REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVSION, PRETORIA

5/3/15

Case Number: 11151/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

05/03/2015
DATE

SIGNATURE

In the matter between:

TJEKA TRAINING MATTERS (PTY) LTD Applicant/Plaintiff

and

A S NONYANE AND ASSOCIATES INC Respondent/Defendant

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicant (plaintiff in the main action) is seeking leave of this court to amend its declaration to a claim in which it is seeking payment in an amount of R1 143 925.36, for services rendered.

[2] In terms of the applicant's declaration, the applicant contends that it and the respondent (acting as project manager for the Free State Department of Police, Roads and Transport) ("the Department"), concluded a service level agreement ("the agreement") on 19 March 2010 in terms of which the applicant would render training services on behalf of the respondent in the Xhariep district. In terms of the agreement, the training was for areas listed in the agreement, which fell within the Xhariep district. The agreement also provided, *inter alia*, that:

2.1 the respondent would pay the applicant, for services rendered, within 7 days of receiving payment from the Department (clause 4.3.1);

2.2 no representations, warranties, undertakings or promises, of whatever nature which may have been made by any of the parties, their agents or employees shall be binding or enforceable by the other party against the other (clause 7.4);

2.3 no variation, amendment or addition to the agreement shall be valid unless the same has been reduced in writing and signed by or on behalf of the parties(clause 7.5).

2.4 the agreement would commence on 22 February 2010 irrespective of the date on which the agreement was signed (clause 8.1);

[3] The applicant further avers that on 26 October 2010 the parties concluded an addendum to the agreement in terms of which the Xhariep agreement was extended for a further period and that the agreement was extended to also include areas within the Motheo district. The applicant further avers that during November 2010 the respondent terminated the agreement on the ground of alleged budget constraints.

[4] Furthermore, the applicant avers that on 26 November 2010 it submitted invoices (numbers IN002819 and IN002892) to the respondent. The two invoices were attached to the applicant's declaration as 'D' and 'E'. As appears from the attached invoices, annexure 'D' (for R 583 005.89) relates to services rendered under the Xhariep District training project; and annexure 'E' (for R 560 919.47), relates to the Motheo District Training project.

[5] It is common cause that on 25 October 2013, the respondent received payment from the Department.

[6] In its summons served on the respondent on 01 March 2011, the applicant seeks payment of a total amount of R1 143 925.36 made up

of R 583 005.89, for services rendered in terms of the Xhariep project and R 560 919.47 for the Motheo project.

[7] On 5 September 2011, the respondent filed its plea. In its plea, the respondent denies that a valid agreement was concluded with the applicant based on the addendum. The basis of the respondent's denial is that the agreement contains a non-variation clause (clause 7.5) which provides that no variation, amendment or addition to the agreement shall be valid unless reduced to writing and signed by or on behalf of the parties to the agreement. As appears from the addendum, attached to the applicant's declaration and marked "B", only the signature of the applicant's representative appears. The respondent contends that since it did not sign the addendum, no valid agreement was concluded in relation to the Motheo project.

[8] On 23 April 2014 applicant served on the respondent's attorneys a notice in terms of Rule 28 (1) of its intention to amend its declaration, in particular, paragraphs 3 to 17. In brief the salient features of the proposed amendments are as follows:

8.1 that on 26 October 2010 the parties concluded a part-written part-oral agreement in terms of which the applicant was subcontracted to provide training in the Motheo District;

8.2 that the training would be provided to the listed areas for an amount per course limited to R 45 625.00 per contractor;

8.3 that defendant would pay the applicant within seven (7) days of raising an invoice, subject to the Department having paid the defendant;

8.4 that the applicant duly performed its obligations in terms of the agreement;

8.5 that on or about 26 November 2010 the applicant submitted an invoice to the respondent in the amount of R 560 919.47;

8.6 that despite the respondent having received money from the Department on 01 July 2013, the respondent has failed to pay the amount due;

8.7 consequent to the above the applicant claims payment of the amount of R 560 919.47 plus interest at 15.5% per annum *a tempore morae* to date of final payment and costs.

[9] The defendant objects to the proposed amendments on the ground that the proposed claim has prescribed and that the proposed amendments are not bona fide.

[10] It is the respondent's contention that with the proposed amendment the applicant seeks to introduce a new cause of action based on a part-oral part-written agreement concluded on 26 October 2010. Furthermore, it was argued on behalf of the respondent that the applicant in its un-amended declaration had placed reliance on the agreement which was concluded on 19 March 2010, and allegedly varied through an addendum on 26 October 2010, a cause of action different from the

one sought to be introduced through the proposed amendment. Counsel further argued that the new cause of action sought to be introduced through the amendment is based on a completely separate agreement, which agreement's prescription period began to run on 26 October 2010, terminating on 26 October 2013.

[11] A court has a discretion to allow a party to amend its pleadings at any time before judgment as the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties. *Gralio (Pty) Ltd v D E Claasen (Pty) Ltd* 1980 (1) SA 816 (A). In *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 the court held at para [9] that:

> "The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waywark NO.* The practical rule that emerges from these cases is that amendments 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 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.

See also *Moolman v Estate Moolman & Another* 1927 CPD 27, at 29.

[12] The determining factor on whether or not to allow an amendment is prejudice. If when the proposed amendment is considered, taking into account the circumstances of the case and the propose amendment

does not prejudice the respondent that cannot be cured by a cost order, the amendment will invariably be allowed.

[13] In the original declaration, the applicant's claim is for payment on both the Xhariep and the Motheo projects. In terms of the proposed amendment, the applicant seeks payment only with regard to the Motheo project and for the same amount. Nothing turns on the fact that, although the applicant originally relied on the addendum (annexure "B") with regard to the claim pertaining to the Motheo project, it now relies on a partly oral partly written agreement. The applicant still bears the onus of proving the existence of the partly oral partly written agreement on which it relies. Furthermore, I am of the view that the respondent will not suffer any prejudice if the amendment is allowed since right from the time the summons were issued, the respondent was aware that the applicant also seeks payment for services rendered in the Motheo project.

[14] The respondent is also opposing the amendment on the ground that the applicant's claim as set out in the proposed amended declaration has prescribed. It is the respondent's contention that the proposed amendment as it stands implies that the agreement on which the applicant relies was concluded on 26 October 2010 and therefore the three-year prescription period has elapsed. It is the applicant's contention that the period of prescription has not expired as, in terms of the agreement, payment to the applicant was subject to the department

paying the respondent, who in turn had to pay the applicant within seven days of payment by the Department. Since the respondent only received money from the Department on 25 October 2013, the period of prescription has not expired.

[15] In *Stroud v Steel Engineering Co Ltd and Another* 1996(4) SA 1139(WLD) the court held at 1142C-F that:

> "There remains the contention that because the claim is prescribed, it should not be allowed. I accept that the Court normally would not permit an allegation which has no possibility of advancing the situation of a litigant and can at best serve as a basis for the need to hear evidence which leads nowhere. Accordingly, it would make no sense to permit a claim which is known to have prescribed. But if the supervening of prescription is not common cause, the application for amendment is normally not the proper place to attempt to have that issue decided. Technically speaking, in fact, prescription is not an issue until it has been pleaded. I say 'normally' because there may be special cases, for example where only legal interpretation makes the difference to facts which are common cause. However, except in such special situations, once prescription is not common cause, the plaintiff should not be deprived of his chance to put his claim before the Court because of apparent probabilities at the time when amendment is considered. Considerations of effectiveness and fairness confirm that propriety. The present defendant ought to raise its proposed defence (prescription) in the same way that it would raise any other defence which becomes appropriate after an amendment is granted."

[16] There is a dispute as to whether the Motheo project debt has prescribed. In the light of what is stated in the *Stroud* matter (supra), I am of the view that the applicant cannot be denied an amendment

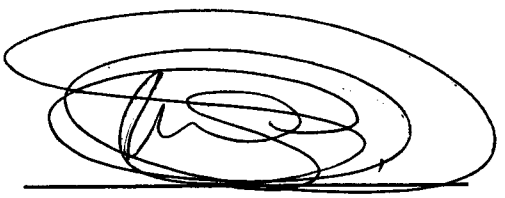
based on an issue which still has to be decided upon during trial. I am therefore of the view that the applicant has shown sufficient cause for its application to amend its declaration to be allowed.

[17] On the question of costs, I am of the view that the respondent did not unreasonably oppose the application to amend. Since the applicant is the party seeking an indulgence, I am of the view that it should bear the costs occasioned by the amendment.

[18] Accordingly the following order is made:

18.1 The applicant is granted leave to amend its particulars of claim in accordance with its Notice of Intention to Amend in terms of Rule 28(1) dated 24 October 2013.

18.2 The applicant to pay the costs occasioned by the amendment.



MNGQIBISA-THUSI J

Judge of the Gauteng High Court Division

Appearances:

For Applicant: Adv Mulligan

Instructed by: Potgieter Marais attorneys

For Respondent: Adv Nowitz

Instructed by: Nochumsohn & Teper Attorneys