

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2010/6776

DATE:12/10/2011

REPORTABLE

In the matter between

LETHIMVULA HEALTHCARE (PTY) LTD

APPLICANT/DEFENDANT

and

PRIVATE LABEL PROMOTION (PTY) LTD

RESPONDENT/PLAINTIFF

***Practice** - Application for leave to institute counterclaim after delivery of plea – criteria applicable – Uniform Rules of Court, rule 24(1).*

J U D G M E N T

VAN OOSTEN J:

[1] This is an application by the defendant in the main action, under Uniform Rule of Court 24(1), for the introduction of a counterclaim where its plea has already been delivered. For the sake of convenience and ease of reference I will refer to the parties as in the action.

[2] The litigation between the parties, in essence, is based on a written lease agreement concluded between them on 13 February 2007 (the lease agreement). It is necessary to summarise the terms thereof that are relevant to this application. The plaintiff leased to the defendant, then a registered medical Scheme Administrator known as Old Mutual Health Care (Pty) Ltd, certain furnished and equipped office accommodation and facilities for the use of a call centre, for the sole purpose of administering the Medshield Medical Scheme (Medshield). The fee payable by the defendant to the plaintiff for the use of the premises was calculated at R5372-00 per month per agent workstation for the first twelve months and R4910-00 per month per agent workstation for the second 24 months. The contentious provision concerns the period of the lease: the lease was for a fixed period of 36 months from 1 November 2007 until 31 October 2010 but, in order to meet the defendant's commercial objectives, provision was made for a reduction of the term of the lease to 12 months (therefore terminating on 31 October 2008) by written notice given by the defendant to the plaintiff 90 days before the completion of the first 12 month period. The last date on which the defendant could effectively give such notice accordingly, was 31 July 2008.

[3] On 15 July 2008 Medshield gave the defendant notice terminating its services to Medshield with effect from 31 January 2009 but affording the defendant the opportunity to re-tender for the administration contract with Medshield. This prompted the defendant to address an email, dated 30 July 2008, to the plaintiff, which the defendant contends, constituted a valid termination of the lease on completion of first twelve month period. The plaintiff disputes the validity of the notice and contends that the defendant remains liable for the full fixed term of the lease. The dispute led to the commencement of the litigation between the parties which consisted of the launching of an application by the plaintiff in which it sought a declarator to the effect that the lease agreement had not been validly terminated, that it remained valid and that the defendant accordingly was obliged to comply with its obligations in terms thereof (the main application).

[4] The main application came up for hearing before Bregman AJ. The learned Judge decided the issue in favour of the plaintiff. The defendant was moreover ordered to pay certain unpaid amounts due for the months May to August 2009 and a declarator was

issued that the defendant was liable for the damages sustained by the plaintiff for the period commencing 1 November 2009 until 31 October 2010, in respect of which the plaintiff was to institute proceedings by no later than a stated date.

[5] Pursuant to the order of Bregman AJ the plaintiff instituted action against the defendant for payment of damages for the period referred to in the order, in the amount of R11 574 540-00. The defendant defends the action and on 26 April 2010 filed a plea denying that the plaintiff suffered any damages and pleading in the alternative firstly, that the plaintiff should not be granted specific performance and secondly, that the plaintiff claim should be limited to its proven *id quod interest*, if any.

[6] I turn now to the facts giving rise to the present application. The trial of the action was enrolled for hearing on 31 May 2011. In preparation for trial the defendant's legal representatives consulted with Mr Weinberg, a former Group Head: Business Development of the plaintiff. During the consultation Weinberg revealed certain information that the defendant was unaware of and which the defendant now alleges is material and directly relevant to the issue between the parties. Based on the new evidence the defendant contends that it has become entitled to introduce a counterclaim which, in draft form, is annexed to the papers. I will revert to the nature of the new evidence in due course. These events prompted the defendant on the date of the hearing of the action before Wepener J, by way of a substantive application, to seek a postponement of the action which was granted, and costs reserved. The present application was subsequently launched which is opposed by the plaintiff on the basis firstly, that the facts now alleged by the defendant do not raise what would have been a defence to the application and, secondly, that the application lacks *bona fides*.

[7] Next, it is necessary to deal with the new evidence and the resultant counterclaim the defendant now seeks to introduce. Weinberg, during the consultation I have already referred to, and with reference to management meetings of the plaintiff held on 5 August, 18 August and 8 September 2008, which he all attended, the minutes of which are attached to the papers, revealed that the plaintiff had accepted the defendant's e-mail of 30 July 2008 as a valid termination of the lease agreement. This, the defendant states, was in direct conflict with both the plaintiff's version and stance taken in the main

application, which was upheld by Bregman AJ. Weinberg further revealed that he was specifically authorised by Mr Ball, a director of the plaintiff and the deponent to the affidavits of the plaintiff in the main application, to negotiate an extension of the lease period after expiry of the initial 12 month period with the defendant, independent of the lease agreement, which he in fact did. In this regard it is significant, as is common cause between the parties, that the defendant vacated the premises at the end of April 2009. It bears mentioning that the plaintiff did not discover the minutes of the management meetings I have referred to, but that these were only furnished in response to a notice in terms of Rule 35(3) to the defendant's attorneys, on 6 April 2011. The minutes were discussed with Weinberg on 19 May 2011 and it was only then, the defendant states, that the full implications thereof on the action were appreciated. Upon further reflection it is further stated, it became apparent to the defendant that Ball, in the main application, had "deliberately misstated" the true facts and that he had failed to make full disclosure of the facts relating to the termination of the lease. The non-disclosure, the defendant contends, was fraudulent and made with the intention of misleading the court, to such extent that a different judgment in the main application would have resulted had the true facts been known. Based on the new matter the defendant further contends that it has become entitled to an order setting aside the judgment of Bregman AJ together with an order for repayment of the amounts, interest thereon and costs the defendant has paid pursuant to the judgment, which is in essence is the relief claimed in the defendant's proposed counterclaim.

[8] The introduction of a counterclaim subsequent to the delivery of a plea, where as in this case, the plaintiff has refused to consent thereto, requires the leave of the court. In this regard rule 24(1) provides:

‘A defendant who counterclaims shall, together with his plea, deliver a counterclaim setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage...’

(See, as to the history of this sub-rule: *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O) para [12] - [17]). It is necessary to consider what the criteria are in an application for relief under rule 24(1). First, there must be a

reasonable and acceptable explanation for the lateness. In the present matter I am satisfied that the explanation for the lateness satisfies this requirement and this was in any event not challenged. Secondly, the defendant must show an entitlement to institute a counterclaim. Had it not been for the lateness the defendant, as provided for in terms of rule 24(1), would have been entitled together with the plea, to introduce a counterclaim “setting out the material facts thereof in accordance with rules 18 and 20”. Would these requirements be any different now that the leave of the court is sought to introduce a counterclaim? Put differently: should the defendant, finding itself in this position, be required to establish more onerous requirements in order to succeed?

[9] Counsel have not been able to refer me to any direct authority on the point nor was I able to find any. Useful guidance in the quest to find an answer is however provided in the judgment of Schabert J, in *Hosch-Fömrder Technik SA (Pty) Ltd v Brelko CC and Others* 1990 (1) SA 393 (W). In that matter the court dealt with an application by the defendant under the provisions of rule 24(2) for leave to institute a claim in reconvention against the plaintiff and others. In regard to the requirements to be satisfied in order to succeed the learned Judge held that it was necessary for the applicant to disclose its *locus standi* and, further, to disclose the cause or causes of action upon which the action against them would be based. To this the learned Judge added:

‘The need to establish a *prima facie* case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) at 737G-738A. I do not think that the condition in Rule 24(2) must be construed in this way.’

The same reasoning, in my view, for the reasons that follow, must apply to an application under rule 24(1).

[10] The argument before me extended well beyond the requirements referred to in rule 24(1). Providing fertile earth for many, if not most, of the contentions advanced by the plaintiff were the prior procedures in which affidavits had been filed: firstly, the defendant’s answering affidavit in the main application, secondly, the defendant’s application for the postponement of the trial and thirdly, the affidavits filed in the instant application. But there it did not end: the arguments further expanded to the proper interpretation to be afforded to the contentious email as well as the correspondence

exchanged between the parties, the minutes of the newly discovered management meetings of the plaintiff, the documents giving rise to the fraudulent concealment now relied upon by the defendant and finally, the judgment of Bregman AJ. From these the plaintiff extracted a number of “inconsistencies” as well as “significant differences” resulting in an alleged “tension” between the versions on which the defendant now relies, which led the argument to conclude that the new evidence is irrelevant, in conflict with the conduct of the parties and in any event inconsistent with the case the defendant has to advance which is that there was a valid cancellation of the lease agreement followed by a new oral agreement of lease.

[11] I have given careful consideration to all the arguments. Seemingly wanting at this stage is the *viva voce* evidence concerning these aspects. I can do no better than to quote the instructive preference in regard to the benefits of an oral hearing, articulated by Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) 390F, as follows:

“My conclusion rests upon my experience, and the experience of others before me, which shows that an assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person who has made it is tested by cross-examination. There is the rare case, of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the Court is justified in disregarding it without recourse to oral evidence. But I cannot say that Mr. Rowe’s assertions on the point in dispute fall into one of those categories. They fall rather into the class of assertions which, although apparently improbable, might be accepted after an oral hearing. It seems to me, therefore, that on the principles recognised in *Frank v Ohlsson’s Cape Breweries, Ltd.*, 1924 A.D. 289 at p. 294, and in *Peterson v Cuthbert & Co. Ltd.*, 1945 A.D. 420 at p. 428, the dispute under discussion is one which ought not to be resolved without an oral hearing.”

Inviting and weighty as some of the plaintiff’s contentions may be, I, on the view I take of the matter, do not consider it necessary at this stage to reach any firm conclusion on any of the contentions. The plaintiff does not resist the application on the ground that the defendant’s proposed counterclaim does not comply with rules 18 and 20. I can see no reason why the defendant should be placed in any different position than it would have been had it not been for the lateness. Or, as counsel for the defendant has put it: the defendant should not be penalised for the lateness. Once an acceptable explanation for the lateness has been tendered all that remains for the defendant to show its

entitlement to institute a counterclaim which in draft form, complies with rules 18 and 20. The acceleration of the application to the stage akin to the end of the trial, as has now happened before me, requiring at this stage a final decision on the merits of the defendant's counterclaim, without having had the benefit of oral evidence, in my view, will result in a premature determination of the issues. The plaintiff, moreover, should the counterclaim be allowed, will not suffer prejudice that cannot be cured by an appropriate costs order at the end of the trial. Once the counterclaim has been filed, it remains open to the plaintiff, in terms of the rules of court, should it wish to do so, to address such causes of complaint as there may be. Those complaints, accordingly, ought to be dealt with at that stage and then in terms of the relevant rules of court.

[12] Finally, the wording of rule 24(1) indicates the conferment of a discretion on the court. In the exercise of my discretion, for the reasons stated together with considerations of justice and equity, I have come to the conclusion that I should exercise my discretion in favour of allowing the introduction of the defendant's counterclaim, thereby ensuring the proper ventilation of all disputes between the parties in the ensuing trial.

[13] It follows that the application must succeed. The defendant has properly asked for the costs of this application to be costs in the action.

[14] In the result the following order is made:

1. Leave is granted to the defendant to deliver its counterclaim in the form set out in annexure "NM1" to the notice of motion, within 10 days of the date of this order.
2. The costs of this application are ordered to be costs in the action.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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PETER LE MOTTÉE ATT

DATE OF HEARING

27 JULY 2011

DATE OF JUDGMENT

12 OCTOBER 2011