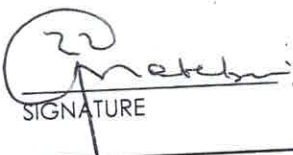


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
DATE	31/05/2019
SIGNATURE	

CASE NO: 66203/14

In the matter between:-

TEE QUE TRADING SERVICES (PTY) LTD

Plaintiff/Applicant

and

NEDBANK LIMITED

Defendant/Respondent

JUDGEMENT

MATEBESE AJ

INTRODUCTION:

- [1] The applicant, the plaintiff in the main action, applies for leave to amend its amended particulars of claim. The application is opposed by the respondent, the defendant in the main action.
- [2] The parties hereto shall for convenience, henceforth be referred to as the plaintiff and the defendant, respectively.
- [3] From the documents it appears that:
 - 3.1 On 26 October 2016, pursuant to the filing of plaintiff's amended particulars of claim on 28 September 2016, the defendant filed a notice in terms of rule 23 (1) of the Uniform rules of court. The defendant contended in the notice that the plaintiff's amended particulars of claim, on various grounds listed in the notice, lacked the necessary averments to sustain a cause of action and are also vague and embarrassing.
 - 3.2 On or about 6 June 2018, in an attempt to remedy the aforesaid, the plaintiff delivered a notice of intention to amend its particulars of claim in terms of rule 28 (1) of the Uniform rules.
 - 3.3 On 19 June 2018 the defendant delivered, in terms of rule 28 (3) a notice of objection to the plaintiff's proposed amendment.
 - 3.4 The plaintiff therefore had to bring the current application in terms of rule 28 (4) of the Uniform rules. As stated herein above plaintiff seeks the leave of this court to amend its particulars of claim.

Plaintiff also seeks an order of costs against the defendant only in the event the latter opposes the application.

- [4] In what follows I deal first with the proposed amendment so as to put it into its proper perspective and show how, if granted, it is likely to impact on the particulars of claim as they currently stand, thereafter outline the defendant's grounds of objection and later deal with the issues arising herein.

The proposed amendment:

- [5] In its notice in terms of rule 28 (1) plaintiff proposes to amend its particulars of claim as follows;

- 5.1 By deleting paragraph 16.1 which provides:

"The Defendant appointed the plaintiff to perform problem resolution services, maintenance services and disaster recovery services to the Defendant;

(Clause 4.1, read with clause 2.62 and clause 15, 16 and 17)"

and substituting the above paragraph with a new paragraph 16.1 which reads:

*"16.1 The Defendant appointed the Plaintiff to perform the services and provide the deliverables to the Defendant, on the terms and conditions contained in the contract documents;
(Clause 4.1)"*

- 5.2 By adding the following two paragraphs below 16.6 as paragraphs 16.7 and 16.8, respectively:

"16.7 The Plaintiff and the Defendant agreed that they shall continue to be bound by the terms of the Non-Disclosure Agreement (NDA);

(Clause 39)

16.8 NDA was defined as Non-Disclosure Agreement concluded between the parties on 5 October 2011;

(Clause 2.43)”

I was informed during argument that the above proposed amendments are not the subject of the defendant’s objection. Accordingly, I need not deal further with same. Suffice only to mention that it will therefore follow, in terms of rule 28 (5) that the above amendment may be effected and no leave is required in respect thereof.

5.3 By numbering the paragraph below the sub-heading “The further negotiations between the Plaintiff and the Defendant “as paragraph 22.

This proposed amendment is also not contentious in my understanding and I need not deal with it any further in this judgement. Its fate is the same as those above.

5.4 By deleting the heading above paragraph 37 and replacing it with the following:

“THE DEFENDANT’S OBLIGATIONS IN TERMS OF THE MASTER AGREEMENT READ WITH NDA, ALTERNATIVELY THE DUTY OF CARE OWED BY THE DEFENDANT TO THE PLAINTIFF”

5.5 By inserting the words “contractual obligations and/or alternatively” between the words “following” and “legal” in paragraph 37 so that the paragraph reads:

"In the entirety of the set of facts and circumstances set out above in paragraph 12-14, paragraphs 4-21 and paragraphs 24-28 above the Defendant owed the following "contractual obligations and/or alternatively" legal duty of care to the Plaintiff during the course of the negotiations:

37.1"

(The underlining is mine and is merely intended to show the proposed addition to the paragraph. This will apply to all the paragraphs below where the plaintiff proposes to insert or add certain words in a paragraph)

- 5.6 By inserting the words "CONTRACTUAL OBLIGATIONS AND/OR" in the heading above paragraph 38 so that the heading reads:
"THE DEFENDANT'S BREACH OF CONTRACTUAL OBLIGATIONS AND/OR DUTY OF CARE"

- 5.7 By inserting the words "*terms of the Master agreement read with NDA, alternatively its*" between the words "the" and "duty" in the first sentence above paragraph 38 so that the sentence reads:
"The Defendant breached the terms of the Master agreement read with the NDA, alternatively its duty of care in that the Defendant:
38.1"

- 5.8 By deleting the reference to paragraph 23.4 in paragraph 39.2 and replace it with paragraphs "24 to 29 above" so that paragraph 39.2 reads:
"The Defendant obtains an advantage that it would not have been able to obtain, but for the facts set out in paragraphs 24 to 29 above;

- 5.9 By inserting the words "*terms of the Master agreement read with NDA, alternatively breach of its*" in the last line of paragraph 39.3 between the words "the" and "legal" so that the paragraph reads:

"The Defendant concludes the further agreement at a purchase price less than what the Defendant would not have been able to procure the Foglight software and the services in relation thereto at, but for the breach of the terms of the Master Agreement read with NDA, alternatively breach of its legal duty of care"

- 5.10 By inserting the words "*terms of the Master agreement read with NDA, alternatively breach of*" between the words "the" and "legal" in the first line of paragraph 40 so that the paragraph reads:

"As a direct result of the Defendant's intentional conduct and the breach of the terms of the Master agreement read with NDA, alternatively breach of legal duty of care by the Defendant, the Plaintiff lost the opportunity to conclude the further agreement and thereby the Plaintiff suffered loss of profit in the sum of US\$ 6 176 607 – 00, calculated as set out in paragraphs 41 to 47 hereinafter"

- 5.11 By inserting the words "*terms of the Master Agreement read with NDA, alternatively breach of*" in the first line of paragraph 44 and between the words "the" and "legal" so that the paragraphs reads:

"But for the Defendant's conduct and the Defendant's breach of the terms of the Master Agreement read with NDA, alternatively breach of legal duty of care that the Defendant owed to the Plaintiff, the further agreement would have been concluded between Plaintiff and the Defendant at a contract

price equivalent to US\$ 14 753 214 – 00 calculated as set out in paragraph 41 above”

- 5.12 By inserting the words *“terms of the Master agreement read with NDA, alternatively its”* in the first line of paragraph 48 and in between the words “the” and “duty” so that the paragraph reads: “As a direct result of the Defendant’s intentional conduct and the breach of the terms of the Master agreement read with NDA, alternatively its duty of care, the Plaintiff suffered loss of profit in the amount of US\$ 4 804 214 – 00, calculated as follows....”

The Defendant’s objection.

- [6] in the main the defendant objects to the proposed amendment on the grounds that:

- 6.1 in terms of the section 11(d) and 12(1) of the Prescription Act 68 of 1969 (“the Prescription Act”) the period for the alleged debt which the plaintiff seeks to claim in terms of the proposed amendment is three years from the date on which the debt became due;
- 6.2 regard being had to paragraph 30 of the present particulars of claim, the alleged conduct which the plaintiff relies on as constituting an alleged breach by the defendant of its alleged contractual obligations (i.e. the calling of a private meeting with Quest to the exclusion of the plaintiff, and the ensuing conclusion of an agreement by the defendant directly with Quest) occurred in September 2012;
- 6.3 regard being had to paragraph 47 of the present particulars of claim, the plaintiff was aware of such alleged breach by March

2013, having regard thereto that this is the date at which the plaintiff alleges it received an ex gratia payment of US\$ 1 million from Quest "*in part compensation*" for the plaintiff's alleged loss;

- 6.4 in the circumstances, the alleged debt which the plaintiff seeks to claim in terms of the proposed contractual claim which the plaintiff seeks to introduce, became due by no later than March 2013;
 - 6.5 the alleged debt sought to be claimed by the plaintiff in terms of the proposed contractual claim therefore became prescribed by March 2016;
 - 6.6 the notice of amendment is dated 6 June 2018, and such process can no longer serve as judicial interruption of prescription by claiming payment of the alleged debt which is sought to be claimed in terms of the contractual claim, as such alleged debt has been extinguished.
- [7] The defendant further argues that the plaintiff's original particulars of claim contained a contractual claim but the contractual claim contained in the original particulars of claim was not prosecuted to final judgement as required in section 15 (1) and 15 (2) of the Prescription Act. Therefore, so the defendant contends, the service of the original particulars of claim does not affect the above position as regards the debt being extinguished.
- [8] In short the defendant contends that the amendment seeks to introduce a new debt and that the debt sought to be introduced by the plaintiff by way of the proposed amendment has since prescribed and that it is accordingly incompetent to allow the amendment. It further argues that to the extent that the summons issued in 2014 interrupted prescription of the debt, as originally claimed, such interruption lapsed by virtue of section 15 (2) of

the Prescription Act as the action under the said summons was not prosecuted to final judgement but was abandoned by the plaintiff.

The issues

[9] The issues in this matter are:

- (a) whether the proposed amendment introduces a new debt. A negative answer in this regard disposes of this matter;
- (b) if the answer to the above is in the affirmative, whether the debt introduced by the new amendment has prescribed in terms of section 11(d) read with section 12(1) of the Prescription Act;
- (c) if it has, whether the prescription was interrupted;
- (d) if it was interrupted, whether the plaintiff abandoned the process that interrupted prescription resulting in the interruption of prescription lapsing in terms of section 15(2) of the Prescription Act; and
- (e) costs of the application.

Whether the amendment introduces a new debt.

[10] In determining this issue one has to look at the particulars of claim sought to be amended and compare them with the proposed amendment in order to determine whether a new debt as envisaged in the Prescription Act is sought to be introduced by the proposed amendment.

- [11] The Prescription Act does not define what a debt is. However, the then Appellate Division in *Escom*¹ defined a debt for purposes of the Prescription Act to mean that which is owed or due, anything (as money, goods or services) which one person is under an obligation to pay or render to another.
- [12] The above definition has since received approval by the Constitutional Court in *Makate*² and *Off-Beat Holiday Club*.³
- [13] With the above definition in mind one therefore must begin to compare the particulars of claim sought to be amended with the plaintiff's proposed amendment and determine whether the argument that a new debt is sought to be introduced can find support therefrom.
- [14] This involves a determination whether a new cause of action, which means every fact that the plaintiff must prove in order to succeed in his claim and not every piece of evidence necessary to prove each fact⁴, which is different to the one already pleaded in the particulars sought to be amended is contained in the proposed amendment.
- [15] Confronted with a question whether on a consideration of the particulars sought to be amended and the proposed amendment there appears any new *facta probanda* sought to be introduced by the proposed amendment, counsel for the respondent was constrained to make a concession that there is none. In my view the concession was well made.
- [16] Looking at the substance of the particulars of claim sought to be amended, it is clear that no claim or debt sought to be recovered by the

¹ Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344F

² Makate v Vodacom 2016 (4) SA 121 (CC) para.93

³ Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others 2017 (5) SA 9 (CC) para.44

⁴ De Kock v Middelhoven 2018 (3) SA 180 para.23 and the authorities referred to therein.

plaintiff is introduced by the amendment. The debt remains the same or substantially the same.⁵

[17] If anything, the amendment is no more than a clarification of what may appear or appears to be unclear or a defect in the particulars of claim.

[18] The above finding therefore disposes of this matter. It is therefore unnecessary to deal with the rest of the issues identified herein above save only for the issue of costs which I consider hereunder

Costs

[19] The general rule in matters of this nature is that the party that seeks an indulgence, like the leave to amend *in casu*, is liable for the costs.

[20] However that is not an absolute rule in that where the granting of the indulgence is opposed and the opposition is found to be unwarranted, frivolous or vexatious the opposing party may be held liable for the costs.

[21] I have indicated herein above that on a mere look at the particulars of claim sought to be amended compared with the proposed amendment it is clear that no new factual allegations are sought to be included in the particulars of claim by the amendment sought.

[22] The amendment simply seeks to add or insert certain words to certain paragraphs, headings and sentences in the particulars of claim.

⁵ *Embling and Another v Two Oceans Aquarium* CC 2000 (3) SA 691 (C) at 698 C-F though in the context of the introduction of a defendant by way of amendment; *Rustenburg Platinum Mines Limited v Industrial Maintenance Painting Services* CC [2009] 1 All SA 275 para.13

[23] In my view the objection by the defendant is overly technical and is not based on reasonable grounds.

[24] I therefore find no basis why costs should not follow the result.

[25] In the circumstances I make the following order:

25.1 The application for leave to amend succeeds and the plaintiff is granted leave to amend its particulars of claim as proposed in the Notice dated 6 June 2018;

25.2 The defendant shall pay the costs of the application.



Z.Z. MATEBESE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the plaintiff: Adv R.B. Mphela
Instructed by Nicholas Ngwenya Incorporated
PRETORIA

For the defendant: Adv P.T. Rood SC (with Adv E. Kromhout)
Instructed by Cliffe Dekker Hofmeyr Attorneys
SANDTON