

CASES / VONNISSE

THE LATE AMENDMENT OF PLEADINGS – TIME FOR A NEW APPROACH?

Randa v Radopile Projects CC
2012 (6) SA 128 (GSJ)

1 Introduction

Section 34 of the Constitution encapsulates the ideal of access to justice in civil matters, and provides that everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. This includes the requirement that the duration and costs of civil litigation should be reasonable. Unfortunately this objective is sometimes defeated by unnecessary and costly delays, due to tactical and careless postponements of civil matters in both the high and magistrates' courts. One of the main culprits in this regard is the procedure of the amendment of pleadings after a trial has commenced. Our courts have always followed a very liberal approach in this regard in that an application for amendment will usually succeed, unless it is made *mala fide* or will lead to prejudice to the opponent, which cannot be cured by a cost order and, where appropriate, a postponement. In *Randa v Radopile Projects CC* (2012 (6) SA 128 (GSJ)), Willis J advocated a new approach in deciding of whether an application for an amendment should be granted. This approach is also in line with the latest developments in England, where the Courts recently favoured a more conservative approach in relation to applications for amendments at a late stage. This case note will firstly focus on a brief discussion of the historical development of the Court's discretion in allowing amendments to pleadings. Secondly, the decision in *Randa* will be critically analysed. Thirdly, the latest developments in the English law will be discussed, and, lastly, some alternatives will be considered for legal reform. It will be argued that the Supreme Court of Appeal should alter its approach to the late amendment of pleadings in favour of a more conservative approach, as evidenced by the current English approach, alternatively that the legislature should intervene to capture the scope and ambit of a Court's discretion in deciding whether an application for the amendment of a pleading after the commencement of a trial, should succeed.

2 Historical development of the Court's discretion

It is trite law that a court hearing an application to permit an amendment has a wide discretion, which should be exercised judicially (*Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) 694G–H). The approach that should be followed by a court when deciding whether to permit an amendment has been stated as follows in the *locus classicus* of *Moolman v Estate Moolman* (1927 CPD 27 29):

“[T]he 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.”

This approach was endorsed in later decisions where it was held that an amendment would not be allowed in circumstances which will cause the other party such prejudice as could not be cured by an order for costs and, where appropriate, a postponement (see for eg, *Bitcon v City Council of Johannesburg & Arenow Behrman & Co* 1931 WLD 273 293; *Rosenberg v Bitcom* 1935 WLD 115 117–9; *Union Bank of SA Ltd v Woolff* 1939 WLD 222; *Mabaso v Minister of Police* 1980 (4) SA 319 (W) 323D; *O’Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) 255A–B; *Luxavia (Pty) Limited v Gray Security Services (Pty) Limited* 2001 (4) SA 211 (W) par 10; *De Lange v Herman & Co* 1930 EDL 137 139; *Fish Hoek Village Management Board v Romain* 1932 CPD 304 307; *Cecil v Champions Limited* 1933 OPD 27; *Perlman v Zoutendijk* 1934 1 PPH F68 (C); *Lawson & Kirk v SA Discount Acceptance Corporation (Pty) Limited* 1937 2 PH F129 (C); *Wehmeyer v Williams Hunt & Brook Limited* 1940 CPD 511 513; *Coetzee v Steyn* 1955 (3) SA 48 (O); *Heeriah v Ramkissoo* 1955 (3) SA 219 (N); *Zarug v Parvathie* NO 1962 (3) SA 872 (D) 876D–E; *Simmons* NO v *Gilbert Hamer & Co Limited* 1963 (1) SA 897 (N); *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 107072 (C); *Meyerson v Health Beverages (Pty) Limited* 1989 (4) SA 667 (C); *Benjamin v Sobac SA Building & Construction (Pty) Limited* 1989 (4) SA 940 (C) 957H–958B; *Devonia Shipping Limited v MV Luis (Yeoman Shipping Co Limited Intervening)* 1994 (2) SA 363 (C); *Commercial Union Assurance Co Limited v Waymark* NO 1995 (2) SA 73 (Tk); *Embling v Two Oceans Aquarium CC supra* 694H–695D).

This common-law rule has also been given statutory effect in the magistrates’ courts in the *proviso* to section 111 of the Magistrates’ Courts Act (32 of 1944) which provides that “no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of its action or defence” (see Jones and Buckle *The Civil Practice of the Magistrates’ Courts in South Africa Vol 1* (2012) 685). The power of the courts to allow even material amendments is therefore limited only by considerations of prejudice or injustice to the opponent in civil proceedings (*Erasmus Superior Court Practice Vol 2* (2015) D1–332; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) 637A–641C; *Devonia Shipping Limited v MV Luis (Yeoman Shipping Co*

Limited Intervening) *supra* 369F–I). In *Cross v Ferreira* (1950 (3) SA 443 (C) 447) it was held that the primary object of allowing an amendment was to obtain a proper ventilation of the dispute between the parties, in order to determine the real issues between them, so that justice might be done.

Despite this liberal attitude of the courts towards amendments to pleadings, it has been held that a litigant seeking to make an amendment at a late stage does not do so as a matter of right, but is seeking an indulgence from the Court (*Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) 512E–H; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) 928D). Where there has been a delay in bringing the application for leave to amend, some explanation for the delay should therefore be provided by the applicant (*Krogman v Van Reenen* 1926 OPD 191 194–195; *Embling v Two Oceans Aquarium CC* *supra* 695C–F). However, in the absence of prejudice to the opponent, an amendment may be granted at any stage of the proceedings before judgment, despite such delay, however careless the mistake or omission may have been and however late the application for the amendment (*Krogman v Van Reenen* *supra* 193). In *Mabaso v Minister of Police* (*supra*) it was held that even in a case of gross negligence, a court should grant an amendment unless there is a likelihood of prejudice to the opponent which cannot be cured by a suitable cost order. In *Bankorp Limited v Anderson-Morshead* (1997 (1) SA 251 (W) 253E–F) the Court stated that “arguments that amendments are to be refused only because of delay in seeking an amendment repeatedly fail”.

The mere loss of the opportunity of gaining time is not in law prejudice or injustice (*Union Bank of SA Ltd v Woolf* *supra* 225). The essential ground for the refusal of an amendment is prejudice to the opponent, and an amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part; his punishment should be an order to pay the wasted costs occasioned by the amendment (*Union Bank of SA Ltd v Woolf* *supra* 225; *Myers v Abramson* 1951 (3) SA 438 (C) 451D; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* *supra* 640H; *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) 223B). The applicant does not need to provide any satisfactory explanation for the delay in bringing the application to amend. It is only in relation to the question of prejudice that the applicant is required to show that his application to amend is *bona fide*, and to explain any delay there might have been in this regard (*Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* *supra* 640H; *Barclays Bank International v African Diamond Exporters (Pty) Ltd* (1) 1976 (1) SA 93 (W) 96C). It therefore seems that the fact that the delay in bringing the application for amendment would give rise to consequential prejudice to the other party, would be the only ground for refusing an amendment (*Krause v SAR & H* 1948 (3) SA 1145 (O); *Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd* 1954 (3) SA 945 (T) 948A–C; *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* *supra* 227A–C). In *Four Tower Investments (Pty) Limited v André’s Motors* (2005 (3) SA 39 (N) par 19), Galgut DJP stated that there was “a gradual move away from an overly formal approach”, and that it is a development which is to be welcomed if proper ventilation of the issues in a case is canvassed,

so that justice can be achieved. Galgut DJP cautioned that Courts should therefore be careful not to find prejudice where none really exists (par 19).

3 Randa v Radopile Projects CC

3.1 Facts

The respondent (plaintiff in the court *a quo*) claimed an amount of R100 000,00 from the appellant (defendant in the court *a quo*) in the Randburg Magistrates' Court (court *a quo*) in 2002 in terms of a building dispute. The trial only commenced in 2009. There were several postponements at the instance of both parties before the trial commenced and there were many costs orders issued against the appellant. The respondent notified the appellant on the date of the commencement of the trial of its intention to object to evidence being led outside that specified in the appellant's discovery affidavit. The presiding magistrate in the court *a quo* had, on the day that the trial began, raised her own concerns with the intention of the appellant in possibly seeking to amend his plea or counterclaim at a later stage, as it may have resulted in unnecessarily drawing out the proceedings and may have necessitated the recalling of witnesses. The appellant, however, chose to proceed with the trial and not to amend his plea and counterclaim at that stage. On the 17th of August 2010, the appellant served a notice of intention to amend his plea and counterclaim. In this amendment the appellant sought to, *inter alia*, increase the quantum of his damages from R84 456,66 to R332 243,75 and to abandon R232 243,75 of his claim which was the amount that exceeded the monetary jurisdiction of the magistrates' court. On the 26th of November 2010, the respondent filed a notice of objection to the appellant's notice of intention to amend on the following grounds:

- (a) The trial in the action had already commenced and two of the three expert witnesses of the respondent had already completed their evidence and had already been cross-examined. The appellant had not filed expert notices in respect of his damages claim, and in view of the fact that the expert witnesses of the respondent had been cross-examined and re-examined, the appellant would be able to adapt the evidence, taking into account the evidence led by the respondent's expert witnesses as well as the cross-examination and re-examination of those witnesses.
- (b) The respondent would suffer extreme prejudice as a result of such evidence being introduced by the appellant and would lead to another delay in finalizing the matter.
- (c) If the proposed amendment were to be granted, the respondent would have to recall its witnesses, including the expert witnesses.
- (d) The respondent would be unjustly and irretrievably prejudiced in that it was incurring costs on a scale as between attorney and own client.

The application for amendment was set down for hearing on the 1st of July 2011. The magistrate dismissed the appellant's application for leave to amend his plea and counterclaim due to the following reasons:

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- (a) The magistrate considered the prejudice suffered by the respondent due to the lengthy delays in the trial and that the matter had become unduly protracted, due mostly to the conduct on the part of the appellant.
 - (b) The magistrate was of the view that the amendment brought by the appellant was to, once more, delay the finalization of the matter. The magistrate held that the respondent would suffer further prejudice should the appellant be allowed the opportunity to tailor his evidence in accordance to that of the applicant's expert witnesses' testimony.
 - (c) The magistrate indicated that the appellant had from May 2009 until November 2010 to place his application to amend before the Court. The appellant offered no explanation for such a delay. The magistrate found that the conduct of the appellant had been nothing short of tardy and dilatory, and that the appellant's delays in bringing the application or the failure to properly compute his claim, was not satisfactorily explained by the appellant.
 - (d) The magistrate found that, if the application was granted, it would result in further delays in the matter which would cause prejudice to the respondent and which prejudice would not be cured by an appropriate order of costs.

The appellant thereafter appealed to the South Gauteng High Court (as it was then), for leave to amend his plea and counterclaim.

3.2 *Decision of the Court*

Although Willis J felt that he was bound to previous precedent and prevailing practice (par 3), he held that it has long been his conviction that the commencement of a trial should be the essence upon which the courts' attitude towards applications for amendments to pleadings should be balanced (par 4). The further away the parties are from the commencement of the trial, the easier it should be for a party to obtain an amendment, and the deeper the parties are into a trial, the more difficult it should be (par 4). The reasons for this are that, once a trial commences, costs increase exponentially and there are sometimes considerable logistical difficulties in securing the timeous attendance of witnesses at court. During the trial, the court will form certain impressions of witnesses and develop a sense in whose favour the balance of probabilities lies. Willis J stated that these factors mitigate against the more relaxed or liberal attitude towards amendments that may prevail before a trial commences (par 5).

Willis J stated that there are no previous decisions where a superior court held something like this (par 16):

"We are now well advanced in a trial action. The amendment, if granted, will necessitate the recalling of witness and may also necessitate the need to *subpoena* witnesses whom it was not previously intended to call by the other party. The litigant seeking the amendment ought reasonably to have known, a long time ago, what his case was all about. If the amendment is granted, a postponement will have to follow. A postponement will result in a part-heard trial, bringing about massive inconvenience not only to the other side but also their witnesses and this Court as well. The registrar's office will be vexed. Even if this Court makes a costs order against the party seeking the

amendment, it is far from certain that the other side will succeed in fully recovering costs upon taxation. If a debtor owes money, it is only right that the creditor is paid sooner rather than later. Interest a *tempore morae* does not relieve cash flow. Conversely, if a plaintiff's case is without merit, it matters greatly for the defendant to be discharged from liability sooner rather than to have the millstone of litigation around the neck. The application to amend is dismissed with costs."

Willis J further held that the principle that an amendment will be refused if the party seeking it is *mala fide*, takes on a different perspective once an application to amend is brought before a court after the commencement of the trial (par 17). This is because it is usually inappropriate for a trial judge to express an opinion as to the credibility of witnesses before the parties have closed their cases (par 17, with reference to *Vilakazi v Santam Assuransie Maatskappy Beperk* 1974 (1) SA 23 (A) 26G–27A). A court is therefore not allowed to state, during the trial, that an application for amendment is not *bona fide* and that it is inappropriate for the liberal approach to prevail in such circumstances (par 17).

Notwithstanding this liberal approach of the courts in relation to amendments, and after much deliberation, Willis J held that the magistrate in *casu* acted with appropriate judicial discretion in deciding to disallow the amendment, as she did not decide the matter according to a "wrong principle" (par 18).

Bava AJ held that that the magistrate exercised her discretion correctly by refusing the appellant leave to amend his plea and counterclaim (par 43). Bava AJ held that the magistrate would have had an appreciation of whether an appropriate cost order would be able to compensate for the prejudice suffered by the respondent, or whether such order would not be in the interests of justice by placing the parties in the same position as they were prior to the amendment being sought (par 38). The appeal was therefore dismissed with costs (par 45).

4 Recent developments in English law

The traditional approach in English law in relation to applications for amendment of pleadings was summarized in *Cobbold v Greenwich LBC* ([1999] EWCA Civ 2074) as follows:

"[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient management of justice is not significantly harmed".

Over the years, there had been a gradual move away from the approach as set out in the *Cobbold* decision. In *Savings and Investment Bank Ltd (in Liquidation) v Fincken* ([2003] EWCA Civ 1630) it was held that:

"the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all of the circumstances as summed up in the overriding objective".

An example of this approach is evidenced in *Brown v Innovatorone PLC* ([2011] EWHC 3221(Comm)), where the Court emphasized that parties to litigation have a legitimate expectation that trial dates will be met and would not be put back or delayed without good reason. The Court identified the following, non-exhaustive, list of factors that a Court should take into account in the exercise of its discretion (par 6–14):

- (a) The history of the amendment and the explanation of why it is being made late.
- (b) The prejudice which will be caused to the applicant if the amendment is refused.
- (c) The prejudice which will be caused to the other party if the amendment is allowed.
- (d) Whether the text of the amendment is set out satisfactorily in terms of clarity and particularity.

In *Archlane Ltd v Johnson Controls Ltd* ([2012] EWHC B12 (TCC)), the Court refused permission for an amendment ten weeks before the trial, *inter alia* because there was no reason why that evidence could not have been obtained at an earlier stage and the application to amend made earlier. The Court stated that the extent to which the applicant was the author of its own misfortune was a relevant factor because:

“to the extent that the [amending party] will suffer prejudice by the refusal of this amendment, which I accept is a clear possibility, it seems to me clear also that it is very substantially the author of that prejudice. The reality is that nothing has changed since the original incident and it appears that nothing has been discovered now which could not have been discovered three years ago”.

In April 2013 certain reforms recommended by Lord Justice Jackson (the so-called Jackson reforms) were implemented into the English Civil Procedure Rules. As part of the Jackson reforms, the overriding objective was amended to provide that the Court must deal with cases “justly and at proportionate cost” (CPR r.1.1(1)), “saving expense” (CPR r.1.1(2)(b)) and “allotting an appropriate share of Court resources” (CPR r.1.1(2)(e)).

In *CIP Properties (AIP) Limited v Galliford Try Infrastructure Limited (No.3)* ([2015] EWHC 1345 (TCC)) the Court summarized the proper approach to amendments after the Jackson reforms as follows:

- (a) The lateness of an amendment is a relative concept. An amendment is “late” if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation which have been completed by the time of the amendment (par 19(a)).
- (b) An amendment can be regarded as “very late” if permission to amend threatens the continuation of the trial, even if the application is made some months before the trial is due to commence. Parties have a legitimate expectation that the trial dates will be met and not postponed without good reason (par 19(b)).

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- (c) The history of the amendment, together with an explanation for its lateness, is a matter for the applicant and is an important factor in the balancing exercise. In essence there must be a good reason for the delay (par 19(c)).
 - (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly drawn or focused (par 19(d)).
 - (e) The prejudice to the other party will, if the amendments are allowed, incorporate at one end of the spectrum, the simple fact of being “mucked around”, to the disruption and additional pressure on their lawyers in the run-up to trial, and the duplication of cost and effort at the other. If allowing the amendments would necessitate the postponement of the trial, that may be an overwhelming reason to refuse the amendments (par 19(e)).
 - (f) Prejudice to the applicant, if the amendments are not allowed, will include its inability to advance his/her amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the applicant's own conduct, then it is much less important in the balancing exercise (par 19(f)).

It is clear from the decision in *CIP Properties* that the approach in *Cobbold* is no longer correct, and that the applicant must now justify the timing of the amendment in all instances of late amendment, not just in cases of very late amendments which jeopardize the trial date. The starting point is no longer that amendments should be allowed, provided that any prejudice to the other parties can be compensated for in costs; the new starting point is whether there is any good reason for the lateness of the amendment (McErlean “Late amendments – a new approach” 10 June 2015 <http://www.hardwicke.co.uk/insights/articles/late-amendments-a-new-approach> (accessed 2017-01-31)).

5 Critical commentary

The starting point in the South African law when deciding on whether to permit an amendment of a pleading had always been the proper ventilation of the dispute between the parties. From this starting point flows the fact 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 and, where appropriate, a postponement. This approach has, however, not kept up with modern times where the concept of “access to justice” had taken on a position of paramount importance, not only in South Africa, but also worldwide. The commencement and continuation of a civil trial had become sacrosanct in recent times with the pressing need to eradicate unnecessary and costly postponements which gives rise to a diminishing of valuable legal resources and, indirectly, hampers access to justice in the form of speedy and cost effective civil trials.

As already stated, in the English law the approach of the courts was initially that amendments should be allowed, provided that any prejudice to the other parties could be compensated for in costs. This approach has

gradually changed over the years to culminate in the current position where the new starting point is whether there is any good reason for the lateness of the amendment. This starting point is also in line with the approach proposed by Willis J in *Randa*. The main purpose of this approach is the preservation of the trial itself.

At first glance, the different starting points may seem trivial in that it may be argued that it boils down to a slight change in emphasis, and that it may culminate in decisions where the end result will be exactly the same. As stated by Bava AJ in *Randa*, previous case law makes it clear that an amendment cannot be granted for the mere asking without some explanation being offered therefor, and if the amendment is not sought timeously, some reason must be given for the delay (par 36, with reference to *Commercial Union Assurance Co Limited v Waymark supra* 77 F-1). As stated, it is only in relation to the question of prejudice that the applicant is required to show that his application to amend is *bona fide*, and to explain any delay there might have been in this regard. Our courts are therefore in principle reluctant to disallow even an amendment at a late stage, and are not too strict on their interpretation of what constitutes an acceptable reason for the bringing of a late amendment. As long as a court is of the opinion that the amendment is not made *mala fide*, and that the opponent can be put back for the purposes of justice in the same position as he had been when the pleading which he seeks to amend was filed by way of a cost order or postponement, the amendment will in most instances be allowed. This approach has been given statutory status in the magistrates' courts where the words "notwithstanding adjournment" in s 111(1) of the Magistrates' Court Act set out the principle that, if an adjournment can cure the prejudice caused by an amendment, such amendment should be granted, with an appropriate postponement (Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 682).

In order to overcome the hurdle of having to permit an amendment unless it is made *mala fide*, or any prejudice to the opponent cannot be cured by a cost order or postponement, some courts resort to the use of legal gymnastics where it would simply state that the aforementioned prejudice would not be able of being cured by an appropriate order of costs, or a postponement, and that the amendment should therefore be disallowed (see for example the approach of the court *a quo* in *Randa* as discussed above). But as pointed out by the authors of *Jones and Buckle*, the number of cases in practice in which any prejudice caused by an amendment, would not be able to be cured by orders for postponement and costs, is negligible. This is due to the fact that the old principle that the amendment must not take the opposite party by surprise, practically disappears as no one can be taken by surprise if he has been given a reasonable postponement within which to consider the proposed amendment. A party will also not be prejudiced in the matter of costs, since any costs occasioned by an adjournment will automatically fall upon the party responsible for the postponement (Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 682).

It is submitted that the position will change drastically if the starting point for the consideration of an amendment is whether there is any good reason

for the lateness of the amendment, in a similar vein as the English approach. If the applicant is unable to provide a good reason, or if a court is satisfied that the late amendment is due to the negligence of the applicant or his legal representative, that should be the end of the matter and the court should refuse the amendment, even if the application to amend is not *mala fide* and even if such amendment would not cause an injustice to the other side which cannot be compensated by costs and, where appropriate, a postponement. There are a number of reasons why such an alternative approach could be justified.

First, parties in civil litigation have more than enough time to consider any possible amendments to pleadings during the preparation for the trial phase. The purpose of this phase is for parties to properly prepare for trial, and if used productively, should, in most instances, eradicate the need for later amendment and postponement of the trial. It is during this phase that a party must ensure that its pleadings are in order to enable him/her to bring on any possible amendments during this phase in a timely manner which will not jeopardize the continuation of the trial in that matter.

Secondly, as correctly pointed out by the respondent in *Randa*, where an amendment is granted, wasted costs occasioned thereby, are usually only awarded on a party and party scale, while the other party is incurring costs on a scale as between attorney and own client (par 25). Even in the event where the court grants a cost order in favour of the other party on a scale as between attorney and own client, the reality dictates that such a party would not be able to fully recover its wasted costs. This situation is aggravated in the magistrates' courts which are not authorized to grant attorney and own-client cost orders (s 48 of the Magistrates' Courts Act and *War Systems Technologies CC t/a System Technologies v United Computer Systems (UHB) CC* [2004] 1 All SA 457 (W)). This was also realized by Willis J, in *Randa*, where he stated that there is no guarantee that the other side will succeed in fully recovering costs upon taxation (par 16).

Thirdly, unnecessary postponements due to pleadings being amended after a trial has commenced, give rise to undue delays in the finalization of civil matters which in turn contribute to the problem of overfull Court rolls and civil case backlogs. This indirectly results in a serious impediment to access to justice as enshrined in section 34 of the Constitution which, *inter alia*, entails the speedy resolution of a civil dispute. Statistics show that it takes on average a staggering two and a half year period for the finalization of an opposed civil matter (Manyathi-Jele "Court-annexed Mediation Officially Launched" April 2015 *De Rebus* 11). Willis J in *Randa* also correctly pointed out that it is only right that the plaintiff in a matter is paid sooner rather than later, and that interest *tempore morae* does not relieve such a party's cash flow. On the other hand, if a plaintiff's case is without merit, a defendant should be discharged from liability as soon as possible to avoid having a "millstone of litigation around the neck" (par 16).

In light of the aforementioned the time may be ripe to reconsider the current approach to the late amendment of pleadings in our law. In this regard the English approach may be a good starting point. It is, however, submitted that the English approach is too strict and conservative in its interpretation of what a "late" amendment entails. As stated, in accordance with

the current English approach, an amendment is “late” if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation. It is therefore suggested that the South African definition of “late” should correspond to the English definition of “very late” in terms of which permission to amend will threaten the trial date, and even if the application is made some months before the trial is due to start. The approach that parties have a legitimate expectation that the trial dates will be met and not adjourned without good reason, should also be endorsed in the South African law.

6 Conclusion and recommendations

A number of options can be considered to change the *status quo* relating to the approach followed by our courts when considering amendments at a late stage. The first option would be for the Supreme Court of Appeal to develop the common-law rule on which the current approach of the Courts is premised, in line with the current approach of its country of origin. It is, however, submitted that the current common-law rule relating to the late amendment of pleadings is so entrenched in our law, that it is difficult to see the Supreme Court of Appeal deviating from the modern-day application thereof in the near future. It is therefore submitted that the only other alternative would be for the legislature and Rules Board to intervene to make the following amendments to section 111 of the Magistrates’ Court Act and Uniform Court Rule 28:

- (a) There should be a clear differentiation between ordinary amendments and late amendments. Ordinary amendments should be those that are applied for before the trial of the matter and which would not jeopardize the continuation of the trial. Late amendments should be defined as those that are applied for after the trial has already commenced, or which will in any way jeopardize the continuation of the trial if it has not commenced yet.
- (b) Ordinary amendments should be dealt with exactly the same as in the past, namely that the amendment should 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 and, where appropriate, a postponement.
- (c) With regard to late amendments, the court should follow a two-stage enquiry. During the first stage of the enquiry the court should ascertain whether there is a good reason for the lateness of the application to amend. In this regard good reason should relate to a proper and acceptable explanation in the normal sense of the word, and not in relation to any prejudice that may be caused to the other party. If the applicant is unable to provide a good reason as afore said, that should be the end of the matter and the amendment should be refused. If a good reason is provided, the court should, during the second stage of the enquiry, ascertain if the application for amendment is *bona fide* and if it would cause an injustice to the other side which cannot be compensated by costs and, where appropriate, a postponement.

- (d) If a late amendment and/or postponement is granted by the court, the court should award wasted costs to the respondent on an attorney and own client scale in the high court, and on an attorney and client scale in the magistrate's court.

It is submitted that this proposed approach will ensure that the continuation of trial dates will be preserved at all cost, which will in turn alleviate court backlogs and promote access to justice in the form of speedy and costly resolution of disputes, as guaranteed by section 34 of the Constitution.

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