

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case Number: 13946/15
13947/15
13951/15
13952/15**

In the matter between:

CHARNELL COMMANDO	First Applicant
GERALDINE STHEPHANIE CUPIDO	Second Applicant
NORMAN ANDREW CUPIDO	Third Applicant
GICILLE VANNESSA COMMANDO	Fourth Applicant
WILLEM NEL	Fifth Applicant
MEESHADÉ JACOBA NEL	Sixth Applicant
DAPHNE NEL	Seventh Applicant
PRISCILLA NEL	Eighth Applicant
DYLAN NEL	Ninth Applicant
MA AIDA ABELS	Tenth Applicant
SULAIMAN GOLIATH	Eleventh Applicant
FAIZA FISHER	Twelfth Applicant
GEORGE FARIA RODRIGUES	Thirteenth Applicant
NASHIET ABELS	Fourteenth Applicant
CHRASHANNA SMITH	Fifteenth Applicant
DELIA SMITH	Sixteenth Applicant
BRENDA SARAH SMITH	Seventeenth Applicant
MACHAL SMITH	Eighteenth Applicant
MEGAN SMITH	Nineteenth Applicant
ROSELINE SMITH	Twentieth Applicant
CHESLYN SMITH	Twenty-First Applicant

RASHIEDA SMITH	Twenty-Second Applicant
MARK NEIL SMITH	Twenty-Third Applicant
MOGAMAT TAURIQ SMITH	Twenty-Fourth Applicant
GRAHAM BEUKES	Twenty-Fifth Applicant
SOFIE MASILO	Twenty-Sixth Applicant
and	
WOODSTOCK HUB (PTY) LTD	First Respondent
CITY OF CAPE TOWN	Second Respondent

APPLICANTS HEADS OF ARGUMENT IN THE AMENDMENT APPLICATION

I BACKGROUND

1. The Bromwell Residents and many other similarly situated families living in rental properties are being displaced from their homes due to rising property prices and rapid gentrification of inner city suburbs such as Woodstock and Salt River. The main application concerns the extent of the City's duty to take positive measures to mitigate the displacement of these residents.

2. On 18 and 25 July 2017 the City announced a package of plans to expedite the delivery of affordable and inclusionary housing opportunities in the inner city. These plans include the development of transitional housing projects to address the demand for housing by families displaced or evicted from their homes due to rapid development of inner city suburbs.

3. The plans announced by the City furthermore confirmed that the City had decided in May 2017 to put an end to the development of temporary relocation areas (“TRAs”) located on the outskirts of the City. The media releases accompanying the announcement of these plans referred to the City’s approach to confronting the urgent demand for affordable and inclusionary housing, as representing a “*180-degree change*”.
4. The main application had been launched on 20 September 2016. The City had filed extensive affidavits between then and the hearing of the merits almost a year later on 12 and 13 September 2017.
5. None of its affidavits disclosed details of the plans referred to in the media releases or the City’s “*180 degree change*” in approach to implementing inclusionary and transitional housing projects for evicted and displaced residents in inner city suburbs. Save for some sparse information about erf 13814 which was in response to questions raised by Respondents.
6. In those affidavits that were filed, the City disputed the suitability of certain City and state owned sites identified by the Bromwell Residents as being suitable for emergency housing. Some of these sites were nonetheless later listed as being candidates for transitional housing in the City’s media releases on 18 and 25 July 2017.
7. These media releases by the City and their reference to one such transitional housing site, erf 13814 Salt River, elicited questions from the presiding Judge during argument on the merits on 12 September 2017.

8. In consequence of these questions, on 13 September 2017 the City's media releases of 18 and 25 July 2017 and the City's recommendation approving the proposed Salt River transitional housing project were formally introduced into evidence.¹
9. On 13 September 2017, the very day that argument on the merits of the main application resumed, the City issued two further media releases.
10. The first announced the launch of an inner city social housing initiative aimed at reversing the legacy of apartheid spatial planning and using City-owned land in a manner which would "*mitigate the negative effects of gentrification*".² The second announced the details of City-owned sites which would be made available for the development of affordable housing and the implementation of the City's first inner city transitional housing projects.³
11. The City was afforded an opportunity to respond to submissions made in the course of the hearing relating to the contents of these media releases and their relevance to the issues raised in the main application. It did so by way of an affidavit filed on 31 October 2017 in which it referred in detail to a Prospectus for Affordable Housing in the Woodstock and Salt River precinct released on 28 September 2017 ("the Prospectus") which had been foreshadowed in its media release on 13 September 2017.⁴

¹ Vol 7: p 2466 - 2524

² Vol 7: p 2605

³ Vol 7: p 2607

⁴ Vol 7: p 2529- 2583

12. In response to this affidavit, the Applicants filed an affidavit giving notice of their intention to effect amendments to their notice of motion in consequence of the recorded “180 degree change” by the City in its approach to providing transitional housing in the Woodstock and Salt River area. Simultaneously with the filing of this affidavit, the Applicants filed a Notice in terms of Rule 28 setting out the details of intended amendments to the relief sought in part B of their notice of motion.⁵
13. Both the Woodstock Hub⁶ and the City⁷ objected to the intended amendments.
14. On 1 February 2018 the Applicants applied for leave to affect their intended amendments pursuant to the provisions of Rule 28(4).⁸

II THE AMENDMENTS SOUGHT BY THE APPLICANTS

15. The Applicants seek leave to affect the following amendments to the relief sought in part B of their notice of motion in the main application:

12.1 The deletion of the existing paragraph 1 and its replacement with the following as a new paragraph 1:

⁵ Vol 7: Notice in terms of Rule 28: p 2626

⁶ The Woodstock Hub’s objection appears at Vol 7: p 2640 - 2644

⁷ The City’s objection is detailed in its affidavit opposing the Applicants application for leave to amend: Vol 7: p 2688 - 2729

⁸ Vol 7: p 2645 - 2687

“1.It is declared that the housing programme of the Second Respondent and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the Second Respondent’s constitutional and statutory obligations to the extent that:

1.1 it fails to provide the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds.”

12.2 The deletion of paragraph 2 and its replacement with the following as a new paragraph 2:

“2. It is declared that the Second Respondent is under a constitutional duty to provide the Applicants and their dependents residing with them with temporary emergency accommodation or transitional housing:

2.1 in the Woodstock, Salt River and inner city precinct as identified in the Prospectus for Affordable Housing in the Woodstock and Salt River Precinct issued by the Second Respondent on 28 September 2017; and

2.2 in a location as near as possible to the property where the Applicants currently reside at erf 10626, Bromwell Street, Cape

Town (“the property”).”

12.3 The insertion of the words “3 (*three*) months” in paragraph 3 and their replacements with the words “12 (*twelve*) months”.

12.4 The deletion of the existing paragraph 4 and its replacement with the following:

“4. The Second Respondent is ordered to comply with its constitutional obligations as declared in this order.”

12.5 The insertion of a new paragraph 5 as follows:

*“5. The Second Respondent is directed to deliver a report to this Court within 3 (*three*) months of the date of this order, confirmed on affidavit, detailing the emergency accommodation or transitional housing that it will make available to the Applicants in the Woodstock, Salt River and inner city precinct, when such accommodation will be available, the proximity of such accommodation and explaining why the particular location and form of accommodation has been selected. The report must also set out the steps taken by the Second Respondent during the three months before the report is filed to meaningfully engage with the Applicants and/or the Applicants’ attorneys regarding the provision of temporary emergency accommodation or transitional housing to the Applicants.”*

III LEGAL PRINCIPLES

16. The primary object of an amendment is to obtain a proper ventilation of the dispute between the parties in order to determine the real issues between them.⁹
17. A court exercises its discretion in deciding whether to grant or refuse an application for an amendment. Amendments will usually be allowed unless the amendment is *made mala fide* or would cause prejudice to the other party which cannot be compensated by a costs order or some other suitable order such as a postponement.¹⁰
18. The central considerations are prejudice and injustice to an opponent as a result of a material amendment. By “*prejudice*” is meant the rights of a party in regard to the subject matter of the litigation and a causal connection which is not too remote between the amended pleading and prejudice to the other party’s rights.¹¹
19. There is no absolute rule against an amendment which introduces a new cause of action. The key consideration remains an assessment of whether the other party will be prejudiced by the amendment with regard to the subject matter of the litigation and the nature of such prejudice.

⁹ Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Pty Ltd 2001 1 All SA 129 (SCA) at 133H-I

¹⁰ Imperial Bank Limited v Hendrick Barnard NO (349/12) [2013] ZASCA 42 (28 March 2013) at [8]

¹¹ South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D) at 296A

20. Where it is necessary to determine the real issue between the parties, a new cause of action may be added by way of an amendment even though it has the effect of changing the character of the action and may necessitate re-opening of the case for new evidence to be led.¹²
21. A delay in seeking an amendment is not in itself grounds for refusal of an amendment where there is an explanation for the delay.¹³ An amendment may however be refused where there is evidence of male fides, for example, a litigant who deliberately refrains until a late stage from launching an application with the purpose of catching his opponent unaware¹⁴ or obtaining a tactical advantage.¹⁵
22. The principles applicable were summarized by Corbett CJ in *Caxton Ltd & others v Reeva Forman (Pty) Ltd & Another*¹⁶ as follows:

“Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.” The following statement by Watermeyer J, as he then was, in Moolman v Estate Moolman & another 1927 CPD 27 at 29 has been accepted and followed as reflecting the situation in our law: ‘The question of amendment of pleadings has been considered in a number of English cases. See for example: Tildesley v Harper (10 ChD 393); Steward v North Met Tramways Co (16 QBD 556) and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would

¹² Myers v Abramson 1951 (3) SA 438 (C) at 449H-450A; Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 643A-C

¹³ Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (N); Mabaso v Minister of Police 1980 (4) SA 319 (W)

¹⁴ Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd 1954 (3) SA 945 (T)

¹⁵ Middleton v Carr 1949 (2) SA 374 (A) 386

¹⁶ Caxton Ltd & others v Reeva Forman (Pty) Ltd & Another 1990 (3) SA 547 (A) at 565G

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 it is sought to amend was filed.' In Rosenberg v Bitcom 1935 WLD 115 at 117 Greenberg J, as he then was, stated: 'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the 6 Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.'

In Zarug v Parvathie NO 1962 (3) SA 872 (D) at 876C Henochsberg J held: 'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay.'

Caney J stated in Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 641A: 'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.' And at 639B: 'The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.' And at 642H: 'In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.'

IV GROUNDS FOR THE AMENDMENTS

23. The grounds for the amendments sought by the Applicant are based squarely on the 180 degree change in the City's approach as evidenced by

the Prospectus and the July media releases.¹⁷

24. But the City's stated 180 degree change is evident not only in the Prospectus, which expressly recognizes the displacement of working class tenants in Woodstock and Salt River due to rising property prices.¹⁸ It is clear that one of the consequences of this belated change in approach by the City was that certain evidence placed before the court by the City in the main application was no longer accurate by the time that the merits were argued on 12 and 13 September 2017.
25. The Applicants had in their founding affidavit in the main application identified a number of City-owned properties which they proposed were suitable for the purposes of emergency housing.¹⁹ The response of the City in its answering affidavit dated 25 October 2016 was that none of the 14 properties identified were suitable for viable housing development.²⁰
26. It is apparent from the City's affidavit dated 1 November 2017²¹ that the position previously taken by the City in respect of the suitability of a number of these properties for housing purposes has significantly changed.
27. Erven 13140, 13167, 13160 and 13146 (Woodstock Hospital) were stated in the City's answering affidavit to be owned by the Provincial Department of Public Works ("PPW") and not viable or suitable for emergency

¹⁷ Vol 7: Affidavit of Chanel Commando: p 2602 para 22

¹⁸ Vol 7: p 2591 para 7

¹⁹ Vol 2: p 33 para 76-77

²⁰ Vol 2: p 568 - 569p

²¹ Vol 7: p 2538 - 2542

accommodation.²²

28. In its affidavit dated 1 November 2017 the City advised that the City had negotiated the sale of these properties for social and affordable housing in the region of 700 units.²³

29. Erf 12011 was stated by the City to have a house on it and belonging to PPW. In its answering affidavit dated 1 November 2017 the City advises that this statement was incorrect and that the site is proposed for a 42 room transitional housing project.²⁴ Erf 114825 was recorded in the City's answering affidavit to be "*too small and not viable for a housing development.*"²⁵ The City's latest affidavit now states that it may be possible to develop this property as a BNG infill project for qualifying beneficiaries with an income below R3500.00 per month.²⁶

30. It is submitted that there was an obligation on the City to place relevant and material evidence before the court so as to ensure that the case was decided on the correct facts. There is no proper explanation, it is submitted, from the City for its failure, up until November 2017, to bring to the attention of the Court the changed situation regarding the viability of the properties which it

²² Record: p 1882

²³ Vol 7: p 2540: para 25.2.4

²⁴ Vol 7: p 2541: para 25.3

²⁵ Vol 2: p 568: para 125.7

²⁶ Vol 7: p 254: para 25.4

had previously maintained were not suitable for either housing development or any form emergency housing.

V OBJECTIONS TO THE AMENDMENTS

The City's objections

31. The City's first objection is that the proposed amendments "*entail a near complete abandonment*" of the relief initially sought in the notice of motion and its "*substitution for new relief.*"
32. It is incorrect that the Applicants have completely abandoned the relief initially sought in the notice of motion. Prayer 2 of the notice of motion initially sought a declaratory order that City was under a constitutional duty to provide them with emergency accommodation in a location "*as near as possible*" to the property. The (intended) amended prayer 2 specifies that the location of such emergency accommodation or transitional housing, pursuant to the declaratory order, must be in the Woodstock, Salt River and inner city precinct as identified in the Prospectus.²⁷ This does not constitute a complete abandonment of the underlying terms of the relief as initially sought.
33. The second objection is that the proposed relief had not been sought at the inception of the proceedings or at an earlier stage and that there is "*no*

²⁷ Notice of Amendment: p 2627: para 2.1

conceivable reason” for this.²⁸

34. What this objection fails to take into account is that the 180 degree change in the manner in which the City was implementing its housing plans in the Woodstock and Salt River area occurred after the inception of the proceedings and indeed during the course of the hearing on the merits itself.
35. The third objection is that the new relief is inconsistent with the City’s evidence regarding the income qualification levels in respect of affordable housing and that none of the occupiers save for Mr Smith fall within this income bracket. Linked to this contention is the objection that none of the alternative housing targeted in the area is presently available.²⁹ The Applicants dispute the factual basis for the assertion that none of them except Mr Smith would qualify for affordable housing as defined in the Prospectus.³⁰
36. While it is correct that the City’s Five Year Housing Plan had been attached to its answering affidavit, the Five Year Housing Plan, as opposed to the Prospectus, is singularly lacking in detail in relation to the implementation of affordable and transitional housing in the Woodstock and Salt River area. The only mention of such sites in the Five Year Plan are to the Salt River Market, which is stated to be a “*possible/future project*” and Woodstock (Pine Road social housing) which is recorded as being a project in the “*planning*

²⁸ Vol 7: p 2673: para 2

²⁹ Vol 7: p 2654

³⁰ Vol 7: p 2600: para 14

stage.”³¹ The Five Year Plan contains no detail at all in relation to the transitional housing plans detailed in the City’s July 2017 media releases, the Prospectus and its November 2017 affidavit.

37. Notably the Five Year Plan records the City’s (then) commitment to implement temporary relocation areas (“TRAs”) for emergency housing and notes that the City “...has embarked on various initiatives to establish more of these temporary housing opportunities.”³²
38. In relation to the Wolwerivier TRA or IDA, the Five Year Plan states that Wolweriver (160ha) is a “possible / future project...[in] the next 1-5 years”.³³
39. However the City’s Councillor Herron, shortly after announcing the City’s 180 degree change in approach, is now recorded as stating that plans to build permanent housing at Wolweriver have been set aside.³⁴
40. It is submitted that this reference to the apparent abandonment by the City of future development of Wolwerivier, is critical, given that the central plank of the City’s defence to the application is that Wolwerivier, as a matter of fact, is “as near as possible to the property” and that for this reason, the City has met the relief sought by the Applicants.
41. The fourth objection is that the Applicants approach has been a “...consistently moving target.”³⁵ Whether or not this is so is a matter for

³¹ Vol 2: p 681

³² Vol 2: p 651

³³ Vol 2: p 681

³⁴ Vol 7: p 2659: para 23

³⁵ Vol 7: p 2674: para 4

argument on the merits. It is not a matter which can in any way be determinative of an application for amendment in terms of Rule 28. It is with respect difficult to understand the relevance and import of this objection to an amendment application.

Woodstock Hub's objections

42. Woodstock Hub objects on the basis that the challenge to the Five Year Policy should have been made at the inception of the proceedings or at an earlier stage.³⁶
43. This objection, similar to that of the City, has been dealt with above.³⁷ It is without merit. The objection also fails to take into account that the proposed amendments relate to the constitutionality of both the Five Year Plan and its implementation by the City.³⁸

VI PREJUDICE

44. The City complains that it will be prejudiced by the proposed amendments in that they will necessitate extensive further evidence on the part of the City and that it would require adequate time to file an affidavit which appropriately addresses such evidence.³⁹ It is submitted that this is not the type of irremediable prejudice which justifies the refusal of an amendment application. The City does not say that it will be impossible for it to meet a case based on the proposed amendments. Its contention is that it will require

³⁶ Vol 7: p 2682

³⁷ See para 33 above

³⁸ Vol 7: p 2666: para 1

³⁹ Vol 7: p 2708

sufficient time to do so.

45. The City also points out that the merits of the matter have already been argued on two prior occasions.⁴⁰ It is submitted that the first hearing on the merits cannot legitimately be taken into account given the recusal application which resulted in the then presiding Judge “*stepping aside*” in order for the merits to be argued de novo.
46. The Woodstock Hub’s complaint in the main relates to the financial consequences of the protraction of the proceedings.⁴¹ The figures provided by the Woodstock Hub in relation to financial prejudice are disputed by the Applicants.⁴² The Applicants point out that the water supply on the property is restricted, one of the vacated properties has been sold and renovations done on another unit owned by the Woodstock Hub.⁴³

VI CONCLUSION

47. It is submitted that the proposed amendments are not sought *male fide* and that they raise a triable issue.
48. For these reasons, it is submitted that the amendment application should be granted.

SHELDON MAGARDIE

Counsel for the Applicants -Bromwell Residents
Chambers

⁴⁰ Vol 7: p 2707

⁴¹ Vol 7: p 2727: para 13

⁴² Vol &: p 2744: para 29

⁴³ Vol 7: p 2744: para 29

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Table of authorities

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3. South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D)
4. Myers v Abramson 1951 (3) SA 438 (C)
5. Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D)
6. Mabaso v Minister of Police 1980 (4) SA 319 (W)
7. Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd 1954 (3) SA 945 (T)
8. Middleton v Carr 1949 (2) SA 374 (A) 386
9. Caxton Ltd & others v Reeva Forman (Pty) Ltd & Another¹ 1990 (3) SA 547 (A)