(Inlexso Innovative Legal Services) rm

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 39469/19 &

CASE NO: 74907/2018

DATE: 27/02/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED 14 May 2020
Electronically signed

In the matter between

TECHNOFIN (PTY) LTD t/a MEDEQUIP RENTAL Applicant

and

BUSTQUE 525 (PTY) LTD t/a OLYMPUS DENTAL 1st Respondent

BRADFIELD CHARLES FREDERICK 2nd Respondent

RABIE EVAN ROCHE 3rd Respondent

J U D G M E N T

DAVIS J

1. Introduction:

This is the ex tempore judgment in two interrelated opposed applications in cases 74907/2018 (the “amendment application”) and 39469/2019 (the "vindication application”)

which I heard yesterday. The parties to the two applications are identical and both applications had to do with three items of highly technical dentistry equipment ("the equipment") in possession of the Olympus Dental Practice.

2. The parties:

As already mentioned, the parties in both applications are the same. The applicant in each application is Technofin (Pty) Ltd t/a Medequip Rental. The first respondent is Bustque 525 (Pty) Ltd t/a Olympus Dental. The second and third respondents are two dentists.

3. Chronology and salient facts:

3.1 During the second half of 2015, the dentists sought to furbish their dental practice with dentistry equipment. The applicant sourced the specified equipment and on 12 November 2015, the first respondent entered into two master rental agreements and on 12 May 2016 entered into a third master rental agreement, all with the applicant. The three agreements were for a Sirona Dental Treatment Centre, a Sirona dental x-ray machine and a Sirona Cerec MC X milling unit respectively.

3.2 In terms of a pre-existing main session agreement dated 24 February 2012, the applicant ceded its rights in terms

of the first and third of the master rental agreements to GBS Mutual Bank.

3.3 In terms of an agency agreement with GBS Mutual Bank, the applicant continued to collect the rentals in terms of those master rental agreements as agent on behalf of GBS Mutual Bank.

3.4 In the main session agreement, provision is made that should the first respondent fail to pay rentals, GBS Mutual Bank would be entitled to claim indemnity and payment of the outstanding rentals from the applicant and recede the agreements back to the applicant.

3.5 Initially all went well and the rentals in respect of all the agreements were claimed on invoice and paid by the first respondent.

3.6 On 27 August 2017, the dentists complained that they had believed the rental agreements to be instalment sale agreements and that the true nature of the agreements had been fraudulently misrepresented to them.

3.7 After some correspondence, the dentists referred their complaint to the consumer ombudsman and from May

2018, that is approximately 19 months ago, stopped paying rentals.

3.8 As a result the applicant was called upon to indemnify GBS Mutual Bank, which it did.

3.9 On 26 July 2018, all the master rental agreements were cancelled by the applicant.

3.10 On 15 October 2018, the applicant instituted action for the return of the equipment, payment of the arrears rental and rental for the unexpired period of the respective master rental agreements as provided for in their express terms.

3.11 The respondents delivered notices to defend the action which prompted applications for summary judgment.

3.12 In their affidavits whereby they successfully resisted summary judgment, the respondents have repeated the allegations of fraudulent misrepresentation and confirmed that they had stopped making payments.

3.13 Subsequent to leave to defend being granted, the respondents delivered an exception to the applicants'

particulars of claim. The gist of the exception is that the applicant, having ceded its rights in respect of the rental agreements which form the subject matter of the first and third claims (being in respect of the first and third master rental agreements) lack the necessary *locus standi*. The rights in terms of the master rental agreement which forms the subject matter of claim 2 has never been ceded. So far, the relevant chronology.

4. <u>The current applications:</u>

4.1 In response to the attack on its alleged lack of *locus standi* and in order not to fall back on its agency agreement with GBS Mutual Bank, the applicant took recession of its rights in terms of claims 1 and 3 on 20 May 2019. In order to rely on this fact, the applicant sought to amend its particulars of claim. The proposed amendment was objected to, resulting in the present substantive application for amendment. That is now the aforesaid "amendment application".

4.2 In addition to the above and reliant on the respondent's clear intention not to be bound by any rental agreement and to treat the agreements as "unlawful", but yet still remaining in possession of the equipment, the applicant launched a separate application for the return of the

equipment, alternatively to have the equipment returned for safekeeping pending finalisation of the main action. This is the "vindication application".

5. The Amendment Application:

5.1 The general principles pertaining to amendments of pleadings which find application in this particular matter are the following:

1. Amendments will generally 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 an appropriate cost order. See *Moolman v Estate Moolman & another* 1927 CPD 27 and *Devonia Shipping Ltd v MV Luis Yeoman Shipping Co Ltd Intervening* 1994 (2) SA 363 (C) at 369F-I.

2. There has been a gradual move away from an overly formal approach to amendments of pleadings. See *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd 2008 (2) SA 177 (C)* and *JR Janisch (Pty) Ltd v WM Spilhaus & Company (WP) (Pty) Ltd* 1992 (1) SA 167 (C).

3. The primary object of allowing an amendment is to allow a proper and full ventilation of the dispute between the parties in order to determine the real issues. See inter alia *YB v SB* 2016 (1) SA 47 WCC.

4. There is no objection in principle to a new cause of action being added by way of an amendment if that is necessary to determine the real issues between the parties. See *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D), at 643 (C).

5. Even if a pleading might appear to be possibly open to exception or even if the Court is of the opinion that the question of whether or not the pleading is excipiable is arguable, it would seem the more correct course would be to allow the amendment. See *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G.

5.2 The respondents' main objection to the amendment is the introduction of a fact which has occurred after the institution of the action. That is now the recession referred to earlier. The respondents argue that the applicant should have had its house in order prior to the institution of the action and that the cause of action on which a plaintiff seeks to rely on must have existed at the time of the issuing of the summons.

10 5.3 As a general proposition, the prior existence of a cause of action is not only correct but also logical. Our Courts have however, held that in special circumstances a plaintiff would be entitled to establish a cause of action, an essential element of which only came into being after the issuing of the summons. See for example, *Philotex (Pty) Ltd v Snyman* 1994 (2) SA 710(T) at 716J to 717A and *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1976 (1) SA 93(W) at 97H.

20 5.4 What would be the consequence if the present amendment is not granted? As debated with counsel, the only consequence would be that the applicant would proceed with claim 2 in the main action and institute a fresh action in respect of claims 1 and 3. Apart from the fact that this would result in a duplication of costs and

possible delays, the fact remains that the parties to the two actions and the evidence to be led would be so identical as to require either a consolidation or a joint hearing of the two actions.

5.5 In Philotex above at 716G–I, Van Dijkhorst, J with reference to inter alia *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) and *Ritch v Bhyat* 1913 TPD 589 stated that:

> "*Practical considerations have in the past dictated that causes of action which arose after the issue of summons be joined to the existing ones in the same action.*"

5.6 The practicalities have been explained as follows in *Ritch v Bhyat* above at 592:

> "*If, however, the summons contains several valid causes of action together with one or more invalid claims, the striking out of the invalid claims will not destroy the summons entirely. In such a case if claims invalid at the date of summons are shown by the declaration to have become valid, then, even if they are struck out a fresh summons could be issued embodying these claims and the action founded on this summons consolidated with that of the other claims. There is no advantage to be*

gained in such a case by insisting on a fresh summons. The Court would allow an amendment. This is the view that was adopted by the Chief Justice in the cases of the BSA Company v Furbur 10 CTR 740 and Le Roux v Prins 2SC page 405. In the latter case Lord de Villiers said:

> *"The tendency of recent rules of procedure in this Court has been to sweep away all unnecessary technicalities and hindrances to the speedy and effectual administration of justice."*

5.7 If the present amendment is allowed, it would result in a multiplicity of actions being avoided. I find that there are sufficient special circumstances and practical considerations in the present case to allow the amendment. I find insufficient prejudice for the respondents should the amendment be effected. In fact, it would afford them the opportunity of not only continuing with the ventilation of the allegations of fraud and misrepresentation but also the institution of a counter claim which they have said in their affidavits resisting summary judgment that they intend to pursue, namely the recovery of the rentals already paid. In

addition, it would also save costs and time by disposing of the grounds raised in the notice of exception referred to earlier.

6. The vindication application:

6.1 Once the master rental agreements have been cancelled, as the applicant says it has done, the respondents have no right to retain possession of the equipment.

6.2 On the respondents' version, if the agreements had been induced by fraudulent misrepresentation and therefore were null and void, the respondents still have no right to retain possession of the equipment.

6.3 In the affidavit resisting the return of the equipment, the respondents claim that they will tender return of the equipment against the repayment of the rentals they have paid. Apart from the fact that such a claim for repayment, if it exists, would be one based on unjustified enrichment which has its own inherent difficulties such as the fact that the respondents have had the benefit of the use of the equipment during the period for which they have paid rental, they still would have no right in law to exercise such a conditional right of possession. They have no common law retention or any other contractual

right of security over or in the equipment. They are simply without any right to possession of the applicant's equipment.

6.4 In so far as there is a plea of *lis alibi pendens* in that return of the equipment is also claimed in the main action, as it is in the vindicatory application, there is no cogent reason why return of the goods must be delayed until the hearing of a pending action in which pleadings have not even yet become closed. In the meantime, the respondents are not only in possession of highly specialised equipment which need servicing, the equipment, by their very use in the dental practice, decrease in value daily. This and the fact that the respondents seek to retain the use of another's property for their own benefit without paying for it enjoins me to exercise the discretion which a Court has in respect of pleas of *lis alibi pendens* in favour of the applicant.

6.5 The vindication application should therefore also succeed.

7. Costs:

7.1 In so far as a party needs to remedy or rectify its pleadings, it should pay for the costs occasioned thereby

and that the applicant has tendered the unopposed costs occasioned by its amendment.

7.2 In respect of the costs of opposition not tendered by the applicant, I find no reason why costs should not follow the event, being the applicant's substantial success in the opposed application for amandment. This should include the costs reserved pursuant to a previous postponement to allow the respondents an opportunity to deliver their answering affidavits.

7.3 I do not however, find that the opposition was so unreasonable that it justifies a special costs order. I am also disinclined to find that the opposition was with a *mala fide* intent to delay proceedings. An order of costs on the party and party scale should suffice.

7.4 In respect of the vindication application, costs should similarly follow the event but also on the scale as between party and party.

8. I have been furnished with draft orders which I have amended and marked X in case 74907/2018 and Y in case 39469/2019. For purposes of the record, I read out the orders, they are as follows:

ORDER

Case 74907/2018:

1. The applicant is granted leave to amend its particulars of claim in accordance with its notice of amendment dated 2 August 2019.

2. The applicant is to pay the unopposed costs of the application and the respondents jointly and severely, the one paying and the other to be absolved, are ordered to pay the costs occasioned by the opposition thereto as between party and party, including previously reserved costs.

Case 39469/2019:

1. The respondents are ordered to forthwith release to and allow the applicant to remove the following equipment:

   1.1 The Dentsply Sirona Dental Teneo Treatment Centre with serial number 6364157.

   1.2 The Dentsply Sirona, Orthophos XG 3D dental x-ray unit with serial number 648120, and

   1.3 The Dentsply Sirona Cerec MC X milling unit with serial number 238128 ("the equipment")

2. The Sheriff of the Court is authorised and directed to forthwith and with the technical assistance of qualified technicians accorded by the applicant, remove the equipment from the possession of the respondents.

3. In the event of the respondents failing or refusing to give effect to this order, the applicant is authorised to approach the Court on the same papers supplemented if needs be, to obtain further relief to secure compliance with the order.

4. The respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application as between party and party.

Electronically revised
DAVIS J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA
DATE READ IN COURT : 27/02/2020

On behalf of the Applicant in both applications: Adv RJ Groenewald

On behalf of the Respondents in both applications: Adv H Lerm