


LOM Business Solutions t/a Set LK Transcribers/LR

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 18899/04

2007-07-17

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES/NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
(2) OF INTEREST TO OTHER JUDGES YES/NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
(3) REVISED	<input checked="" type="checkbox"/>
DATE: 29 Oct 2007	SIGNATURE: 

In the matter between

RUSTENBURG PLATINUM MINES LTD

Plaintiff

and

10 MAINTENANCE PAINTING SERVICES

Defendant

J U D G M E N T

WILLIS, J. The trial in this matter commenced before me on 21 May 2007 and the plaintiff, having led the evidence of three witnesses, attempted on 24 May 2007 to move an amendment to the particulars of claim. This proposed amendment was objected to by the defendant and consequently the matter was postponed for the purposes of the plaintiff following the provisions of rule 28.

20 The plaintiff served a notice of amendment and the defendant noted an objection thereto. The application is accordingly brought by the plaintiff for the leave of this Court to amend its particulars of claim in

accordance with the notice being annexure A to the notice of motion.

The relevant portions of the plaintiff's particulars of claim (for the purposes of deciding this particular issue) read as follows:

"3.1 During the period 2002 and in terms of an agreement or agreements entered into between the parties the defendant performed certain work and supplied certain materials for and on behalf of the plaintiff.

10 3.2 From time to time during the period of 2002 the defendant submitted to the plaintiff tax invoices in terms of which it is recorded and alleged that it had performed certain work and supplied certain materials in connection therewith in terms of the aforesaid agreement or agreements and that accordingly it had become entitled to payment in respect thereof.

20 3.3 Relying on the correctness of the invoices submitted by the defendant to the plaintiff as aforementioned the plaintiff from time to time paid various amounts to the defendant believing that the amounts claimed by the defendant in terms of its aforementioned invoices were indeed due, owing and payable by it to the defendant.

3.4 Subsequent to making the aforementioned payments to the defendant the plaintiff discovered that certain of the defendant's claims were not valid and payments in respect of thereof were not due, owing and payable by the plaintiff, more especially since the defendant had not

performed all of the work and supplied all of the materials as claimed by it in its said invoices.

3.5 In consequence of the foregoing the plaintiff paid to the defendant an amount of R719 897,76 in excess of the amount that should have been paid by it to the defendant and to which the defendant was entitled.

4. In making the payment/payments totalling the sum of R719 897,76 the plaintiff did so in the *bona fide* but mistaken and reasonable belief that the defendant was entitled to such payment/payments in accordance with the invoices issued by the defendant as aforementioned whereas in truth and in fact the aforesaid sum was not due and payable by the plaintiff to the defendant and has not since the date of payment become so due and payable."

The plaintiff claims repayment of this sum of R719 897,76. In other words, the plaintiff has based its claim on an enrichment action, the classic *condictio indebiti*. This is common cause.

The relevant portion of the amendment sought by the plaintiff reads as follows:

20 Alternatively to paragraph 3.2, 3.3, 3.4, 3.5, 4 and 5, 6.1 from time to time during the period 2002 the defendant performed certain work and supplied certain materials and submitted to the plaintiff invoices in terms of which it recorded monies that were payable to it in respect of work performed by it

and materials supplied by it as well as work and material to be performed and supplied in future all of which were in terms of the aforesaid agreement/agreements alternatively accepted by the plaintiff.

6.2 Having received the said invoices

6.2.1 The plaintiff paid to the defendant the amounts reflected as payable in terms of thereof.

10 6.2.2 The parties represented by their duly authorised representatives orally agreed at the plaintiff's premises during and about January/February 2003 that the defendant would not attend to certain of the work and supply certain materials which were to be performed and supplied in the future to the value of R719 897,76 plus VAT it being implied alternatively tacitly agreed to by the parties [my emphasis] that the defendant would repay to the defendant the amount paid by the plaintiff in respect of work and material to be
20 done and supplied by the defendant in future and which was not done and supplied in the aforesaid sum of R719 897,76 plus VAT."

To this proposed amendment in clause 6.2.2 are certain allegations made in the alternative but it is important to note for purposes of this

judgment that following words appear in the alternative claim sought to the previous alternative 6.2.2 namely that it being alleged that it was "implied alternatively tacitly agreed to by the parties that the defendant would repay to the plaintiff the amount paid by the plaintiff in respect of work to be done and supplied by the defendant in future which was not done and supplied in the aforesaid sum of R719 876,76 plus VAT."

The explanation given by the plaintiff for the amendment is as follows:

10 During the course of the evidence given by Mr Bart Pietersa it became apparent to counsel and me that if the admitted overpayment made by the plaintiff to the defendant was not made in circumstances outlined in the plaintiff's particulars of claim same was made in circumstances where plaintiff had agreed to make advanced payments to the defendant in respect of work to be done and materials to be supplied in the future and that by virtue of defendant not doing so there had been an overpayment in the same amount."

20 The defendant has raised the various objections of objections to the amendment sought by the plaintiff these being:

1. The amendment has been brought at a late stage.
2. Prejudice to the defendant.
3. The plaintiff seeks to introduce a different debt and that same has prescribed.

4. That paragraph 6.2.2 and 6.2.3 of the proposed amendment do not comply with rule 18(6).
5. That the proposed amendment is vague and embarrassing.
6. That "the embarrassment is compounded in the light of the evidence already led."

The view that I take of this matter is there is a single point raised which is dispositive of the issue and accordingly it is not necessary for me to deal with all the objections raised by the defendant. That issue is whether the plaintiff has sought to introduce a different debt. It is
10 common cause that depending on the interpretation which one gives to this question of "debt", the claim has either prescribed or has not prescribed.

Counsel referred me to various cases in particular the following:
Mazibuko v Singer 1979 (3) 258 (W) at 265D-266C; *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C-G; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15A-16D; *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G; *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 826J,
20 *Oertel & Andere NNO v Direkteur van Plaaslike Bestuur & Andere* 1983 (1) SA 354 (A) at 370B; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107A-G and *CGU Insurance Ltd v Rundel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA).

It seems to be now settled law that an amendment is permissible provided that the debt which is claimed in the amendment is the same

or substantially the same debt as originally claimed (see in particular the *CGU Insurance Ltd* case supra at paragraph 5). It also seems to be settled law that a summons which sets out an excipiable cause of action can interrupt the running of prescription provided that the debt is cognisable in the summons and is identifiable as substantially the same debt as the debts in the subsequent amendment (*CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* at paragraph 5 again).

It also seems clear that in the context of the interpretation of section 15 of the Prescription Act 68 of 1969 one must give the meaning
10 of the word debt "a wide and general meaning". See once again the *CGU Insurance Ltd* case supra at paragraph 6. In the *CGU Insurance Ltd* case Jones AJA, delivering the judgment of the Court, says if "the debt is not the set of material facts, it is that which is begotten by the set of material facts."

It seems to me that however wide and general a meaning one may wish to give to the word "debt" and however generous one wishes to be to a party seeking amendment, and however much one may earnestly believe that the parties should fully ventilate the issues before them, the meaning of a word "debt" cannot be so wide as to exclude its
20 fundamental, original and basic meaning - that it entails some kind of obligation. I am fortified in this view by reference to the case of *Oertel & Andere NNO v Direkteur van Plaaslike Bestuur & Andere* supra where Van Heerden AJA delivering the judgment with which Wessels JA, Corbett JA and Kotze JA, concurred that:

"Volgens die aanvaarde betekenis van die begrip

slaan "n skuld" op 'n verpligting om iets te doen
(hetsy by wyse van betaling of lewering van 'n saak
of diens) of nie te doen nie." (at 370B)

It is correct, as Mr Basslian has forcefully argued, that the amendment does not alter the amount which the plaintiff has claimed and that the same amount is claimed between the same parties. Nevertheless the proposed amendment creates an obligation which arises separately in my respectful view from the claim as originally pleaded. That obligation is an agreement which was allegedly entered into
10 January/February 2003 (and it is common cause that the relevant period for prescription has lapsed).

Accordingly it seems to me that the application for the amendment must fail. The following order is made: the application to amend the particulars of claim set out in the notice of motion dated 25 June 2007 is dismissed with costs.

ON BEHALF OF THE PLAINTIFF:
ATTORNEYS ON BEHALF OF PLAINTIFF:

Adv M Basslian
Leppan Beech Inc.

20 ON BEHALF OF DEFENDANT:
ATTORNEYS ON BEHALF OF THE DEFENDANT:

Adv E L Theron
Alan Levin &
Associates
