IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 86475/2014

Heard on: 16 November 2020

Date of Judgment: 20 November 2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

18 November 2020
DATE SIGNATURE

In the matter between:

TRICKS WROUGHT IRON SERVICES (PTY) LTD **Applicant**

and

VHEMBE DISTRICT MUNICIPALITY **Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] This is an application for leave to amend applicant's particulars of claim. In 2014 applicant issued summons against respondent for payment of R 1 419 8709.00 pursuant to an alleged oral agreement between the parties,with the following terms:

[1.1] Applicant undertook to supply concrete toilet structures ("the goods") to Ratakuwa Concrete Factory ("Ratakuwa"), which Ratakuwa would in turn supply to respondent.

[1.2] Applicant would submit a direct payment request to respondent for the aggregate cost of the goods by submitting invoices and delivery notes for the goods to both Ratakuwa and to respondent;

[1.3] Respondent would pay applicant directly within 7 days of the submission of the invoices and delivery notes.

[2] Applicant alleges that it delivered a direct payment request to respondent for payment of the claimed amount on 24 April 2014. Respondent did not effect payment, resulting in this action being brought. Applicant alleges that in entering into the oral agreement, it had been represented by one George Henning, and respondent had been represented by one Willie Venter. The payment request upon which applicant relies is attached to the particulars of claim, and is headed "Vhembe District Municipality Cession Form".

[3] The action was subject to inordinate delays. It has been enrolled for trial twice, and removed by agreement between the parties on each

occasion. During 2016 applicant launched an application for the joinder of Ratakuwa as a defendant. Respondent initially opposed the application, but later withdrew its opposition. On 13 October 2016 the joinder order was granted. It was, however, never served on Ratakuwa. There is no doubt that applicant's erstwhile attorney failed to prosecute the action diligently. During late 2019 applicant terminated its attorney's mandate, and it appointed its current attorneys, which resulted in steps being taken to bring the matter to fruition, including the launching of this application.

[4] Applicant seeks to effect the following amendments:

[4.1] The replacement of "Willie Venter" for "Mr. Masala Makulule" in paragraph 4 of the particulars of claim, as representative of the respondent when the agreement was concluded;

[4.2] Applicant seeks to amend its averment that the agreement was purely oral, by pleading a partly oral, partly written agreement, with the payment request being the alleged written part of the agreement.

[4.3] Applicant seeks to include an averment that it had performed in terms of the agreement by delivering the goods to Ratakuwa;

[4.4] Applicant seeks to incorporate a date on which it delivered the invoices and delivery notes to Ratakuwa and to the respondent in paragraph 6 of the particulars of claim;

[4.5] Applicant seeks an amendment of the amount claimed, by reducing the claim by R 1.00 to R 1 419 871.00.

[5] Respondent has raised a number of objections to the proposed amendment. They are as follows:

[5.1] The amendment seeks to 'extricate' Mr Venter from the action and thus it prejudices the respondent;

[5.2] The amendment seeks to 'extricate' Ratakuwa from the action, and it is thus prejudicial to respondent;

[5.3] The amendment seeks to 'undermine' the order made that Ratakuwa may be joined as a party;

[5.4] The payment request (cession form) should be accompanied by an original letter by Ratakuwa agreeing to direct payment to applicant;

[5.5] The amendment ignores the role played by Ratakuwa;

[5.6] Neither Ratakuwa nor Meyer have been cited as defendants;

[5.7] There is no *lis* between the applicant and respondent;

[5.8] The delay in prosecuting the action is prejudicial to respondent in that it does not know the whereabouts of its witness, Makumule, and would have to 'frantically' search for him;

[5.9] Respondent has suffered for six years because of applicant's ineptitude;

[5.10] The action has been costly for the respondent.

[6] In its answering affidavit, and before me, respondent added a further ground of objection. It was argued that the so-called bald allegation that applicant seeks to introduce, that it had performed in terms of its obligations to Ratakuwa, was so vague that respondent could not plead thereto, and that allowing the amendment would render the particulars of claim excipiable. Respondent also alleged in the answering affidavit that applicant had not made all the averments necessary to sustain a cause of action based on the payment request. Respondent furthermore alleged that it could not interrogate whether applicant had performed properly because it had not been party to the contractual relationship between applicant and Ratakuwa.

[7] Applicant has argued that respondent is bound to its notice of objection, and that it cannot raise fresh objections in its answering affidavit, or in argument before me. Respondent says the opposite: that it is entitled to raise fresh objections in its answering affidavit.

[8] Rule 28 (3) requires a party objecting to an amendment to clearly and concisely state the grounds upon which the objection is founded. Once an objection is delivered, it is not necessary to follow the motion procedure prescribed in rule 6, save in certain specific instances, for

instance where an admission is sought to be withdrawn.[1] Therefore, in most instances, an application for an amendment will not require a substantive founding affidavit, nor an answer thereto.

[9] Counsel for respondent sought to distinguish this matter from ***Squid Packer*** (*supra*) on the grounds that in the instant matter the new objections had been raised in an answering affidavit, whereas in ***Squid Packer*** the objection was first raised in argument. I do not agree. Rule 28 (3) is peremptory and was enacted, it seems to me, to allow the party seeking an amendment to understand exactly what objection it has to meet. It is thus not open to a party to amplify its objection in an answering affidavit which would, in most instances, not even be required. It is therefore necessary to consider the objection solely on the grounds set out in the notice of objection

[10] The first objection raised by respondent is that applicant is trying, through the amendment, to 'extricate' Willie Venter and Ratakuwa from the matter. Venter and Ratakuwa have never been parties to the action, nor do I believe that either of them has a direct and substantial interest in the subject matter of the action. Venter was allegedly a representative of the respondent, whilst Ratakuwa has no interest in whether applicant is successful in its claim against respondent or not. I do not understand

[1] Squid Packers (Pty) ltd v Robberg Trawlers (Pty) Ltd 1999 (1) SA 1153 (SECLD) at 1157 H

in what manner applicant is trying to 'extricate' either Venter or Ratakuwa. This objection has no merit.

[11] Respondent's allegation, that Ratakuwa should be joined as a party to the action, is in my view incorrect. Nevertheless, I do not have to make a finding on this issue, which is for the trial court to consider. In any event, whether Ratakuwa is a party to the proceedings or not is irrelevant to the application to amend. If the amendment is granted, it makes no difference to the status in the action of Venter nor of Ratakuwa. I also do not understand the contention that applicant is somehow trying to undermine the joinder order. Whether the amendment is granted or not, Ratakuwa may still be joined as a party.

[12] A further objection was that the payment request had to be accompanied by an original letter from Ratakuwa agreeing to the direct payment. This objection is made without any context to it, and without stating why the absence of such an averment in the particulars of claim would preclude the granting of an order that applicant may amend. I do not find any merit in this objection.

[13] Respondent also objects on the grounds that there is no *lis* between the parties. The *lis*, it is alleged, is between Ratakuwa and the applicant. This argument ignores the fact that it is quite possible to have two different contractual relationships between parties, arising from the same set of facts. The relationship between applicant and Ratakuwa is contractual, and is for the sale of goods. The alleged relationship

between applicant and respondent is also contractual, and requires respondent, upon certain conditions having been met, to effect payment to applicant directly of monies that would have, had it not been for the cession agreement, been paid to Ratakuwa. If the averments in the particulars of claim are correct, there is most definitely a *lis* between applicant and respondent.

[14] The final objection can be summarized as follows: Due to the inordinate delay in prosecuting the action, respondent has been prejudiced. Witnesses may be hard to find, additional costs have been incurred by the respondent, and the result of applicant's inaction has caused respondent to "suffer". Respondent has, it says, expended large sums of public money in defending the action.

[15] There is no doubt in my mind that the delay in prosecuting this matter was largely caused by the applicant's erstwhile attorney. Respondent is not completely blameless, however, having opposed the joinder of Ratakuwa, before withdrawing the opposition later on, resulting in a further delay. Nevertheless, there is no doubt that the action has not been prosecuted with much vigour. Respondent initially alleged that the delay has resulted in its witness, Mr. Makumule, having left respondent's employ. Respondent apparently had no knowledge of his whereabouts, which would mean that respondent would have to search for him. That objection was not persisted with because it appears that Mr. Makumule has been found and can be called as a witness.

[16] Respondent does not allege that the delay in the matter has caused it any other prejudice, save that the action has resulted in the expenditure of the municipality's funds. That is, unfortunately, the inevitable result of litigation. In and of itself a delay in prosecuting the action, without any prejudice resulting therefrom, is not a ground upon which an amendment can be refused.[2]

[17] A Court has a wide discretion whether to allow an amendment or not. That discretion must be exercised judiciously, whilst remembering that:

"The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts."[3]

[18] The well-known *dictum* in ***Moolman v Estate Moolman***[4] is apposite to this matter:

"The practical rule adopted seems to be that amendments will always be allowed unless the application is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words the parties cannot be put back for purposes

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[2] Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and another 1967 (3) SA 632 (D&C.L.D.) at 642 D
[3] Whittaker v Roos and Another 1911 T.P.D. 1092 at page 1102
[4] 1927 CPD 27 at page 29

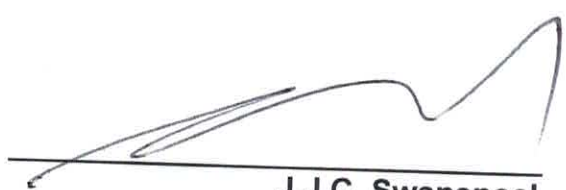
of justice in the same position as they were when the pleading which it is sought to amend was filed."

[19] In my view the application to amend is not *mala fide*, but rather the result of fresh minds having considered the matter, and having found that a slightly different approach must be taken to the pleadings. In the result, I am inclined to grant the application to amend.

[20] I make the following order:

[19.1] The application to amend the particulars of claim in accordance with applicant's notice of amendment dated 17 May 2020 is granted;

[19.2] Applicant shall pay the costs of the amendment up to the filing of the notice of objection on 29 May 2020. Respondent shall pay the costs of the application from 29 May 2020 onwards.



J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria