oral submission that they did not receive the letter. Under

the circumstances the Applicant and her Counsel's submission in this regard seems to be incorrect. If her representatives decided not to respond they did it at their own peril.

[29] The Applicant also did not deal at all with the factual allegations made by Mr Van Niekerk. She merely claimed that he acted unethically by breaching her right to privilege. I therefore must accept that Mr Van Niekerk's allegations stand uncontested.

ATTORNEY AND CLIENT PRIVILEGE

[30] Before dealing with the amendments it is appropriate to consider whether there is any merit in Applicant's argument that Mr Van Niekerk acted unethically by providing an affidavit in the context of this case.

[31] Our Courts have on various occasions held that "*when a client alleges a breach of duty by the Attorney, the privilege is waived as to all communications relevant to that issue*".[3]

[32] In *Tandwa*[4], the Supreme Court of Appeal applied this principle in circumstances where a party accused his former advocate of incompetence. The Court held that the advocate was fully entitled to submit an affidavit in response to these allegations, as privilege had been imputably waived. This conclusion was explained as follows:

---

[3] *S v Tandwa and Others* [2007] ZASCA 342008 (1) SACR 613 (SCA) at paras 18 – 20; *S v Boesman* 1990 (2) SACR 389 (E) 394G-H.
[4] Twanda supra.

"*[18] Since accused 1 has nowhere expressly consented, the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In* Peacock v SA Eagle Insurance Co Ltd *and* Harksen v Attorney-General Cape, *the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.*

[19] In propounding a doctrine of imputed waiver (which may also be termed fictive or deemed waiver), the judge in Peacock and Harksen drew on a passage from Wigmore, much-cited in our courts, that enjoins 'fairness and consistency' in inferring the extent of an implied waiver of attorney/client privilege. Wigmore in the same paragraph goes on to conclude that it is a 'fair canon of decision' that 'when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue'.

[20] The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of

the allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was admissible in assessing the accused's claims."[5]

[33] In *Tandwa*[6], the SCA approved of the High Court's judgment in *S v Boesman*[7]. There the Court admitted evidence from advocates who were accused of making admissions in error. It was held as follows in *Boesman*:

"[W]here, as has happened in this case, the accused have elected to give evidence concerning the instructions given by them to their counsel, and where they seek to withdraw admissions made by their counsel on their behalf on the ground that their counsel acted contrary to their instructions in making the admissions, they have waived the privilege attaching to the communications made by them to their counsel in that regard, and the element of fairness referred to in the passage in Wigmore, quoted by Rumpff JA in Wagner's case, requires that the State should be allowed to call the counsel concerned to give evidence concerning such communications.[8]"

---

[5] *Tandwa supra* par 18-20.
[6] Twanda par 18 – 20.
[7] *Boesman supra*.
[8] *Boesman* 394G-H.

[34] In the light of the allegations made in her affidavit against her previous legal representatives, I am of the view that the conduct of the Applicant amounted to an imputed waiver of privilege by the Applicant and that Mr Van Niekerk was entitled to file an affidavit. He clearly limited the contents of his affidavit to the allegations that he did not obtain instructions from her in drafting the plea. In the light of the facts the application to strike out his affidavit is denied. I am of the view that Ms Steinberg's submission that the Applicant could not on the one hand accuse her former Attorney of failing to follow her instructions, but on the other hand attempt to suppress evidence to the contrary, was correct.

PRINCIPLES REGARDING AMENDMENTS

[35] This Court has a discretion to refuse or grant amendments under Rule 28 of the Uniform Rules, but it is a discretion that must be exercised on proper principles.[9] These principles were summarised by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*[10]:

> "*[9] ... [A]mendments will always be allowed unless the amendment is* mala fide *(made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or '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*[11]*'.*"

---

[9] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565 (Caxton).

[10] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (Afforable Medicines).

[11] *Affordable Medicines* par 9.

[36] The courts have further emphasised that proposed amendments must raise a triable issue that is sufficiently important to justify the prejudice and costs to the other parties and the Court[12].

[37] Applicant as a result bears the onus to prove that the amendments were made in good faith, will not result in injustice or prejudice to the plaintiffs and that any prejudice could be cured by a suitable costs order. The Applicant must also show that the proposed amendment raise triable issues of sufficient importance to justify possible prejudice.

[38] The withdrawal of admissions requires special scrutiny. While the test to be applied is the same as for other amendments, it is far more difficult to satisfy this test. In *President Versekeringsmaatskappy Bpk v Moodley*[13] this Court explained this as follows:

> *"The approach is the same [as for other admissions], but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence[14]."*

---

[12] *Caxton* at 565, citing De Villiers JP in *Krogman v Van Reenen* 1926 OPD 191 at 195.
[13] *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H–111A (Moodley).
[14] *Moodley* at 110H-111A.

[39] As a result it is required of a defendant to provide a full and honest explanation of the circumstances surrounding the making of an admission and the reasons for seeking its withdrawal[15].

[40] In this instance the Applicant's only real explanation for withdrawing the admissions were the alleged failures of her previous attorneys to consult properly and obtain instructions. It is clear from what was stated above that her attorneys did consult and did follow her instructions. In her replying affidavit she made no attempt to respond to Mr Van Niekerk's allegations and as a result they presently stand largely uncontradicted.

[41] In *Bellairs v Hodnett*,[16] the Appellate Division emphasised that the withdrawal of admissions requires "*a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it.*" If no satisfactory explanation is provided, that is the end of the matter.[17]

[42] It is not enough for an applicant merely to assert that an admission was made in error. The error must be fully explained to satisfy the court that

---

[15] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1150; (Bellairs) *Northern Mounted Rifles v O'Callaghan* 1909 TS 174; *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735.

[16] Bellairs at 1150F–H.

[17] *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd* 1946 CPD 735 at 749: "*[T]he enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice.*"

the attempted withdrawal of the admission was made in good faith, rather than simply to secure a tactical advantage.[18]

[43] The Applicant sought to withdraw no less than eleven admissions. These admissions relate to factual and not legal issues. Applicant should have been able to identify and correct these admissions when perusing her plea after the consultations with ENS attorneys.

[44] Applicant stated that she was unaware of the legal implications of these admissions and that her new legal representatives were entitled to give her different advice as to what should have been admitted. Different legal representatives may indeed give different advice, but that cannot imply that a litigant may not be bound by pleadings drafted on her instruction and after proper consultation. If a litigant seeks to blame their legal representatives for errors a full explanation must be given as to why no blame should be attributed to herself.

[45] In *Saloojee and Another NNO v Minister of Community Development*[19], the following is stated:

> *"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to*

---

[18] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640 and the cases cited therein.
[19] *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141 (Saloojee).

laxity.... If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case[20]."

[46] In the context of this matter Applicant failed to give a reasonable explanation for the withdrawal of the admissions. She is by all accounts not merely an average layperson but a businesswoman with vast experience in the corporate world and served on the boards of many companies. It is inconceivable that she did not have the necessary capacity to consider and comprehend the plea and the admissions made therein, especially in the light of the fact that they related to factual allegations.

[47] The Respondents in opposing the amendments also raised the issue of the applicant's failure to explain the undue delay in moving for the amendments. In this regard note must be taken of the fact that her plea was filed in June 2017, about two and a half years ago.

[48] The case law is clear that unexplained delays are indeed relevant in assessing whether amendments are sought in good faith and whether this will prejudice the other side[21]. In *Zarug v Parvathie NO*[22] it was

---

[20] *Saloojee* at 141.
[21] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640.
[22] *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C, approved in this Division in GMF Kontrakteurs (Edms) Bpk And Another v Pretoria City Council 1978 (2) SA 219 (T) (Zarug).

held that: "*if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay*[23]."

[49] Apart from her allegation that it was only when her current legal representatives appraised the papers that she understood the alleged shortcomings, no other explanation was given.

[50] The Respondents importantly raised the issue of prejudice in their opposition to the application for amendment and said that the prejudice they would suffer cannot be cured by an appropriate cost order. Even though the authorities state that in the absence of a satisfactory explanation the court need not consider prejudice. I deem it appropriate to deal with this aspect.

[51] Respondents stated that the proposed amendments go to material issues which would require them to re do substantial portions of their trial preparation, to reconsult witnesses and to gather fresh evidence.

[52] The following was raised in their heads of arguments pertaining to prejudice. Applicant's proposed amendments go to material issues which would require the Respondents to redo a substantial portion of their trial preparation, to reopen consultations with key witnesses, and to gather fresh evidence. This was illustrated in the heads of argument with reference to different transactions.

---

[23] *Zarug* at 222.

a) On the BNP deal, Applicant's sought to retract admissions regarding the flawed procurement process. By seeking to place the entire procurement process into dispute, Applicant would force the Respondents to subpoena further evidence, find new witnesses who can establish that the proper processes were not followed, and call expert witnesses to testify on the requirements of proper procurement in these circumstances. This, they contend, is a minefield of factual and legal issues, which will substantially prolong the trial and will force the respondents to incur substantial new costs which were never anticipated.

b) In respect of the Airbus / Pembroke deal, Applicant had previously admitted that on 27 May 2013 the Board resolved to finance ten aircraft through Pembroke Capital and that the Board did not at any time overturn this resolution. This is, according to them significant, as it demonstrated that Applicant's letter to the Minister in June 2013 was incorrect in claiming that the Board had resolved to finance only two aircraft. Applicant now seeks to withdraw these admissions in their entirety and even goes so far as to place the Board resolution of 27 May 2013 in dispute. This too, according to Respondent will require the Respondents to subpoena further documents and call further witnesses who can authenticate the relevant board resolutions and minutes.

c) In respect of the Airbus Swap Transaction, Applicant seeks to withdraw her admissions that there was no Board approval or ministerial approval for the insertion of a middleman at the time that she wrote to the Airbus CEO in September 2015. She now seeks to change her version entirely by claiming that there was Board and Ministerial approval at the time for the insertion of a middleman. This too, Respondents allege will require them to gather further evidence and to interview new witnesses to determine precisely what the Board had decided at the time.

[53] The Respondents pointed out that neither of the Plaintiffs are for profit companies. As far as First Respondent is concerned it relies on contributions of citizens to enable litigations. Furthermore Applicant on her own version is unemployed and suffers from financial constraints and will not be able to satisfy any cost order that maybe granted against her.

[54] In any event if evidence is led or provided by the Applicant during the trial that clearly contradicts admissions made by her in her plea, nothing will prevent her legal representatives to approach the Court at that point for an amendment based on the evidence and the Court may then reconsider such an application at that point. It must be noted that at this point no evidence in support of the withdrawal of the admissions were provided.

[55] The further objection against the proposed amendments were that it constitutes an impermissible attempt to introduce exceptions, objections and legal argument as well as evidence. It was argued that the bulk of the proposed amendments do not raise triable issues.

[56] Applicant did indeed seek to introduce exceptions and technical objections to the particulars of claim, accusing Respondents *inter alia* of failing to plead a cause of action. If she wished to raise these objections, she was required to file an exception, applications to strike out or notices of an irregular step before filing her plea[24]. She cannot use amendment procedure to introduce exceptions and objections[25], she accused the Respondent of fact.

[57] She also sought to use the proposed amendment to plead evidence and to advance argument. This is also impermissible[26].

[58] The way in which the Applicant went about to plead, went far beyond stating her case, it amounts to the pleading of evidence and as a result these amendments do not comply with the rules and cannot be granted.

[59] In conclusion the application for amendment cannot be granted.

---

[24] Uniform Rules 23, 30, 30A.

[25] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734: *"It can be said in general terms ... that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. ..."*

[26] Rule 18(4): (4) *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

JOINDER APPLICATION

[60] The Applicant filed a further application in terms of Rule 10(3) to join some 28 other Directors of SAA.

[61] Applicant claimed that the other Directors must be joined because the issues in dispute stem in part from actions and resolutions of the Board. As a result she sought to join all the board members that served with her at SAA during her tenure, on the basis that they acted as a collective and as a result they could be sued on substantially the same questions of facts and law.

[62] Rule 10(3) reads as follows:

> *"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."*

[63] Although there is doubt that the Applicant's reliance in Rule 10(3) is legally competent, as this rule permits a plaintiff to join several co-defendants on grounds of convenience where the claim raises

substantially the same questions of law and fact. In the common law a defendant's right to join other parties are narrowly confined.[27]

[64] However, for purposes of this application the Court will approach the matter on the basis of non-joinder. Non-joinder arises where another party has a direct and substantial interest in the matter, which is determined by the relief that is sought. A party can only be said to have a direct and substantial interest in the matter if the relief cannot be sustained and carried into effect without prejudicing their interests.[28]

[65] In *Amalgamated Engineering Union*,[29] the Appellate Division explained further that "*[t]he question of joinder should ... not depend on the nature of the subject-matter of the suit ... but... on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.*"

[66] This means that the relief is decisive, not the facts or issues in dispute. Even where a Court may be called on to make findings that are adverse to another party this does not establish grounds for non-joinder if the relief sought does not adversely impact on that party's interests.[30]

---

[27] *Burger v Rand Water Board & Another* 2007 (1) SA 30 SCA par 7.
[28] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653 (Amalgamated Engineering); *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) at para 10.
[29] *Amalgamated Engineering* at 657.
[30] *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 10; *Judicial Service Commission and Another V Cape Bar Council And Another* 2013 (1) SA 170 (SCA) at paras 15 – 17.

[67] In this instance the Respondents seek relief only against the Applicant and not against the other Board Members[31]. The relief claimed therefore does not impact on the other director them at all and as a result they do not have a direct and substantial interest in this matter.

[68] That does not mean that they may not be called as witnesses and that their evidence may be determinative of the success of the Respondents claims against the Applicant.

[69] The other directors do not have a direct and substantial interest in the relief sought even if the evidence ultimately reveals that they were complicit in any unlawful conduct that may be proved.

[70] In any event a Plaintiff is entitled to choose their defendant from a group of wrongdoers.[32]

[71] It would furthermore seem that the delinquency claim against the other directors have prescribed in terms of sec 162(2)(a) of the Companies Act, which provides that a delinquency claim must be brought within 24 months after the director vacated his/her position.

---

[31] *Amalgamated Engineering* at 653; *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) at para 10.
[32] Harms, Civil Procedure in the Superior Courts, Last Updated February 2019 564 at B10.2 *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1982 (3) SA 618 D.

[72] As a result of all the facts set out above the joinder cannot succeed.

COSTS

[73] The parties agreed that the costs of the two applications will be argued and determined at the hearing of the special plea.

ORDER

[74] I make following order:

1) **The application for Amendment in terms of Rule 28(4) is dismissed;**

2) **The application for Joinder in terms of Rule 10 (3) is dismissed.**

R G TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 25 & 26 NOVEMBER 2019

DATE OF JUDGMENT: 2 DECEMBER 2019

ATTORNEY FOR APPLICANT:	**LUGISANI MANTSHA INC**
ADVOCATE FOR APPLICANT:	**ADV. B BUTHELEZI**
ATTORNEY FOR RESPONDENT:	**PANDOR ATTORNEYS**
	ADVOCATE FOR RESPONDENT:
	ADV. C STEINBERG, C
	McCONNACHIE AND N KAKAZA