

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 1037/05

In the matter between:

**THE TOURISM, HOSPITALITY &
SPORT EDUCATION &
TRAINING AUTHORITY**

Plaintiff

and

TMS – SHEZI INDUSTRIAL

SERVICES (PTY) LIMITED

Defendant

JUDGMENT

MOLAHLEHI J

Introduction

1] The issue for consideration in this case concerns whether or not this Court should award costs after upholding the exception raised by the defendant in an earlier judgment. The issue of costs was argued only after judgment upholding the exception was delivered.

2] I deem it not necessary to transverse the details relating to the merits of the exception, the same having been dealt with in the

earlier judgment. I will however touch briefly on those background facts which are central to and have a bearing on the consideration of whether or not costs should be awarded and in whose favour.

- 3] The plaintiff issued summons against the defendant during April 2004, and the defendant filed its plea during June of the same year. Thereafter, the plaintiff amended its particulars of claim. At that stage the defendant had not indicated an intention to take an exception to the plaintiff's claim.
- 4] The matter was set down for trial for the 17th March 2007, and five days before the hearing, the defendant filed an exception contending that the plaintiff's particulars of claim did not disclose a cause of action.
- 5] The plaintiff objected to the exception on two grounds. The first ground concerned the late filing of the exception and the second ground being that the parties had already concluded a binding pre-trial

minutes.

- 6] In as far as the pre-trial minutes were concerned, the plaintiff argued at that stage that the Court was bound by the pre-trial minutes which requires the Court to determine whether or not the defendant breached its obligations in terms of the contract.
- 7] The defendant argued that the Court was not in a position to make a costs order regarding the merits as the matter was still to go to trial. It was further argued on the behalf of the defendant that what happened prior to the exception can best be determined at the end of the trial if the plaintiff was to amend its papers and proceed with the matter to trial or after the counter claim was considered.
- 8] It was held in the earlier judgment that the pre-trial minutes did not preclude any of the litigants from raising an exception to the claim or to the defence of the other party, once the pre-trial minutes were

concluded. See (*Mokgae v Sentra-boer (Koóparasie) Bpk (1981) 4 SA 239(T)* at 244 M – 245 A).

- 9] As concerning the timing of the exception the Court accepted the authority of *Bateman Ltd v Ca Brand Projects (Pty) Ltd 1995 (4) SA 128 (T)*, where the full bench set aside the decision of the Court *a quo* for refusing to entertain an exception which was raised informally by counsel on the day of the trial.
- 10] In as far as the timing of the exception was concerned, the defendant argued that it was entitled to bring the exception once the plaintiff had elected to amend its particulars of claim. The defendant correctly argued that in filing the amendment the plaintiff threw the pleadings wide open and entitled the defendant to file an exception.
- 11] The plaintiff contended that the defendant never tendered an explanation to the Court when the matter was argued as to why the exception was

taken five court days before the trial.

12] In the earlier judgment, I shared the sentiments of the plaintiff that the exception should have been brought earlier but concluded that because of the need to determine whether or not the exception goes to the root of the claim, it was necessary to consider it, rather than proceed hearing the evidence which at the end may produce the same result. I further found that if there was any prejudice occasioned by the delay in filing the exception such prejudice could be addressed through a costs order.

13] The plaintiff argued that the exception could not have been prompted by the amendment to the particulars of claim. What may have prompted the exception in all probability, according to the plaintiff, was when the defendant considered its preparation for trial and had a proper look at the particulars of claim.

- 14] The issue of an exception was apparently raised for the first time at the pre-trial conference. The plaintiff further argued that the appropriate time for the defendant to have raised the exception would have been between the filing of the summons which was during April 2004 and June 2004, when the plea was filed.
- 15] Counsel for the plaintiff relied on the judgment in *Bateman* where the defendant's counsel informally raised the exception to the particulars of claim at trial. In *Bateman's* case unlike the present case the exception was brought informally at the commencement of the trial and no supporting affidavit was filed to support the application. The other difference with the present case is that in *Bateman* there were no further steps taken in the form of amendments to the pleadings as was the case in the present case.
- 16] In *Bateman*, the Court held that, had the defendant filed the exception earlier there would have been a great deal of saving of costs. In this regard the Court held per De Villiers J that:

“Although the exception should have been upheld on that

day, I am nevertheless of the opinion that, in view of all the relevant facts and circumstances, it would be fair and reasonable that the defendant should pay the plaintiff's costs in respect of the first day of the trial."

17] In *Cohen v Heywood* 1948 (3) SA 365 at 374, Greenberg JA in dealing with the same issue said:

"In my opinion the question in each case is whether the party who did take the exception was unreasonable in failing to do so. If he was, then he should not be entitled to the costs unnecessarily incurred in the case of going to trial.

Ordinarily it would be unreasonable of a party not take an exception which if allowed would dispose of the case, but there may be circumstances which make it impossible to say that the omission to take the exception connotes unreasonableness."

18] I have already indicated that the plaintiff in the present case argued that the defendant was not entitled to costs because the exception was taken at a very late stage in the proceedings and further that there was no explanation for such a delay. The plaintiff further argued that the defendant failed to tender an explanation as to why the exception was taken five days before the trial.

19] In *Prope v South African Bank and Another* 1992 (3) SA 208(TPD) , the Court in dealing with the argument of the plaintiff that the defendant was barred from raising the exception because it had not objected to the proposed amendment held that :

“There, is in my view no merit in the argument. There is nothing in the Rules to suggest that this should be so. Moreover, the plaintiff took the further step after receipt to remove the complaint, to inform the first defendant that they did not intend further to amend their particulars of claim as they did not consider the pleadings to be vague and embarrassing. The plaintiffs are accordingly bared under Rule 30 from suggesting that the exception is an irregular proceeding.”

20] In the present case the plaintiff took a further step in the proceedings when it filed its amendment and accordingly opened the proceedings wide. It was after the amendment was filed that the defendant filed its exception.

21] The applicant opposed the exception and filled a comprehensive objection to it. In this regard it cannot be said that the plaintiff suffered prejudice. Although the exception was much broader in its scope than the amended

clauses of the plaintiff's particulars of claim, it however largely dealt with the key issues raised by the amendment. However, even if the exception did not address itself to the issues that arose in the amendment, I have not found anything in the rules that an exception following an amendment should be confined to the amended clauses.

22] In as far as prejudice was concerned, it is my view that the plaintiff had, as indicated earlier had the opportunity to respond to the exception, weigh and assess its prospects and could have either withdrawn or requested postponement to amend its particulars of claim.

23] The reasonableness of the timing of the exception, may have probably been different but for the plaintiff's amendment. It is therefore difficult to see, in the light of the amendment, how it could be said the defendant acted in an unreasonable manner in filing the exception at that time and how the plaintiff could be said to have been prejudiced by this approach.

24] In the circumstances of this case I am of the view that law and fairness dictate that the respondent should be awarded the costs of

the exception excluding those of preparation for the trial. The appropriate time for assessing the costs of the preparation would be either at the end of the trial if the applicant does amend its particulars of claim or at the end of the counter claim.

- 25] I finally do not agree with the plaintiff that reserving a judgment on the day the exception was heard amounted to a postponement occasioned by the exception.

Order

- 26] In the result I make the following order:

1. The plaintiff should pay the defendant's costs from the date on which the exception was filed up to including the day the exception was heard.

MOLAHLEHI J

Date of Hearing: 23 July 2007

Date of Judgement: 21 February 2008

APPEARANCES:

For the Applicant: Advocate M M Antonie

Instructed by: Webber Wenzel Bowens

For the Respondent: Advocates I J Zidel SC with L Moreno

Instructed by: Fluxmans Inc