

Original

DELETE WHICHEVER IS NOT APPLICABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
05/08/2010
DATE SIGNATURE

CASE NO: 22555/2000

5/8/2010

In the matter between:

JSW ELECTRICAL (PTY) LTD

Plaintiff/Respondent

and

MINISTER OF WATER AFFAIRS

Defendant/Excipient

J U D G M E N T

MNGQIBISA-THUSI J

[1] The defendant is seeking an order in the following terms:

1.1 striking out the plaintiff's notice of amendment of its particulars of claim dated 31 August 2009.

1.2 striking out the plaintiff's amended pages delivered pursuant to the notice of amendment referred to in paragraph 1.1 above which pages were filed on 21 September 2009.

[2] In order to put the two applications in their proper perspective, it is necessary to set out the context in which the two prayers/applications came about.

[3] On 4 September 2000 the plaintiff issued summons on the defendant claiming payment of an amount of R 637 361.40, together with interest and costs. The claim represents the outstanding amount arising from a contract concluded between the parties in terms of which the plaintiff pursuant thereto

had allegedly supplied goods to and done work for the defendant, for which the defendant has not paid in full.

[4] On 1 February 2007 the plaintiff served the defendant with a notice of bar in terms of Rule 26.

[5] On 6 February 2007 the defendant filed a notice taking an exception to the plaintiff's particulars of claim on the ground that the particulars of claim lack the averments necessary to sustain a cause of action, alternatively, that they do not disclose any cause of action. The defendant's complaint relates to paragraph 3 of plaintiff's particulars of claim, in which the plaintiff alleges that:

"3.1 At or about March 1995, and at Pretoria, the Plaintiff duly represented by Walter Johann Siegl" ("hereinafter referred to as "Siegl") entered into a written, alternatively oral, agreement (hereinafter referred to as "the Agreement") with the Defendant's government department, the Department of Water Affairs and Forestry (hereinafter referred to as "the Department") duly represented by Fred Hose ("hereinafter referred to as "Hose") who warranted that he was authorised to conclude such an agreement."

[6] The defendant's exception reads as follows:

- "1. In paragraph 3.1 of the proposed amended particulars of claim the plaintiff avers that the defendant was duly represented by one Fred Hose who warranted that he was authorised to conclude such an agreement;
2. ...;
3. The plaintiff in its amended particulars of claim has failed to set out with any particularity any basis upon which the alleged representation by the one Fred Hose could bind the defendant in the said contract, in that, nowhere is it alleged that the said Fred Hose is an employee of the defendant and that he acted within the scope of his employment in so signing such a contract."

[7] On 15 April 2008 the plaintiff filed an application for a trial date. The defendant then filed a Rule 30 notice in terms of which it sought the striking out of the plaintiff's application for a trial date on the ground that such an application constituted an irregular step in that:

7.1 the pleadings in the matter had not yet closed; and

7.2 there is an exception pending in the matter and the matter was therefore not ripe for trial.

[8] On 4 June 2008 the plaintiff filed a Notice of intention to amend its particulars of claim. The defendant responded by filing on 18 June 2008 a Notice of intention to oppose the proposed amendment on the basis that such amendments, if allowed render the plaintiff's particulars of claim excipiable on the grounds of being vague and embarrassing, alternatively that it lacks averments necessary to sustain a cause of action. The plaintiff then filed the amended pages to its particulars of claim on 24 June 2008.

[9] On 28 July 2008 the defendant issued a Notice excepting to the plaintiff's filed amended pages.

[10] On 3 September 2008 the defendant filed an exception to the plaintiff's amended particulars of claim.

[11] In its exception the defendant alleges that in its amended particulars of claim the plaintiff has failed to set out with any particularity any basis upon which the alleged representation by Fred Hose could bind the defendant in that nowhere is it alleged that Fred Hose is an employee of the defendant and that he acted within the course and scope of his employment in signing the contract. Secondly the defendant is taking an exception to the plaintiff's amended particulars of claim on the ground that they are contradictory and

therefore vague and embarrassing in that in paragraph 6 of the particulars of claim the plaintiff indicates the amount owing as being R 637 361-40 whereas in paragraph 7 the amount indicated as owing is R 829 737.66.

[12] A hearing date for the exception was set down for 1 September 2009. However, on 30 August 2009, a day before the hearing of the exception, the plaintiff filed a Notice of intention to amend its particulars of claim in order to address the defendant's complaints in its exception. On 1 September 2009 the hearing of the exception was postponed sine die and the plaintiff tendered the costs occasioned by the postponement.

[13] On 10 September 2009, the defendant filed a Rule 30 Notice in terms of which it sought the striking out of the plaintiff's Notice of intention to amend on the ground that the Notice was out of time and that the plaintiff had not applied for condonation.

[14] On 10 September 2009 the plaintiff filed the amended pages to its particulars of claim.

[15] On 7 October 2009 the defendant filed a Notice of intention to apply for the striking out of the plaintiff's Notice of amendment. On 11 October 2009 the defendant filed a Notice of application to strike out the plaintiff's amended pages.

[16] As correctly pointed out by the defendant's counsel, the following issues need to be decided:

15.1 whether the plaintiff is entitled, after being served with a notice of intention to except and the exception application has been set down for hearing, to file a notice of intention to amend its particulars of claim a

year later after service of the Rule 23 application without applying for condonation and tendering costs;

15.2 whether the plaintiff is entitled In view of the Rule 30 Notice served on it to file the amended pages to its particulars of claim.

[17] It was correctly submitted on behalf of the defendant that the plaintiff has been in total disregard of the Rules of this court. That, in spite of the fact that the defendant's exception to the plaintiff's particulars of claim had been set down for the 1 September 2009, the plaintiff had only filed its Notice to amend on the 30 August 2009 without applying for condonation and without tendering the costs of the exception. It was further contended on behalf of the defendant that the plaintiff's conduct had resulted in the defendant being prejudiced in that it had not been in a position to file its plea, pending the finalisation of the hearing of the exception. Further that as a result of the plaintiff's disregard of the defendant's Rule 30 notices, its Notice to amend dated 31 August 2009 and the amended pages filed on 10 September 2009 should be struck out in terms of Rule 30, alternatively, Rule 30A.

[18] It was submitted on behalf of the plaintiff that, even though the plaintiff had not responded to the defendant's Rule 30 notices, the plaintiff was entitled to file both its Notice of intention to amend and the amended pages in order to deal with the defendant's complaints as set out in its Rule 23 notice. That in terms of Rule 28, there was no time frame within which a party could apply to amend its particulars of claim. That whatever prejudice the defendant might have suffered can be cured by an order as to costs. Further, it was contended on behalf of the plaintiff that even if the defendant's exception was upheld, it was practice for the courts to grant the plaintiff

permission to apply for the amendment of its particulars of claim. *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA).

[19] In order to succeed in its application the defendant has to show that it has suffered prejudice as a result of the plaintiff's conduct. A court is entitled, in a proper case, to overlook any irregularity which does not work any substantial prejudice to the other party. *Levitan v Newhaven Holiday Enterprises* 1991 (2) SA 297 (C) at 298A.

[20] In the present case the defendant in argument has not shown what substantial prejudice it has suffered besides the fact that it has not been in a position to file its plea. Further, any prejudice it may have suffered can be cured by a cost order against the plaintiff.

[21] At the time of the hearing of this case the plaintiff had dealt with the defendant's complaints in the exception the defendant had taken. I am in agreement with the argument advanced on behalf of the plaintiff that it was not necessary for it to aver that Hose was acting within the cause and scope of his employment when he concluded the contract with the defendant in that the notion of vicarious liability is only applicable in the case of delicts committed by employees in the cause and scope of their employment. Since the plaintiff's cause of action is based on contract, the defendant's complaint is misplaced.

[22] Regarding the proposed amendments by the plaintiff, in *Mabaso v Minister of Police* 1980 (4) SA 319 (W) at 323D the court stated said the following:

"In the absence of prejudice to the other party, leave to amend may be granted at any stage, however careless the mistake or omission may have been and however late may be the application for amendment."

[23] Further, in *Moolman v Estate Moolman* 1927 CPD 27 at 29 the court held that:

"... the practical rule adopted seems to be that amendments will always 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 costs, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend was filed."

[24] I am therefore of the view that this is not a proper case in which this court can order the plaintiff's notice of intention to amend and its amended pages to be struck off. Accordingly the defendant's application is dismissed.

[25] On the issue of costs, I am of the view that the plaintiff was, as correctly pointed out by the defendant, in flagrant disregard of the rules of court and this kind of conduct cannot be countenanced. The plaintiff should therefore be responsible for the costs of the exception which was set down for 1 September 2009 and for the costs of the application in terms of Rule 30.

[26] Accordingly the following order is made:

- 18.1 The defendant's application is dismissed;
- 18.2 The plaintiff is granted leave to amend its particulars of claim;
- 18.3 The plaintiff is responsible for all the costs of the exception set down for 1 September 2009 and for the costs of this application.


MNGQIBISA-THUSI
Judge of the North Gauteng High Court